



## **Federation for Hunting & Conservation – Malta (FKNK)**

### **A critical analysis of the 'Technical Note' in respect of the Spring 2011 hunting derogation**

#### **Forward**

The Technical Note on the calculation of 'small numbers' in terms of Article 9 (1)(c) of the "Birds" Directive, hereinafter referred to as TN, gave rise to an unjust and impractical spring hunting derogation in 2011 owing to the fact that its conclusions are flawed due to unsound unscientific parameters and erroneous calculations.

The aim of this paper is to expose those mistakes and incorrect assertions, and to allow for an equitable spring hunting derogation in line with opportunities allowed by the Birds Directive.

## 1. Total Annual Mortality

The TN declared (pg. 1, Section 2) that the threshold of 'small quantities' should be fixed as a given percentage of the *total* annual mortality. Further on, however, the TN contradicted itself by fixing the threshold as a given percentage of only a *partial* annual mortality. This gives rise to the absurd implication that while accepting that a given percentage of the adult population dies, the compilers of the TN were of the opinion that none of the juveniles or first-year birds are subject to dying!

The TN admitted that the population targeted by the derogation is composed of "adults and young adults (immature)" (pg. 2, para. c), and explained that the immature young or juveniles must be treated as "adults in spring" (para. e). Therefore, the TN should at the very least have abided by its own declarations, and treated that part of the populations as adults, and added them in their calculations (at the adult mortality rate of 50% for Turtle dove and 69% for Quail, as opposed to the higher mortality rates for juveniles). By the TN's own yardstick then, the figures given under Table 1 should be revised to take the **whole** adult population into account, not just the "older" adults. This arbitrary methodology, even in contradiction to assertions in the same report, continues to further distort the results.

## 2. The Reference Countries

The TN stated (page 1) “Both Quail and Turtle Dove follow three migratory flow routes”.

They certainly do not. Both the Quail and the Turtle Dove are broad-front migrants<sup>1</sup>, meaning that, unlike the narrow-front migrants which use the major flyways<sup>2</sup> to cross the sea, the birds of both species cross the Mediterranean on a very wide front. Consequently, it is wrong to assume, as the TN did, that “the bird populations of countries lying in the path for the Central European route” are the only ones to be used in determining the basic size of the reference population. As a matter of fact, the TN, again contradicting itself, included France among those countries although France is obviously not a Central European country.

The TN (pg. 3) did not restrict itself only to the countries identified as ‘source countries’ through ringing recoveries; but it extrapolated from other data and added other countries to the list. However, even in doing so and going by the ‘Central European route’ theory, the TN was wrong to exclude certain countries. The TN included France and Germany, but excluded Belgium and the Netherlands. It included Hungary, but left out Bulgaria and Romania. Serbia and Montenegro are in, but Greece is not. Poland features as well, but European Russia does not feature at all.

With our present knowledge of bird migration patterns, it is possible to state with a justifiable degree of accuracy that broad-front migrants over the Maltese islands breed in many more countries than the few listed in Table 1 of the TN. This becomes obvious by extrapolation from data available for other broad-front migrant species<sup>3</sup> which have a similar migration strategy as that of Quail and Turtle Dove. Moreover, from studies carried out by Ferdinando Spina & Stefano Volponi, and published in 2008 as “L’Atlante italiano della Migrazione degli Uccelli in Italia”, it is very clear that both Quail and Turtle Dove passing through the Maltese region may end up breeding far to the western, northern, and eastern regions of the European continent, and are definitely not restricted to the Central European countries.

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<sup>1</sup>“During the spring migration period, the birds (referring to quails) fly across the Mediterranean on a very broad front” (Shirihai 1996, Snow & Perrins 1998). *Ornis Fennica* 85:37–45. 2008

<sup>2</sup> The major flyways are three: (West) Morocco/Gibraltar; (Central) Tunisia/Sicily; (East) Bosphorus Strait

<sup>3</sup> The pallid harrier (*Circus macrourus*) uses a “broad-front migration strategy” [IUCN]. This bird breeds in countries such as Romania, Russia, Turkey, and Ukraine, and it occurs in Malta on migration. In 2005 Reuters reported a Russian warning that migrating birds could spread the bird flu virus to the Middle East and Mediterranean countries “because bird migration routes from Siberia also go through to those regions.” [The Financial Times, FT.com news.ft.com/cms/s/285cff9a-0db1-11da-aa67-00000e2511c8.html, entitled “Fears for Europe as bird flu spreads west”]. In 2009 BirdLife Malta recorded a robin (*Erithacus rubecula*) - another broad-front strategist - that originated from Russia

### 3. Breeding age of Quail

The TN asserted (page 2 para. e) that: “The two species reach their sexual maturity at one year of age.”

