



## EDITORIAL

### WINTER IS COMING. THE POLISH WOODWORM GAMES

The political developments in Poland, which took place in course of the past two years, have brought very chilling eastern winds to Brussels. In a relatively short period of time, one of the success stories of economic (and seemingly of political) transformation and the EU enlargement policy has become a pariah and a tough cookie to crack for the many across Europe. The tsunami of right-wing populism, combined with an onslaught on rule of law, have turned into a major challenge for the European Union, its institutions and, with one exception, for its own Member States.<sup>1</sup> So far the EU's response has been relatively mild, yet it has also exposed the inherent limits of the existing system, whereby the members of the club, which dismantle constitutional courts and independent judiciary can go unpunished. Although views in this respect vary, some argue that the existing toolkit to handle recalcitrant Member States is not fit for purpose.<sup>2</sup> Interestingly enough the most recent episode in the Polish saga is not related to any of its domestic constitutional issues but rather to a woodworm, which populates some of the Polish forests and, as it happens, it is the arch-enemy of the Poland's Minister of Environment. The latter decided to employ its strongest armoury and for months now has been proceeding with a large-scale logging of primeval *Białowieża* Forest, which is a UNESCO protected site and a habitat of many animals, including some of the endangered species. According to the European Commission, the actions of the Polish authorities constitute a breach of two EU environmental directives.<sup>3</sup> Not surprisingly, the Guardian of the Treaties, commenced the infringement pro-

<sup>1</sup> The only exception is Hungary, which, too, has a solid track record of anti-democratic reforms pursued by V. Orban and his Fidesz Party. See further, *inter alia*, Z. SZENTE, *Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2017.

<sup>2</sup> It is questionable whether so-called "rule of law" cases qualify for infringement proceedings envisaged in Arts 258-260 TFEU. See further, *inter alia*, D. KOCHENOV, L. PECH (eds), *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, Vol. 11, pp. 512-540; D. KOCHENOV, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, in *Hague Journal on the Rule of Law*, 2015, p. 153 *et seq.*; C. HILLION, *Overseeing the Rule of Law in the European Union Legal Mandate and Means*, SIEPS, European Policy Analysis, 2016, [www.sieps.se](http://www.sieps.se).

<sup>3</sup> Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

ceedings, which have reached the Court of Justice in July 2017.<sup>4</sup> Bearing in mind the scale of the cull and the pace of it, the European Commission filed for an *interim* order requesting suspension of the logging. This was entertained by the Court of Justice almost in an instant,<sup>5</sup> yet on temporary basis, until the judges conduct an in-depth enquiry whether the request made by the applicant has merits.<sup>6</sup> Thus far, this story seems nothing out ordinary, as, to put it simply, we've been there before. Not for the first, and definitely not for the last time a Member State is exercising its defiance. So, why a case of forest woodworm deserves an editorial? The truth is that *ips typographus*, as it is called, has proven to be a challenge not only to the *Białowieża* Forest but, arguably, also to the rule of law. It is one of many actions of the illiberal Polish Government, which is happy to accept cheques coming from Brussels and, at the same time, quite eager to disregard EU law and the values on which the EU is based. The woodworm case has exposed a number of interesting phenomena. For instance, it encapsulates the fact that the EU benefits from a much more robust procedural toolkit if a Member State is in breach of an environmental directive than when it acts in flagrant breach of values on which the EU is based.

In order to have the full picture of the situation at hand it is worth going briefly, though step-by-step, through the key facts. To begin with, the European Commission submitted its action as per Art. 258 TFEU on 20 July 2017. As already noted, the applicant requested interim measures arguing that the logging constitutes a serious and irreparable danger to animal habitats and integrity of protected 2000 Natura area *Puszcza Białowieska*. That request was entertained by the Vice-President of the Court of Justice already on 27 July 2017, yet – as alluded to above – that order was applicable until the proceedings on interim measures were completed. On 4 August 2017 Poland presented its written submission on Commission's request for interim measures. A hearing took place on 11 September 2017. Two days later the European Commission supplemented its original submission, requesting imposition of financial penalty. This was not surprising, bearing in mind the fact that Poland disregarded the first order and proceeded with logging of the *Białowieża* Forest, claiming that chopping of a large part of it was necessary and proportionate to protect the public security.<sup>7</sup> In turn, the case was referred to the Grand Chamber, which held a hearing on 17 October 2017. On 20 November 2017 the Court of Justice adopted its decision on *interim* measures and ruled that Poland shall, with an immediate effect, suspend logging until the Court rules as to the merits of the

<sup>4</sup> Court of Justice, case C-441/17, *European Commission v. Poland*, pending.

