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Post - Accession Compliance and the Environmental *Acquis* in Poland: Putting the EU Enforcement Mechanisms to the Test?

ERRIKETI TLA DA SILVA

Post - Accession Compliance and the Environmental *Acquis* in Poland: Putting the EU Enforcement Mechanisms to the Test?

Erriketi Tla da Silva [1]

Abstract

The enlargement wave of 2004 led to the reunification of a divided continent and to the transformation of the EU. Accession required radical reforms in all fields, including the integration of the environmental acquis and the candidate countries had to adapt their environmental policies in order to achieve membership. This paper seeks to examine the post-accession compliance of Poland with EU Environmental legislation. More specifically, it will explore whether the pre-accession conditionality influenced Poland's behavior after membership was achieved and whether the enforcement of EU environmental law has been adequate and effective. It will be argued that democratic backsliding has spillover effects on other sectoral policies, not directly linked to the rule of law, such as environmental protection. In this direction, this paper will present the notion of environmental rule of law and evaluate the implementation of European Union environmental legislation via infringement procedures instigated by the Commission against Poland. It will then assess the effectiveness of the enforcement mechanisms of the EU, highlighting their inherent inefficiency to effectively deal with violations of EU environmental law, since they were designed before the inclusion of the environment to the objectives of the Union and propose solutions to address environmental backsliding.

Keywords:
Enlargement, Poland, backsliding, environmental protection, compliance, enforcement

Introduction

The unprecedent enlargement wave of 2004 led to the reunification of Europe and to a holistic transformation of the EU. Nowadays, geopolitical developments have brought enlargement in the forefront of the EU agenda, especially in view of the attribution of the candidate status to Ukraine, Moldova and Georgia. At the same time the *acquis* is continuously growing, and adaptation becomes more complicated. Thus, it is crucial to explore post-accession compliance and reflect on the lessons learned on the wake of the 20-year anniversary of the "big-bang" enlargement.

Accession was not achieved without efforts, as it required radical reforms in all fields, including the integration of the environmental *acquis* into national environmental legislation. The candidate

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countries had to implement numerous Directives and to adapt their environmental policies to achieve membership. From the early stages of enlargement negotiations, it had become evident that the gap between the EU environmental legislation and the national legislation of the Central and Eastern European (CEE) countries was particularly wide and created concerns about the potential distortion of the internal market and the effectiveness EU environmental legislation (European Parliament 1998).

The adaptation of the national legal systems to achieve harmonization with the EU regulatory style was a "herculean" task (Andonova 2005). The CEE countries had to perform democratic, market and environmental transition at the same time in order to adopt the environmental *acquis* and to join a Union composed by Member-States with fundamentally different political and social characteristics. However, despite the big gaps that had to bridged, candidate countries managed to integrate the environmental *acquis* into their national legislation and paved their way to EU membership. The transition from an authoritarian rule to democracy had to be combined with the strengthening of environmental protection under the monitoring of the Commission (Cotta 2018). Since a regime that guarantees transparency and accountability is more likely to foster sustainable development and have a better environmental performance, there was hope that the political transition would foster green transition (Buzogány and Cotta 2022).

The possibility of membership allowed the CEE countries to adopt long term strategies in order to achieve democratization and marketization while being supported in this difficult process with technical and financial assistance provided by the EU. Essentially, the candidate countries had to transpose EU directives into their national legal orders, a process that led to structural reforms of their legal systems. However, the nature of Directives as a legal instrument renders the extensive control of the efficiency of the implementation measures taken by the Member-States a very difficult exercise[2]. The true challenge is to manage to lock in these changes after accession in order to ensure the implementation of the *acquis* will not stop when membership is achieved. This difficulty has been described in literature as the "Copenhagen dilemma', i.e. the Union's inability to effectively deal with the Member's State backsliding after their accession in areas that used to be at the center of their accession requirements (Leloup et al. 2021). Membership conditionality served as the primary motivating factor for driving environmental policy reforms in CEE states in the decade leading up to their membership in the EU. After accession, the threat of infringement proceedings and the associated political and financial costs were expected to serve as a powerful external pressure mechanism. Non-compliant CEE governments risked reputational damage, reduced bargaining power, and financial penalties, which would further motivate them to comply with EU law (Buzogány and Cotta 2022).

