

**The Rule of Law and its Social Reception
as Determinants of Economic Development**
A Comparative Analysis of Poland and Germany



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Executive Summary

The rule of law, by securing civil and economic rights, directly contributes to social prosperity and is one of our societies' greatest achievements. In the European Union (EU), the rule of law is enshrined in the Treaties of its founding and is recognised not just as a necessary condition of a liberal democratic society, but also as an important requirement for a stable, effective, and sustainable market economy. In fact, it was the stability and equality of opportunity provided by the rule of law that enabled the post-war *Wirtschaftswunder* in Germany and the post-Communist resuscitation of the economy in Poland.

But the rule of law is a living concept that is constantly evolving – both in its formal, *de jure* dimension, embodied in legislation, and its *de facto* dimension, or its reception by society. In Poland, in particular, according to the EU, the rule of law has been heavily challenged by government since 2015 and has evolved amid continued pressure exerted on the institutions which execute laws. More recently, the outbreak of the COVID-19 pandemic transformed the perception of the rule of law and its boundaries throughout the EU and beyond (Marzocchi, 2020).

Against this background, this study examines the rule of law as a determinant of economic development in Germany and Poland from both the *de jure* and *de facto* perspectives, in line with the following research questions:

- Research question 1: What formal institutions constitute the rule of law to the extent relevant to economic development in the countries under analysis – in other words, what is the state *de jure* of the rule of law?
- Research question 2: What is the social reception of those institutions to the extent relevant to economic development – in other words, what is the state *de facto* of the rule of law?
- Research question 3: How does the state *de facto* of the rule of law impact economic development in the countries under analysis?

The problem that we undertake to research is multifaceted and highly complex. We address the former challenge with a multidisciplinary approach. Taking rules, or norms, as the leading theme of the project and the common denominator of its respective parts, the study bridges two research fields, new institutional economics and sociology of law, contributing to both of them. We believe that by confronting legal norms with social norms – which are often overlooked by legislators – and by grounding our econometric analysis in solid sociological considerations – which are

usually disregarded or relegated to assumptions by economists – we will capture synergies that have so far been missing in academic literature.

Defining the rule of law. The rule of law is a subtle and evolving concept, and any attempt to define it would merit a separate study. In theoretical legal literature, a differentiation is usually drawn between the formal and the substantive approaches to the rule of law (e.g. Krygier, 2015; Waldron, 2016). In the formal approach, which is usually associated with the Anglo-Saxon conception, the rule of law consists in the rightful procedures – such as separation and balance of powers, timely and orderly publication of laws, and the functioning of an independent judiciary. In the substantive approach, more akin to the German *Rechtsstaat*, substantive elements such as rights and freedoms deemed inalienable – in the economic context, *inter alia*, property rights, economic freedom, and freedom from corruption – also become integral components of the rule of law.

In parallel, economists have transcended the boundaries of their science, proposing several candidates for extra-economic causes of economic growth. New institutional economics, in particular, focuses on studying the rule of law as one of the core institutions determining economic growth. According to this stream of research, institutions may be contract-enabling and stimulate economic growth if they decrease transaction costs (i.e. the costs related to the identification of a suitable transaction, the negotiation of a contract with the transaction partner, and the enforcement of the contract) and increase inclusiveness (i.e. the degree to which diverse parties can participate in a transaction, thus contributing to the societal pool by way of skills and effort). In contrast, institutions are contract-disabling if they increase transaction costs and create ‘clubs’ with special privileges.

Because our study has direct economic relevance and is based on existing literature in the field of institutional economics (e.g. Acemoğlu et al., 2005a), we distinguish and account for those emanations of the rule of law that satisfy one or both of the above-mentioned criteria, namely:

1. separation and balance of powers;
2. the independent judiciary;
3. legal certainty;
4. economic freedom;
5. property rights;
6. anti-corruption regulations;
7. free media;
8. items of general relevance (e.g. non-discrimination, state liability).

Clear, certain, and predictable regulations permit economic actors to plan their actions, allowing them to efficiently manage their resources. Property rights secure ownership of assets, driving

down the costs of securing them by private means. In particular, intellectual property rights, by allowing companies to recoup investment and reap returns, play a crucial role in driving innovation. As such, they are particularly important to innovation-based economies (such as Germany) and economies facing a transition to the innovation-based model (such as Poland). Economic freedom ensures equality of opportunity, allowing everyone to contribute to the common pool. Fortified by anti-corruption mechanisms, economic freedom ensures the optimal allocation of resources, as seen for instance in merit-based employment and competition-based project financing (in contrast to arbitrary allocations, such as by nepotism or cronyism). The checks and balances built into the political system keep it from being hijacked by certain interests and are strengthened by the public scrutiny routinely performed by free media. Acting as a referee, the independent judiciary provides insurance to companies and households through which contracts are enforced (e.g. default), the decisions of state authorities are reviewed (e.g. in tax disputes), and the unfair practices of other market participants (e.g. unfair competition) are screened out.

Historical review. Both Germany and Poland boast rich constitutional traditions in which the rule of law has historically played an important role, although not without deviations. The current perceptions of the rule of law and the levels of trust in public institutions appear to be influenced by historical and economic factors and differ across the old lines of division that used to cut both countries in two (in Germany) or three (in Poland).

In Germany, trust in public institutions has been, and partly remains, lower in the East – a result of an economic downturn, missing identification with the newly built institutions, and a legacy of the structural democratic deficit of the former authoritarian state (Roland Rechtsreport, 2015; Köcher, 2019; Roland Rechtsreport, 2020). Similarly, available studies on Poland indicate that following the unification, with a single legal system now in place, the social working of legal rules still differs along the borders of the old partitions (e.g. Becker et al., 2016; Vogler, 2016). These findings correlate with the regional differences in gross domestic product (GDP) per capita levels, which also largely follow the borders of the old partitions, yet the establishment of a causal relationship is notoriously difficult due to the problem of endogeneity.

More urgently, the rule of law in Poland has been undergoing a clear erosion since 2015. That erosion has taken the form of both detrimental changes in the legal rules and in the approach of the ruling class to law – i.e. legal culture. The legal analysis presented in the report describes this process with respect to the particular dimensions of the rule of law. In the second part of this report, we study how these changes translate to the wider social reception of the rule of law.

