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The line of adjudication of the European Court of Justice on the conservation of natural habitats and of wild fauna and flora



Biodiversity



Definition

- Biodiversity is of vital importance to all living nature. It can be defined as the diversity of living forms, with all their variability at the microscopic and macroscopic levels. It is the sum of all genes, species, habitats and natural processes that constitute the essence of the Earth's existence (Biodiversity and the Law, ed. W.J. Snake III, Washington 2009, p. XIX).
- Currently, biodiversity is one of the most important concepts in contemporary law focused on the protection of nature and the environment. The level of biodiversity is a crucial factor for achieving sustainable development objectives on global, regional and local scales, as well as for the implementation of the principle of justice between generations.

- This concept was legally defined by the Convention on Biodiversity, which was open for signature at Rio de Janeiro on 5 June 1992 (currently the Convention has 196 signatories, including the European Union, which adopted the Convention by decision of the Council of the EEC of 25 October 1993). (OJ L 309, 13.12.1993). According to its provisions, biodiversity means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.

- Among the regional agreements regulating biodiversity in the EU, of key importance are two conventions adopted under the auspices of the Council of Europe: the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979, (also known as the Bern Convention), and the European Landscape Convention of 20 October 2000 (also known as the Florence Convention).
- The sources of EU law which constitute the basis for the conservation of certain plant or animal species at the European level include two of the most important and well-known EU directives which were designed to protect biodiversity: the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158) ('the Habitats Directive'), and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended by Directive 2013/17 ('the Birds Directive').
- According to Article 2 of the Habitats Directive, its primary objective is to ensure biodiversity through the conservation of natural habitats and of wild fauna and flora within the European territory of the Member States to which the Treaty on European Union applies. Action taken pursuant to this Directive aims to maintain or restore, in an appropriate state of conservation, the natural habitats and species of wild fauna and flora of interest to the Union, taking into account economic, social and cultural requirements, and regional and local characteristics. To this end, a coherent European ecological network of special conservation areas called Natura 2000 was established.

- The fundamental role of biodiversity in protecting the European Union's environment is also highlighted in the report adopted in 2013, namely the Seventh General EU Action Program – 'Living well, within the limits of our planet' (Decision of the European Parliament and of the Council No. 1386/2013 of November 20, 2013, OJ 28/12/2013, p. 171). It sets out the Union's environmental goals up to 2020, but also with an extended time perspective up to 2050.
- The Seventh Programme points out that the integrated and coherent development of environment and climate policy can help to ensure biodiversity protection, and that EU action should therefore focus on three objectives: 1. to protect, preserve and enhance the Union's natural capital; 2. to transform the Union into a resource-efficient, green and competitive low-carbon economy; and 3. to protect Union citizens from environmental pressures and threats to health and well-being. These three objectives are thematically interlinked, and should be pursued in parallel. Actions taken in support of one objective will often also contribute to other objectives, e.g. by increasing resource efficiency, the exploitation of natural capital will decrease; while strengthening the resilience of the Union's core capital will benefit human health and well-being. Conversely, action to mitigate and adapt to climate change will increase the resilience of the EU economy and society, while stimulating innovation and protecting the EU's natural resources.

The ECJ



The judgment of the Grand Chamber C-441/17
(17.04.2018) 'Puszcza Białowieska' Natura 2000 site



The topic

- The Puszcza Białowieska Natura 2000 site is, according to the Commission, one of the best preserved natural forests in Europe, characterised by large quantities of dead wood and old trees, in particular trees a century old or more. Its territory includes extremely well-preserved natural habitats defined as ‘priority’ habitats within the meaning of Annex I to the Habitats Directive, such as the habitats 91D0 (bog woodland) and 91E0 (alluvial forests with alder, ash, willow and poplar), and other habitats of Community importance, including habitat 9170 (sub-continental oak-hornbeam forests).
- Given its nature value, the Puszcza Białowieska (‘the Białowieża Forest’) is also included on the World Heritage List of the United Nations Educational, Scientific and Cultural Organisation (Unesco).

The problem

- It is common ground that, in the light of the large amount of dead wood, many species of saproxylic beetles included in Annex II to the Habitats Directive are also present on the Puszcza Białowieska Natura 2000 site, in particular *Boros schneideri* and *Rhysodes sulcatus*, as are species of saproxylic beetles that are also entered in Annex IV(a) to that directive as species in need of strict protection, such as the goldstreifiger beetle, the flat bark beetle, the false darkling beetle and *Pytho kolwensis*. Also present are bird species listed in Annex I to the Birds Directive, whose habitat consists of dying and dead spruces, including those colonised by the spruce bark beetle (*Ips typographus*), such as the honey buzzard, the pygmy owl, the boreal owl, the white-backed woodpecker, the three-toed woodpecker, the red-breasted flycatcher and the collared flycatcher, whilst the stock dove (*Colomba oenas*) is a migratory species protected under Article 4(2) of the Birds Directive.

