

Poland: Rule-of-Law Developments End of October-December 2021

Thomas Wahl

News

This news item continues the overview of recent rule-of-law developments in Poland (as far as they relate to European law) since the last update in [eu-crim 3/2021, 135-137](#).

- 27 October 2021: The [Vice-President of the CJEU orders Poland to pay the Commission a periodic penalty payment of € 1 million per day](#) since the country has not complied with the interim measures ordered on 14 July 2021 in Case [C-204/21](#) (→ [eu-crim 3/2021, 135](#)). The reason for the penalty payment is in particular that Poland has denied so far to comply with the request to cease the exercise of the new competences by the disciplinary chamber. The Vice-President follows the Commission's application and held that "it appears necessary to strengthen the effectiveness of the interim measures imposed by the order of 14 July 2021 by providing for the imposition of a periodic penalty payment on Poland in order to deter that Member State from delaying bringing its conduct into line with that order." Poland must pay as long as the disciplinary chamber is acting; according to the CJEU, the disciplinary chamber fails to be independent and impartial. The final judgment in the dispute between the Commission and Poland will be delivered at a later stage by the CJEU's Grand Chamber.
- 4 November 2021: The [President of the CJEU, Koen Lenaerts, warned](#) at the congress of the International Federation of European Law (FIDE) that the European project in its current form is at stake. The CJEU and the primacy of EU law are currently in "an extremely serious situation". He called for the principle of the primacy of EU law to be upheld. He also recalled that membership in the EU is voluntary and is exercised by democratic and sovereign decision. As long as a Member State is part of the Union, it must accept EU law and the interpretation of EU law by the CJEU. These comments were a clear hint to the judgment of the Polish Constitutional Tribunal of 7 October 2021 in which the primacy of EU law over national constitutional law was denied (→ [eu-crim 3/2021, 137](#)).
- 8 November 2021: The [ECtHR rules](#) that the procedure for appointing judges to the Chamber of Extraordinary Review and Public Affairs had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Chamber which cannot be considered an "independent and impartial tribunal established by law" within the meaning of Art. 6(1) ECHR. The ECtHR's ruling concerned applications by two judges who took legal action against decisions by the National Council of the Judiciary (NCJ) on their applications for judicial posts ([application nos. 49868/19 and 57511/19, Dolińska-Ficek and Ozimek v. Poland](#)). With respect to the appointment procedure of the NCJ, which deprives the Polish judiciary of the right to elect judicial members of the NCJ and enables the Polish

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executive and legislature to directly and indirectly interfere, the ECtHR requests Poland to rapidly remedy the situation (Art. 46 ECHR).

- 9 November 2021: It is [reported](#) that a judge from the Elbląg District Court is suspended since he tried to implement the CJEU's interim order of 14 July 2021 in a specific case. The judge found that the Polish Disciplinary Chamber is illegal and thus the waiver of a prosecutor's immunity was not effective.
 - 16 November 2021: The [CJEU declares](#) another feature of the Polish judicial system incompatible with EU law. According to the CJEU, the Polish regulations allow the Polish Minister of Justice – who is also the Public Prosecutor General – to second judges to higher criminal courts and to terminate the secondments at any time without stating reasons, is contrary to Art. 19(1) TEU and Directive 2016/343 on the presumption of innocence in criminal proceedings. The cases were referred to the CJEU by the Regional Court of Warsaw before which the composition of the panel adjudicating several criminal cases was put into question ([Joined Cases C-748/19 and C-754/19, WB and Others](#)). The CJEU confirms that the secondment of a judge by the Polish Minister of Justice to the court jeopardizes the requirement of independence.
 - 24 November 2021: The [Polish Constitutional Tribunal rules](#) that Art. 6 (ECHR), which guarantees a fair trial before an independent court, is not compatible with the Polish Constitution insofar as it concerns the Polish Constitutional Tribunal as a court. It is argued that the Polish Constitutional Tribunal adjudicates the hierarchy of norms and not individual complaints. The Polish Constitutional Tribunal deduces from this that Poland is not bound by ECtHR decisions which concern the Tribunal itself. The decision is a reaction to the ECtHR's decision of 7 May 2021 in the case *Xero Flor* (→ [eucrim 2/2021, 71](#)), in which the judges in Strasbourg found that the election of judges to the Polish Constitutional Tribunal in 2015 was irregular and thus infringed the applicant's rights to a "tribunal established by law" in accordance with Art. 6(1) ECHR.
 - 15 December 2021: [MEPs debate on the latest worrying developments](#) in Poland. This includes the decision by the Polish Constitutional Tribunal of 24 November 2021 on the partial incompatibility of Art. 6 ECHR with the Polish Constitution (cf. above), the de facto ban on abortion, the issue of "LGBTIQ-free zones" (→ [eucrim 3/2020, 161](#)), and the slow progress in the Article 7 procedure against Poland. MEPs calls on the, the Council, the Member States and the Commission to step up their efforts to stop the continuous deterioration of EU values in Poland.
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