Rule of Law *de jure*

Given the complexity of measuring and studying the rule of law from the *de jure* perspective, we structure this part of the research around indicator analysis and legal analysis.

Indicator analysis. Measuring the rule of law is a complex task that cannot be reduced to single numbers and data. Nevertheless, we use the insights of the indices that evaluate business environment, investment attractiveness, and state of the rule of law *per se* to ensure a comprehensive *de jure* analysis of the rule of law frameworks in Germany and Poland.

From the analysis of five key rule of law indicators, we conclude that Poland performs low relative to Germany and other EU countries. In the 2020 edition of the *World Justice Project Rule of Law Index*, Poland scores 0.66, ranking 28th globally, but trails in both the regional and the income cohorts, ranking 19th and 27th, respectively. In addition, Poland experienced a significant downturn across all the indicators in recent years. Following a strong performance in the *World Justice Project Rule of Law Index* and recognition as a successful reformer in the 2010 and 2011 editions of the report, Poland experienced a 25% drop in the constraints on government power indicator between 2015 and 2019, which is the largest of the 126 countries in the study. According to the Heritage Foundation's *Index of Economic Freedom*, a significant decline was recorded in judicial effectiveness (by 24% since 2018).

The performance of Germany remains high and historically stable. Specifically, Germany ranks 6th globally with a score of 0.84 in the *World Justice Project Rule of Law Index*, with government accountability, freedom from corruption, and accessibility and efficiency of the court system being repeatedly praised as particularly strong points (World Justice Project, 2011, 2014). Similarly to Poland, Germany's historically stable score (around 79 points) in the World Bank's *Doing Business* index has been linked with a steady decline in its relative ranking (from 14th in 2015 to 22nd in 2020). However, including social criteria to the rule of law, Germany performs better than many other countries with higher scores in the purely economic freedom indexes (e.g. the United States ranks 6th and Germany ranks 20th in the Fraser Institute's *Economic Freedom of the World* index; however, looking at the Social Progress Imperative's *2020 Social Progress Index*, Germany is ranked 11th out of 163 countries, whereas the United States is ranked 28th).

The results of these indices should be interpreted cautiously, though, as different issues and challenges come with their use, including diverse temporal and geographical coverage – often referred to as the 'OECD bias' (Moller and Skaaning, 2011) – and reliance on expert-interviews rather than on large panels. Finally, a significant challenge concerns the correlation between

single indices, as they all use different measurements and it is not always clear what exactly is understood as rule of law.

Legal analysis. Our analysis shows that the legislation of both countries generally secures the rule of law with regard to its economically relevant aspects, that is: equality and non-discrimination; separation and balance of powers; the independent judiciary; legal certainty; economic freedom; property rights; anti-corruption regulations; and free media. The many resemblances in the rule of law *de jure* between Germany and Poland can be traced to similarities in their legal traditions and to the EU's *Acquis Communautaire*. One significant difference between the two countries is that the social aspect of the rule of law is much more pronounced in Germany than in Poland.

Since 2015, however, many components of the rule of law, including checks and balances, free media, and judicial independence, have suffered in Poland. This includes the 2016 re-merger of the offices of Minister of Justice and General Prosecutor, which reduced the independence of the prosecutors to the advantage of the government, as well as serious structural incursions on the independence of the judiciary.

Rule of Law *de facto*

By combining the insights of our *de jure* analyses with the findings from surveys and in-depth interviews with representatives of small and big businesses in Germany and Poland, we find significant divergences in terms of understanding and status of the rule of law in both countries.

Our sociological results, in particular, show that many Polish firms consider the rule of law as formal obedience of rules, which is primarily their responsibility *vis-à-vis* the state. At the same time, the state is largely mistrusted by Polish business representatives with '*position of the opposing party*' and '*social capital that parties dispose of*' being recognised as two of the most important factors for a successful trial in 35.5% and 24% of cases by small and big businesses, respectively. Further, 84% and 90.5% of Polish big and small businesses, respectively, expect that in cases of a dispute between a private company and the administration, the court would act biased and pass a verdict in favour of the latter. Such distrust towards the Polish state helps explain why large portions of Polish society are relatively indifferent to the breaches of the rule of law by the government with regard to judiciary independence, political opposition, and free media, among others. When analysed from a historical perspective, these findings can likely be related to Poland's long periods under foreign rule (168 years in the 19th and 20th centuries), including the old imperial powers and, more recently, the communist regime.

In Germany, on the other hand, firms view the rule of law more as an instrument at their disposal, to be used *vis-à-vis* business partners and the state. This perception is not devoid of critique, with



about one-third of small and big business representatives in Germany stating that ‘*none*’ of the rule of law elements are being adequately fulfilled in the country.

Impact of the rule of law on economic development

Thus, there is a clear contrast between the evaluation of the performance of the rule of law and the role of the state in both countries. While many companies in Poland confuse ‘rule of law’ for ‘strict rule-obedience’, the German perception is significantly closer to the understanding of the rule of law as a device primarily in the service of society (including in its economic capacity). In comparison with Polish firms, the attitude of German firms is closer to the spirit of the social contract and also shows an implicit awareness of the advantages of the rule of law as theoreticized by new institutional economics. For instance, at least three interviewees from Germany clearly highlighted that the rule of law reduces transaction costs, which is realised as a type of insurance against uncertainty and as facilitated dispute resolution, among others.

Further, considering the recognition by German respondents of the transaction cost-reducing properties of the rule of law and the lower degree of uncertainty as to the state’s actions and intentions, one can expect higher levels of investments and, hence, of economic development in the long term. Our empirical findings confirm this assumption. Using a novel estimation technique on a new database of Polish and German variables, we found that the level of the rule of law can be predicted strongly by both political and macroeconomic conditions. Plugging these results into an equation relating investment to the rule of law, we found that the rule of law does indeed also positively impact investment, quite substantially over the life cycle of a worker and almost immediately.