The polish decision

- On 17 February 2017, the Director General of the State Forest Office adopted Decision No 51 'concerning the removal of trees colonised by the spruce bark beetle and the harvesting of trees constituting a threat to public safety and posing a fire risk, in all age classes of forest stands in the Białowieża, Browsk and Hajnówka Forest Districts' ('Decision No 51').
- Paragraph 1 of Decision No 51 imposes upon the competent authorities, 'in the light of the extraordinary and catastrophic situation caused by the spread of the spruce bark beetle', in particular the obligation, in those three forest districts, to carry out the immediate felling of trees threatening public safety, essentially along transport and tourist routes, the continuous removal of dry trees and post-harvest slash, and the continuous and timely felling of trees colonised by the spruce bark beetle, in all age classes of forest stands, as well as the harvesting of the timber and its transportation or its debarking and storage. Paragraph 2 of Decision No 51 states in this regard that, for the purposes of that felling, 'there shall be a derogation from the restrictions concerning the age of trees and the function of forest stands'.

The consequences

- It is common ground that, following the adoption of Decision No 51, work began on the removal of dead trees and trees colonised by the spruce bark beetle in the three forest districts, Białowieża, Browsk and Hajnówka, in a 'forest restoration area' of approximately 34 000 hectares, which accounts for nearly 54% of the area of the Puszcza Białowieska Natura 2000 site. Furthermore, according to the Commission, which relies on data from the State Forest Office, the felling carried out in the Białowieża Forest since the beginning of 2017 accounts in total for more than 35 000 m³ of timber, including 29 000 m³ of spruce, that is to say, approximately 29 000 trees.

- By letter of 28 April 2017, the Commission sent a reasoned opinion to the Republic of Poland, alleging that it had failed to fulfil its obligations arising from Article 6(1) and (3) and Article 12(1)(a) and (d) of the Habitats Directive and Article 4(1) and (2) and Article 5(b) and (d) of the Birds Directive. The Commission called on the Polish authorities to comply with the reasoned opinion within one month of receiving it. The Commission justified that deadline, in particular, on the basis of information that the felling had begun and of the direct risk that the Puszcza Białowieska Natura 2000 site could therefore suffer serious and irreparable harm.

The justification of the ECJ

- The appropriate assessment of the implications of the plan or project for the site concerned that must be carried out under the first sentence of Article 6(3) of the Habitats Directive requires that all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field (see, inter alia, judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 51, and of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 57).

- The assessment carried out under the first sentence of Article 6(3) of the Habitats Directive may not, therefore, have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned (see, inter alia, judgments of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 44, and of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50).

- The competent national authorities cannot, therefore, authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host natural habitat types of Community interest or priority natural habitat types. That would particularly be so where there is a risk that an intervention will bring about the disappearance or the partial and irreparable destruction of such a natural habitat type present on the site concerned (see to that effect, inter alia, judgments of 24 November 2011, *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 163, and of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 43).

- In accordance with settled case-law, it is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see, inter alia, judgments of 26 October 2006, *Commission v Portugal*, C-239/04, EU:C:2006:665, paragraph 24, and of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 42).

- It is in the light of those principles that it should be examined whether, as the Commission contends by its first complaint, the Republic of Poland breached its obligations under Article 6(3) of the Habitats Directive by adopting the 2016 appendix and Decision No 51.

- **Declares that the Republic of Poland has failed to fulfil its obligations under:**
- **– Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013, by adopting an appendix to the forest management plan for the Białowieża Forest District without ascertaining that that appendix would not adversely affect the integrity of the site of Community importance and special protection area PLC200004 Puszcza Białowieska;**
- **– Article 6(1) of Directive 92/43, as amended by Directive 2013/17, and Article 4(1) and (2) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, as amended by Directive 2013/17, by failing to establish the necessary conservation measures corresponding to the ecological requirements of (i) the natural habitat types listed in Annex I to Directive 92/43, as amended by Directive 2013/17, and the species listed in Annex II to that directive, and (ii) the species of birds listed in Annex I to Directive 2009/147, as amended by Directive 2013/17, and the regularly occurring migratory species not listed in that annex, for which the site of Community importance and special protection area PLC200004 Puszcza Białowieska were designated;**
- **–**

- **Article 12(1)(a) and (d) of Directive 92/43, as amended by Directive 2013/17, by failing to guarantee the strict protection of certain saproxylic beetles, namely the goldstreifiger beetle (*Buprestis splendens*), the flat bark beetle (*Cucujus cinnaberinus*), the false darkling beetle (*Phryganophilus ruficollis*) and *Pytho kolwensis*, listed in Annex IV to that directive, that is to say, by failing effectively to prohibit the deliberate killing or disturbance of those beetles or the deterioration or destruction of their breeding sites in the Białowieża Forest District; and**
- **– Article 5(b) and (d) of Directive 2009/147, as amended by Directive 2013/17, by failing to guarantee the protection of the species of birds referred to in Article 1 of that directive, including, in particular, the pygmy owl (*Glaucidium passerinum*), the boreal owl (*Aegolius funereus*), the white-backed woodpecker (*Dendrocopos leucotos*) and the three-toed woodpecker (*Picoides tridactylus*), that is to say, by failing to ensure that they will not be killed or disturbed during the period of breeding and rearing and that their nests or eggs will not be deliberately destroyed, damaged or removed in the Białowieża Forest District.**

Thanks for your attention!