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Escape into Private Law as a Means to Avoid Applying EU Law – How Luxembourg is Trying to Save Puszcza Białowieska against Warsaw

I. Introduction

Puszcza Białowieska, one of the last areas of ancient forest in Europe, is some kind of miracle. Since 1979 the Białowieża National Park has been listed on the World Heritage List, and in 2014 that listing was expanded to cover all of Puszcza Białowieska (in Poland as well as in Belarus). The region's hundreds of years of almost undisturbed growth has allowed Białowieża Forest to become home to at least 59 mammal species (including wolf, lynx and otter), over 250 species of birds, 13 species of amphibians, 7 of reptiles and over 12 000 invertebrate species. An estimated 5000 species of fungus grow there, along with 25 % of the world's population of European Bison.

This picturesque and unique site became the scene of juridical as well as social conflict when on 25 March 2016 the Polish authorities adopted a decision allowing for a three-fold increase in logging operations in the Białowieża Forest district, as well as for logging in areas so far excluded from any intervention. At an EU level, this decision led the EU Commission to initiate an infringement procedure against Poland in the Court of Justice of the European Union (CJEU), on the basis of Art. 258 TFUE,[1] while in Poland the Ombudsman tried to challenge it in the Polish judiciary system. The dispute, which has not yet been settled by the CJEU, provides not only a very good insight into the approach that the Polish government takes towards the legal disputes it engages in, but also illustrates the problems that the Polish judiciary system faces, in particular when dealing with EU law, and the disastrous effects that this might lead to. This case can also be seen as a metaphor of the crisis that Poland as a state of law is suffering right now, and of the reasons that led it there.

This article presents the story of the conflict over the Białowieża Forest, at a national as well as an EU level, which should be resolved on the basis of EU law by both the CJEU and the Polish national courts (acting as European courts) in parallel. It also sets out the arguments of the Polish government and Polish courts. While the CJEU has not yet adopted its final decision (though the imposition of interim measures and a periodic penalty on Poland is highly suggestive), the Polish courts have decided to avoid the application of EU law in a clear violation of the rules. Hence, this is also a story of failed dialogue between the EU courts and the Polish courts.

II. The Background

1. The Natura 2000 site

On 13 November 2007, the European Commission decided, on the basis of Article 4 (2) of the Habitats Directive,[2] to include the Puszcza Białowieska region as part of the Natura 2000, i. e. as a site of Community importance. Natura 2000 is an EU network of core breeding and resting sites for rare and threatened species, and some rare natural habitat

[1] Action brought on 20 July 2017, European Commission v Republic of Poland, case C-441/17.

[2] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

types that are protected in their own right.[3] This network aims to ensure the long-term survival of Europe's most valuable and threatened species and habitats, listed under the Birds Directive[4] and the Habitats Directive. In the case of Puszcza Białowieska, the Natura 2000 site protects species and habitats that are dependent on old-growth forests, including the availability of dead wood, and for some of these species, it is the most important or the last remaining site in Poland.

2. The Birds and Habitat Directives requirements

The Habitats and the Birds Directives both set out specific requirements regarding the special areas of conservation, aimed at ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. The Polish Minister for the Environment, who issued the decision on the increased logging, was accused of violating these requirements, both at an EU level and a national level.

a) The general requirement of care

Article 6 (2) of the Habitats Directive requires Member States to take appropriate steps to avoid, in the special areas of conservation, any deterioration of natural habitats and the habitats of species, as well as any disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the directive.

b) Assessment of the implications requirement

Article 6 (3) of the Habitats Directive requires that any plan or project that is not directly connected with or necessary to the management of the site, but which is likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. As the CJEU explained, the requirement to have an appropriate assessment is conditional on its being likely to have a significant effect on the site (Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, p. 40), i. e. there must be a probability or a risk of significant effects on the site concerned (ibidem p. 43). Further, considering the precautionary principle, which is one of the foundations of the high level of protection pursued by the Community environment policy, in accordance with Article 174(2)(1) EC (by reference to which the Habitats Directive must be interpreted), such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the concerned site. If it appears that there are possible significant effects, then an assessment must be carried out in order to effectively ensure that plans or projects that adversely affect the integrity of the concerned site are not authorised, and thereby contributes to achieving the main aims of the directive i. e. ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora (ibidem, paragraph 44).

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3 http://ec.europa.eu/environment/nature/natura2000/index_en.htm.

4 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

c) No plan or project authorisation if adverse effects might occur

The CJEU clarified (case C 258/11 Peter Seetman and others v An Bord Pleanála, paragraph 40) that authorisation for a plan or project, as referred to in Article 6 (3) of the Habitats Directive, can only be given on the condition that the competent authorities – once all the aspects of the plan or project have been identified that may, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

The authorisation criterion laid down in Article 6 (3) of the Habitats Directive integrates the precautionary principle and makes it possible to effectively prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered. The authority, therefore, must refuse to authorise a plan or project where uncertainty remains as to the absence of adverse effects on the integrity of the site. A less stringent authorisation criterion would not ensure as effectively the fulfilment of the objective of site protection intended under that provision (Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 57 and 58).

d) Special conservation measures required

Article 6 (1) of the Habitats Directive requires that Member States establish the necessary conservation measures for the special areas of conservation, involving, as necessary, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures that correspond to the ecological requirements of the natural habitat types in the directive's Annex I and the species in Annex II present on the sites.

Article 4 (1) and (2) of the Birds Directive specifies that the species mentioned in its Annex I are the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In relation to this, an account must be taken of: species in danger of extinction, species vulnerable to specific changes in their habitat, species considered rare because of the small populations or restricted local distribution, and other species requiring particular attention for reasons of the specific nature of their habitat. Trends and variations in population levels should also be taken into account as a background for evaluations. In addition, Member States are obliged to classify, in particular, the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where the Birds Directive applies. Member States are also obliged to take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where the Birds Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States must pay particular attention to the protection of wetlands, and particularly to wetlands of international importance.

e) Establishing a system of protection

Article 12 (1) letters (a) and (d) of the Habitats Directive imposes on Member States an obligation to undertake the requisite measures for establishing a system of strict protection for the animal species listed in Annex IV (a) of that directive in their natural range, prohibiting: (a) all forms of deliberate capture or killing of specimens of these species in the wild, and (d) any deterioration or destruction of breeding sites or resting places. Article 5 letters (b) and (d) of the Birds Directive obliges Member States to take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular: (b) any deliberate destruction of, or damage to, their nests and eggs or the removal of their nests, or (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as the disturbance would be significant given the objectives of this directive.

