

## LEGAL CONSEQUENCES OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-432/21

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**Abstract:** This article synthetically discusses the judgment of the Court of Justice of the European Union of 2 March 2023 in case C-432/21.<sup>2</sup> It aims to familiarise international readers with this issue, which might be a contribution to an academic, international discussion in this field, significant in the era of climate change.

The author first indicates the role of forests in climate policy and considers the socio-economic conditions of the current situation of forests in Poland. Then, the international reader will be introduced to the most critical issues related to the judgment that concern the Polish legal order, i.e., forest management and the code of good practices in forests.

In the next part, she moves on to the essential elements of the legal basis for the complaint filed by the European Commission against Poland and shows grounds of action and the operative part of the judgment. Then, the most important points of the parties' arguments were briefly presented. In addition, reference will be made to the legal consequences of issuing the judgment in question.

**Keywords:** environmental law; forest management plans; good practice; access to justice

**DOI:** 10.14712/23366478.2024.10

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<sup>2</sup> WYROK TRYBUNAŁU (druga izba) z dnia 2 marca 2023 r., spis treści. In: *InfoCuria: Judikatura* [online]. [cit. 2023-04-10]. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=A17A32D653927428139B3B9B3443C81B?text=&docid=270827&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=7766664>.

## INTRODUCTION

The importance of forests,<sup>3</sup> especially in the context of emphasised climate change<sup>4</sup> and in global terms, is undeniable.<sup>5</sup> Indeed, forests can play a significant role in both mitigating climate change and adapting to the negative consequences of this process.<sup>6</sup> This issue is all the more important from a research perspective, given that the European Green Deal<sup>7</sup> assumes that the EU economy will achieve zero net greenhouse gas emissions<sup>8</sup> as early as in 2050.<sup>9</sup> In the shorter term, by 2030, this will entail even more ambitious targets to reduce greenhouse gas emissions by at least 55% compared to the 1990 level.<sup>10</sup> These objectives, in turn, require a more intensive use of the potential

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<sup>3</sup> A forest within the meaning of the Act of 28 September 1991 on Forests (*Journal of Laws*. 2022, item 672 as amended, hereinafter: referred to as the AC) is land:

1) with a compact area of at least 0.10 ha, covered with or temporarily deprived of, forest vegetation (forest plantations) – trees, shrubs and undergrowth:

a) intended for forestry production;  
b) constituting a nature reserve or forming part of a national park; or  
c) entered in the register of historical monuments;

2) related to forest management, occupied for the following used for forest management: buildings and other structures, water reclamation facilities, forest dividing lines, forest roads, areas under power lines, forest nurseries, timber storage areas, as well as forest car parks and tourist facilities.

<sup>4</sup> It is worth reading the latest report of the Intergovernmental Panel on Climate Change (Climate Change 2021: the Physical Science Basis. In: *ipcc* [online]. 2021 [cit. 2023-04-11]. Available at: <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/>).

<sup>5</sup> ASSELT, H. Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes. *New York University Journal of International Law and Politics*. 2012, Vol. 44. No. 4, pp. 1205–1278.

<sup>6</sup> According to Statistics Poland, the area of forest in Poland in thousands of hectares was 9264.7 in 2022 (Rocznik Statystyczny Leśnictwa 2022. In: *Główny Urząd Statystyczny* [online]. 30.11.2022 [cit. 2023-04-15]. Available at: <https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-lesnictwa-2022,13,5.html>).

<sup>7</sup> See more: KÖHL, M. et al. The EU climate package “Fit for 55” – a double-edged sword for Europeans and their forests and timber industry. *Forest Policy and Economics*. 2021, No. 132, p. 102596.

<sup>8</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions: The European Green Deal, 11.12.2019 COM(2019) 640 final. In: *EUR-Lex: Access to European Union law* [online]. 2019, p. 2 [cit. 2023-04-11]. Available at: <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=COM%3A2019%3A640%3AFIN>.

<sup>9</sup> It should be noted in passing that official communications from Polish government representatives emphasise that it is impossible to achieve this goal by this date, and that this date for Poland, due to its heavy dependence on fossil fuels, should be postponed by several years. Significantly, Poland does not have a separate climate protection Act and no legislative work on its adoption is underway (as of 12.4.2023).