<sup>5</sup> Order of the Vice-President of the Court of Justice of 27 July 2017, case C-441/17 R, *European Commission v. Poland*.

<sup>6</sup> *Ibidem*.

<sup>7</sup> It should be noted that *Białowieża* Forest is not the only one affected by the actions of the Polish Government. These days logging of trees seems to be quite *en vogue* in governmental circles.

case.<sup>8</sup> As a matter of exception, Poland may continue cutting the trees, if it is unconditionally necessary for public security, especially in proximity of public roads or important infrastructure. Furthermore, such actions have to be proportionate and, will be permitted only if there are no other more environment friendly ways of protecting public security. Should the Polish Government fail to comply with the order in question within 15 days, the Court of Justice has reserved the right to impose a penalty of at least 100.000 Euro per day, counted from the day of delivery of the order of 20 November 2017 to the Polish Government. The initial reaction of the Polish Minister of Environment was a bit ambiguous, suggesting, however, that the Government may comply with the interim order. Irrespective of whether that happens or not, it is important to present the woodworm games in a broader perspective.

To call a spade a spade, the current Polish administration has an idiosyncratic attitude to law, the way it is made as well as the way it is interpreted or implemented. This is applicable not only to the national law but also to the EU legal order. The fact that the Parliament adopts laws in a rushed fashion, in the middle of the night and without meaningful merit-based debates is a matter of bad taste. In equally bad taste, those developments are reported by state-owned media, which employ propaganda tools characteristic for totalitarian regimes or, a contemporary pro-Kremlin TV outlet Russia Today. However, the disregard for the Polish Constitution and adoption of laws, which are contrary to the foundations of the legal system, undermine the rule of law.<sup>9</sup> Some of those practices have been now taken to the EU level, which not only put the credibility of the Polish authorities into question but also threaten the EU legal order. It is one thing to have a person holding the post of Prime Minister of a Member State<sup>10</sup> arguing that EU law should be optional for the Member States,<sup>11</sup> but quite another for the Government to openly disregard an interim order of the Court of Justice.<sup>12</sup> This is unprecedented, but sadly, it is at the heart of the woodworm games played by the Polish Government. As argued by the European Commission, and accepted by the judges at Kirchberg, the Polish Government ignored the order of 27 July 2017 and continued its onslaught on the *Białowieża* Forest. It claimed that culling a half of it is necessary on serious grounds of public security, even though more civilised ways of protecting the public security exist. The fact that the Government ignored the order of the Court, sends a

<sup>8</sup> Order of the Court of Justice of 20 November 2017, case C-441/17 R, *European Commission v. Poland*.

<sup>9</sup> See, *inter alia*, A. ŁAZOWSKI, *Time to stop the Polish danse macabre*, CEPS Commentaries, [www.ceps.eu](http://www.ceps.eu).

<sup>10</sup> It is commonly known that the current Polish Prime Minister holds the office but not the power, which is vested in the hands Jarosław Kaczyński, who is the chairperson of the leading party, Prawo i Sprawiedliwość. Thanks to this manoeuvre he remains legally unaccountable.

<sup>11</sup> *Allow countries to suspend EU law they don't like*, Polish PM argue's, in *Financial Times*, 9 November 2017.