3. Approval of the appendix to the forest management plan

On 25 March 2016, the Polish Minister for the Environment approved an appendix to the forest management plan for 2012–2021, adopted by a decision of the Minister for the Environment on 9 October 2012. It allowed for a three-fold increase in logging operations in the Białowieża Forest district, as well as for logging in areas so far excluded from any intervention. The reasons for the decision explained that it was made in response to an outbreak of Spruce Bark Beetle, and that the logging was aimed at combating the infestation of the Bark Beetle, stopping the degradation and initiating the regeneration of the forest sites, as well as ensuring public safety. The Minister for the Environment also rationalised that the appendix concerns primarily "sanitary pruning", as well as removing those trees that threaten the safety of people on the forest site, and counteracting the fire hazard caused by drought that increases the dieback of trees. The application for approval of the appendix was signed on Friday, 18 March 2016 (there is no available information on when it was delivered to the Ministry for the Environment), so it took the Minister at most five working days to issue the decision.

Apart from causing reactions from the Polish Ombudsman and the EU Commission, which are discussed below, the decision to increase logging was protested against by Polish scientists,[5] the Committee of the Environment protection of the Polish Academy of Science,[6] the State Council for Nature Conservation,[7] as well the international community of scientists.[8] In addition, the UNESCO World Heritage Committee adopted a decision urging Poland to immediately halt logging and wood extraction in the old-growth forests of Białowieża.

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5 http://naukawpolsce.pap.pl/aktualnosci/news,414738,apel-dziekanow-wydzialow-przyrodniczych-ws-polityki-ochrony-srodowiska.html, https://ug.edu.pl/media/aktualnosci/55583/apel_rady_wydzialu_ https://ug.edu.pl/media/aktualnosci/55583/apel_rady_wydzialu_biologii_ug_w_obronie_puszczy_bialowieskiej, http://www.biol.uw.edu.pl/pl/aktualnosci/54-aktualnosci/1952-stanowisko-w-sprawie-objecia-puszczy-bialowieskiej-ochrona, https://amu.edu.pl/content/300143-list-otwarty-pracownikow-i-doktorantow-wydzialu-biologii-uam-w-sprawie-puszczy-bialowieskiej.

6 http://www.botany.pl/kop-pan/stanowiska/Puszcza_Bialowieska_2.pdf.

7 http://greenmind.pl/wp-content/uploads/2015/12/PROP-15-13_aneks-PUL-Nadlesnictwa-Bialowieza.pdf.

8 http://www.nationalpark-bayerischer-wald.de/nationalpark/forschung/conference_2017/letter_to-prof_jan_szyszko/index.htm.

The decision followed the advice of the International Union for Conservation of Nature (IUCN) – the official advisory body on nature to UNESCO's World Heritage Committee.[9]

III. The story in Poland

The decision of the Minister for the Environment of 25 March 2016 inspired reaction at a domestic level, where on 22 September 2016, the Polish Ombudsman appealed against the decision to the Provincial Administrative Court (further PAC) in Warsaw, and environmental protection organisations: Stowarzyszenie Pracownia na Rzecz Wszystkich Istot and Fundacja ClientEarth Prawnicy dla Ziemi joined the case. The Ombudsman attacked the decision on several levels; his primary aim, however, was not to stop the logging, but to repeal the decision itself. As he explained, this would allow the Minister for the Environment to adopt a new decision in accordance with law, after analysing the criticisms, and proving that the increased logging is necessary for protecting the environment and does not bring about any adverse effects for the environment.

The Ombudsman argued that the Minister for Environment had violated international regulations, EU law and specific provisions of Polish law. In particular, he referred to:
– EU law: a violation of Article 6(3) of the Habitats Directive and Article 11 of the Environmental Assessment Directive;[10]
– Polish law:

1) A violation of Article 96 (1) of the Act on Sharing Information on the Environment and its Protection, the Participation of Society in Protecting the Environment and on the Environmental Impact Assessment of 3 October 2008 (UUIS),[11] by not considering before issuing the decision whether the appendix to the plan of the forest management could potentially have a significant impact on a Natura 2000 site.

2) A violation of Articles 7 and 77 of the Code of Administrative Procedure, by not applying them and by failing to gather complete evidence, as well as of Article 107 § 3 by failing to apply it properly and by failing to properly set out the reasons behind the decision.

3) A violation of Article 23 (2) of the Act on Forests of 28 September 1991,[12] by not applying it and by approving an appendix to the forest administration plan that increases logging beyond the quantities established in the forest management plan in no relation to a damage or a natural disaster.

1. The legal form of the approval

For the legal dispute in Poland, the initial – and as it turned out also the crucial – legal question concerned establishing the legal form of the approval of the appendix to the forest management plan. The Polish doctrine and jurisprudence came up with three different interpretations:

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[9] https://www.iucn.org/news/secretariat/201707/unesco-urges-poland-immediately-stop-logging-old-growth-forests-białowieża-world-heritage-site-following-iucn's-advice.

[10] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L26/1 of 28.1.2012.

[11] Official Journal of 2016, item 363.

[12] Official Journal of 2011, No 12, item 59.

1) Administrative decision (only this form allows the environmental organisations to challenge the approval in an administrative court);[13] (

2) Other than a public administration decision, which can be appealed against in an administrative court, as indicated in Art 3 § 3 (4) of the Law on Proceedings Before Administrative Courts (the PPSA);[14]

3) An internal act that comes from an organisational subordination of the party receiving it that, by its nature, cannot be the subject of appeal in an administrative court.[15] For such acts, it is not possible to exercise any kind of judiciary control, as the Code of Administrative Procedure does not apply to them (Art. 3 § 3(1) Code of Administrative Procedure) and the administrative courts have no jurisdiction over them (Art. 5 (1) PPSA).

