

POLAND

Business, Judicial Independence and the Rule of Law

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Executive Summary

For the past five years, since the return to power of the Law and Justice Party (PiS), the Polish legal system, in particular the judiciary, has been subject to numerous legislative and policy changes, which affect business and investment. The changes have exposed the Constitutional Tribunal, Supreme Court, common courts, National Council of the Judiciary, and the prosecutor's office to greater political influence. The governing majority also has adopted legislative amendments in the area of criminal law relevant to doing business in Poland, including new rules regarding forfeiture of crime-related assets.

Over the same period, there has been a significant deterioration in judicial effectiveness in Poland. According to the Index of Economic Freedom, judicial effectiveness in Poland has dropped from 58 points in 2017 to 42.8 points in 2020, which now places it in the category of “repressed.”¹ The European Commission recently underscored the link between an effective judicial sector and a country's business environment, noting in its 2020 Justice Scoreboard:

Effective justice systems that uphold the rule of law have been identified as having a positive economic impact. Where judicial systems guarantee the enforcement of rights, creditors are more likely to lend, businesses are dissuaded from opportunistic behavior, transaction costs are reduced and innovative businesses are more likely to invest.²

The European Commission also emphasized that “[j]udicial independence is a fundamental element of an effective justice system.”³ Yet according to data from the World Economic Forum, Poland has the second worst perception of judicial independence by businesses among all EU countries (and this perception has declined sharply since 2010).⁴ The perception held by both the general public and companies is considered “low” by the European Commission, and has been showing a decreasing trend in recent years.”⁵ In fact, only 27% of

¹ The Heritage Foundation, 2020 Index of Economic Freedom, Country data: Poland, available at: <https://www.heritage.org/index/visualize?cnts=poland&type=il> (accessed 11 Nov. 2020).

² Eur. Comm'n, *Communication from the Commission to the European Parliament, The Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: 2020 EU Justice Scoreboard*, 10 July 2020, p. 5 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0306&from=EN> (citing studies conducted by the IMF, European Central Bank, OECD, World Economic Forum and the World Bank which support the proposition that a well-functioning justice system has a beneficial impact on a nation's economy) [hereinafter 2020 EU Justice Scoreboard].

³ 2020 EU Justice Scoreboard, p. 60.

⁴ 2020 EU Justice Scoreboard, p. 48, Figure 48.

⁵ Eur. Comm'n, Commission Staff Working Document, *2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland*, Brussels, Sept. 30, 2020, SWD(2020) 320 final, p. 2, https://ec.europa.eu/info/sites/info/files/pl_ro_l_country_chapter.pdf [hereinafter Eur. Comm'n 2020 Rule of Law Report: Poland].

companies perceive the independence of Poland's courts and judges as "fairly or very good."⁶ Companies' most cited reason for this low perception of judicial independence was "interference or pressure from the Government and politicians."⁷ Civil society, the European Union (EU), and international organizations have similarly expressed concern that the numerous changes to the court system in many ways undermine the independence of Poland's judiciary.

Not only the perceived lack of judicial independence but the actual infringement on judicial independence stemming from recent legislative changes, pose a number of threats to business in Poland. These threats include:

- widening the political control over the judiciary, which may result in a decision in a civil case based on the relationship of the business entity with the government rather than application of the law;
- restraining judges from issuing decisions in commercial cases or other cases affecting businesses that would not be in the interest of governing politicians;
- a lack of legal certainty of decisions issued by judges appointed by the National Council of the Judiciary since 2018, resulting from their potentially invalid appointments;
- a lack of legal certainty of decisions due to the new extraordinary appeal mechanism;
- increased politicization of the prosecutor's office and resulting politically motivated criminal investigations and indictments against businesspersons and business entities;
- politically influenced use of criminal law measures, including seizure of property or arrest pursuant to the new provisions in criminal law; and
- the general risk of violation of the right to a fair trial and right to an effective remedy.

The developments in Poland in terms of judicial effectiveness and judicial independence also have the potential to impact negatively foreign direct investment in Poland. The Law and Justice party's judicial reforms have begun posing threats to the business environment and ultimately may influence investors, many of whom recognize the importance of a country's adherence to the rule of law and an effective judicial system for business security.

The Government of Poland is encouraged to improve the general state of the rule of law in the country (including safeguarding the independence of the judiciary), uphold the rights of businesses and individuals operating businesses in Poland, reverse measures that have undermined the legal certainty of court decisions, and address issues that contribute to the backlog of cases and effectiveness of the judiciary.

⁶ Eur. Comm'n 2020 Rule of Law Report: Poland, p. 2 (citing 2020 EU Justice Scoreboard figures). This reported perception has dropped from approximately 35–36% in 2018. 2020 EU Justice Scoreboard, p. 42, figure 46.

⁷ Eur. Comm'n 2020 Rule of Law Report: Poland, p. 2; 2020 EU Justice Scoreboard, p. 42, figure 47.

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Foreword

Judicial independence is paramount to the rule of law in any democratic society and a crucial element for economic growth and stable development. The transparency, predictability, and proper safeguards to ensure independence and impartiality of a country's courts are vital for business security and for attracting foreign direct investment. Poland has been an economic European Union success story, with impressive economic growth, increased wages and record low unemployment over the past few decades. However, recent concerns about a lack of respect for human rights and the rule of law, including systematic efforts to restrict and undermine the independence of the judiciary, under the current government represent a real threat to the business environment in Poland, including direct investment by foreign companies.

The Helsinki Foundation for Human Rights (HFHR) is a Warsaw-based NGO that promotes respect for human rights and the rule of law in Poland and abroad. The HFHR has been actively involved in the public discourse around judicial independence in Poland in recent years and has been an outspoken critic of the many judicial reforms enacted by Poland's Law and Justice Party since it returned to power in 2015. This latest HFHR report identifies those legal reforms pertaining in particular to concerns of businesspersons and business entities, the potential impact on economic growth due to increasing backlogs in the Polish courts, and the impact that undermining judicial independence and the rule of law have on foreign direct investment.

This report serves as a valuable addition to the existing body of work on the threats to the independence of the Polish judiciary and the rule of law crisis in Poland by focusing on the intersection of judicial independence and business security and freedom. It is an important read for any individual or business currently operating in Poland or considering investing in the country.



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Chapter 1

Background

Poland

| | |
|--|-------------------------------------|
| Population | 38 million |
| GDP per capita in 2019 | USD 15,692.5 |
| Growth in GDP in 2019 | 4% |
| Unemployment rate in 2020 | 3.04% |
| Number of courts | 378 common courts (as of July 2020) |
| Number of incoming civil, commercial, administrative and other cases (1st instance/per 100 inhabitants) | 30 ⁸ |
| Average length of the proceedings in Poland in commercial cases | 73 days ⁹ |

Poland has one of the fastest growing economies in the European Union, with a reported 4 percent growth in GDP in 2019.¹⁰ Unemployment has stabilized at record lows and wages have improved.¹¹ Until the outbreak of the COVID-19 pandemic in early 2020, Poland's economy had been experiencing "uninterrupted economic expansion" for nearly three decades.¹² During that time, Poland's investment climate also grew in "attractiveness to foreign investors, including U.S. investors."¹³ However, while the business environment is generally favourable, several factors have been cited in recent reports as barriers to investment. One of the identified challenges to private investment in Poland, including foreign investment, is the persistent threat to the rule of law in the country.¹⁴

Poland has increasingly come under international scrutiny for the deteriorating state of the rule of law, drawing criticism from the United Nations (UN), the European Union (EU) and the Council of Europe (CoE) as well as international human rights organizations such as Amnesty

⁸ 2020 EU Justice Scoreboard.

⁹ 2020 EU Justice Scoreboard.

¹⁰ Eur. Comm'n, *Commission Staff Working Document: Country Report Poland 2020*, accompanying the *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank and the Eurogroup*, SWD(2020) 520 final, Brussels, 26 Feb. 2020, p. 7 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0520&from=EN> [hereinafter *Eur. Comm'n, Country Report Poland 2020*]; see also U.S. Dept. of State, 2020 Investment Climate Statements: Poland, <https://www.state.gov/reports/2020-investment-climate-statements/poland/> (estimating Poland's GDP growth in 2019 as 4.1%).

¹¹ Eur. Comm'n, *Country Report Poland 2020*, p. 8.

¹² U.S. Dept. of State, 2020 Investment Climate Statements: Poland.

¹³ U.S. Dept. of State, 2020 Investment Climate Statements: Poland.

¹⁴ Eur. Comm'n, *Country Report Poland 2020*, p. 36.

International and Human Rights Watch. It is the subject of multiple cases before both the Court of Justice of the European Union and the European Court of Human Rights in relation to the changes made to its judiciary since the Law and Justice (PiS) party took power in 2015. The EU has even launched Article 7 TEU infringement proceedings against Poland in relation to its judicial reforms.

In recent months, the EU sought to make the funding from its 2021–2027 budget conditioned on respect for the rule of law.¹⁵ Under the new mechanism, threats to judicial independence and lack of effective remedies could lead to funding cuts for Member States.¹⁶ The European Parliament announced on 16 December 2020 that it had “approve[d] the ‘rule of law conditionality’ for access to EU funds” and that EU budget payments now “can be withheld from countries in which established breaches of the rule of law compromise management of the EU funds.”¹⁷ According to the European Parliament’s press release,

the new law does not only apply when EU funds are misused directly. . . It will also apply to systemic breaches of fundamental values that all member states must respect, such as democracy or the independence of the judiciary, when those breaches affect – or risk affecting – the management of EU funds.¹⁸

The move underscores the EU’s commitment to the rule of law. As the Director of Foreign Policy at the Centre for European Reform recently remarked, “The rule of law enables the EU to function. The single market works because companies from one member state can rely on consistent laws, consistently applied, in the others.”¹⁹ However, presently there is a real rule of law crisis in Poland that is threatening not only the judiciary and human rights, but also the EU market system.

The aim of this report is to summarize the main changes pertaining to the system of the judiciary, as well as other legal developments since 2015, that might be of importance for business freedom and security of investments in Poland. There is already an extensive body of work documenting both the rule of law crisis in Poland and the legal and policy framework for doing business in Poland. However, the number of papers analysing the link between

¹⁵ Philippe Dam, *EU Funds Tied to Respect for the Rule of Law: Deal Will Defend Democracy, Protect EU budget*, HUMAN RIGHTS WATCH, 10 Nov. 2020, <https://www.hrw.org/news/2020/11/10/eu-funds-tied-respect-rule-law> (accessed 3 Dec. 2020).

¹⁶ *Id.*

¹⁷ European Parliament, Press Release, *Parliament approves the “rule of law conditionality” for access to EU funds*, 16 Dec. 2020, <https://www.europarl.europa.eu/news/en/press-room/20201211IPR93622/parliament-approves-the-rule-of-law-conditionality-for-access-to-eu-funds>.

