

New paths of research in the European Commission's compliance practice: the example of Poland

Karolina Boiret, *University of Warsaw*

ORCID ID: 0000-0002-9488-2205

Abstract

The article explores the potential for new research into issues of state non-conformity as a result of increasing euro-skepticism in Europe. Relying on the Polish example, it suggests that a new attitude towards the EU has arisen which escapes traditional classifications and warrants a rethinking of established theories on sources of non-compliance. This attitude gives new context to the Commission's existing enforcement practice and calls for a fresh look at its compliance instruments not only with respect to infringement cases but also in its dispute with Poland over the rule of law principle where the conduct of both parties seems to be symptomatic of their more general approaches.

Keywords: European Commission, non-compliance, enforcement, Poland, sanctions, rule of law

Nowe kierunki badań nad praktyką kontrolną Komisji Europejskiej na przykładzie Polski

Streszczenie

Celem artykułu jest zaproponowanie nowych kierunków badań w obszarze kontroli przestrzegania prawa UE przez państwa członkowskie wobec rosnącego w Europie eurosceptyzmu. Artykuł proponuje na przykładzie Polski, że uformował się nowy sposób prowadzenia polityki unijnej, który wyrywa się tradycyjnym klasyfikacjom i wymaga przemyślenia istniejących teorii nt. źródeł naruszeń państw. Skutkuje to koniecznością rewaluacji dotychczasowej praktyki kontrolnej KE i niesie ze sobą potrzebę nowego spojrzenia na stosowane przez Komisję procedury, metody i narzędzia kontroli nie tylko względem naruszeń prawa EU, ale również w sporze dotyczącym zasady praworządności, gdzie zachowania obu stron są symptomatyczne dla ich ogólnej praktyki.

Słowa kluczowe: Komisja Europejska, naruszenia państw członkowskich, procedury przestrzegania prawa UE, Polska, sankcje, praworządność

The past few years have brought a gradual shift in the political make-up of Europe where euro-skeptical political parties have grown visibly in strength. In some EU Member States, they have already won elections while in another effectively pushed for its exit¹. This ongoing change brings multiple questions concerning its context, impact and outcome, each of significance to many different aspects of the EU's operation, including state compliance.

Euro-skepticism tends to go in pair with criticism of EU obligations and, from there, non-compliance is just one step away, providing a vivid means of demonstrating a Member State's negative outlook. A national authority's will to conform to EU law is thus linked to the attitude that it exhibits towards the Union and, neglected or inappropriately addressed, can have far-reaching consequences for the European project. To what extent non-compliance is indeed coupled with euro-skepticism and how responsive and effective are the Commission's strategies with respect to defiant violations are two questions that immediately come to mind in that context, especially that the Commission alone has the power to "make it or break it" by being too lenient, too harsh or simply arrogant and off-putting, and it isn't immediately obvious which of the approaches presents the safest and most effective solution. Hence, what is needed nowadays is, in particular, a fresh look at issues of state non-compliance and the Commission's enforcement practice from the perspective of this spreading EU antagonism present across many national political parties.

The purpose of this article is, therefore, to explore the potential for new research within the area of the Commission's enforcement and in the context of recent changes in the political make-up of Europe. The article, therefore, does not in itself seek to provide answers but rather to outline the direction which research into state non-compliance should be taking nowadays.

Main theories of non-compliance and corresponding tools

The political science research into reasons behind state non-compliance on the international arena has led to the development of two main theories. The enforcement theory (Olson 1971; Downs et al. 1996) proposes that states make the choice to violate international law when the estimated costs of applying a given norm offset the benefits. The management theory (Chayes, Chayes 1995) proposes that states do not chose to violate international law and when non-compliance takes place it is rather due to circumstances existing outside their control such as unclear legal provisions or political and economic capacity limitations. According to this theory states have a natural inclination towards effectiveness and the pursuit of common interests while the enforcement theory assumes that national interests take precedent over international if the stakes are high enough.

¹ As of the date of writing this article (August 2019), the Brexit Withdrawal Agreement (2018), negotiated and endorsed by all EU Member States and the UK Government, has not yet been ratified by the UK Parliament. The United Kingdom is expected to leave the EU on 31 October 2019 with or without the Agreement.

Interestingly, both theories had been initially perceived as contradictory but their mutual complementarity was eventually acknowledged and since then they have been treated as two equally valid explanations of state non-compliance (Tallberg 2002; Conant 2012).

Understanding the reasons behind state infractions is beneficial because – as both theories agree – different motives require different solutions and a properly selected measure can go a long way in ensuring state compliance considering that states are sovereign entities with the power to both further and damage international cooperation. Hence, the enforcement theory proposes that – since states perceive their international obligations in terms of costs and benefits – their infractions should be combated by means of coercive measures (e.g. sanctions) because they increase the costs. On the other hand, the management approach suggests that – since state infractions stem from difficulties and limitations instead of bad will – they can be prevented (clarification, simplification, transparency, capacity-building) and, if not, informal and problem-solving methods (cooperation, dialogue) should suffice as Member States have a natural predisposition for cooperation and, given the opportunity, conform.

The European Commission in its compliance practice relies on methods drawn from both theories. On the one hand, it has at its disposal coercive measures (Court of Justice infringement proceedings, financial sanctions under Article 260 TFEU, special Treaty and non-Treaty infringement procedures) and, on the other, it resorts to a wide spectrum of preventive tools (transposition guidelines, expert groups, administrative cooperation) as well as amicable and conciliatory problem-solving methods (EU Pilot, pre-litigation procedure under Article 258 TFEU, “package meetings”, dialogue and negotiation) (European Commission 2007). It can be questioned whether the Commission applies these enforcement and managerial instruments in accordance with the conditions presented in the aforementioned theories, but recent behavior of Poland towards the EU bring another question, if the theories themselves have managed to keep up with the evolving world and if they should not be supplemented by a new type of non-compliance sources and a new set of tools.

