

Poland: Rule-of-Law Developments January – March 2022



eucrim

European Law Forum: Prevention • Investigation • Prosecution

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 4/2021, 200-201](#).

- 19 January 2022: The [Commission sends a demand for payment of €69 million to the Polish government](#), as Poland has not yet given in to the dispute over the operation of the controversial Disciplinary Chamber of the Polish Supreme Court. Poland has so far refused to comply with a payment order by the CJEU's Vice-President of 27 October 2021 (→ [eucri](#)m 4/2021, 200) that fined Poland for not having implemented interim measures to cease the exercise of the new competences by the Disciplinary Chamber. The Polish government now has 45 days to comply with the payment request. In the last resort, the money could be offset against EU funding for Poland.
- 3 February 2022: [The European Court of Human Rights \(ECtHR\) confirmed](#) previous judgments that the Polish Supreme Court does not meet the standards of the right to a fair trial enshrined in Art. 6 ECHR. In the case at issue (Application no. 1469/29, *Advance Pharma SP.Z O.O v Poland*), a Polish company instituted claims for damages in tort against the Polish State; its appeal was dismissed by the Civil Chamber of the Polish Supreme Court at last instance. The ECtHR shared the view that the Civil Chamber of the Polish Supreme Court is not a “tribunal established by law” and lacks impartiality and independence within the meaning of Art. 6(1) ECHR. The violation mainly resulted from the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the National Council of the Judiciary (NCJ) and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure. This systematically compromised the legitimacy of a court composed of the judges appointed in that way. The ECtHR criticizes the Polish State for disregarding rulings by the CJEU and Polish courts that declared the judicial reform not in conformity with EU and national law. The judges in Strasbourg call on the Polish State to stop the perpetuation of the systemic dysfunction and to take rapid action to remedy the situation in accordance with Art. 46 ECHR.
- 8 February 2022: [The ECtHR orders Poland](#), by way of an interim measure, to ensure that the Disciplinary Chamber of the Polish Supreme Court does not decide on the waiver of immunity of a Polish judge until the final determination of the complaint by the ECtHR. In the case at issue (Application no. 6904/22, *Wróbel v Poland*), the complainant is a Supreme Court judge and co-author of a Supreme Court resolution denying the Disciplinary Chamber to be an “independent tribunal established by law”. Charges are pending against him before the Disciplinary Chamber for “criminal negligence in relation to a judicial decision given in a criminal case”, which could result in the waiver of his immunity. According to the ECtHR, these proceedings must now be suspended until the ECtHR has decided on

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

Published in
2022, Vol. 17(1) [eucri](#)m pp 5 – 7
ISSN: 1862-6947



the merits of the case, i.e. whether the complainant's right to a fair trial under Art. 6 ECHR was respected. The ECtHR issues such interim measures only exceptionally if the complainant would otherwise face a real risk of irreparable harm.

- 9 February 2022: [The General Court confirms](#) that the CJEU's case law on the rule of law in European Arrest Warrant cases applies, by analogy, in competition cases. In the case at issue ([Case T-791/19, Sped-Pro v Commission](#)), a Polish company complained before the European Commission about the abuse of a dominant position on the market for rail freight transport services by the PKP Cargo S.A., a company controlled by the Polish State. The Commission rejected the complaint and pointed to the Polish competition authority which would be best placed to examine the case. According to the General Court states the Commission must ensure that the fundamental right to a fair trial before an independent tribunal enshrined in Art. 47(2) of the Charter of Fundamental Rights is, like in the area of freedom, security and justice, also guaranteed in competition cases that affect the effective application of Arts. 101 and 102 TFEU. National courts must be in a position to review the legality of decisions of the national competition authorities and to directly apply Arts. 101 and 102 TFEU. If the Commission examines the European interests it must assess, as a first step, whether there is a real risk of a breach of the right connected with a lack of independence of the courts of the Member State in question, on account of systemic or generalised deficiencies in that State, and, as a second step, whether the person concerned actually runs a real risk, having regard to the particular circumstances of the case. In the present case, the judges in Luxembourg blamed the Commission for having failed to examine adduced evidence that the complaining Polish company runs a real risk of a breach of its rights because its case will not appropriately be treated by the Polish authorities and courts.
- 16 February 2022: Following the CJEU's judgment that upheld the validity of the Regulation on the conditionality mechanism (→ spotlight under "Protection of Financial Interests"), [EP President Roberta Metsola commented](#): "The European Parliament now expects the Commission to apply the conditionality mechanism swiftly. Conditionality of EU funds linked to respect of the rule of law is non-negotiable for the European Parliament."
- 21-23 February 2022: An [EP delegation travels to Poland](#) to assess respect of EU values. MEPs meet with government officials, national authorities, the judiciary, civil society and media organisations. The mission collects information with a focus on the separation of powers, the independence of the judiciary, the situation of fundamental and minority rights, and the effects of the Polish Constitutional Tribunal's standpoint on the primacy of EU law.
- 22 February 2022: The [General Affairs Council holds its fifth hearing on the rule of law in Poland](#) under the Article 7(1) TEU procedure. The hearing is a precondition for the Council to determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2 TEU. The purpose of the hearings is to provide the Council with an updated picture of the situation and to help integrate developments since the last hearing on 22 June 2021. Commission Vice-President [Vera Jourovà](#) stressed in the meeting that the Commission maintains its rule-of-law concerns particularly due to the activity of the Polish Constitutional Tribunal, the National Council of the Judiciary and the disciplinary regime for judges and prosecutors in Poland.
- 10 March 2022: [The Polish Constitutional Tribunal confirms a motion](#) by Polish Prosecutor General and Minister of Justice [Zbigniew Ziobro](#) and argues that certain ways the ECtHR had interpreted Art. 6(1) ECHR in cases against the judicial reform in Poland are unconstitutional. In essence, the Constitutional Tribunal stated that the ECtHR and national courts "are not authorized to assess the organisation of the judiciary, the competence of courts, and the law defining the organisation, procedure and method of election of members of the (Polish) National Council of the Judiciary". In addition, the Constitutional Tribunal stressed that the Polish constitution does not allow the ECtHR or national courts "to disregard constitutional provisions, laws and judgments of the Polish Constitutional Tribunal". Last but not least, the Constitutional Tribunal believes that Art. 6(1) ECHR "cannot include a

