

Poland: Rule-of-Law Issues July – Mid-October 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 issue 2/2021, 71-72](#).

- 29 June 2021: In the [cases *Broda and Bojara v. Poland*](#) (applications no. 26691/18 and 27367/18, → [eucriM 2/2020, 68](#)), the ECtHR holds that Poland violated the right of access to a court (Art. 6(1) ECHR) when the Polish Minister of Justice prematurely terminated the office of two vice-presidents of a Polish regional court on the basis of a law of 2017 implementing the judicial reform in Poland. The judges in Strasbourg emphasise the importance of safeguarding the independence of the judiciary and respect for procedural fairness in cases concerning the careers of judges. They observe that all the powers to remove judges from office were in the hands of the executive. The applicants had not been heard or informed of the reasons for the ministerial decisions and the law did not foresee any judicial, independent review of those removal decisions. The ECtHR also holds that Poland was to pay each of the applicants €20,000 in respect of pecuniary and non-pecuniary damage.
- 14 July 2021: The Vice-President of the CJEU grants interim measures in the infringement proceedings of Case C-204/21 and [orders Poland to immediately suspend](#) the application of the provisions recently introduced by the so-called “muzzle law” (→ [eucriM 1/2020, 2-3](#)). In particular, Poland is requested to cease the exercise of the new competences by the disciplinary chamber. The interim injunction thus fully follows the request by the Commission, which brought the action before the CJEU ([eucriM 1/2021, 4](#)).
- 14 July 2021: The [Polish Constitutional Tribunal rules](#) that Poland is not obliged to comply with interim measures of the CJEU if they relate to the shape and functioning of the judiciary. This would counter the Polish constitution. The decision [triggers a debate](#) whether Poland steps towards a “legal polexit”.
- 15 July 2021: The Commission reacts to the decision of the Polish Constitutional Tribunal of 14 July 2021. The [Commission states](#) that it is “deeply concerned” by the decision and finds that it “reaffirms our concerns about the state of the rule of law in Poland.” Poland is expected “to ensure that all decisions of the European Court of Justice are fully and correctly implemented.”
- 15 July 2021: The CJEU [delivers its judgment](#) in the infringement proceedings brought by the Commission against Poland in October 2019 (→ [eucriM 3/2019, 157-158](#)) and declares a central part of the judicial reform in Poland incompatible with EU law ([Case C-791/19](#)). The Commission opposed the disciplinary regime applicable to judges of the Polish Supreme Court and to judges of the ordinary courts that was introduced in 2017. Prior to the present judgment, which closes the proceedings, the

AUTHOR

Thomas Wahl

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

Published in
2021, Vol. 16(3) [eucriM pp 135 – 137](#)

ISSN: 1862-6947

<https://eucriM.eu>



CJEU, on 8 April 2020, granted interim measures by which Poland was ordered to suspend the relevant national provisions giving the powers to the Disciplinary Chamber of the Supreme Court (→ [eu-crim 1/2020, 4](#)). The CJEU now upholds all the complaints made by the Commission. In particular, the judges in Luxembourg find that the Disciplinary Chamber does not provide all the guarantees of impartiality and independence, and the disciplinary regime could be used in order to exert political control over judicial decisions or to exert pressure on judges with a view to influencing their decisions.

Furthermore, Poland failed to guarantee essential rights in disciplinary cases against judges and to ensure that judges can decide to make references for preliminary rulings to the CJEU without pressure. The judgment means that Poland must take the measures necessary to rectify the situation.

- 15 July 2021: The Commission [launches an infringement procedure](#) against Poland enquiring statements on declarations of “LGBT-ideology free zones” by several Polish regions and municipalities since 2019. The Commission notes that Poland has failed to date to provide requested information on the matter. According to the Commission, this behaviour is “hampering the Commission’s ability to exercise its powers vested under the Treaties and failing to comply with the principle of sincere cooperation.”
- 22 July 2021: In the case *Reczkowicz v. Poland* (application no. 43447/19, → [eu-crim 2/2020, 68](#)), the ECtHR holds that the creation of the Disciplinary Chamber of the Polish Supreme Court, which was enacted in 2017 as part of the large-scale legislative reform of the Polish judicial system, was in breach of the ECHR. The underlying case concerned disciplinary proceedings against a barrister whose case was dismissed by the newly created Disciplinary Chamber of the Polish Supreme Court. The judges in Strasbourg find that the procedure for appointing judges 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 Disciplinary Chamber. The Disciplinary Chamber was not therefore a “tribunal established by law” within the meaning of the ECHR. The ECtHR also holds that Poland was to pay the applicant €15,000 in respect of non-pecuniary damage.
- 27 July 2021: [Hundreds of Polish judges sign an appeal](#) to the government and the president of the Supreme Court demanding that “all obliged authorities (...) fully implement the order of the Court of Justice of the European Union of 14 July 2021 (C-204/21) and the judgment of this Court of 15 July 2021 (C-791/19), including the immediate cessation of the action of the Disciplinary Chamber of the Supreme Court.”
- 14 August 2021: The Sejm (lower house of the Polish Parliament) [passes legislation](#) that intends to restrict ownership of Polish TV and radio companies. The ruling PiS party justifies the act based on the need to ward off the danger of takeovers of a TV station by companies from hostile countries. However, critics consider the law a disguised measure to get rid of the broadcasting network TVN, which the government perceives as preferring the opposition. TVN is indirectly controlled by a US company, which would be forced to sell its majority stake as a consequence of the reform. Hence, the law is also dubbed “Lex TVN”.
- 7 September 2021: The [Commission decides to further proceed against Poland](#) since the country has not fully complied with the CJEU’s order of 14 July 2021 and its judgement of 15 July 2021. The Commission files a request to the CJEU to impose financial penalties on Poland to ensure compliance with the Court’s interim measures order. Since Poland continues to conduct disciplinary cases under the contested regime, the Commission sent a letter of formal notice (Art. 260(2) TFEU) restarting the infringement proceedings. If Poland does not comply, the Commission may bring the case to the CJEU again.
- 10 September 2021: It [is reported](#) that Polish Minister for Justice, *Zbigniew Ziobro*, suspended a judge who implemented the CJEU and ECtHR judgments regarding the illegal Disciplinary Chamber of the Supreme Court. The judge was accused of having overstepped his powers when he examined the status of judges who were newly appointed by the politically influenced NCJ.

