

**Case C-441/17**

**European Commission**  
v  
**Republic of Poland**

(Failure of a Member State to fulfil obligations — Environment — Directive 92/43/EEC — Article 6(1) and (3) — Article 12(1) — Conservation of natural habitats and of wild fauna and flora — Directive 2009/147/EC — Articles 4 and 5 — Conservation of wild birds — Amendment to a forest management plan — Natura 2000 Puszcza Białowieska site (Poland) — Special areas of conservation)

1. By its application, the European Commission requests that the Court declare that:
  - by approving an appendix to a forest management plan for the Białowieża Forest District (Poland) without satisfying itself that that appendix will not adversely affect the integrity of the Puszcza Białowieska Site of Community Importance (‘the SCI’) and Special Protection Area (‘the SPA’) PLC200004, the Republic of Poland has failed to fulfil its obligations under Article 6(3) of Directive 92/43/EEC; ([2](#))
  - by failing to take the necessary conservation measures corresponding to the ecological requirements of (i) the natural habitat types listed in Annex I and the species listed in Annex II to the Habitats Directive, and (ii) the birds listed in Annex I to Directive 2009/147/EC ([3](#)) and the regularly occurring migratory species not listed in that annex, for which the Puszcza Białowieska SCI and SPA PLC200004 were designated, the Republic of Poland has failed to fulfil its obligations under Article 6(1) of the Habitats Directive and under Article 4(1) and (2) of the Birds Directive;
  - by failing to guarantee the strict protection of the saproxylic beetles (the flat bark beetle (*Cucujus cinnaberinus*), the goldstreifiger beetle (*Buprestis splendens*), the false darkling beetle (*Phryganophilus ruficollis*) and *Pytho kolwensis*) ([4](#)) listed in Annex IV to the Habitats Directive, that is, by failing to prohibit the deliberate killing or disturbance of those beetles or the deterioration or destruction of their breeding sites in the Białowieża Forest District, the Republic of Poland has failed to fulfil its obligations under Article 12(1)(a) and (d) of the Habitats Directive; and
  - by failing to guarantee the protection of the species of birds referred to in Article 1 of the Birds Directive, including, in particular, the white-backed woodpecker (*Dendrocopos leucotos*), the three-toed woodpecker (*Picoides tridactylus*), the pygmy owl (*Glaucidium passerinum*) and the boreal owl (*Aegolius funereus*), that is, by failing to ensure that they will not be killed or disturbed during their breeding and rearing periods and that their nests or eggs will not be deliberately destroyed, damaged

or removed in the Białowieża Forest District, the Republic of Poland has failed to fulfil its obligations under Article 5(b) and (d) of the Birds Directive.

2. The present case will give the Court, first, a further opportunity to point out what distinguishes plans relating to a Natura 2000 site which fall within Article 6(1) of the Habitats Directive from plans which are not directly connected with or necessary to the management of the site but are likely to have a significant effect on it, as referred to in Article 6(3). Secondly, this case will prompt the Court to indicate the level of rigour required of the Member States when designing and implementing those plans or projects, because of the particularly strict requirements arising from the provisions of the directives relied on by the Commission, as interpreted by the Court.

3. In this Opinion, I shall set out the reasons why I think that this action for failure to fulfil obligations is admissible and must be upheld.

## **I. Legal framework**

### ***A. The Habitats Directive***

4. The 1st, 3rd, 6th, 10th and 15th recitals of the Habitats Directive read as follows:

‘Whereas the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article 130r of the Treaty [subsequently Article 174 EC and then Article 191 TFEU];

...

Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;

...

Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;

...

Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future;

...

Whereas a general system of protection is required for certain species of flora and fauna to complement Directive 79/409/EEC; [(5)] whereas provision should be made for management measures for certain species, if their conservation status so warrants, including the prohibition of certain means of capture or killing, whilst providing for the possibility of derogations on certain conditions;

...’

5. Article 1 of the Habitats Directive reads as follows:

‘For the purpose of this Directive:

- (a) *conservation* means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);
- (b) *natural habitats* means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural;
- ...
- (d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (\*) in Annex I;
- (e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i);

...

- (g) *species of Community interest* means species which, within the territory referred to in Article 2, are:
  - (i) endangered ... or
  - (ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or
  - (iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or
  - (iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

- (h) *priority species* means species referred to in (g)(i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (\*) in Annex II;
- (i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as “favourable” when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) *site* means a geographically defined area whose extent is clearly delineated;

(k) *site of Community importance* means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

For animal species ranging over wide areas, sites of Community importance shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction;

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

...’

6. Article 2 of the Habitats Directive is worded as follows:

‘1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

7. Article 3(1) of the Habitats Directive provides:

‘1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the [SPAs] classified by the Member States pursuant to Directive 79/409 ...’

8. Article 4(2), third subparagraph, and (4) and (5) of the Habitats Directive state:

‘2. ...

The list of sites selected as [SCIs], identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

...

4. Once [an SCI] has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).’

9. Article 6 of that directive provides:

‘1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.’

10. Article 7 of that directive states:

‘Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409 ... in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409 ..., where the latter date is later.’

11. Under the heading ‘Protection of species’, Article 12(1) of the directive provides:

‘1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

...

(d) deterioration or destruction of breeding sites or resting places.’

12. Article 16(1) of the directive provides:

‘1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

...

- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

...’

13. Annex I to the Habitats Directive, entitled ‘Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation’, refers in point 9, ‘(Sub)natural woodland vegetation comprising native species forming forests of tall trees, with typical undergrowth, and meeting the following criteria: rare or residual, and/or hosting species of Community interest’, under heading 91, ‘Forests of Temperate Europe’, to sub-continental oak-hornbeam forests (Galio-Carpinetum oak-hornbeam forests, Natura 2000 code 9170) and bog woodland (Natura 2000 code 91D0) and alluvial forests with willow, poplar, alder and ash (alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*), Natura 2000 code 91E0), the latter two forests being specially designated as priority habitat types.

14. Annexes II and IV to the directive are entitled, respectively, ‘Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation’ and ‘Animal and plant species of Community interest in need of strict protection’. Under point (a) of each of those annexes, covering ‘animals’ — ‘invertebrates’, there is a list of insect species, including beetle species, which lists, in particular, the goldstreifiger beetle, the flat bark beetle, *Pytho kolwensis* and the false darkling beetle, with the clarification, set out in Annex II, that the latter is a priority species. Annex II also lists *Rhysodes sulcatus* and *Boros schneideri*. (6)

## **B. The Birds Directive**

15. Recitals 6 and 8 of the Birds Directive read as follows:

‘(6) The measures to be taken must apply to the various factors which may affect the numbers of birds, namely the repercussions of man’s activities and in particular the destruction and pollution of their habitats, capture and killing by man and the trade resulting from such practices; the stringency of

such measures should be adapted to the particular situation of the various species within the framework of a conservation policy.

...

- (8) The preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. Certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution. Such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole.’

16. Article 1 of the Birds Directive provides:

‘1. This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

2. It shall apply to birds, their eggs, nests and habitats.’

17. Article 2 of the Birds Directive states:

‘Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.’

18. Article 3 of the Birds Directive provides:

‘1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

- (a) creation of protected areas;
- (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
- (c) re-establishment of destroyed biotopes;

...’

19. Article 4(1), (2) and (4) of that directive provides:

‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

- (a) species in danger of extinction;
- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;

- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as [SPAs] for the conservation of these species in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. ...

...

4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

20. Article 5 of the directive provides:

'Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

...

- (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

...

- (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;

...'

21. Article 9 of the directive provides:

'1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

- (a) – in the interests of public health and safety,

...

- to prevent serious damage to crops, livestock, forests, fisheries and water,

...

2. The derogations referred to in paragraph 1 must specify:

- (a) the species which are subject to the derogations;

...

- (c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;



- (d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;
- (e) the controls which will be carried out.

3. Each year the Member States shall send a report to the Commission on the implementation of paragraphs 1 and 2.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of the derogations referred to in paragraph 1 are not incompatible with this Directive. It shall take appropriate steps to this end.'

22. The diverse species listed in Annex I to the Birds Directive include the white-backed woodpecker, the three-toed woodpecker, the pygmy owl, the boreal owl, the honey buzzard (*Pernis apivorus*), the red-breasted flycatcher (*Ficedula parva*) and the collared flycatcher (*Ficedula albicollis*).

## II. Background to the dispute

### A. Facts giving rise to the dispute

23. By Decision 2008/25/EC of 13 November 2007 adopting, pursuant to [the Habitats] Directive ..., a first updated list of sites of Community importance for the Continental biogeographical region, (7) in response to proposals from Member States, the Commission designated the Natura 2000 Puszcza Białowieska site (Poland), in accordance with the third subparagraph of Article 4(2) of the Habitats Directive, as an SCI, having the code PLC200004, on account of the presence of natural habitats and the habitats of certain priority animal species. The site, which was created to protect 10 natural habitat types and 55 plant and animal species, is also an SPA designated under the Birds Directive.

24. The Natura 2000 Puszcza Białowieska site is one of the best preserved natural forests in Europe, characterised by large quantities of dead wood and ancient trees, some of which are centuries old. Its territory includes natural habitats defined as 'priority' habitats within the meaning of Annex I to the Habitats Directive, such as bog woodland (Natura 2000 code 91D0) and alluvial forests with willow, poplar, alder and ash (Natura 2000 code 91E0), and other habitats of 'Community importance', such as sub-continental oak-hornbeam forests (Natura 2000 code 9170). The Commission has stated that, according to a Forest Europe report, in 2015 undisturbed forests accounted in Europe for only some 3% of the total forest area and that they accounted in Poland for 0.63% of the total forest area. (8)

25. Present on the Natura 2000 Puszcza Białowieska site are many species of saproxylic beetle which are included in Annex II to the Habitats Directive, in particular *Boros schneideri* and *Rhysodes sulcatus*, and also those listed in Annex IV(a) of that directive as species in need of strict protection, such as the flat bark beetle, the goldstreifiger beetle, the false darkling beetle and *Pytho kolwensis*. Also present are bird species referred to 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, inter alia, the honey buzzard, the red-breasted flycatcher, the collared flycatcher, the white-backed woodpecker, the three-toed woodpecker, the pygmy owl and the boreal owl, and in Annex II, Part B, to that directive, such as the stock dove (*Columba oenas*), a migratory species covered by Article 4(2) of that directive.

26. Given its ecological importance, Puszcza Białowieska ('the Białowieża Forest') is also inscribed on the World Heritage List of the United Nations Educational, Scientific and Cultural Organisation (Unesco).

27. The Natura 2000 Puszcza Białowieska site, which has a surface area of 63 147.58 hectares, is administered by two different authorities. One of them is responsible for the management of the Białowieski Park Narodowy (Białowieża National Park, Poland), namely a territory representing

approximately 17% of the total area of the Natura 2000 site, that is, approximately 10 500 hectares. The other authority, the Lasy Państwowe (State Forestry Office, Poland), (9) manages, over 52 646.88 hectares, the three Forest Districts of Białowieża (12 586.48 hectares), Browsk (20 419.78 hectares) and Hajnówka (19 640.62 hectares). (10) The Białowieża Forest District represents approximately 20% of the total area of the site, or an area equivalent to that of the national park, representing approximately 24% of the area of the three forest districts as a whole.

28. On 17 May 2012 the Minister Środowiska (Minister for the Environment, Poland) issued a recommendation to exclude management measures in forest stands over 100 years old. According to the Republic of Poland, that recommendation prevented, in practice, the implementation in those stands of effective conservation operations, consisting in the timely removal, in sufficient volume, of spruce wood colonised by the spruce bark beetle from the threatened area, with the result that the possibilities of rapidly responding to the increasing spread of the spruce bark beetle were hindered.