Intentional violations of EU law

Before this potential new approach to (non-)compliance can be presented, it is first necessary to have a closer look at the way state non-conformity is seen by the enforcement theory as it involves the notion of intent on the part of state authorities. This is not to say that unintentional violations do not take place in Poland but rather that the intent to transgress is what lies at the core of this potential new development in non-compliance patterns.

Intentional violations of EU law are nothing new and Member States have been attempting to bend rules in their favor since the beginning of the Communities. According to the enforcement theory states infringe international law deliberately when the benefits of non-compliance offset the costs so when the protection of a national interest or

a specific interest group (e.g. farmers, fishermen)² is seen as more important than the consequences of non-conformity. This suggests that when a Member State intentionally violates EU law, the ensuing dispute – as a general rule – pursues a specific goal (benefit), has a material explanation (even if erroneously interpreted or exaggerated) and – whether by means of threats or sanctions (the cost) – the infringing government can be reasoned with. This does not mean that exceptions do not take place but rather that Member States are rational entities which do not resort to non-compliance without a subjectively-justifiable motive and at least try to keep the problem contained, preventing it from “spilling over” to other issues which would invite more costs.

Furthermore, intentional violations can have different levels of severity depending on the interest at stake and can take different forms such as when Member States feign ignorance and shift blame onto errors and misinterpretations (so-called ‘evasion’)³ or when they do not hide behind excuses and, instead, openly refuse to comply or make public announcements of intent (‘defiance’)⁴, the latter being more rare as it brings more costs (Krislov et al. 1986: p. 64).

According to the enforcement theory, such intentional infractions should be combated by means of coercive measures as they increase the costs but it is not certain whether the Commission indeed follows this reasoning in practice, and further research into the subject would be welcome. Since the future of the EU is dependent not only on the Member States’ fulfillment of their EU obligations but also on their overall desire to participate and further the European project, combating high-stakes violations must be a little like walking on eggshells where the Commission has to ensure conformity without alienating the transgressing Member State. With that in mind, I propose a hypothesis that when the Commission encounters defiance it actually delays formal Treaty procedures, resorting in the first place to informal and amicable measures such as negotiations and dialogue and keeping coercive measures as a means of last resort; in other words, it begins slow and progressively turns up the heat. As will be indicated later, this is how the Commission has also approached the rule of law dispute with Poland but it can be questioned whether this was the right choice and if the Commission had not made the mistake of applying old theories to a new type of conflict.

A new approach towards the EU?

The current political situation in the European Union (EU) is asking for a reevaluation of theories concerning the character and background of intentional state violations of EU law particularly in terms of rationality of state conduct. Due to a shift of the Polish political scene in 2015 marked by the coming to power of the Law and Justice political

² E.g. C-304/02 (Judgment of the Court 2005) and C-265/95 (Judgment of the Court 1997).

³ This is particularly visible with respect to violations of Articles 34 and 36 TFEU.

⁴ E.g. C-1/00 (Judgment of the Court 2001) and 42/82 (Judgment of the Court 1983). The fact that the majority of examples of serious non-compliance disputes concerns France is an interesting research problem in itself.

party (*Prawo i Sprawiedliwość* – PiS), a new approach towards the EU seems to be emerging. The Polish government stands out nowadays by having both an overall negative perception of the European project and a strong focus on internal matters at the cost of its position on the European arena and conflict with EU institutions. Its methods of conducting politics as well as its hierarchy of goals have also evolved, making it an inflexible, unpredictable and unprofessional partner that is hard to reason with, which – as will be indicated later – is also visible in its (non-)compliance practice.

Poland nowadays firmly believes in the supremacy of national goals (regularly identified with the interests of the governing party) and treats the European Union at the very least as an inconvenience and at worst as an enemy. As a result, it does not shy away from conflict and lacks genuine will to work together and find a mutually satisfactory solution. It may appear on the surface as desiring cooperation but it does not strive for compromise and its idea of a satisfactory solution boils down to the EU withdrawing, as is most apparent with the rule of law dispute discussed further. To be fair, Poland does sometimes concede, but only when it is pressed against the wall and not before putting up a fierce fight. This general inflexibility and close-mindedness makes Poland a tough partner in negotiations.

Furthermore, Poland's behavior on the EU arena is now marked by occasional unpredictability when trivial goals (such as petty squabbles) take precedent over more crucial and/or beneficial interests. This was, for example, the case during the elections of the European Council's President in 2017 when Poland alone voted against the Polish candidate Donald Tusk achieving the infamous voting quota of 1:27 simply because he had been the Law and Justice party's political opponent for many years. The image Poland had back then projected to the world by ostentatiously refusing to support a Polish candidate so wholesomely supported by everyone else was without doubt detrimental to its interests in the EU and yet this was the path chosen, suggesting that the governing party's hierarchy of goals no longer corresponded to what is generally accepted in the EU.

Finally, the Polish method of conducting dialogue is nowadays based on relying on weak and unsubstantiated claims while disregarding the EU's substantial arguments, transforming meaningful dialogue into a conversation between deaf parties. Polish politicians rely nowadays on *ad hominem* accusations against the representatives of the EU.⁵ They also tend to disseminate inaccurate information about easily-verifiable facts⁶ and

⁵ This is visible especially with respect to the First Vice-President of the European Commission Frans Timmermans who – in the dispute over the rule of law – has been accused inter alia of being biased and partial by Prime Minister Beata Szydło (Bos-Karczewska 15.01.2016), lying and living in an ivory tower by Minister of Foreign Affairs Witold Waszczykowski (Wielišński 17.02.2017), and lacking knowledge and being driven by political considerations by Minister of Justice Zbigniew Ziobro (Kospa 12.01.2016).