<sup>10</sup> In order to achieve the European Green Deal targets, the European Commission published the “Fit for 55” package of documents in 2021, including, *inter alia*, specific legislative solutions aimed at achieving a reduction at the level of 55%. In addition, the EU’s CO<sub>2</sub> target concerning sinks for the land use and forestry sector has been increased, which will reduce the Union’s greenhouse gas emissions in 2030 by as much as 57% compared to 1990.

of forest ecosystems as carbon sinks.<sup>11</sup> The biodiversity strategies<sup>12</sup> and a new forestry strategy,<sup>13</sup> which envisage improving the quality of the European Union's forest areas<sup>14</sup> (through their protection and remediation) and increasing their area (afforestation and reforestation), are also relevant here.<sup>15</sup> The Polish legislature does not seem to take sufficient note of these issues.

Speaking of the socio-economic situation, it is necessary to point out that forests, and indirectly also nature protection, have recently been treated in Poland in a completely different way from the statutory regulations. It is impossible to resist the impression that the Polish lawmaker is increasingly often reducing the protection of forests to their production function only,<sup>16</sup> often violating the diversity and the exceptional nature of unique formations in Europe. Suffice it to mention here, another case known in Poland as "saving" the Białowieża Forest<sup>17</sup> from invasion of the spruce bark beetle, which ended with the judgment of the Court of Justice of the European Union (the Court) of 17 April 2018 in case C-441/17.<sup>18</sup> This judgment held that the Republic of Poland had failed to fulfil its Member State obligations, which consisted, *inter alia*, in adopting an

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<sup>11</sup> One of the flagship development projects of the State Forest Holding "State Forests" is Forest Carbon Farms. The project is expected to contribute to increasing the amount of CO<sub>2</sub> absorbed by the forest ecosystem, mainly tree stands and soil. In 2018, an estimation of the magnitude of the expected effects of the project for the next 30 years was carried out. According to preliminary results, the forests within the Forest Carbon Farms project will additionally absorb around 1 million tonnes of CO<sub>2</sub> (Leśne Gospodarstwa Węglowe. In: *Projekty rozwojowe Lasów Państwowych* [online]. 28.10.2021 [cit. 2023-04-11]. Available at: [https://projekty-rozwojowe.lasy.gov.pl/projekty-rozwojowe/-/asset\\_publisher/7PcENrBXIBZJ/content/lesne-gospodarstwa-weglowe](https://projekty-rozwojowe.lasy.gov.pl/projekty-rozwojowe/-/asset_publisher/7PcENrBXIBZJ/content/lesne-gospodarstwa-weglowe)). To illustrate the scale of the problem, it is worth pointing out that Poland emits 311 million tonnes of CO<sub>2</sub> annually (data for 2021). CO<sub>2</sub> emissions from the combustion of all three fossil fuels – gas, oil and even coal – have increased, although over the previous 35 years coal emissions in Poland have been falling (ANDREW, R. *Figures from Global Carbon Budget 2022* [online]. [cit. 2023-04-11]. Available at: <https://robbieandrew.github.io/GCB2022/>).

<sup>12</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030. Bringing nature back into our lives, 20.5.2020 COM(2020) 380 final. In: *EUR-Lex: Access to European Union law* [online]. 2020 [cit. 2023-04-11]. Available at: <https://eurlex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020DC0380>.

<sup>13</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: New EU Forestry Strategy for 2030, 16.7.2021 COM(2021) 572 final. In: *EUR-Lex: Access to European Union law* [online]. 2021, p. 8 [cit. 2023-04-11]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0572>.

<sup>14</sup> See more: VIZZARRI, M. et al. Setting the forest reference levels in the European Union: overview and challenges. *Carbon Balance and Management*. 2021, Vol. 16, No. 23, pp. 1–16.

<sup>15</sup> PRZYBOJEWSKA, I. Lasy w kontekście prawnych unormowań ochrony klimatu. *Prawne Problemy Górnictwa i Ochrony Środowiska*. 2023, Nr. 1, pp. 1–29.

<sup>16</sup> The literature identifies three functions of forests. According to W. Radecki these functions are as follows: the protective function, the production function, the social function. See DANECKA, D. – RADECKI, W. *Ustawa o lasach: komentarz*. Warszawa: Wolters Kluwer Polska, 2021, p. 21.

<sup>17</sup> The Białowieża Forest is a forest complex with an area of approximately 1,500 km<sup>2</sup> on the Polish-Belarusian border. The legal situation is diverse – it includes a national park, nature reserves, a protected landscape area and a Natura 2000 site. According to the EU Commission, the Białowieża Forest Natura 2000 site is one of the best preserved natural forests in Europe, characterised by large amounts of dead wood and historic stands of trees, especially stands which are 100 years old.

