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16 May 2022

Hon. Andrzej Duda  
President of Poland  
ul. Wiejska 10  
00-902 Warszawa, Poland  
[listy@prezydent.pl](mailto:listy@prezydent.pl)

Re: Disciplinary Chamber of the Supreme Court and other Rule of Law Concerns

Dear President Duda:

On behalf of the American Bar Association (ABA), I thank the people and the Government of Poland for their response to the war in Ukraine, particularly for welcoming over three million Ukrainian refugees fleeing their homes and for providing them with immediate access to work, education, and medical care. We also commend your commitment to rethink the approach to the Disciplinary Chamber of the Supreme Court as urged by the European Union (EU) and the Court of Justice of the EU (CJEU). However, the ABA has concerns over continued threats to judicial independence and the rule of law in Poland and whether the legislative proposals currently under consideration sufficiently guarantee the impartiality and independence of the bodies responsible for appointing and disciplining judges, the rights of individual judges and lawyers, and ultimately the right to a fair trial for Polish citizens.

The ABA is the largest voluntary association of lawyers, judges, and other legal professionals in the world. It is committed to the promotion of independence of the legal profession, the administration of justice in adherence to the rule of law, and the rights of lawyers and judges in the United States and internationally. Since 2017, the ABA has been vocal in advocating for issues pertaining to the rule of law and judicial independence in Poland and has published numerous official statements, reports, and press releases on these issues.<sup>1</sup>

The ABA's ongoing concerns over the current state of the rule of law and judicial independence stem from analysis by the local legal community that suggests that none of the current legislative proposals for reform of Poland's judiciary – including proposals for replacing the Disciplinary Chamber – satisfy the demands by the European Commission or the rulings by the CJEU and

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<sup>1</sup> See, e.g., American Bar Association Center for Human Rights (ABA CHR), *Update: Poland: Erosion of Judicial Independence Continues*, [https://www.americanbar.org/groups/human\\_rights/reports/poland--erosion-of-judicial-independence-continues/](https://www.americanbar.org/groups/human_rights/reports/poland--erosion-of-judicial-independence-continues/); ABA CHR, *The Case of Judge Alina Czubieniak: Threats to Judicial Independence in Poland Through the Use of Judicial Disciplinary Procedures*, Dec. 2019, [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/report-poland-alina-czubiekiak-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/report-poland-alina-czubiekiak-2019.pdf); ABA CHR, *The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland*, 19 Nov. 2020, [https://www.americanbar.org/groups/human\\_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/](https://www.americanbar.org/groups/human_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/).

European Court of Human Rights (ECtHR). In particular, legal experts fear that, like the previous method, the newly proposed method of appointments to the new chamber may again result in political influence over the body.

The U.N. Basic Principles on the Independence of the Judiciary stipulate that governments have a duty to respect the independence of the judiciary and prohibit “any inappropriate or unwarranted interference with the judicial process.”<sup>2</sup> Pursuant to the U.N. Basic Principles, judges are entitled to a fair hearing when a complaint or charge has been made against them, which includes the right to a fair hearing before an independent and impartial decision-maker in disciplinary proceedings.<sup>3</sup> In addition, the U.N. Guiding Principles on Business and Human Rights instruct governments to “protect and promote the rule of law by taking measures to ensure” fairness in the application of the law, legal certainty, and procedural and legal transparency.<sup>4</sup> Legal certainty – which is of particular importance to businesses that need to be able to anticipate liability – is under threat in Poland if there are politically influenced appointments and questionable validity of the legal decisions issued by courts composed of such judges.<sup>5</sup> Even a *perceived* lack of independence of the judiciary and the rule of law can impact business in the country.<sup>6</sup>

Concerns over the lack of impartiality and independence of the Disciplinary Chamber, as well as the body that appoints its members (the National Council of the Judiciary (NCJ)), have dominated recent decisions by the CJEU and ECtHR. The CJEU first examined inquiries about the independence of the NCJ and the independence and impartiality of the Disciplinary Chamber in November 2019 in the case of *A.K. and Others*,<sup>7</sup> as a result of which Poland’s Supreme Court Chamber of Labor and Insurance issued a judgment in December 2019 and the joint chambers of the Supreme Court issued a resolution in January 2020 recognizing that the NCJ does not have the requisite attributes of independence and that the Disciplinary Chamber is not a court within the meaning of Polish law or EU law.<sup>8</sup>

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<sup>2</sup> U.N. Basic Principles on the Independence of the Judiciary, adopted by the 7<sup>th</sup> U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, endorsed by G.A. Res. 40/32 (29 Nov. 1985) and G.A. Res. 40/146 (13 Dec. 1985), Principles 1 and 4.