¹⁸ *Id.*

¹⁹ Judy Dempsey, *Judy Asks: Can the EU Solve the Budget and Rule-of-Law Crisis?*, Carnegie Endowment for International Peace, Carnegie Europe, 26 Nov. 2020, <https://carnegieeurope.eu/strategiceurope/83324> (accessed 3 Dec. 2020).

these two spheres remains relatively limited. Although this report does not aspire to be a comprehensive one,²⁰ its objective is to fill this gap and provide information on what effect the government's attacks on judicial independence and the rule of law may have on the rights and freedoms of business entities and businesspersons, as well as foreign investors.

To this end, the report examines the following risks of doing business or investing in Poland under the PiS government: the lack of legal certainty in judicial decisions due to politically influenced appointments, increased politicization of the prosecutor's work that has resulted in numerous investigations and charges against businesspersons, changes to criminal law provisions on forfeiture, case backlogs that impede judicial effectiveness, and the lack of judicial independence and rule of law as they relate to foreign direct investment.

²⁰ The authors of the report give priority to the issue of judicial independence – a cornerstone of a democratic state ruled by law – and changes to the judiciary system (including the prosecutor's office) as well as amendments to criminal law and procedure, while certain other legislative changes affecting business freedom have been deliberately omitted from this paper.

Chapter 2

Recent Legal Reforms in Poland Threaten Business Freedom and Security

Since the coming to power of the PiS party in 2015, the government has undertaken sweeping judicial reform in the country that has impacted courts at all levels and created a judicial system that is greatly exposed to political influence. Three key areas of legal reform that pose a threat to business freedom and security in Poland are the lack of legal certainty in judicial decisions, the growing politicization of the work of the prosecutor's office, and changes to the criminal code affecting forfeiture.

2.1 Lack of Legal Certainty in Judicial Decisions

Finality of legal decisions in both civil and criminal cases is of utmost importance not only to individual citizens but also business entities operating in Poland. Legal certainty is considered a “fundamental principle of the rule of law, recognized by most jurisdictions around the world.”²¹ According to the UN Guiding Principles on Business and Human Rights, Poland has a “duty to protect and promote the rule of law by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, *legal certainty*, and procedural and legal transparency.”²² Legal certainty is important to businesses because it allows companies to anticipate and plan for liability. According to the UN Conference on Trade and Development Secretariat, legal certainty is an “operational necessit[y]” for economic actors engaging in a given market.²³

Legal certainty has been undermined in the Polish judicial system due to the irregularities in judicial appointments since 2015 and questionable validity surrounding those appointments. The PiS government's changes to the Polish court system, which call into question the validity of certain judicial appointments to the Constitutional Tribunal, Supreme Court and common courts in turn result in uncertainty of the legal decisions issued by benches composed of such judges. In addition, the PiS government's introduction of the extraordinary appeal, which permits a new chamber of the Supreme Court to revise legally binding judgments issued by ordinary courts, including the Supreme Court itself, may create legal uncertainty

²¹ United Nations Trade and Development Board, Note by the UNCTAD Secretariat, *Enhancing legal certainty in the relationship between competition authorities and judiciaries*, U.N. Doc. TD/B/C.I/CLP/37 (17 Aug. 2016), p. 2, available at: https://unctad.org/system/files/official-document/ciclpd37_en.pdf. [hereinafter Note by the UNCTAD Secretariat]. The UN Trade and Development Board provides as a workable definition of ‘legal certainty’: ‘[P]ragmatic application of the law, which underlines a guiding principle to secure predictability of decisions that encompasses both notions of legitimate expectations and of non-retroactivity . . . of the law.’ *Id.*

²² United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, p. 3, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (emphasis added).

²³ Note by the UNCTAD Secretariat, p. 1.

for commercial cases and other business-related cases. This uncertainty translates into greater risk for those doing business in Poland.

2.1.1 Wrongful Composition of the Constitutional Tribunal

One of the first legal changes adopted by the new PiS majority in 2015 concerned the Constitutional Tribunal and its composition. After coming to power on 25 October 2015, the PiS majority appointed five judges to the Constitutional Tribunal, the legal validity of three of whom stands in question:²⁴ Mariusz Muszyński, Jarosław Wyrembak and Justyn Piskorski. This has raised doubts regarding the legal validity (and finality) of the Constitutional Tribunal's decisions in cases assigned to these judges.²⁵

Since the commencement of its work in 1986, the Constitutional Tribunal has made numerous important decisions from the perspective of the commercial sector. The Constitutional Tribunal has ruled on provisions regulating *inter alia* unfair competition (the issue of so-called “shelf fees”),²⁶ functioning of large-area stores,²⁷ and property tax levied on individual businessmen.²⁸ According to the Polish Constitution, the judgments of the Constitutional Tribunal are binding and final.²⁹ Thus, there is no appeal procedure provided by the law in order to challenge the decisions of the Constitutional Tribunal. However, in a case where the Constitutional Tribunal finds a provision of law incompatible with the Constitution, a person whose case was decided by the court on the basis of this provision has a right to apply for the re-opening of the procedure.³⁰ Where such judgment is rendered by a wrongfully composed panel of the Constitutional Tribunal, the common court will have to decide whether there are grounds to acknowledge this decision and re-open the procedure.

²⁴ In 2015, the terms of office of five judges of the Constitutional Tribunal were set to expire by the end of the year. During the last session of the Parliament in October 2015, the then-governing majority appointed five judges to replace those with expiring terms. However, the President never swore them into office and upon coming to power on 25 October 2015, the PiS majority amended the law on the Constitutional Tribunal and appointed five new judges to the tribunal. See Helsinki Foundation for Human Rights, *Ruled by Law: Threats to the Protection of Human Rights in Poland in 2015–2019* (2019), pp. 13–14, <https://www.hfhr.pl/wp-content/uploads/2020/01/EN-Rz%C4%85dy-prawem-web-FIN.pdf> [hereinafter Helsinki Foundation for Human Rights, *Ruled by Law*]. According to a decision by the Constitutional Tribunal itself in December 2015, the PiS majority only had the constitutional basis to appoint two of the new judges, thus three out of the five new judges appointed by the PiS were done so without a proper legal basis. Helsinki Foundation for Human Rights, *Ruled by Law*, pp. 13–14.

²⁵ Perhaps relatedly, public trust towards the Constitutional Tribunal has decreased – in 2018, 50% of respondents declared a lack of trust towards the Tribunal, whereas 36% declared such an attitude in 2016. CBOS, *O nieufności i zaufaniu*, available at: https://www.cbos.pl/SPISKOM.POL/2018/K_035_18.PDF

²⁶ Judgment of 16 Oct. 2014, case no SK 20/12.

²⁷ Judgment of 8 July 2008, case no K 46/07.

²⁸ Judgment of 12 Dec. 2017, case no SK 13/15.

²⁹ Poland Const., 1997, Art. 190(1).

³⁰ See Const., Art. 190(4).

In light of the current composition of the Constitutional Tribunal, more decisions by the tribunal may potentially be challenged, undermining the intended finality of its decisions. (In 2018, the three judges with a questionable legal basis for their appointments adjudicated 28 cases.) The case of the wrongful composition of the Constitutional Tribunal is a matter of proceedings before the European Court of Human Rights in the case of *Xero Flor v. Poland* (application no. 4907/18).³¹ This case was initiated by a Polish company that claimed a violation of its right to a fair trial based on the Constitutional Tribunal's refusal to hear a constitutional challenge brought by the company. The applicant company asserts that its fair trial rights were breached because the Constitutional Tribunal bench, which included Judge M. Muszyński, was composed in violation of the Constitution.³² As long as the legal validity of the composition of the Constitutional Tribunal remains in question, legal certainty of its decisions cannot be guaranteed.

2.1.2 National Council of Judiciary Appointments to the Supreme Court and Common Courts

The second problem in terms of legal certainty is related to the appointment authority of the National Council of Judiciary (NCJ) for judges of the Supreme Court³³ and the common courts. The NCJ is a body whose primary duty, according to the Constitution, is to safeguard the independence of courts and judges.³⁴ The NCJ reviews and assesses the candidates for the posts of judge of the Supreme Court, common courts, administrative courts and military courts, and submits the motions for appointment of the aforementioned to the President of Poland. Until 2018, the judges appointed to the NCJ were selected by their peers. However, with the entry into force in 2018 of the changes to the Act on National Council of Judiciary, the 15 judges-members³⁵ of the NCJ now are appointed by the Sejm (Poland's lower house of Parliament) by a 3/5th majority, which means that the PiS party has more say in who sits on the NCJ. In recent jurisprudence the Supreme Court confirmed that given the way in which it was elected and its recent works, the NCJ does not meet the standards of the independent body.³⁶

³¹ Eur. Ct. of Hum. Rts., Press Release, *ECHR gives notification to Poland of another case raising an issue related to changes in the judiciary*, 11 Sept. 2019.

³² Eur. Ct. of Hum. Rts., Application no. 4907/18, *Xero Flor SP.Z O.O. v. Poland* (2018), Statement of Facts, Sept. 2, 2019, available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-195994"\]}](https://hudoc.echr.coe.int/eng#{).

³³ The Supreme Court is the top court in the Polish judiciary system. The Supreme Court hears the cassation appeals in all kinds of cases pending before the common courts, including cases related to competition law, companies and investments.

³⁴ Const., Art. 186(1).

³⁵ The Constitution provides that the National Council of the Judiciary is comprised of 25 members, 15 of which are judges. Const., Art. 187(1).

³⁶ See e.g., Supreme Court resolution of 23 January 2020 case no. BSA I-4110-1/20 The NCJ in its new composition has also given the appearance of bowing to political influence due to its failure to fulfill its constitutional duty of protecting judges' independence. For example, the NCJ did not take action on disciplinary proceedings initiated

The lack of independence by this important appointment body potentially taints every appointment it makes and calls into question both the validity of the appointments and the independence of those judges. Since 2018, the NCJ has appointed over 500 judges to the Supreme Court and the common courts, and the President of Poland has sworn almost 400 of them into office.³⁷ As the composition of the NCJ – with a majority of its members selected by the Polish Parliament – does not meet the standards of an independent body,³⁸ it has raised legal concerns whether judges appointed by the NCJ in its current composition are entitled to adjudicate cases and whether their decisions are valid.

On 23 January 2020, the Supreme Court adopted a resolution of three joint chambers of the Supreme Court – the Civil, Criminal and Labor and Social Insurances Chambers – which addressed the problem of judicial appointments by the NCJ in its current composition. First, the Supreme Court focused on the situation of judges appointed by the NCJ to the Supreme Court. The Supreme Court held that adjudicating benches of the Supreme Court that include such judges should always be treated as unlawfully composed.³⁹ According to the Supreme Court, the situation with regard to judges of the common courts was different: the participation of NCJ-appointed judges in adjudicating cases does not always render the bench unlawful.⁴⁰ Such consequences arise only if the defective appointment causes a breach of the standards of judicial independence provided in the Constitution, EU law, or the

against judges active in public debate on the judiciary, nor has it opposed the media attacks on judges. Moreover, according to press reports, three members of the National Council of the Judiciary were purported to have participated in slander campaigns against other judges, including the First President of the Supreme Court. See Helsinki Foundation for Human Rights, *Ruled by Law*.

