



FREECOURTS NEWSLETTER

11.22(3)

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BREAKING NEWS!



On 29 November 2022, Judge Igor Tuleya was reinstated to adjudicate after 741 days. The decision was made by Supreme Court Judges: Wiesław Koziół, Dariusz Kala and Małgorzata Wiąsek – Wiaderek (Chamber of Professional Liability). On 30 November 2022 the judge appeared in court and received a letter from the President of the court informing him that he had been reinstated to adjudicate under the previous conditions. Judge Tuleya's return to work is undoubtedly a victory for civil resistance and a symbol that any oppression of power can be fought back. Morally the victory is big, systemically it is only a tiny step towards restoring the rule of law. There is still a long march ahead.

Introduction

We are pleased to be able to present to you the third issue of the Free Courts Newsletter, a regular publication in which we reliably and continuously bring to you the most important events in Poland on the justice system and breaches of the rule of law.

We are lawyers defending the rule of law in Poland; we watch the activities of the ruling party closely day by day and speak out about all irregularities. We do not want any injustice to escape public attention.

Top story: National Recovery Plan – All quiet on the Western Front

... The fine that the CJEU imposed on Poland in October 2021 for failing to implement the order on the Disciplinary Chamber – a million euros per day – is still in force. It will exceed €400,000,000 in December! Furthermore, even money from the Cohesion Fund could be at risk... [read more →](#)

We are not alone

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The repression continues

... Legal judges are not giving up and are taking every step to stop the further deepening of the rule of law crisis in Poland. This is even evidenced by the declaration of 30 legal judges of the Supreme Court published on 17 October 2022, in which they emphasised that they 'do not see any possibility of adjudicating together with people appointed in a defective procedure'... [read more →](#)



Masquerade in the Supreme Court

In the previous edition of the Free Courts Newsletter, we wrote about the amendment to the Act on the Supreme Court, which entered into force on 15 July 2022. It provided, among other things, for the liquidation of the illegal Disciplinary Chamber and the establishment in its place of a Chamber of Professional Liability, the membership of which was to be decided upon by the President (giving him the right to appoint neo-judges to the Chamber of Professional Liability, including those who had previously been adjudicating in the Disciplinary Chamber).

The requirement to liquidate the Disciplinary Chamber is one of three 'milestones' or, in other words, conditions formulated by the European Commission on the basis of the rulings of the CJEU of 14 and 15 July 2021 and enshrined in the National Recovery Plan. They need to be met to unblock the funds from the EU Recovery Fund, in which Poland is entitled to more than €58 billion. Poland was also supposed to establish a new chamber in the Supreme Court in place of the Disciplinary Chamber, which would satisfy the requirement of impartiality and independence in accordance with Article 19 of the Treaty on European Union.



The Disciplinary Chamber no longer operates at the Supreme Court, but the Chamber of Professional Liability has been

established in its place, which is a very similar court, only under a different name. (...) A dependent body cannot appoint independent judges, this is simple. The Chamber of Professional Liability has the same original sin (as the Disciplinary Chamber), namely the appointment of its members by the neo-NCJ. Maria Ejchart-Dubois

On the basis of the decision of neo-judge Małgorzata Manowska, acting as First President of the Supreme Court, the incumbents of the Disciplinary Chamber received the opportunity to transfer to other chambers of the Supreme Court or to retire. Five neo-judges from the Disciplinary Chamber decided to remain in the Supreme Court – three moved to the Criminal Chamber, one to the Labour and Social Insurance Chamber and one to the Cham-

ber of Extraordinary Control and Public Affairs. The remaining six members of the Disciplinary Chamber decided to retire. They will receive more than €4,250 a month from the taxpayers' pockets until they reach retirement age and, when they do, they will be entitled to 75% of that amount, namely €3,200!