<sup>18</sup> WYROK TRYBUNAŁU (wielka izba) z dnia 17 kwietnia 2018 r. In: *InfoCuria: Judikatura* [online]. [cit. 2023-04-11]. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=D009C65E895DBDCED41C9D44953494CF?text=&docid=201150&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=2224320>.

annex to the forest management plan<sup>19</sup> of the Białowieża Forest District without ensuring that the annex would not adversely affect the integrity of the site of Community importance and of the special protection area PLC200004 Białowieża Forest. What is significant and must be strongly emphasised is that from the grounds of the judgment it follows that the active forest management measures taken by Poland did not only consist of “sanitary felling” to eliminate only the spruce trees infested by the spruce bark beetle, as they were also carried out on broadleaf trees (e.g., hornbeams, oaks, and alders).<sup>20</sup> Secondly, these actions were in total contradiction with the adopted plan of protection tasks for this area.<sup>21</sup>

The subject matter discussed in the following section is currently under discussion in Poland, due to the judgment of the Court of Justice of the European Union (the CJEU or the Court) of 2 March 2023 in case C-432/21 (the judgment). The author is aware that it is not possible to exhaust the topic, especially as the matter is multithreaded. For this reason, the most important issues will be presented, which will perhaps contribute to an international academic discussion in this field.

## FOREST MANAGEMENT AND THE CODE OF GOOD PRACTICE – SELECTED ISSUES

As regards the matter under discussion, it is necessary to refer to the Polish Forest Act. Pursuant to Article 6(1)(1) of the Forest Act, forest management is defined as; the forestry activities of arranging, protecting and managing the forest, maintaining and enlarging forest resources and crops, managing wildlife, harvesting – except for purchase – of timber, resin, Christmas trees, stumpwood, bark, needles, game and undergrowth produce, as well as the sale of these products and the performance of non-productive functions of a forest.

Forest management is carried out according to the following principles:

- universal protection of forests;
- sustainability of forest maintenance;
- continuity and sustainable use of all forest functions; and
- extension of forest resources.<sup>22</sup>

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<sup>19</sup> It is the basic forest management document prepared for a specific site, containing a description and assessment of the condition of the forest and the objectives, tasks and methods of forest management (Article 6(1)(6) of the Forest Act). As a rule, a forest management plan is prepared for 10 years. It may be prepared for periods shorter than 10 years, e.g., in case of damage or natural disasters (Article 18(1) and (2) of the Forest Act).

<sup>20</sup> The spruce bark beetle colonises only coniferous trees, mainly spruce, and not broadleaf trees. It should be noted in passing that in the Belarusian part of the Białowieża Forest, adjacent to the Natura 2000 Białowieża Forest, the competent authorities did not deem it necessary to carry out “sanitary felling” in order to reduce the spruce bark beetle infestation.

<sup>21</sup> The activity of the spruce bark beetle is not considered a threat in the plan of protection tasks, nor is the control of the spruce bark beetle by means of felling and removal of infested spruce stands considered a protection measure in this plan. On the contrary, it is the removal of spruce stands infested by the spruce bark beetle that is explicitly recognised in the plan as a threat.

<sup>22</sup> For more, see: HABUDA, A. (ed.). *Polskie prawo leśne*. Warszawa: Difin, 2016.

Sustainable forest management is carried out according to a forest management plan or a simplified forest management plan.<sup>23</sup>

However, the greatest attention should be focused on the no longer binding<sup>24</sup> Article 14b(3) of the Forest Act,<sup>25</sup> which was one of the grounds for the EC's action against Poland in case C-432/21. Further analysis requires quoting this regulation in the wording from before its repeal. Pursuant to Article 14b(3) of the Forest Act, forest management carried out in accordance with the requirements of good forest management practice does not infringe the provisions on the protection of particular resources, formations and components of nature, in particular the provisions of Articles 51<sup>26</sup> and 52<sup>27</sup> of the Nature Conservation Act.<sup>28</sup> It is important to emphasise the wording "in particular" used here, which leads to the conclusion that these could also have been other provisions, such as: Article 120 of the Nature Conservation Act (prohibition on the introduction of alien species), Article 60 of the Nature Conservation Act (zonal protection of protected species), Article 33 of the Nature Conservation Act (Natura 2000 areas), and Article 15 of the Nature Conservation Act (prohibitions applicable in the area of a national park and a nature reserve). The above meant that a kind of legal fiction was being introduced in the sense that forest management carried out in accordance with the requirements of good practice, even if it had been in fact carried out in contravention of the provisions of the Nature Conservation Act – did not legally violate them.<sup>29</sup> This regulation imposed the extension of this fiction to all provisions on the protection of individual resources, creations, and components of nature. Significantly, the code of good practice was to apply uniformly to all forests (regardless of whether they were commercial or protective forests), as no distinction was made in this regard.