³⁷ Oko.press, Wykaz osób, wobec których Prezydent postanowił o powołaniu na stanowisko sędziowskie lub asesorskie na wniosek KRS, w składzie której zasiada 15 sędziów wybranych przez Sejm (383 osoby), stan na 24 stycznia 2020 r., *available at*: https://ruleoflaw.pl/wp-content/uploads/2020/01/krs_wykaz_2020-01-24_final.pdf (accessed 15 May 2020).

³⁸ See Rep. of Poland Sup. Ct., Case III PO 7/18, Judgment, 5 Dec. 2019, para. 88 (concluding that “the National Council of the Judiciary in its current formation is neither impartial nor independent of the legislature or the executive[.]”).

³⁹ Supreme Court, Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 Jan. 2020 (noting that “a court formation is unduly appointed [...] where the court formation includes a person appointed to the office of a judge of the Supreme Court on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts”).

⁴⁰ Supreme Court resolution of 23 January 2020 case no. BSA I-4110-1/20 The Supreme Court ruled that “A court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3) if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. [...] The interpretation of Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure provided in points 1 and 2 hereof shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date hereof under the Code of Criminal Procedure before a given court formation.”

European Convention of Human Rights.⁴¹ In its decision, the Supreme Court did not decide on the status of the judges appointed by the NCJ, leaving it to the decision of the Parliament.

The decision of the Supreme Court was highly criticized by the PiS government. In response to this decision, the Prime Minister directed a motion to the Constitutional Tribunal for verification of the resolution's compliance with the Constitution. In April 2020, the Constitutional Tribunal – which, as noted above, itself lacks validity in its composition – ruled that the Supreme Court resolution was unconstitutional.⁴²

It is difficult to predict what will be the practical consequences of these decisions – some of the judges of the common courts would apply only the decision of the Supreme Court without recognizing the judgment of the Constitutional Tribunal. In such case, however, these judges will have to bear the risk of disciplinary proceedings launched against them. But in any event, under the current circumstances, the legal validity of judges appointed by the National Council of the Judiciary in its current composition remains in question and therefore the legal uncertainty of the decisions issued by these judges also remains.

2.1.3 The Extraordinary Appeal

The Act on the Supreme Court of 8 December 2017 introduced two new chambers in the Supreme Court: the Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber. It also introduced a new form of judicial review – the extraordinary appeal, which may be lodged against a final, binding judgment issued by ordinary courts or military courts and even the Supreme Court itself.⁴³ Both the composition of the new extraordinary chamber and the new procedural mechanism of the extraordinary appeal insert into the Polish court system additional avenues of legal uncertainty that may impact businesses operating in Poland.

The Chamber of Extraordinary Control and Public Affairs is solely composed of judges appointed by the National Council of Judiciary in its current composition. As discussed above, the National Council of the Judiciary has become politicized through a restructured appointment system, thus raising concerns about the independence of the new chamber.⁴⁴

⁴¹ *Id.* (observing that “a court formation is unduly appointed [...] also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary [...] if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.”).

⁴² Constitutional Tribunal, Case no. U 2/20, 20 April 2020.

⁴³ Act on the Supreme Court of 8 December 2017, as amended, Article 94(1).

⁴⁴ Another concern about the Extraordinary Control and Public Affairs Chamber as pertains to doing business in Poland is that it has been given responsibility for hearing cases concerning Poland's competition law. This competence was transferred to the Extraordinary Chamber from the Chamber of Labor and Public Insurances,

In addition, the legal status of the judges appointed to the new chambers is questionable in light of the jurisprudence of the Supreme Court of Poland and the Court of Justice of the European Union.⁴⁵

With the extraordinary appeal, judgments delivered by Polish courts, with some exceptions,⁴⁶ can now be challenged before the Supreme Court's Extraordinary Control and Public Affairs Chamber, which has the authority to overturn the final decision. A contested judgment can be challenged through the extraordinary appeal process up to five years after becoming final.⁴⁷ The extraordinary appeal can be brought by the Ombudsman or the Minister of Justice, as well as other entities such as the President of the Financial Supervision Authority, the Financial Ombudsman and the President of the Office of Competition and Consumer Protection "to the extent of their competence."⁴⁸ If an extraordinary appeal is upheld,

which "played a crucial role in developing Polish competition law and was highly respected by all actors: competition authority officials, competition law practitioners, and scholars." Bernatt, M. (2019), *Rule of Law Crisis, Judiciary and Competition Law*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431631 (accessed 15 May 2020). Legal scholars have criticized this change in competences as wasting the expertise and knowledge developed by the Chamber of Labor and Public Insurances. *Id.*

⁴⁵ See Rep. of Poland Sup. Ct., Case III PO 7/18, Judgment, 5 Dec. 2019, para. 88 (concluding that "the National Council of the Judiciary in its current formation is neither impartial nor independent of the legislature or the executive[.]"); CJEU (Grand Chamber), Joined Cases C-585/18 *A. K. v. Krajowa Rada Sądownictwa*, C-624/18 and C-625/18 *CP, DO v. Sąd Najwyższy*, Judgment, 19 Nov. 2019, paras 139–152 (stating, in para 139, that "independence enjoyed by the KRS in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, [...] may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality[.]").

⁴⁶ Eur. Comm'n, *Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520*, Official Journal of the European Union, 23 Jan. 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H0103&from=BG#ntr45-L_2018017EN.01005001-E0045 (noting the following exceptions outlined in Articles 89 and 90 of the Act: Criminal cases cannot be extraordinarily appealed from to the detriment of the defendant more than one year after the ruling becomes final (or, if the cassation has been lodged, no later than six months upon the examination of the cassation); there is also no possibility of appeals against judgments establishing the nullity of a marriage, annulling a marriage or pronouncing a divorce (only in so far as one or both of the parties remarried after the ruling became final) or a decision on adoption. The extraordinary appeal also cannot concern petty offences or minor tax offences.) [hereinafter Eur. Comm'n Recommendation (EU) 2018/103].

⁴⁷ See Act on the Supreme Court of 8 December 2017, as amended, Article 89(3); see also U.S. Dept. of State, *2020 Investment Climate Statements: Poland*. From the law's entry into force in 2018, for a period of three years (until 2021), an extraordinary appeal could be brought against judgments issued after 1997. *Id.*

⁴⁸ Act on the Supreme Court of 8 December 2017, as amended, Article 89(2). Under the law, the extraordinary appeal can be brought in limited circumstances – against judgments which "violate[] the principles or the rights and freedoms of persons and citizens enshrined in the Constitution;" are a "flagrant breach of the law on the grounds of misinterpretation or misapplication;" or where "there is an obvious contradiction between the court's findings and the evidence collected." Act on the Supreme Court of 8 Dec. 2017, as amended, Article 89(1). However, despite the specified criteria, the decision to bring an extraordinary appeal is a discretionary one, typically made by the Ombudsman or Minister of Justice–Prosecutor General. By the end of 2019, the Extraordinary Control and Public Affairs Chamber had received 79 complaints, the majority of which were submitted by the Minister of Justice–Prosecutor General, with only 9 of the complaints submitted by the Ombudsman. U.S. Dept. of State, *2020 Investment Climate Statements: Poland*.

the Supreme Court will repeal the contested ruling in whole or in part and issue a ruling on the merits of the case or refer it back to the court with jurisdiction.⁴⁹

This procedure undermines the notion of finality in both civil and criminal cases. The uncertainty created by the extraordinary appeal may deter businesses from seeking to defend their rights in court or may tie them up in litigation at great financial cost and time. In the opinion of the Venice Commission, by introducing the provisions of the extraordinary appeal, “no judgment in the Polish system will ever be final anymore” and these provisions “jeopardize the stability of the Polish legal order.”⁵⁰ According to the European Commission, the new extraordinary appeal procedure raises concerns for “the principle of legal certainty which is a key component of the rule of law.”⁵¹ As such, the Commission has recommended that Poland amend the law on the Supreme Court to remove the extraordinary appeal procedure in order to ensure compliance with *inter alia* the requirements of safeguarding the independence of the judiciary, legal certainty, and European standards on judicial independence.⁵²

2.2 Growing Politicization of the Prosecutor’s Work

The prosecutor’s office is responsible for carrying out investigations into criminal matters, including financial crimes and business-related crimes. In 2016, the Polish Parliament adopted changes to the Act on the Public Prosecutor’s Office, which affected the system of management of the prosecutor’s office. Namely, the positions of the Prosecutor General and the Minister of Justice, who is a member of the PiS party, were merged.⁵³ Through these changes, the Prosecutor General-Minister of Justice gained additional powers to influence legal proceedings. The Prosecutor General-Minister of Justice has obtained the status of a superior prosecutor in relation to prosecutors of organizational units of the prosecution service. As such, he now has the power to fully interfere in their investigative activities.

⁴⁹ Act on the Supreme Court of 8 December 2017, as amended, Article 91(1). If the Supreme Court finds that the reason the ruling violates the principles or rights and freedoms of persons or citizens is that the Act is incompatible with the Constitution, it will submit a legal question to the Constitutional Tribunal and may stay proceedings if the outcome of the case depends on the outcome of the proceedings before the Constitutional Tribunal. *Id.* at Art. 91(2).

⁵⁰ The Venice Commission also noted that the system of extraordinary appeals against final judgments existed in many former communist countries and opined that the Polish system of extraordinary appeals ‘has a lot of similarities’ with the old Soviet system. See Opinion 904/2017 CDL(2017)035 of the Venice Commission on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (‘CDL(2017)035’), and Opinion 892/2017 CDL(2017)037 of the Venice Commission on the Act on the Public Prosecutor’s Office as amended (‘CDL(2017)037’).

⁵¹ Eur. Comm’n Recommendation (EU) 2018/103, para. 19 (citing ECtHR Case *Brumărescu v. Romania*, 28 October 1999, para 61; Case *Ryabykh v. Russia*, 3 March 2003, para 54 and 57; Case *Miragall Escolano and others v Spain*, 25 January 2000, para 33; *Phinikaridou v Cyprus*, 20 December 2007 para 52.).

⁵² Eur. Comm’n Recommendation (EU) 2018/103, para. 46.

⁵³ Amnesty Int’l *Poland: Free Courts, Free People: Judges Standing for Their Independence* (2019), p. 9, 31, <https://www.amnesty.org/download/Documents/EUR3704182019ENGLISH.PDF>.

