

Strategies of the Polish government in the rule of law dispute with the European Commission

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Abstract

The objective of this article is to identify, analyse and assess the effectiveness of strategies undertaken by the Polish government in its rule of law dispute with the European Commission (2016–2018), while taking into account the broader political context in the European Union. The main hypothesis stipulates that until the Commission's launch of the article 7.1 TEU in December 2017, strategic goals of the government concentrated at the national level (consolidation of domestic electoral support), rather than at the European level (damage control and dispute resolution). Weakness of the European-level strategy can be attributed to Polish decision-makers' erroneous assumptions and assessment with regard to the political situation in Europe and the logic of political game in the EU.

Keywords: Poland, European Commission, rule of law, article 7 TEU

Strategie rządu RP w sporze o praworządność z Komisją Europejską

Streszczenie

Celem niniejszego artykułu jest identyfikacja, analiza i ocena skuteczności strategii rządu RP w sporze o praworządność z Komisją Europejską (2016–2018), z uwzględnieniem szerszego kontekstu politycznego w Unii Europejskiej. Hipoteza główna stanowi, że do momentu uruchomienia przez Komisję procedury z art. 7.1 TUE w grudniu 2017 roku, strategiczne cele rządu koncentrowały się na poziomie krajowym (mobilizacja krajowego poparcia), a nie na poziomie europejskim (minimalizacja strat i rozwiązanie sporu). Słabości strategii na poziomie europejskim należy upatrywać w błędnych założeniach i błędnej diagnozie ośrodka decyzyjnego w Polsce co do sytuacji politycznej w Europie oraz co do logiki gry politycznej w UE.

Słowa kluczowe: Polska, Komisja Europejska, praworządność, rządy prawa, artykuł 7 TUE

On 13 January 2016 the European Commission launched the rule of law procedure according to the framework defined in its communication adopted in March 2014. As a result, the Commission issued three recommendations addressed to the Polish government (27 July 2016, 21 December 2016 and 26 July 2017). Whereas the 2016 recommendations concerned the Constitutional Court (CC), the last one – due to the growing pace of legal changes in Poland – regarded also the draft laws on the Supreme Court (SC), common courts and the National Council of the Judiciary (NCJ). According to the Commission, entry into force of these proposed laws would result in a structural damage to the judicial independence in Poland (Pech, Platon 2017: 4). Meanwhile, between January 2016 and March 2018 the European Parliament and the Council held regular debates and discussions about the respect of the rule of law in Poland, with the EP adopting several resolutions calling on other EU institutions to take action in order to restore the rule of law in Poland.

Whereas the positions of European institutions on this matter are well known, there is lack of scholarly work that analyses and evaluates strategies of the Polish government in its dispute with the Commission from political science rather than legal perspective. Thus the objective of this article is to identify, analyse and assess the effectiveness of strategies undertaken by the government of the Law and Justice party (L&J; in Polish: Prawo i Sprawiedliwość, PiS) in its rule of law dispute with the European Commission (2016–2018), while taking into account the broader political context in the European Union¹. The main hypothesis stipulates that until the Commission's initiation of the article 7.1 of the Treaty on the European Union in December 2017, strategic goals of the government concentrated at the national level (consolidation of domestic electoral support), rather than at the European level (damage control and dispute resolution). Weakness of the European-level strategy can be attributed to Polish decision-makers' erroneous assumptions and assessment with regard to the political situation in Europe and the logic of political game in the EU.

The article consists of 4 sections. In the first one I outline the inter-institutional game concerning the protection of the rule of law in the EU in the years 2012–2015. This indicates the broader context of the European rule of law agenda and proves that this agenda is not directed against the Polish government formed in the autumn 2015. Sections two and three are dedicated to the identification and analysis of two strategies that are evident from government's actions: a) strategy of escalation aimed

¹ Data as of 12 March 2018.

at consolidation of electoral support and b) strategy of de-escalation that does not, however, equal a strategy of adaptation. The analysis is based on rich empirical material: official documents of the Commission, EP and the Council; official documents and communications of the representatives of the Polish government; minutes of EP debates; as well as media statements of governmental and party officials. In the final section I seek to assess the effectiveness of the two strategies.