<sup>3</sup> *Id.* at Principle 17; Int’l Comm. of Jurists, *Poland: Stop Arbitrary Proceedings Against Judge Igor Tuleya*, 4 June 2020, <https://www.icj.org/poland-stop-arbitrary-proceedings-against-judge-igor-tuleya/>.

<sup>4</sup> U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the U.N. “Protect, Respect and Remedy” Framework*, 2011, p. 3, available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf).

<sup>5</sup> See Helsinki Foundation for Human Rights, *Poland: Business, Judicial Independence and the Rule of Law*, Feb. 2021, [https://www.hfhr.pl/wp-content/uploads/2021/02/Report\\_B-JI-in-Poland\\_190221-final.pdf](https://www.hfhr.pl/wp-content/uploads/2021/02/Report_B-JI-in-Poland_190221-final.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> CJEU, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Case Nos. C-585/18, C-624/18 and C-625/18, Judgment of the Court (Grand Chamber) (19 Nov. 2019), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli%3AECLI%3AEU%3AC%3A2019%3A982> (noting that Article 47 of the Charter of Fundamental Rights of the European Union precludes the settlement of disputes regarding the application of EU law by a body that is not an independent and impartial tribunal in the meaning of that article.).

<sup>8</sup> See Rep. of Poland Supreme Court, Case III PO 7/18, Judgment (5 Dec. 2019), <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20po%207-18-2.pdf>; Rep. of Poland Supreme Court, Case BSA I-4110-1/20, Resolution (23 Jan. 2020), [http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1\\_20\\_English.pdf](http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf).

On 8 April 2020, the CJEU issued an interim order to Poland (Case C-791/19 R) to suspend the Disciplinary Chamber's jurisdiction in disciplinary cases of judges due to the lack of apparent independence and impartiality of the disciplinary body.<sup>9</sup> The CJEU's Grand Chamber issued a final judgment (Case C-791/19) on 15 July 2021, holding that the Disciplinary Chamber does not constitute an independent and impartial tribunal. In its ruling, the court emphasized that the way in which the Disciplinary Chamber's members are appointed is "such as to give rise to reasonable doubts in the minds of individuals" regarding the impartiality and independence of the body and thereby to undermine trust in the administration of justice.<sup>10</sup>

The day before the Grand Chamber's judgment in Case C-791/19, the then-Vice President of the CJEU granted the European Commission's request for interim measures to, among other things, suspend the jurisdiction of the Disciplinary Chamber in a broader spectrum of cases, including cases relating to the status of Supreme Court judges and their performance in office and cases relating to lifting a judge's immunity.<sup>11</sup> It also ordered Poland to suspend immediately the effects of the decisions already adopted by the Disciplinary Chamber in cases related to lifting a judge's immunity applications for authorization to initiate criminal proceedings against a judge. The court's decision was again based in its determination that the independence of the Disciplinary Chamber cannot be guaranteed, and, therefore, the Disciplinary Chamber's jurisdiction over these matters "is liable to cause serious and irreparable damage to the EU legal order."<sup>12</sup>

On 22 July 2021, in the case of *Reczkowicz v. Poland*, the ECtHR concluded that the NCJ lacks "sufficient guarantees of independence" from the legislature and executive and therefore judges selected by this body do not satisfy the requisite judicial independence and impartiality under Article 6 of the European Convention on Human Rights and Fundamental Freedoms, which guarantees the right to a fair trial.<sup>13</sup>

To summarize, some of the key infringements identified by the CJEU and ECtHR in these and other judgments<sup>14</sup> that still need to be addressed through legislative reform include:

- The lack of independence and impartiality of the Disciplinary Chamber of the Supreme Court and, as a result, the lack of guarantee of a fair trial for Polish lawyers in disciplinary proceedings and in cases related to waiving a judge's immunity;

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<sup>9</sup> CJEU, *European Commission v. Poland*, Case No. C-791/19 R, Order of the Court (Grand Chamber) (8 April 2020), available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX%3A62019CO0791%2801%29>.

<sup>10</sup> CJEU, *European Commission v. Poland*, Case No. C-791/19, Judgment of the Court (Grand Chamber) (15 July 2021), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0791>.

<sup>11</sup> CJEU, *European Commission v. Poland*, Case No. C-204/21 R, Order of the Vice-President of the Court (14 July 2021), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CO0204%2802%29>.

<sup>12</sup> *Id.*

<sup>13</sup> Eur. Ct. of Human Rights, *Reczkowicz v. Poland*, Application No. 43447/19 (22 July 2021), available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-211127%22%7D>.