However, the liquidation of the Disciplinary Chamber and its replacement by the Chamber of Professional Liability does not implement the orders of the CJEU. Firstly, according to the amended Act, the members of the new chamber are appointed by the President (a politician). Secondly, judges appointed by the neo-NCJ (the National Council of the Judiciary formed after 6 March 2018), namely so-called neo-judges, may continue to be members of the Chamber of Professional Liability. The legality of the neo-NCJ has been repeatedly contested by Polish and European courts. The nominations of neo-judges have been addressed in Poland by the Supreme Court in the 'Resolution of the three Chambers' of 23 January 2020, the Supreme Administrative Court and the ordinary courts. There is also an established line of judgments on this issue in the European courts. In the case of the CJEU, these include the judgments in cases: C-585/18, C-624/18 and C-625/18 (A.K.), C-791/19 (Commission v Poland), and C-132/20 (Getin Noble Bank). This was confirmed, among others, by the ECtHR in the judgments in *Grzęda v Poland* (Application no. 43572/18), *Reczkowicz v Poland* (Application no. 43447/19), *Dolińska-Ficek and Ozimek v Poland* (Application no. 49868/19 and 57511/19) and *Advance Pharma v Poland* (Application no. 1469/20).

Professor Włodzimierz Wróbel, an outstanding judge of the Criminal Chamber of the Supreme Court, described the whole procedure of liquidating the Disciplinary Chamber as a 'masquerade'.

The European Court of Human Rights has not been fooled by this trickery either: in recent months it issued a series of precedent-setting measures for Polish judges whose cases were to be heard by the Chamber of Professional Liability, namely fo: Irena Piotrowska, Aleksandra Janas, Joanna Hetnarowicz-Sikora, Andrzej Sterkowicz, Adam Synakiewicz, Włodzimierz Wróbel, Marzanna Piekarska-Drżek and Agnieszka Niklas-Bibik. The ECtHR ordered Poland to guarantee the requirements of a fair trial in accordance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It follows from these measures that the Chamber of Professional Liability, the membership of which includes neo-judges, does not satisfy the requirements of an independent and impartial court established by law.

The membership of the Chamber of Professional Liability was finally established in September. On 17 September 2022 (Saturday, late in the evening), President Andrzej Duda issued an order appointing the eleven-person membership of the Chamber of Professional Liability (chosen from among 33 judges drawn by lots by Małgorzata Manowska). The order was then countersigned by the Prime Minister. In accordance with the President's choice, six neo-judges and five legal judges of the Supreme Court are members of the Chamber of Professional Liability. According to President Duda, this is a 'compromise' decision, and it should also be mentioned that, of these five judges, three can be considered 'moderate' – they had previously submitted a dissenting opinion to the 'Resolution of the Three Chambers' of January 2020. This means they considered the neo-NCJ, neo-judges and Disciplinary Chamber to be legitimate.



However, Andrzej Duda decided to ostentatiously show that he has no intention of upholding the constitutional order and

obligations arising from international agreements, but instead patrons the lawlessness that has been taking place in Poland for seven years. It should be reiterated that, all the time, he is participating in the appointment of dozens of new neo-judges, causing this cancer to grow. Michał Wawrykiewicz

On 12 October 2022, Supreme Court Judge Krzysztof Staryk of the Labour and Social Insurance Chamber, one of the five legal judges elected to the Chamber of Professional Liability, refused to adjudicate in the chamber. The case of Prosecutor Krzysztof Parchimowicz, who is a symbol of resistance to the politicisation of the Polish prosecution service, among other things, was scheduled to be heard on that day. Judge Staryk wrote a letter to the President stating that the appointment of the Chamber of Professional Liability cannot satisfy the requirements of the rulings of the European courts and that the appointment of its membership by politicians breaches the principle of the tripartite separation of powers.

On 27 October 2022, Wiesław Kozielewicz, who, despite his legal status, had previously temporarily served as president of the Supreme Court managing the work of the Chamber of Professional Liability and who had adjudicated on disciplinary cases of judges, became president of the Supreme Court in charge of the Chamber of Professional Liability.