- 16 September 2021: The European Parliament (EP) [passes a resolution](#) in which it condemns several recent rule-of-law developments in Poland. MEPs criticise, *inter alia*, the “Lex TVN” (bill passed on 14 August 2021 by the Sejm, see above) as “an attempt to silence critical content and a direct attack on media pluralism.” MEPs also call on the Polish Prosecutor General and Minister of Justice to comply with the recent rule-of-law related judgments and orders of the CJEU (see above). They should also refrain from further questioning the primacy of Union law and withdraw their pending motion before the Polish Constitutional Tribunal to review the constitutionality of certain parts of the EU Treaties. Lastly, the resolution expresses other concerns over events deteriorating the rule of law in Poland, including smear campaigns against judges, journalists and human rights activists.
- 6 October 2021: In a discussion with Commissioners *Dombrovskis* and *Gentiloni*, [MEPs called on the Commission](#) not to approve the Polish and Hungarian resilience and recovery plans unless the countries address all concerns over their rule-of-law deficiencies, in line with the conditionality rules for the access to EU funds. Although deadlines have expired, the Commission has not taken a final approval decision since it is not entirely satisfied with the measures against fraud and corruption in the submitted plans.
- 6 October 2021: The CJEU [raises again doubts](#) on the independence of the Polish judiciary after the reforms of 2018. The [case \(C-487/19, W.Ż.\)](#) concerned the transfer of a judge to another division of a regional court without his consent. The CJEU first notes that an ordinary court such as a Polish regional court forms part of the Polish system of legal remedies in the “fields covered by EU law” within the meaning of the second subparagraph of Art. 19(1) TEU. Thus, a transfer of a judge without consent is potentially capable of undermining the principles of irremovability of judges and judicial independence. Such transfer measure must be open to challenge before the courts in a procedure that fully safeguards the rights of the defence. In this context, the CJEU found that the circumstances by which the judge of the Chamber of Extraordinary Control was nominated and who ordered dismissal of the actions against the transfer measure give rise to reasonable doubts concerning the independence of that body. Subject to final assessment, the referring court (civil chamber of the Polish Supreme Court) may declare such order null and void.
- 7 October 2021: [The Polish Constitutional Tribunal rules](#) on a motion submitted by Polish Prime Minister *Mateusz Morawiecki* of whether the CJEU is going too far in its rulings on Poland’s judicial system and exceeds its competences under the European Treaties. The Constitutional Tribunal finds (case K 3/21) that Articles 1 and 19 of the EU Treaty as interpreted by the CJEU are inconsistent with the Polish Constitution. In doing so, the court not only denies the obligation to provide effective and independent legal protection in the area of Union law (a manifestation of the rule of law), but also the primacy of Union law over national constitutional law.
- 7 October 2021: In a first statement following the Polish Constitutional Tribunal’s decision of the same day, [the Commission reaffirms](#) the primacy of Union law and stresses that it will make use of its powers under the Treaties to safeguard the uniform application and integrity of Union law.
- 8 October 2021: In a [press statement](#), Commission President *Ursula von der Leyen* voices her deep concerns over the judgment of the Polish Constitutional Tribunal of 7 October 2021. She stresses that the Commission will maintain the primacy of EU law.
- 19 October 2021: The [plenary session of the European Parliament](#) sees an exchange of blows between EU Commission President *Ursula von der Leyen* and MEPs on the one hand and Polish Prime Minister *Mateusz Morawiecki* on the other. They debated on the consequences of the Polish Constitutional Tribunal’s ruling of 7 October that key provisions of the EU Treaty are inconsistent with the Polish Constitution (see above). In her speech, *von der Leyen* reiterated that the ruling “puts into question the foundation of the EU and is a direct challenge to the unity of the European legal order”. She listed the sanctions Poland will have to face: another infringement procedure, the use of the conditionality regulation to cut EU funds, and a renewed application of the Article 7-procedure determining a

serious breach of EU values. The Polish Prime Minister denied that the Constitutional Court had acted illegally and argued that constitutional courts in other Member States issued similar rulings in the past. He also announced that the controversial Disciplinary Chamber of the Supreme Court would be dissolved and be replaced by new provisions. The majority of MEPs called on the Commission to use all the available tools to defend Polish citizens and to finally trigger the rule of law conditionality mechanism.

- 21 October 2021: Following the heated debate in plenary of 19 October, the [EP adopts a resolution](#) which “[d]eeply deplores the decision of the illegitimate [Polish] ‘Constitutional Tribunal’ of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU”. According to the resolution (adopted with 502 votes for, 153 against, and 16 abstentions), “the illegitimate ‘Constitutional Tribunal’ not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland”. MEPs lists several actions that the Commission is called on to take urgently.

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**