Inter-institutional negotiations on safeguarding the rule of law in the EU

The rule of law framework was presented by the Commission in its communication from 11 March 2014, but it had not appeared in a vacuum. Already in the September 2012 state of the Union address, EC president J.M. Barroso made clear that “the Union needs a better developed set of instruments as concerns the rule of law, not just the alternative between the ‘soft power’ of political persuasion and the ‘nuclear option’ of Article 7 TEU” (European Commission 2014: p. 2). On 6 March 2013 four foreign affairs ministers of EU members states (Denmark, Finland, Germany and Netherlands) submitted a letter to the EC president, calling for action and creation of a new mechanism for the sake of safeguarding the fundamental values of democracy, rule of law and human rights. The move was urged by the worrying constitutional changes introduced in Hungary and Romania (Bankuti et al. 2012; Perju 2015). The General Affairs Council (GAC) held its first discussion on the state of the rule of law in the EU on 22 April 2013, followed by a statement from the Justice and Home Affairs Council (JHA) on 6 June 2013, where the respect of the rule of law was considered a prerequisite of protection of the fundamental rights and the Commission was invited to “take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues” (Council of the European Union 2014b: p. 3). Moreover, in the years 2013–2014 the Parliament adopted a number of resolutions, calling other EU institutions to develop new instruments guaranteeing protection of democracy and the rule of law in member states, while excluding double standards in treating individual EU members. For instance, in July 2013 the EP approved a report, where it advocated creation of a special committee, featuring representatives of the Commission, EP and the Council, that would develop appropriate solutions to come up with a new rule of law mechanism to be located before the preventive phase of the art. 7 procedure (Closa 2016: p. 23).

In March 2014 the Commission proposed a framework that was aimed at preventing a systemic threat to the rule of law and avoiding the formal initiation of the art. 7 TEU. The rationale was to deal with systemic (and not incidental) threat to the rule of law with regard to separation of powers, independence and impartiality of the judiciary or the judicial control system (European Commission 2014: p. 7; cf. Ciosa 2016: p. 27). In the document the Commission justified EU competence to monitor the respect of the rule of law in the EU, as well as its own competence to conduct monitoring in a member state. Firstly, according to art. 49 TEU, respect of the rule of law is a condition for EU membership, whereas mutual trust between member states and their legal systems constitutes a foundation of the Union. For example, “a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another member state and an European Arrest Warrant against an alleged criminal issued in one member state must be executed as such in another member state” (European Commission 2014: p. 4). Secondly, the Commission is the guardian of the treaties and has the responsibility of ensuring the respect of values on which the EU is founded and of protecting the general interest of the Union (European Commission 2014: p. 2). The rule of law framework does not constitute an alternative to the procedure laid down in art. 7 TEU, but it precedes and complements it; if the Commission, on the basis of the art. 7, is entitled to address a reasoned proposal to the Council, it logically is competent to solicit information and pursue dialogue with a member state in question in order to prepare such a proposal.

Furthermore, the communication aimed at filling an important gap when it comes to protection of Union basic values within the EU. In fact, the European Union requires respect of the rule of law and monitors the progress when it comes to candidate countries, but until recently it has not considered a possible regress on the matter, once a state becomes an EU member (Konstadinides 2017: p. 164). Article 7, introduced by the Treaty of Amsterdam, was conceived as a political mechanism reserved for individual and extreme cases, such as fundamental disrespect of the rights of ethnic minorities (ethnic cleansing) in the newly acceded Central and Eastern European states. Thus in itself it cannot serve as a permanent mechanism of systemic monitoring of democracy and rule of law in the member states, similar to the monitoring mechanisms in place for candidate countries.

The Commission’s communication received a cold shoulder in the Council. In line with the opinion issued by the Council’s legal service, EU institutions act exclusively

in accordance with the principle of conferral of competences. Meanwhile, art. 2 TEU does not confer material competences on the institutions. When it comes to safeguarding the principles enumerated under art. 2, the EU institutions can only act in the framework of the art. 7 TEU, but they can neither develop nor modify it. The Commission – in the opinion of the Council’s legal service – is competent to issue recommendations addressed to member states, but only in the areas, where treaties explicitly confer competences on the Commission. It can also act under articles 241, 337 and 352 TFEU, on its own initiative or on the Council’s proposal, but these provisions cannot serve as a treaty basis for establishing a permanent procedure, especially in the area that constitutes an exclusive competence of member states. This does not mean that there is no possibility of establishing a permanent monitoring mechanism that involves the Commission or other EU institutions. However, it would necessitate a separate intergovernmental agreement concluded unanimously by the member states (Council of the European Union 2014a: p. 5–7). Thus the Council did not question the validity of insertion of “assessment stage” – systemic dialogue and monitoring of respect of the rule of law in the member states, but attributed the right to define its parameters to member states, and not the Commission (Closa 2016: p. 30). As a follow-up, the Italian presidency proposed in November 2014 a peer-review annual dialogue in the Council, with the participation of the Commission.