The Chamber of Professional Liability is

trying to rectify some of the mistakes of its predecessor, the Disciplinary Chamber. While still in a temporary, five-person membership, it overturned the suspensions of Judges Marta Pilśnik, Adam Synakiewicz and Anna Bator. It reinstated Judges Krzysztof Chmielewski and Maciej Rutkiewicz. Prosecutor Parchimowicz was also acquitted by the Chamber of Professional Liability, although he still faces five other disciplinary charges. It should be remembered that the reinstatement of judges suspended by the Disciplinary Chamber is one of the necessary conditions for unblocking billions of euros from EU funds.

National Recovery Plan – All quiet on the Western Front

In August, during a press conference with the French President, Emmanuel Macron, the head of the Polish government referred to the lack of disbursement of EU funds to Poland from the Recovery Fund: 'I recently read an interesting article by Jan Rokita – a name everyone in Poland knows – who said that it cannot be so, at a particular time like today, that two countries are subject to sanctions, namely Russia and Poland. Poland, which is indeed taking in millions of refugees, (...) which is opening its heart to women and children from Ukraine, is today subject to European sanctions which are, as the author of this brief analysis says, even more arduous than Russia.' So what does the Polish Prime Minister mean when he talks about sanctions imposed on Poland?

After 7 years of United Right group's government, Poland, previously a shining example of how to implement EU law, now faces the risk of being cut off from EU funds. We may not receive money from the Cohesion Fund, we may not get funds from the Recovery Fund and we may continue to pay fines for violating the rule of law. However, these are not sanctions, but the consequences of the government's actions and its anti-EU rhetoric.

The 'Next Generation EU' initiative, referred to as the Recovery Fund, was established in 2020, at the European Council's summit. Its centrepiece is the Recovery and Resilience Facility instrument, a project worth more than €720 billion to stimulate the economies of Member States after the

Covid-19 pandemic. Poland is entitled to more than €58 billion paid out as grants and loans from the Recovery Fund.

A condition for receiving EU funds from the Recovery Fund is the signature of a National Recovery Plan (NRP). This is a document prepared by an EU Member State and approved by the European Commission. The implementation of the NRP involves fulfilling the obligations contained in it, which are referred to as 'milestones'. The Polish NRP was approved by the European Commission and later by the Council of the European Union in June 2022. The next step constituted working negotiations, while Poland could submit an application to unblock the funds. This has not happened to this day.

'The milestones' were formulated on the basis of the CJEU rulings of 14 July 2021 (C-204/21 R) and 15 July 2021 (C-791/19) and these are the bone of contention between Warsaw and Brussels. In order to unlock funds from the Recovery Fund, Poland has to satisfy the following conditions:

- The liquidation of the Disciplinary Chamber, and the establishment of a court satisfying the requirement of independence and impartiality in its place;
- The reform of the disciplinary system and a guarantee of a lack of disciplinary liability of judges for the content of their rulings;
- The reinstatement of judges wrongly penalized by the Disciplinary Chamber and the assurance of a procedure for their reinstatement.

Poland has still not satisfied any of the rule of law 'milestones'. We have described the only step the government has taken, namely the abolition of the Disciplinary Chamber and its replacement by the Chamber of Professional Liability, above.

This is not the end of the story: the fine that the CJEU imposed on Poland in October 2021 for failing to implement the order on the Disciplinary Chamber – a million euros per day – is still in force. **It will exceed €400,000,000 in December!** Furthermore, even money from the Cohesion Fund, namely the €76.5 billion allocated under the EU's multi-annual budget, could be at risk. Why? Because Poland is not respecting its basic treaty obligations: Articles 2 and 19 of the Treaty on European Union and Article 47 of the EU Charter of Fundamental Rights. Interestingly, the government is considering suing the European Commission at the CJEU. This is how it wants to recover at least some of the money from the fines imposed on it.