This provision already received a huge wave of criticism at the stage of legislative work and public consultation.<sup>30</sup> Even before the abovementioned regulation was issued, there were views in the literature highlighting the flawed and dangerous nature of this regulation. What is extremely worrying is the number of dangers that have been identified. Only the most important ones will be mentioned.

It was emphasised that as a result of the proposed changes entities carrying out felling in forests would basically be doing it on their own, without the need to consult naturalists or obtain permits from the relevant authorities. According to K. Kasprzak, as

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<sup>23</sup> It is a plan prepared for a forest of at least 10 ha, constituting a compact forest complex, containing a summary description of the forest and the land to be afforested and the basic tasks concerning forest management (Article 6(1)(7) of the Forest Act).

<sup>24</sup> Following the EC's action, the Act of 17 November 2021 amending the Forest Act and the Nature Conservation Act was enacted (*Journal of Laws*, 2022, item 84), which entered into force on 13 February 2022 and repealed Article 14b of the Forest Act.

<sup>25</sup> In Polish: "Gospodarka leśna wykonywana zgodnie z wymaganiami dobrej praktyki w zakresie gospodarki leśnej nie narusza przepisów o ochronie poszczególnych zasobów, tworów i składników przyrody, w szczególności przepisów art. 51 i art. 52 ustawy z dnia 16 kwietnia 2004 r. o ochronie przyrody."

<sup>26</sup> This provision concerns prohibitions relating to the protection of animal species.

<sup>27</sup> This provision concerns prohibitions relating to the protection of plants and fungi.

<sup>28</sup> The Nature Conservation Act of 16 April 2004 (*Journal of Laws*, 2022).

<sup>29</sup> RADECKI, W. *Ustawa o lasach: komentarz*. Warszawa: Difin, 2017, pp. 164–165.

<sup>30</sup> For more, see: RADECKA, E. Ochrona rezerwatowa w lasach po ostatnich zmianach. *Prawne Problemy Górnictwa i Ochrony Środowiska*. 2018, Nr. 1–2, pp. 81–96.

a result, all protected species, including endangered, rare, and priority species, would be deprived of statutory protection in the areas of planned felling.<sup>31</sup>

The literature on the subject strongly emphasises the incompatibility of the above-mentioned regulations with the requirements of EU law,<sup>32</sup> more specifically with Article 16 of the Birds Directive<sup>33</sup> and Article 9 of the Habitats Directive.<sup>34</sup> These violations are found, *inter alia*, in the blanket derogations from species protection for designated activities, and this is because individual forest management activities will not have to be preceded by an individual permit granted by the competent regional director for environmental protection, which will make it impossible to comply with the obligation imposed by the Habitats and Birds Directives to report in detail on the derogations granted. Moreover, as noted, the derogations from the protection referred to in the above articles must cumulatively fulfil all the conditions indicated in these provisions. The Court of Justice of the European Union<sup>35</sup> has emphasised that national provisions governing derogations which do not contain all the conditions are not in accordance with the Directives.

As already mentioned, Article 14b of the Forest Act has been repealed. The regulations on the requirements of good forest management practice have been transferred to the Nature Conservation Act (Article 52b). A draft regulation of the Minister of Climate and Environment on the requirements of good forest management practice is currently being drafted,<sup>36</sup> on which diverse comments are being made, including those that strongly emphasise that once again the assumptions arising from EU directives will not be met.<sup>37</sup>

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<sup>31</sup> KASPRZAK, K. Grozi nam masowa wycinka drzew. *Przegląd Komunalny*. 2017, Nr. 1, pp. 46–47.

<sup>32</sup> *Opinion of the Naturalists' Club: Klub Przyrodników* [online]. 14.11.2017 [cit. 2023-04-11]. Available at: [http://www.kp.org.pl/pdf/stanowiska/ktg/2017-11-14\\_KP%20opinia%20o%20proj%20Wymogow%20dobrej%20praktyki%20gosp%20lesnej.pdf](http://www.kp.org.pl/pdf/stanowiska/ktg/2017-11-14_KP%20opinia%20o%20proj%20Wymogow%20dobrej%20praktyki%20gosp%20lesnej.pdf).