Specifically, the shift from the current level of the rule of law in Poland to its historical maximum (i.e. 0.964 in 2009-2010) would result in an increase in its income-based capital per worker of an additional USD 3,216.40 (in 1990 constant USD). Similarly, if the rule of law in Germany was to increase from its current level (i.e. 0.989 in 2018) to its 2012 maximum, the country would see a gain in capital of about USD 1,190.00 per worker. Conversely, if Poland and Germany were to suffer lower levels of the rule of law (i.e. shift for Poland from its current level to 1986, and for Germany – from its current level to today’s level in Poland), their workers would see USD 11,240.12 and USD 7,911.78 less capital, respectively.

The effects begin to peter out the further away we examine the level of the rule of law (starting in year 3 and persisting for years after that), meaning that the domino effects of poor rule of law are substantial indeed as well as immediate. Put simply, given the opportunity cost – not just today but in future years – of foregone investment, recent year rule of law is crucial for building up an adequate level of investment for workers.



These results show how decisions affecting the rule of law have longer-term ramifications for a country, and that lower levels of rule of law can ultimately result in far lower levels of investment and hence, development.

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List of Abbreviations

AIC	Akaike Information Criterion
ARD	Working group of public broadcasters of the Federal Republic of Germany [<i>Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland</i>]
BERI	Business Environmental Risk Intelligence
BI	Business International
CATI	Computer-Assisted Telephone Interviewing
CIM	Contract-Intensive Money
CNTS	Cross-National Time-Series
CPI	Consumer Price Index
ECJ	European Court of Justice
EF	Ethnolinguistic Fractionalisation
ELF	Ethnolinguistic Fractionalisation Index
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICRG	International Country Risk Guide
FIEF	Fraser Institute's Economic Freedom of the World Index
FDP	Free Democratic Party
GDP	Gross Domestic Product
GDR	German Democratic Republic
KRS	Polish National Council of the Judiciary [<i>Krajowa Rada Sądownictwa</i>]
NATO	North Atlantic Treaty Organization



NGO	Non-Governmental Organisation
NIE	New Institutional Economics
OECD	Organisation for Economic Cooperation and Development
OLS	Ordinary Least Squares
PiS	Law and Justice [<i>Prawo i Sprawiedliwość</i>]
PLN	Polish Zloty
RoL	Rule of Law
SB	Small Business
TEU	Treaty on the European Union
UOKiK	Office of Competition and Consumer Protection in Poland [<i>Urząd Ochrony Konkurencji i Konsumentów</i>]
UrhG	German Act on Copyright and Related Rights [<i>Urheberrechtsschutzgesetz</i>]
US	United States
VAR	Vector Autoregression
WJP RLI	World Justice Project Rule of Law Index
ZUS	Polish Social Insurance Social Insurance Institution [<i>Zakład Ubezpieczeń Społecznych</i>]

Introduction

By securing civil and economic rights, the rule of law contributes directly to the prosperity of European societies and is one of their greatest achievements. The rule of law is not just a necessary condition for a modern liberal society but also an important requirement for a stable, effective, and sustainable market economy. Recently, the connection between the rule of law and the economy has increasingly been the focus of much scientific and analytical work (see Obinger, 2000). This finds its expression in the research programme known as *new institutional economics*. In this interdisciplinary field, economic outcomes such as gross domestic product (GDP) or the investment rate are explained not only with capital or labour inputs, as in the classical growth models, but also with institutions. Institutions, understood by new institutional economics as formal and informal rules of the (social) game (North, 1990), act as incentives which promote certain social interactions (including economic interaction) while discouraging others. Two types of institutions are singled out in the literature: extractive institutions, which favour select groups within the society, and inclusive institutions, which enhance the well-being of the entire society (Acemoglu et al., 2005a). There are different possibilities for inclusive institutions to influence the national economy:

- independent judiciary as a safety mechanism against fraudulent activities and unfair competition – through contract enforcement and the settlement of commercial disputes;
- legal certainty, e.g. regulatory stability, as a basis for private investments;
- freedom from corruption as a basis for the optimal allocation of resources (e.g. merit-based employment or competition-based project financing).

All-inclusive institutions are based on the rule of law, understood as the principle of primacy of law in social organisation and equality of all before law. Those institutions, being specialised legal norms, can be perceived as emanations of the general rule of law.

Importantly, as suggested by research in the sociology of law, the adoption of legal norms does not warrant compliance with them, and that the *de facto* state of the rule of law often diverges from its *de jure* state (e.g. Woodruff, 2006). The success or failure of legal norms depends to a large extent on the social norms that have developed historically. The different fates of similar reforms in different countries serve as an example here (Balcerowicz and Rzońca, 2014). Within the economic literature, these factors are generally called informal institutions (e.g. Tabellini, 2010) and correspond to what is referred to in the sociological literature as the social working of the legal rule (Griffiths, 2003). Sociological research indicates that the successful implementation of a rule depends on the understanding and acceptance of that rule by society (Moore, 1973).

In the context of the inclusive institutions described above, the relevant legal norms may be more or less successful depending on their social reception:

- insufficient trust in the judiciary can lead to unofficial and inefficient mechanisms of conflict resolution; alternatively, trust in the judiciary can increase risk appetite and thereby stimulate entrepreneurship;
- the extent to which rules are understood translates to the extent to which they are complied with;
- anti-corruption regulations can be circumvented if social tolerance of corruption is high; alternatively, the working of anti-corruption regulations can be strengthened by social pressure (Fisman & Miguel, 2007).

In the long term, insufficient understanding of the rule of law in a society can prompt the government to abandon or undermine the rule of law, leading to negative social and economic effects. This can be accelerated by external shocks, such as the recent economic crisis, which has shaken the foundations of liberal democracies and market economies throughout Europe.

Against this background, this study examines the rule of law in Germany and Poland in the economic context from both the *de jure* (Part II) and *de facto* (Part III) perspectives, in line with the research questions listed below:

- Research question 1: What formal institutions constitute the rule of law to the extent relevant to economic development in the countries under analysis – in other words, what is the state *de jure* of the rule of law?
- Research question 2: What is the social reception of those institutions to the extent relevant to economic development – in other words, what is the state *de facto* of the rule of law?
- Research question 3: How does the state *de facto* of the rule of law impact economic development in the countries under analysis?