29. On 9 October 2012 the Minister for the Environment, at the request of the Regionalna Dyrekcja Lasów Państwowych w Białymstoku (Regional Directorate of the State Forestry Office, Białystok, Poland) and in response to a pre-infringement EU Pilot investigation (11) initiated by the Commission in June 2011, approved the Plan Urządzenia Lasu (forest management plan), which was accompanied by environmental impact forecasts ('the 2012 FMP').

30. For the Białowieża Forest District, the plan included a description of forests and land intended for afforestation having a total area of 12 592.71 hectares, an analysis of the forest economy, a nature protection programme and a mission statement concerning:

- the forest product volume (from pruning prior to felling and felling) in the amount of 63 471 m<sup>3</sup> of net timber;
- the area intended for afforestation and reforestation (that is to say, 12.77 hectares);
- the area intended for forest maintenance (that is to say, 2 904.99 hectares);
- forest protection, including fire protection measures;
- the hunting economy; and
- needs in terms of technical infrastructure.

31. That plan, which reduced the authorised volume of timber extraction for the three forest districts to approximately 470 000 m<sup>3</sup> within 10 years, a significant proportion in relation to the 1 500 000 m<sup>3</sup> of timber extracted between 2003 and 2012, accordingly set the limit at 63 471 m<sup>3</sup> for the Białowieża Forest District. (12)

32. However, it is common ground that, on account of the massive extraction of timber from 2012 to 2015, the maximum volume authorised in the 2012 FMP for a 10-year period was reached in the Białowieża Forest District in almost three years. At the same time, the Forestry Office observed during that period a spread of the spruce bark beetle.

33. On 6 November 2015 the Regionalny Dyrektor Ochrony Środowiska w Białymstoku (Regional Director of Environmental Protection, Białystok, Poland) adopted a Plan Zadań Ochronnych (management plan) (13) ('the 2015 PZO'), (14) which lays down conservation objectives and establishes conservation measures relating to the Natura 2000 Puszcza Białowieska site for the territory of the three Forest Districts of Białowieża, Browsk and Hajnówka, in accordance with the objectives set out in Article 6(1) of the Habitats Directive. The 2015 PZO is a measure of local law and, according to the Commission, must be regarded as a plan 'necessary to the management of the site' within the meaning of Article 6(3) of the Habitats Directive.

34. In Annex 3 to the 2015 PZO, the Polish authorities specified, on the basis of the natural habitats and the habitats of the animal and bird species referred to in Annex I to the Habitats Directive and the habitats of the animal species referred to in Annex II to that directive and bird species referred to in Annex I to the Birds Directive, the forest management practices which constitute potential threats to the maintenance of a favourable conservation status for the habitats on the Natura 2000 Puszcza Białowieska site. In that regard, reference was made, in particular, to the felling of trees in centuries-old stands of two types of habitat (oak-hornbeam forests and alluvial forests), the removal of dead or dying trees or those affected by bark beetle (pines or spruces colonised by the spruce bark beetle) over 100 years old, as well as logging and the restoration of forests and mixed forests through forest management operations.

35. Annex 5 to the 2015 PZO sets out the following conservation measures to prevent the potential threats identified in Annex 3 to that PZO for the protected habitats and species present in the three forest districts:

- exclusion of forest management operations (such as felling, reforestation and maintenance) in all tree stands in habitats 91D0 (bog woodland) and 91E0 (alluvial forests with willow, poplar, alder and ash);
- exclusion of forest management operations in all stands composed of at least 10% century-old specimens in habitat 9170 (sub-continental oak-hornbeam forests), in the habitats of the honey buzzard, the white-backed woodpecker, the three-toed woodpecker, the red-breasted flycatcher and the collared flycatcher, the goldstreifiger beetle and the flat bark beetle, *Boros Schneideri* and the hermit beetle (*Osmoderma eremita*);
- exclusion of forest management operations in all stands composed of at least 10% century-old specimens (stands of spruce, pine or combining spruce and pine) for pygmy owl and boreal owl habitats;
- for the purpose of conserving the habitats of *Pytho kolwensis*, the false darkling beetle and *Rhysodes sulcatus*, conservation of dead trees in harvested forest stands, including the preservation of all dead centenarian spruce trees until they are completely mineralised, except where there is a threat to public safety.

36. On 25 March 2016 the Minister for the Environment, at the request of the Director-General of the Forestry Office, approved an appendix to the 2012 FMP ('the 2016 appendix') prepared by the Regional Directorate of the Forestry Office, Białystok, amending the parts of the 2012 FMP relating, first, to the total area of forest and land to be afforested, by reference to the situation on 1 January 2016, amounting (after amendment) to 12 585.30 hectares, secondly, to the harvesting volume of the main forest products (resulting from pruning prior to felling and felling), amounting (after amendment) to 188 000 m<sup>3</sup> of net workable timber, and, thirdly, to the planned area for afforestation and reforestation, amounting (after amendment) to 28.63 hectares.

37. The approval of the 2016 appendix is justified by 'the occurrence of serious damage within forest stands, as a result of the constant spread of the spruce [bark] beetle, resulting (during the implementation period of the [2012] FMP) in the need to increase logging (occasional products) in order to maintain the forests in an appropriate state of health, to ensure the sustainability of the forest ecosystems and to halt the deterioration and undertake a process of regeneration of natural habitats, including habitats of Community interest'.

38. It is stated in that appendix that it 'relates primarily to the removal of infected spruce trees, with a view to limiting the spread of the spruce bark beetle (need to carry out sanitary pruning)'.

39. It also states that there will take place 'the removal of trees for the purpose of ensuring the safety of persons in the Białowieża Forest, because the accumulation of dying trees constitutes a public danger' on 'tourist paths and rest and recreation areas in the forest'.

40. Finally, it is noted in that appendix that ‘drought in recent years has increased the die-back of spruce trees and stands, thereby resulting in an increased risk of fire in the Białowieża Forest’.

41. The 2016 appendix thus permits almost a tripling of logging in the Białowieża Forest District, from 63 471 m<sup>3</sup> to 188 000 m<sup>3</sup> for the period from 2012 to 2021, and the carrying out of active forest management operations, such as sanitary pruning, reforestation and restoration, in areas where any intervention was previously excluded.

42. As at the time when the 2012 FMP was adopted, a positive opinion was issued by the Regional Director for Environmental Protection, Białystok. Moreover, it is common ground that, for the purposes of the adoption of the 2016 appendix, the Regional Directorate of the Forestry Office, Białystok, carried out in 2015 an environmental impact assessment of the planned measures, the result of which was that those measures have ‘no significant negative impact on the environment or, in particular, on the conservation objectives and integrity of the Natura 2000 site’.

43. By a document also dated 25 March 2016, the Minister for the Environment and the Director-General of the Forestry Office, in pursuit of the objective of resolving differences of opinion on the method of managing the Białowieża Forest ‘on the basis of scientific knowledge’, drew up a remediation programme entitled ‘Programme relating to the Białowieża Forest as Cultural and Natural Heritage of Unesco and a Natura 2000 Network Site’. That programme seeks ‘rigorously to document the different points of view and to determine the responsibility of specific persons for decisions taken’. It was decided for that purpose:

- ‘to produce and make available to the public’ scientific and legal documents relating to the Białowieża Forest;
- to implement a study and monitoring programme, including an identification and description of plots where stands have been established by humans and forest management measures have taken place, taking into account certain protected habitats and species. In each forest stand, first, the number and volume of dead trees will be calculated and, secondly, the organic carbon content of the forest litter and the soil profile will be measured; and
- to establish a photographic record.

44. In order to put an end to the scientific controversy concerning the appropriateness of human intervention and tree felling, that programme also made provision to carry out a long-term experiment, which will reserve a third of the area of the forest districts, in which the effects of the absence of implementation of the forest management measures will be evaluated for the purposes of a comparison with the effects of the ‘tree pruning and logging operations (among others)’ planned from 2016 onwards, which will be carried out in the other part. An economic impact analysis is also provided for.

45. On 31 March 2016 the Director-General of the Forestry Office adopted, in accordance with his mission and ‘taking into account requirements relating to the diversification of risks of significant alteration to natural habitats and of disappearance of biodiversity, on account of the spread of the spruce bark beetle (one of the most extensive in history) in the Białowieża Forest area’, Decision No 52 establishing ‘functional reference areas’ in the territory of the Forest Districts of Białowieża and Browsk. They represent approximately 33% of the area of the Białowieża Forest District, that is, 4 137.28 hectares, and are managed in accordance with the measures set out in the 2012 FMP. As from 1 April 2016 and taking into account the forest management plans in force in those districts, Decision No 52 provides for the carrying out within those reference areas of ‘forest management aimed at maximising the effects of biodiversity formation, (in practice) exclusively as a result of natural processes’. It is stated in that decision that that management activity will be limited to:

- ‘(1) the pruning of trees which constitute a danger to public safety and a fire risk, connected with the abandonment *in situ* of felled trees;

- (2) allowing the abovementioned areas to renew themselves naturally, as provided for by the rules on forest management;
- (3) maintaining the forest resources in a state that limits to the maximum the penetration of forests by man, in order to prevent alteration of the aforementioned natural processes, subject to the forest access referred to in point (4);
- (4) the performance of non-productive forest functions, such as land made available for the conduct of scientific studies and similar actions;
- (5) the creation of a protective belt on the boundaries of those areas, by installing pheromone traps, that is, solutions seeking to prevent the transition from (and to) those areas of organisms which are sufficiently harmful to threaten the survival of the forests’.

Decision No 52 nevertheless provides that the areas thus covered are not to include the nature reserves.

46. Section 2 of that decision provides that, in the forests within the Forest Districts of Białowieża and Browsk located outside the reference areas, the management activity based on the forest management plans will be carried out in accordance with the principles of sustainable forest management. It also provides as follows: ‘however, that management will be carried out in such a way as to ensure, in practice, the protection of nature, by applying forest management methods’.

47. According to Section 3 of that decision, ‘operations in the territorial area of the Forest Districts of Białowieża and Browsk concerning the natural resources survey, the monitoring of biodiversity, the state of natural habitats and the carbon balance of the forest ecosystems, as well as the collection of any factual documentation, are to be governed by a separate order of the Director-General of the Forestry Office concerning the natural resources survey of all land managed by that Office’. According to Section 3(2), the Regional Director of the Forestry Office, Białystok, is to submit a report every two years (as of 31 January 2017) on the monitoring of operations and the conservation status of biodiversity within the Białowieża Forest.

48. Under Section 4(b) of Decision No 52, it is possible to derogate from the exclusion of those areas from active forest management operations in the event of ‘the execution of works, where the obligation to carry out those works arises from legal provisions of general application, including the PZO relating to the Natura 2000 site’.

49. On 17 February 2017 (15) the Director-General of the Forestry Office adopted, for the three forest districts, Decision No 51 ‘concerning the felling of trees affected 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 of Białowieża, Browsk and Hajnówka’. (16)

50. Article 1 of that decision provides that ‘in the light of the extraordinary and catastrophic situation caused by the spread of the spruce bark beetle at the Puszcza Białowieska site, the Director of the Regional Directorate of the Forestry Office, Białystok, and the forest inspectors of the Białowieża, Browsk and Hajnówka Forest Districts shall be required to:

1. carry out, without delay, in the forests managed by the Forestry Office, the felling of trees threatening public safety, primarily along transport and tourist routes, ensuring compliance with public safety as an essential priority;
2. carry out the continuous removal of dry trees and post-harvest slash, in accordance with the provisions applicable to the prevention of forest fires, including by transport or by chipping and transport;

3. carry out the continuous and timely felling of trees affected by the spruce bark beetle, in all age classes of forest stands, as well as the harvesting of timber and its timely transport (or debarking and storage);
4. undertake — using the results of the Puszcza Białowieska Forest natural resources survey carried out by the Forestry Office in 2016 — the implementation and continuous updating of forest stand restoration strategies following the spread of the spruce bark beetle in the Puszcza Białowieska forest area, using various methods of renewal (natural regeneration, reforestation by sowing or planting) and protection, with a view to the regeneration and restoration of plant communities and, in particular, the protection of valuable natural habitats falling within the protection of the Natura 2000 Puszcza Białowieska site and, where artificial regeneration is necessary, the use of trees and shrubs native to Puszcza Białowieska;
5. monitor the effects referred to in point 4, by regularly surveying the state of the forests and assessing biodiversity, including by using a network of large-scale natural resource survey areas;
6. incorporate the timber harvested following the felling referred to in points 1 to 3 in the execution of the Leśne Gospodarstwa Węglowe (carbon forest farms) project, referred to in Order No 2 of the Director-General of 17 January 2017 [project seeking to increase the level of absorption of CO<sup>2</sup> and other greenhouse gases by means of forests]. Dry wood which is not affected [by the spruce bark beetle] (sterile dead wood) may be stored in transitional facilities established on cleared spaces and open sites. Affected wood (wood which is colonised by bark beetle) must be debarked and stored in accordance with the rules laid down by the forest protection guidelines. Wood storage areas shall be protected against fire;
7. organise a system for the sale of timber harvested as a result of the felling referred to in points 1 to 3 to meet the needs of the inhabitants of the municipalities located in the territorial area of Puszcza Białowieska.’