<sup>12</sup> At the same time, the practice of ignoring judgments of the Court of Justice is not unheard of.

number of very worrying signals. Not only its actions are in breach of the principle of loyal co-operation laid down in Art. 4 para. 3 TEU, but also they amount to a textbook case of political vandalism. Furthermore, it undermines the authority of the Court of Justice and, in more general terms, the EU institutions. It is notable that in equal measure the Polish Government has been trying to question the authority of the European Commission and the Venice Commission, which is part of the Council of Europe system.<sup>13</sup> It is also a warning sign that Poland may take its defiance to the next levels and start treating EU law, including the jurisprudence of the Court of Justice, as optional. If that were to materialise, it would be a profound threat to uniformity and efficacy of EU law. Perhaps such general considerations were one of the reasons why the European Commission and the Court of Justice decided to follow the famous Al Capone's statement that one can achieve a lot with a nice talk but far more with a talk and a gun, which – in this case – has translated into the interim measures, including the financial penalty. This takes us, however, to the flip side of the rule of law coin. The question is if the current system envisaged by EU law is bulletproof.

*Interim* measures are vaguely regulated in Art. 279 TFEU, which provides as follows: “[t]he Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures”.

In the case at hand, the key question is whether Art. 279 TFEU is broad enough to accommodate the financial penalties. If so, which rules govern their calculation and adoption. On the one hand, the provision in question says that “any necessary measures” can be prescribed. On the other hand, the question is how broad is the meaning of “any”.<sup>14</sup> Unsurprisingly, the Polish Government argues that financial penalties may be imposed only as per Art. 260 TFEU. Equally unsurprisingly, the European Commission and the Court of Justice claim that it also encompasses a financial penalty. Thus, the Grand Chamber ruled accordingly, demonstrating that even without ruling on the merits, it is clear to a naked eye that the large-scale logging of the *Białowieża* Forest causes irreparable damage. This, however, raises numerous points, which the Court of Justice failed to address. To begin with, once again the Court of Justice engaged in very creative interpretation of Treaty provisions.<sup>15</sup> To make things worse, the reasoning of the Court is not particularly elaborate. In para. 114 the judges talk about the extraordinary circumstances surround-

<sup>13</sup> In the same vein, it has been emulating the Hungarian Government.

<sup>14</sup> See W. DOUMA, *A new and practical way of stopping EU law violations*, in *EU Observer*, 14 September 2017, euobserver.com.

<sup>15</sup> See, for instance, Court of Justice, judgment of 12 July 2005, case C-304/02, *Commission of the European Communities v. France* [GC]. In that case the Court of Justice ruled that the word “or” used in Art. 260 TFEU means “and”, hence both types of financial penalties envisaged therein can be imposed in a single case. See further on financial penalties, *inter alia*, A. SIKORA, *Financial penalties for non-execution of judgments of the Court of Justice*, in A. ŁAZOWSKI, S. BLOCKMANS (eds), *Research Handbook on EU Institutional Law*, Cheltenham, 2016, pp. 324-352.

ing the case at hand, yet they fall short of employing the key principle that Poland is in breach of, that is the principle of loyal co-operation laid down in Art. 4 para. 3 TEU. While it is debatable, whether Art. 279 TFEU is broad enough to accommodate the financial penalties, the conclusion of the Court would be more persuasive if the judges applied both provisions jointly. Secondly, as noted above, the Court rules in para. 118 that the penalty would amount to at least 100 000 Euro per day. If not dubious, it is definitely very much unclear how the Court of Justice calculated that amount and whether the penalty would be proportionate to the breach of EU law at stake. What if, following the Court's order, the Government partly suspends the logging, yet still not to the satisfaction of the European Commission and the Court. Would the judges then still impose the penalty but use a lower minimum amount? The language employed by the Court seems to preclude lowering of the daily amount of the penalty, while leaving the door open only for its increase. In Court's defence one has to acknowledge that it is stepping into uncharted territory, as such a scenario has materialised for the first time in over six decades of Court's history. Furthermore, financial penalties as interim measures are not envisaged in any of the European Commission's Communications on penalties based on Arts 258 and 260 TFEU.<sup>16</sup> Hence, it has had no point of reference to rely on. Thirdly, as elaborated by the Court of Justice in its order, the interim measures do not prejudice the final outcome of this litigation. So, a question emerges what would happen if the Court imposed the penalty for non-compliance with the interim order but then ruled that Poland was not in breach of the directives in question. On the one hand, it is true that the financial penalty would be imposed for breach of an interim order, not the directives themselves. On the other hand, it would create a rather ambiguous situation. While it would exceed the limits of this editorial to analyse this case in greater depth, those four key points demonstrate rather well the breadth of legal issues at stake. Furthermore, they prove that the current system governing the interim measures is not exactly bulletproof.