⁶ For example, Prime Minister Mateusz Morawiecki said in the European Parliament in 2018 in defense of unconstitutional reforms of the Polish Supreme Court which sought to replace many of the Court's judges by illegally reducing their terms of office, that during the communist martial law in Poland in years 1981-1982 these same judges had condemned his 'comrades in arms' to 10 years of prison. Facts, however, prove that not only was the Prime Minister 13 years old during martial law but also none of the few judges (8 on almost a 100) who were indeed adjudicating during that time had condemned political opponents to 10 years of prison (Czuchnowski 6.07.2018).

rely on false claims and non-existent evidence. For example, Minister of Foreign Affairs Witold Waszczykowski told the press that the re-election of Donald Tusk as President of the European Council in 2017 (infamous 1:27 vote) had been a fraud and that the Minister had at his disposal "expert opinions which demonstrated that the nomination of Tusk could be challenged on the basis of EU law" (TVN24 27.03.2017), thus accusing the heads of all EU Member States of fraud. Suffice to say that no such opinion has ever been put forward.

A new approach to (non-)compliance?

This aforementioned behavior suggests a changing approach to the EU and it is also visible with regard to issues of compliance, where Poland does not always respect the authority of the Court of Justice (CJEU), lacks the will to cooperate with the European Commission and sometimes even disregards established case-law and practice.

Probably one of the most telling examples concerns the Polish widespread logging of trees in *Puszcza Białowieska*, one of the last primeval forests in Europe, designated as a Natura 2000 site. Holding the felling of trees to be contrary to EU law, the Commission brought in 2017 infringement proceedings against Poland before the Court of Justice (case C-441/17) and applied for interim relief which was provisionally granted a week later by the Vice-President of the CJEU, ordering Poland to cease its logging of the forest. Poland, however, continued with the felling of trees as before. The result was such that the Court of Justice, for the first time in the history of the EU's interim relief, had doubts whether Poland would adhere to the final order on interim relief and had to threaten it with a periodic penalty payment of at least 100 000 euros per day to ensure the measure's effectiveness (Order of the Court 2017).⁷ The looming sanction did compel Poland to cease the logging but the authorities still waited until the last day before complying, having everyone doubt whether they would comply at all, and demonstrating how unpredictable and persistent they had become.

Another example concerns the application made by the Polish Chief Prosecutor (and Minister of Justice) Zbigniew Ziobro in 2018 to the Polish Constitutional Tribunal asking whether Article 267 TFEU was compatible with the Polish Constitution in so far as it permits a national court to make a preliminary reference to the European Court of Justice in cases concerning the shape, organization and procedures of a Member State's judiciary. This application constituted a reaction to a couple of preliminary references made by the Polish Supreme Court with respect to new reforms of the Polish judiciary involving such issues as irremovability and independence of judges (compulsory retirement of Supreme Court judges in case C-619/18 discussed further – Judgment of the Court 2019) as well as non-discrimination on the basis of age in case C-563/18 (*Sąd Okręgowy* 2018). By asking for a ruling on the incompatibility of Article 267 TFEU with the Polish Constitution, the Minister of Justice was contesting the jurisdiction of the Court of Justice and,

⁷ Poland eventually lost this case (Judgment of the Court 2018b).

according to commentators, sought to partially exclude Poland from the preliminary reference procedure and, in the long run, bring about a so-called "Polexit" (Gazeta.pl 17.10.2018, Wilgocki 17.10.2018). On another occasion, Minister Ziobro challenged the independence of the Court of Justice by stating publicly that it was carrying out the desires of the Commission's Vice-President Frans Timmermans because the date for the opinion of Advocate General in the aforementioned case C-619/18 concerning compulsory retirement of the Supreme Court judges (Judgment of the Court 2019) was scheduled not long before the elections to the European Parliament (Gazeta.pl 12.02.2019).

These examples do not only suggest diminished professionalism and unpredictability on the part of the Polish authorities which, by now, have proven themselves capable of making unsubstantiated accusations as long as they fall on fertile soil. These examples also demonstrate the spill-over effect where a dispute over the Polish Supreme Court leaks into other areas such as the very essence of the preliminary reference procedure. Most of all, however, these examples seem to be symptomatic of a larger trend of the authorities not caring about how Poland is perceived by its partners nor shying away from sparking even the most unfounded conflicts with the EU. As a result, while all intentional violations stem from the desire to oppose the EU, the Polish examples differ in that respect that they more frequently pursue unclear goals, are based on weak arguments, do not constitute measures of last resort, tend to unnecessarily spill-over to other areas and are often fiercely defended irrespective of the size and nature of their benefits.

It should be noted, however, that a fair share of these public defiant statements are just bravado: a lot is said and a bit less done.⁸ This, however, does not necessarily have to negate the hypothesis that a new approach to compliance is emerging. Because even if the Polish authorities ultimately conform to the CJEU's decision or withdraw from the most far-reaching and unlawful measures, they tend to do so after a long battle, under widespread intensive pressure and in the face of consequences they are not ready to bear. This means that they are capable of compromise but their overall unpredictability makes it difficult to foresee when it will happen. Also, too many layers of conflict have already been initiated with the EU to exert such strong pressure in each case as this would not only be difficult to execute, it would also devalue itself.