<sup>33</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (codified version – Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds – OJ L 20 of 26 January 2010, p. 7).

<sup>34</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Official Journal of the EU. L 206 of 22 July 1992, p. 7, as amended).

<sup>35</sup> What is extremely interesting is that irregularities in the introduction of derogations from the prohibitions set out in Article 51(2) and Article 52(2) of Nature Conservation Act have been examined by the CJEU (Case C-46/11 and Case C-192/11, respectively). The CJEU emphasises that derogations from the prohibitions provided for in the Directive should be set out in national legislation with sufficient clarity and precision.

<sup>36</sup> Projekt rozporządzenia Ministra Klimatu i Środowiska w sprawie wymagań dobrej praktyki w zakresie gospodarki leśnej. In: *Rządowego Centrum Legislacji* [online]. 2022 [cit. 2023-04-11]. Available at: <https://legislacja.rcl.gov.pl/projekt/12361354/katalog/12890180#12890180>.

<sup>37</sup> See more: Uwagi KP do projektu rozporządzenia Ministra Klimatu i Środowiska w sprawie wymagań dobrej praktyki w zakresie gospodarki leśnej. In: *Klub Przyrodników* [online]. 7.11.2022 [cit. 2023-04-11]. Available at: <https://kp.org.pl/pl/urzadzanie-lasu/ogolne-podstawy/3254-uwagi-kp-do-projektu-rozporzadzenia-ministra-klimatu-i-srodowiska-w-sprawie-wymagan-dobrej-praktyki-w-zakresie-gospodarki-lesnej>; and Projekt rozporządzenia Ministra Klimatu i Środowiska w sprawie wymagań dobrej praktyki w zakresie gospodarki leśnej. In: *Rządowego Centrum Legislacji* [online]. 2022 [cit. 2023-04-11]. Available at: <https://legislacja.rcl.gov.pl/projekt/12361354/katalog/12890180#12890180>.

## LEGAL GROUNDS FOR THE ACTION

According to Article 258 of the Treaty on the Functioning of the European Union,<sup>38</sup> if the Commission considers that a Member State has failed to fulfil an obligation under the treaties, it delivers a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court.

This action is a fundamental tool of the Union's system of judicial review.<sup>39</sup> Under Article 19 of the Treaty on European Union,<sup>40</sup> the Court ensures respect for the law and interpretation in the application of the treaties, while the Commission is the guardian of compliance with Union law (Article 17 of the TEU). The literature emphasises the “uniqueness” of this procedure, as the Member States and the Commission have generally sought to resolve the issues at the root of possible proceedings before the Court, at the pre-judicial stage,<sup>41</sup> although at the same time it is mentioned that the number of cases brought before the CJEU on this basis is steadily increasing.<sup>42</sup> It should also be mentioned that this instrument is sometimes considered outdated and not in line with the current economic and political contexts.<sup>43</sup>

It is impossible to discuss the whole procedure in detail here, as well as the formal elements of the action, so I therefore refer you to the literature on this subject.<sup>44</sup>

## THE GROUNDS OF THE ACTION IN QUESTION AND THE OPERATIVE PART OF THE JUDGMENT

By the action, the Commission requested the Court to declare that the Republic of Poland had failed to fulfil its obligations under the Birds and Habitats Directives and the Aarhus Convention because it has introduced provisions into the national system whereby forest management based on good practice does not contravene any nature conservation provisions under the Habitats Directive and the Birds Directive and

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<sup>38</sup> *Journal of Laws*. 2004, No. 90, item 864/2, as amended; hereinafter referred to as the TFEU.

<sup>39</sup> The origins and evolution of sanctions in the event of failure to comply with a judgment of the CJEU establishing an infringement are extensively discussed by e.g., SIKORA, A. *Sankcje finansowe w razie niewykonania wyroków Trybunału Sprawiedliwości Unii Europejskiej*. Warszawa: Wolters Kluwer Polska, 2011, p. 68 ff.

<sup>40</sup> *Journal of Laws*. 2004, No. 90, item 864/30, as amended, hereinafter referred to as the TEU.

<sup>41</sup> SIKORA, *c. d.*, p. 54.