judge's subjective right to hold an administrative position within the structure of the common judiciary in the Polish legal system". The [motion](#) and the judgment (case K 7/21) is seen as a reaction to ECtHR judgments of November 2021, in which the judges in Strasbourg confirmed the irregularity of Polish judges' appointments and a violation of the right to an independent and impartial tribunal established by law (cases *Dolińska-Ficek, Ozimek v Poland* → [eucrim 4/2021, 201](#)). [Critics](#) to the motion said that the Polish Minister of Justice wanted to receive green light from the Constitutional Tribunal in order not to comply with the ECtHR rulings. The judgment of the Constitutional Tribunal resembles its controversial judgment of 7 October 2021, in which it declared the interpretation of Arts. 1 and 19 of the EU Treaty as interpreted by the CJEU inconsistent with the Polish Constitution (case K 3/21 → [eu-crim 3/2021, 137](#)).

- 13 March 2022: [27 former judges of the Polish Constitutional Tribunal protest](#) against the judgment of the same court of 10 March 2022. They state that the judgment in question "is another scandalous example of jurisprudence violating the Constitution" and stressed that "[t]his deepens the crisis of the constitutional state, including in particular the principle of a democratic state of law and the principle of separation of powers, and causes growing isolation of Poland in Europe." The former judges also draw attention to the worrying circumstances in which the judgment was released.
- 15 March 2022: For the first time, the Grand Chamber of the ECtHR dealt with the conformity of the judicial reforms in Poland with the ECHR. In its [judgment "Grzęda v Poland" \(Application no 43572/18\)](#) the judges in Strasbourg ruled that the removal of a Polish judge from the National Council of the Judiciary (NCJ) before his term had ended and his inability to get judicial review of that decision breached the applicant's right access to a court (Art. 6 § 1 ECHR). The judgment stressed that the successive judicial reforms weakened judicial independence and had exposed the Polish judiciary to interference by the executive and legislature (for an analysis of the case → [related link](#)). [93 applications](#) are currently pending before the ECtHR concerning the reorganisation of courts in Poland.
- 22 March 2022: The CJEU (Grand Chamber) [declared inadmissible](#) an action for preliminary ruling in which the Polish Supreme Court (chamber for labour and social insurance law) asked whether EU law confers on it the power to decide that a court president did not have a valid judge's mandate to initiate disciplinary proceedings against another judge before a disciplinary court due to the Polish reforms of the judiciary ([Case C-508/19](#)). The judges in Luxembourg stated that the questions referred are hypothetical because the referring court lacked jurisdiction as the main issue – the legal relationship of the judge who initiated disciplinary proceedings – is a public law question, not a civil one. It is up to the judge who faced disciplinary proceedings to object before the disciplinary court that said dispute is not determined by an independent and impartial tribunal previously established by law as previously ruled by the CJEU. In its [opinion of 15 April 2021](#), Advocate General *Tanchev* believed that the reference for preliminary ruling is admissible and that the referring court can establish a flagrant breach of the judge's appointment.
- 25 March 2022: [94 judges of the Polish Supreme Court call on](#) the Polish parliamentarians to fully implement the judgments of the ECtHR and the CJEU and to liquidate the main source of problems with the rule of law, namely the new National Council for Judiciary (neo-NCJ). The appeal comes along the start of debates on several bills that are to address the Polish disciplinary chambers and the reform of the Supreme Court.
- 31 March 2022: [OKO.press reports](#) that Acting First President of the Supreme Court *Małgorzata Manowska* and the Disciplinary Commissioner of the Supreme Court are intensifying repression against Polish judges who want to examine the legality of the appointment of a neo-judge by the new, politicised National Council for Judiciary (neo-NCJ) and to apply the judgments of the ECtHR and CJEU which found the appointments to the NCJ incompatible with European rules.

- 31 March 2022: A new bill launched by the governing PIS party on the “protection of the population” [sparks criticism](#) since it would enable the government to restrict constitutional freedoms without parliamentary control and to remove undesirable mayors at the local level.
-

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and “criministrative” law.

All news items are freely accessible at: <https://eucrim.eu/news/>

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.

The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



**Co-funded by
the European Union**