51. Article 2 of that decision provides that ‘the felling referred to in Article 1 shall be exempted from the restrictions concerning the age of trees and the function of forest stands applicable to forests under the management of the State Forestry Office in the Puszcza Białowieska area’.

52. It is common ground that, following the adoption of Decision No 51, work began on the removal of dead trees and trees affected by the spruce bark beetle from the three Forest Districts of Białowieża, Browsk and Hajnówka, in a ‘forest restoration area’ of approximately 34 000 hectares, which represents almost 54% of the area of the Natura 2000 Puszcza Białowieska site.

53. Moreover, according to the Commission, which relies on data from the Forestry Office, felling in the Białowieża Forest carried out since the beginning of 2017 represents in total more than 35 000 m<sup>3</sup> of timber, including 29 000 m<sup>3</sup> of spruce (that is approximately 29 000 trees). According to information provided by non-governmental organisations, which used data from the Forestry Office, the felling of stands over 100 years old carried out until May 2017 produced 2 385.13 m<sup>3</sup> of timber in the Białowieża Forest District, 1 874 m<sup>3</sup> in the Forest District of Browsk and 6 540 m<sup>3</sup> in the Forest District of Hajnówka.

### ***B. Pre-litigation procedure***

54. Having been informed of the approval of the 2016 appendix, the Commission on 7 April 2016 sent the Polish authorities, via the EU Pilot pre-infringement electronic communication system, [\(17\)](#) a request for clarifications on a series of issues relating to the impact of increased timber extraction in the Białowieża Forest District on the conservation status of natural habitats and wildlife species of Community interest in the Natura 2000 Puszcza Białowieska site.

55. In their reply of 18 April 2016, the Polish authorities justified the increase in the volume of timber extracted in the light of an unprecedented spread of the spruce bark beetle.

56. On 9 and 10 June 2016 the Commission's staff visited the Białowieża Forest to carry out investigations in approximately 10 different areas of the Natura 2000 Puszcza Białowieska site.

57. On 17 June 2016 the Commission sent the Polish authorities, in accordance with Article 258 TFEU, a letter of formal notice, on the grounds that the measures approved in the 2016 appendix were not justified, that those authorities had failed to ensure that those measures would not adversely affect the integrity of the Natura 2000 Puszcza Białowieska site and that, by allowing an increase in timber extraction, they had failed to fulfil their obligations under the Habitats and Birds Directives.

58. By letter of 27 June 2016, addressed to the European Commissioner for the Environment, the Polish Minister for the Environment indicated that further information was required concerning the habitats and species on the Natura 2000 Puszcza Białowieska site and that a survey of them was in progress.

59. The Polish authorities replied to the letter of formal notice on 18 July 2016, rejecting the Commission's complaints in their entirety.

60. In February and March 2017 an exchange of correspondence took place between the Polish Minister for the Environment and the European Commissioner for the Environment. The Minister for the Environment stated that the initial results of the survey were already known and that he had decided on that basis to begin the felling provided for in the 2016 appendix.

61. 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 under Article 6(1) and (3) and Article 12(1)(a) and (b) of the Habitats Directive and Article 4(1) and (2) and Article 5(b) and (d) of the Birds Directive. The Commission invited the Polish authorities to comply with that reasoned opinion within one month of receiving it. The Commission justified that deadline, in particular, by information that the felling had begun and by the direct risk that the Natura 2000 Puszcza Białowieska site might therefore suffer serious and irreparable damage.

62. On 26 May 2017 the Republic of Poland replied to the reasoned opinion, claiming that the alleged failures to fulfil obligations were unfounded.

63. Not satisfied with that reply, the Commission brought the present action.

### ***C. Procedure before the Court***

64. By separate document lodged at the Registry on 20 July 2017, the Commission lodged an application for interim measures under Article 279 TFEU and Article 160(2) of the Rules of Procedure of the Court of Justice, seeking an order that the Republic of Poland, pending the judgment of the Court in the main action, first, cease, except where there is a threat to public safety, the active forest management operations in habitats 91D0 (bog woodland) and 91E0 (alluvial forests with willow, poplar, alder and ash) and in the centuries-old stands of habitat 9170 (sub-continental oak-hornbeam forests), as well as in the habitats of the white-backed woodpecker, the three-toed woodpecker, the pygmy owl, the boreal owl, the honey buzzard, the red-breasted flycatcher, the collared flycatcher and the stock dove and in the habitats of certain saproxylic beetles, namely the flat bark beetle, *Boros schneideri*, the false darkling beetle, *Pytho kolwensis*, *Rhysodes sulcatus* and the goldstreifiger beetle and, secondly, stop the removal of centuries-old dead spruces and the felling of trees as part of increased logging on the Natura 2000 Puszcza Białowieska site, resulting from the implementation of the 2016 appendix and Decision No 51.

65. The Commission also requested, pursuant to Article 160(7) of the Rules of Procedure of the Court of Justice, that the interim measures referred to above be granted before the defendant submitted its

observations, owing to the risk of serious and irreparable damage for the habitats and the integrity of the Natura 2000 Puszcza Białowieża site.

66. By order of 27 July 2017, (18) the Vice-President of the Court provisionally granted that latter request pending the adoption of an order terminating the proceedings for interim measures.

67. On 13 September 2017 the Commission supplemented its application for interim measures by requesting that the Court order additionally that the Republic of Poland pay a periodic penalty payment if it fails to comply with the orders made in the proceedings.

68. On 28 September 2017 the Republic of Poland requested that the case be assigned to the Grand Chamber of the Court. Applying Article 161(1) of the Rules of Procedure, the Vice-President of the Court referred the matter to the Court, which, in the light of the importance of the case, assigned it to the Grand Chamber, in accordance with Article 60(1) of those rules.

69. By order of 20 November 2017, (19) the Court upheld the Commission's application, until delivery of final judgment in the present case, while authorising, exceptionally, the Republic of Poland to implement the operations provided for in the 2016 appendix and Decision No 51 where they are strictly necessary, and in so far as they are proportionate, in order to ensure, directly and immediately, the public safety of persons, on condition that other, less radical measures are impossible for objective reasons. The Court also ordered Poland to send to the Commission, no later than 15 days after notification of that order, details of all measures that it has adopted in order to comply fully, detailing, with reasons, the active forest management operations that it intends to continue because they are necessary to ensure public safety. The Court reserved its decision on the Commission's additional application seeking an order for payment of a periodic penalty payment. (20)

70. Moreover, by document lodged at the Registry on 7 August 2017, the Commission requested that the present case be given priority treatment in accordance with Article 53(3) of the Rules of Procedure of the Court. By decision of 9 August 2017, the President of the Court granted that request. However, by order of 11 October 2017, (21) the President of the Court decided of his own motion that the present case was to be determined under the expedited procedure as referred to in Article 23a of the Statute of the Court of Justice of the European Union and Article 133 of the Rules of Procedure of the Court.

### III. Arguments of the parties

#### A. Admissibility

71. The Republic of Poland argues that the second, third and fourth complaints raised by the Commission are inadmissible, in so far as they relate to the operations implemented in the territories of the Forest Districts of Browsk and Hajnówka, referred to in Decision No 51. First, those complaints unjustifiably extend the scope of the complaints set out in the reasoned opinion, since the latter complaints refer only to the consequences of the adoption of the 2016 appendix on the Białowieża Forest District. Thus, the subject matter of the dispute is extended *ratione loci* and also *ratione materiae*, since the operations referred to in Decision No 51 are different from those set out in the 2016 appendix. Secondly, the wording of those complaints is obscure, in particular with regard to whether the complaints relate exclusively to the adoption of the 2016 appendix or whether they also relate to the operations provided for by Decision No 51.

72. In support of the admissibility of all its complaints, the Commission stated at the hearing that it follows from the settled case-law of the Court that the subject matter of the dispute may be extended between the pre-litigation stage and the litigation stage, provided that the facts complained of are of the same kind and constitute the same conduct. It is clear from the documents before the Court, according to the Commission, that the acts attributed to the Republic of Poland in the reasoned opinion concerned only the Białowieża Forest District, since the measures adopted by the Polish authorities at that time concerned



only that district. However, the Commission points out that the same measures have also been adopted by the Republic of Poland for the two other forest districts forming part of the Natura 2000 Puszcza Białowieska site. Taking the view that this case is concerned with identical facts, constituting the same conduct, it considers that it is reasonable for the action for failure to fulfil obligations to relate to the entire territory covered by the disputed measures on the date when the case was brought before the Court. Moreover, the Commission submits that not declaring its action admissible on the ground that the reasoned opinion did not refer to facts subsequent to it would render the exercise of the Commission's right to a legal remedy extremely difficult or even impossible. In that regard, the Commission notes that the fact that the geographical scope was extended between the reasoned opinion and the action for failure to fulfil obligations is solely a consequence of the Polish authorities' own choice to adopt decisions of the same nature in the course of the pre-litigation procedure and to organise their publication at a late stage, thereby precluding that extension from being accepted as a ground of inadmissibility of the Commission's application.

## ***B. Substance***

### ***1. The Commission***

73. By its first complaint, the Commission claims that the Republic of Poland has failed to fulfil its obligations under Article 6(3) of the Habitats Directive by approving the 2016 appendix and by implementing the forest management operations thus provided for, without satisfying itself that this will not adversely affect the integrity of the Natura 2000 Puszcza Białowieska site.

74. According to the Commission, the 2016 appendix, in that it amends the 2012 FMP, constitutes a plan or project not directly connected with or necessary to the management of the Natura 2000 Puszcza Białowieska site but likely to have a significant effect thereon, on account of the tripling of the volume of harvestable timber in the Białowieża Forest District provided for therein. Unlike PZOs, FMPs are not management plans within the meaning of Article 6(1) of the Habitats Directive, because they do not lay down the objectives and the necessary conservation measures for Natura 2000 sites. The main purpose of FMPs is to regulate forest management practices, in particular by determining the maximum volume of timber which can be extracted and by establishing forest protection measures. It is therefore necessary, before adopting or amending them, to carry out an appropriate assessment of their implications for the Natura 2000 site concerned in the light of the conservation objectives of that site, in accordance with Article 6(3) of the Habitats Directive, as occurred, moreover, in the present case, since in 2015 the Republic of Poland carried out such an assessment of the implications of the draft 2016 appendix for conservation on the Natura 2000 Puszcza Białowieska site.

75. The Commission takes the view, however, that the Polish authorities failed to ensure that the 2016 appendix would not adversely affect the integrity of that Natura 2000 site, which entails the lasting preservation of its constitutive characteristics that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site as an SCI and SPA. In this case, the characteristics of the integrity of that Natura 2000 site are as follows: the natural ecological processes which occur there (natural regeneration of the trees, natural selection of species, natural ecological succession); diversity in terms of the combination of species and age structure of its forest stands, which include a significant proportion of trees in optimal or terminal phase; the abundance of dead wood; and the presence of species typical of natural forests undisturbed by man and inhabiting the above natural habitats.