This in turn was fervently criticised by the European Parliament in February 2015. The EP called for greater ambition and action from the Commission, while warning that the safeguarding of the rule of law should under no circumstances be left to the discretion of the governments. Commission’s reaction was a cautious one, but possible use of the rule of law framework in the future was not excluded, despite objections from the Council. In the end, the mechanism was first activated in January 2016 with regard to the situation in Poland and the so-called reform of the Constitutional Court, executed by the Law and Justice government immediately after it seized power in autumn 2015.

Strategy of escalation: mobilising domestic support

The first strategy implemented by the Law & Justice government was not aimed at reaching agreement with the Commission, but rather at consolidation of domestic electoral support. Goals were defined at the national and not at the European level. In narrative terms the strategy of escalation focused on 3 main arguments: 1) Polish government enjoys democratic mandate to reform the judiciary; 2) Polish government

has regained “full sovereignty” and assertiveness, which results in hostile counteraction from malevolent foreign forces; 3) European Commission employs double standards, while being misinformed at best and consciously biased – at worst.

Speaking in January 2016 in the European Parliament, prime minister Beata Szydło placed the democratic mandate of her party at the heart of her argumentation: “we introduce changes [with regard to the Constitutional Court], because as a result of democratic elections of October 2015 Polish citizens decided, in this democratic electoral act, that they wanted those changes, which had been proposed by my party, to be implemented. This is the decision of Polish citizens” (European Parliament 2016a). Thus the respect of the rule of law principle was weighted against the governments’ right to introduce virtually any change justified by the electoral victory (despite the fact that the latter only led to an absolute and not constitutional majority in the parliament). Meanwhile, the position of the Commission remained unchanged: “respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa” (European Commission 2014: p. 4). According to Grzegorz Ekiert, “today’s Poland is a clear example of the tyranny of the majority where the ruling party disregards the constitution, the rule of law, parliamentary procedures and citizens’ rights on a daily basis. The idea of democracy that Kaczyński believes in implies that the parliamentary majority can do anything it wants, should face no institutional constraints of any kind and that the opposition should shut up and follow” (Ekiert 2017: p. 5).

The validity of this assessment by Harvard scholar was confirmed by an open letter addressed in January 2016 by the minister of justice Zbigniew Ziobro – who both politically and institutionally benefitted from the contested judiciary reform – to the German member of the European Commission Guenther Oettinger. In this letter the minister asked, why the commissioner protested against the reform in Poland, but at the same time was not concerned with the “dramatic denial of press independence”, namely the fact that the Polish weekly “Newsweek”, owned by a German publishing house, openly supported “protests aimed against democratically elected Polish parliament and government” (Ziobro 2016). In reality, the letter was directed rather to the domestic electorate instead of the commissioner and aimed at forging a narrative of the “good” Polish government fighting with the “bad” German capital supported by the “total opposition”, the latter having no legitimate right of protesting and criticising the government.

The second key element of the narrative was about a new sovereign and assertive foreign policy that logically stirs opposition from the main EU players. Accordingly, the united Europe is no longer an opportunity, but a risk at best and a threat at worst. It constitutes a threat to: a) economic development of Poland (caught in the middle-income growth trap that the EU and especially the euro zone model petrifies); b) identity and cultural specificity of the Polish Nation, especially in the context of the migration crisis (Buras 2017: p. 2). In his statements for pro-government media – *Gazeta Polska* [*Polish Newspaper*] and *TV Republika* [*TV Republic*] – Jarosław Kaczyński, the leader of the ruling party, underlined the inevitable nature of the conflict with Germany and the EU core on one hand (“if we want to achieve a success and join the EU centre, reach GDP comparable to Germany, we must be aware that they would try to block us” – 29 January 2018), and a messianic role for Poland in a fallen Europe on the other (“if we look at today’s Europe, it is a picture of a fallen civilisation. We can go back. Poland can and must play a miraculous role that was once described by poets, but seemed unrealisable. Today it materialises before our eyes. Poland assumes the mission described by [poets] Mickiewicz and Słowacki” – 27 July 2017). It should be stressed that this is a narrative typical for peripheral states that seek revision of the terms specifying their position in relation to the centre, which is the result of an earlier strategy of adaptation to the rules defined solely by the centre (cf. Cianciara 2017: p. 272–273, 288–289).

