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## Provisional Measures Against EU Member States in the light of the Białowieża Forest case<sup>3</sup>

**Abstract.** The purpose of the article is to present the specific relationship between the EU, which is a unique international organisation, and its Member States, which are the source of integration and, paradoxically, its natural limit. The article contains an analysis of provisional measures imposed on Poland by the Court of Justice of the European Union (CJEU) as an example of a judicial and autonomous control mechanism concerning Member States and their obligations under EU law. Case *European Commission v. Poland* (2017) serves as a central element of the considerations. On 27 July 2017, the CJEU imposed a temporary injunction against logging in the Polish Białowieża 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 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 Białowieża Forest seems to be under attack from the Spruce Bark Beetle. This species of beetle is a pest which colonises primarily spruce trees (*Ips typographus* for the lovers of the Latin language).

The assumption made in the article is that provisional measures (applied under EU procedural law) have dogmatic roots in the tradition of civil proceedings in Member States. What is involved here are national procedures aimed at securing a claim in

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  - 3 The following paper constitutes a part of the research conducted within the framework of the statutory research at the Faculty of Law of the University of Warsaw.

certain circumstances which establish a *prima facie* case on the inefficiency of the future decision. The specificity of provisional measures results from the specificity of EU law, which, in order to be effective, requires a judicial review. Provisional measures are one of the tools to guarantee its effectiveness. Despite relatively strict conditions for the applicability of provisional measures by the CJEU, they can help ensure effectiveness of UE law. The measures imposed to stop the destruction of the Białowieża Forest can be an example here.

**Keywords:** European Law, European Commission, provisional measures, Białowieża Forest, rule of law, Poland

### **Law as a significant source of European integration**

It is clear from the Treaties on which the EU is founded, both in their original version and in the version amended, that the intention of the founders of the EU was to go beyond a classic international organisation with a static structure and mode of action. The feature distinguishing the EU from other organisations is its transnationality resulting from its *modus operandi*, which is evidenced by, among other things, the binding power of the provisions of the Treaties *ratione materiae*, the analysis of EU objectives (art. 2 et seq. of the Treaty on the Functioning of the European Union, hereinafter: TFEU) complemented by – which is vital in the light of this article – a jurisdictional control mechanism of the observance of commitments by the Member States, the liability regime of those states which differs from classic international law regulations, as well as relocation of the decision-making centre to a level which cannot be qualified as national.

In both the Member States and the EU, respect for the rule of law means no more and no less than respect for judicial decisions, especially in cases where a court does not rule in favour of the incumbent political majority of the moment. For example, it was the need to ensure the effectiveness of final judicial decisions and thus, the need to uphold the rule of law within the EU, that led the CJEU to hold in *Commission v Poland* that the adoption of interim measures may be accompanied by the imposition of a periodic penalty payment in the event that those measures would not be complied with. Such imposition is not to be seen as a sanction, but as a means of ensuring the effective application of EU law in cases where there are grounds for doubting that the Member State concerned has complied with a previous interim relief order or that it is prepared to comply with a new order (*Commission v. Poland*, 2017, paras 102, 103, and 109).

From the early days, the European Union has been a construct of a legal nature as it has been created on the basis of law, functions on the basis of law and represents

a legal structure (Shapiro, 1980, p. 538).<sup>4</sup> EU law supports the process of integration. Since the very beginning of European integration, the principle of autonomy of EU law from international as well as national legal systems has been adopted. It has to be considered that law *per se* has been and is a social institution with an extraordinary integration potential, which results from a well-developed system of rules of legal discourse (Azoulai, 2016, pp. 449–463; see also Czachór, 2013). In contrast to political discourse, legal discourse has greater freedom to move from abstract ideas to the situation of particular individuals, (Habermas, 2005, p. 92) which is yet another remark of major importance for further deliberations. This allowed for an unprecedented scale of the development of structures created by law, such as the EU itself. However, it has to be noted that shared commitment to respecting the EU *rule of law* is a prerequisite for the efficient functioning of this characteristic of law.

Obviously, there are also views according to which the traditional role of legal principles under EU law is often abused as a result of interpretations made by EU courts and the fact that a lot of interpretations (by the CJEU) are of a political nature (Shaw & More, 1995, p. 21). The active role of the Court in law making and development (through case-law) undeniably links it with political developments in the EU (J.H.H. Weiler, 1991, p. 2413). Such arguments are put forward by Member States in situations where their interests conflict with European (common) interests, at least in the opinion of a given government. This observation serves as an introductory remark to further considerations in the article.