The first part of this study tackles research question 1 by way of index analysis and legal analysis. To set the stage for the research, the rule of law as we understand it in this study is first defined, the theory linking it with economic phenomena explained, and the historical development of the rule of law in both countries sketched.



The second part focuses on the *de facto* perspective. First, we discuss the sociological findings on the perception of the rule of law in the economic context based on the results of the surveys and in-depth interviews conducted in June-July 2020 throughout Germany and Poland. Second, using the findings from the legal and sociological analyses as a foundation, we analyse the empirical results in regard to the economic determinants of the rule of law and the impact of the latter on economic development.

Part I. Understanding the rule of law

1. Defining the rule of law

The rule of law is a subtle concept, and any attempt to define it would merit a separate study. In the theoretical legal literature, a differentiation is usually drawn between the formal and the substantive approaches to the rule of law (e.g. Krygier, 2015; Waldron, 2016). In the formal approach, which is usually associated with the Anglo-Saxon conception of the rule of law, the rule of law only consists in the rightful procedures – such as separation and balance of powers, timely and orderly publication of laws, and the functioning of an independent judiciary. In the substantive approach, more akin to the German *Rechtsstaat*, substantive elements such as rights and freedoms deemed inalienable – in the economic context, property rights, economic freedom, and freedom from corruption – also become integral components of the rule of law. These versions of the rule of law are sometimes called the *thin* and the *thick* versions, respectively, with Van Veen (2017) noting a trade-off between the feasibility of the former and the justness-orientation of the latter.

Because our study has direct economic relevance and is based on existing literature in the field of institutional economics (e.g. Acemoğlu et al., 2005a), we distinguish and account for those emanations of the rule of law that satisfy one or both of the following criteria: 1) decrease transaction costs and 2) increase transaction inclusiveness (see the next section). These are:

1. equality, non-discrimination, and other items of general relevance;
2. separation and balance of powers;
3. the independent judiciary;
4. legal certainty;
5. economic freedom;
6. property rights;
7. anti-corruption regulations;
8. free media.

2. Institutions, economic growth, and the rule of law

In trying to explain the often disparate trajectories of nations' economic development, economists have traditionally studied the production functions of capital and labour inputs. In those classical growth models, macroeconomic variables such as the savings rate and scale were identified as

driving economic growth. However, this was more an exercise in rephrasing the problem rather than solving it, as the nagging question *What drives those variables?* persisted unabated.

More recently, economists have transcended the boundaries of their science, proposing several candidates for extra-economic causes of economic growth, known as *fundamental causes of economic growth*: culture, geography, institutions, and even luck (Acemoğlu et al., 2005a). Probably the strongest research tradition of the four, *new institutional economics*, has developed around the third candidate. In this strand, rooted in Ronald Coase's transaction costs economics and pioneered by the likes of Oliver Williamson, Douglass North, and Daron Acemoğlu, institutions are understood rather broadly, as *rules of the social game* (North, 1990), which incentivise certain modes of social interaction (including economic interaction) while discouraging others. Institutions may be contract-enabling and stimulate economic growth if they decrease transaction costs – i.e. the costs related to the identification of a suitable transaction, negotiation of a contract with the transaction partner, and enforcement of the contract – and increase inclusiveness – i.e. the degree to which diverse parties can participate in a transaction, thus contributing to the societal pool by way of skills and effort. In contrast, institutions are contract-disabling if they increase transaction costs and create 'clubs' with special privileges.

Box 1: The 'institutions' of new institutional economics

In this theory, institutions are to be understood quite broadly – not necessarily as some functionally specialised organisations, but rather as (in)formal blueprints for social behaviour – especially legal rules.

The mechanism described above is seen at work in a variety of contexts, ranging from classic economic issues, such as the problem of monopoly, to seemingly unrelated phenomena such as the emergence of organised crime. In a monopoly, all providers but one are excluded from the transaction, which eliminates competition, diminishing social welfare. Even in absence of a monopoly, with transactions nominally open for entry to all, transaction costs may be prohibitive. For instance, without property rights to rely on, companies and households are forced to look for alternative, more expensive insurance to secure their savings, and more inclined to consume them instead. Likewise, without an efficient judiciary to enforce the contract, unpaid debts or undelivered services will either have to be forfeited or enforced via more expensive and potentially criminal channels (see *Box 2*).

Box 2: The origins of mafia

In late 19th century Sicily, the absence of a reliable state apparatus to enforce property rights meant that property had to be protected privately, which generated high costs. This legal vacuum was soon to be filled as specialised groups emerged and started to offer the service of protection at a lower price than had to be otherwise borne through individual effort. Mafia was born (see Gambetta [1993] and Skaperdas [2001] for a detailed discussion).

Among the institutions studied by new institutional economics, the rule of law occupies a central role. Clear, certain, and predictable regulations permit economic actors to plan their actions, allowing them to efficiently manage their resources. Property rights secure ownership of assets, driving down the costs of securing them by private means. In particular, intellectual property rights, by allowing companies to recoup investment and reap returns, play a crucial role in driving innovation. As such, they are particularly important to innovation-based economies (such as Germany) and economies facing a transition to the innovation-based model (such as Poland). Economic freedom ensures equality of opportunity, allowing everybody to contribute to the common pool. Fortified by anti-corruption mechanisms, economic freedom ensures optimal allocation of resources, as seen for instance in merit-based employment and competition-based project financing (in contrast to arbitrary allocations, such as by nepotism or cronyism). The checks and balances built into the political system keep it from being hijacked by particular interests and are strengthened by the public scrutiny routinely performed by free media. Acting as a referee, the independent judiciary provides insurance to companies and households through which contracts are enforced (e.g. default), the decisions of state authorities are reviewed (e.g. in tax disputes), and the unfair practices of other market participants (e.g. unfair competition) are screened out.

3. A historical review of the rule of law in Germany and Poland

Both Germany and Poland have rich constitutional traditions, of which the concept of the rule of law is the backbone.

Germany

Until 1871, the year of the unification of the German Empire (*Deutsches Kaiserreich*), the German nation was a collection of several small states with related ethnic, cultural, and linguistic heritages. Several constitutional elements of the Federal Republic's Basic Law, especially with

regard to federalism and eventual-democratic governance, stem from this long history and evolution of German society and government.