In recent years, however, the EU has been facing a rule of law crisis, with concerns being raised over the independence of the judiciary and corruption. This crisis has been particularly acute in countries such as Hungary and Poland, where government actions are threatening democratic values and the rule of law. The EU has responded by launching various mechanisms to address these concerns ranging from an extensive use of the infringement procedure of Articles 258-260

2 Directives due to their legal nature are the main instrument used for the implementation of EU Environmental Law, despite some tendency to switch to Regulations the last years. Directives impose an obligation of result and Member-States are free to choose the methods of their implementation. When it comes to environmental matters, the implementation of a Directive can differ significantly among the Member-States since it can be influenced by various factors such as the geographical and climate conditions.

TFEU to the adoption of the Conditionality Regulation 2020/2092[3].

The current democratic backsliding can affect environmental protection. This is because environmental protection mostly relies on the enforcement of laws, which in turn requires an independent judiciary and strong institutions. If there is a rule of law crisis, characterized by weak institutions, corruption, lack of accountability and compromised judicial independence, the effectiveness of environmental protection efforts can be undermined. Under this background, this paper will argue that democratic backsliding threatens the environmental rule of law, can have detrimental effects for the environment and will cause significant delays in the achievement of the climate targets. To this end, this paper will introduce the concept of environmental rule of law, assess the enforcement of EU environmental law through infringement procedures initiated by the Commission using Poland as case study and discuss possible solutions.

The concept of environmental rule of law

To prevent society from exceeding critical ecological limits, it is crucial to have a good understanding of environmental laws, follow them, and ensure that they are respected. Despite the increasing awareness regarding environmental protection there is often a disparity between what the laws require and how they are actually implemented and enforced.

Environmental rule of law plays a crucial role in this regard as it combines the principles of the rule of law with environmental concerns (Kreilhuber and Kariuki 2019). More specifically, it is a set of rules and principles that integrates environmental needs with the rule of law. Therefore, compliance with the environmental rule of law means that environmental legislation should be transparent, just, and effectively enforced to safeguard the natural environment and address environmental challenges. The environmental rule of law seeks to create a legal framework that not only sets environmental standards but also ensures that these standards are adhered to, with consequences for those who violate them. Essentially, it emphasizes the importance of environmental sustainability by linking it with fundamental rights and responsibilities. Environmental rule of law is essential for ensuring consistent and predictable enforcement of laws and regulations, which is necessary to promote environmental sustainability, protect human health, and preserve natural resources for present and future generations.

Regulating the environment through legislation and enforcing it through a judicial system that adheres to the rule of law is a prerequisite to ensure environmental protection in practice. In a democracy, the legislature acts as a guarantee of the quality of environmental protection setting standards and obligations and the judiciary as a guarantee of effective enforcement and sanctioning when environmental legislation is breached (Kreilhuber and Kariuki 2019). That being said, the role of an independent judiciary that complies with the principles of the rule of law is the key to environmental protection in practice.

On an EU level, there is a comprehensive toolbox of substantive environmental law regulating all fields of environmental protection. In addition, the EU possesses a system of judicial remedies in order to ensure compliance with EU legislation as well as the uniform application of EU law. The most direct way to enforce EU legislation is via the infringement procedure of Articles 258-260 that starts with an administrative stage and may lead to a judicial referral of a Member-State to the

3 Regulation 2020/2092 allows the EU to take measures, such as suspension of payments, in cases when breaches of the rule of law principles affect or seriously risk affecting the EU budget or the EU's financial interests.

Court. This tool has been used extensively to enforce EU legislation and to tackle the rule of law crisis in Poland and Hungary. Since effective implementation of environmental law is fundamental in order to address the current environmental emergency, the lack of compliance of certain Member-States poses a serious threat to the environmental rule of law. Even though assessments after the first years of membership showed good levels of compliance with environmental policies (Börzel and Sedelmeier 2017), recent instances of democratic backsliding suggest that the rule of law crisis can also have knock-on effects on sectoral policies not directly related to the rule of law (Buzogány and Cotta 2022).

The following section of this paper will "zoom in" to Poland, one of the protagonists of the rule of law crisis and will discuss its post-accession compliance with EU environmental law and the reaction of the Commission and the Court with the use of the infringement procedure.