<sup>42</sup> *Ibid.*, p. 57. At the end of 2021, 91 infringement proceedings were pending against Poland, of which 36 were new proceedings. Most of these concerned the following areas: justice and consumers (6 cases) and environment/mobility and transport/financial stability, financial services and capital markets union (5 cases each). See Poland: 2021 Annual Report on monitoring the application of EU law. In: *European Commission* [online]. [cit. 2023-04-11]. Available at: [https://commission.europa.eu/law/law-making-process/applying-eu-law/infringement-procedure/2021-annual-report-monitoring-application-eu-law/poland\\_en](https://commission.europa.eu/law/law-making-process/applying-eu-law/infringement-procedure/2021-annual-report-monitoring-application-eu-law/poland_en).

<sup>43</sup> This, in turn, has led to proposals for changes to the current review model. For more, see *ibid.*, p. 57 ff.

<sup>44</sup> See e.g., BOJAREK-ZIAJA, H. *Skarga do Europejskiego Trybunału Praw Człowieka oraz Skarga do Trybunału Sprawiedliwości Unii Europejskiej*. Warszawa: Wydawnictwo Prawnicze LexisNexis, 2010.



because it ruled out the possibility for environmental organisations to challenge forest management plans in court.

The operative part of the judgment took into account the pleas in the action while indicating that the infringements had occurred by:

1. the adoption of Article 14b(3) of the Forest Act of 28 September 1991, as amended by the Act of 16 December 2016 amending the Nature Conservation Act and the Forest Act, which stipulates that forest management carried out in accordance with the requirements of good forest management practice does not violate the provisions on the protection of individual natural resources, formations, and components, in particular the provisions of Articles 51 and 52 of the Nature Conservation Act;
2. by failing to adopt all legislative provisions necessary to ensure that nature conservation organisations can apply to the courts for an effective review of the substantive and formal legality of forest management plans under the Forest Act.

## ARGUMENTS OF THE PARTIES – SELECTED ISSUES

The parties' arguments took several steps. This part of the article will raise the most important issues mentioned in the judgment.

By its first complaint, the Commission claims, in essence, that the introduction into Polish law of a provision according to which forest management, carried out in accordance with good forestry practice requirements, does not infringe any nature conservation provision falling within the requirements laid down by the Birds and Habitats Directives constitutes an incorrect transposition of the abovementioned provisions of those directives.

The Commission considers that the Polish legislation does not meet the requirements of correct transposition or provide a legal framework for a coherent system of prohibitions and derogations following the provisions of those two directives. In that regard, as regards Article 14b(3) of the Law on Forests, which provides that forest management carried out in accordance with the requirements of good forestry practice does not infringe the provisions of the Law on Nature Protection, the Commission points out, in particular, that the Regulation on Good Practice Requirements does not provide for the condition, referred to in Article 16(1) of the Habitats Directive, that the activity must not be “*detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*”.

Moreover, unlike the requirements laid down in Article 16(1) of the Habitats Directive and Article 9(1) of the Birds Directive, the regulation on Good Practice Requirements does not provide that a derogation from the rules on species protection is only possible if there is ‘no satisfactory alternative’. In the defence, the Republic of Poland submits that, pursuant to Articles 48 to 50 of the Law on Nature Protection, the Minister for the Environment is to define, by means of a regulation, the plant, animal, and fungal species falling into the various categories of protection which require the establishment of areas for the protection of their sanctuaries or their sites (and, in the case of animals, also of their breeding sites or places where they are regularly found) and which are, ac-



ording to that law, protected by the appropriate prohibitions, as provided for in Articles 51 and 52 of that law. Under those provisions, the particularly valuable species are protected in accordance with the respective regulations of the Minister for the Environment on the protection of species.

Regarding the protection of habitats, the Commission points out in its application that Article 6(1) of the Habitats Directive and Article 4(1) of the Birds Directive recommend adopting conservation measures for specific areas. Applying Article 14b(3) of the Law on Forests and the Regulation on Good Practice Requirements means that it is no longer necessary to adopt and implement protective measures in Poland in respect to those areas, which infringes those provisions of the Habitats and Birds Directives.

In the Commission's view, there is a risk that, where a given operation is in line with good practice, by Article 14b(3) of the Law on Forests, it would be exempt from compliance with the conservation principles of the sites concerned, including Natura 2000 sites. Consequently, there is a risk that the conservation measures which may be defined in the Natura 2000 network conservation plans will not be implemented. In the defence, the Republic of Poland replies that in accordance with Polish legislation, forest management operations must comply with the protective measures laid down in the plans for the specific conservation tasks for Natura 2000 sites.

In its application, the Commission alleges that, since the Law on Forests confers only an internal character on forest management plans, the rights of environmental organisations are not guaranteed. It argues that an act approving such a plan does not have the nature of an administrative decision, since Article 22(1) of the Law on Forests does not refer to an administrative decision, whereas that law expressly provides for the form of an administrative decision as regards other acts of administrative bodies. The Republic of Poland submits that, in any event, the complaint is unfounded.