Germany's modern constitution (*Grundgesetz für die Bundesrepublik Deutschland*) was adopted in 1949 in the Federal Republic of Germany (West Germany) and extended to the territory of the former German Democratic Republic (GDR - East Germany) as part of Germany's unification in 1990. The German *Grundgesetz*, which translates in English as 'Basic Law', was originally intended to be a provisional constitutional document as long as the nation was divided, as mentioned in the original Article 23¹. While the Basic Law came into effect in 1949, the formal end of German occupation by the Western Allies of World War II (United States, United Kingdom, and France) occurred in 1955, as a result of the General Treaty of 1952. In addition to the end of the occupation, this treaty officially recognised the sovereignty of the Federal Republic of Germany.

The sovereignty of the state of East Germany was established in 1949 with the adoption of its constitution. While the constitution stated that the GDR was to be a democratic republic with extended citizens' rights, the reality was to become a different one. The GDR rule of law had been compromised in the most vital areas of freedom of speech, freedom of movement, and political organisation. The law was not binding for all but was subject to the political will of the single political party and was interpreted or suspended arbitrarily. Nevertheless, for the ordinary citizen, the rule of law was adhered to, as long as no political opposition could be detected. The debate whether the GDR has to be defined as an unlawful state (*Unrechtsstaat*) remains difficult to answer².

After the subversion of the GDR, the legal system of the Federal Republic of Germany was copied in the newly created federal states (*Bundesländer*). The transformation and system-change of East Germany were accomplished by dissolving the old system and accessing a 'ready-made state' (Rose et al., 1993; ReiBig, 2010).

In 1990, the rapid and efficient transfer of institutions from West to East began. Soon, it led to the organisational consolidation of East Germany and the establishment of a functioning administration. The conflicts and setbacks typical of a change of order were reduced. It was possible to integrate the new federal states into the institutional order of the Federal Republic in

¹ 'For the time being, this Basic Law shall apply in the territory of the Länder of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.' (Original English text of Article 23 of the Basic Law, now repealed and replaced).

² See Bundestag (2018) for a detailed discussion of the GDR as *Unrechtsstaat*.

a very short time. The change of the political system, the gain in freedom, and the establishment of democracy in East Germany were successfully achieved. Other institutional changes included the development of a common constitutional order, local self-government, and common federal structures (Reißig, 2010).

A more controversial part of the transformation was the actions of the trust agency (*Treuhandanstalt*) which was assigned the privatisation of the former people-owned businesses (*volkseigene Betriebe*). Until today, the perception in the East of the privatisation is one of a sell-out and liquidation (Goschler and Böick, 2017). The economic downturn following the structural changes influenced the public attitude towards the institutions of the social market economy for the years to come.

Trust in public institutions has been, and partly remains, lower in the East, which was a result of the economic downturn, missing identification with the newly built institutions, and the legacy of the structural democratic deficit of the former authoritarian state. This has been observed by several surveys of the rule of law and its subcomponents (Roland Rechtsreport, 2015; Köcher, 2019; Roland Rechtsreport, 2020). For example, according to a study by the Institut für Demoskopie Allensbach, only 39% of East Germans think that courts judge independently, and every second person does not see his or her fundamental rights fully protected. Distrust in media, government, police, and administration is more common in the East than in the West (*ibid.*). Even if the absolute numbers of trust in public institutions are rising, the gap persists and remains one of the major challenges of the Federal Republic of Germany.

Poland

Poland, historically, was in the vanguard of constitutional development in Europe, both in admirable and deplorable ways. The ‘nobles’ democracy’ (*demokracja szlachecka*), which was a system of government with nobility as the political class, crystallised in the 15th and 16th centuries, with ‘Republic’ (*Rzeczpospolita*) soon appearing in the name of the state. It incorporated many elements of the rule of law, including separation of powers, economic freedom, and freedom of speech. The parliament (*sejm*) emerged as an independent branch of government between the 14th and 15th centuries and the *Nihil novi* act of 1505 forbade the monarch to enact laws without the parliament’s approval (the full title of the act read *Nihil novi nisi commune consensus*, that is *Nothing New Without the Common Agreement*).

Box 3: The rule of law in early modern Poland

The political and legal system that developed in Poland in the early modern period was quite unlike the systems of most contemporary European countries, although it showed similarities with England's Parliamentarism and the Netherlands' tolerance. The central, monarchic power was severely reined in, the judiciary's independence was recognised, and all noblemen enjoyed equal legal standing regardless of economic status (aristocratic titles were, as a rule, forbidden).

However, the nobles' democracy increasingly disadvantaged peasantry and the emergent bourgeoisie, including by introducing serfdom and granting monopolies to nobility (on grain, among other goods). Combined with the notoriously weak enforcement that plagued the early Polish state and undermined legal certainty, this led to the system morphing into a clientelist oligarchy, with woeful consequences for the rule of law, and eventually to the collapse of the state in 1795. Shortly before, in 1791, the country famously adopted Europe's first and the world's second written constitution (known as *Constitution of May 3 – Konstytucja 3 maja*) in a bold but belated attempt to repair the crumbling institutions.

During its period of political non-existence (1795-1918), Polish society was under the influence of the three sets of formal institutions and informal norms corresponding with the three empires of which it was part: Austrian, Prussian, and Russian. There is research indicating that following the unification, with a single legal system in place, the social working of legal rules still differs along the borders of the old partitions (e.g. Becker et al., 2016; Vogler, 2016). These findings correlate with the regional differences in GDP per capita levels, which also largely follow the borders of the old partitions, yet the establishment of a causal relationship is notoriously difficult due to the problem of endogeneity.

With statehood restored under the Second Polish Republic in 1918, a democratic March Constitution (*konstytucja marcowa*) was adopted in 1921. However, it was soon replaced with an undemocratic April Constitution (*konstytucja marcowa*) in 1935, as Poland joined the European flirtation with autocracy of the time. In the wake of World War II, a Communist constitution was enforced by the Soviet Union in 1952 after Stalin himself famously revised it. It continued in force, although with crucial amendments from 1989 and 1992, for an interim period following the restoration of Poland's independence in 1989. By 1997, the modern constitution (*Konstytucja Rzeczypospolitej Polskiej*) was ready and in force. In the period leading up to Polish accession to the European Union (EU) in 2004, the country was strongly incentivised to reform its legal system in line with the EU's *Acquis Communautaire* (e.g. Hartwell, 2016).