The above examples suggest that further research into the behavior of Polish authorities would be beneficial in order to confirm whether there indeed emerges a new approach to (non-)compliance marked by unprofessionalism, unpredictability and inflexibility. Should this be established then the question of adequateness of the Commission's compliance tools comes to mind. These methods are, after all, based on the presumption that Member States either weigh the benefits of infractions against the costs or that they can be reasoned with by means of substantial evidence. The Commission's compliance instruments do not take into account the possibility that a Member State may choose disproportionately larger costs over benefits or that it may equate data and facts with random unsubstantiated claims.

⁸ For example, the application to the Constitutional Tribunal regarding the compatibility of Article 267 TFEU was eventually withdrawn.

This problem also concerns the formal infringement procedure under Article 258 TFEU where it is difficult to predict state reactions to unfavorable Court's judgements if state authorities do not recognize the benefits of membership and do not care to ensure their place among the remaining Member States. In that context, it would also be beneficial to ponder the consequences of failure to comply with a Court of Justice judgement imposing financial penalties. Whereas this remains a purely hypothetical option, the situation in Poland indicates that one can no longer entirely exclude the possibility of a Member State refusing to recognize the binding nature of inconvenient legal provisions or Court judgments. Coercive measures have so far worked against Poland but that was because the majority of the Polish population remains pro-EU and the government seems to fear crossing a certain threshold that would send an unambiguous message about its desire to quit the European project⁹. It cannot, however, be ensured that this popular support will continue unaltered, and it would be worth pondering what the Commission or even the EU as a whole could do to ensure cooperation from such governments.

The rule of law and Poland

The unpredictability, unprofessionalism and inflexibility of Polish authorities as well as the accompanying contested adequateness of the Commission's compliance tools can also be observed with respect to the dispute over the rule of law from Article 2 TEU. Since the parliamentary elections of 2015, Poland has adopted a number of laws reforming the Polish judicial system which encroach on the independence of the judiciary and the separation of powers and over which the European Commission has been waging a losing battle, possibly because it had failed to properly evaluate Poland's motives in the first place.

The reforms and their implications are so extensive and complex¹⁰ that it would take more than this article to properly recount every questioned provision adopted by Poland.¹¹ However, to give an example of how these encroachments were brought about, it is worth looking at the Polish Constitutional Tribunal which was the first of the judicial bodies subjected to reform.

Soon after the parliamentary elections in autumn 2015, the new parliament nominated three judges to the Polish Constitutional Tribunal without a valid legal basis (so-called

⁹ When the main figureheads of the governing party (PiS) are asked whether they are advocating a so-called 'Polexit', they deny it but their behavior and speeches are frequently so antagonistic and critical that they are interpreted by commentators and experts as covert eagerness to leave (Burakowski 17.10.2018). For example, the President of Poland Andrzej Duda called the EU an "imaginary community with little relevance to Poland", talked of how Poland no longer had any influence over its own matters and compared the EU to the partitions of Poland from the XVIIIth century when the country had been invaded and divided among its neighbors, losing its sovereignty for over a hundred years (Bartkiewicz 14.03.2018).

¹⁰ The Commission's four rule of law recommendations to Poland contain a detailed account of all important decisions taken by the Polish authorities in relation to the Polish judicial system, including the Commission's assessment how these decisions were contrary to the rule of law (European Commission 2016a, 2016b, 2017a, 2017b).

¹¹ See more: Barcz, Zawidzka-Łojek 2018.

'substitutes'¹²) in place of another three judges who had been lawfully nominated by the previous parliament a few months before.¹³ The Polish Constitutional Tribunal ruled (Wyrok 2015) this new nomination unconstitutional, alongside some other amendments to its operation and procedures (Ustawa 2015/2217; Wyrok 2016). However, neither of the judgements was implemented while the latter (Wyrok 2016) was not even published as the Polish Prime Minister Beata Szydło (being in charge of the Polish Official Journal) concluded that "it was not a judgement" (Pietruszka 21.03.2016).

The Commission reacted quickly to these actions of the Polish authorities asking them already in December 2015 about the Polish constitutional situation. In January 2016 it launched the Rule of Law Framework and in July 2016, after six months of unsuccessful dialogue, sent Poland its first recommendation (European Commission 2016a) where it found that "there was a systemic threat to the rule of law in Poland" because "the Constitutional Tribunal [was] prevented from fully ensuring an effective constitutional review". The recommendation also enumerated the measures Poland was expected to take, including the publication and implementation of the Tribunal's judgements (Wyrok 2015; Wyrok 2016). The Polish authorities disagreed on all points and did not announce any new measures to "alleviate the rule of law concerns" (European Commission 2016b: Preamble 17).

Despite this failure, as long as Andrzej Rzepliński was the President of the Constitutional Tribunal, the unlawfully nominated judges (aforementioned 'substitutes') were prevented from adjudicating. However, once his term ended in autumn 2016 new President Julia Przyłębska was appointed by the parliament and she allowed the 'substitutes' to sit in benches and decide on judgements. Furthermore, the parliament adopted three new laws governing the functioning of the Constitutional Tribunal repeating in them a number of provisions considered unconstitutional in the unpublished judgement from 2016 (Wyrok 2016). This time, however, the Constitutional Tribunal with its new composition declared these provisions compatible with the Polish Constitution (Wyrok 2017). It stated that the government had had the right to evaluate the unpublished judgment from 2016 and refuse its publication, and that the nomination of the three 'substitutes' in place of the other three judges lawfully nominated had, in fact, been legal. What's more, this new judgement of 2017 was issued by two of the three¹⁴ 'substitutes', which means that they ruled in their own case in contrast to the principle *nemo iudex in causa sua*.