Environmental backsliding in Poland

The implementation of the environmental *acquis* was undoubtedly a big challenge for Poland, since apart from the integration of a vast body of legislation, the process of transitioning from a socialist regime and moving towards European integration has necessitated significant changes in its institutional structures. In order to respond to this challenge Poland received unparalleled technical and financial support by the EU through programs and funding, such as PHARE, SAPARD, or ISPA (Buzogány and Cotta 2022).

Like all accession states, Poland had to comply with the third Copenhagen criterion which stipulated that prospective Member States must have the capacity to effectively transpose EU legislation into their national legal orders and implement them on the ground. This entailed adhering to the extensive body of EU law, known as the *acquis communautaire*, compliance with which was considered crucial for aspiring EU members to demonstrate their readiness and ability to fully integrate into the EU. At the time of accession negotiations, Chapter 22 of the *acquis* included approximately 300 pieces of legislation on the substantive EU environmental law, encompassing both horizontal and sector-specific legislation, with directives being the main legal instruments used in its implementation. Candidate countries were obliged to set out realistic long-term national environmental strategies aiming to an effective and gradual integration of the *acquis* (Buzogány and Cotta 2022). The first years after accession was achieved there were no major issues regarding the implementation of EU environmental law by Poland. However, during the last years the growing democratic backsliding has had severe effects on Poland's compliance with the environmental *acquis*, as it becomes evident from the cases brought before the Court of Justice by the European Commission against Poland, that will be analyzed below. Therefore, the current situation in Poland can be described as 'environmental backsliding', i.e., a reversal of environmental compliance and progress that were previously implemented as a result of the integration of *the environmental acquis*, leading to a decline in environmental quality.

By analyzing the judicial activity of the Court regarding the implementation of EU environmental law by Poland it becomes evident that the enforcement actions for breaches of various sectoral legislation have increased in the recent years. In particular, since Poland's accession and until 2015, only two infringement cases had resulted in Poland's referral to the Court of Justice. However,

since 2015 and until today, Poland has been referred to the Court five times[4]. It should be noted that deficiencies in compliance with EU law can arise both formally, such as failure to transpose EU legislation into national laws and practically, such as failure to effectively enforce the law (Sedelmeier 2008).

Regarding biodiversity, the Court considered in Case C-192/11 that Poland failed to apply adequate conservation measures for birds residing in its territory and failed to correctly define the conditions to be met in order to be able to derogate from the prohibitions laid down by that Directive. In addition, in Case C-46/11, the Court declared that Poland failed to transpose correctly the conditions governing the derogations laid down in Article 16(1) of the Habitats Directive 92/43/EEC.

Regarding water legislation, the Court declared that Poland only partially transposed the Water Framework Directive 2000/60/EC in Case C-648/13 as well as that Poland violated the Nitrates Directive 91/676/EEC by failing to define adequately vulnerable zones that would be in danger of nitrates pollution from agricultural sources and to adopt the relevant action programmes in Case C-356/13.

In addition, in Case C-336/16, Poland was found to be in breach of the Ambient Air Quality Directive 2008/50/EC, since exceedance of the daily limit vales of specific particulate matters was detected without appropriate measures to ensure the minimization of the exceedance period.

Poland was referred to the Court in Case C526/16 for a breach of the Environmental Impact Assessment Directive 2011/92/EC by excluding projects for exploration of gas by drilling from the procedure for determining whether such an assessment is required.

The previously analyzed infringement cases show that there have been significant deficiencies in the transposition of virtually every type of sectoral environmental legislation and that the lack of compliance does not concern only a specific field. Thus, it becomes evident there is a clear tendency of non-compliance with the environmental *acquis* with most of the actions concerning primarily incorrect or partial transposition of directives adopted more than a decade ago. The number and the seriousness of the infringement procedure against Poland for breaches of environmental legislation may also indicate that the post-compliance monitoring was not adequate to ensure the sufficient integration of the environmental acquis into national legislation.

The most notable infringement cases regrading environmental law against Poland are the Białowieża Forest Saga and the Turów Mine case, which will be analyzed in the next part of the paper.