The disciplinary system for judges is still waiting to be reformed. The so-called 'Muz-

zle Act' which has been in force under Polish law since 2020, introduced disciplinary liability of judges for conducting the 'independence and impartiality test' formulated in the CJEU's judgment in A.K. of 19 November 2019. The CJEU ordered Polish judges to independently assess the legality of the neo-NCJ and the Disciplinary Chamber, taking into account the criteria specified by the Court (the so-called 'independence test') and once again confirmed that the organisation of the judiciary in a Member State must comply with EU law, including guaranteeing independence. It should be emphasised that the EC does not expect just the suspension of the implementation of the Muzzle Act, it also expects that Polish judges will not be punished for the content of their judgments and for asking the CJEU for preliminary rulings. Nor that they will be threatened with disciplinary action for examining the status of other judges.

The ruling camp's continuous attack on the rule of law in Poland, constituting the axiological backbone of the EU, and the incessant destruction of the Polish judiciary are the reasons for both withholding payments from the Recovery Fund and the imposition of penalties on Poland by the CJEU in the July rulings.



The rule of law is the absolute foundation of the functioning of the EU. Without it, there is no question of any other EU

agenda – neither agricultural policy, nor climate policy, nor security or trade issues, movement of people and capital. It is all based on the trust that Member States respect certain common rules. Michał Wawrykiewicz

We are not alone

One of the pillars of the battle for human rights in Poland and for the independence of the judiciary upholding them is the European Court of Human Rights in Strasbourg. It is its case law that is helping develop standards for the protection of the rule of law – a value that underlies the whole of the legal order of the EU.

More than 100 cases are already pending before the Court arising from complaints by Polish judges and citizens who have not received a guarantee of a fair trial because of the destruction of the judiciary in Poland, which is a European standard, or have experienced repression in the form of suspension from performing official duties or a reduction in their salaries.

In a dozen cases this year alone, the Court

applied interim measures involving the imposition of an obligation on the Polish government to inform the Court of the date of the hearing or session before the Supreme Court (the Disciplinary Chamber, the Chamber of Professional Liability and the Chamber of Extraordinary Control and Public Affairs) at least 72 hours before its start or prohibiting a ruling from being issued until the case is heard by the Court. In the latest measure issued (in the case of Judge Waldemar Żurek), the Court prohibited the Chamber of Extraordinary Control and Public Affairs from starting to examine the extraordinary complaints filed by Minister of Justice Zbigniew Ziobro in Judge Żurek's personal cases.

What does the measure issued in this case really mean? The Court found that the Chamber of Extraordinary Control and Public Affairs established by the neo-NCJ did not satisfy the requirements of an independent and impartial court established by law (in accordance with Article 6 of the Convention).

Furthermore, on 6 October 2022, the Court issued a ruling in the case of Judge Paweł Juszczyszyn (Application no. 35599/20). The finding of a breach of Article 18 of the Convention requires special attention. Judge Juszczyszyn's case is the first Polish case in which the Court found a breach of this provision.

In the judgment, we read: 'However, having regard to all the foregoing considerations, the Court is satisfied that the predominant purpose of the disciplinary measures taken against the applicant that led to his suspension was to sanction the applicant and to dissuade him from assessing the status of judges appointed upon the recommendation of the reconstituted NCJ by applying the relevant legal standards, including those stemming from Article 6 § 1 of the Convention.' [para. 337 of the judgment]. Let us briefly recall Judge Juszczyszyn's story:

Paweł Juszczyszyn is a judge of the District Court in Olsztyn. In November 2019, as a judge seconded to the Regional Court in Olsztyn, he heard an appeal against a judgment of a district court, the bench of which included a judge appointed with the involvement of the National Council of the Judiciary in the form assigned to it in 2018 (neo-NCJ), i.e. a so-called neo-judge. Given the ruling of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, which formulated the criteria for assessing the independence of the NCJ, Judge Juszczyszyn issued an order requiring the Head of the Chancellery of the Sejm to present the notices of citizens and judges in support of the candidates for members of the National Council of the Judiciary

and to send these documents to the court under the sanction of a fine. This is how he wanted to check whether the members of the neo-NCJ, who nominate new judges, are themselves appointed in accordance with the law. It turned out that this seemingly most ordinary procedure of a court requesting a document could not – in the current situation – be fulfilled. The Sejm denied the judge access to the lists of support for the NCJ.