The story of Polish woodworm games not only encapsulates the weaknesses of the EU law enforcement machinery but it also unveils, once again, a paradox. The EU's toolbox provides ammunition that can be used in case of breach of EU legislation proper. However, it leaves the EU almost toothless when it comes to cases of flagrant breaches of rule of law. To put it differently, the European Commission may take a Member State to the Court of Justice, and have the latter impose penalties for logging of a forest in breach of EU environmental law. Yet, when the Member State undermines the independence of judiciary, by making its Minister of Justice a key player in judicial appointments and dismissals and, at the same time, a chief public prosecutor, the European Commission can only trigger its Rule of Law Mechanism and adopt non-binding recommendations or rea-

<sup>16</sup> See, for instance, Communication of 15 December 2017 from the Commission on *Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings*.

soned opinions. As the case of Poland proves, such acts are very much ignored and legitimacy of the European Commission questioned by the Polish ruling party (called “Law and Justice”, *sic!*). Although it is debatable, one can argue that the *modus operandi* envisaged in Art. 7 TEU is too fortified with the Member States involvement to serve any purpose. Hence, it is very unlikely that a Member State would be deprived of its voting rights in the Council, as theoretically possible under Art. 7 TEU.<sup>17</sup> Consequentially, a country which undermines the foundations on which the EU is based can get away with it unsanctioned. But, if it uses proverbial tanks to kill butterflies, that can lead to financial penalties. This undermines EU’s credibility not only internally but also in its external relations, where in some cases it pursues policies heavily based on political conditionality.<sup>18</sup>

It is unclear how this story will end. For now, it is yet another warning sent to the European Union that it has on board some recalcitrant Member States, which will have recourse to defiance whenever they find it fit. In the case at hand, it is not the question of who is right or wrong in nuts and bolts of application of EU environmental law. This will be decided by the Court of Justice. Yet, it is a matter of principle that the Member States should not ignore the interim orders of the Court of Justice. The road from there to complete disrespect of judgements of the Court, in particular those imposing penalties as per Art. 260 TFEU, is short. To put it differently, if Poland is happy to ignore an *interim* order of the judges at Kirchberg, it may with equal ease ignore a judgment of the Court imposing a penalty for breach of EU law. This would, arguably, amount to a serious and persistent violation of the rule of law. The disregard by the party running Poland of authority of its own Constitutional Tribunal and the Supreme Court is a clear sign of trajectory it moves on. As 2017 is nearing its end, the EU is currently facing a plethora of crises but it is its legal order that keeps the integration endeavour together. If we start dismantling it bit by bit, the decline of the EU as we know it, may follow. One should have in mind, though, that the EU integration dividend is simply too great to lose. Never before Europe has experienced decades of peace and prosperity. This is even so, despite the doom and gloom of the Eurozone crisis. In the great scheme of things, the EU is not perfect, yet definitely worth fighting for.

**A.L.**

<sup>17</sup> For instance, Hungary and Poland joined forces, and if one is to believe political declarations, should the European Council wish to adopt a decision as per Art. 7 para. 2 TEU, either Poland or Hungary would block it. Without such a decision of the European Council it would be impossible to impose sanctions in accordance with Art. 7 para. 3 TEU.

<sup>18</sup> See, for instance, EU-Georgia Association Agenda adopted on 21 November 2017. One of the main priorities for Georgia is compliance with the rule of law and independence of judiciary. This, bearing in mind the current situation in Poland looks as if the European Union pursued “do as I say, don’t do as I do” philosophy.