The first issue for the Ombudsman was therefore to establish whether the approval was an internal or external act, because that determined the availability of judiciary control. Supervision, as the Ombudsman explained, is not synonymous with organisational subordination. While the supervising body has the means to influence the subjects under its supervision, it cannot replace these institutions in their activities. The supervising entitlements contain the right to inspect and the possibility to influence other subjects in a binding way, for example by repealing or suspending decisions, or by suspending the management of such bodies. The supervisory body can, however, do only what the legislator has allowed it, and to pursue only those aims that the legislator has set. In the case of organisational subordination, the "supervisory body" may use any means it deems appropriate. According to the Ombudsman, the National Forest (the recipient of the approval) is supervised by the Minister for the Environment, but it is not subordinate to the minister. This conclusion follows, according to the Ombudsman, also from Article 28(2) and (3) of the Act on Government Administrative Departments,[16] which lists the National Forests as a body supervised by the Minister for the Environment. The Act on Forests also refers to "supervision" (Art. 4(4)) and the supervisory entitlements of the minister are very precisely established there.

Hence, approving the forest management plan is not, according to the Ombudsman, a case of exercising organisational superiority between State bodies and other organisational units of the State, i.e. it is not an internal act. As an external act, it might be qualified as a decision or another act mentioned in Article 3 § 3 (4) PPSA). The difference between a decision and the other act is a subtle one: a decision is an application of an act of law (the application of an individual and a concrete norm that establishes the legal situation of the addressee), while the other act constitutes simply the execution of a law (achieving the purpose of the legal norm). The approval of the appendix to the forest management plan cannot be reduced to the execution of a law, according to the Ombudsman, which follows from the supervisory position of the minister. When approving or refusing to approve the forest management plan, the minister defines the legal consequences for the factual situation he has established, i. e. he applies law by issuing an administrative decision.

[13] See: PAC Warsaw, judgement of 30 April 2009, IV SA/Wa 2036/08 and of 28 January 2015, IV SA/Wa 2004/14.

[14] PAC Warsaw, judgement of 14 June 2012, IV SA/Wa 495/12.

[15] SAC judgement of 1 March 2014, II OSK 2477/12.

[16] Official Journal 2016, item 543.

2. The Aarhus Convention

Another point that the Ombudsman raised to support the argument that the approval was a decision was the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1988 in Aarhus.[17] This convention guarantees public access to the environmental information held by the public authorities. The convention describes the procedure that ensures public participation in environment-sensitive decisions, which includes, for example, reasonable time-frames for informing the public (Article 6) or access to a review procedure before a court or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission of private persons or public authorities that violate national environmental regulations (Article 9). The Aarhus Convention, and in particular its Article 9, is reflected in Article 10a of Directive 85/337[18] and Article 11 of the Environmental Assessment Directive. In the Polish legal system, this right is guaranteed in Article 44(3) UUIS, according to which environmental protection organisations have a right to file a claim in an administrative court in any case that requires public participation, if it is justified by the statutory aims of that organisation, even if such organisation did not participate in the proceedings requiring public participation. The Ombudsman stressed that the Polish rules on forest management can be seen as conforming with these requirements only if the approval of the forest management plan is qualified as an administrative decision, because only this form gives the environmental protection organisations access to contesting it.

Referring to the decisions of administrative courts that refused the possibility of the direct application of the Aarhus Convention and the Environmental Assessment Directive, because of their incorporation to the UUIS Act, the Ombudsman stressed that the CJEU takes another stance in this respect. The CJEU decided that, although the national legislature is entitled to limit to individual public-law rights only the rights whose infringement may be relied on by an individual in legal proceedings contesting the decision, act or omission referred to in the directive, such a limitation cannot be applied to environmental protection organisations without disregarding the objectives of Article 11 of the Environmental Assessment Directive (judgement of 15 October 2015, case C-137/14, Commission v. Federal Republic of Germany), meaning that "rights capable of being impaired", which the environmental protection organisations are supposed to enjoy, must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having a direct effect. The consequence of refusing to recognise the appendix to the forest management plan as an administrative decision is that it would not be possible to carry out any control over the assessment of the impact of the project on the Natura 2000 site, on the basis of Article 96 (1) UUIS.

Additionally, the Ombudsman pointed out that, according to Article 20(2) of the Law on Forests, the boundaries and the area of forest established on the basis of the forest management plan are entered into the register of lands and buildings, while the Act on Geodetic and Cartographic law of 17 May 1989[19] establishes that changes in the register entries may be carried out only on the basis of a final administrative decision.

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17 Official Journal 2003, number 78, item 706.

18 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

19 Official Journal 2015 item 520, with the subsequent changes.

3. Violation of EU law

The Ombudsman also based his claim on violations of EU law, in particular, Article 6(2) and 6(3) of the Habitats Directive. They were transposed to Polish law in: Article 33(1) and (3) of the Act on the Protection of the Environment of 16 April 2004[20] (Art. 6(2)), and in Chapter V of UUIS – in particular its Article 96(1) (Art. 6(3)). According to Article 96(1), the organ that issues a decision required before starting to carry out a plan or a project, other than a plan or a project that can affect a site not directly related to the protection of a Natura 2000 site or not connected with this protection, is required to assess, before issuing the decision, whether the plan or project may adversely affect a Natura 2000 site.

While Article 96 UUIS does not mention expressly the approval of a forest management plan, the need to ensure the correct implementation and a pro-European interpretation of national law dictates that the exploitation of wood, if it can have an impact on a Natura 2000 site on the basis of a decision on the approval of the forest management plan, must be preceded by an assessment of the implications for the site. The Ombudsman also referred to the precautionary principle that necessitates preventive actions, and stressed that the Polish administrative courts have already established that a comprehensive analysis assessing how the adverse effect could be eliminated should always be conducted by anyone who undertakes such projects. Further, an administrative body that conducts proceedings as a part of which an assessment of the impact on a Natura 2000 site is conducted (Art. 33(3) of the Act on Environmental Protection) may issue a decision that allows the project to be carried out only if – according to scientific knowledge (which must be confirmed in the evidence material) – there is no significant effect on the species for which the Natura 2000 site was created (Art. 33 (1) and (2) of the Act on Environmental Protection).[21] In addition, the Supreme Administrative Court, referring to the case law of the CJEU, stressed that the Member States cannot allow an intervention that could threaten the ecological nature of the sites.[22]

Referring to Article 6(3) of the Habitats Directive and the case law of the CJEU, the Ombudsman claimed that, under EU law, while making the decision on the approval of the forest management plan, and in particular on the increase of logging, the Minister for the Environment was obliged to assess whether there are grounds to establish the potentially significant impact of this plan on the Natura 2000 site, and whether it is necessary to assess the implications for the Natura 2000 site. Without carrying out an assessment, it is not possible to make sure that the public organs will guarantee the protection of the Natura 2000 sites, which is a violation of Article 6(2) and (3) of the Habitats Directive, as well as Article 33(1) of the Act on Environmental Protection.