<sup>14</sup> *E.g.*, In the case of *Xero Flor v. Poland*, the ECtHR found in its judgment of 7 May 2021 that the Constitutional Tribunal's adjudicating with the incorrectly appointed judges in their panels violates the European Convention on Human Rights and Fundamental Freedoms by not giving the parties a guarantee of an independent and impartial court. Eur. Ct. of Human Rights, *Xero Flor v. Poland*, Application No. 4907/18 (7 May 2021), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-210065%22%7D>. In the *Advance Pharma v. Poland* case, the ECtHR found in the judgment of 3 February 2022 that the Supreme Court's adjudicating in their panels with the justices incorrectly appointed by the President of Poland (at the motion of the new National Council of the

- Permitting the content of judicial decisions to be classified as a disciplinary offence by judges of the ordinary courts, including decisions that execute CJEU and ECtHR rulings;
- The failure to suspend application of the provisions under which the Disciplinary Chamber has jurisdiction to adjudicate, at both first and second instance, on applications for authorization to initiate criminal proceedings against judges;
- The failure to suspend the effects of decisions already adopted by the Disciplinary Chamber that authorize the initiation of criminal proceedings against or the arrest of a judge;
- The obligation to reinstate Polish judges unlawfully suspended from adjudication by the Disciplinary Chamber;
- Defective constitution of the NCJ and defective judicial nominations by the NCJ to the ordinary courts, administrative courts, Supreme Administrative Court, and the Supreme Court due to undue political influence; and
- The politicization of the Constitutional Tribunal.

These threats to judicial independence in Poland will persist if care is not given to ensure that both the ongoing legislative reforms and decisions issued by the Polish judiciary implement the judgments of the CJEU and the ECtHR. By way of example, on 21 March 2022, the Warsaw-Praga District Court issued a final judgment ordering the re-admission of Judge Igor Tuleya – who had been suspended by the Disciplinary Chamber in November 2020 – to perform his official duties and receive cases. The court’s ruling reinstating Judge Tuleya in essence revokes the Disciplinary Chamber’s resolution of 18 November 2020;<sup>15</sup> however, the President of the District Court in Warsaw refuses to execute it and continues to prevent Judge Tuleya from resuming official duties and adjudicating cases. Equally concerning is the fact that the Disciplinary Chamber continues to adjudicate disciplinary cases against judges and cases regarding lifting judicial immunity in violation of CJEU orders to suspend operations. According to media reports, as of February 2022, there were 95 disciplinary cases against judges registered with the Disciplinary Chamber.

The ABA respectfully urges the Government of Poland to use the opportunity of its current legislative reforms to bring meaningful changes to the justice system that ensure that judicial independence is consistent with long-standing Polish democratic and human rights traditions, as well as Poland’s international treaty obligations and European law. To this end, it urges the government to guarantee that Polish judges have adequate appointment and disciplinary procedures in line with international law and standards on judicial independence and impartiality. It further urges the Government of Poland to reject any draft law on the appointment

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Judiciary) violates the Convention and the human right to an independent and impartial court. Eur. Ct. of Human Rights, *Advance Pharma v. Poland*, Application No. 1469/20 (3 Feb. 2022), available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-13549%22%7D>.

<sup>15</sup> On 18 November 2020, the Disciplinary Chamber lifted Judge Tuleya’s judicial immunity from prosecution and suspended him from his judicial duties. The November 2020 hearing and ruling regarding Judge Tuleya’s judicial immunity took place after the CJEU issued interim measures which ordered Poland to suspend the jurisdiction of the Disciplinary Chamber of the Supreme Court in disciplinary matters due to its apparent lack of independence and impartiality. See CJEU, Case No. 791/19 R, Order of the Court; American Bar Association, *The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland*, 19 Nov. 2020, [https://www.americanbar.org/groups/human\\_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/](https://www.americanbar.org/groups/human_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/).

16 May 2022

Page 5 of 5

and discipline of judges that fails to comply with the judgments of the CJEU and ECtHR and to execute the judgments of the CJEU and the ECtHR as they relate to the independence of Poland's judiciary.

Thank you for your consideration of the ABA's views expressed in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Reginald M. Turner". The signature is fluid and cursive, with a large loop at the end.

Reginald M. Turner

cc: Ursula von der Leyen, President of the European Commission  
Roberta Metsola, President of the European Parliament  
Antony J. Blinken, U.S. Secretary of State  
Mark Brzezinski, U.S. Ambassador to Poland  
Tomasz Grodzki, Marshal of the Senate of Poland