It is also important to note that Polish courts have sent very few preliminary references to the Court of Justice regarding the interpretation of EU environmental law. Generally, this could signify that the Member-State has a high level of legal confidence in its understanding and application of EU law and does not require clarifications but also that the Member-State may be asserting its own authority and independence in interpreting EU law, rather than relying on the Court for guidance or that it disagrees with the jurisprudence of the Court and chooses not to seek further guidance in order to avoid direct confrontation. The democratic backsliding and the compromised

4 The relevant data have been collected via the infringement database of the European Commission (https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/screen/home). The year 2015 has been selected as a turning point after which Poland's democratic backsliding started following the election of the Law and Justice party (Prawo i Sprawiedliwość, PiS) which gained control of both the presidency and the parliament and passed a series of controversial constitutional and judicial reforms.

judicial independence in Poland have definitely contributed to the limited number of references reaching Luxembourg. The few references sent by Polish courts regarding environmental matters cover rather detailed and technical issues of significance for its economic interests such as the criminal liability for trade of wild fauna and flora in Case C-344/08 and the interpretation of the term 'energy from renewable sources', for the purpose of Article 2(a) of Directive 2009/28 in Case C-4/16.

Despite not being very active regarding the use of Article 267 TFEU, Poland has been rather active in using Article 263 TFEU in order to annul provisions of EU environmental law to protect its economic interests. In Case C-5/16, Poland challenged the legal basis of the market stability reserve, an instrument adopted by the Council to stabilize the Emissions Trading System's market and fix the structural imbalance in the supply and demand of pollution allowances. The adoption of the instrument would result into an increase of the price of emission allowances. Poland, being particularly reliant on fossil fuels, argued unsuccessfully that the increase in emission allowance prices could lead to a change in the competitiveness of various types of power stations and in the structure of electricity production at a national level, resulting to a decrease in the competitiveness of the energy sector. Moreover, Poland tried to annul, in Case C128/17, Directive 2016/2284 (NEC Directive), supported by Hungary and Romania. Poland alleged the infringement of several procedural and material norms of the Directive as well as the breach of the principles of proportionality and equal treatment, but all pleas were disbanded by the Court.

To conclude, it becomes evident that after its accession, Poland was condemned for violations of the environmental *acquis* multiple times, while on the same it has been using the EU judicial remedies selectively aiming to protect its economic interests and not to ensure compliance with EU environmental law.

A need for cutting-edge enforcement: the Białowieża forest and the Turów mine cases

The Białowieża Forest saga

The reaction of the Commission and the Court of Justice in order to protect the Białowieża Forest[5] in Poland is perhaps the most prominent example of full-scale enforcement of environmental legislation in the EU. The case, even though it concerns environmental issues, is directly related to the rule of law and demonstrates the spillover effects of democratic backsliding to environmental protection. In fact, the Court linked Poland's lack of compliance with its order with Article 2 TFEU, stating that Poland failed to respect one of the values of the rule of law: namely, that of ensuring the effective application of the Union law (C-441/17 R, para. 102).

The case concerns an infringement procedure against Poland for logging activities in the Białowieża Forest. Following an announcement of the Polish Environment Minister in March 2016 that logging would be tripled, environmental NGOs, Polish citizens and UNESCO strongly voiced their concerns The Ministry tried to provide justification for the increased logging activity by invoking public safety and the need to protect the forest itself from an outbreak of bark beetles.

5 The Białowieża Forest is the best-preserved forest ecosystem and the last low-land deciduous and mixed old-growth forest in Europe. One-third of the Polish section of the Białowieża Forest is protected as a national park and nature reserves, which are strictly protected areas. The remaining two-thirds of the forest are managed for forestry purposes. Due to its exceptional significance, has been recognized as a UNESCO World Heritage site and a Natura 2000 site (Blicharska and Angelstam 2010).

In April 2016, 7 NGOs submitted a complaint to the Commission, alerting that Poland had violated Articles 6(2) and 6(3) of the Habitats Directive and Article 4(4) of the Birds Directive. Subsequently, in June 2016, the Commission initiated a formal infringement procedure. Although the proposed plan for increased logging in Białowieża Forest had not yet been implemented and thus the violation had not yet occurred, there were serious concerns that the damage would be irreversible.