This statement is totally wrong as far as the Quail is concerned. This bird reaches sexual maturity at the very early age<sup>4</sup> of around two to three months, and is capable of laying multiple and consecutive clutches<sup>5</sup>. It also is known to breed in North Africa even before it migrates to breed again in the European countries<sup>6</sup>.

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<sup>4</sup> Guyomarc'h, J.C. and D.I.M. Wallace. 1998. *Coturnix coturnix* Quail. Pp. 27-46 in: Ogilvie, M., ed. *Birds of the Western Palearctic*. Update Vol. 2(1). Oxford University Press

<sup>5</sup> Breeding. (Replaces *BWP* Vol. 2, pp. 501-2) *C. coturnix* is an extreme r-strategist which maximizes the productivity of young in the minimum of time, with fast growth, early somatic maturity (6–7 weeks of age), precocious sexual maturity which leads birds born before summer solstice to reproduce at least once in the same year, and probably 2-3 clutches in the first year of life, despite each clutch (mean 11 eggs) reaching near female's own body weight (Guyomarc'h and Guyomarc'h 1995, Puigcerver *et al.* 1997)

<sup>6</sup> Hemon *et al.* 1988, Puigcerver *et al.* 1989a, Michailov 1996

#### **4. Misrepresentative Methodology**

From another aspect, the methodology used in the TN to arrive at the 'small numbers' calculation was biased and misrepresentative of the facts, because the calculations were based on the minimum published figures in those cases where the data is known to have low confidence levels; and on the average values in the cases of high confidence levels. Irrespective of whether levels are of high or low confidence, in all cases the correct procedure should have been to base calculations on both the minimum and the maximum figures, and then work out the average totals. The correct methodology would have ensured a fair and balanced result that would also have reflected the reality of the situation.

## 5. Interpretation of the Court Ruling

The TN gave a seriously flawed interpretation of the criteria used by the European Court of Justice (ECJ) in its ruling that hunting for quail and turtle dove in the autumn season cannot be regarded as constituting another satisfactory solution<sup>4</sup>.

### 5.1 Those Very Specific Circumstances

The TN twisted the ECJ's deliberations and decisions by altering (pg. 5 section 5, footnote 6) the wording of para. 63 of the Court's decision by means of the addition in parenthesis of the words "approximately 5,000 for each species" which do not appear in the original text of the Court's ruling in Case C-76/08. The TN thereby created the impression that the Court had in mind only the size of the autumn harvest. In actual fact, however, the Court attributed its decision to "those very specific circumstances".

It is, therefore, necessary and essential to consider what "those very specific circumstances" were which the Court deliberated upon and accepted as conclusive.

Those special circumstances referred to the bird migration circumstances peculiar to the Maltese archipelago, and included certain specific ornithological facts, viz.:

- i.** the Quail and the Turtle Dove appear over the Maltese islands in the 'autumn' season in negligible numbers which the ECJ termed as "inconsiderable"<sup>7</sup>;
- ii.** the meagre migration of both species takes place over a very short period, "mainly at the end of August and during September"<sup>8</sup>;
- iii.** both quails and turtle doves appear only around the South Western cliffs of Malta, and are consequently accessible only to those hunters (c. 20%) whose hunting grounds happen to be in that part of the island<sup>9</sup>; and
- iv.** both species are listed by the International Union for the Conservation of Nature (IUCN) in the category of 'Least Concern'<sup>10</sup>.

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<sup>7</sup> "60. In the present case, it is apparent from the documents in the case and, in particular, the annual reports submitted by the Republic of Malta to the Commission and from the arguments presented at the hearing that, in the autumn hunting seasons of the years in question, hunters were able to capture only an inconsiderable number of birds."

<sup>8</sup> "61. Moreover, it is not disputed by the Commission that, during that period, only a restricted part of the territory of that Member State is visited by the two bird species in question and that they migrate mainly at the end of August and during September."

<sup>9</sup> "61. Moreover, it is not disputed by the Commission that, during that period, only a restricted part of the territory of that Member State is visited by the two bird species in question and that they migrate mainly at the end of August and during September."

Consequently, it should be abundantly clear that the attempt by the compilers of the TN at reducing the above-mentioned Court deliberations to a mere consideration of numbers is a travesty of the Court's intentions and decisions.