Considering the precautionary principle and Article 6(3) of the Habitats Directive, the Minister for the Environment was obliged to assess whether this project could potentially have a significant impact on a Natura 2000 site before issuing the decision of 25 March 2016. If the answer was affirmative, the minister should have issued a decision on the basis of Article 96 (3) of UUIS to send all the relevant materials to the appropriate regional environmental protection director in order to conduct an assessment of the impact on a Natura 2000 site. Since the justification for the decision do not contain any mention relating to an impact assessment, the Ombudsman concluded that none had been

[20] Official Journal of 2016, item 1651.

[21] PAC judgement of Warsaw of 8 December 2010, IV SA/Wa 2017/10; SAC judgement of 10 June 2012, II OSK 708/11; PAC judgement of 31 June 2012, II SA/Bk 336/12.

[22] Judgement of 21 February 2012, II OSK 2544/11.

carried out, meaning that the decision violates Article 6(3) of the Habitats Directive as well as Article 96 (1) and (3) of UUIS.

4. Violation of the rules of administrative procedure

According to the Ombudsman, the Minister for the Environment also abused the rules of the Code of Administrative Procedure: Article 7,[23] Article 77 § 1[24] and Article 107 § 3,[25] to a degree that has an impact on the outcome of the case. The decision issued by the Minister for the Environment was based solely on documentation provided by, as the Ombudsman puts it "the applicant", and it did not use all the available evidential material (the minister was ex officio aware of multiple reservations regarding the planned change of the forest administration plan in relation to Puszcza Białowieska as a Natura 2000 site, but did not refer to them in any way). In the justification for the decision, there is no reference at all to the possible adverse impact that the project might or might not have on a Natura 2000 site. The decision lacks an assessment of even those documents that the minister referred to in the justification of the decision, i.e. the opinion of the Regional Director for Environmental Protection in Białystok and the Podlaski Regional Sanitary Inspector in Białystok. The minister limited himself to indicating merely that such opinions had been issued, which is particularly meaningful for the environmental protection opinion as it was preceded by a number of opinions that indicated a possible adverse impact on a Natura 2000 site. In addition, the decision does not contain an assessment of the legitimacy of the increase in logging, or an assessment of alternative methods of protecting the forest against damage by the beetle (should the minister decide that such protection is really necessary).

According to the Ombudsman, the minister violated the law also by not applying Article 23 (2) of the Acts on Forests allowing an increase in (certain categories of) logging of healthy trees only in the event of "damage or natural disaster", and the beetle does not qualify as either.

5. Constitutional dimension

The Ombudsman emphasised that environmental protection is strongly embedded in the constitution of Poland, which refers to it is several times, starting with Article 5 indicating that the Republic of Poland must safeguard, among values like the independence and integrity of its territory or the freedoms and rights of persons and citizens, also the protection of the natural environment pursuant to the principles of sustainable development. Further, the public authorities should prevent any negative health consequences of degradation of the environment (Art. 68(4)), and pursue policies ensuring the ecological security of current and future generations (Art. 74(1)), and the protection of the environment is their duty. Article 86 of the Constitution obliges everyone to care for the quality

[23] Public administration bodies must uphold the rule of law during proceedings and must take all necessary steps to clarify the facts of a case and to resolve it with regard to the public interest and the legitimate interests of members of the public.

[24] The public administration body is required to comprehensively collect and examine all evidential material.

[25] The factual justification of the decision should contain the facts that the body regards as proven, the evidence relied upon and the reasons for which other evidence has been treated as not authentic and without probative force. The legal justification should contain the legal authority for the decision with reference to the relevant law.

of the environment and sets out a responsibility for causing its degradation. As the Ombudsman stressed, such far-reaching duties (in particular of the public bodies) must be accompanied by guarantees of their enforcement, and hence Article 74 (3) declares that everyone has the right to be informed of the quality of the environment and its protection. This rule is complemented by the Aarhus Convention and UUIS. It means that the society, also through environmental protection organisations, is entitled to an active (not only passive) participation in the processes that impact the environment. In cases related to investments of significance for the environment, it is necessary to allow these entitlements to be exercised, and this obligation is placed on the public bodies that deal with a given case. The way in which the Ministry for the Environment proceeded in the case of approving the appendix raised reasonable doubts, in the eyes of the Ombudsman, as to whether these norms were violated as a result of issuing the decision, considering, among other things, that the proceedings lasted for just five days and society did not have a real chance to exercise its entitlements.

6. The first instance decision

In its decision of 14 March 2017,[26] the PAC in Warsaw rejected the complaint of the Ombudsman and the environmental protection organisations. The reasons of this decision focused solely on the nature of the approval, i.e. on demonstrating that it is neither an administrative act nor an act within the meaning of Article 3 § 2 PPSA, and hence the administrative courts have no jurisdiction over it (Art. 5 point 1 PPSA).

The Court took the view that the approval relates to the property of the State, which is represented by the National Forests, hence the approval has no external addressee. All the actions of the Minister for the Environment in this regard are internal, and no administrative decision is issued. Since the minister provides the National Forests with the statute, and the National Forests do not have any legal personality or legal capacity, it cannot be the subject of rights and obligations. According to the PAC, the approval cannot be qualified as "another act", because the actions of the Minister are not directed at "third persons" (individuals or entities that are the owners of the forest).

7. The second instance

The Ombudsman (as well as Stowarzyszenie Pracownia na Rzecz Wszystkich Istot and Fundacja ClientEarth Prawnicy dla Ziemi) appealed against this decision, accusing the PAC of violating administrative law (Art. 58 PPSA in relation to Art. 5 point 1 PPSA), by recognising the claim as inadmissible, because of its internal character, which also triggered a violation of Article 1 PPSA in relation to Article 184 of the Constitution (refusal by a court to assess the legality of a decision that constitutes an act of public administration); and further of violating Article 141 § 4 first sentence in relation to Article 166 PPSA by not referring to the impact that the Aarhus Convention and the Envorinmental Assessment Directive have on establishing the legal nature of approval; abusing Article 22 (1) and Article 23 (1) of the Act on Forests in relation to Article 47 of the Charter of the Fundamental Rights of the European Union[27] and in relation to Article 6 and Article 9(2) and (3) of the Aarhus Convention by assuming that approving the forest management plan is not an administrative decision; Article 91(1) and (2) of the

[26] IV SA/Wa 2787/16.