On 20 July 2017, the Commission initiated legal action against Poland for its failure to protect the Białowieża Forest before the Court. While the judgment was still pending, the Court issued interim measures in July 2017, ordering Poland to halt wood harvesting in the Białowieża Forest (Order of 27 July 2017, C-441/17 R). However, for the first time in history, Poland disregarded this order and continued logging activities despite the interim measures. Such refusal is undoubtedly a blatant violation of the rule of law (Grzeszczak and Muchel 2018). Faced with this situation, the Commission asked for the issuing of interim measures claiming this time a penalty payment. Poland utilized its right under the Court's Statute and requested that the case be referred to the Grand Chamber pursuant to Article 16(3) of the Statute of the Court of Justice.

On November 2017, the Grand Chamber issued an unprecedented order by virtue of which, the Court imposed a daily penalty payment of EUR 100,000 on Poland for non-compliance with the logging ban under Article 279 TFEU (Order of 20 November 2017, C-441/17 R). Finally, in April 2018, the Court issued a final judgment confirming that the logging increase in the Bialowieza Forest was illegal (Case C-441/17).

It needs to be noted that the case is revolutionary regarding EU procedural law. Firstly, invoking Article 279 TFEU in parallel with an infringement procedure is very rare. Secondly, the reactiveness of the Court needs to be commended, since the Court issued the first interim measures order in just seven days and the President of the Court ruled of his own motion to apply the accelerated procedure provided for in Article 23a of the Statute of the Court of Justice and Article 133 of the Rules of Procedure. (Case C-441/17, para 60). The combination of these tools and their original interpretation was so effective that there was no further need for the last resort of the infringement procedure, namely Article 260 TFEU.

What is completely new in the Białowieża Forest affair is what the Commission requested in September 2017. As mentioned above, Poland carried on these activities even after the provisional order to cease logging. The Commission had to reinvent a way of securing the effectiveness of EU law, since the Court order had not been sufficient. This led to the idea of an additional interim relief request for the imposition of a penalty payment. According to the Court, that penalty payment for the prosecution of activities did not constitute a sanction but was a means to ensure the effectiveness of the order (Order of 20 November 2017, C-441/17 R, para. 102). This innovative manoeuvre of the Court was successful since following the order of the 20th of November 2017, Poland ended its deforestation operations.

The Białowieża Forest case was the first instance where Article 279 TFEU was used to impose financial penalties that were previously only enforced by Article 260 TFEU. This interpretation does not seem legally contestable as the language of the article itself allows for "any necessary" measures to be taken. The authors of the Treaties deliberately included this broad language to encompass all types of measures (Krämer 2018). It is important to note that this order accentuates the obligation of Member-States to comply with EU environmental law and this cutting-edge enforcement is used to respond to an unprecedented situation since never had a Member-State

refused to comply with an interim measures order imposed by the Court (Krämer, 2018).

Most importantly, however, the Białowieża Forest saga shows that the current enforcement framework is not fit for addressing environmental issues, which by their nature require immediate and preventive response in order to avoid irreparable damage. Since the infringement procedure lacks suspensory effect, Member-States may continue pursuing detrimental activities to the environment and cause irreversible damage.

On a positive note, however, the Białowieża Forest saga demonstrates that the current tools, albeit not being historically designed for addressing environmental challenges can be very flexible if interpreted in light of the Treaty requirement for a high level of environmental protection (Article 191 TFEU) by the Court. In the Białowieża Forest case the Court laid the foundations for cutting-edge enforcement and showed that it has the willingness to deal with major environmental emergencies with the current enforcement toolbox.

It is also important to refer to access to justice, which, albeit not being the main issue of the case, is of crucial importance in environmental matters. Civil society asked for the intervention of EU institutions to find a remedy to stop logging, because of the impossibility to access to justice at the national level. Therefore, despite not being the focal point of the Białowieża case, access to justice represents the problem at its very beginning. As such, access to justice should be seen as an indirect tool of enforcement of EU environmental law: the more environmental issues are solved at the national level, the less judicial review is needed before the Court of Justice, and the fastest the application of EU environmental law is guaranteed.

Unfortunately, the Białowieża Forest saga did not put an end to infringement in EU Forestry legislation by Poland. In Case C432/21, the national forestry law which created a presumption that forest management in compliance with good practices is in compliance with national legislation on the conservation of specific natural resources, breaches the Birds and Habitats Directives. Moreover, Poland was found to be in breach of Directive 92/43 and of the Aarhus Convention as approved by Council Decision 2005/370/EC, since its national legislation did not ensure that environmental organisations are able to access a court for an effective review of the substantive and procedural legality of forest management plans.