## 5.2 Significance of the Status Quo factor

The second crucial point that needs to be exposed fully consists in the fact that the ECJ was not referring only to the past years (2004, 2005, 2006, and 2007 as documented) but to a continuous state of things. The wording of the relevant paragraphs in the text (English version) of the Court case (Case C-76/08) goes:

“61. .... only a restricted part of the territory of that Member State *is* visited by the two bird species in question”

“61 ... they *migrate* mainly at the end of August and during September.”

“63 ... hunting for quails and turtle doves during the autumn hunting season *cannot* be regarded as constituting, in Malta, another satisfactory solution, so that the condition that there *be* no other satisfactory solution, laid down in Article 9(1) of the Directive, should, in principle, be considered met.”

“66 In those circumstances, even though only an inconsiderable number of the two species at issue *are* present in autumn ...”

It is evident from the wording used by the Court that, unless a rare and extraordinary event takes place in the future that would upset this constant or continuum, it is expected and assumed that the situation regarding autumn hunting will remain unchanged. Therefore, it is logical to infer that any variation which does not qualify as an extraordinary event that alters the *status quo* is of no value and of no significance in respect of a spring hunting derogation. By this we understand that, particularly with reference to the autumn harvest, the relatively constant autumn figures are expected and assumed to remain at the level of “inconsiderable numbers” unless those “very special circumstances”, particularly the one pertaining to numbers, examined and accepted by the Court, undergo unexpectedly drastic changes.

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<sup>10</sup> “62. Finally, it is not apparent from the documents in the case that the population of the two species of bird hunted is below a satisfactory level. It is apparent, in particular, from the IUCN Red List of Threatened Species that the species in question are listed in the ‘least concern’ category.”

### 5.3 Determining what constitutes “considerable numbers”

In the light of the foregoing, a careful enquiry is needed to determine what constitutes “considerable” numbers in this case, as opposed to the “inconsiderable” ones assessed by the Court. Stating that a ceiling of 10,000 birds for each species is enough to make a satisfactory autumn hunt, as the TN did, is a crude and arbitrary decision that has absolutely no scientific and no legal basis.

From the scientific point of view, the principle of what constitutes “considerable” numbers has to be considered from the perspective of what makes up the total number of individuals in the reference populations. A figure of 10,000 birds may be considered to be “considerable” if the total population of the species concerned amounts to only twenty to thirty times that amount. But if the total population of a species amounts to **several millions**, then it would be reasonable to consider a figure of **not less than 200,000 birds** as “considerable”. This is exactly the case as concerns the Quail and the Turtle Dove, whose breeding populations in Europe are estimated to be **8,400,000-14,100,000** individuals for Quail<sup>11</sup> and **10,500,000-21,600,000** individuals for Turtle Dove<sup>12</sup>.

Consequently it can justifiably be argued in terms of established criteria, such as those used by the IUCN, that, in the specific case of Turtle Dove [*Streptopelia turtur*] and Quail [*Coturnix coturnix*], a figure of not more than 200,000 birds for Turtle Dove and a figure of not more than 300,000 birds for Quail may be considered as “inconsiderable”.

From the legal aspect, the ECJ did not give a definition of what makes a number “inconsiderable” nor did it express an opinion as to what one should consider to reach such a conclusion. However, if a figure of about 5,000 birds makes for an unsatisfactory autumn hunt, it does not mean that the multiplication of that figure would make an autumn hunt satisfactory neither would it upgrade the numbers to “considerable”. In autumn the number of Maltese shooters and trappers is in the region of 14,000, and a seasonal bag of 5,000 birds would amount

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<sup>11</sup> “In Europe, the Quail breeding population is estimated to number 2,800,000-4,700,000 breeding pairs, equating to 8,400,000-14,100,000 individuals (BirdLife International 2004). Europe forms 5-24% of the global range, so a very preliminary estimate of the global population size is 35,000,000-300,000,000 individuals, although further validation of this estimate is needed.” IUCN 2009

<sup>12</sup> “In Europe, the Turtle Dove breeding population is estimated to number 3,500,000-7,200,000 breeding pairs, equating to 10,500,000 – 21,600,000 individuals (BirdLife International 2004). Europe forms 25-49% of the global range, so a very preliminary estimate of the global population size is 20,000,000-100,000,000 individuals, although further validation of this estimate is needed”. IUCN 2009

in theory to 0.3 birds per hunter. A seasonal bag of 10,000 birds would theoretically result in 0.7 per hunter. A seasonal bag of 20,000 birds would make it 1.4 birds per hunter, and so on. But whereas that might make the autumn hunt “less unsatisfactory” by a very slim margin, it definitely does not make it “satisfactory”.