But it did not stop there. Judge Juszczyszyn's order incited an avalanche that led to the Disciplinary Chamber ruling that the judge is to be suspended indefinitely (until the disciplinary charges are heard) and that his salary be reduced by 40%. As the Disciplinary Chamber pointed out, Judge Juszczyszyn had committed a 'judgmental excess' which posed a threat to welfare in the form of the peaceful work of other judges, while the judgment lacked legal grounds and a justification. Judge Juszczyszyn was prevented from adjudicating for 839 days.

The case came to an end in the European Court of Human Rights, which, in its judgment, stated that the repressive actions to which Judge Juszczyszyn has been subjected since 2020 constitute a breach of the European Convention on Human Rights, in particular the right to a trial by a tribunal and the right to a private life.

The repression continues



The most important thing is that all judges have not given up. Despite the very strong chilling effect and the disciplinary machinery that has been unleashed against them, they have not succumbed to it and have preserved their internal independence. In fact, the whole system of judicial independence now rests on their shoulders. Sylwia Gregorczyk-Abram

Disciplinary charges were pressed against four judges from the Court of Appeal in Warsaw in October of this year alone. The grounds for the charges are rulings in which they questioned the legality of the judicial appointment procedure that has been in force in Poland since 2019. While pressing the charges against the judges, the disciplinary commissioner breached the measure established by the Court of Justice of the European Union in July 2021, which applied to the suspension of the application

of provisions prohibiting judges of the ordinary courts from examining the legality of the appointment of neo-judges.

However, legal judges are not giving up and are taking every step to stop the further deepening of the rule of law crisis in Poland. This is even evidenced by the declaration of 30 legal judges of the Supreme Court published on 17 October 2022, in which they emphasised that they 'do not see any possibility of adjudicating together with people appointed in a defective procedure'.

This declaration of the legal judges of the Supreme Court could draw with it further disciplinary charges. Paweł Czubik, a neo-judge of the Chamber of Extraordinary Control and Public Affairs, claimed that the declaration of the 30 judges constituted an act of resignation from office and filed a motion to initiate a procedure to establish whether the declaration of the 30 judges means that they have resigned from judicial office. Paweł Czubik's motion is to be examined by Małgorzata Manowska, acting as First President of the Supreme Court, and then referred to President of the Republic of Poland, Andrzej Duda.

Małgorzata Manowska, acting as first president of the Supreme Court, said that 'If I receive the case, and that will certainly be the case, I will examine it, but, of course, the final decision rests with the President. (...) If 30 judges made a declaration that they would not adjudicate, then another judge had the right to express doubts as to whether this meant their resignation. I am not assessing that, it is a matter of the legal analysis that will follow.' Furthermore, she adds that '(...) I am not threatening disciplinary action, I will not give that pleasure to anyone who wants to carry the slogan that I am bullying judges and initiating proceedings against them on banners to Europe. However, if there is no alternative, it is primarily up to the disciplinary commissioner and then the court to assess the conduct of the judges. My wishes are irrelevant here.' Statements of this type do not soften the conflict that has arisen in the Supreme Court, especially if the words are spoken by a person acting as the first president.

Speaking of the Supreme Court, the threat of disciplinary action hanging over Professor Małgorzata Gersdorf, former First President of the Supreme Court, regarding the adoption of a resolution of three combined Chambers of the Supreme Court, **must not be forgotten.**

The matter is about the resolution of the three Chambers of the Supreme Court – Civil, Criminal and Labour – of 23 January 2020, from which it arises that, if a person appointed on a political motion of the National Council of the Judiciary is a member of a panel of the Supreme Court, the panel is incorrectly staffed. At the end of

October, Disciplinary Commissioner Piotr Schab summoned Professor Małgorzata Gersdorf to submit written explanations on this, while claiming that the Supreme Court judges could not have passed the resolution because the Supreme Court was in a competence dispute with the Sejm. It was the commencement of issuing the resolution which, he believes 'clearly and grossly breached the provision of Article 86, para. 1 of the Act on the Constitutional Tribunal'. The situation is complicated all the time: in addition to the split in the judiciary, there is also a growing social division.