Since 2015, the rule of law in Poland has been undergoing clear erosion. That erosion has taken the form of both detrimental changes in the legal rules and in the approach of the ruling class to law, or legal culture. The legal analysis presented further in the report describes this process with respect to the particular dimensions of the rule of law. The question of how these changes translate to the wider social reception of the rule of law will be our objective in the second phase of the research.

Part II. Analysis de jure

A. Index review

Measuring the rule of law is a complex task that cannot be reduced to single numbers and data. Much of the thick concept of the rule of law remains inaccessible for empirical data. Nevertheless, indices can provide objective insights into the thin aspect of the rule of law (Voigt, 2013). In recent decades, there have been a variety of projects to identify and measure various components of the rule of law. Such indices collect or use data from surveys, expert interviews, and thorough legal analysis.

Different problems and challenges come with the use of these indices. Moller and Skaaning (2011: 375) point out that they cover different years and differ with regard to the countries included. In addition, they suffer from what ‘may be termed an ‘OECD bias’ as they measure the world from the point of view of the well-functioning and affluent OECD countries’ (*ibid.*)³. Some indices rely only on expert interviews (rather than large panels) or take data only from the capital of a country. Finally, there is a big problem when it comes to the correlation between single indices since they all use different measurements, and it is not always clear what exactly is understood as the rule of law⁴.

Comparing Germany and Poland according to the data of the indices cannot be the only assessment of the rule of law. Nevertheless, some trends and insights can be derived from it if properly contextualised. In order to do so, every analysis of an index in the overview below will commence with a short introduction of the methodology before the most important trends are named.

1. The World Justice Project’s Rule of Law Index

1.1. Methodology and set-up

The *World Justice Project Rule of Law Index* (WJP RLI) is entirely dedicated to the rule of law, which is measured on eight variables, or ‘factors’ (further divided into 44 ‘sub-factors’):

³ Some have been accused of being to eurocentric, serving a neoliberal agenda or having a libertarian bent (Moller and Skaaning, 2011: 375).

⁴ Ed Dolan (2017) gives an elaborate example on how the measurement and choice of the sub-factors can be deeply flawed.

Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. Starting with the very first edition of the report, the WJP has been trying to develop another factor, *Informal Justice*⁵, to capture informal and community-based mechanisms of law. That factor, which could be helpful in our *de facto* analysis, has however never been integrated into the index due to the complexity and country-specificity of such mechanisms (although relevant data has been collected). Furthermore, it needs to be emphasised that the WJP ‘measures how the rule of law is experienced and received’ (World Justice Project, 2019) and therefore giving more insight into the *de facto* than the *de jure* analysis of the rule of law.

The WJP RLI is scaled from 0 (the weakest rule of law) to 1 (the strongest rule of law) and its most recent 2019 edition uses 120,000 household surveys and 3,800 expert surveys. It includes 126 jurisdictions around the world, with Germany and Poland featuring in the same regional cohort (*EU, EFTA & North America – 24 jurisdictions*)⁶ and the same income cohort (*High – 38 jurisdictions*).

1.2. Scores, positions, and graphs

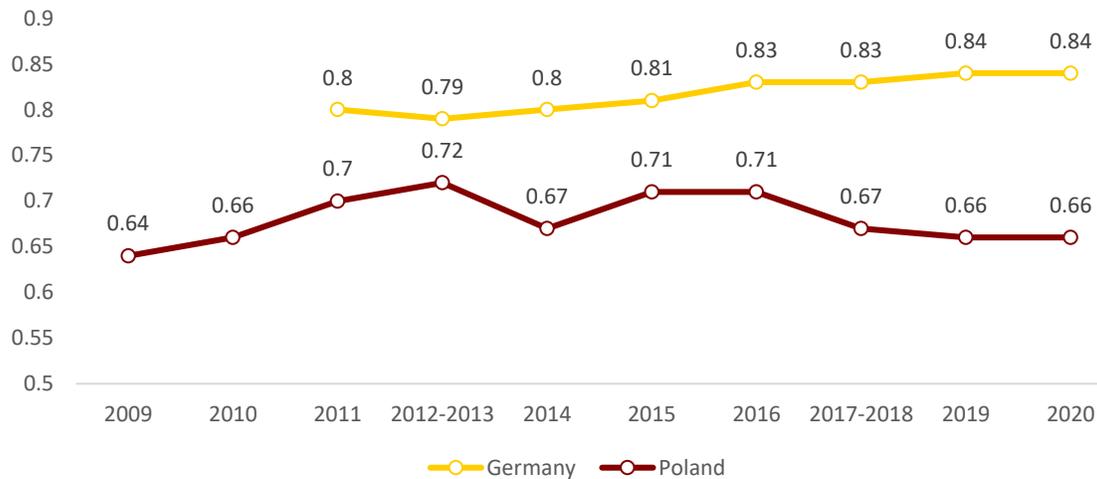
Germany’s score is 0.84, giving the country the 6th rank globally and in both cohorts. Compared to other countries, Germany performs the best in *Civil Justice* (4th rank in the world), *Fundamental Rights*, and *Constraints on Government Powers* (5th and 6th, respectively). *Order and Security* brings it the lowest ranking position among the factors (17th), but the highest score (0.89). Historically, Germany has been seen as a strong performer and is steadily improving its position in the ranking. Government accountability, freedom from corruption, and accessibility and efficiency of the court system have been praised as particularly strong points (World Justice Project, 2011, 2014).

Poland scores 0.66, ranking 28th globally, but trails in both the regional and the income cohorts, at the 19th and 27th places, respectively. Poland scores very high on *Order and Security* (0.86; 19th rank in the world) and high on *Absence of Corruption* (0.73; 20th rank), but low on *Constraints on Government Power* (0.58; 51st rank).

⁵ Referred to as ‘traditional justice’ in the 2008 and 2009 editions.

