Bialowieza Forest, the Spruce Bark Beetle and the EU Law Controversy in Poland

Robert Grzeszczak & Ireneusz Pawel Karolewski

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One might think that insects are rarely subject to political controversies in the EU. Not recently though. On 27 July 2017, the Court of Justice of the European Union imposed a temporary injunction against logging in the Polish Bialowieza Forest, a UNESCO World Heritage Site and the last old-growth forest in Europe, while the case is being tried with the final Court decision expected in December 2017. Nevertheless, the Polish minister of the environment Jan Szyszko said on 31 July that the Polish government will ignore the ruling and that the logging will continue in tune with the "protective measures" for the forest, since the Bialowieza Forest seems to be under attack from the Spruce Bark Beetle (*Ips typographus* for the lovers of the Latin language). Szyszko has recurrently warned of a bark beetle plague affecting in particular spruce trees in this ancient forest. Thus, according to the Polish government, Mother Nature in Bialowieza cannot be left to her own devices, and the government needs to step in by cutting down the infected trees (and selling them, even though the selling part has not been highlighted by the Polish government very much).

The beetle, the EU and the logging industry

The rub lies in the fact that Poland is a member of the European Union and thus subject to the so-called "Habitats directive" (conservation of natural habitats and of wild fauna and flora) and the "Birds directive" (conservation of wild birds), both protecting wild fauna (in the Bialowieza woodland it would be e.g. the Flat Bark Beetle or the False Darkling Beetle) and wild birds (e.g. the White-Backed Woodpecker or the Pygmy Owl). The European Commission argues in the action brought against Republic of Poland on 20 July 2017 that the logging in the Bialowieza Forest ecosystem endangers the protected species, in particular through deterioration or destruction of their breeding sites or disturbance of their rearing periods.

The central feature of the Bialowieza Forest is that it is natural and untouched by human activity and has not only a high share of ancient trees but also a large number of centuries-old dead trees, the latter being characteristic for natural forests. In addition, this primeval forest is populated by more than 4,000 species of fungi, more than 10,000 species of insect, 180 bird species and 58 mammal species, whose survival is contingent on natural processes.

Nonetheless, the Polish government (in particular the Polish Minister of the Environment on 25 March 2017 and the Director-General of State Forests on 17 February 2017) permitted a threefold increase in logging in Bialowieza Forest, also in the old-growth areas. The government argues that it is all about "sanitary pruning" to combat the bark beetle infestation, but Polish environment activists and forest scientists are highly skeptical pointing to the vested interests of the Polish logging industry worth annually 1,6 billion Euro lurking behind the entire project. The State Forests control 96% of the Polish timber market generating raw material for exported goods worth 10,7 billion Euro annually. In this interpretation, the threefold increase in logging could be viewed as just a pretext to combat the spreading of the Spruce Bark Beetle infestation where in fact it might be much more about generating augmented income for the logging industry. This could be the case, since the logged trees in Bialowieza are apparently marked for commercial distribution and the method of "sanitary pruning" seems to be highly controversial among forest scientists. Numerous scientists point out that logging of the infested spruces would not stop the bark beetle infestation at all, just leaving huge parts of the forest

damaged. Moreover, environmental activists argue that even trees without bark (and thus not attracting the bark beetle) are cut down in the ancient forest of Bialowieza, which defies the argument of the Polish government protecting the woodland by logging the infected trees.

Take me to Court

The infringement procedure that the European Commission (art. 258-260 TFEU) enacted against Poland is the primary mechanism of how the bloc deals with the EU law violations. In contrast to the art. 7 TFEU, which envisions sanctions based on a decision by the member states, the law infringement procedure is a purely legal mechanism dealt with by the Court of Justice of the EU. It means that, as with any other court, the ruling is binding and should a country decide to ignore it, the court can impose fines on the defiant EU member state (art. 260 TFEU). Before the final ruling is made, the European Commission can file for temporary injunction, whose function is to avoid irreversible damages resulting from the continuation of the law infringement. After a member state in question has been notified about the intention of the Commission, the Commission can "specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances" (art. 260(3) TFEU). Should the Court find that there is an infringement, the penalty payment cannot exceed the amount specified by the Commission. Hitherto, for the EU this legal procedure has been highly effective in making the member states stop the infringement. However, as the case 441/17 (the action of the Commission against the Republic of Poland) shows, there are apparently exceptions to the rule.

On 27 July 2017, the Vice-President of the Court of Justice of the EU, Antonio Tizziano, imposed an interim junction on logging in Bialowieza, but Poland ignored the ruling and continued logging. On 11 September 2017, the Commission filed a motion to impose a financial penalty on Poland for ignoring the interim injunction. A further court proceeding took place on 17 October 2017, this time upon the motion of the Polish government and with a full court of fifteen judges. On 20 November 2017, the Court of Justice ruled in a summary proceeding that the Polish government should stop the logging immediately (with only one strict exception of guaranteeing the public safety, for instance if the infected trees close to transport routes would endanger human life) and imposed financial penalty of 100,000 Euro for each day if Poland was to ignore the ruling. The final ruling is scheduled for December 2017 when the Court will decide on whether the logging in the Bialowieza forest violated the "Habitats Directive" and the "Birds Directive". In other words, the decision on the financial penalty does not preclude that the Court might rule in favor of the Republic of Poland. Should Poland, however, lose the case in December 2017, the question remains if the country will be fined for the time between 27 July and 20 November 2017, when the Polish government has clearly ignored the Court decision on the interim injunction. In fact, it is the very first time in the EU's history that a member state ignored an interim injunction by the Court of Justice, which makes the Polish case a precedence.