## LEGAL IMPLICATIONS OF THE RULING IN QUESTION

A judgment given based on Article 258 of the TFEU is declaratory in nature,<sup>45</sup> i.e., the Court has no power to repeal the contested act of national law, nor can it impose an obligation to pay damages to compensate for the harm caused by the unlawful act or omission of national authorities.<sup>46</sup> What needs to be emphasised is that this judgment directly affects national law, i.e., all state authorities are obligated to ensure compliance with the judgment.<sup>47</sup>

According to the wording of Article 260(2) of the TFEU,<sup>48</sup> if the Commission considers that the Member State concerned has not taken measures to comply with the

<sup>45</sup> See more: GORMLEY, L. Infringement Proceedings. In: JAKAB, A. – KOCHENOV, D. (eds.). *The Enforcement of EU Law and Values: Ensuring Member States' Compliance Get access Arrow*. Oxford: Oxford University Press, 2017, pp. 65–78.

<sup>46</sup> SIKORA, A. *c. d.*, p. 106.

<sup>47</sup> *Ibid.*, p. 111.

<sup>48</sup> Implementation of a procedure based on this legal basis is rare. In 2021. The Commission decided to bring a total of 31 new cases to the Court, of which 29 under Article 258 of the TFEU and two under Article 260(2) of the TFEU. In 2021. The Court delivered 18 judgments on the basis of Article 258 of the TFEU,

Court's judgment, it may bring the case before the CJEU, after having given the Member State the opportunity to submit its observations. The Commission therefore addresses a warning letter.<sup>49</sup>

Such a construction thus means that proceedings under Article 260 of the TFEU are aimed at bringing about compliance with a judgment of the CJEU already issued (under Article 258 of the TFEU). Of utmost importance is the fact that none of the provisions regulates the time after which the Commission may initiate a procedure based on Article 260(2) of the TFEU. As it seems, this time should be reasonable and determined *in casu*,<sup>50</sup> but taking into account the principle that the compliance of the original judgment is to start immediately and should be completed as soon as possible.<sup>51</sup> It is also emphasised that the date of delivery of the judgment under Article 258 of the TFEU determines the starting point of the duration of the infringement, consisting of the non-compliance with this judgment.<sup>52</sup> As mentioned, in a second action, the Commission may determine the amount of a lump sum or a periodic penalty payment.<sup>53</sup> The amounts should be determined in such a way that they are, firstly, appropriate to the circumstances of the case and, second, proportional to the infringement found and taking into account the ability of the Member State concerned to pay.<sup>54</sup> While the lump sum is a one-off payment, the periodic penalty payment is due for a given period of infringement (defined in various ways, such as daily or semi-annually). It must be emphasised here that the purpose of these financial measures is to put economic pressure on the infringing State.<sup>55</sup>

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none on the basis of Article 260(2) of the TFEU and two on the basis of Article 260(3) of the TFEU. Commission staff working document, General statistical overview, Accompanying the document, Report from the Commission, Monitoring the application of European Union law, 2021 Annual Report, Brussels, 15.7.2022 SWD(2022) 194 final. In: *EUR-Lex: Access to European Union law* [online]. 2022 [cit. 2023-04-12]. Available at: <https://eur-lex.europa.eu/legal-content/AUTO/?uri=CELEX:52022SC0194&qid=1658173530287&rid=1>.

<sup>49</sup> The relevant moment to assess the existence of an infringement of Article 260(1) of the TFEU and the circumstances of (non-) compliance with the original judgment is when the time limit set by the Commission in its letter of formal notice to the Member State has expired. This is the case even if, after the expiry of the deadline from the letter of formal notice, the Commission agrees not to bring an action under Article 260(2) of the TFEU at that point in time as a result of correspondence with the Member State. See STĘPKOWSKI, Ł. Odpowiedzialność państw członkowskich z tytułu niewykonania wyroku Trybunału Sprawiedliwości oraz obowiązku odzyskania pomocy państwa. Głosa do wyroku TS z dnia 12 marca 2020 r., C-576/18, EPS 2020/9/34-43. *Europejski Przegląd Sądowy*. 2020, Nr. 9, pp. 34–43.