The Polish authorities had thus paid little attention to the Commission's first rule of law recommendation of June 2016 (European Commission 2016b) and, with constitutional review no longer independent, promptly moved onto the remaining judicial bodies. Over the course of only two years (2016-2017), "more than 13 consecutive laws have been

¹² The press in Poland has dubbed them 'dublerzy' which roughly translates into 'substitutes'.

¹³ There had, in fact, been five judges nominated by the previous parliament (No. VII) but the Constitutional Court declared the nomination of two judges out of five unlawful (as it was premature by a few months). The subsequent parliament (No. VIII) was, therefore, supposed to nominate only the remaining two but, instead, it nominated a whole new five.

¹⁴ Only two of three so-called 'substitutes' sat on this judgement because the third had by then passed away.

adopted affecting the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the national Council for the Judiciary, the prosecution service and the National School of Judiciary.¹⁵ The common pattern of all these legislative changes [was] that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies" (European Commission 2017b: para. 173).

These reforms were adopted and implemented in spite of the Commission's three subsequent recommendations (European Commission 2016b, 2017a, 2017b), the Venice Commission's two opinions (Venice Commission 2016a, 2016b), the European Parliament's three resolutions (European Parliament 2016a, 2016b, 2017) as well as statements, opinions and reports made by various other international organizations and bodies such as the Council of Europe Parliamentary Assembly¹⁶, the United Nations¹⁷, Organization for Security and Co-operation in Europe¹⁸, CCJE¹⁹, CCBE²⁰, and ENCJ²¹ emphasizing the reforms' incompatibility with the Polish Constitution and international standards of judicial independence and calling Poland to desist and revert the disputed amendments. In early 2018, the Commission launched against Poland Article 7(1) TEU procedure (European Commission 2017c) but this also failed to bring any significant change to the disputed reforms of the Polish judicial system.

Polish responses to these multiple critical statements can be overall summarized as defensive, delaying, dismissive but also manipulative. When and if the Polish authorities responded, it was mostly to defend their reforms using weak and subjective argumentation²² irrespective of how overwhelming and substantial were the charges, and not shying away from crude language and *ad hominem* attacks. At the same time, they strove to give the impression of being open to dialogue and cooperation, regularly requesting clarifications only to reiterate their previous explanations, and showing themselves as victims of unfair attacks despite their alleged efforts to cooperate while accusing others of relying on arbitrary and unsubstantiated argumentation.²³ The European Commission

¹⁵ The most important of those reforms were: the Law on the National School of Judiciary and Public Prosecution (Ustawa 2017/1139), the Law on the Ordinary Courts Organization (Ustawa 2018/1443), the Law on the National Council for the Judiciary (Ustawa 2018/3) and the Law on the Supreme Court (Ustawa 2018/5).

¹⁶ Parliamentary Assembly of the Council of Europe (Council of Europe 2017).

¹⁷ United Nations Special Rapporteur (United Nations 2017).

¹⁸ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE 2017).

¹⁹ Consultative Council of European Judges (CCJE 2017).

²⁰ Council of Bars and Law Societies of Europe (CCBE 2017).

²¹ European Network of Councils for the Judiciary (ENCJ 2017).

²² For example, in one of its responses to the Commission's report before the General Affairs Council under Article 7(1) TEU Poland – aside from defending the disputed reforms – suggested that the Commission did not understand their intricacies and was demonstrating bad will by refusing to withdraw from the CJEU case C-619/18 concerning the compulsory retirement of Supreme Court judges despite Poland's amendment of the contested provision, ironizing about some of the Commission's arguments (Wójcik 5.02.2019).

²³ For example, Minister of Foreign Affairs Witold Waszczykowski said in 2017 that Poland was still hopeful about returning to the path of dialogue whereas Vice-President Timmermans – by participating in the

seemed to be powerless in the face of this new and unpredictable style of 'dialogue' and, in the end, Poland has managed with a few exceptions to carry through near all of its reforms regardless of international criticism, the Commission's recurring pleas and the impact it had on its position.

Most of the time when the Polish authorities withdrew from their plans under the pressure from the Commission and political opposition, it was temporary and cosmetic as when the Polish President Andrzej Duda vetoed the Law on the Supreme Court on suspicion of its unconstitutionality as it placed the Court's judges under the influence of the Minister of Justice. This veto did not, however, prevent the Polish parliament from adopting a similar law a bit later, this time according to the project put forward by the President of Poland himself. One of the main changes made by the President to the original draft was that his version subsequently adopted placed Supreme Court judges under the influence of the President of Poland, not the Minister of Justice.²⁴

Similarly futile was the 'success' of the Polish opposition when the government finally decided to publish in 2018 (so two years later) the infamous unpublished judgement from 2016 (Wyrok 2016) concerning the unconstitutionality of some old reforms of the Constitutional Tribunal. Not only did the publication of this judgement have no effect as subsequent laws and judgements made it redundant but it was also published with the annotation regarding its status stating that it had been "issued in violation of the law" since back then that was what the Prime Minister had said about it and why she had refused to publish it.