[27] OJC of 2010, No 83 item 389.

Constitution in relation to Article 9 of the Constitution, by not applying them and by rejecting a claim when its admissibility follows from an international convention, ratified by Poland, as well as violation of Article 288 TFUE; and violating Article 91 (1) and (2) of the Constitution in relation to Article 9 of the Constitution, by not applying them, i.e. rejecting the claim in a situation when its admissibility should be granted in light of the pro-European interpretation of law. The Ombudsman asked for the decision to be repealed and sent back for reconsideration.

The General Director of the National Forests submitted the view that the motion of the Ombudsman should be dismissed, arguing, among other things, that the forest management plan concerns the property of the State and is addressed to a subordinated body. It is neither an administrative decision, nor an act referred to in Article 3 § 2 point 4 PPSA. He also claimed that the PAC did not have a duty to refer to EU law or the Aarhus Convention, because of its lack of cognition in the case, and anyway, the project undertaken at the Puszcza Białowieska site is not covered by the categories of projects established in Annex 1 to the Aarhus Convention, the project does not qualify as having a significant impact on the environment and that the Convention does not have the right to contest every action of an individual or a public body, if that action cannot be contested according to national legislation.

The Supreme Administrative Court (SAC) rejected the Ombudsman's appeal, explaining that, on the basis of Article 5 point 1 of the PPSA, administrative courts have no jurisdiction in cases that arise in situations of organisational superiority and subordination between public administration bodies. The National Forests are a national organisational unit without legal personality, and the Minister for the Environment supervises their activities (Art. 28 (3) of the Act on Government Administrative Departments). The minister's supervision also follows from Article 4 (1) of the Act on Forests, which in the eyes of the SAC is decisive for establishing the superiority and subordination relation that excludes the jurisdiction of administrative courts. The SAC also stressed that the fact that Article 6 of the Act on Forests sets out that the forest management plan is the basic forest administration document for a given object (area), does not mean that it constitutes an administrative decision, because it does not establish rights or duties that are to be implemented, but simply constitutes an act of a superior directed at a State organisational unit. The SAC referred to its judgement of 12 March 2014,[28] in which it explained that the forest management plan is an internal act, "from the sphere of dominium, not imperium". Therefore, the SAC concluded that all the charges of violations of law, including EU law, are without foundation, because the PAC did not have the jurisdiction to apply them.

IV. The EU story

In April 2017, seven environmental protection organisations (WWF, Greenpeace, Greenmind, ClientEarth Prawnicy dla Ziemi, Dzika Polska, Pracownia na rzecz Wszystkich Istot and Ogólnopolskie Towarzystwo Ochrony Ptaków) sent a complaint to the EU Commission[29] concerning an alleged breach of Union law, i.e. a failure to comply with Article 6(2) and Article 6(3) of the Habitats Directive and Article 4(4) of the Birds Directive in relation to the revised forest management plan for the Białowieża Forest District. The same month, the EU Commission issued a reasoned opinion in which it

[28] II OSK 2477/12.

[29] https://www.documents.clientearth.org/wp-content/uploads/library/2016-04-19-complaint-to-the-european-commission-concerning-alleged-breach-of-union-law-over-logging-bialowieza-coll-en.pdf.

requested Poland to refrain from large-scale logging in the Białowieża Forest, arguing that the available evidence shows that the measures undertaken by the Polish government were not compatible with the conservation objectives of the site, and that they exceed those necessary for ensuring the safe use of the forest. The Commission also claimed that the logging is likely to adversely affect the conservation of the Natura 2000 site's habitats and species, as well as cause irreparable biodiversity loss. Poland, however, began to implement the decision on increased logging, following Decision No 51 by the Director-General of State Forests on 17 February 2017, (which claimed dead trees were removed and trees affected by the Spruce Bark Beetle) over an area of approximately 34 000 out of 63 147 hectares of the Natura 2000 site.

In June 2017, the Commission sent a letter of formal notice to the Polish authorities urging them to make sure that the conservation and protection requirements of the EU's rules set in the Birds and Habitats Directives are complied with on this site. Since the logging was already being carried out in the forest, and included the removal of 100-year-old and older trees and operations in the habitats, which should be strictly protected according to the Natura 2000 management plan, the Commission sent Poland a final warning, giving Poland one month to comply (instead of the customary two), due to the threat of serious irreparable damage to the site. Following Poland's reaction,[30] on 20 July 2017, the Commission brought an action against Poland for a failure to fulfil its obligations under the Habitats Directive and the Birds Directive, and in particular:

1) Article 6(3) of the Habitats Directive, by approving on 25 March 2016 the appendix to the forest management plan for the Białowieża Forest District (Poland) and implementing the forest management operations prescribed in that appendix without assessing first whether doing so would adversely affect the integrity of the Natura 2000 Puszcza Białowieska site;

2) Article 6(1) of the Habitats Directive and Article 4(1) and (2) the Birds Directive, by failing to take the necessary conservation measures prescribed therein;

3) Article 12(1)(a) and (d) of the Habitats Directive, by failing to guarantee the strict protection of certain saproxylic beetles, listed in Annex IV(a) to the Habitats Directive, namely by failing to effectively prohibit the deliberate killing or disturbance of those beetles, or the deterioration or destruction of their breeding sites in the Białowieża Forest District; and

4) Article 5(b) and (d) of the Birds Directive, by failing to guarantee the protection of the species of birds referred to in Article 1 of the Birds Directive, by failing to ensure that they will not be killed or disturbed during their breeding and rearing periods, and that their nests or eggs will not be deliberately destroyed, damaged or removed in the Białowieża Forest District.