76. The Commission argues essentially that the Polish authorities could not exclude the existence of scientific doubt as to the absence of adverse effects on the integrity of the Natura 2000 Puszcza Białowieska site on the basis of the environmental impact assessment prepared in 2015, with a view to drawing up the 2016 appendix, on the ground that that assessment was based on the assessment carried out in 2012, with a view to the adoption of the 2012 FMP, and focused on stands affected by the spruce bark beetle. It also claims that the subsequent establishment of reference areas and survey work similarly cannot provide the certainty necessary for authorising forest management works.

77. The Commission states, more particularly, that the measures to remove dead and dying trees, the forest management measures in the form of sanitary pruning, felling of trees in the case of centuries-old stands in sub-continental oak-hornbeam forests and in alluvial forests, and the measures to remove dying or dead centuries-old spruces colonised by the spruce bark beetle, provided for in the 2016 appendix, constitute ‘potential danger[s]’ for the natural habitats and habitats of species at issue, which are identified in the 2015 PZO. By contrast, the Commission does not regard the activity of the spruce bark beetle as a ‘potential danger’, since it is, on the contrary, the removal of the spruces colonised by the spruce bark beetle which is expressly regarded in Annex 3 to the 2015 PZO as a threat to the habitats of three protected bird species.

78. The Commission also points out that, in the current state of scientific knowledge, the stages in the spread of the spruce bark beetle form part of the natural cycles regularly observed in that type of forest. Moreover, they are not monitored in any way within the Białowieża National Park, where the conservation status of the habitats is better than in the forest districts managed by the Forestry Office in which sanitary pruning was carried out. Scientific studies also attest to the better conservation status of Białowieża Forest habitats which are excluded from all human intervention. Scientists are also concerned that the removal of dead or dying trees disrupts the age structure balance of the forest stands, impoverishes the diversity of protected species and habitats, and eliminates important food sources for many protected animal species. The removal of dead wood in the course of sanitary pruning is therefore incompatible with the conservation objectives of the protected areas, since retention of the dead wood in the forest is necessary to preserve biodiversity.

79. According to the Commission, it is also clear from the Polish authorities’ response to the EU Pilot application that the measures approved in the 2016 appendix will be implemented over an area of 5 100 hectares, which represents 58% of the Białowieża Forest District and 8% of the area of the Natura 2000 Puszcza Białowieska site. In that regard, the Commission notes that, in their reply to the reasoned opinion, the Polish authorities indicated that, following inclusion of the reference areas, the area of application of the 2016 appendix will extend over 3 401 hectares, that is, 5.4% of the area of the Natura 2000 Puszcza Białowieska site. The Commission points out that the measures thus implemented will in fact have a much greater impact, since the Polish authorities have themselves acknowledged that the operations aimed at preventing the spread of the spruce bark beetle will cover a total area of 34 000 hectares, whereas the reference areas on which those measures will not be implemented cover 17 000 hectares. In those circumstances, the Commission takes the view that the impact of those measures on environmental protection cannot be presented as being insignificant, in particular since, by setting in the 2012 FMP a volume of harvestable timber of 63 471 m<sup>3</sup> until 2021, the competent authorities had, after assessing the environmental impact, established a balanced level of harvesting in the light of the conservation objectives of the Natura 2000 site.

80. The Commission considers that at no point in the decision-making process have the Polish authorities taken account of the reservations made and opinions issued by scientific bodies. In that regard, the 2015 environmental impact assessment was based, on the one hand, on an erroneous method, since it does not refer to the specific objectives of conservation of habitats and animal species which were the subject matter of the 2015 PZO and, on the other hand, on an assessment dating from 2012, and it focused on stands colonised by the spruce bark beetle. Nor does that assessment determine what is meant by the integrity of the Natura 2000 site at issue or indicate how the planned operations are likely adversely to affect it. In the Commission’s view, there is a risk that the proposed forest management operations will be implemented without sufficient consideration of the conservation needs and objectives of those habitats and species. In addition, the 2016 appendix was not adopted on the basis of updated information, since, in order to have a better knowledge of the places where those species are distributed, the Polish authorities carried out in 2016 a survey of the site, the results of which were not definitive when the reasoned opinion was issued.

81. In support of the latter argument, the Commission recalls that, according to the case-law of the Court, 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. (22) Consequently, the Republic of Poland has infringed Article 6(3) of the Habitats Directive, if only for the simple reason that the Minister for the Environment, in approving the 2016 appendix, could not be certain that the operations provided for in that appendix would not have any adverse effects on the integrity of the Natura 2000 Puszcza Białowieska site. It also follows that no measure can remedy the infringement of that provision, even in the event that it is subsequently established that there were no adverse effects, since the requirements for the adoption of a positive decision were not fulfilled when the appendix was approved.

82. The Commission submits that, accordingly, the establishment of ‘reference areas’ on 33% of the territory of that Natura 2000 site cannot be regarded as a measure mitigating the adverse effects of implementation of the 2016 appendix. First, those areas were not subject to the environmental impact assessment carried out in 2015. Secondly, the establishment of those areas does not make it possible to prevent or reduce the adverse effects caused by implementation of the appendix. They merely preserve the prior situation in part of the Białowieża Forest District, but do not limit the adverse effects resulting from the operations provided for in the 2016 appendix on the rest of the territory of that district, which covers a larger area. The ‘reference areas’ were, moreover, designated arbitrarily. In fact, since the designation of such areas does not affect the maximum total volume of timber extraction determined in the appendix, the establishment of those areas results in an intensification of felling in the rest of the territory of the Białowieża Forest District.

83. Furthermore, the Commission points out that it is possible to derogate from the exclusion of those areas, since paragraph 4(b) of Decision No 52 allows the accepted limitations in those reference areas to be disregarded and Decision No 51 orders the felling and removal of dry trees and trees of all age classes colonised by the spruce bark beetle without taking into account those areas.

84. By its second complaint, the Commission submits that the Republic of Poland has failed to fulfil its obligations under Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive by implementing the active forest management operations provided for in the 2016 appendix and in Decision No 51.

85. It argues that, in accordance with Article 4(1) and (2) of the Birds Directive, for the bird species in Annex I to that directive which resulted in the designation of an SPA and for the migratory species not listed in that annex, Member States are required to adopt special conservation measures concerning their natural habitat in order to ensure their survival and reproduction in their area of distribution. The maintenance of the habitats of the Natura 2000 Puszcza Białowieska site at a favourable conservation status concerns, in accordance with Article 4(1) of the Birds Directive, in particular, the following species: the honey buzzard, the white-backed woodpecker, the three-toed woodpecker, the pygmy owl, the boreal owl, the red-breasted flycatcher and the collared flycatcher. The stock dove is among the migratory species referred to in Article 4(2) of that directive.

86. The Commission points out that the objective of the Birds and Habitats Directives is to permit the maintenance or restoration of the habitats of those species at a favourable conservation status and not merely to prevent their extinction. The argument that intensification of felling is in accordance with the provisions on the conservation of birds, since the minimum number of pairs of woodpeckers is maintained on the site at issue, is therefore unfounded.

87. The Commission further argues that the mere inclusion of the conservation measures for the Natura 2000 Puszcza Białowieska site in the 2015 PZO, with no real possibility of applying them, is not sufficient to regard the obligation to establish the necessary conservation measures, provided for in Article 6(1) of the Habitats Directive, as having been fulfilled. To ‘establish’ implies that those measures can be effectively applied and thus have a practical effect. That interpretation also applies to Article 4(1) and (2) of the Birds Directive.

88. However, the implementation of active forest management operations, such as felling, sanitary pruning and reforestation, in habitats in respect of which maintaining their conservation status formally excludes such activities, by treating them in the same way as threats, infringes conservation measures advocating, in particular, ‘excluding from forest management operations all stands of a species in which at least 10% of the specimens are over a century old’, ‘preserving dead trees’ and ‘preserving all dead centenarian spruce trees until they are completely mineralised’. In that regard, the locations where those operations are planned coincide with the sites of the centuries-old forest stands and the habitats of the saproxylic beetles, primarily the flat bark beetle and *Boros schneideri*. Moreover, the tripling of forest harvesting by 2021 and the removal of the trees which it entails are contrary to the conservation measures and will render them ineffective. Those operations are, by their nature, threats to natural habitats and the habitats of species of birds and saproxylic beetles, as identified in Annex 3 to the 2015 PZO.

89. Therefore, those operations not only reinforce those threats, but also further complicate implementation of the conservation measures established in the 2015 PZO. They are also likely to have an adverse impact on the general conservation status of certain species of saproxylic beetles, in particular the false darkling beetle and the goldstreifiger beetle, in Poland and Europe, while the Natura 2000 Puszcza Białowieska site is one of their last or one of their most important areas of distribution in the European Union.

90. By its third complaint, the Commission submits that the Republic of Poland has failed to fulfil its obligations under Article 12(1)(a) and (d) of the Habitats Directive by implementing the forest management operations provided for in the 2016 appendix and in Decision No 51, since they do not enable the avoidance of deterioration or destruction of breeding sites or resting places of the saproxylic beetles included in Annex IV(a) to that directive, namely the flat bark beetle, the goldstreifiger beetle, the false darkling beetle and *Pytho kolwensis*, and consequently constitute a serious threat to their survival.

91. Article 12 of the Habitats Directive requires Member States both to adopt a comprehensive legislative framework and to implement concrete measures to halt the decline of populations of the species listed in that annex. A system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature, such as to enable the effective avoidance of deterioration or destruction of breeding sites or resting places of those species. (23)

92. The Commission argues that all species of saproxylic beetles covered by that strict protection need, during their life cycle, dying or dead trees, whether standing or on the ground. Various scientific studies confirm that dead spruces form the major habitat of the flat bark beetle and are of paramount importance in its life cycle. Two or three years after the death of a spruce tree or at a later stage of its decomposition, the tree is occupied by other species of saproxylic beetle, including *Pytho kolwensis* and the false darkling beetle. Also, the intensification of felling of stands, especially of spruce trees, and the removal of dead wood and dying trees colonised by the spruce bark beetle leads to the death of those strictly protected species and to the destruction of their breeding sites and their resting places. Since those species which live in the stumps and under the bark of trees are not very visible, it is impossible to choose effective palliative measures such as selective felling, for example. The only relevant measure likely to prevent deterioration of the breeding sites or resting places of those species is non-intervention in habitats where they are known to be present.

93. The prohibitions in Article 12 of the Habitats Directive are absolute, irrespective of the number and presence of specimens of animal species which must be subject to strict conservation measures. The widespread presence of the flat bark beetle cannot therefore justify an intensification of forest management operations likely to lead to an infringement of those prohibitions. Moreover, the false darkling beetle is an extraordinarily rare species for which there are only four known habitats in Poland, two of which are in the Białowieża Forest District, to the extent that the loss of a single habitat could have a considerable adverse effect on the maintenance of its conservation status in Europe. As for the goldstreifiger beetle, it is present in Poland only on the Natura 2000 Puszcza Białowieska site. Finally, that site is the last and also the most important habitat of *Pytho kolwensis* in Poland, bearing in mind that it is otherwise present in the European Union only in Sweden and Finland.

94. By its fourth complaint, the Commission submits that the Republic of Poland has failed to fulfil its obligations under Article 5(b) and (d) of the Birds Directive by failing to establish a general conservation scheme capable of preventing, in particular, the deliberate destruction of the nests and the disturbance on the Natura 2000 Puszcza Białowieska site of the white-backed woodpecker, the three-toed woodpecker, the pygmy owl and the boreal owl, which species are included in Annex I to that directive.

95. The Commission argues that, like Article 12 of the Habitats Directive, Article 5 of the Birds Directive requires Member States not only to establish a comprehensive legislative framework, but also to take specific and detailed conservation measures, including effective enforcement measures. Those rules stem from the obligation to halt effectively the decline of those bird species. However, it is clear that the significant intensification of timber extraction in habitats of vital importance for the breeding and resting of species naturally occurring in the wild state on the Natura 2000 site at issue increases the risk of destruction of their nests and deliberate disturbance, including during their breeding season.