The most tangible success of the Commission in its dispute with Poland over the rule of law took place in 2018. The aforementioned new Law on the Supreme Court (Ustawa 2018/5) lowered the retirement age of the Supreme Court judges from 70 to 65 and applied to judges in office allowing them to request a prolongation from the President of Poland who could make this decision according to no clear criteria or time-frame, whereas the Polish Constitution stipulates that the First President of the Supreme Court is appointed for a term of 6 years (Article 183(3)) and that judges are irremovable (Article 180). When the law entered into force in April 2018, these new retirement rules became applicable to the Court's President and 37% of judges in office at the time with the effect of mid-mandate compulsory retirement. As a result, many of the Supreme Court judges were forced to retire but its President Matgorzata Gersdorf refused and, for quite a while, it was not sure who would prevail with the authorities exerting strong pressure such as a smear campaign²⁵, reference to the Constitutional Tribunal (no longer independent),

European Parliament's LIBE committee session regarding Poland – had exceeded the competences of an international bureaucratic institution and his actions had become political (Wilgocki 31.08.2017).

²⁴ This new version of the Law on the Supreme Court (Ustawa 2018/5) was the very same which would later be considered in case C-619/18 (Judgment of the Court 2019) an infringement of Article 19(1) TEU due to the compulsory retirement of Supreme Court judges, discussed further.

²⁵ The practice of discrediting judges in the eyes of Polish citizens by the governing party in order to justify their reforms goes beyond the President of the Supreme Court. Already in its first rule of law recommendation the Commission criticized the practice of "undermining the legitimacy and efficiency of the Constitutional Tribunal" (European Commission 2016a: 74). Similarly, the proposal for a Council decision under Article 7(1) TEU indicates that Poland should "refrain from actions and public statements which

designation of the person to replace her, etc. The adoption of this law drew, however, a strong reaction not just from the EU and the Polish opposition but also from the world at large and in July 2018 the European Commission initiated the infringement procedure. Poland unsurprisingly denied the infringement and in October the Commission brought Article 258 TFEU proceedings before the Court of Justice in case C-619/18, simultaneously requesting interim relief and expedited procedure, both granted. A month later, Poland suddenly repealed the disputed provision²⁶ (Ustawa 2018/2507) but the Commission did not withdraw the case and in June 2019 the Court of Justice declared that by applying the lowered retirement age to judges in post and by granting the President of Poland the discretion to extend the period of judicial activity, Poland had infringed Article 19(1) TEU (Judgment of the Court 2019). The above case was, therefore, a success but, in the end, it was limited in scope and had little impact on other similarly questionable reforms of, for example, ordinary courts where judges are nowadays demoted and subjected to disciplinary hearings for referring inconvenient preliminary questions to the Court of Justice (Iustitia 12.12.2018). Too many contestable provisions are still in force, and this one case of preventing compulsory mid-term retirement of Supreme Court judges seemed, in the end, merely a single battle won in a losing war.

The European Commission and the rule of law: success or failure?

The aforementioned analysis brings the question whether the European Commission has properly handled the problem of the rule of law in Poland. Was there a better way to address the situation that the Commission has either overlooked or dismissed? One of the ways of answering this question would be to look at the Commission's conduct through the perspective of existing theories of non-compliance and corresponding methods of ensuring that compliance.

The Commission's response to the Polish encroachments on the Constitutional Tribunal in late 2015 was to follow a managerial approach and utilize the Rule of Law Framework (European Commission 2014) which is a soft-law instrument based on dialogue and negotiation ('start slow and progressively turn up the heat'). For the next two years (2016-2017), the Commission continued with this approach sending one recommendation after another likely with the hope that informal exchanges would achieve better results than

could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole" (European Commission 2017c: art. 2(e)). These criticized actions and statements constituted of inter alia a billboard campaign "Just courts" ordered by the government and meant to convince Polish people to reforms by presenting concrete examples of bad judicial decisions and conduct such as releasing a pedophile, drunk driving or stealing a sausage (sic!) (Kondzińska 14.09.2017). Also, a journalist investigation has recently found that deputy Minister of Justice Łukasz Piebiak arranged and controlled "organized hate towards [specific] judges who are opposed to changes in the justice system implemented by PiS" (Gatczyńska 19.08.2019).

²⁶ Poland repealed the disputed 'compulsory retirement' provision at the beginning of judicial proceedings under Article 268 TFEU likely with the hope of preventing the CJEU from ruling in this case as its judgement would strengthen the position of the Polish judiciary against the encroachments of the authorities on its independence.

a rapid and aggressive pursuit of Poland which could force it to move to the offensive in order to defend against the politically undesired procedure under Article 7 TEU. The result of this strategy was, however, that the Commission's successes were minimal, if one can call them successes at all, while Poland has continued further down the road of contestable reforms. It could even be said that, despite all evidence pointing to the lack of genuine will on the part of Polish authorities, the Commission has allowed itself to be tantalized by empty promises, and stretched out the Rule of Law Framework to as many as four recommendations (European Commission 2016a, 2016b, 2017a, 2017b), where each was a little longer than the last, supplemented with additional charges against new reforms that Poland had adopted in the meantime, and where each was met with similar unprofessional and crude replies repeating *ad nauseam* the conviction of their alleged legality and the Commission's inability to understand.

In that regard, it would seem that the Commission – by relying on the same reasoning behind dispute resolution as with regards to violations of EU law – may have failed to comprehend the real motives behind Poland's actions and thus applied towards it inadequate managerial tools. It may have underestimated the determination of Polish authorities to bring unconstitutional systemic change and failed to realize in time their veiled unwillingness to cooperate, somewhat naturally expecting Poland to behave in a rational, predictable and professional manner and giving it the benefit of the doubt for too long. The Commission surely was not ready for the level of undiplomatic language used, and it would be interesting to analyze in greater detail whether the Commission has indeed misinterpreted the situation.