Playing tit for tat

In response to the motion by the Commission and the interim injunction by the Court of Justice in July 2017, the Polish Ministry of the Environment filed a motion to dismiss the injunction as unjustified on 4 August 2017. At the same time, the Polish government reversed the logic of the Commission's argument and filed for damages to the amount of 757 million Euro (3,24 billion Zloty), should it stop the logging in the Bialowieza Forest and thus cause damage to the ancient woodland through allowing the further spreading of the spruce bark beetle (also involving economic damages, for instance resulting from the risk to the production of honey, legally allowed in the Forest). Interestingly, the amount of 757 million Euro is calculated by the Ministry of the Environment on the basis of Polish forestry law in relation to the cost of excluding an area from logging. Therefore, the amount reflects the value of the cubic meters of wood that can be exploited commercially in the Bialowieza Forest.

In the opinion of the Polish government, the arguments of the Commission are only hypothetical and thus are not sufficient in terms of a factual and legal *prima facie* justification. At the same time, the Polish government argues that the criterion for an interim injunction has not been fulfilled either, since the Commission took its time to file its motion from February to July 2017 which, therefore, could not have been an urgent matter.

Moreover, the Polish position interprets the notion of public safety very extensively, as public safety is the only exception from the interim injunction allowed by the Court decision of 27 July 2017. Still, the Court of Justice has not stipulated what it means exactly by public safety, and the European law is very vague in this regard. Against this backdrop, the Polish government argues that public safety does not only encompass falling timber close to roads that could become a threat to tourists and conservation workers but also trees inside the woodland, as they could fall accidentally on mushroom pickers. In particular, the Polish State Forests stretched the meaning of public safety *ad absurdum* by stressing that public safety does not only apply to people but to the entire nature. In this vein, failing to remove dead trees from the natural forests increases the chances of wildfires and is thus danger to public safety.

In the order on 20 November 2017, the Court dismissed all arguments presented by the government of Poland. Based on documents and research material offered by both parties, the Court came to the conclusion that Poland has no convincing case that stopping of the logging until the final ruling would irreparably damage the local ecosystem of the forest. At the same time, the damages done to the Forest through continued logging would be very likely to be permanent which justifies both the summary proceedings and the temporary junction.

Poland and the rule of law paradox

The whole matter is far from simple and even paradoxical. The Court of Justice decided about the temporary junction already on 27 July 2017. However, the Polish government chose to ignore the ruling and thereby made it into the textbooks of European integration as the first member state to do so. Against this background, the Court decided on 20 November 2017 that the Polish government is not trustworthy (of course without this exact wording) and required it to notify the Commission within fifteen days about all measures the government took in order to end the law infringement including the public safety procedures. Should the Commission find that Poland still does not fully respect the EU law, it would file a motion to impose the financial penalty until the day of the final ruling on the issue at hand.

After the order on 20 November the Polish Ministry of the Environment said that the logging has been stopped and all heavy machinery are withdrawn from the Bialowieza Forest in line with the interim injunction so there is no reason to impose any financial penalties. Assuming that the Polish government would fully comply with the ruling of 20 November, there is still the question about the defiance to the ruling of 27 July, which was an ad hoc judicial decision without hearing both parties on the matter. Even though it is a rare procedure, the legal interpretation is straightforward: Poland ignored the order. Hence, the question is what possible implications will have for both Poland and the EU.

The decision whether or not to enforce penalties for the period between 27 July and 20 November 2017 lies with the Commission that would need to enact a new procedure with this specific goal. This is, however, a discretionary prerogative of the Commission that might not be used for political reasons. Should Poland fully comply, such a step would have a taste of sanctions in connection with the article 7 of the TFEU, which the Commission cannot enact due to the possible veto of Hungary. A similar idea was formulated quite undiplomatically by the judge-rapporteur Antonio Tizziano during the Court proceeding on 11 September 2017. He argued that Poland could be punished on the basis of the article 279 TFEU prompting the critique of political bias by the Polish representatives.

The difficulty of such an approach is that a Court cannot discuss sanctions as punishment, as they are

part of the prerogative of the executive rather than the judicial branch. In this vein, the interim injunction cannot precipitate the final ruling and be repressive in nature. The only goal of interim injunction is to secure the implementation of the ruling, rather than punishing a member state for other reasons. Otherwise, the EU would shift towards a politicization of the Court and undermine its own legitimacy.

What if such sanctions/punishment were decided indeed? Poland would certainly reject this measure as politically biased and refuse the payment. This would generate plenty of further complications, particularly about the execution of the penalties, for instance by setting the debt off against payments Poland receives from the EU which would ensue further lawsuits by the Republic of Poland. Furthermore, such punitive measures would raise serious doubts whether they are in tune with the rule of law itself. Hence, paradoxically the wish to punish the rule of law transgressions in Poland might lead to rule of law violations at the level of the EU. This rule of law paradox is far more than just an academic issue, as it could undermine the entire rule of law regime in the EU. Not exactly something the EU in an identity crisis can afford nowadays.

ABOUT THE AUTHORS

Robert Grzeszczak
Robert Grzeszczak is Professor of European Law and Head of the Chair of Transnational Law at the University of Warsaw. He chairs the Committee on Legal Sciences of the Polish Academy of Sciences.
Ireneusz Pawel Karolewski
Ireneusz Pawel Karolewski is Professor of political science at the Willy Brandt Centre for German and European Studies at the University of Wroclaw and lecturer for political science at the University of Potsdam.

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