96. The Natura 2000 Puszcza Białowieska site is the most important area in Poland where the white-backed woodpecker and the three-toed woodpecker are present. Dying and dead trees, in particular centenarian spruce trees, are the most important feeding and breeding places for those two species of woodpeckers. The removal of thousands of trees colonised by the spruce bark beetle would result in the deliberate destruction of the habitats of those woodpeckers as well as a large-scale disturbance of those species. In that regard, the Polish authorities have not adduced any evidence that those two species of woodpeckers benefit from intensification of tree felling in their habitats, whereas it is, on the contrary, likely to accelerate the decline of those species. Moreover, there is no data indicating whether, after the end of the spread of the spruce bark beetle, the population of those woodpecker species is likely to recover to a greater or lesser degree. It would be decades before the planting of young spruce trees returned the habitat to a condition favourable to woodpeckers such as that of the ancient stands, particularly the centuries-old ones. Finally, it is necessary to take into consideration that spruce trees regenerate themselves in areas affected by the spruce bark beetle, without the need for human intervention.

97. The Commission further argues that the dying and dead trees are also important nesting sites for the pygmy owl and the boreal owl, which depend on the presence of cavities formed by woodpeckers. The large-scale removal of spruce trees colonised by the spruce bark beetle is a major factor in the destruction of their breeding area. The Natura 2000 Puszcza Białowieska site is one of the densest ranges of the pygmy owl and the boreal owl. The fact that the pygmy owl concentration there is greater than its average concentration in Poland does not justify active management operations which are likely to disturb specimens and destroy nests of that species.

98. It is also apparent from the information obtained that the removal and felling took place during the breeding season of the four woodpecker and owl species at issue. The 2016 appendix and Decision No 51 authorise felling without any temporal restrictions. An infringement of the prohibition on disturbing those species during the breeding season therefore cannot be ruled out.

## ***2. The Republic of Poland***

99. On the first complaint, alleging infringement of Article 6(3) of the Habitats Directive, the Republic of Poland argues, first, with regard to the status of the 2016 appendix, that the 2012 FMP, like that appendix, is a ‘management plan’ for the purposes of Article 6(1) of the Habitats Directive. According to the Republic of Poland, the FMP is a technical tool for the implementation of the PZO. Since the PZO makes no reference to a volume of timber extraction in the territory of the various forest districts, but indicates only the locations of the operations necessary for the conservation needs of species and habitats, its application is not possible in the absence of a FMP. The Republic of Poland states, next, that the strategic environmental impact assessment carried out in 2015 showed that implementation of the forest management measures in the 2016 appendix would not have any negative impact on the protected species and habitats of the Natura 2000 Puszcza Białowieska site, or on the coherence and integrity of that site.

100. In the present case, the need to increase the volume of harvestable timber referred to in the 2012 FMP arises, in particular, from the impossibility of fully implementing the conservation measures referred to at that time in the draft PZO. The 2016 appendix thus makes it possible to achieve the conservation tasks of limiting the spread of the spruce bark beetle. In that regard, it should be pointed out that the level of logging referred to in the 2016 appendix, namely 188 000 m<sup>3</sup>, is well below the levels set out in the FMPs for the periods 1992-2001 (308 000 m<sup>3</sup>) and 2002-2011 (302 000 m<sup>3</sup>). The Commission does not explain why a much higher level of logging was previously acceptable in the light of the conservation objectives of that Natura 2000 site.

101. With regard to the Commission's argument that the absence of any adverse impact of the 2016 appendix on the integrity of the Natura 2000 Puszcza Białowieska was not assessed, the Republic of Poland states that, in accordance with the Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko (Law on access to information relating to the environment and its protection, on public participation in environmental protection and on environmental impact assessments) of 3 October 2008, (24) a strategic assessment of the environmental impact of that appendix was necessary, given that the Regional Director of Environmental Protection, Białystok, considered it likely that implementation of that appendix could have a potential impact on the Natura 2000 Puszcza Białowieska site. Therefore, the 2016 appendix could be authorised only after ensuring that the planned operations would not have a negative impact on that site. Accordingly, following the environmental impact assessment, the first draft of the appendix, concerning a logging volume of 317 894 m<sup>3</sup>, was rejected because of the negative opinion of the Regional Director of Environmental Protection, Białystok. Logging was finally limited to 129 000 m<sup>3</sup> in the 2016 appendix, after a new assessment which showed that there would not be a significant negative impact on the integrity of the site. Consequently, as the Commission acknowledged, an assessment was carried out. The 2016 appendix even had a significant positive impact, at least in the medium term, on a number of elements referred to in the 2015 PZO, since the change in the volume of harvesting was essential for implementing the conservation measures provided for in the PZO. Furthermore, the 2016 appendix does not provide for the deliberate killing or capture, or even disturbance, of animals. The current conservation status of breeding sites and resting places is preserved, in accordance with the provisions of the 2015 PZO.

102. The Republic of Poland also submits that the Commission in fact incorrectly presumed that the measures listed in the 2016 appendix contained in themselves a risk of adverse effects on the integrity of the Natura 2000 Puszcza Białowieska site. In that regard, the Commission failed to take into account, together with the strategic assessment of the impact of the 2016 appendix carried out in accordance with Article 6(3) of the Habitats Directive, all the empirical data and scientific and historical documents relating to that Natura 2000 site, as well as the most important aspect of that Natura 2000 site. This is that the integrity of the Natura 2000 Puszcza Białowieska site has been shaped for centuries by human activities, through the effect of sustainable harvesting of the forests. In particular, the status and percentage coverage of the habitats and species present when the PLC200004 Puszcza Białowieska site was designated as part of the Natura 2000 network are the result of the previous harvesting of the Białowieża Forest, namely the extraction of timber from forest stands planted in the past. In fact, it is the drastic reduction, under pressure from the Commission, of logging in ageing forest stands in the 2012 FMP which led to a die-back of forest stands, in particular of spruce trees. The interruption in the sustainable management of Białowieża Forest resources encouraged the spread of the spruce bark beetle. Subsequently, protected habitats began to undergo changes. For example, oak-hornbeam forests, that is to say the dominant habitat, started to be converted into bogs or meadows. The Polish authorities therefore drew up a remediation programme to address the spread of the spruce bark beetle, having as its starting point an overall survey of the state of the habitats and species of the Natura 2000 Puszcza Białowieska site, the results of which were not yet available when the defence of the Republic of Poland was submitted. In that context, the adoption of the 2016 appendix is an attempt to return to the former method of management.

103. In those circumstances, it is the interruption of the conservation measures which threatens the integrity of that Natura 2000 site and the continuity of the habitats found there. The Commission therefore

committed an error in basing its decision on the primary nature of the Białowieża Forest and asserting that the species present in that forest are species typical of areas undisturbed by man. For example, a species such as the marsh fritillary (*Euphydryas aurinia*), which was present in the past because of the regular livestock grazing, is no longer present now that such grazing no longer takes place.

104. The choice of active forest management is also made in other Member States. For example, in the Republic of Austria a programme was established to limit the spread of the spruce bark beetle in national parks and on land having a high nature value, in the context of which the prohibition on carrying out works was maintained in 'biodiversity centres', while forests were simultaneously protected from neighbouring production by using forest management techniques. It is generally recommended that land on which natural processes are protected, such as national parks, be clearly divided into an intervention-free area and peripheral areas in which operations to limit the spread of the spruce bark beetle will be carried out. By creating such reference areas, the Republic of Poland implemented the same approach. Moreover, according to the Republic of Poland, even if forest management operations do have negative effects on the size of woodpecker populations, their impact is limited, since it was possible to maintain the number of woodpeckers at a relatively high level, in accordance with the PZO for the Natura 2000 Puszcza Białowieska site. Furthermore, contrary to the Commission's submissions, the establishment of reference areas could in no way be regarded as an acknowledgment of the existence of a negative environmental impact caused by the operations taking place or as an attempt to mitigate the effects of such an impact.

105. The Republic of Poland also argues that the operations provided for in the 2016 appendix are consistent with the 2015 PZO. In accordance with that plan, management operations, such as felling and pruning prior to felling, are excluded in stands of a species in which at least 10% of the specimens are over a century old. In those forest stands only sanitary pruning is carried out in order to eliminate spruce wood colonised by the spruce bark beetle. Dry wood is not removed. In addition, no sanitary pruning is carried out in nature reserves and in boggy and wetland habitats. The areas which are not covered by sanitary pruning represent 7 123 hectares, or 58% of the area of the Białowieża Forest District. The Republic of Poland points out that the fact that the operations provided for in the 2016 appendix concerned only 5.4% (3 401 hectares) of the area of the site at issue was taken into consideration in deciding to implement those operations. In those circumstances, the environmental impact assessment carried out in 2015, under Article 6(3) of the Habitats Directive, found that the potential threat identified in the 2015 PZO and linked to the removal of dead and dying trees could not materialise.

106. The Republic of Poland also points out, with regard to saproxylic beetles, that dead pines, which constitute the habitat of the goldstreifiger beetle, will not be removed. As for flat bark beetle populations, they are concentrated on aspen and ash, according to studies conducted between 2016 and 2017 in which nearly 12 000 trees were analysed.

107. In that regard, the Republic of Poland argues that the survey carried out since April 2016 is the first project of that nature, in which various constituent elements of biodiversity have been objectively assessed and statistically verified over 1 400 areas distributed within a regular network covering the entire Białowieża Forest site. In the case of *Boros schneideri*, the most important threat is the decline of pines in the SPA of the national park in particular. The most serious threat to *Pytho kolwensis*, the false darkling beetle and *Rhysodes sulcatus* results from interruption of the continuing flow of large pieces of dead wood caused by the rapid die-back of older spruce stands on account of the spread of the spruce bark beetle.

108. Moreover, the implementation of felling related to the removal of dead spruce trees has a positive impact on the habitat of the hermit beetle and the goldstreifiger beetle, by increasing access to light in the forest. As for the other species (the flat bark beetle, *Boros schneideri* and *Rhysodes sulcatus*), spruce is not their favourite habitat. At present, in the Białowieża Forest, there is an average of about 64 m<sup>3</sup> of dead wood per hectare. Having regard to the continuous emergence in the landscape of dead wood, that element fully ensures the safety of the habitats of the beetle species at issue. The Republic of Poland states that, in the course of the strategic environmental impact assessment process, the impact of the planned operations on all protected elements within the Natura 2000 Puszcza Białowieska site was evaluated.

109. According to the Republic of Poland, it is also necessary to take into account the reference areas, which are in no way intended to offset or mitigate the allegedly negative impact of the active management operations at issue. Those areas were established in accordance with the principle of sincere cooperation, referred to in Article 4(3) TEU, for the purpose of comparison with other areas of the Białowieża Forest. Moreover, those reference areas were by no means delineated at random. Their location is linked to the conservation status of the natural habitats and the absence of any necessity to carry out any conservation tasks arising from the 2015 PZO. Nor can the Commission criticise the Polish authorities for having failed to carry out an environmental impact assessment in relation to the reference areas. If such reasoning were followed, the same criticism should be made concerning the interruption of harvesting throughout the Białowieża Forest sought by the Commission.

110. In that regard, the Commission is mistaken when it considers that inaction has a positive impact on biodiversity. Thus, the results of the survey carried out since April 2016 show that, for example, in the strict protection zone of the Białowieża National Park only one colony of *Boros schneideri* was observed to be present, while in the territory of the Forest Districts of Białowieża, the presence of 70 such colonies was observed. A similar situation exists for a whole series of other species.

111. With regard to consideration of the best scientific knowledge available, the Republic of Poland points out that, according to its interpretation of that concept, it referred to the specific circumstances of the case, considering all the positions and taking into account the constraints inherent to the site concerned. It also considered the data resulting from the strategic environmental impact assessment before implementing the conservation measures. Since the process concerned is a dynamic one, knowledge is continually being acquired.

