

# Poland: Rule-of-Law Developments November-December 2022

**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 3/2022, 168-169](#).

- 9 November 2022: Following the declaration of 30 Supreme Court judges of 17 October 2022 (→ [eu-crim 3/2022, 169](#)), in which they refuse to adjudicate in panels with neo-judges (i.e. judges nominated after the controversial judicial reforms of 2018 by dependent, politicized institutions), the struggle goes into the next round. The [press reports](#) that, on the one hand, the new Chamber of Professional Liability at the Supreme Court, which replaced the former and illegal Disciplinary Chamber, is still composed of neo-judges and some neo-judges filed a motion to remove said 30 Supreme Court judges from office. On the other hand, legal experts believe that also the new Chamber is in conflict with European law. It is also unclear as to whether decisions in which neo-judges participated are valid. Meanwhile, the Polish President *Andrzej Duda* appointed a judge to chair the Chamber who is considered moderate and is not a neo-judge.
- 16 November 2022: In a dispute on releasing candidate lists for the new National Council of the Judiciary, [the Supreme Administrative Court ruled](#) that the Polish Constitutional Tribunal has been infected with illegality and has lost its ability to adjudicate lawfully since it is controlled by so-called “stand-in judges” who were unlawfully appointed by the ruling PiS party. As a result, the Supreme Administrative Court refused to stay the proceedings and to wait for a decision by the Constitutional Tribunal before which the case was brought in parallel.
- 17 November 2022: Polish NGOs that are associated with the Polish right-wing government [contest the selection](#) of independent and critical NGOs for the National Recovery Plan Monitoring Committee. The Committee is to supervise the implementation of the reforms and investments that Poland receives from the EU Recovery and Resilience Fund. The appointment is a pre-condition for disbursement of the money. The responsible Polish minister will now choose the members of the Committee anew.
- 29 November 2022: *Igor Tuleya*, a symbolic figure of independent and free judges in Poland, files a [third application to the ECtHR](#) because the Polish court presidents, appointed by the Polish Minister of Justice, have not implemented the judgments ordering his reinstatement.
- 2 December 2022: [In an open letter](#), 13 Polish NGOs urge the OSCE Office for Democratic Institutions and Human Rights (ODIHR) “to send a Full-Scale Election Observation Mission to Poland in autumn 2023 to observe our country’s parliamentary elections.” Since the election promises to be highly

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polarized and the possibility of widespread election fraud has been raised, a full election observation mission from the part of ODHIR should ensure a level playing field for all participants.

- 15 December 2022: According to Advocate General (AG) *Collins*, several parts of the Polish law of 2019 amending rules on the organisation of the ordinary courts and on the Supreme Court is not compatible with EU law. The [AG's opinion](#) refers to an action for failure to fulfil obligations brought by the Commission against Poland ([Case C-204/21](#)). The AG recommends the CJEU upholding the Commission's action with respect to the following pleas which result in breaching the requirement of an independent and impartial tribunal within the meaning of EU law:
    - Prohibition on judges and courts to raise or address the question as to whether a judge has been legally appointed or can exercise judicial functions;
    - The corresponding disciplinary regime which makes the examination by a judge of compliance with the requirements of an independent and impartial tribunal previously established by law, a disciplinary offence;
    - Jurisdiction of the Disciplinary Chamber to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office.
    - Ultimately, the AG takes the view that the obligation on judges to declare their membership of a political party, an association or a post in a non-profit foundation, and to publish those data, breaches EU data protection law because sensitive data are processed without the Polish law having established adequate safeguards.
  - 15 December 2022: AG *Collins* delivers his [opinion](#) in references for a preliminary ruling that deal with the lawfulness of lifting a Polish judge's immunity from prosecution and suspending him from hearing cases assigned to him ([Joined Cases C-615/20 and 671/20](#)). The AG underpins that the Disciplinary Chamber of the Polish Supreme Court at issue has not met the requirements of independence, impartiality and tribunal previously established by law as stated in his opinion in Case C-204/21 (→ supra). Therefore, the Disciplinary Chamber cannot be considered authorized to prosecute judges or suspend judges from their office. The AG stressed that the Polish courts have the right to disregard contrary rulings of the Polish Constitutional Court if they consider them to be inconsistent with EU law and refuse to apply any national rule that requires them to comply with those rulings. In addition, the AG requests Poland to ensure that the Disciplinary Chamber's jurisdiction is exercised by an independent and impartial tribunal previously established by law as well as the nullification of the effects of the resolutions which that Chamber adopted.
  - 15 December 2022: In two references for preliminary rulings brought to the CJEU by Polish courts ([Joined Cases C-181/21 and C-269/21](#)), the AG examines the compatibility of various elements of the revised procedure to appoint judges in Poland with EU law. [According to the AG](#), the CJEU should rule that the submitted factors are by themselves insufficient to reach the conclusion of an incompatibility with the principle of prior establishment by law of a court or tribunal (recognised by Art. 19(1) subpara 2 TEU). The referring courts raised doubts as to (1) the lack of participation of a judicial self-governing body in the appointment procedure; (2) the role of the National Council of the Judiciary (KRS) in the appointments since the KRS consists, for the most part, of members chosen by the legislature, and (3) the insufficient possibilities for unsuccessful candidates to challenge the procedure for the appointment of judges to the ordinary courts. The AG referred to previous case law and argued that Art. 19(1) TEU (read in conjunction with Art. 47 of the Charter) must be interpreted in the sense that the appointment process gives rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges. This threshold has not been met in the references.
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