Anti-western, especially anti-German rhetoric in the party-captured public media adequately reflects the creeping de-Europeanisation of Poland’s internal and external policies. As of autumn 2015 one can observe a departure from Western-European liberal model of state and society, whereas adaptation to this model set the main direction for Polish internal and external policies since 1989. This does not necessarily imply that the government is ready for an exit strategy (although unintended effects cannot be fully excluded, as in the case of British government of David Cameron), but it does claim the right to pursue its own model within the EU that is opposed to the liberal one. At the same time, the Polish government insists on its continuous right to exploit the comparative advantage based on common market freedoms and large inflows of funds guaranteed by the current shape of EU agricultural and cohesion policies. This revisionist strategy consists of questioning the dominant liberal rules of the game and imposing (maximalist scenario) or being allowed to apply (minimalist scenario) own rules of the game, largely incompatible with those hitherto in operation in the EU club.

Thus the strategy of escalation pursued in the rule of law dispute with the Commission serves domestic legitimisation of wider revisionist strategy in Poland's European policy.

Finally, European institutions – especially the Commission – have been aggressively accused of lack of objective judgement, one-sidedness, ignorance, prejudice and double standards. In the letter from March 2016, addressed to first vice-president Frans Timmermans, foreign affairs minister Witold Waszczykowski wrote that the Commission is guilty of “one-sidedness far from objectivity”. A December 2017 communication from the Polish MFA reads that the government cannot “agree to one-sided and unfair opinions directed at Poland. The campaign of negative information about reforms conducted in our country is not based on facts and prevents us from adequately addressing the allegations. This contradicts impartiality of European institutions and adversely affects mutual cooperation” (Ministerstwo Spraw Zagranicznych 2017). Finally, during an EP debate in January 2016 a ruling party MEP Ryszard Legutko accused the Commission of double standards, indicating that it failed to investigate assaults on the rule of law that were committed by the previous government of the Civic Platform in the years 2007–2015 (European Parliament 2016a).

Strategy of de-escalation: towards pragmatic dialogue?

The strategy of de-escalation at the European level has been pursued since January 2016, but it was completely overshadowed by the domestic strategy of escalation until December 2017, when the Commission formally launched the procedure under art. 7.1 TEU. It must be stressed that the current privileging of the de-escalation strategy does not equal a return to the 2004–2015 strategy of adaptation to the EU rules of the game. Instead the government's idea is simply to explain the rationale of judicial reforms more effectively – in this perspective the rule of law problem voiced by the Commission boils down to a mere misunderstanding. As indicated by minister of foreign affairs Jacek Czaputowicz, “we do not intend to abandon the reforms. We only wish that the Commission analyses them systematically, while taking the full context into consideration, and that it fully understands the reasons behind the changes” (Ministerstwo Spraw Zagranicznych 2018a). It is precisely in these terms – clarifying the intentions of Polish authorities, and not agreeing to any meaningful concessions in the spirit of compromise, that the 96-page White Paper on the reforms of the Polish judiciary was published on 7 March 2018 and submitted to the Commission and the governments of EU member states.

There are three main elements of the de-escalation strategy: 1) argumentation that the changes introduced in Poland are in line with the judiciary standards practiced in other member states; 2) continuation of the dialogue with the Commission, aimed not so much at reaching compromise, but rather at damage control and effective blockage of the procedure under art. 7.1 TEU at the level of the Council; 3) attempt to convince member states (especially from Central-Eastern Europe) that the Commission's action are a) unlawful; b) unjustified, which should allow to gather a blocking minority under art. 7.1 TEU.