112. In that regard, the Republic of Poland states that the Białowieża Forest is an ecosystem which is so specific and unique that the results of the studies on interdependence between different organisms carried out in other ecosystems cannot simply be transposed to the situation in that forest. Although the Republic of Poland acknowledges that part of the scientific community is opposed to the treatment of the spread of the spruce bark beetle by the felling of affected trees, it points out that there is also a series of scientific works according to which the absence of a response to the spruce bark beetle in the Białowieża Forest actually results in a high probability of serious and irreparable harmful effects to the natural habitats and habitats of the animal species for the conservation of which the Natura 2000 Puszcza Białowieska site was designated. It also cites a publication (25) according to which ‘it is clear from the multi-year studies carried out at the permanent study areas of Białowieża National Park that strict protection should be only a supplement to and not the main element of the strategy for conserving and maintaining a high level of biodiversity’.

113. With regard to the second complaint, alleging infringement of Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive, the Republic of Poland argues that the 2016 appendix is consistent with the 2015 PZO, which corresponds to implementation of the obligation to establish the necessary conservation measures, in accordance with Article 6(1) of the Habitats Directive. The 2016 appendix constitutes the practical implementation of those conservation measures. It ensures the maintenance or restoration, at a favourable conservation status, of the natural habitats or habitats of species for which the Natura 2000 Puszcza Białowieska site was designated. Failure to implement those measures would result in the degradation of protected valuable natural habitats.

114. Thus, the active conservation measures set out in the 2015 PZO for the habitat ‘sub-continental oak-hornbeam forests’ include, in particular, adapting the composition of the forest stand in a manner which is consistent with the natural habitat in forest stands dominated by aspen, birch, pine and, more rarely, spruce. Those measures also include forest tending and conservation aimed at discovering and tending to isolated seedlings and trees of hardwood species. Those measures were directly transposed into the 2012 FMP. However, implementation of those active conservation measures is correlated with the extraction of bulk timber.



115. The Commission's assertions that there is no basis to the argument concerning the maintenance of the population of the species concerned at the level indicated in the 2007 standard data form ('the SDF') and in the 2015 PZO is contrary to basic 'ecological knowledge' and common sense. If the quantitative level of each protected species on a given Natura 2000 site were to increase constantly beyond the level indicated in the SDF, the outcome would be an unpredictable disruption of the ecological system in the area concerned. The issue of the acceptable level would then arise.

116. The quantitative changes observed in a section of the populations of protected species in the Białowieża Forest are the result of increased access to food, linked to a short-term disturbance, namely the large-scale spread of the spruce bark beetle. In the longer term, the natural consequence of that situation is an abrupt decline. The size of the three-toed woodpecker and white-backed woodpecker populations remains at a relatively high level. There is no abrupt quantitative change at the boundaries of the national park, as the spread of the spruce bark beetle is not on a large scale there. That situation is the result of both the small proportion of spruce trees in those forest stands and the different nature of the forest habitats. It follows that, in habitats having different parameters which affect the propensity of those habitats to be subject to a large-scale spread of the spruce bark beetle, dynamic equilibrium may be maintained through selected forest management measures.

117. Nor are the 2016 appendix and Decision No 51 liable to have an adverse impact on the conservation status of certain species of saproxylic beetle. The danger to species such as the false darkling beetle and the goldstreifiger beetle essentially results from limiting and suppressing the effects of fires. Other species such as, for example, the flat bark beetle and *Boros schneideri* find good development conditions in the Białowieża Forest. With regard to *Boros schneideri*, the long-term threat arises from the failure to renew pine trees in Białowieża National Park.

118. With regard to the third complaint, alleging infringement of Article 12(1)(a) and (d) of the Habitats Directive, the Republic of Poland submits that all the saproxylic beetle species present on the Natura 2000 Puszcza Białowieska site need, during their life cycle, dead or dying trees and that it is impossible to establish whether they are present in their larval stages without jeopardising that habitat. To ensure an appropriate state of protection, the Polish authorities adopted a system of long-term conservation of habitat continuity for those species in the form of a network of forest plantation islets in reserves and areas of protection around the protected species, on wet habitats, in the reference area, and where dead trees are permanently and naturally present in all stands in Białowieża Forest. The effectiveness of that operation is demonstrated by the results of the survey carried out in 2016 by the Instytut Badawczy Leśnictwa (Forest Studies Institute, Poland).

119. According to the Republic of Poland, it is clear from those results that the flat bark beetle is a common species throughout the Białowieża Forest site, which is less likely to occupy spruce than other tree species, and for which dead and dying trees are not an essential habitat. With regard to *Boros schneideri*, those results establish that it is a species preferring pine, for which dead or dying spruce trees are not an essential habitat, and which is also widespread in the whole of the Białowieża Forest. The only monitored location in the Białowieża Forest of *Rhysodes sulcatus* is the Białowieża National Park. All the locations of the false darkling beetle are in the Natura 2000 Puszcza Białowieska site, the key area being in Białowieża National Park. Moreover, the locations in harvested forests, defined on the basis of historical information, are in the reference area. Furthermore, the essential cause of the disappearance of the false darkling beetle is the absence of burned wood. Similarly, the presence of *Pytho kolwensis* has not been reported outside that national park. By contrast, the activity of the spruce bark beetle could threaten the continuity of the areas occupied by that species, namely dead, old and felled spruce trees in wet habitats. Finally, as for the goldstreifiger beetle, the primary cause of its disappearance in Europe is the absence of old pine trees that have died following fires, which constitute its preferred habitat. Because of the lack of renewal of pine in the national park, the future of that species can be ensured only in harvested forests, in which pine has been artificially renewed.

120. For all those reasons, the operations provided for in the 2016 appendix do not have a significant negative impact on the population of those species. The maintenance of those species goes hand in hand

with the continuity of certain habitats resulting from disturbances, such as fires. Otherwise, only active protection interventions would be capable of preserving the habitat of those species.

121. With regard to the fourth complaint, alleging infringement of Article 5(b) and (d) of the Birds Directive, the Republic of Poland argues that the strategic assessment of the environmental impact of the 2016 appendix showed that the measures necessary to establish a general system of protection for all species of naturally occurring birds in the wild state had been adopted, including a prohibition on deliberately destroying or damaging their nests and their eggs or removing their nests or deliberately disturbing them, in particular during their breeding and rearing periods, in so far as the disturbance has a significant effect in the light of the objectives of the Habitats Directive. It is apparent from the stock numbers of the four bird species referred to by the Commission, found to be present on the Białowieża Forest site, based on the data contained in the SDF, that neither the presence nor the way of life of any of those species is threatened. Moreover, the Polish authorities undertook to maintain at least 60 pairs of each of those species. Furthermore, on the Natura 2000 sites in Poland as a whole, it is possible to find stock numbers of the two species of woodpeckers which are greater than those contained in the SDF.

122. In particular, the value of the global abundance index of forest bird populations has increased by 25% over the course of the 2000-2014 period. In accordance with the forestry principles and the forest conservation guidelines in force, the negative effects of commercial activities on biodiversity are limited. Thus a policy of leaving old clumps of trees in clearings, conserving biocenotic trees, carrying out complex pruning, leaving seed-producing plants in clearings and using natural regeneration as much as possible is beneficial to birds. Those principles are applied in all forest districts of the Forestry Office. It is clear from certain studies that sanitary pruning generally has no negative impact on cavity nesters and other forest species of vertebrate animals.

123. According to the Republic of Poland, the positive impact of a large-scale spread of the spruce bark beetle on the survival and reproduction of woodpeckers can only be temporary because, in the long term, it will lead to the disappearance of the oldest layers of bog peat. The available data indicate a loss of diversity and a decline in the stock numbers of species inhabiting hollow trees in circumstances where tree mortality is 70 to 100% in coniferous forests. By contrast, in mixed forests, the negative effects on conifer mortality are present to a lesser extent. The constant reduction in the spread of the spruce bark beetle may be a factor in maintaining a relatively stable situation with regard to woodpecker populations.

124. The Republic of Poland also argues that the phenomenon of the collapse of carnivore populations on account of the scarcity of food is a scientific fact. The Commission did not present any scientific data calling into question the presented scenario of a transformation of the environment after the spread of the spruce bark beetle. It is only the scale of the transformation that is impossible to envisage, that is to say the scale which would make it possible to ascertain whether the decline in the stock numbers of species benefiting from the spread of a specific insect species will be limited to a return to the population level before the spread or whether, in view of the disappearance of food and the impossibility for the bark beetle to affect other trees, the stock of woodpeckers following that decline will be lower than that described in the conservation objectives of the site in the plan of protection activities.

125. The Commission disregards the fact that the natural processes occurring on Natura 2000 sites are long-term processes. A permanent limitation of the spread of the spruce bark beetle, that is to say a limitation of its territorial coverage or the maintenance of a high proportion of spruce in the stands, may be an active protection operation which maintains a relatively stable situation in relation to woodpecker populations, from a long-term perspective. Despite potential negative effects on woodpecker populations caused by the forest management operations involved, the population size remains at a relatively high level, in accordance with the 2015 PZO, and any changes in the bird species' ranges arising from predictive models of climate change are spread over a period of time. Consequently, the final effect of the temporary operations implemented using forest management methods may make it possible to remedy the previous significant decline in woodpecker stock numbers.

126. With regard to the pygmy owl, the loss of breeding areas due to the removal of spruces on 5% of the site is illusory. That species, which nests in cavities hollowed out by woodpeckers, generally the great spotted woodpecker (*Dendrocopos major*), a species with large stock numbers, does not show any preference as to the species of tree in which it reproduces. Furthermore, the pygmy owl is often present in degraded environments. Thus it is more frequently present in the developed part of the Białowieża Forest than in the reserve beyond the forest environment, which means the objective of the 2015 PZO can be attained, even though the survey during the 2016 season revealed an uneven distribution in the Browsk Forest District as compared with the other two forest districts. Similarly, the boreal owl is a species which often occupies cavities hollowed out by the black woodpecker (*Dryocopus martius*). The removal of spruce trees on 5% of the Natura 2000 Puszcza Białowieska site may therefore be regarded as having no impact on the stock numbers inhabiting the Białowieża Forest.

127. Furthermore, according to Finnish data, forest management through the clearing of areas, provided that the felled portion does not exceed 50% of the forest area from a long-term perspective, not only has no negative impact on those species but, by increasing accessibility to food, leads to increased reproduction. In addition, the populations of those species increase in size and spread to new areas. The positive aspects of forest management are referred to as being among the causes of that phenomenon. So-called 'biocenotic' trees, including hollow trees, are left upon their biological death. As a result, the potential nesting sites of pygmy owls and boreal owls remain accessible, especially since the 2015 PZO provides for operations to 'conserve, during management interventions, all pines and firs with apparent cavities, except where there is a danger to the public'.

#### **IV. My analysis**

128. After examining the admissibility of the present action for failure to fulfil obligations, I shall propose that the Court consider together the first and second complaints raised by the Commission and then, also together, the third and fourth complaints, which depend on the first two.

##### ***A. Admissibility of the action***

129. The Republic of Poland challenged, in its written observations, the admissibility of the second, third and fourth complaints of the action for failure to fulfil obligations, on the ground that the Commission, in its application, expanded the subject matter of the dispute in the light of what was put forward during the pre-litigation phase and, more particularly, in the reasoned opinion.

130. It is common ground that the pre-litigation phase related only to the decision taken by the Polish authorities when the reasoned opinion was sent, namely the 2016 appendix concerning the forest management measures limited to the Białowieża Forest District, whereas the action for failure to fulfil obligations covers the entire Natura 2000 Puszcza Białowieska site and thus concerns the three Forest Districts of Białowieża, Browsk and Hajnówka, in which the forest management measures were extended by Decision No 51 of 17 February 2017.