The Commission also requested that the CJEU, pending the judgment in the main proceedings, grants interim measures, i.e. orders Poland to cease, except where there is a threat to public safety, the active forest management operations, including the removal of

[30] There is information available that Poland sent a response to the Commission, but no information is available as to the precise content of the response. On 5 July 2017, the Minister for the Environment published a statement in response to the "spreading of disinformation regarding the Białowieża Forest – both in the domestic and in the international press." He explained that in 2012 "under the pressure of ecocentrists, the commercial impact of people on the tree stands and habitats that had been shaped in the past was radically restricted." He followed that "The restricted felling of ageing, single-age tree stands planted over one hundred years ago resulted in massive dying out of these trees. Along with the dying out of the tree stands, the habitats being a Natura 2000 site began to disappear." Respecting the EU law related to the Natura 2000 sites requires immediate remedying of the current situation, but the ecocentrists provided a total criticism of the recovery programme." A full statement is available at: https://www.mos.gov.pl/puszcza-bialowieska/aktualnosci/szczegoly/news/statement-of-the-minister-of-environment-professor-jan-szyszko-regarding-the-liability-for-the-con/.

centuries-old dead spruces and the felling of trees as part of increased logging in the Białowieża Forest area, owing to the risk of serious and irreparable damage for the habitats and the integrity of the Natura 2000 Puszcza Białowieska site.

On 27 July 2017, the CJEU provisionally granted that request[31] (issued a ban on logging in the protected area, except in cases where public safety is at stake). Despite this, as claimed by the Commission, the logging was continued with the use of heavy machinery,[32] in breach of the imposed interim measures. The opinion of the Commission was based on, in particular, a report compiled by the Joint Research Centre (JRC) of 6 September 2017, based on satellite images of the Białowieża site, as well as a study made by the Commission services, based on a comparison between photographs from members of Polish civil society and official data provided by the Forestry Office regarding the location of the protected natural habitats and species. The dispute now became precedent-setting, because no Member State had ever before ignored interim measures imposed by the CJEU.

A hearing took place on 11 September 2017, after which, on 13 September, the Commission additionally requested – for the first time in history – an order against Poland to pay a periodic penalty payment if it fails to comply with the orders made in the proceedings (until the logging stops). Subsequently (19 September), Poland demanded that the Commission be invited to submit evidence on which the additional request was based, and when the Commission provided the evidence (21 September), Poland contended that the Commission's additional request was "manifestly" inadmissible and unfounded. On the one hand, Poland claimed that Article 279 TFEU does not expressly empower the Court to impose periodic penalty payments on Member States, and that such a power cannot be based on a purely purposive interpretation[33] of Article 279 TFEU and that granting the application would infringe Poland's rights of defence, since it had not had the chance to make representations either on the question of whether the active forest management operations at issue fall within the public safety exception recognised in the order of 27 July 2017, nor on the amount of the periodic penalty payment requested. On the other hand, Poland also argued that that the additional application is unfounded as the Commission relied on a misreading of the scope of the public safety exception for which it provides, and on material that has no evidential value. The spokesperson of the Ministry for the Environment claimed that the satellite images provided by the Commission are of poor quality, and give no possibility to verify the time and place they were taken.[34] Further, Poland requested that the Vice-President of the Court be excluded from the proceedings, claiming that his behaviour during the hearing had been biased;[35] as well as attributing the case to the Grand Chamber of the Court and lodging of security arguing that, in the event that the Commission's application is granted, it is necessary to make compliance with the order for interim measures conditional on the Commission lodging security in an amount equal to the cost of the damage that might arise as a result of compliance with that order, namely PLN 3,240,000,000 (around €757,000,000). Inter-

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[31] Commission v Poland (C-441/17 R, not published, EU:C:2017:622).

[32] Harvesters were still being blocked by ecological organisations at the sites in October 2017 http://bialystok.wyborcza.pl/bialystok/7,35241,22464240,zmasowana-blokada-w-puszczy-bialowieskiej-strazy-lesna-uzywa.html.

[33] Indeed, one can claim that many difficulties are encountered in Poland, when it comes to the understanding and the use of the teleological interpretation.

[34] http://bialystok.wyborcza.pl/bialystok/7,35241,22444224,szyszko-podwaza-jakosc-map-i-zdjec-satelitarnych-puszczy-bo.html.

[35] http://www.rp.pl/Kraj/170928870-Polska-chce-wylaczenia-wiceprezesa-Trybunalu-UE-z-postepowania-w-sprawie-Puszczy.html.

estingly, this amount was calculated on the basis of Polish legislation that requires compensation where woodland loses its status as forested land, i.e. Poland has treated the Białowieża Forest as any other forest that is grown for commercial purposes.

1. The order for interim measures

On 20 November 2017, the CJEU granted the Commission's application for interim measures. The Grand Chamber of the Court ordered Poland to cease, immediately and until delivery of the final judgment, the active forest management operations in specified habitats and the removal of centuries-old dead spruces and the felling of trees as part of increased logging on the Puszcza Białowieska site.[36] According to the order, Poland may, exceptionally, continue to take the measures where they are strictly necessary, in so far as they are proportionate, in order to ensure, directly and immediately, the public safety of persons, on the condition that other, less radical measures are impossible for objective reasons, i.e. when they are the sole means of ensuring the public safety of persons in the immediate vicinity of transport routes or other significant infrastructure, where it is impossible to ensure such safety, for objective reasons, by taking other, less radical measures, such as adequate signposting of the danger or a temporary ban, backed up, where necessary, by appropriate penalties, on public access to the immediate vicinity.

2. Interim measures – prima facie case, urgency and balancing of interests

In the justification to the order, the Court explained the prerequisites of issuing the interim measures, i.e. the prima facie case, the requirement of urgency and the need to balance the interests.

The interim measures may be ordered only if it is established that such an order is justified, prima facie, in fact and in law, and the order is urgent in order to avoid serious and irreparable damage to the interests of the European Union. According to the CJEU, since there is a major legal or factual disagreement whose resolution is not immediately obvious, the action is not prima facie without reasonable substance. The Court stressed in particular that the arguments relied on by the Commission do not appear, prima facie, to be unfounded, and it is not inconceivable that the active forest management operations in question fail to respect the protection requirements under the Habitats Directive and the Birds Directive.