The Turów mine case

Another proof of cutting-edge enforcement against environmental backsliding is the Turów mine case. In summary, there was a dispute between Polish and Czech authorities over the operation of the Turów mine, which is located close to the borders of both countries. The Czech Republic argued that the mine's lignite extraction activities were harming the environment and causing water shortages in its territory, while Poland alleged that shutting down the mine would pose a risk to its energy security and result in a loss of jobs.

After referring the matter to the Commission which issued a reasoned opinion, the Czech Republic brought an action before the Court and successfully asked for interim measures so that Poland would cease mining activities at the Turów mine (Case C-121/21). Following Poland's refusal to comply with the order, the Czech Republic sought again interim measures. The Court, confirming the approach taken in the Białowieża Forest case ordered Poland to pay a daily penalty of EUR 500,000 until it complied with the previous order (Case C-121/21 R). However, once again, the

Polish Government explicitly[6] refused to comply, stating that the penalty is disproportionate. In the end, an amicable solution was found between the two neighboring states through diplomatic negotiations and the Czech Republic waived all its claims.

This case is significant as it is the first under Article 259 TFEU regarding environmental obligations and the first inter-state action in which the Court has granted interim measures. Thus, this precedent may encourage more frequent use of Article 259 TFEU by Member-States in situations where diplomatic channels are insufficient (Basheska 2021). Essentially, the Member-States are elevated to guardians of the Treaties that may step in to ensure compliance of EU law if the Commission decides not to act under Article 258 TFEU. Moreover, this case reaffirms the potential of 279 TFEU as way to impose pecuniary penalties for non-compliance with Court orders and proves that the Białowieża Forest was not an exception.

At the same time, however, it also proves that even the use of the full potential of the current enforcement framework, including inter-state disputes, is not deterrent enough to prevent consistent insubordination and environmental backsliding. Poland's refusal to comply with the second interim measures order shows that the enforcement mechanism of the EU reached the limit of its capabilities. In the end the dispute was solved, and compliance was ensured outside the EU framework via diplomatic channels.

To conclude, both cases demonstrate the unprecedented insubordination of a Member-State to comply with EU environmental law and when examined under the current historical context, they demonstrate the spillover effects of democratic backsliding to environmental protection. In view of the pressing environmental emergency, the growing rule of law crisis and the demonstrated limits of EU procedural law, it is crucial to assess whether a substantive reform of EU environmental law is need in order to prevent backsliding. To this end the following section will analyze the potential of the principle of non-regression in addressing this issue.

Addressing environmental backsliding: the emergence of the principle of non-regression

Non-regression i.e., the prohibition of a reduction in the level of environmental protection that has already been established, is an emerging concept in EU Law without having gained explicit recognition in the Treaties or the case law of the Court of Justice (Prieur, 2016).

Regarding the latter, the seeds towards the emergence of non-regression as a principle regarding the rule of law have been planted in Case C-896/19, *Repubblika*. In this case, the Court, going almost as far to render an *obiter dictum*, stated that it is not possible to regress in judicial independence from the level before accession. While acceding to the EU, the Member-States promised to abide by the *acquis* the cornerstone of which is Article 2 TFEU. However, this principle raises more questions than it answers. How does the prohibition of regression affect the principle of equality between the Member-States? Does it mean that Member-States can have different standards of independence and would this result to unequal treatment towards Member-States with higher standards? In addition, it is not always easy to define regression and there is not enough clarification for the precise ambit of this principle. For example, is short-term regression that would be remedied later on allowed? It becomes evident from the ambiguity of this concept that it is difficult to transfer this emerging principle as pronounced in *Repubblika* outside the

6 See information on the official webpage of the Polish government (in Polish), accessed 03/09/2023. https://www.gov.pl/web/premier/polski-rzad-zabezpiecza-interesy-energetyczne-milionow-polakow

sphere of judicial independence without clarifying its content further.