The EU is based on the principle of loyal cooperation, on the fulfilment of obligations under EU and international law in good faith and on the principle of non-discrimination, which is, in turn, the foundation for the principle of mutual trust between Member States.

The extent to which individual Member States are engaged and successful in complying with integration rules differs from state to state. It is, however, likely that Poland will go down in the history of European law as the magnitude of infringements of the above-mentioned principles it commits is unparalleled. Therefore, there is nothing to be proud of as Poland's case can constitute a precedent for other instances of systemic abuse of the *rule of law*. For the first time ever, the European Commission has applied the procedure known as *A new EU Framework to Strengthen the Rule of Law* (see *Annexes to the Communication*, 2014) as well as – in December 2017 – activated the mechanism established under art. 7 TEU. The debate on the rule of law and democracy erosion in Poland is accompanied by instances of a lack of loyalty of this state to other Member States and EU law (the matter of

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4 Shapiro described the nature of the community as “(...) *A juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology*”.

refugees), as well as blatant disregard for the principles of Union law – here too, for the first time ever, a Member State has not complied with provisional measures ordered by the Court.

In a crisis, the Commission can trigger the rule of law framework to address systemic threats in EU countries. In recent years, the European Commission has been confronted with crisis events in some EU countries, which revealed systemic threats to the rule of law. The Commission reacted by adopting the rule of law framework to address such threats in EU countries. The objective of the rule of law framework is to prevent emerging threats to the rule of law to escalate to the point where the Commission has to trigger the mechanisms of Article 7 of the Treaty on European Union (TEU). This is done through dialogue with the EU country concerned. Poland has already given many proofs that it does not take seriously the call for dialogue. Failure to enforce a provisional measure in Białowieża as proof of this (see European Commission, 2017).

### **Value of Białowieża – what’s the subject of controversies in the EU’ law: insects or the logging industry?**

The Białowieża Forest conserves a diverse complex of protected forest ecosystems which exemplify the Central European mixed forests terrestrial ecoregion, and a range of associated non-forest habitats, including wet meadows, river valleys and other wetlands. The area has an exceptionally high nature conservation value, including extensive old-growth forests. The Białowieża Forest World Heritage site is an immense range of primary forest including both conifers and broadleaved trees covering a total area of 141,885 hectares. Białowieża Forest is a large forest complex located on the border between Poland and Belarus. Thanks to several ages of protection the Forest had survived in its natural state to this day. The Białowieża National Park, Poland, was inscribed on the World Heritage List in 1979. Białowieża Forest includes a complex of lowland forests that are characteristics of the Central European mixed forests terrestrial ecoregion. The area has exceptional conservation significance due to the scale of its old-growth forests, which include extensive undisturbed areas where natural processes are on-going. A consequence is the richness in dead wood, standing and on the ground, and consequently a high diversity of fungi and saproxylic invertebrates (see UNESCO World Heritage Centre, 2018). What is important for the subject of the dispute between Poland and the European Commission - is that the richness in dead wood, standing and on the ground, leads to a consequent high diversity of fungi and saproxylic invertebrates. The long tradition of research on the little disturbed forest ecosystem and the numerous publications, including description of new species, also contributes significantly to the values of the nominated property.

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 Białowieża Forest (see *The Guardian*, 2016), 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 EUR 1,6 billion lurking behind the entire project. The State Forests control 96% of the Polish timber market generating raw material for exported goods worth EUR 10,7 billion 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 Białowieża 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 Białowieża, which defies the argument of the Polish government protecting the woodland by logging the infected trees (Grzeszczak & Karolewski, p. 2).

Actions taken by the Polish government are questioned - both from the position of international law and from the perspective of European law. An IUCN Advisory mission to the property took place in 2016. At its 41st session, the World Heritage Committee requested the States Parties of Belarus and Poland to invite a joint World Heritage Centre mission to assess, inter alia, whether “Białowieża Forest” meets the criteria for inscription on the List of World Heritage in Danger.<sup>5</sup> The World Heritage Committee, at its 41st session in Kraków, Poland (2-12 July 2017), reiterated its request to the State Party of Poland to maintain the continuity and integrity of protected old-growth forest in Białowieża Forest (see World Heritage Committee, 2018). The Committee strongly urged the State Party to immediately halt all logging and wood extraction in old-growth forests, and to clarify third party reports about logging that cannot be justified as so-called sanitary cuttings.