That being said, was there something that the Commission could have done differently? Would an earlier initiation of Article 7 TEU rectify some of the above-mentioned problems? Not necessarily, as the so-called 'atomic procedure' is considered a means of last resort and its rapid commencement would have likely brought suspicion of partiality on the Commission's side as it could not be said that it had exhausted beforehand all other available means (read: managerial methods). It could also have led to a quick exhaustion of all available tools and penalties or, alternatively, to an even worse outcome of Article's 7 TEU failure as the ministers in the Council and members of the European Parliament would likely be less eager to agree to such an undesired and extreme measure as they may be today. These concerns suggest that the Commission may have not necessarily underestimated Poland but simply had no choice but to test managerial methods for a sufficiently long period of time. Finally, the fact that Article 7 TEU procedure has not yielded any tangible results during 1.5 years since its commencement indicates that its earlier launch would not have been any more beneficial either.

Article 7 TEU is indeed underway. The European Parliament adopted already in March 2018 a resolution giving consent to continuing with the procedure (European Parliament 2018). The General Affairs Council has also taken action but so far it has limited itself to conducting hearings under Article 7(1) TEU where the Commission updates the ministers about the state of the rule of law in Poland and where Polish authorities present their own position and answer questions (Council of the European Union 2018). The result is

such that there has not yet been any determination made about a "clear risk of a serious breach" of Article 2 TEU values. Nobody wants to use Article 7 TEU lightly as that would create a dangerous precedent but it does not bode well if the Council cannot make up its mind after 1.5 years of hearing statements and analyzing the evidence. This begins to look like the Council may never reach a decision, possibly because of the looming unanimous voting of Article 7(2) TEU.

In the end, it may be the Court of Justice of the EU who proves the most effective in dealing with the rule of law problems in Poland. Its judgement in case C-64/16 concerning Portuguese judges (Judgment of the Court 2018a) has opened up to Polish courts the possibility of relying on Article 19(1) TEU in order to indirectly combat at least some of the contested reforms in the Polish judicial system, and in 2018 alone Polish courts have sent nine²⁷ such preliminary references, which makes about 30% of all Polish references from that year. One of them (C-563/18) concerned, for example, the aforementioned "disciplinary proceedings ... conducted under political influence" against Polish judges (Sąd Okręgowy 2018). It is not yet certain how the Court will rule in these cases and whether the Polish authorities will respect its rulings but it nonetheless seems like a step in the right direction.

The Commission must have also noticed the potential in the Court of Justice and it has also made use of the infringement procedure against Poland by bringing in 2018 before the Court two cases under Article 258 TFEU: C-619/18 concerning the infamous compulsory retirement of the Supreme Court judges (Judgment of the Court 2019) and C-192/18 still pending regarding the similar lowering of retirement age of ordinary courts' judges as well as the different retirement age for male and female judges (European Commission 2018b). Interestingly these were the only two actions for failure to fulfill obligations brought against Poland in 2018²⁸, as if the Commission had decided to focus its resources only on the most important Polish violations of EU law. As of the date of this article²⁹, there has not yet been a single infringement action brought against Poland in 2019. The Commission has, however, initiated the pre-litigation procedure under Article 258 TFEU over the mentioned earlier disciplinary proceedings against Polish judges and a reasoned opinion has already been sent to Poland in that regard (European Commission Press Release 3.04.2019, 17.07.2019).

The problem with relying too heavily on the infringement procedure is, however, such that – for it to be successful – Poland has to be proven to have infringed a specific provision under the Treaty or secondary legislation (such as Article 19(1) TEU or 157 TFEU) and the majority of contested Polish provisions do not seem to be sufficiently covered by EU law. Some claim that the Commission could make Article 2 TEU the subject-matter of infringement proceedings (Taborowski 2018: p. 51) but this would be harder to justify especially in the face of Polish loud claims about the EU's encroachments on its internal

²⁷ C-522/18, C-537/18, C-558/18, C-563/18, C-585/18, C-624/18, C-625/18, C-668/18, and C-824/18.

²⁸ There was one more infringement case C-206/18 brought in 2018 but under the Article 260(3) TFEU and it was withdrawn from the register (European Commission 2018c).

²⁹ August 2019.

operation and exclusive competences, and the Commission seems to prefer to tread here on the safe side. As a result, the Court of Justice as a coercive means of enforcing compliance does have its limitations and – with the Polish government's overall unpredictability – it is uncertain how far its authority reaches. In other words, will the costs of unfavorable CJEU judgements be enough to offset the benefits that the governing party draws from their unconstitutional reforms? Will it even care about the costs at all?

Possibly due to the overall ineffectiveness or insufficiency of available tools, the Commission is currently pursuing a new type of penalty that has the potential of curbing Poland's breaches of the rule of law. Currently, a proposal for a regulation is undergoing the ordinary legislative procedure "concerning the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States" (European Commission 2018a). By means of this regulation, the Commission seeks to create a new type of penalty against Member States showing a "generalised deficiency" with respect to the rule of law: "the suspension of payments and of commitments, a reduction of funding under existing commitments, and a prohibition to conclude new commitments with recipients." The project assumes that the Council would make the decision on the Commission's proposal, after presenting the Member State in question with the opportunity to respond and only on the basis of specific criteria concerning, among others, the seriousness, time-frame and effects of this deficiency but also the degree of state's cooperation. While the proposal appears an interesting response to the situation in Poland, it is still a long way from being adopted and applied, and we can only speculate about its potential effects.

All in all, a brief overview of the Commission's reactions to the rule of law problems in Poland suggests that the early conciliatory measures, although understandable, did not yield sufficient results nor did the coercive procedure under Article 7 TEU meet its expectations (at least so far) and a more detailed evaluation of the Commission's approach would be welcome if we are to draw conclusions for the future.