Regarding environmental law, non-regression is on its way to be recognized as a principle of International Law and has gained the endorsement of the Parliament in its Resolution of 29 September 2011 (Prieur 2016). Given that the environmental principles of the Treaty originated first in international texts, it not unlikely that there will be attempts to explicitly recognize such principle in the Treaties. The recent judgment (24 April 2021) of the *Bundesverfassungsgericht* goes towards this direction as well, with the recognition of the principle of inter-generational equity, a principle which by its nature encompasses the concept of non-regression. In addition, one may also argue that there is already an implicit basis for non-regression in the Treaties. Namely, the concept of sustainable development which includes the preservation of the environment for future generation coupled with the requirement for a high level of environmental protection could be interpreted as a prohibition of environmental backsliding. Thus, a combined reading of the objectives to reach a "high level of protection" and "improve [...] the environment" in Article 3(3) TEU and Article 191(1,2) TFEU could constitute an implicit legal basis for non-regression. A negative non-regression obligation is also inherent to the positive obligations following from Article 11 TFEU and 37 CFR (Hachez 2012).

However, the concept of non-regression remains still very vague in environmental law. It is crucial to identify whether non-regression is to be construed as a factual concept that encompasses any real harm to the environment or solely as a legal concept that applies only to reductions in the level of protection. The principle is typically understood as a legal concept that prevents the government from decreasing the level of environmental protection that has already been established by repealing or amending current legislation, exiting from international agreements, or passing laws that permit actions that were formerly prohibited (Prieur 2012).

It should be noted that an explicit recognition of such principle creates serious democratic concerns. The biggest concern is its binding effect on the legislator, limiting the democratically conferred power to change previously adopted legislation. To address this issue, the non-regression principle should not restrict future legislators from amending a particular piece of legislation. Instead, it should be applied in a manner that only obligates maintaining the previous level of environmental protection, rather than any specific law (Prieur 2012). One might also fear that non-regression could discourage lawmakers from establishing more stringent standards since governments may prefer not to be obligated to maintain them in the future.

Recognizing non-regression would not stop the limits of enforcement but would clarify better the obligations of Member-States. The potential of this principle depends on its application by the Court. Used as a self-standing ground of annulment, it could allow the Commission to challenge legislation that has been weakened during the legislative process and no longer meets the previous level of environmental protection required.

Conclusion

It becomes evident from the foregoing, that there are connections between the rule of law crisis and environmental deregulation in Poland. This shows that democratic backsliding can have spillover effects that go further than areas related strictly to the rule of law. Therefore, we are facing a multifaceted crisis that can have severe consequences for the EU and can inhibit the achievement of the climate targets. To this end, studying further the observance of the EU environmental *acquis* on a cross-country and a cross-regional level could contribute to the further

understanding of post-accession environmental compliance.

In addition, recent developments, and more specifically the adoption of the Conditionality Regulation, bring once again the notion of conditionality to the fore. Membership conditionality was replaced after accession by infringement proceedings that are now complemented by the Conditionality Regulation, affirming the effectiveness of conditionality in various forms as a tool to monitor compliance with EU legislation on a pre-accession and on a post-accession level.

Against this background, it is fundamental to ensure that all Member-States comply with the environmental *acquis* and to prevent further environmental deregulation. The determination of the Commission in some infringement cases and most notably in the Białowieża forest and the Turów mine cases can serve as an example of cutting-edge enforcement and of the true potential of Articles 258-260 and 279 TFEU. However, these cases are also an alarming proof of the limits of enforcement and of the general difficulties to sufficiently address environmental challenges with a legal framework originally adopted for an economic organization.

In light of the 20-year big bang enlargement anniversary which comes only 6 years before the first assessment of the climate targets in 2030, it is crucial to reflect on the fundamental importance of environmental rule of law and more specifically on ways to prevent environmental backsliding with the current means that the Union possesses as well as with possible reform ideas. The emerging principles of non-regression and intergenerational equity if applied after striking the right balance to address democratic concerns, have the potential to contribute to the effective application of environmental law in all Member-States in light of the current environmental emergency. However, the prohibition of post-accession regression can only send a strong message but is not able to overcome the limits of the infringement procedure or solve the “Copenhagen Dilemma”. It becomes therefore evident, that the current enforcement framework needs to be redesigned to adapt to the distinct nature of environmental issues as well as that the Conditionality Regulation needs to be used to its full extent in order to provide incentives to correctly implement the *acquis* and discourage backsliding.

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