The European Commission argues in the action brought against Republic of Poland on 20 July 2017 that the logging in the Białowieża Forest ecosystem endangers the protected species, in particular through deterioration or destruction of their breeding sites or disturbance of their rearing periods.

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5 The mission report is available at <https://whc.unesco.org/document/157756>.

## European Law perspective - legal basis of the case and development of the situation

The rub lies in the fact that Poland is member of the European Union and thus subject to the so-called “Habitats directive” (conservation of natural habitats and of wild fauna and flora (Council Directive, 1992; Council Directive, 2013)) and the “Birds directive” (conservation of wild birds (Directive, 2009)), both protecting wild fauna (in the Białowieża 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). In 2007 the Commission, in accordance with the Habitats Directive, approved the designation of the Natura 2000 Puszcza Białowieska site, which includes the three forest districts of Białowieża, Browsk and Hajnówka, as a ‘site of Community importance’ on account of the presence of natural habitats and habitats of certain priority species of animals and birds (*European Commission v. Poland*, 2017). The site is also designated under the Birds Directive.

Because of the constant spread of the spruce bark beetle, the Polish Minister for the Environment authorised in 2016, for the period from 2012 to 2021, almost a tripling of harvesting of wood in the Białowieża forest district alone, and the carrying out of active forest management operations such as sanitary pruning, reforestation and restoration, in areas where any intervention was previously excluded. In 2017, the Director General of the Forestry Office then adopted, for the three forest districts of Białowieża, Browsk and Hajnówka, Decision No 51 ‘concerning the felling 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 forest districts’ Work thus began on the removal of dead trees and trees colonised by the spruce bark beetle from those three forest districts in an area of approximately 34,000 hectares, the Natura 2000 Puszcza Białowieska site extending to 63,147 hectares. Since it took the view that the Polish authorities had failed to ensure that those forest management measures would not adversely affect the integrity of the Natura 2000 Puszcza Białowieska site, the Commission brought an action on 20 July 2017, seeking a declaration that Poland had failed to fulfil its obligations under the Habitats and Birds Directives<sup>6</sup>.

In response to the motion by the Commission and the temporary injunction by the Court of Justice in July 2017, the Polish Ministry of the Environment filed a motion

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6 The Commission also asked the Court to order Poland, pending delivery of the Court’s judgment on the merits, to cease, except where there was a threat to public safety, active forest management operations in certain habitats and forest stands, and to stop the removal of centuries-old dead spruces and the felling of trees as part of the increased volume of harvestable wood on the Natura 2000 Puszcza Białowieska site. The Commission supplemented that application by a request for a penalty payment to be ordered in the event of failure to comply with the orders made. By order of 20 November 2017, the Court granted that application.

to dismiss the temporary junction 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 EUR 757million (PLN 3,24 billion), should it stop the logging in the Białowieża 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 (Grzeszczak & Karolewski, 2017, p. 3).

The entirety of the case 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 made thus entry into the textbooks of European integration as the first and infamous 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 (Grzeszczak & Karolewski, 2017, p. 3).

### **Provisional measures – general theoretical aspects**

Provisional measures have a specific theoretical basis that goes beyond the dimension of international law. However, the fact remains that it is this field of law that constitutes the most representative normative area for the case of Białowieża. Provisional measures can be found in numerous areas of the legal system and – in view of the variety of their shape – their identifying feature is the aim of ensuring efficient, provisional legal protection in a specific or abstract legal position, as well as securing a legitimate legal interest.

The need to provide provisional protection of a legal interest even before a case is settled is a natural outcome of the development of legal relationships. It is also one of the basic components of the fulfilment of goals and values of a given legal procedure as such, which are relevant for the implementation of a provisional measure, i.e. a standardised and objectified evaluation of the eligibility of the claim made. In this context, civil proceedings are undoubtedly a classic example of such a procedure.