All hands must be on deck, otherwise the 'Titanic' will not rise again. I encourage all lawyers to become involved. Many people have given their lives for Poland and we all have such people in our families. It seems to me that it would be a shame if we did not make a small effort to save this place from disaster. We have a war next door which shows what our alternative is. Either the West or the East. Full stop. Polish judges are passing a major test of courage. We lawyers also need to pass this test.
Paulina Kieszowska-Knapik



Worth reading:

- Expert: The deformation of the courts is very dangerous for next year's elections
- Letter to the OSCE (ODIHR) regarding election observation mission for 2023 Polish parliamentary elections dated November 22, 2022
- Poland's implementation of the European Convention on Human Rights: Secretary General's Report dated November 23, 2022 (Council of Europe)

About the Free Courts Foundation

The Free Courts Foundation is a non-governmental and non-profit organisation founded by a group of Polish lawyers: Maria Ejchart-Dubois, Sylwia Gregorczyk-Abram, Paulina Kieszowska-Knapik and Michał Wawrykiewicz. As professionals, realising the significance of the harmful changes being introduced into the Polish legal system leading to the politicisation of the independent courts, we undertake various activities of upholding the rule of law in Poland. **Katarzyna Wiśniewska, PhD became a new member of the Free Courts in October. 5 junior lawyers are also part of the Foundation's team.**

The Foundation's objective is to increase knowledge and strengthen the independence of the courts and judges, as well as to conduct activities in support of the rule of law and the broadly-understood protection of human rights, civil liberties and to counteract discrimination.

#FreeCourts co-founded the Justice Defence Committee (KOS) in 2018, the organisation that represents and helps repressed judges of the ordinary courts, judges of the Supreme Court and the Supreme Administrative Court, as well as prosecutors.

The Free Courts Initiative has been awarded The European Parliament's 'European Citizen's Prize' in 2020 for exceptional achievements in giving concrete expression to the values enshrined in the Charter of Fundamental Rights of the European Union. In 2022 the Free Courts received the 2022 UIA Rule of Law Award in cooperation with LexisNexis together with the Egyptian lawyer Mohamed El Baquer. The UIA Rule of Law Award in cooperation with LexisNexis is a symbolic prize that aims to acknowledge and publicise award-recipients for their commitment and actions. Since its creation, it has been successively awarded to the Malaysian Bar, in 2016; to Saidbek Nuritdinov, President of the Union of Advocates of the Republic of Tajikistan, in 2017; to the Honourable Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court, in 2018; to French lawyer, Bertrand Favreau, President of the IDHAE, in 2019, to European Lawyers in Lesbos, in 2020, and to Afghan lawyer Latifa Sharifi in 2021.

Also on our channels

The Free Courts report named '2500 Days of Lawlessness', which presents, step by step, how the political authority has brought about the destruction of the rule of law. It is a record of all legislative changes and other decisions taken by the executive and legislative authorities to politicise the judiciary. The report was originally issued in June 2021 under the name '2000 days of lawlessness' and we keep it updated on an ongoing basis. The situation as at 5 November 2022 is 2,500 days of lawlessness. The report also shows that none of the steps taken since 2015 were intended to implement a genuine and credible reform of the judiciary. Knowing what work has been done will be crucial when the time comes to repair what has been destroyed. Subjective reviews of events – our commentaries on current events with English subtitles are available on our channel on YouTube.

The Free Courts newsletter is sent out several times a year, at least once every three months. If you do not want to receive it, please send an email to kontakt@wolnesady.org.

The newsletter is produced with the support of the Henryk Wujec Civic Fund and the Economic Freedom Foundation as well as in cooperation with the Heinrich Böll Foundation in Warsaw



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