In relation to the urgency requirement, the CJEU pointed out that the purpose of the interim proceedings is to guarantee the full effectiveness of the future final decision in order to ensure that there is no gap in the legal protection provided by the Court. The urgency must therefore be assessed in light of the need for an interlocutory order necessary to avoid serious and irreparable damage to the party seeking the interim relief. The CJEU relied on the arguments of the Commission, which claimed that the active forest management operations carried out by Poland are likely to cause irreparable and serious damage to the environment. The CJEU stressed that since those operations involve the removal of old, dying or dead trees, including both those affected by Bark Beetle and those unaffected, it does seem very likely that they will have an impact on the relevant habitats. The CJEU also pointed out that, until 2016, one of the measures for conserving those habitats was a prohibition on operations of that type in certain areas. Therefore, the

[36] The measures based on the decision of the Minister for the Environment of the Republic of Poland of 25 March 2016 and Article 1(2) and (3) of Decision No 51 of the Director-General of Lasy Państwowe (Forestry Office, Poland) of 17 February 2017.

consequences are likely to constitute serious and irreparable damage to the interests of the EU and its common heritage. The Court stressed that if the Commission's allegations were to be confirmed, the damage caused would be impossible to rectify.

In weighing up the interests, the CJEU took the position that it pleads in favour of granting the interim measures. The interests requiring balancing were: the protection of the habitats and species from a potential threat in the form of active forest management operations at issue, and the interest of preventing damage to the natural habitats of the Białowieża Forest resulting from the presence of the Spruce Bark Beetle. The CJEU established that Poland has not provided reasons why the cessation of the operations until judgment is given in the main proceedings (stressing that it will probably be within just a few months from the date of the order[37]) is likely to cause serious and irreparable damage to that habitat. The fact to which Poland referred, i.e. that the operations are limited to a restricted area of the Natura 2000 Puszcza Białowieska site, did not support Poland's case in the Court's eyes. On the contrary, the Court stressed that this argument tends to reinforce the Commission's position that a temporary cessation of those operations would not lead to the site suffering any serious damage. Also, as Poland has not provided detailed information on the harm the Spruce Bark Beetle would cause in the short term, the CJEU decided that it is more urgent to prevent the damage that a continuation of the operations at issue would cause to the protected site.

3. Refusal on lodging security

The Court refused Poland's request for the lodging of security. It explained that this can be envisaged only if the party against which it is ordered is liable for sums that the security is intended to cover, and there is a risk of that party becoming insolvent, which is not the case here, since, as the Court said, there is no reason to expect that the European Union would be unable to meet its obligations if it were required to pay compensation.

4. Penalty payment

The Court decided to bolster the effectiveness of the interim measures by imposing a penalty payment on Poland, in case it fails to comply immediately and fully with the interim measures. The Court explained that Article 279 TFEU grants a broad discretion in the exercise of which it is empowered, including to specify the subject matter and the scope of the interim measures requested, and to adopt, where necessary at its own discretion, any ancillary measure intended to guarantee the effectiveness of the interim measures that it orders, which may entail the provision for a periodic penalty payment if a party does not respect the order.

In this case, the Court decided that additional measures must be taken to ensure the effectiveness of the requested measures, as the prospect of a periodic penalty payment encourages the relevant Member State to comply with the interim measures, enhances the effectiveness of those measures and guarantees the full effectiveness of the final decision.

The imposition of an ancillary measure, the Court explained, in no way prejudges the future decision in the main action. In addition, while it is not necessary at this stage to establish whether, as the Commission claims, the Republic of Poland has failed to comply with the order of 27 July 2017, there is sufficient material in the file (the satellite

[37] Due to decision of the CJEU of 11 October 2017 to introduce a fast-track procedure.

images) to give the Court grounds to doubt whether the Republic of Poland has complied with that order, or whether it is prepared to comply with the present order from now until the date of the final decision, particularly where it concerns the interpretation of the public safety exception set out in the order. The fact that Poland has entrusted the assessment of public safety requirements to an ad hoc independent committee does not exonerate it from its responsibility to ensure compliance with the limits of that exception.

In relation to other arguments raised by Poland, the Court explained that a periodic penalty payment cannot, in the circumstances of the present case, be seen as a punishment, and that Poland's interpretation of the system of legal remedies under EU law in general, and of proceedings for interim measures in particular, would have the effect of considerably reducing the likelihood of those proceedings achieving their objective in the event of the Member State concerned failing to comply with the interim measures ordered against it.

The Court ordered Poland to send to the Commission, no later than 15 days after notification of the order, details of all the measures that it has adopted in order to fully comply with the order, detailing, with reasons, the active forest management operations at issue that it intends to continue because they are necessary to ensure public safety. If the Commission is of the view that Poland has failed to comply fully with the order, it will be able to request that proceedings be resumed. The Court will then decide, by way of a new order, on whether the order has been infringed and if it finds an infringement, the Court will order Poland to pay the Commission a periodic penalty payment of at least EUR 100 000 per day, from the date of notification of the present order to Poland until it complies with the order, or until final judgment in Case C-441/17 is delivered.

5. The aftermath

As of the day of submitting this article, the Commission has not initiated any actions against Poland. In reaction to the order, the Minister for the Environment (*Szyszko*) declared that "Poland is not threatened with any penalties, and this is clearly stated in the order," and also that no penalties can be imposed on Poland in the future, because "Poland respects the order of the CJEU 100% and respects the Natura 2000 law,"[38] and that the CJEU in its order "is trying to make its thoughts more precise, and this is what the certain conflict is about."[39] However, after the order was issued, harvesters were removed from the sites, as claimed by the Head of the National Forests, Konrad Tomaszewski, "because the sanitary state [of the forest] has been sufficiently put into order, and not because of the Court's order."[40] The new prime minister, Mateusz Morawiecki, declared that Poland respects decisions of the CJEU and will also respect its judgements. He also said that the measures undertaken in the Puszcza Białowieska site were aimed at protecting it, and in particular that *Minister Szyszko* was trying "to save Puszcza Białowieska, not to destroy it." He also stressed, "we would like to believe that the European institutions also aimed at protecting the Polish environment. We want to belive it."[41]

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[38] https://oko.press/szyszko-polsce-groza-kary-trybunal-kara-120-tys-euro-dzien-groteska-wykonaniu-ministra/.

[39] https://businessinsider.com.pl/wiadomosci/100-tys-zl-kary-dla-polski-za-wycinke-w-puszczy-bialowieskiej/61fmx6l.

[40] http://www.polskatimes.pl/fakty/polityka/a/harwestery-wycofane-z-puszczy-bialowieskiej-lasy-panstwowe-stan-sanitarny-zostal-uporzadkowany,12694958/.