⁶ Before 2014, Poland was classified in a different regional cohort: *Eastern Europe & Central Asia*.

Graph 1. Germany and Poland in the *World Justice Project Rule of Law Index*, 2009-2020.



Source: *World Justice Project (2009, 2010, 2011, 2012-2013, 2014, 2015, 2016, 2017-2018, 2019a, 2020)*.

Note: The WJP did not provide overall scores until the 2014 edition of the study. The earlier scores (between 2009 and 2012-2013) were calculated by authors by averaging the individual factor scores.

With the exception of 2014, Poland showed strong performance in the ranking and was praised in the early editions of the report as a successful reformer⁷. In the most recent editions, the country slipped in the ranking considerably and actually recorded a 25% drop in the *Constraints on Government Power* indicator between 2015 and 2019 (World Justice Project, 2019b).

Box 4: Poland's decline in the World Justice Project Rule of Law Index

Poland's drop by 25% in the *Constraints on Government Power* indicator between 2015 and 2019 is the largest of all the countries in the study (126 as of 2019).

The same year (2019), the World Justice Project's Rule of Law Award was granted to the Polish Commissioner for Human Rights Adam Bodnar for 'courageous efforts to stem the country's

⁷ e.g. World Justice Project (2010): 'Poland is the leading country among the indexed economies in the region, and ranks at the top of upper-middle income countries in most dimensions;' World Justice Project (2011): 'Poland ... stand[s] out amongst the former centrally planned economies with good performances across all categories.'

backsliding on judicial independence and fundamental rights’ (World Justice Project, 2019c) (see Section 2 above for a discussion of the Commissioner’s activities).

2. The Heritage Foundation’s Index of Economic Freedom

2.1. Methodology and set-up

The Heritage Foundation’s *Index of Economic Freedom*, currently into its 25th edition and covering 186 countries, uses secondary sources⁸ to conduct assessments of economic freedom. Four areas are investigated, one of which is the rule of law, measured on the variables *Property Rights*, *Judicial Effectiveness*, and *Government Integrity*.

The Heritage Foundation’s methodology has to be treated with caution when looking at the design and conception of the measurement. It has been suggested that the institution overstates the wealth effects of a deregulated economy and does not differentiate between good and bad regulations⁹.

2.2. Scores, positions, and graphs

Poland scores below the EU-27 average on all three components, at 63.1 vs. 77.5 for *Property Rights*, 42.8 vs. 59.7 for *Judicial Effectiveness*, and 64.6 vs. 69.1 for *Government Integrity*. Germany, in contrast, scores above the European average in all three components, at 80.5 vs. 77.5 for *Property Rights*, 74.3 vs. 59.7 for *Judicial Effectiveness*, and 82.8 vs. 69.1 for *Government Integrity*, leading the authors to conclude that the rule of law prevails in the country.

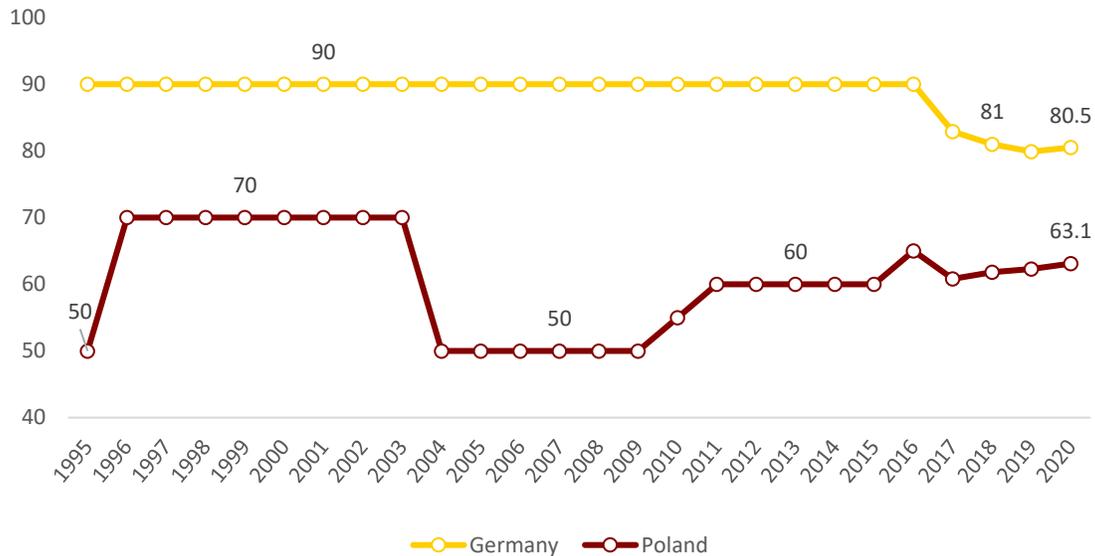
Property rights, including intellectual property rights, are protected in a full and efficient manner in Germany, according to the authors of the *Index*¹⁰. In Poland, in turn, concerns about the effectiveness and possible politicisation of the judiciary have a negative influence on confidence in property rights.

⁸ These are: Credendo Group’s *Country Risk Assessment*; Transparency International’s *Corruption Perceptions Index*; TRACE International’s *The Trace Matrix*; World Bank’s *Doing Business*; World Economic Forum’s *World Competitiveness Report*; and World Justice Project’s *Rule of Law Index*.

⁹ See Ed Dolan (2017) for a more detailed critique on The Heritage Foundation and Fraser Institute Indexes.

¹⁰ The drop in the score that began in 2016 and was especially heavy that year is not explained in the respective reports (The Heritage Foundation, 2017, 2018, 2019a).

Graph 2. Germany and Poland, the *Property Rights* factor of the *Index of Economic Freedom*, 1995-2020.