Provisional measures, be it in the national, international, or EU legal system, are a manifestation of efficient legal protection. If legal proceedings are to be considered as the central point of considerations, the existence of a claim is the key prerequisite for the possibility of imposition of a provisional measure. The rules of civil proceedings are a classic example of the application of provisional

legal protection on national level. Pursuant to art. 730<sup>1</sup> § 1 of the Polish Code of Civil Procedure (1964), which covers interim proceedings (art. 730 and following) “securing a claim may be requested by each party or participant to the proceedings if it made the claim probable and showed that it had legal interest in securing the claim.” In § 2, the criteria for securing a claim are defined in the following way: “Legal interest in securing a claim exists where, in the event of denying the motion, it would be impossible or significantly difficult to enforce the prospective judgment or achieve the aim of the proceedings.” The claim as a prerequisite for provisional legal protection exists – in a modified form – in every procedure that provides for the application of a provisional or safeguard measure as it determines the need to guarantee full effectiveness of the future ruling in view of the risk that the recognition of the claim will be undermined.

Interim proceedings are ancillary to fact-finding proceedings as they make it possible to compensate the creditor enforcing his claims under fact-finding proceedings. The aim of interim proceedings is to provide legal protection of a provisional nature (Jakubecki, 2017, art. 730-1217). As indicated by the Supreme Court, interim proceedings are – as a rule – incidental and ancillary to fact-finding proceedings (Judgment of Supreme Court, 2013). The identifying features of the procedure are independence as well as accessory and provisional nature of applied measures (Iżykowski, 1985, p. 17). As will be outlined below, the same features distinguish proceedings for interim measures before the CJEU.

It should be noted that provisional measures are also provided for in the Polish Law of the Administrative Courts Procedure (p.p.s.a.). Article 61 sets out admissibility of suspension of the contested act or activity of public administration. That is aimed at ensuring a temporary legal protection within the administrative-law relations. As indicated in the source literature, mentioned provisions entail some interpretation obstacles in the context of preliminary ruling procedure (Kmieciak, 2010, p.52). This issue deserves on a separate study.

Provisional measures under EU law represent a sort of reflection of interim measures existing in the national legal orders of the Member States, primarily in civil proceedings. In view of increased integration, which was inextricably linked to developments in EU law, there was a need for a procedural path for effective protection of claims under EU law. Procedural instruments found in national legal orders of the Member States necessarily served as a point of reference. This is confirmed in the mirror image of fundamental characteristics of the proceedings for interim measures before the CJEU, which contain regulations concerning provisional legal protection stemming from civil proceedings in numerous Member States, including Poland. In the light of the above, provisional measures under EU law ensure legal protection provided by the EU judiciary.

Despite a clearly universal shape of provisional measures under EU law, which represent a reflection of the measures existing in national legal orders, the



measures applied by the Court have certain distinctive features. This is linked to the fundamental principles of the EU as an expression of will of the Member States, which, by declaring commitment to certain values (art. 2 TEU) and EU law, submitted to a judicial review of compliance with those values and regulations (art. 19 TEU, also in conjunction with art. 7 TEU). In order to ensure efficiency of such a review, it was reasonable to implement national solutions regarding provisional legal protection into the procedural path of securing claims under EU law. This issue will be covered in the following text.

It should be mentioned in passing that the situations where provisional measures are imposed under national law may be different from the classic understanding of this instrument and, at the same time, may stem from international law or EU secondary law. An extremely detailed and sectoral code of regulations for balancing gas transmission systems – the so-called BAL NC regulation (Commission Regulation, 2014) – is an example here. It provides for a possibility of implementing interim measures by transmission system operators in the absence of sufficient liquidity of the wholesale gas market (Art. 45 BAL NC). The measures are subject to approval by national regulatory authorities (Art. 46(4) BAL NC). Despite certain differences from provisional measures in a classic sense, the measures implemented under the regulation are ultimately aimed at ensuring legal protection for the participants of the wholesale natural gas market, whose economic and legal interest could be threatened as a result of imbalance of transmission systems. Thus, provisional measures provided for in the regulation, which is technical in nature, are aimed at securing the legal order in which a balanced transmission system is a requirement for the completion of legal and economic relations.

### **Provisional measures in public international law**

Developments in international law and the resultant development of an international justice system made it necessary to provide provisional legal protection also in the case of legal disputes between individual states. Given that the states to a dispute recognise the jurisdiction of an international court, in a certain legal situation and under certain circumstances it is also possible that a situation arises where the efficiency of the future judgment is jeopardised before the decision is reached. Hence, at the beginning of the international judiciary, the need to introduce provisional measures by international courts was recognised. The first international court of a general nature, i.e. the Permanent Court of International Justice (PCIJ) established in 1921, had the power to order provisional measures, as indicated in art. 41 of the Statute (Statute of the Permanent Court of International Justice, 1923). The measures were supposed to “reserve the respective rights of either party.” The wording of art. 41 of the Statute of the International Court of Justice (n.d.) is almost

identical. The article states that “1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