Already in January 2016 prime minister Szydło claimed that there was nothing unusual about the changes introduced in Poland: “the changes we introduced to the law on Constitutional Court are in line with European standards and they do not diverge from regulatory arrangements used in other EU states” (European Parliament 2016a). Similarly, while reacting the launch of “art. 7 procedure” against Poland, prime minister Mateusz Morawiecki wrote on Twitter on 20 December 2017: “Poland is attached to the rule of law principle as much as the EU is. The reform of the judicial system in Poland is necessary. In the dialogue between Warsaw and the Commission, we need openness and honesty” Moreover, in a letter addressed to the commissioner for human rights of the Council of Europe, the MFA underlined that provisions adopted for the NCJ were similar to those existing in Spain, whereas there were no charges formulated against Spain neither by the Commission nor by the Council of Europe (Ministerstwo Spraw Zagranicznych 2018a). Finally, quasi-totality of the White Paper of 7 March was dedicated to a detailed description of the new legal provisions related to CC, SC, NCJ and the common courts that were systematically juxtaposed with provisions in place in other EU member states (mostly in France, Germany and Spain).

In the beginning of 2018 a number of personal meetings were held between the Polish prime minister and the foreign affairs minister on one hand, and president and first vice-president of the Commission on the other. The Polish government planned a series of meetings on the White Paper with representatives of the Commission and all EU governments. Crisis management with regard to art. 7.1 TEU was centralised in the prime minister's chancellery, as opposed to the 2016 uncoordinated actions at the level of individual ministries. As indicated by the director of the government think-tank – Polish Institute of International Affairs – the best tactics would be to close the dispute as soon as possible, notably by convincing at least 6 EU member states to vote against the Commission's reasoned proposal in the Council. Other governments

should be persuaded that this is a perfect opportunity to “deprive the Commission of an instrument that it currently seeks to unlawfully create for itself” (Dębski 2018: p. 13). Otherwise, the Commission may, while acting without adequate legal basis, continue to abuse “the rule of law procedure” and the “nuclear option” towards other states in the future. Dębski also pointed out that the EU does not have a treaty-based competence to assess the organisation of the judicial system in a member state.

The argumentation regarding the lack of legal basis for the Commission to monitor the situation in a member state before the formal launch of the art. 7.1 TEU was partly based on the opinion issued by the Council’s legal service in 2014. However, it can be easily criticised. Firstly, an informal, “preventive” phase of the procedure *de facto* serves the protection of member states’ interests (Barcz 2018: p. 78). Secondly, it is worth comparing provisions of art. 7.1 to the provisions of art. 49 TEU. On the basis of the latter the Commission monitors progress achieved by candidate countries in the context of values defined in art. 2 TEU, despite the lack of explicit competence in the treaty to conduct such monitoring (Pech, Platon 2017: p. 5). In addition, argumentation contained in the White Paper suggests that the government gave up arguing that art. 7 TEU could not be invoked with regard to judicial reforms in the member states and that the Commission acted unlawfully in the framework of its own rule of law procedure. However, the government upholds that Commission’s actions were unjustified and further proceeding under art. 7 TEU is politically harmful for the entire Union. As to the former, since Polish reforms introduced similar institutional arrangements to those existing in other EU states, determining a clear risk of serious breach of the rule of law principle would equal declaring such a risk in other states too. As to the latter, further proceedings under “art. 7 procedure” would undoubtedly strengthen anti-European and populist forces in the EU (Kancelaria Prezesa Rady Ministrów 2018: p. 93–96). All in all, this shift may signify a turn from largely confrontational legal argumentation towards a more soft political narrative.

Effectiveness of government’s strategies: an assessment

Implementation of the inward-oriented strategy of escalation allowed to consolidate domestic support for the government, but ended in failure at the European level, i.e. the Commission went from informal dialogue to formal initiation of the art. 7.1 TEU procedure against Poland on 20 December 2017. It is worth underlining that it was only the prospect of the formal launch of the treaty-based mechanism that finally prompted

the government to intensify action at the European level with the aim of conflict de-escalation, which was preceded by government's reconstruction between December 2017 and January 2018. The crucial question here is why serious de-escalation efforts were not undertaken earlier, in order to avert the risk of considerable weakening of Poland's position in the EU. Below I argue that this is the result of erroneous assumptions and assessment of Poland's decision-makers with regard to the political situation in Europe and the logic of political game in the EU.