Furthermore, any superior prosecutor, including the Prosecutor General–Minister of Justice, has the authority to issue orders or instructions concerning specific pending investigations,⁵⁴ such as instructions to file an indictment, and may change or revoke a decision of a subordinate prosecutor.⁵⁵ The superior prosecutors also can take over the pending proceedings and transfer them to other prosecution units.⁵⁶ According to the largest prosecutors’ association in Poland, Lex Super Omnia, the legal and policy changes concerning the prosecutor’s office contributed to creating a group of prosecutors loyal to the prosecution’s top management (the Prosecutor General–Minister of Justice) who replaced the group of independent and highly experienced prosecutors.⁵⁷

Several prosecutions in recent years suggest that the PiS party’s changes to the management and organization of the prosecutor’s office have resulted in the work of that office becoming increasingly politicized. One example is the case of Przemysław Krych, the founder of a real estate company, who was arrested and held in pre-trial detention for six months as a part of an investigation involving the former speaker of the Polish Senate.⁵⁸ Przemysław Krych reported to the media that he had been asked repeatedly to turn over evidence which could incriminate the former speaker. Przemysław Krych has been released from pre-trial detention, but the proceedings in his case are still pending.⁵⁹

A case that garnered international attention, including a rebuke from the then–U.S. Ambassador to Poland, Georgette Mosbacher,⁶⁰ involved TVN24 – a private Polish news channel, which is owned by the U.S.-based Discovery Inc. network.⁶¹ In January 2018, TVN24

⁵⁴ *Id.* at pp. 31–32 (quoting Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, para. 95, <https://rm.coe.int/16806db712>).

⁵⁵ *Id.* at p. 31 (citing Law on the Public Prosecutor Office, Articles 8 and 13(2)).

⁵⁶ See Helsinki Foundation for Human Rights, *Ruled by Law*.

⁵⁷ Lex Super Omnia, *Królowie życia w prokuraturze*, available at:

<https://drive.google.com/file/d/1oLJBekkHSHyHARK-bhqMIPX3qEva9rSB/view>.

⁵⁸ As in the case of the Law and Justice prior term in government in 2005–2007, the number of the court decisions on pre-trial detention has been rising rapidly for the last five years. Although this trend does not have a direct impact on the security and freedom of business, still it makes the freedom of business much more exposed to the automatic decisions of the authorities.

⁵⁹ Wojciech Moskwa, *Has Poland’s Government Become a Threat to Business?*, BLOOMBERG, 23 Sept. 2019, <https://www.bloomberg.com/news/articles/2019-09-23/has-poland-s-government-become-a-threat-to-business> (accessed 3 Dec. 2020).

⁶⁰ Ruby Mellen, *The U.S. ambassador in Warsaw chastised Polish officials about their attacks on media*, THE WASHINGTON POST, 29 Nov. 2018, <https://www.washingtonpost.com/world/2018/11/29/us-ambassador-warsaw-chastised-polish-officials-about-their-attacks-media/> (accessed 19 Jan. 2021) (quoting, in part, the letter from Ambassador Mosbacher, stating: “I hope that members of your government will refrain from attacking, let alone prosecuting, independent journalists, who articulate public interests and strengthen our societies[.]”).

⁶¹ In July 2017 Discovery Communications agreed to buy Scripps Networks Interactive, the previous owner of TVN. See Chris Dziadul, *Discovery rings in the changes at Poland’s TVN*, BROADBAND TV NEWS, 14 June 2018, <https://www.broadbandtvnews.com/2018/06/14/discovery-rings-in-the-changes-at-polands-tvn> (accessed 15 Jan. 2021); Meg James, *Discovery completes \$12-billion takeover of Scripps Networks’ Food, HGTV and Travel channels*, LA TIMES, 6 March 2018, <https://www.latimes.com/business/hollywood/la-fi-ct-discovery-scripps-merger-20180306-story.html> (accessed 15 Jan. 2021).

broadcast a documentary which featured footage provided by an undercover TVN24 reporter who had infiltrated a Polish neo-Nazi organization. The footage showed the organization's members holding a birthday party for Adolf Hitler.⁶² It reportedly "fed concerns over the rise in visibility of Polish far right movements in recent years," with critics accusing Poland's ruling PiS party "of turning a blind eye to radical nationalist sentiment."⁶³ In November 2018, Polish prosecutors reportedly "initiated a criminal investigation into the TVN cameraman who had infiltrated the neo-Nazi organization" and filmed the ceremony, "on suspicion of charges of propagating fascism."⁶⁴ But the matter was subsequently dropped.⁶⁵

Another prominent example indicating that the functioning of the prosecution has been highly politicized is that of Leszek Czarnecki, owner of Getin Noble Bank. In 2018, Mr. Czarnecki disclosed an audio recording of a conversation he had earlier that year with the President of the Financial Supervision Authority, during which the latter made him a corrupt offer for favorable treatment of his enterprises in return for employing a certain lawyer with outrageously high total annual remuneration of approximately USD 10.5 million.⁶⁶ In August 2020, the prosecution filed a motion for Mr. Czarnecki's arrest. However, Mr. Czarnecki secretly fled the country in November 2018 and remains abroad. In the opinion of Mr. Czarnecki's lawyer, the decision of the prosecutor's office to initiate an investigation that allegedly exposed Getin Noble Bank's clients and the bank itself constitutes an unlawful use of the prosecution in order to exact revenge for revealing corruption at the highest levels of state financial supervision.⁶⁷

In another case related to Getin Noble Bank, businessman Piotr Osiecki was arrested in August 2018 and remained in pre-trial detention for three months under suspicion of collusion aimed at selling a company to the bank's subsidiary for an excessively high price (which was overvalued, according to the prosecution).⁶⁸ Despite a court's ruling to release

⁶² France 24, *Poland outraged after neo-Nazis 'mark Hitler's birthday'*, 21 Jan. 2018, <https://www.france24.com/en/20180122-poland-outraged-after-neo-nazis-mark-hitlers-birthday> (accessed 19 Jan. 2020).

⁶³ Christian Davies, *US ambassador scolds Polish officials over claims journalists staged neo-Nazi event*, THE GUARDIAN, 28 Nov. 2018, <https://www.theguardian.com/world/2018/nov/28/georgette-mosbacher-us-ambassador-poland-letter-prime-minister-documentary> (accessed 16 Nov. 2020).

⁶⁴ *Id.*; see also Ruby Mellen, *The U.S. ambassador in Warsaw chastised Polish officials about their attacks on media*, The Washington Post, <https://www.washingtonpost.com/world/2018/11/29/us-ambassador-warsaw-chastised-polish-officials-about-their-attacks-media/> (accessed 19 Jan. 2021) (reporting that "agents from Poland's Internal Security Agency visited the cameraman's house and gave him a summons to appear for questioning under suspicion of promoting fascism[.] however the matter was subsequently dropped).

⁶⁵ Mellen, *The U.S. ambassador in Warsaw chastised Polish officials about their attacks on media*.

⁶⁶ Reuters Staff, *Polish regulator denies corruption accusation in Getin Noble case*, REUTERS, 13 Nov. 2018, <https://www.reuters.com/article/poland-regulator-getin-noble-bnk-idUSL8N1XN6I1> (accessed 15 Jan. 2021).

⁶⁷ M. Kolińska-Dąbrowska, *Leszek Czarnecki – dla PiS wróg publiczny numer jeden. Kim jest polski miliarder?*, Wyborcza.pl, 22 Sept. 2020, available at: <https://wyborcza.pl/7,155287,26327538,leszek-czarnecki-dla-pis-wrog-publiczny-numer-jeden-kim-jest.html> (accessed 13 Oct. 2020).

⁶⁸ G. Nawacki, *Prokuratorzy upodlają przedsiębiorców*, PULSBIZNESU, 2 Dec. 2018, <https://www.pb.pl/prokuratorzy-upodlaja-przedsiębiorcow-947169> (accessed 13 Oct. 2020).

him on bail, the prosecution initially did not allow the lawyers to enter the prosecutor's office in order to post bail.⁶⁹ Mr. Osiecki, whose case is still pending, was eventually released on bail after posting a record ~USD 29 million. The Polish Business Roundtable has condemned the arrest and pre-trial detention of Piotr Osiecki.⁷⁰

In October 2020, one day before the arrest hearing of Leszek Czarnecki, one of Mr. Czarnecki's lawyers, Roman Giertych, was detained by agents of the Central Anti-Corruption Bureau under the charge of having acted to the detriment of a business company.⁷¹ A former politician and deputy prime minister, Mr. Giertych has been long known for being a vocal critic of the PiS government. Apart from representing Mr. Czarnecki, Roman Giertych has been involved in a number of cases against the PiS government and involving high-profile politicians and businessmen, such as the ex-prime minister of Poland D. Tusk, and G. Birgfeldner, an Austrian businessman who sued a company related to Jarosław Kaczyński (leader of the PiS party). The International Bar Association's Human Rights Institute has characterized the arrest and prosecution of Mr. Giertych as "politically motivated" and Poland's Ombudsman, Adam Bodnar, described the manner of Mr. Giertych's arrest as "raising the 'highest concerns.'"⁷² The Ombudsman was particularly concerned about the legality of presenting charges to Mr. Giertych given his condition (namely, his reported unconsciousness), which might have excluded his understanding of charges and a possibility to elaborate on them. This, according to the Ombudsman, may have violated Mr. Giertych's right to defence.⁷³

The increased politicization of activities by the prosecutor's office has even reached into internal company policies. In July 2020, the prosecution brought an indictment against the human resources manager at IKEA for a 2019 firing of an employee who posted anti-LGBT

⁶⁹ *Id.* (reporting that on 26 November 2018 lawyers who appeared in early hours to place the bail – in the form of promissory notes worth approx. USD 29 million – were not allowed in the prosecutor's office until the court dismissed the prosecution's motion opposing the conversion of arrest into bail).

⁷⁰ Polish Business Roundtable, *Statement of the Polish Business Roundtable on the illegal detention of Piotr Osiecki*, 31 Jan. 2019, <https://prb.pl/en/2019/01/31/statement-of-the-polish-business-roundtable-on-the-illegal-detention-of-piotr-osiecki/> (accessed 3 Dec. 2020).

⁷¹ TVN24, *Attorney Roman Giertych detained by anti-corruption bureau*, 15 Oct. 2020, <https://tvn24.pl/tvn24-news-in-english/poland-warsaw-attorney-roman-giertych-detained-by-anti-corruption-office-4721788> (accessed 16 Nov. 2020). The Central Anti-Corruption Bureau has alleged that Mr. Giertych took part "in a scheme to take money out of a company and launder funds" in the amount of approximately USD 23 million (90 million zlotys). See Reuters Staff, *Prominent Polish lawyer and critic of government charged with fraud*, REUTERS, 17 Oct. 2020, <https://www.reuters.com/article/us-poland-arrests-lawyer-idUSKBN2720ML> (accessed 3 Dec. 2020).