Rule 39 of the European Court of Human Rights (the ECHR (see European Court of Human Rights, 2018)) provides for an interesting example of the shape of provisional measures: “The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.” This regulation results from the need to identify the broadest possible scope of cases where the ECHR has the power to apply a provisional measure. This is probably due to the sensitivity of legal human issues, which requires the widest possible admissibility of application of provisional measures. In the case of imposition of provisional measures by the ECHR, the enforcement of the rulings concerning the states signatory to the Convention on the Protection of Human Rights and Fundamental Freedoms (1950) is often suspended. It is also noteworthy that there is a tendency in the case-law of the ECHR to extend the category of cases where the Court orders provisional measures. In the past, they concerned mostly refugees, whereas now also issues regarding family or bioethics are covered (cf. *Lambert and others v. France*, 2015). This means that provisional measures can be part of the evolution of the case-law and make it possible to adjust legal protection to the developments in legal human issues and, as a result, to the specificity of cases before an international court, for instance the ECHR.

Thus, provisional measures are an intrinsic part of the international criminal system in cases where a legal claim as a prerequisite for the imposition of measures is present. This regards both legal disputes between states (the ICJ) and the relations between a state and an individual (the ECHR). Against the backdrop of provisional measures in international law, the measures applied by the TFEU seem extraordinary in nature, which results from the specificity of the EU as an international organisation.

### **Provisional measures under EU law**

The power to order provisional measures by the CJEU stems from art. 278 and 279 TFEU in conjunction with art. 256(1) of the TFEU (2012), according to which the Court may, if it considers that circumstances so require, order the application of the contested act to be suspended or prescribe any necessary interim measures on the basis of art. 156 of the Rules of Procedure of the CJEU. However, art. 278

TFEU establishes the principle of no suspensory effect of actions brought before the Court due to the presumption of legality attaching to European Union measures. The judge hearing an application for interim relief may order the application of the contested act to be suspended or prescribe provisional measures only in exceptional circumstances (*Belgium v. European Commission*, 2016).

Interim procedure before the CJEU and the EGC contains all three constituent elements regarding provisional legal protection indicated above. It represents a distinct and specific procedure (Lenaerts, Arts, Maselis & Bray, 2006, p. 419) which is accessory to the main proceedings (Lenaerts, Arts, Maselis & Bray, 2006, p. 421) and is provisional (Lenaerts, Arts, Maselis & Bray, 2006, p. 422). Nevertheless, depending on the type of main proceedings, certain differences need to be stressed.

For instance, in the case of the application for interim measures under infringement proceedings (art. 258 TFEU), the mere fact that the procedure is declarative does not preclude interim measures. As for the preliminary ruling procedure (art. 267 TFEU), the Court holds that it lacks the power to take preliminary measures (Lenaerts, Arts, Maselis & Bray, 2006, p. 424). It is also indicated that as for the action for annulment of an act adopted by an institution, body or agency of the European Union, there is little prospect of suspension of the contested act due to the fact that the mere subject matter of the proceedings aims at – if the contested act is annulled – ultimately suppressing the act (Lenaerts, Arts, Maselis & Bray, 2006, p. 423). Nevertheless, the suspension is possible and present in the EU case-law (*Case Kortas*, 1999, para 37).

Three conditions are necessary for a provisional measure to be imposed. In accordance with the Court's case-law, the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that: (i) *fumus boni iuris*, which means that such an order is justified, *prima facie*, in fact and in law (ii) it is urgent insofar as, in order to avoid causing serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent. Where appropriate, the judge hearing such an application must also weigh up the interests involved (*Evonik Degussa v. European Commission*, 2016, para 21; *Poland v. European Commission*, 2017, para 24).