Therefore, it is logical to conclude that the figure of 10,000, conjured up by the TN compilers, was an extremely negligible and disproportionately low figure, the use of which in the “inverse proportion” formula, as expounded in the TN, was neither scientifically nor legally justified.

## 6. The “inverse proportion” formula

The success or failure of the “inverse proportion” formula may be gauged by whether, and to what degree, it reflected the deliberations and decisions made by the European Court of Justice in its ruling of 10 September 2009.

It must be pointed out that the ECJ considered the autumn harvest in the case of Malta to be ‘inconsiderable’, which is another way of saying that the Court was of the opinion that the takings in autumn by Maltese hunters are so insignificant that they do not reach anywhere near the level at which it becomes necessary to sit up and take notice. Nevertheless, the TN based its ‘inverse proportion’ formula on the inconsiderable autumn numbers, and, by doing so, ignored a declaration by the Court of their inconsiderableness, which declaration was based on the extensive historical and technical documentation before it.

At this stage, it must be remembered that the whole point about whether a spring hunting derogation may or may not be applied depends completely on whether “those very specific circumstances” are still existing without which no derogation is possible. One of those circumstances concerns the numbers taken in the preceding autumn. If autumn takings remain “inconsiderable”, which is normally the case, a derogation is justified. If autumn takings become “considerable”, which is normally not the case, a derogation cannot be justified. This is clear from both the requirements of the “Birds” Directive as well as the ECJ ruling. The crux of the matter is that numbers are either “inconsiderable” or they are not. They cannot be half-half, and neither the “Birds” Directive nor the ECJ ruling contemplates any deviation from that rule.

**Therefore, it was wrong for the TN to consider the autumn figures as anything except a clear indicator as to whether a spring derogation was possible or not.**

## **7. Reducing a derogation to absurdity**

When a spring hunting derogation becomes justifiable, the onus is on the government to ensure that the derogated period of spring hunting serves its purpose and lives up to its *raison d'être*. In other words, a spring hunting derogation must provide in real terms the satisfactory solution justifying its application. For that to happen, the derogation must not be shackled by manipulative measures resulting in further sub-sets of inconsiderable numbers.

But that is exactly what the TN did. It chose to bypass the ECJ ruling by introducing and applying a mathematical formula which had no basis in science or law, thus reducing the corresponding spring hunting derogation to an absurdity.

## **8. Perversion of Justice**

The manner in which the Malta Spring 2011 hunting derogation was applied produced a result that is nothing short of a perversion of justice. The Court had ruled that the “inconsiderable” autumn harvest did not provide the satisfactory solution referred to in Article 9 (1) of the “Birds” Directive. The Court’s ruling paved the way for a spring hunting derogation to redress the balance and provide the satisfactory solution sought. Instead, the Maltese hunters were presented with a spring hunting pseudo-solution with national bag limits, particularly regarding Quail, that were being even more “inconsiderable” than the figures they were supposed to compensate for<sup>13</sup>. This perverse situation was brought about by the wrongful introduction and implementation of the “inverse proportion” formula. That formula was unscientific, had no legal bearing and was clearly tailor-made to reach a pre-determined aim that completely belittled and defeated the purpose of the ECJ judgment, which was to allow a satisfactory alternative to Maltese hunters and trappers.

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<sup>13</sup> The average autumn harvest of 5,000 quails was considered by the ECJ as “inconsiderable”. The bag limit for Spring 2011 was set at 2,500 quails, i.e. half of the “inconsiderable” number it was supposed to replace!

## **9. Conclusions**

In the light of the considerations amplified above, it is evident that the Technical Note contributed to the failure of the Spring 2011 hunting derogation to provide a satisfactory alternative solution to autumn hunting. Therefore, the FKNK

- (i) calls upon the government of Malta to rescind the Technical Note and that part of the framework legislation affected by it;
- (ii) urges the government to re-examine the whole issue from the scientific, legal and technical aspects with a view to eliminating the errors, contradictions and manipulative misrepresentations mentioned in this critical analysis; and
- (iii) reiterates its position that it is ready and willing to make a contribution in real terms through its knowledge and expertise in hunting matters, as it has always done in good faith whenever requested by any government.

The FKNK will persist in its efforts to achieve a fair and balanced spring-hunting derogation and to see that justice will finally be done to Malta's hunters and trappers.

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