⁷² International Bar Association, *IBAHRI calls for charges against lawyer Roman Giertych to be dropped*, Nov. 10, 2020, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=b18313a1-c6ad-4f6c-8191-a419b0ef3392> (accessed 3 Dec. 2020). According to the IBAHRI, during a search of Mr. Giertych's home, he "suffered a stroke, fell unconscious and was hospitalized." *Id.*

⁷³ Poland, Commissioner for Human Rights, Letter to Regional Prosecutor in Poznań, 21 Oct. 2020, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Prokuratoar%20Regionalnego%20w%20Poznaniu%20ws.%20Romana%20Giertycha.pdf>

quotes from the Bible on the company's intranet (internal internet forum).⁷⁴ The biblical quotes posted by the employee reportedly condemn homosexuality, calling it "an abomination," and according to some reports, refer to death as homosexuals' fate.⁷⁵ According to the indictment, the IKEA human resources manager is charged under Article 194 of the Penal Code for restricting an employee's rights to religious freedom, a crime that is subject to a fine and up to two years in prison.⁷⁶

Poland's PiS government is notoriously anti-LGBT and has made headlines in recent months due to its anti-gay rhetoric and numerous arrests of LGBT activists. The PiS party reportedly has called "LGBT 'ideology'" "an invasive foreign influence that undermines [Poland's] traditional values."⁷⁷ President Andrzej Duda has described the fight for gay rights "as 'even more destructive' than communism."⁷⁸ At the time of the IKEA employee's dismissal in 2019, Justice Minister Zbigniew Ziobro, who denounced IKEA for the firing, reportedly said the case "was an example of using 'legal and economic violence against those who do not share the values of homosexual activists.'"⁷⁹ He also allegedly stated that it was "scandalous that foreign companies in Poland were discriminating against those who do not share their values."⁸⁰ The overt opposition to LGBT+ persons and their rights by the PiS government – especially the Minister of Justice, who has the statutory authority to influence prosecutions – poses a threat to businesses operating in Poland that are dedicated to human rights, equality, and an inclusive work environment.⁸¹

⁷⁴ Businessinsider.com.pl, *Jest akt oskarżenia ws. kierowniczki z IKEA. Chodzi o zwolnienie pracownika*, available at: <https://businessinsider.com.pl/finanse/handel/jest-akt-oskarzenia-ws-kierowniczki-z-ikea-chodzi-o-zwolnienia-pracownika/lw7tjw7> (accessed 11 Sept. 2020); see also Vanessa Gera, Associated Press, *IKEA manager charged for firing Pole over anti-gay remarks*, May 28, 2020, <https://apnews.com/article/7e7769013989de3364de16156550b936> (accessed 17 Nov. 2020).

⁷⁵ Businessinsider.com.pl, *Jest akt oskarżenia ws. kierowniczki z IKEA. Chodzi o zwolnienie pracownika*, available at: <https://businessinsider.com.pl/finanse/handel/jest-akt-oskarzenia-ws-kierowniczki-z-ikea-chodzi-o-zwolnienia-pracownika/lw7tjw7>

⁷⁶ Businessinsider.com.pl, *Jest akt oskarżenia ws. kierowniczki z IKEA. Chodzi o zwolnienie pracownika*, available at: <https://businessinsider.com.pl/finanse/handel/jest-akt-oskarzenia-ws-kierowniczki-z-ikea-chodzi-o-zwolnienia-pracownika/lw7tjw7>

⁷⁷ Reuters Staff, *IKEA manager in Poland charged for firing employee over anti-gay comments*, REUTERS, 28 May 2020, <https://www.reuters.com/article/us-ikea-ab-poland-discrimination-idUSKBN23436Z> (accessed 16 Nov. 2020).

⁷⁸ Loveday Morris, *Poland's 'LGBT-free zones' energize some activists, prompt others to leave*, THE WASHINGTON POST, 28 Oct. 2020, https://www.washingtonpost.com/world/europe/poland-lgbt-rights/2020/10/27/e82bce8a-12f7-11eb-a258-614acf2b906d_story.html (accessed 16 Nov. 2020); see also Human Rights Watch, *Poland: Crackdown on LGBT Activists*, 7 Oct. 2020, <https://www.hrw.org/news/2020/08/07/poland-crackdown-lgbt-activists>; BBC NEWS, *Poland LGBT: Diplomats from 50 countries call for end to discrimination*, 28 Sept. 2020, <https://www.bbc.com/news/world-europe-54317902> (accessed 16 Nov. 2020).

⁷⁹ Reuters Staff, *IKEA manager in Poland charged for firing employee over anti-gay comments*, REUTERS, 28 May 2020, <https://www.reuters.com/article/us-ikea-ab-poland-discrimination-idUSKBN23436Z> (accessed 16 Nov. 2020).

⁸⁰ Vanessa Gera, *IKEA manager charged for firing Pole over anti-gay remarks*, ASSOCIATED PRESS, 28 May 2020, <https://apnews.com/article/7e7769013989de3364de16156550b936> (accessed 17 Nov. 2020).

⁸¹ This risk is likely to be greater for foreign companies, including American companies, many of which have been actively pursuing in recent years more inclusive workplace environments geared toward sensitivity and elimination of bias vis-à-vis minorities and LGBT+ individuals. See, e.g., Lindsay-Rae McIntyre, *IBM Stands Strong*

Each of the examples outlined above illustrates the lack of security in Poland's business environment for those who overtly oppose the PiS government or those who take actions that contradict PiS views. With the Minister of Justice's position now merged with that of the Prosecutor General, the legislative changes enacted under the PiS government further expose businesses and business personnel in Poland to politicized criminal charges.

2.3 Changes in Criminal Law on Forfeiture

The PiS majority also has adopted several amendments in the area of criminal law that could potentially pose a threat to the security of businesses in Poland. Among these changes are provisions regulating the seizure of property associated with a criminal offence. Polish criminal law has long provided for forfeiture of items that have been derived directly from a crime, have served to commit a crime, or have been intended to serve in the commission of a crime. Moreover, if the perpetrator has gained a "material benefit" from committing a crime that is not subject to the forfeiture of the items, the court may impose the forfeiture of such benefit or of its equivalent-in-value. However, the PiS government's amendments to the forfeiture provisions in the criminal code now expose innocent persons and business entities to greater risk of having to forfeit their property.

In 2017, the criminal code was amended to allow the court to reach property that was acquired up to five years before the commission of a crime.⁸² This was a drastic expansion of reach compared to the court's previous reach of property – that which was acquired

with its LGBT Employees, 23 June 2016, <https://www.ibm.com/blogs/think/2016/06/standing-together/> (accessed 3 Dec. 2020); Amazon.com, About, Diversity and Inclusion, <https://www.aboutamazon.com/workplace/diversity-inclusion> ("Our diverse perspectives come from many sources including gender, race, age, national origin, sexual orientation, culture, [and] education We are committed to diversity and inclusion and always look for ways to scale our impact as we grow.") (accessed 3 Dec. 2020). At the beginning of 2020, there were over 1500 companies with American capital operating in Poland according to the American Chamber of Commerce. See American Chamber of Commerce in Poland and KPMG in Poland, *30 Years of American investments in Poland*, April 2020, p. 12, [https://amcham.pl/sites/default/files/2020-04/KPMG%20and%20AmCham%20report%20%30%20years%20of%20American%20investments%20in%20Poland".pdf](https://amcham.pl/sites/default/files/2020-04/KPMG%20and%20AmCham%20report%20%30%20years%20of%20American%20investments%20in%20Poland) [hereinafter Am. Chamber of Commerce, *30 Years of American investments in Poland*]. Five of the top six U.S. investors in Poland in terms of employment have received perfect scores on the U.S.-based Human Rights Campaign's Corporate Equality Index in both 2019 and 2020: Amazon.com, Inc., United Technologies Corporations, IBM Corp., McDonald's Corporations, and Citigroup. See Human Rights Campaign, *Corporate Equality Index 2020*, Appendix A, <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/CEI-2020.pdf?mtime=20200713132437&focal=none>; Am. Chamber of Commerce, *30 Years of American investments in Poland*. (The Human Rights Campaign index rates U.S. businesses on their demonstrated commitment to LGBTQ inclusion in the workplace.) For these employers, they may be placed in a position where either they abandon their commitment to workplace inclusion, particularly in relation to LGBT+ employees, or they risk their personnel facing prosecution by the Prosecutor's office if they attempt to uphold inclusive workplace policies as IKEA's manager did.

⁸² See Criminal Code of 1997, as amended 2017, Art. 45(2).

during or after the commission of a crime.⁸³ With the 2017 amendments, a presumption was introduced into the law that

the property which the perpetrator has taken possession of, or has acquired entitlement to, within a period of 5 years before committing a crime until the moment of passing of even a non-final sentence, constitutes a benefit derived from the commission of the crime, unless the perpetrator or another interested person proves otherwise.⁸⁴

This is the so-called “extended confiscation” rule. The 2017 amendments also dictate that not only the specific item deemed a material benefit from a crime may be forfeited,⁸⁵ but any proceeds made from the item also will be deemed to constitute a material benefit gained from a crime and therefore be subject to forfeiture.⁸⁶

Second, the possibility of forfeiture of a business organisation/enterprise that is the property of the perpetrator or the property of a third party – or its equivalent-in-value – has been introduced.⁸⁷ This can be applied if the business organisation has been used as a tool by the perpetrator to commit the crime or to conceal a material benefit gained from the crime. An enterprise owned by a third person can be seized where the owner “wanted” or “accepted” the use of the business organisation in committing the crime or concealing a material benefit gained from the crime.⁸⁸ According to the information of the National Prosecutor’s Office, the value of assets seized pursuant to the new provisions in order to secure forfeiture constituted one-third of the entire value of seized property in 2018.⁸⁹

⁸³ See Criminal Code of 1997, as amended 2015, Art. 45(2) (covering only “the property which the perpetrator has taken possession of, or has acquired entitlement to, while committing a crime or after its commission until the moment of passing of even a non-final sentence.”).

⁸⁴ Criminal Code of 1997, as amended 2017, Art. 45(2).

⁸⁵ Criminal Code of 1997, as amended 2017 (English translation), Art. 44(1) (“The court imposes the forfeiture of items that have been derived directly from a crime.”).

⁸⁶ See Criminal Code of 1997, as amended 2017 (English translation), Art. 45(1a) (“It is deemed that proceeds from the items and rights composing a material benefit gained from a crime also constitute a material benefit gained from a crime.”).

⁸⁷ Criminal Code of 1997, as amended 2017 (English translation), Arts. 44a(1) and (2).