As for the first condition, it is stressed that despite the distinctness of proceedings for interim measures, in order to fulfil the criterion *fumus boni iuris*, the action in the main proceedings must have a reasonable prospect of success (Lenaerts, Arts, Maselis & Bray, 2006, p. 423). It is a specific feature of the CJEU's judgments regarding interim measures that despite the fact that the judge hearing an application for interim relief cannot pre-judge the outcome of the main proceedings, it is necessary to evaluate whether the arguments put forward in the main action should be taken into account *prima facie*. Hence, an application for interim measures

must specify in sufficient detail the pleas in law in the main action. The indicated specificity, which is not necessarily positive, concerns broad discretion of the judge in the main action and vague criteria for the decision on the imposition of interim measures. The case-law in that regard differs as to the extent to which *prima facie* evidence has been delivered that the action in the main proceedings is well founded. In some cases judges consider that there needs to be a “strong presumption” that the claim is justified and they dismiss applications for interim measures due to the insufficient amount of information which makes it impossible to determine whether the plea in question is well founded (*Satya Prakash v. Commission of the EAEC*, 1965). This approach has evolved significantly (Žurek, 2000, p. 201), with the latest rulings indicating that the Court tends to use a negative criterion, i.e. examines whether there are grounds to consider that the plea in the main action is unfounded, which allows for a recognition of a greater number of applications for interim measures (*Hans-Martin Tillack v. European Commission*, 2006, para 52-63).

As for the condition of urgency of the application for interim measures, key importance should be given to the aspect of serious and irreparable harm, which also involves a degree of appreciation and valuation by the judge hearing the case. This concerns the case of the Białowieża Forest and the works conducted there. The EU case-law indicates that irreversible harm occurs if it cannot be eliminated by the decision reached in the main action if the dispute is settled in favour of the applicant for interim measures (*Euroalliages v. European Commission*, 2003). A financial loss can be considered as irreversible harm only if it cannot be compensated after the decision in the main action is reached. This regards, for instance, cases where there is a threat to the existence of a business or where irreversible harm is not quantifiable and concerns market loss, such as a loss in consumer confidence (*Cambridge Healthcare Supplies v. European Commission*, 2000).

In order to reduce the scope of examination of the condition of urgency of the application for interim measures, the component of serious and irreversible harm was added. This means that the circumstances determining the seriousness of irreversible harm need to be taken into account, i.e. it needs to be considered that a larger enterprise is more likely to offset potential legal losses than a smaller enterprise (*Sofrimport SARL v. European Communities*, 1988). Furthermore, the case-law indicates that the risk of harm needs to be real, i.e. it must be possible to envisage it with a sufficient degree of likelihood (*Hänseler GmbH v. European Commission*, 2000). The occurrence of an undefined, potential risk cannot be regarded as sufficient (*Kingdom of Belgium v. European Commission*, 1987).

Satisfying two conditions cumulatively may not be sufficient to determine the admissibility of a provisional measure. The judge hearing an application for interim relief may additionally weigh up the interests of the parties (*Jack Hanning v. European Parliament*, 1988), third parties (*Comité Central d'Entreprise de la SA Vittel and Comité d'Etablissement de Pierval v. European Commission*, 1993),

and the Member States (*Comité Central d'Entreprise de la Société Générale des Grandes Sources and others v. European Commission*, 1992).

## Conclusion

Numerous decisions of the CJEU that are regarded as controversial result from the need to settle specific cases, from loopholes in primary legislation and from the necessity to ensure legal protection under EU law (Rosas & Arnati, 2012, pp. 43-45). The same regards the case of the Białowieża Forest. In various cases regarding more or less burning issues, the Court has been instrumental in shaping the current state of (legal) integration by means of many related “legal doctrines” such as those regarding direct effect, primacy of law, implied powers, human rights, as well as being bound by law and judicial rulings (Weatherill, 1995, pp. 210-214). It remains to be seen whether the case of the Białowieża Forest will also lay the foundations for the evolution of EU law.

The above analysis shows that the conditions for the imposition of a provisional measure under EU law are largely constrained and strict. The question is, therefore, whether – in view of the objective of ensuring efficient legal protection through the implementation of an interim measure – the criteria for assessing its admissibility are not too narrow and if they do not give rise to inconsistencies in decisions on the imposition of provisional measures. In this context, it should be noted that both the Polish regulations concerning interim proceedings as well as provisional legal protection measures under international law are far less stringent. Hence, the decision on the imposition of interim measures in the case of Białowieża confirms the serious nature of the infringements committed by the Republic of Poland as regards the protection of nature conservation areas and demonstrates that a provisional measure may be an efficient tool for the protection of interests, not only economic, but also social, environmental, cultural and axiological ones. The fact that the Polish government sabotages the decision on provisional measures reached by the CJEU has proven (even more clearly than the Polish judiciary reforms) to many other Member States that Poland breaches the rule of law. The ruling was given on 17 April – Poland lost the case, which had already been announced by Advocate General in his opinion.

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