131. However, the Court has already had occasion to state that the subject matter of the dispute may be extended to events causing the failure to fulfil obligations which took place after the reasoned opinion was delivered in so far as they are of the same kind and constitute the same conduct as the events to which that opinion referred, in order to infer that an action is admissible(26)

132. In the present case, it is clear from the documents before the Court that the measures taken by the Polish authorities in the 2016 appendix and in Decision No 51 are of the same kind, in that they consist in authorising the felling and removal of trees with the aim, in particular, of combating the spread of the spruce bark beetle throughout the Natura 2000 Puszcza Białowieska site.

133. Accordingly, even though the reasoned opinion of 28 April 2017 refers only to the 2016 appendix, approved on 25 March 2016, relating to forest management measures limited solely to the Białowieża

Forest District, the Commission's application, which also relates to Decision No 51 of 17 February 2017, must be declared admissible, since that decision extended to the other Forest Districts of Browsk and Hajnówka implementation measures of the same kind and constituting the same conduct. (27)

## ***B. Merits of the action***

134. As a preliminary point, it must be pointed out that the subject of the dispute cannot be concerned with whether forests of the Natura 2000 Puszcza Białowieska site are primal or natural, since it is common ground that the site was, on a proposal of the Republic of Poland, classified as an SCI under the Habitats Directive (28) by Decision 2008/25, adopted by the Commission on 13 November 2007, and also constitutes an SPA for birds designated in accordance with the Birds Directive. In addition, official quantitative data, which serve as a reference in the discussions concerning the habitats and species present in those areas, were provided by the Republic of Poland in the SDF. Thus the Habitats and Birds Directives are applicable to the dispute, regardless of the classification of the forests of the Natura 2000 Puszcza Białowieska site, and must provide the framework for forest management on that site.

135. The present action again gives the Court the opportunity to clarify the obligations arising from those directives, more particularly according to whether the plans or projects fall within the scope of Article 6(1) or Article 6(3) of the Habitats Directive.

### ***1. The first and second complaints***

136. By its first and second complaints, the Commission argues that the Republic of Poland has failed to fulfil its obligations under Article 6(1) and (3) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive.

137. In order to assess the merits of those two complaints, the Court will have to decide whether the forest management operations at issue fall within the scope of Article 6(1) or Article 6(3) of the Habitats Directive and whether, by adopting and implementing the forest management measures contained in the decisions at issue, the defendant actually established the conservation measures laid down by Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive.

138. The Republic of Poland first argued that the measures contained in the 2016 appendix and Decision No 51 constitute conservation measures within the meaning of Article 6(1) of the Habitats Directive, before also taking the view, it seems in the alternative, that those measures may fall within Article 6(3).

139. However, one classification of the decisions at issue excludes the other. While Article 6(1) of the Habitats Directive provides that Member States are to establish the necessary conservation measures for special areas of conservation, Article 6(3) lays down conditions relating to plans or projects not directly connected with or necessary to the management of the protected sites but likely to have a significant effect thereon, either individually or in combination with other plans or projects. Moreover, the Court has already had occasion to rule on the respective scope of those provisions.

140. It should therefore be borne in mind from the outset that, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as favourable when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future. Accordingly, in that context, the Court has held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host those natural habitat types. (29) As regards, more particularly, Article 6 of that directive, the Court has ruled, in the absence of detailed provisions in that provision, that it imposes upon the Member States a series of specific obligations and procedures designed to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation(30)

141. The Court has also stated that the provisions of Article 6 of that directive must be construed as a coherent whole in the light of the conservation objectives set out, since Article 6(2) and Article (3) are designed to ensure the same level of protection of natural habitats and habitats of species, while Article 6(4) constitutes merely a provision derogating from Article 6(3). (31)

142. It is therefore in the light of those principles that it is necessary to classify the measures provided for in the 2016 appendix and in Decision No 51, which include in particular the felling and removal of dead or dying trees.

143. In that regard, it must be borne in mind, first, that it is common ground that the forest districts concerned by those measures are special areas of conservation and SCIs, designated by the Republic of Poland, where the necessary conservation measures must be applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site was designated, for the purposes of the Habitats Directive. (32)

144. Secondly, it is likewise common ground that the measures at issue resulted in the loss of part of the forest stands. (33) It follows that such measures, by their very nature, cannot constitute measures ensuring the conservation of the Natura 2000 site concerned. However, the Republic of Poland relies on particular circumstances, namely an unprecedented spread of the spruce bark beetle, likely to have an adverse effect on the integrity of that Natura 2000 site, to justify the decisions taken from 2016.

145. However, it follows from the terms of the dispute that scientific controversy remains as to whether the measures thus undertaken, on the one hand, will have an effect on the spread of the spruce bark beetle and, on the other hand, constitute an appropriate method of conserving the protected habitats. In that regard, it may be noted that the remediation programme of 25 March 2016, entitled ‘Programme relating to the Białowieża Forest as Cultural and Natural Heritage of Unesco and a Natura 2000 Network Site’, expressly mentions the differences of opinion on that point.

146. Moreover, although the Polish authorities adopted a PZO in 2015 laying down the measures necessary for the conservation of the Natura 2000 Puszcza Białowieska site, it is clear from the documents before the Court that, contrary to the contentions of the Republic of Poland, the 2016 appendix cannot constitute the practical implementation of the PZO, since it provides for measures which are considered by that PZO to be potential threats to the conservation of protected habitats and species. It follows from the Commission’s observations, and this point is not disputed by the Republic of Poland, that, although the spread of the spruce bark beetle was not identified as an existing or potential threat to the maintenance at a favourable conservation status of the natural habitats and habitats of animal and bird species referred to in Annex 3 to the PZO, the removal of spruces colonised by the spruce bark beetle is expressly regarded in that appendix as a potential threat to the maintenance at a favourable conservation status of the habitats of the pygmy owl, the boreal owl and the three-toed woodpecker, and in particular to the protection of those species.

147. Thus, the measures resulting from the 2016 appendix and from Decision No 51 cannot be regarded as implementing the 2015 PZO. Paradoxically, they may even have the effect of rendering the latter ineffective or even of allowing the Polish authorities to disregard the requirements it lays down. (34)

148. It follows that such measures can in no way be regarded as conservation measures within the meaning of Article 6(1) of the Habitats Directive. It follows that the Republic of Poland did not implement the measures necessary for the conservation of the Natura 2000 Puszcza Białowieska site following the adoption of the 2015 PZO. In those circumstances, I must propose that the Court hold that the Republic of Poland has failed to fulfil its obligations under both Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive and consequently rule that the second complaint raised by the Commission is well founded.

149. The first complaint raised by the Commission must nevertheless be examined by the Court, since the Republic of Poland also argued that the forest management measures provided for in the 2016 appendix

represented plans or projects, within the meaning of Article 6(3) of the Habitats Directive, for the purpose of the adoption of which it had carried out an environmental impact assessment of those measures in 2015.

150. In order to determine whether the measures in the 2016 appendix and Decision No 51 were adopted and implemented in accordance with the requirements set out in Article 6(3) of the Habitats Directive, it seems appropriate to point out, first, that that provision establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. (35)

151. Secondly, as the Court has pointed out, that provision prescribes two stages. The first requires that the Member States carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on the site concerned. (36) In particular, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of that site(37)

152. The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the appropriate assessment described in the preceding point of this Opinion, allows the intended plan or project to be authorised only on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of that directive.(38)

153. The Court has accordingly held that, in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of that directive, the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying its designation in the list of SCIs, in accordance with the directive.(39)

154. It is important to bear in mind, moreover, that the Court held that the assessment carried out under Article 6(3) of the Habitats Directive cannot 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 works proposed on the protected site concerned. (40) It has also been held that that appropriate assessment of the implications of the plan or project for the site concerned implies that all the aspects of the plan or project which can, either individually 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(41)

155. The Court has also noted that, as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future. (42)

156. It must therefore be examined in the light of that case-law whether the facts justifying the action are sufficiently substantiated. In my view, it follows from a simple review of the chronology of the decisions at issue and the logic of the supporting documents that the assessment required by Article 6(3) of the Habitats Directive could not have been carried out.

157. In the first place, it is clear from the documents before the Court that, shortly before the adoption of the 2016 appendix amending the 2012 FMP, the Polish authorities had adopted the 2015 PZO, which shows that the felling and removal of trees colonised by the spruce bark beetle represented a potential threat with regard to the conservation of the Natura 2000 site concerned.

158. Although it is clear from the discussions at the hearing that a balance needs to be struck between active management measures and passive management measures aimed at combating the spread of the spruce bark beetle in order to fulfil the conservation objectives referred to in the Habitats and Birds Directives, there is no provision whatsoever for such a balancing exercise in Decision No 51, in that it allows implementation of the forest stand felling and removal measures without restriction.

159. Moreover, it is clear from the information provided by the Republic of Poland that, on the very day of the adoption of the 2016 appendix, the Polish authorities also adopted a remediation programme, entitled ‘Programme relating to the Białowieża Forest as Cultural and Natural Heritage of Unesco and a Natura 2000 Network Site’, the main purpose of which was, as confirmed at the hearing, to assess the prospective impact of the measures taken on conservation of the site, by establishing, inter alia, reference areas within which no forest management measures were to be implemented.

160. In the second place, although the Republic of Poland argued, in its written observations and at the hearing, that the spread of the spruce bark beetle from 2012 to 2015 was due to the reduction in harvesting volumes decided when the 2012 FMP was adopted, it nonetheless appears from the evidence on the file that the harvesting volumes recorded from 2012 to 2015 were identical to those of the previous years and that the volume of timber extracted from the Białowieża district in fact remained stable during that period. Accordingly, it cannot be validly argued that the spread of the spruce bark beetle is due to the reduction in the volumes of timber harvested from 2012 to 2015.

161. In the third place, although the Polish authorities argue that they carried out an appropriate assessment of the implications of the 2016 appendix for the integrity of the Natura 2000 Puszcza Białowieska site, in accordance with the provisions of Article 6(3) of the Habitats Directive, it is clear from the documents before the Court that that assessment actually took place in 2015 but was concerned only with the measures provided for in the 2016 appendix, relating solely to the Białowieża Forest District, and not therefore with those in Decision No 51 adopted on 17 February 2017 for the purpose of extending, geographically and quantitatively, the tree felling and removal measures throughout the three forest districts of the Białowieża Forest. It should therefore be found that there has been no assessment of the impact of the forest management measures adopted in Decision No 51 on the conservation and integrity of the Natura 2000 Puszcza Białowieska site as a whole. Similarly, it is by no means apparent from the documents before the Court that any cumulative effects of the 2016 appendix and Decision No 51 were considered and assessed by the Polish authorities. (43)

162. Moreover, it is clear from the very terms of that assessment of the impact of the 2016 appendix on the integrity of the Natura 2000 Puszcza Białowieska site that it was conducted on the basis of data from 2012 and not on the basis of updated data relating to 2015, as is required, however, by Article 6(3) of the Habitats Directive, as interpreted by the Court. (44) Indeed, it is stated in point 4.2 of that document that ‘the provisions relating to the impact on the Natura 2000 site in the “environmental impact assessment” for 2012-2021 must not, in principle, be updated. However, it should be noted that the operations will primarily relate to degraded forest stands’.

163. Finally, it follows from the written observations of the Republic of Poland that a survey of biodiversity on the Natura 2000 Puszcza Białowieska site was still in progress when the last decision at issue was adopted and during the pre-litigation phase.

164. In the light of all those factors, the Polish authorities cannot be regarded as having ensured, even if only on the day of approval of the 2016 appendix, that the measures which it contained would have no impact on the integrity of that Natura 2000 site, which is a sufficient basis for finding that the first complaint is well founded.