⁸⁸ See Criminal Code of 1997, as amended 2017 (English translation), Art. 44a(2) (“When sentencing for a crime from the commission of which the perpetrator has even indirectly gained a material benefit of substantial value, the court may impose the forfeiture of [a] business organisation that is not the property of the perpetrator but of another individual, or of its equivalent-in-value, if the business organisation has served to commit the crime or to conceal a material benefit gained from the crime, and the owner had wanted the business organisation to serve in committing the crime or concealing a material benefit gained from the crime or, foreseeing such possibility, had accepted it.”). Generally under Polish criminal law, a prohibited act can be committed intentionally or unintentionally. According to Article 9(1) of the Penal Code, “a prohibited act is committed intentionally if the perpetrator intends its commission, i.e., wants to commit it, or foreseeing the possibility of its commission, accepts it.”

⁸⁹ Poland National Prosecutor’s Office, Wyzwania i sukcesy. Prokuratura 2019 r., Warsaw, available at: <https://pk.gov.pl/wp-content/uploads/2019/08/PROKURATURA-2019-1.pdf> (accessed 15 May 2020).

The Ministry of Justice is preparing another amendment that may further expose businesspersons to risk of losing their property.⁹⁰ The so-called “pre-emptive confiscation” would authorise the state to seize movable or real property that within the last five years was in possession of a person suspected or accused of participation in an organised armed group, regardless of who the current legal owner of such property is and without the necessity to ascertain the fact that it came from criminal activity.⁹¹ Thus, the burden of proof as to the legality of the property would be on the person subject to confiscation, not the authorities. This idea has been widely criticised by business associations and others as introducing a presumption of guilt.⁹² A concern also has been raised as to the irreversible character of potential damage done to the reputation of a businessperson whose enterprise has been seized. No further details concerning the shape of pre-emptive confiscation can be provided at this time, as the draft law has not yet been published on the website of Governmental Legislative Centre.

⁹⁰ Poland, Ministry of Justice, *Konfiskata in rem – nowoczesna metoda zwalczania przestępczości zorganizowanej*, press release, 13 Nov. 2020, <https://www.gov.pl/web/sprawiedliwosc/konfiskata-in-rem--nowoczesna-metoda-zwalczania-przestepczosci-zorganizowanej> (accessed 2 Feb. 2021). See further L. Kostrzewski, Resort Ziobry przygotował projekt pozwalający konfiskować majątek Polaków. Dorobek życia może stracić nawet ten, kto nie jest podejrzany o przestępstwo, *Wyborcza.pl*, 11 May 2020, available at: <https://wyborcza.pl/7,155287,25932519,resortu-ziobry-przygotowal-projekt-pozwalajacy-konfiskowac-majatek.html> (accessed 13 May 2020).

⁹¹ See Business Insider, *Coraz bliżej projektu, który przeraża przedsiębiorców. Chodzi o konfiskatę majątku*, 16 Nov. 2021, <https://businessinsider.com.pl/firmy/konfiskata-prewencyjna-projekt-resortu-zbigniewa-ziobry/9rkx8fk> (accessed 15 Jan. 2021).

⁹² See, e.g., Ela Glapiak, *“Ogromne ryzyko dla uczciwych obywateli”. Pomysł Ziobry budzi strach przedsiębiorców*, BUSINESS INSIDER, 24 Aug. 2020, <https://businessinsider.com.pl/firmy/prewencyjna-konfiskata-majatku-projekt-zbigniewa-ziobry-komentarze-ekspertow/sx0xbtg> (accessed 15 Jan. 2021).

Chapter 3

Case Backlogs May Have Negative Impact On Economic Growth

Increasing backlogs in commercial departments of the common courts⁹³ have been identified as another problem affecting those doing business in Poland and may pose a threat to economic growth and investment more broadly. Courts are generally considered a necessary tool for businesses and entrepreneurs to enforce contractual and property rights. Yet in a 2020 report on the investment climate in Poland, the U.S. Department of State noted that “[g]enerally foreign firms are wary of the slow and over-burdened Polish court system, preferring other means to defend their rights” – such as offshore arbitration.⁹⁴

The World Bank effectively captured the importance of an efficient court system for business in its 2015 *Doing Business* report, noting that

efficient and transparent courts encourage new business relationships because firms know they can rely on the courts if a new customer fails to pay. Speedy trials are essential for small enterprises because they may lack the resources to stay in business while awaiting the outcome of a long court dispute.⁹⁵

⁹³ A court established for hearing economic and commercial cases (a “commercial court”) does not refer to a separate category of courts within the judiciary, but to an organisational unit in a court – a commercial department. Commercial departments are established in district and regional courts, whereas in appellate courts commercial cases are dealt with in civil departments, and by the Civil Chamber in the Supreme Court. Court proceedings in commercial matters fall under the subject matter of civil law, and thus are governed by the Code of Civil Procedure (*Kodeks postępowania cywilnego*). The catalogue of cases that shall be adjudicated in commercial proceedings includes, first and foremost, those arising from civil relationships between entrepreneurs to the extent of business activities pursued between them, even if any of the parties ceases to pursue business activity. (Under Polish law, an entrepreneur is a commercial company (e.g. a limited liability company), as well as a natural person who runs a business activity (an individual entrepreneur).) Commercial cases also include those arising from the relationship between shareholders and the company concerning certain claims. Furthermore, cases arising from certain types of contracts (e.g., for construction work or lease agreements) or between certain entities (e.g., state-owned enterprises and their founding bodies) shall be heard in commercial proceedings. This type of proceeding is also proper for the significant category of cases related to bankruptcy and restructuring law.

⁹⁴ U.S. Dept. of State, *2020 Investment Climate Statements: Poland*. According to research carried out by Dziennik Gazeta Prawna, an estimated 40% of top Warsaw legal firms noticed that, in response to growing concerns regarding the situation in the judiciary system, their clients were much more interested in the possibility of arbitration. Furthermore, 68% of lawyers participating in the research were of an opinion that for their clients’ safety it was better to obtain a judgment of a foreign court or leave the potential contract dispute to arbitration than to choose the jurisdiction of a Polish court. See Patryk Stowik, Uciekają przed polskimi sądami. PiS zachęcił spółki do arbitrażu, Dziennik Gazeta Prawna, <https://prawo.gazetaprawna.pl/artykuly/1245415.arbitraz-sadowy-a-reforma-wymiaru-sprawiedliwosci.html> (accessed 15 May 2020). See also 2019 EU Justice Scoreboard, p. 4 (citing EU Intellectual Property Office (EUIPO), Intellectual Property (IP) SME Scoreboard 2016: https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/sme_scoreboard_study_2016/Executive-summary_en.pdf) (reporting that more than half of responding small and medium-sized enterprises cited court costs and the “excessive length of judicial proceedings” among the main reasons for not instituting court proceedings over infringements of intellectual property rights in Europe).

⁹⁵ World Bank, *Doing Business in Poland 2015*, p. 45
<https://www.doingbusiness.org/content/dam/doingBusiness/media/Subnational-Reports/DB15-Poland.pdf>.

Moreover, “[s]mall businesses looking at securing financing for growth and expansion will find it easier to access finance in jurisdictions where courts can be relied upon to resolve contractual disputes swiftly.”⁹⁶ Another study found that reducing the length of court proceedings by just 1% “may increase growth of firms[.]”⁹⁷

When it comes to commercial matters, Poland’s courts are neither swift nor efficient. The number of vacant judicial posts in Poland has been growing since the beginning of 2016, reaching 745 in April 2019,⁹⁸ while Poland is among four EU countries with the largest number of civil cases (including commercial cases) filed in 2017.⁹⁹ The failure to fill the vacancies has corresponded with a decline in the courts’ case-processing performance, with sitting judges facing a significant increase in caseload.¹⁰⁰ This trend has been particularly evident for civil and commercial judges, who have reported difficulties in dealing with their caseload.¹⁰¹ In some district courts the situation is catastrophic. In the first half of 2018, there were approximately 1,500 cases per judge on average.¹⁰² A 2019 Helsinki Foundation report revealed some improvement, but still an unmanageable caseload – with individual judges having an estimated 700–800 cases on their docket, while according to the judges interviewed for the study, a number of 300–400 cases is an absolute maximum for one judge to handle.¹⁰³

⁹⁶ *Id.*

⁹⁷ 2020 EU Justice Scoreboard, p. 4 (citing Vincenzo Bove and Leandro Elia; The judicial system and economic development across EU Member States, JRC Technical Report, EUR 28440 EN, Publications Office of the EU, Luxembourg, 2017:

http://publications.jrc.ec.europa.eu/repository/bitstream/JRC104594/jrc104594_2017_the_judicial_system_and_economic_development_across_eu_member_states.pdf).

⁹⁸ M. Kryszkiewicz, Zła sytuacja kadrowa w sądach: Najgorzej jest na szczeblu okręgowym, *Gazeta Prawna*.pl, available at: <https://prawo.gazetaprawna.pl/artykuly/1405826.braki-kadrowe-w-sadach.html> (accessed May 14, 2020). At the same time, difficult working conditions translate into an increase in the number of employees who have left their jobs – in the period from 2015 to 2019, an estimated 20,000 employees left their jobs in courts – adding to the struggle to manage an already over-burdened court system. See TVN24.pl, *The end of the protest by employees of the courts and prosecutor's offices. There is an agreement with the Ministry*, <https://www.tvn24.pl/wiadomosci-z-kraju/3/porozumienie-w-sprawie-podwyzek-dla-pracownikow-sadow-i-prokuratur,950188.html> (accessed 12 Sept. 2019). Although the Ministry of Justice announced increased salaries for court employees in July 2019, the situation of administrative court staff still needs to be improved, with the number of staff being too small in relation to their workload and responsibilities.

⁹⁹ The 2019 EU Justice Scoreboard – quantitative data, available at:

https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_quantative_data_factsheet_en.pdf (accessed 15 May 2020).

¹⁰⁰ See further Szuleka, M., Wolny, M., Kalisz, M. (2019), *The Time of Trial. How do changes in justice system affect Polish judges?*, Helsinki Foundation for Human Rights, available at: https://www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-EN_EMBARGO_24072019.pdf [hereinafter Helsinki Foundation for Human Rights, *The Time of Trial*]

¹⁰¹ See further Szuleka, M., Wolny, M., Kalisz, M. (2019), *The Time of Trial. How do changes in justice system affect Polish judges?*, Helsinki Foundation for Human Rights, available at: https://www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-EN_EMBARGO_24072019.pdf.

¹⁰² M. Kryszkiewicz, “Sędziowie nadal obłożeni pracą, MS ma inne priorytety”, *Gazeta Prawna*.pl, 2018, <https://prawo.gazetaprawna.pl/artykuly/1243999.zmian-w-prawie-i-odcizeniu-sedziow-brakuje.html> (accessed 14 May 2020).

¹⁰³ Helsinki Foundation for Human Rights, *The Time of Trial*.