<sup>50</sup> Some differences in the mechanism of application of this provision before and after the entry into force of the Lisbon Treaty should be noted. According to A. Sikora, there have been certain transformations in this respect, as initially the time intervals (from the delivery of the judgment to the expiry of the time limit set by the Commission in its justified opinion) were quite long (2.5 to 9 years), and subsequently there was a tendency to shorten this period (9 months to 2 years). (SIKORA, *c. d.*, pp. 125–126).

<sup>51</sup> PÓLTORAK, N. Komentarz do art. 260. In: WRÓBEL, A. et al. (eds.). *Traktat o funkcjonowaniu Unii Europejskiej: komentarz*. In: *LEX 2012* [online]. Warszawa: Wolters Kluwer Polska, 2012 [cit. 2023-04-11]. Available at: <https://sip.lex.pl/>.

<sup>52</sup> CYGAN, A. What is the EU infringement procedure under Article 258 TFEU and how can proceedings be monitored? In: *LexisNexis* [online]. 19.2.2021 [cit. 2023-11-10]. Available at: <https://www.lexisnexis.co.uk/legal/guidance/what-is-the-eu-infringement-procedure-under-article-258-tfeu-how-can-proceedings-be-monitored>.

<sup>53</sup> See also ŁACNY, J. *Okresowe kary pieniężne, ryczałty i korekty finansowe nakładane na państwa członkowskie za naruszenia prawa UE*. Warszawa: Centrum Europejskie Natolin, 2010.

<sup>54</sup> Communication from the Commission Financial sanctions in infringement proceedings (2023/C 2/01, OJ.EU.C.2023.2.1).

<sup>55</sup> For more about an unclear nature of these payments, see PÓLTORAK, *c. d.*

The purpose of imposing a lump sum payment “*is to punish the past attitude of the Member State, i.e., that it has failed to comply within a reasonable period of time with the judgment of the CJEU declaring an infringement*”.<sup>56</sup> It is a penalty for non-compliance with a ruling. A periodic penalty payment has a persuasive function with regard to the continuing infringement. Another essential difference between these tools is that for the imposition of a lump sum, the fact and extent of the State’s compliance with the Court’s judgment is irrelevant, whereas the imposition of a periodic penalty payment is irrelevant where the State has complied with the CJEU judgment after the initiation of proceedings under Article 260(2) of the TFEU. Moreover, and crucially, it is possible for it to link the amount of the periodic penalty payment to the progress of the compliance with a judgment on the basis of Article 258 of the TFEU;<sup>57</sup> if the State has taken steps to comply with the judgment, but the effects cannot be seen immediately, the periodic penalty payment may be imposed on a longer (e.g., semi-annual) basis rather than on a daily basis.<sup>58</sup>

Particular emphasis should also be given to the fact that the cumulative application of both types of sanctions laid down in Article 260(2) of the TFEU is not ruled out,<sup>59</sup> particularly where the infringement has continued over a long period and tends to persist.

As a side note, it is also worth mentioning that the Court can also impose a penalty in proceedings for provisional measures (Article 279 TFEU). Significantly, it was Poland which was ordered by the Court to pay a daily penalty to the Commission in order to increase the effectiveness of interim measures previously ordered by the Court in order to avoid serious and irreparable damage to the environment and human health as well as to the EU legal order, respectively (see cases C-204/21R and C-121/21R).<sup>60</sup>

## CONCLUSION

The aim of this article was to provide an overview of the issues related to the topic of forest protection currently under discussion in Poland in the context of the Court’s judgment of 2 March 2023. The facts presented in the judgment clearly show that the active forest management carried out in Poland for such a large forest area, which is additionally covered by a form of nature protection, was carried out in breach of basic standards and in contradiction with the conservation objectives for the area. This, in turn, leads to the conclusion that Poland is once again failing to

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> A sanction imposed by the Court of Justice may consist of a lump sum payment to punish the continuation of the infringement and a daily penalty payment to induce the Member State concerned to put an end to the infringement as soon as possible after the judgment of the Court of Justice. Communication from the Commission, updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings (OJ EU 2022/C 74/02).

<sup>60</sup> Commission staff working document, General statistical overview, Accompanying the document, Report from the Commission, Monitoring the application of European Union law, 2021 Annual Report.

make use of its opportunities in the context of using possible tools in the fight against climate change.

The judgment in question, issued on the basis of Article 258 of the TFEU, indicates that the Republic of Poland has failed to fulfil its Member State obligations. At the same time, the article suggests the legal consequences of the failure to eliminate the infringements and possible proceedings imposing a periodic penalty payment or a lump sum payment under Article 260 of the TFEU.

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