165. However, I shall also point out the justification, in my view, for dismissing the other arguments put forward by the Republic of Poland. First, it should be recalled that, according to the case-law of the Court, the assessments of the implications of plans or projects on the integrity of the sites concerned must be carried out in the light of the best scientific knowledge available when the decision is made(45)

Nevertheless, it is clear from the documents before the Court and from the discussions at the hearing that, when the decisions at issue were adopted, there was continuing scientific controversy concerning the most appropriate methods for halting the spread of the spruce bark beetle. It should be noted, moreover, that that difference in scientific opinions even related to the desirability of combating the spread of the spruce bark beetle, (46) and that, according to some, this was a case of a natural cycle corresponding to periodic trends specific to the characteristics of the site whose preservation was the objective justifying its designation in the list of SCIs and as an SPA.

166. Nor, for those reasons, can it be validly argued that the environmental impact assessment carried out before the adoption of the measures at issue fulfilled the requirements arising from Article 6(3) of the Habitats Directive, as interpreted by the Court.

167. Secondly, the Court has held that Article 6(3) of that directive also integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered by the authorities competent to authorise implementation of the measures those plans or projects contain. In that regard, the Court held that a less stringent authorisation criterion than that laid down in that provision could not ensure as effectively the fulfilment of the objective of site protection intended under that provision. (47) The application of that principle in the context of the implementation of Article 6(3) of that directive requires the competent authority to assess the implications of the project for the site concerned in view of the conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects caused by the project, in order to ensure that it does not adversely affect the integrity of the site. (48)

168. In the present case, that assessment could not be finalised in the light of the continuing scientific controversy, the survey measures still in progress on the day the decisions were adopted and the objective pursued by Decision No 52 of establishing reference areas with the aim, according to the oral observations made by the Republic of Poland at the hearing, of evaluating changes in the characteristics of the Natura 2000 Puszcza Białowieska site in the absence of any human intervention.

169. Since, at the time when the decisions at issue were adopted, the reality and the seriousness of the potential risks of adversely affecting the conservation and integrity of that Natura 2000 site had not been fully identified, assessed and, where appropriate, ruled out, the Polish authorities could not adopt either the 2016 appendix or Decision No 51, without also infringing the precautionary principle.

170. Thirdly, as regards Article 6(4) of the Habitats Directive, relied on by the Republic of Poland by reason of the public safety issues which allegedly required the adoption of the decisions at issue, it must be borne in mind that, as a derogation, that provision must be interpreted strictly and can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3)(49)

171. In order to determine the nature of any compensatory measures to be taken, the adverse effects on the site concerned must be precisely identified. Knowledge of the effects of a plan or project, in the light of the conservation objectives relating to the site at issue, is an essential prerequisite for the application of Article 6(4) of the Habitats Directive, since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to that site by the plan or project under consideration.(50)

172. Thus, in accordance with Article 6(4) of the Habitats Directive, in the event that, in spite of a negative assessment conducted in accordance with the first sentence of Article 6(3) of that directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and where there are no alternative solutions, the Member State concerned is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. Accordingly, in such a situation, the competent authority can, where appropriate, only



grant authorisation under Article 6(4) of that directive provided that the conditions set out therein are satisfied. (51)

173. In the present case, it follows both from the foregoing observations on the failure to comply with the prior assessment stage, based on the provisions of Article 6(3) of the Habitats Directive, and from the absence of other particular documents in the case file, that the Polish authorities have not assessed the use of measures alternative to or compensating for (52) the forest management measures adopted and implemented on the basis of the 2016 appendix and Decision No 51. Accordingly, it may also be concluded that, although the Polish authorities relied on reasons of public safety in order to justify the adoption and implementation of the measures at issue, the negative effects of which are therefore implicitly acknowledged, the requirements relating to the derogations in Article 6(4) of the Habitats Directive were not complied with.

174. For all of the foregoing reasons, I must propose that the Court hold that the first complaint raised by the Commission is well founded, as is the second, since, by failing to comply with the requirements of Article 6(3) of the Habitats Directive and by implementing the measures adopted, which cannot constitute a conservation plan within the meaning of Article 6(1) of that directive, the Polish authorities have failed to fulfil their obligations under those provisions and Article 4(1) and (2) of the Birds Directive.

## ***2. The third and fourth complaints***

175. By its third and fourth complaints, the Commission argues that the Republic of Poland has also failed to fulfil its obligations under Article 12(1)(a) and (d) of the Habitats Directive and Article 5(b) and (d) of the Birds Directive, which requires the Court to consider whether the forest management operations at issue are liable to result in the deterioration or destruction of the breeding sites of the species of saproxylic beetles and wild birds specifically protected by those directives.

176. The foregoing findings and considerations concerning the first and second complaints lead me to conclude that the forest management operations at issue are necessarily liable to result in a deterioration of the breeding sites of the protected species living on the Natura 2000 Puszcza Białowieska site.

177. Accordingly, I propose that the Court should hold that third and fourth complaints raised by the Commission are well founded.

178. Consequently, it follows from all the foregoing that I propose that the Court should declare that, by adopting and implementing the forest management measures contained in the 2016 appendix and in Decision No 51 without satisfying itself that those measures will not adversely affect the integrity of the Natura 2000 Puszcza Białowieska site, and by failing to ensure the conservation and protection of the protected habitats and species, referred to in the Commission's application, for which that site was designated as a site of Community interest and an SPA, the Republic of Poland has failed to fulfil its obligations under 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.

## **V. Costs**

179. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has claimed that the Republic of Poland should be ordered to pay the costs and the Republic of Poland has been unsuccessful, it must be ordered to pay the costs.

## **VI. Conclusion**

180. In the light of the foregoing considerations, I propose that the Court should:

- (1) Declare that, by adopting and implementing the forest management measures contained in the Annex to the Białowieża Forest District Forest Management Plan of 9 October 2012, approved on 25 March 2016 by the Minister Środowiska (Minister for the Environment, Poland), and Decision No 51 of the Dyrektor Generalny Lasów Państwowych (Director-General of the Forestry Office, Poland) of 17 February 2017 concerning the felling of trees affected 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 of Białowieża, Browsk and Hajnówka, without satisfying itself that those measures will not adversely affect the integrity of the Natura 2000 PLC200004 Puszcza Białowieska site, and by failing to ensure the conservation and protection of the protected habitats and species, referred to in the Commission's application, for which that site was designated as a site of Community interest and a special protection area, the Republic of Poland has failed to fulfil its obligations under Article 6(1) and (3) and Article 12(1)(a) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Article 4(1) and (2) and Article 5(b) and (d) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds;
- (2) Order the Republic of Poland to pay the costs.

---

[1](#) Original language: French.

---

[2](#) Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as most recently amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) ('the Habitats Directive').

---

[3](#) Directive 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').

---

[4](#) Translation into English is not available.

---

[5](#) Council Directive of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

---

[6](#) Translations into English are not available.

---

[7](#) OJ 2008 L 12, p. 383.

---

[8](#) *State of Europe's Forests 2015*, Forest Europe, 2015, Annex 8, Table No 28, p. 274.

---

[9](#) 'The Forestry Office'.

---

[10](#) As is apparent from Annex 1 to the decision of the Dyrektor Generalny Lasów Państwowych (Director-General of the State Forestry Office, Poland) of 31 March 2016 ('Decision No 52').

---

[11](#) EU Pilot File No 2210/11/ENVI.

---

[12](#) The limits for the Browsk Forest District were set at 214 218 m<sup>3</sup> and for the Hajnówka Forest District at 192 291 m<sup>3</sup>.

---

[13](#) A ‘PZO’.

---

[14](#) Białowieża National Park is subject to a separate PZO, adopted on 7 November 2014 by the Minister for the Environment.

---

[15](#) The pre-litigation procedure started from 7 April 2016, see point 54 et seq. of this Opinion. According to the Commission, that decision was published only in June 2017 in *Biuletyn Informacyjny Lasów Państwowych* (Bulletin of the Forestry Office) No 6 (294).

---

[16](#) ‘Decision No 51’.

---

[17](#) EU Pilot File No 8460/16/ENVI.

---

[18](#) Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland* (C-441/17 R, not published, EU:C:2017:622).

---

[19](#) Order of 20 November 2017, *Commission v Poland* (C-441/17 R, EU:C:2017:877).

---

[20](#) In paragraph 118, the Court stated that ‘if there is found to be an infringement, [it would] order the Republic of Poland to pay to the Commission a periodic penalty payment of at least EUR 100 000 per day, from the date of notification of [that] order to the Republic of Poland until such time as that Member State complies with [that] order or until final judgment ... is delivered’.

---

[21](#) Order of the President of the Court of 11 October 2017, *Commission v Poland* (C-441/17, not published, EU:C:2017:794).

---

[22](#) Judgment of 26 April 2017, *Commission v Germany* (C-142/16, EU:C:2017:301, paragraph 42).

---

[23](#) Judgment of 9 June 2011, *Commission v France* (C-383/09, EU:C:2011:369, paragraphs 18 to 21).

---

[24](#) Dz. U. 2008, No 199, heading 1227.

---

[25](#) B. Brzeziecki, ‘Wieloletnia dynamika drzewostanów w Puszczy Białowieskiej (w warunkach ochrony ścisłej)’ (‘Multi-year dynamics of forest stands in the Białowieża Forest (under strict protection conditions)’), *Stan ekosystemów leśnych Puszczy Białowieskiej*, Centrum Informacyjne Lasów Państwowych, Warsaw, 2016, pp. 45 to 58.

---

[26](#) Judgments of 4 February 1988, *Commission v Italy* (113/86, EU:C:1988:59, paragraph 11), and of 9 November 2006, *Commission v United Kingdom* (C-236/05, EU:C:2006:707, paragraph 12).

---

[27](#) See, by analogy, judgment of 5 April 2017, *Commission v Bulgaria* (C-488/15, EU:C:2017:267, paragraph 46).

---

[28](#) See, in particular, recitals 1, 8 and 9 and annex to that decision (p. 645), attributing to that site the SCI code PLC200004 Puszcza Białowieska.

---

[29](#) Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraphs 37 and 38), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraphs 35 and 36).

---

[30](#) Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 36), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 31).

---

[31](#) Judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 32 and the case-law cited).

---

[32](#) See definitions in Article 1(k) and (l) of that directive.

---

[33](#) See point 52 of this Opinion.

---

[34](#) It may even be maintained that declaring the measures resulting from the 2016 appendix and from Decision No 51 consistent with the 2015 PZO would be tantamount to accepting that the Polish authorities may amend that PZO without taking into account the conservation objectives which such an act must normally fulfil.

---

[35](#) Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 28), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 43).

---

[36](#) Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 29), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 44).

---

[37](#) Judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 20), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 45).

---

[38](#) Judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 46).

---

[39](#) Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 39), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 47).

---

[40](#) Judgments of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 100); 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 and the case-law cited).

---

[41](#) Judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 51 and the case-law cited).

---

[42](#) Judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 52 and the case-law cited).

---

[43](#) See, by way of illustration of that requirement, judgment of 26 April 2017, *Commission v Germany* (C-142/16, EU:C:2017:301, paragraphs 61 and 62).

---

[44](#) See judgment of 26 April 2017, *Commission v Germany* (C-142/16, EU:C:2017:301, paragraph 42).

---

[45](#) Judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 51 and the case-law cited).

---

[46](#) See, to that effect, in particular, the remediation programme, entitled ‘Programme relating to the Białowieża Forest as Cultural and Natural Heritage of Unesco and a Natura 2000 Network Site’, drawn up by the Minister for the Environment and the Director-General of the Forestry Office on 25 March 2016.

---

[47](#) Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraphs 41 to 43 and the case-law cited), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 53 and the case-law cited).

---

[48](#) Judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 28); of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 54); and of 26 April 2017, *Commission v Germany* (C-142/16, EU:C:2017:301, paragraph 34).

---

[49](#) Judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 35), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 60 and the case-law cited).

---

[50](#) Judgments of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraphs 114 and 115), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 61 and the case-law cited).

---

[51](#) Judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 37), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 63).

---

[52](#) Other than the installation of pheromone traps the inefficiency of which has been noted.