The work of the common courts is additionally influenced by the Ministry of Justice's introduction in 2018 of the System for the Random Allocation of Cases. The new system is a centrally managed system that registers every case lodged to the court and at the end of every day purportedly assigns cases to judges at random. The system does not take into account the complexity of cases; nor does it take into account the specific nature of the work of a judge or the time needed to prepare for a hearing.¹⁰⁴ This system has led to a situation where certain judges become overburdened with work due to the complexity or nature of cases on their docket. Moreover, a recent study indicates the risk that the system may be used to manipulate the amount of cases being assigned to particular judges.¹⁰⁵ And the Ministry of Justice has refused to publish the algorithm of the system, which raises concerns that the new system may be used in a politically motivated manner.

The excessive length of proceedings – resulting from the number of incoming cases and the random allocation system combined with the insufficient number of judges and administrative staff – is a major issue for the Polish judicial system. According to the EU Justice Scoreboard, for civil and commercial cases specifically, the time needed to resolve a litigious case at first instance has been increasing year over year for the past decade¹⁰⁶ – from an average 180 days in 2010 to an average 232 days in 2017.¹⁰⁷ The World Bank's *Doing Business* reports reflect dramatically higher numbers for the estimated length of time to enforce a contract in Poland when including the time of filing the claim, the trial and judgment, and enforcement.¹⁰⁸ In 2020, the World Bank reported that the average length of time needed to enforce contracts in Poland has reached an estimated 685 days – longer than that reported in Bulgaria (564), Czech Republic (678) and Hungary (605), and roughly 100 days longer than the average for “OECD high income” countries (589.6).¹⁰⁹

¹⁰⁴ A. Łazarska, The system for the allocation of cases promotes absenteeism by judges, rp.pl, available at: <https://www.rp.pl/Sady-i-prokuratura/302169974-Aneta-Lazarska-System-przydzialu-spraw-premiuje-absencje-sedziow.html> (accessed 2 Feb. 2020). Before this change, the cases in the common courts were allocated to judges in the order they were lodged and in accordance with an alphabetical list of judges.

¹⁰⁵ Helsinki Foundation for Human Rights, *The Time of Trial*.

¹⁰⁶ 2020 EU Justice Scoreboard, Figure 6 (showing an increase for Poland from 2012–2018), https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf.

¹⁰⁷ The 2019 EU Justice Scoreboard – quantitative data, available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_quantative_data_factsheet_en.pdf. As of 2017, the situation was slightly better in the second-instance proceedings (119 days) and before the Supreme Court (158 days). *Id.*

¹⁰⁸ The World Bank's indicator for enforcing contracts “measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system.” World Bank, *Doing Business in Poland 2020*, p. 51, <https://www.doingbusiness.org/content/dam/doingBusiness/country/p/poland/POL.pdf>.

¹⁰⁹ World Bank, *Doing Business in Poland 2020*, pp. 52–53, Poland ranked number 55 globally for enforcing contracts (taking into consideration, time, cost and quality of judicial processes), compared to Hungary's rank of 25 and Bulgaria's rank of 42. *Id.* at 52.

Lengthy court proceedings impact not only companies' perceptions of the effectiveness of a country's judicial system, but can discourage entrepreneurs from seeking redress in court to defend their rights and can have a broader impact on growth. The Polish government must take steps to tackle the backlogs and inefficiency of the common courts to ensure effective judicial processes essential to conducting business and fostering growth.

Chapter 4

Risks to Foreign Direct Investment

Poland as a whole is attractive to foreign investors, including the United States. It has a diversified economy, a well-educated work force, and close proximity to major markets such as Germany.¹¹⁰ By the end of 2018, foreign direct investment (FDI) in Poland exceeded USD 268 billion (PLN 1 trillion).¹¹¹ In its 2020 report on the investment climate in Poland, the U.S. State Department reported that, “U.S. firms represent one of the largest groups of foreign investors in Poland,” with an estimated volume of investment of USD 25 billion.¹¹² According to the American Chamber of Commerce in Poland, total “active assets in Poland held by American investors” at the beginning of 2020 was estimated at over USD 54 billion (PLN 205 billion).¹¹³ However, in recent years some organizations, including private business associations and labor unions, have raised concerns that legal and policy changes – including proposals to introduce legislation on media de-concentration – have increased uncertainty around the stability and predictability of Poland’s business environment and therefore raised concerns among foreign investors.¹¹⁴

¹¹⁰ U.S. Dept. of State, *2020 Investment Climate Statements: Poland*.

¹¹¹ American Chamber of Commerce in Poland and KPMG in Poland, *30 Years of American investments in Poland*, April 2020, p. 12, [https://amcham.pl/sites/default/files/2020-04/KPMG%20and%20AmCham%20report%20%30%20years%20of%20American%20investments%20in%20Poland".pdf](https://amcham.pl/sites/default/files/2020-04/KPMG%20and%20AmCham%20report%20%30%20years%20of%20American%20investments%20in%20Poland). This corresponds to roughly 40% of the value of Poland’s GDP. *Id.*

¹¹² U.S. Dept. of State, *2020 Investment Climate Statements: Poland*. This estimate is by the Warsaw-based American Chamber of Commerce. *Id.* However, the National Bank of Poland estimated in 2018 the volume of U.S. investment to be approximately USD 5 billion. *Id.* The U.S., comprising 11% of FDI in Poland, ranks second, behind Germany, which makes up 21% of FDI in Poland. American Chamber of Commerce in Poland and KPMG in Poland, *30 Years of American investments in Poland*, p. 12. From 2010–2018, American investors became “significantly more active than other foreign companies in Poland,” with U.S. investments increasing “1.5 times faster than other foreign investments.” American Chamber of Commerce in Poland and KPMG in Poland, *30 Years of American investments in Poland*, p. 7, 22.

¹¹³ American Chamber of Commerce in Poland and KPMG in Poland, *30 Years of American investments in Poland*, April 2020, [https://amcham.pl/sites/default/files/2020-04/KPMG%20and%20AmCham%20report%20%30%20years%20of%20American%20investments%20in%20Poland".pdf](https://amcham.pl/sites/default/files/2020-04/KPMG%20and%20AmCham%20report%20%30%20years%20of%20American%20investments%20in%20Poland).

¹¹⁴ U.S. Dept. of State, *2020 Investment Climate Statements: Poland*. The European Commission has raised similar concerns for private investors in Poland generally, noting in 2019 that: “While the general business environment is favourable, some regulatory deficiencies weigh on confidence and certainty. New laws continue to be passed frequently in fast-track legislative procedures without proper public consultation. The risk of a serious breach of the rule of law in Poland persist[s] and the situation is deteriorating. ... This is affecting business trust as economic operators need to be sure that they are equally treated by an independent judiciary.” European Commission, Country Report Poland 2019, SWD(2019) 1020 final, Brussels, 27 Feb. 2019, p. 6, https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-poland_en.pdf.

4.1 The Impact of Judicial Independence and the Rule of Law on Foreign Investment

Literature on the rule of law and foreign investment suggests that stronger rule of law compliance encourages FDI by “ensuring a transparent, stable and predictable environment in which host governments credibly commit to the enforcement of contracts and the protection of property rights and rights of the person.”¹¹⁵ Indeed, a study conducted in 2015 revealed that 93% of the large enterprises that responded “systematically review the rule of law conditions (including court independence) on a continuing basis in the countries they invest in[.]”¹¹⁶

The European Commission’s EU Justice Scoreboard has repeatedly recognized the importance of the rule of law and an effective justice system when it comes to foreign investment in a country. According to the Commission, effective justice systems are “essential for mutual trust, the investment climate and the sustainability of long-term growth.”¹¹⁷ The EU’s 2020 annual sustainable growth strategy also “reiterates the link between effective justice systems and the business environment in Member States.”¹¹⁸

Judicial independence – a pre-requisite for an effective judiciary – plays a key role in attracting foreign investment. A “fully independent justice system” can have “a positive impact on investment,” which in turn contributes to both productivity and competitiveness.¹¹⁹

¹¹⁵ Hogan Lovells, Bingham Centre for the Rule of Law, and British Institute of International and Comparative Law, *Risk and Return: Foreign Direct Investment and the Rule of Law*, 2015, p. 19,

https://www.biicl.org/documents/625_d4_fdi_main_report.pdf?showdocument=1. The *Risk and Return* report defined “Rule of Law” as follows: “Certain, accessible and prospective laws; equally enforced; with access to justice (*i.e.*, the right to challenge decisions in courts or other equivalent bodies); where rights may be asserted (human rights and rights such as property, contracts, etc.); through fair trials before an independent judiciary.” *Id.* at p. 17.

¹¹⁶ 2019 EU Justice Scoreboard, p. 4 (citing The Economist Intelligence Unit: “Risk and Return – Foreign Direct Investment and the Rule of Law”, 2015, http://www.biicl.org/documents/625_d4_fdi_main_report.pdf, p.22); *see also* Federico Carril-Caccia and Elena Pavlova, European Central Bank, *Foreign direct investment and its drivers: a global and EU perspective*, originally published in ECB Economic Bulletin Issue 4/2018, 26 June 2018, https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html#toc1 (noting that “compliance with the rule of law and private property rights are valued positively by [multi-national enterprises].”).

¹¹⁷ 2020 EU Justice Scoreboard, p. 2; *see also* European Commission, *The 2019 EU Justice Scoreboard: Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2019) 198/2*, 2019, p. 1 https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf (“Respect for the rule of law, including the independence of justice systems, has a significant impact on investment decisions and on attracting businesses.”); *id.* at p. 55 (noting that judicial independence “is vital for upholding the rule of law, the fairness of judicial proceedings and the trust of citizens and businesses in the legal system.”); European Commission, *The 2018 EU Justice Scoreboard: Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2018) 364 final*, 2018, p. 41, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (noting that judicial independence “guarantees the fairness, predictability and certainty of the legal system, which are important elements for an attractive investment environment.”).

¹¹⁸ 2020 EU Justice Scoreboard, p.2.

¹¹⁹ 2020 EU Justice Scoreboard, p.2.

But while perceived judicial independence “is a growth-enhancing factor,” a “perceived lack of independence” of the judiciary can deter foreign investment.¹²⁰ In its discussion of why effective justice systems are important for an “investment friendly business environment,” the European Commission pointed to a study, which indicated “a positive correlation between perceived judicial independence and foreign direct investment flows in Central and Eastern Europe.”¹²¹

In its 2020 country report, the European Commission identified breaches in the rule of law as one of the factors that could limit investment activity in Poland.¹²² The Commission emphasized that the continued “risk of a serious breach of the rule of law” has “potentially negative consequences for investors’ trust.”¹²³ It also referred to several international stakeholders, which have stressed that “a persistent threat to the rule of law puts at risk the effective functioning of the justice system and overall institutional stability, distorts mutual trust and subsequently impairs the investment climate and sustainability of long-term growth.”¹²⁴ The Commission specifically connected these concerns to the judicial reforms that undermine the independence of Poland’s judiciary.¹²⁵

4.2 The Retaking of Foreign-Owned Media

One arena in which the influence of the PiS government has already been recognized as a potential deterrent to foreign investment is in media ownership. Since the PiS party came to power in 2015, media freedom has been on the decline and in the past few years party leaders have expressed disdain for foreign-owned media in the country. The PiS government’s actions vis-à-vis the media in Poland has resulted in a dramatic drop on the World Press Freedom Index issued by Reporters without Borders. Poland’s ranking in the World Press Freedom Index has dropped every year that the PiS government has been in power (2015–2020), falling from 18th in 2015 to 62nd in 2020.¹²⁶

¹²⁰ 2020 EU Justice Scoreboard, p.45; 2019 EU Justice Scoreboard, p. 44.