The first assumption concerned imminent and inevitable disintegration of the European Union as a result of economic crisis in the euro zone, migration crisis and, consequently, the anti-EU forces seizing power in key member states. It is true that political scenes in numerous member states underwent substantial changes and support for traditional political parties has been declining. However, 2017 elections in France, Germany and the Netherlands did not give power to radical and eurosceptic forces. Thus new governments in these states are not willing to discuss loosening the integration process within the confederal logic ("intergovernmental democracy"), as promoted by Law and Justice decision-makers (Szczerki 2017: p. 235–238; cf. Szymański 2016). On the contrary, France – under the leadership of Emmanuel Macron – aims at political consolidation of the EU around the recovering euro zone that Poland is not part of and, under the current leadership, is not willing to join, despite treaty-based obligations. Moreover, the government has lost its principal ally, as United Kingdom (cf. Waszczykowski 2016) is leaving the Union as of March 2019, following the result of the popular referendum held in June 2016. Finally, the coherence of the Visegrad Group (V4) proves to be far weaker than expected. In reality, instead of V4 we can often see V2 + V2, where Czech Republic and Slovakia weigh more often towards Germany and Austria rather than Poland and Hungary, while seeking to replace Poland as the key Central European player in Brussels. As indicated by other analysts, hopes for realisation of government's ideas for EU reform resulted from "ideologically determined misperception" (Tosiek 2017: p. 53).

The second erroneous assumption concerned the role of supranational institutions – European Commission and European Parliament. It stemmed from the fact that the Law and Justice government perceived the European integration process in strictly intergovernmental terms, where institutional actors other than the Council could be easily ignored. As a result, the government disregarded the pressure put on the Commission by the Parliament – in the form of proposals for an inter-institutional

agreement or treaty change (European Parliament 2016b) and possible initiation of the procedure under art. 7 by the EP in the event of further inaction of the Commission (European Parliament 2017), as well as by the academic and expert circles (Bard, Carrera 2017; Łazowski 2017; Pech, Platon 2017; Ekiert 2017). It must be stressed that the EP expressed considerable support for the Commission's position in a number of resolutions (13 April 2016, 14 September 2016, 15 November 2017). The resolution stating the existence of the systemic threat of the rule of law in Poland was supported in April 2016 by 513 MEPs (with 142 voting against the motion) and by 438 MEPs (66% of votes cast) in November 2017. The latter resolution also contained a decision of the EP to prepare the reasoned proposal to the Council under art. 7 TEU. This clearly showed Parliament's determination to act independently with a view to push the Commission to fulfil its responsibilities as guardian of the treaties. It is worth noting that opposition to the November 2017 resolution was voiced mainly by deputies representing anti-EU and extreme right parties². Whereas at the national level the government of Poland described Commission's actions as aggressive, in reality in the 2nd half of the year 2017 the Commission faced rising political costs of inaction. A growing number of European and national actors pointed out that cautiousness and indecisiveness on the part of the Commission only encouraged Polish government to further violate the principles defined under art. 2 TEU. Thus by initiating the procedure under "the art. 7 procedure", the Commission could declare its mission accomplished, effectively transferring the responsibility for safeguarding the rule of law to the member states.

At the same time, the Polish government assumed that the dispute would swiftly turn into a battle for power between the Commission and the Council, thus recalling the traditional rivalry between a supranational and an intergovernmental institution, which would ultimately result in weakening political ambitions of the Commission, particularly evident since 2014 under the leadership of Jean-Claude Juncker. Weakening the Commission (limiting its role to a mere executive secretariat of the Council) is in line with the vision advocated by the Polish government, which provides for strengthening of the intergovernmental component as well as national parliaments (confederal logic) at the expense of the Commission and European Parliament (federal

² Opposition (or abstention) to the resolution of 15 November 2017 was voiced mainly by ECR, EFDD, ENF political groups, as well as independent MEPs. Votes against were also cast by 23 EPP deputies (29 abstained), notably from Hungary and Croatia. In terms of national party affiliation those voting against the motion were mostly members of UKIP, British Conservative Party, National Front (France), FPÖ (Austria) and Northern League (Italy).

logic). The assumption of confrontational logic of the game between the Commission and the Council is not entirely incorrect, but suffers from significant limitations that are discussed below.