Conclusions

The Commission's proposal for a new type of penalty for disrespecting the rule of law principle suggests that existing measures have been insufficient in combating state breaches of Article 2 TEU, and that there is a need to strengthen the coercive side of the Commission's dispute with Poland outside of Article 7 TEU procedure. As such, the proposal (European Commission 2018a) is very welcome and, once adopted, it will hopefully prove effective, influencing Polish authorities to weaken their encroachments on the Polish judicial system. However, seeing how many times members of the Polish governing party (PiS) have demonstrated how little they cared for rules and procedures, as well as remembering about their focus on personal interests and connections³⁰, the perspective

³⁰ The extent of 'share of the spoils' and nepotism taking place in Poland since the coming to power of PiS has reached a level previously unseen in the history of Polish contemporary democracy. All manner of high and low positions in public institutions and state-owned companies have been filled with unquali-

in which they suddenly withdraw from their reforms in order to spare Poland EU penalties with the perspective of one day being held personally accountable for their abuse of power and unconstitutional reforms feels a little naïve. It is impossible to predict how far PiS is ready to go to safeguard its position but the extent and content of unconstitutional reforms it has so far carried out effectively placing its members outside the law, does not give a good prognosis for the future. Much more likely is the option where the Polish government, under the Commission's renewed pressure, agrees to a few small compromises and earns itself some goodwill and a delay in penalties but these concessions nonetheless fall short of what Poland needs to do in order to fully embrace Article 2 TEU. The Union can help the Polish people against their government only so far.

This brings me to another question, much harder to put forward for a Polish citizen but one that, after four years of unsuccessful attempts at reinstating the rule of law in Poland, necessarily comes to mind. Is there an end line to the EU's involvement and if not, should there be? So far, the Union's pressure on Poland is dictated as much by the need to maintain its very foundations as it is to safeguard citizens and businesses both Polish and from other Member States. However, assuming that Law and Justice (PiS) finds a way to spread euro-skepticism among the Polish people while foreign businesses slowly withdraw from the Polish market, is there some point of disconnectedness between Poland and the EU that warrants a halt to the Commission's attempts at bringing Poland back into the fold? How far should the EU keep trying to protect Poland from itself? Is there some breaking point after which reconciliation simply become unachievable? Hopefully, this will remain a purely theoretical question for researchers to toy with.

The coming to power of euro-skeptical political parties across Europe seems to be slowly bringing to the EU a new style of politics based on unpredictability, inflexibility and unprofessionalism that pushes it to reevaluate its operations and functioning on a number of planes, including compliance. Poland, in particular, has managed to draw attention to itself by behaving in a way that challenges traditional conceptions and necessitates a return to some core questions such as sources of non-compliance and the

fied members of the governing party, their family, friends and sympathizers (Strzałkowski 16.01.2017), including in the European Parliament (Becker, Dudek 30.11.2018). Furthermore, the rotation on the most lucrative positions is incomparable to previous governments: heads of state-owned companies change on average every twenty days (!), allowing the largest amount of people to benefit from high pays and advantageous severance packages (Graniczewska 12.04.2018). Also salaries are sometimes arbitrarily set, exceeding what could be reasonably expected, as in the case of unqualified assistants to the head of the Polish National Bank who each earn 65 000 PLN monthly (which roughly translates into 15 000 €), which is more than the salary of the Polish President or Prime Minister (Karpiński 28.12.2018). Last but not least, the positioning of unqualified but loyal personnel in all critical positions in the state while taking effective control of near-all monitoring and controlling institutions (e.g. the judiciary or Central Anticorruption Bureau), allows for unchecked political corruption and illegal activity such as the leader of PiS Jarosław Kaczyński being effectively in charge of a private company (through his secretaries and drivers) without reporting it in his earnings (to which he is obliged as a member of the Polish Parliament), refusing to pay the company's contractors and receiving large undue loans from nationalized banks governed by his strawmen in order to build two 190-meters tall towers in Warsaw (costing 300 000 000 €) which would provide his political party with secret financing outside of any control and in amounts which would give them an enormous advantage over remaining Polish political parties for years to come (Czuchnowski, Szpala 29.01.2019; Sieradzka 31.01.2019).

effectiveness of conformity tools. Whether we agree with it or not, euro-skepticism is strengthening in Europe and reliance on existing solutions may prove insufficient to ensure its unhindered survival. The literature's role is to foresee the consequences and look for answers that can be of use to EU institutions. Recent changes in the political make-up of the EU thus call for the reevaluation of our knowledge on state non-compliance and the Commission's enforcement, as well as for a critical analysis of Poland's dispute with the EU over the rule of law principle.

Karolina Boiret – assistant professor at the Faculty of Political Science and International Studies, University of Warsaw. She was awarded the degree of Doctor in Laws at the European University Institute in Florence. Her research interests include: enforcement of EU law against Member States, EU judicial system, legal protection in the EU, the protection of the rule of law in the EU.
E-mail: k.boiret@uw.edu.pl

Karolina Boiret – adiunkt w Katedrze Prawa i Instytucji Unii Europejskiej na Wydziale Nauk Politycznych i Studiów Międzynarodowych Uniwersytetu Warszawskiego. Stopień doktora nauk prawnych uzyskała w Europejskim Instytucie Uniwersyteckim we Florencji. Zainteresowania naukowe obejmują następujące zagadnienia: kontrola przestrzegania prawa unijnego przez państwa członkowskie, unijny system sądowy, system ochrony prawnej w Unii Europejskiej, ochrona zasady praworządności w UE.
Adres e-mail: k.boiret@uw.edu.pl

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