¹²¹ 2020 EU Justice Scoreboard, p. 5 (citing Bülent Dogru, *Effect of judicial independence on foreign direct investment in Eastern Europe and South Asia*, 2012, MPRA Munich Personal RePEc Archive: https://mpra.ub.uni-muenchen.de/40471/1/MPRA_paper_40322.pdf). Poland was not one of the countries examined for the study; however, neighboring countries such as the Czech Republic, Slovakia and Hungary were included in the study. A much earlier study of five Central and Eastern European countries (from 2002), which did include Poland, “found correlations between ineffective courts and lower levels of investment.” World Bank, *Doing Business in Poland 2020*, p. 46 (citing Simon Johnson, John McMillan and Christopher Woodruff, “Courts and Relational Contracts,” in *Journal of Law, Economics and Organization* 18, No. 1 (2002)).

¹²² See Eur. Comm’n, *Country Report Poland 2020*, p. 6 (“A clear risk of a serious breach of the rule of law in Poland continues to exist and may negatively impact the investment climate.”).

¹²³ Eur. Comm’n, *Country Report Poland 2020*, p. 36.

¹²⁴ *Id.*

¹²⁵ See *id.*

¹²⁶ The Economist, *Poland’s ruling party may clobber independent media: Foreign investors could be obliged to sell*, 10 Oct. 2020, <https://www.economist.com/europe/2020/10/10/polands-ruling-party-may-clobber-independent-media> (accessed 16 Nov. 2020); see also Reporters Without Borders, 2020 World Press Freedom Index, <https://rsf.org/en/ranking>.

The concept of retaking foreign-owned media by reducing foreign ownership has been a recurring theme in PiS rhetoric. PiS party leader Jarosław Kaczyński suggested in 2016 that it was unacceptable in a sovereign state for the media to be “largely in the hands of external owners and that they are being used for political ends.”¹²⁷ More recently, Kaczyński allegedly stated that he wishes to “limit foreign investors to a stake of no more than 30% in Polish media[.]”¹²⁸ While Kaczyński claims that the reform is necessary to “present the world more truthfully,”¹²⁹ opponents see it as an attempt by the government to stifle independent journalism.¹³⁰ Former U.S. Ambassador to Poland, Georgette Mosbacher, reportedly criticized via Twitter the government’s move in this regard: “Forcing media companies to sell shares will force investors to look elsewhere. That’s not a good investment climate – it’s censorship. Attracting foreign investment and a strong economy requires predictability.”¹³¹

Independent media outlets that are critical of the PiS party are often labelled by its politicians as “non-Polish,” “German,” or “Polish-language” (thus, indicating their alleged foreign character). For instance, with regard to a leaked conversation of the prime minister, the then-Vice-Speaker of the Sejm, Beata Mazurek, tweeted in 2018: “The German Onet [a major online news portal] insinuates once again,” calling the publication of tapes and testimonies a “well-planned attack” because “everyone knows who is behind these media.” Another governing coalition leader Jarosław Gowin stated in 2019 that “a self-respecting nation must not allow to have the majority of its media in the hands of strangers,” implying that this issue needs to be resolved by the government.¹³²

In the most extreme case, as in that of TVN24 discussed above, the PiS party – through the prosecutor’s office – has gone after private, foreign-owned news outlets that have reported on stories that reflect badly on the PiS government by bringing criminal charges. Doing so sparked a strong reaction from the then-U.S. Ambassador, who wrote a letter to the Polish prime minister, expressing her “deep concern” over PiS officials’ allegations against the TVN24 journalists.¹³³ In the letter, then-Ambassador Mosbacher reportedly stated: “It is

¹²⁷ Wojciech Czuchnowski, Agnieszka Kublik, *Kaczyński: Media in Poland should be Polish*, 15 July 2020, <https://wyborcza.pl/7,173236,26130626,kaczynski-media-in-poland-should-be-polish.html> (accessed 15 Jan. 2021).

¹²⁸ The Economist, *Poland’s ruling party may clobber independent media*.

¹²⁹ *Id.*

¹³⁰ James Shotter, *Poland’s government sets its sights on private media: Critics of conservative-nationalist ruling camp say the targeting of foreign ownership is unjustified*, THE FINANCIAL TIMES, 25 Oct. 2020, <https://www.ft.com/content/06ead126-f8ee-414e-9c2d-f31ad9ac4ce1> (accessed 16 Nov. 2020).

¹³¹ Dominika Wielowieyska, *Deconcentration is just another word for censorship. US ambassador defends Polish independent media and warns about a bad climate for American investors*, 31 Aug. 2020, <https://wyborcza.pl/7,173236,26256353,deconcentration-is-just-another-word-for-censorship-us-ambassador.html?disableRedirects=true> (accessed 22 Dec. 2020). She added in a second tweet, “Long term licenses = long term investment, in any business, including the media business.” *Id.*

¹³² Wyborcza.pl, *Jarosław Gowin zapowiada repolonizację mediów*, 19 June 2019, <https://wyborcza.pl/7,75398,24919210,jaroslaw-gowin-zapowiada-repolonizacje-mediow.html> (accessed 15 Jan. 2021).

¹³³ Davies, *US ambassador scolds Polish officials over claims journalists staged neo-Nazi event*; see also Michał Broniatowski, *US ambassador clashes with Warsaw over media freedom*, POLITICO, 27 Nov. 2018,

astonishing that these public figures would attack journalists who were fulfilling the functions of an independent media in Poland's vibrant democracy[.]”¹³⁴

In recent months, PiS party leaders have discussed two new laws that could bring the “re-taking of foreign-owned media” in Poland to fruition. One law would seek to “re-polonise” the country’s media through the reduction in foreign-ownership; another would “deconcentrate” private media firms” such that the number of outlets that any one media group may own would be limited.¹³⁵ Although no legislation has been formally put forward, The Economist reported in October 2020 that if the proposed reforms do become law, “[t]hey would make it hard or impossible for foreign media investors to do more business in Poland and may even force some sales.”¹³⁶

Even without legislation, there is speculation that the PiS party may “use state-owned companies to buy up independent media.”¹³⁷ Supporting this speculation, in December 2020, PKN Orlen, a major Polish state-controlled petrol company, announced its plan to extend its activity in the media sector through acquiring of one of the biggest publishing groups in Poland – Polska Press.¹³⁸ The transaction will “bring 20 of Poland’s 24 regional newspapers” as well as an estimated 120–150 local weeklies “under the ownership of the state-controlled refiner.”¹³⁹ The transaction – reportedly worth EUR 22 million¹⁴⁰ – has yet to be approved by the Office of Competition and Consumer Protection.

<https://www.politico.eu/article/poland-us-ambassador-clashes-with-warsaw-over-media-freedom/> (accessed 22 Dec. 2020) (reporting that Ambassador Mosbacher’s letter to the prime minister regarding the Discovery Channel-owned TVN24 journalists “warn[ed] the government to lay off efforts to prosecute journalists at the TVN24 news channel[.]”).

¹³⁴ *Id.*

¹³⁵ The Economist, *Poland’s ruling party may clobber independent media*.

¹³⁶ *Id.*

¹³⁷ James Shotter, The Financial Times, *Poland’s government sets its sights on private media: Critics of conservative-nationalist ruling camp say the targeting of foreign ownership is unjustified*, 25 Oct. 2020, <https://www.ft.com/content/06ead126-f8ee-414e-9c2d-f31ad9ac4ce1> (accessed 16 Nov. 2020); see also Zosia Wanat, *Poland threatens to veto EU budget over rule of law*, POLITICO, 13 Oct. 2020, <https://www.politico.eu/article/poland-threatens-a-budget-veto-over-rule-of-law/> (accessed 16 Nov. 2020) (reporting that “Deputy Prime Minister Piotr Gliński said Polish state-owned companies should buy private media operators.”). The Economist reported in October 2020 that PKN Orlen, a large state-owned petrol retailer, is “in talks” to buy Polska Press, a subsidiary of Germany’s Verlagsgruppe Passau, which owns 20 Polish regional newspapers. See Wanat, *Poland threatens to veto EU budget over rule of law*; The Economist, *Poland’s ruling party may clobber independent media*.

¹³⁸ PKN Orlen, Press Release, *PKN Orlen to take over Polska Press*, 7 Dec. 2020, <https://www.orklen.pl/EN/PressOffice/Pages/PKN-ORLEN-to-take-over-Polska-Press.aspx>; see also James Shotter, *Polish media deal revives fears over press freedom*, Financial Times, 7 Dec. 2020, <https://www.ft.com/content/adc4f78b-c7e0-493c-9735-f8cff4759a50> (accessed 22 Dec. 2020).

¹³⁹ Shotter, *Polish media deal revives fears over press freedom*; Gemius Polska, Results of the Mediapanel survey for November 2020, 4 Dec. 2020, <http://www.gemius.pl/wszystkie-artykuly-aktualnosci/wyniki-badania-mediapanel-za-listopad-2020.html> (accessed 18 Jan. 2021). The group’s portfolio also includes popular local online services (generating almost 17.5 million monthly real users). Polska, Results of the Mediapanel survey for November 2020.

¹⁴⁰ M. Zatoński, *Orlen kupić media regionalne*, PULS BIZNESU, 7 Dec. 2020, <https://www.pb.pl/orlen-kupit-media-regionalne-1102499> (accessed 18 Jan. 2021).

Conclusion

As the Polish government faces increasing pressure from the European Union to respect the rule of law, private business and foreign direct investment remain crucial to the country's economic livelihood. However, the same disregard for the rule of law and judicial independence that has brought Poland under EU and international scrutiny undermines business freedom and security and serves as a deterrent to foreign investment. To foster a more secure, business- and investment-friendly environment in the country, the government needs to undo some of the recent legislative reforms that have created legal uncertainty of court decisions at all levels, political influence in the prosecutor's office and over judicial appointments, greater exposure for businesspersons and enterprises under criminal law, and an overburdened and backlogged court system. It also needs to be cautious in its efforts to "retake" the media from foreign companies and otherwise threaten foreign investment. Above all, the Polish government must take decisive steps to safeguard the independence of the judiciary, a cornerstone of an effective justice system.