Both governmental strategies appear to be based on the conviction that member states would refrain from supporting the Commission for fear that they create a precedent and thus risk being the next in line (cf. Pech, Platon 2017: p. 10). This misses two fundamental points – one of tactical and the other of strategic nature. As to the former, member states that have themselves issues with respecting the rule of law may actually favour a situation, where EU institutions focus on one “sinner” only, which temporarily strengthens their position and allows to reap important benefits, for example in the context of the budgetary negotiations. More importantly however, many member states consider Polish revisionism against the EU community of law a far greater threat in comparison to the political ambitions of the Commission. A blatant assault on the separation of powers and independence of the judiciary in one member state undermines the principle of mutual trust (founded on the trust of institutions of each member state to the judicial institutions of all other member states), which is central to the functioning of the single market, as well as the area of freedom, justice and security, for example in the context of the European Arrest Warrant³.

The Law and Justice government seemed to assume that Poland would not incur any real losses, be it legal, financial or political, as long as unanimity in the European Council is unachievable due to the Hungarian promise of veto and thus no formal sanctions under art. 7.3 TEU are imposable. This is a false assumption, deeply embedded in formalist thinking in terms of isolated legal norms, and not in terms of political consequences associated with exclusion from the community of law and values. Meanwhile, such exclusion would effectively materialise already at a point where 4/5 members of the Council declare their support for Commission’s proposal that there exists a clear risk of a serious breach of the values referred to in article 2 TEU, and even at a point where 4/5 votes are gathered to issue Council recommendations (preventive phase of art. 7.1 TEU that takes place before the eventual vote on a “clear risk of a serious breach”). Consequences may be far more serious than damages made

³ This argument was confirmed by a request for a preliminary ruling addressed to the Court of Justice of the EU by an Irish High Court judge Aileen Donnelly in the context of an eventual extradition from Ireland to Poland of a Polish citizen on the basis of the European Arrest Warrant. Ms Justice Donnelly asked the CJEU for the ruling on the effect of the recent legislative changes in Poland (Giblin 2018).

to Poland's reputation on the international arena, which is the argument that dominates the discussion (cf. Zerka 2018). For example, some member states increasingly push for introduction of a formal linkage between structural funds' payments and fulfillment of treaty obligations, including functioning of independent judiciary (Prawda 2018: p. 17). In the forthcoming budgetary negotiations, the rule of law problems in the states that benefit most from the cohesion policy will certainly be exploited by net payers to push for reconstruction of the budget's structure to the detriment of Central-Eastern European states.

Conclusions

The stakes are high in the rule of law dispute between the Polish government and the European Commission – both for Poland and for the EU. Indeed, they are higher and of different nature than many observers would officially admit. As to Polish government, it is currently losing a lot of political capital at the European level that could be otherwise invested more constructively, instead of being wasted on persuading member states to defend Poland in the Council. The result is that Poland automatically weakens its position in any other negotiation game, not only in relation to the most powerful member states, but also to smaller partners from the CEE region (Hungary, Croatia, Bulgaria, Romania), where it aspires to a leadership position. Moreover, weakening and antagonising the European Commission is very clearly not in the Polish interest. Energy policy and smooth functioning of the single market are but two examples, where Poland needs Commission's support in order to oppose lack of solidarity and protectionism from Germany and France. Weakening the EU as a community of law and values is even less in the interest of Poland.

As amply described in the first section on the inter-institutional discussion on the rule of law, the problem is of systemic nature and a long-standing one. Thus contrary to the statements by some Polish decision-makers, actions of EU institutions are not just a by-product of a political game aimed at disciplining the defiant Law and Justice government. The essence of the problem is that the EU has tools at its disposal that allow for systemic enforcement of rule compliance in the case of candidate states and their respect of basic principles of democracy, rule of law and human rights. However, it is not that well equipped when it comes to enforcing compliance once a candidate becomes a member. Whereas rule of law and democratic regress in a candidate state can rather easily result in slowing down or effective freeze of accession negotiations,

there is no comparable solution in case of members. Embedded in the liberal “end of history” thinking, the EU largely failed to foresee that a consolidated democratic system in a member state that had once met all the Copenhagen criteria, may with time destabilise and degrade (Mounk 2018: p. 4–5) in a way that threatens the stability of the entire European project.

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