[41] http://www.polskatimes.pl/fakty/polityka/a/harwestery-wycofane-z-puszczy-bialowieskiej-lasy-panstwowe-stan-sanitarny-zostal-uporzadkowany,12694958/.

Minister Szyszko was dismissed on 9 January 2018, and the new minister (*Henryk Kowalczyk*) declared that it must be carefully evaluated whether the measures carried out at the sites are in conformity with law. If they are, he said, they will be continued without doubt, confirming at the same time the intention to respect the judgement of the CJEU.[42]

V. Warsaw and Luxemburg: the opposing views

The two Polish administrative courts that dealt with the Puszcza Białowieska case decided to employ a common strategy aimed at limiting, as much as possible, their own cognition in the case. It is an excellent example of the *in dubio contra iudicis activitatem* principle, a very common strategy employed by Polish courts. In this case, the measure the courts used to achieve that was to reduce the case, which related in principle to environmental protection and ensuring public participation in making environmentally sensitive decisions, to an issue of ownership. Moreover, the approach adopted by the courts with regards to the ownership was also rather outdated because exercising the powers of the owner, in the eyes of the courts, eliminates any kind of judicial control, at least within the system of administrative control. It would mean, that an action undertaken by a party could not be challenged as violating law, as long as it was made as a part of the entitlements of the owner. Seeking an escape route by referring to the ownership status is clearly an incorrect starting point for judicial reasoning, which artificially creates the lack of jurisdiction of the administrative courts. This has very far-reaching consequences. It leads to results that clearly violate EU law (the Habitats Directive, the Environmental Assessment Directive, and the Aarhus Convention), as well as the Polish Constitution, alongside several rules of ordinary acts.

The judgement in Puszcza Białowieska case is, however, only one of several highly politically sensitive cases, that the SAC adjudicated recently, and where the claimed internal character of the act that comes from an organisational subordination of the party receiving it, was use as a pretence not to adjudicate in the case. The other cases included: the case challenging the decree of the Minister of Culture and National Heritage, on the merger of the Museum of the II World War in Gdańsk and the Museum of Westerplatte and the 1939 War,[43] where the SAC argued lack of competence of the administrative courts, due to the fact that the decree had an internal management character,[44] and the complaint against the Prime Minister's refusal to publish a judgment of the Constitutional Tribunal,[45] where the SAP decided about inadmissibility of the case on the ground that the refusal to publish was not an act or action relating to entitlements or duties prescribed by law taken in an individual case.[46] The outcome of this policy employed by the SAC, i. e. the policy to restrict, as far as possible the cognition of administrative courts (which can be seen as a classical rise to the bottom situation) means that the public is more and more refused any kind of control with relation to the actions of the public administration.

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[42] http://bialystok.wyborcza.pl/bialystok/7,35241,22877272,nowy-minister-srodowiska-nie-wykluczadalszej-wycinki-puszczy.html.

[43] SAP decision of 5 April 2017, II OZ 299/17.

[44] For a very critical analysis of the case see: *Zbigniew Kmieciak*, Glosa do postanowienia NSA z dnia 5 kwietnia 2017 r., II OZ 299/17, Orzecznictwo Sądów Polskich 2017 nr 9.

[45] SAP decision of 25 April 2017, I OSK 126/17.

[46] For a very critical analysis of the case see: *Zbigniew Kmieciak*, Niedopuszczalność skargi do sądu administracyjnego na odmowę publikacji przez Prezesa RM wyroku Trybunału Konstytucyjnego – glosa – I OSK 126/17, Monitor Prawniczy, 2017 nr 13.

This decision of the Polish Supreme Administrative Court in the Puszcza Białowieska case is particularly difficult to comprehend in the light of the ongoing proceedings in the same case in the CJEU, where it is very clear that the CJEU takes a very pragmatic, axiology driven, hands on approach to the issue of protecting the primeval forest, based on the applicable EU law. An analysis of the reasoning presented by the CJEU clearly shows that the objections against the PAC judgement, formulated by the Ombudsman and the environmental protection organisations, are very well founded.

Polish administrative courts, which are also EU courts, have evidently failed to recognise the duties that stem from that status, and the outcome they offered can only be seen as a denial of justice. The decision to reject the appeal of the Ombudsman and the environmental organisations leads to a drastic lowering of the standards, not only in an EU law context, but also in a human rights context, as it limits public access to justice. The CJEU will hopefully remedy this by adopting a judgement that will (at least from a legal point of view) rectify the situation with regards to the Puszcza Białowieska; a question, however, remains as to the approach and attitude presented by the Supreme Administrative Court in this case. The difference between the reasoning of the Polish administrative courts and the CJEU is quite striking, in particular where it comes to entering into dialogue that should exist between national and European courts and – in case of the Polish courts, the approach they present with regard to the applicability of EU law. The status pretence, which they use to escape the need to apply EU environmental protection law is particularly hurtful for the environment. In addition, the courts make absolutely no attempt to answer the question as to who – if not the administrative courts – should make sure that EU law is observed in Poland.

The story of the logging of Puszcza Białowieska has not ended yet. In November 2017, environmental protection organisations (WWF, Greenpeace, Greenmind, ClientEarth Prawnicy dla Ziemi, Dzika Polska, Pracownia na rzecz Wszystkich Istot and Ogólnopolskie Towarzystwo Ochrony Ptaków) sent a communication to the Aarhus Convention Committee,[47] claiming an alleged violation of the Convention. The communication will be discussed by the Committee in March 2018. On 11 January 2018, the district court in Hojnówka issued a judgement in which is stated that 10 activists who blocked the harvesters at the Puszcza Białowieska site in June 2017 had not committed an offence, since they had acted in a state of higher necessity.[48] Interestingly, in November 2017, the same court had found the activists guilty, but did not inflict any penal measures on them. Still, there are about 150 people awaiting adjudication in similar cases. It seems then that in case of Puszcza Białowieska, the hope lies with society and the European Union.

[47] https://www.documents.clientearth.org/wp-content/uploads/library/2017-11-14-communication-to-the-aarhus-convention-compliance-committee-coll-en.pdf.

[48] https://bialystok.onet.pl/sad-w-hajnowce-aktywisci-ekologiczni-niewinni-byl-stan-wyzszej-konieczności/dnbtccd.