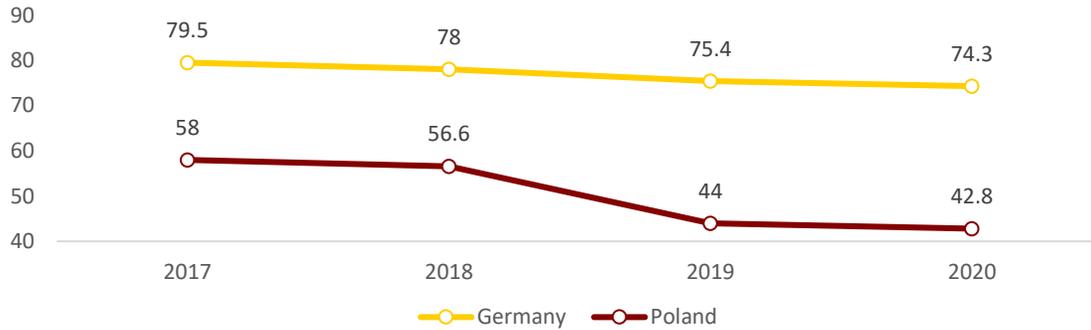
Source: *The Heritage Foundation*, 2020.

Note: Initial, final, minimum, and maximum values marked.

The Foundation makes no reservations as to the independence of the German courts¹¹. The Foundation recognises the independence of the Polish judiciary but calls for reforms to reinforce it. It also places judicial effectiveness on the side of concerns amid troubles with the timeliness of the proceedings. The system of commercial courts, in particular, is assessed as subpar. The *Judicial Effectiveness* factor, added to the Index in 2017, shows a particularly strong decline in Poland in the newest edition of the ranking. That decline, by 13.8 points, or over 24%, brings Poland’s score below the world average of 45.1 and can be explained by the government’s continued attempts to subjugate the judiciary.

¹¹ The drop in the score that began in 2017 is not explained in the respective reports (The Heritage Foundation, 2018, 2019a).

Graph 3. Germany and Poland, the *Judicial Effectiveness* factor of the *Index of Economic Freedom*, 2017-2020.

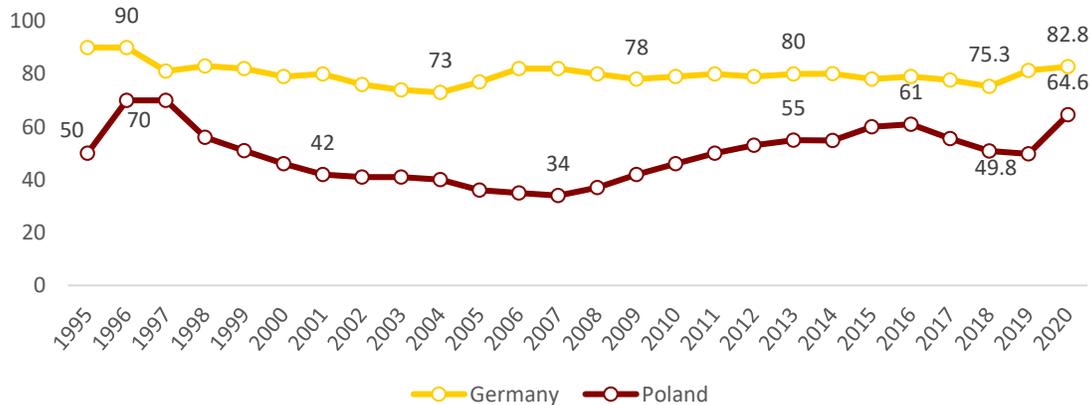


Source: The Heritage Foundation, 2020.

Note: The *Judicial Effectiveness* factor was not part of the Index before 2017.

Germany’s *Government Integrity* factor has shown consistent performance historically, averaging 80 points and never dropping below 73. Poland’s performance has been more volatile, ranging between 34 and 70 points and showing a steady decline between 2015 and 2019 (by 11.2 points, or over 18%). According to the Foundation, despite the significant increase of the score in 2020 (by 14.8 points, or 28.7%), the Polish economy suffers from red tape. Corruption concerns government procurement, regulations, and permits (The Heritage Foundation, 2016, 2019a, 2020).

Graph 4: Germany and Poland, the *Government Integrity* factor of the *Index of Economic Freedom*, 1995-2020.



Source: The Heritage Foundation, 2020.

Note: Initial, final, minimum, and maximum values marked.

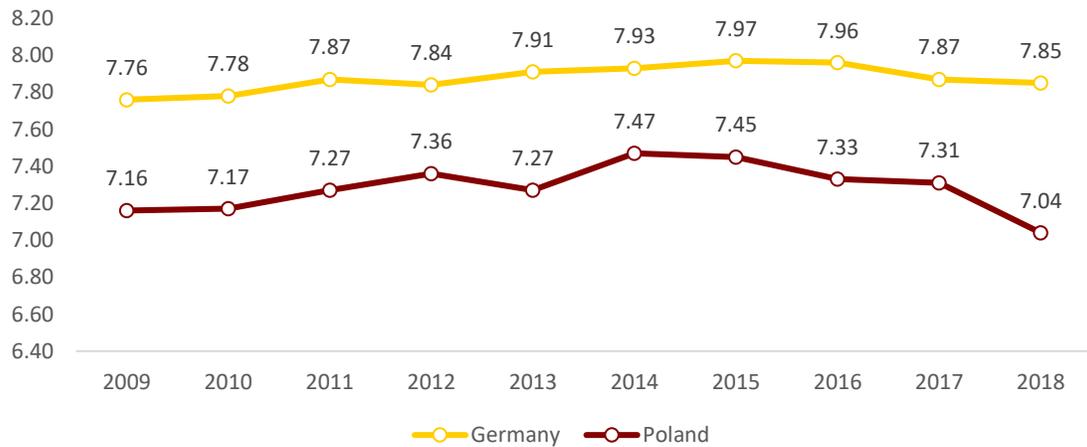
3. The Fraser Institute’s Economic Freedom of the World Index (FIEF)

3.1. Methodology and set-up

The *Economic Freedom of the World Index* of the Fraser Institute measures economic freedom in five major areas: *Size of Government*, *Legal System and Security of Property Rights*, *Sound Money*, *Freedom to Trade Internationally*, and *Regulation*. Each of the areas is composed of several sub-components, all spanning between 0 and 10. In total, the index comprises 42 distinct variables that have been collected from third-party sources and are weighted equally for the composition of the main factors. This is supposed to guarantee the neutrality, transparency, and replication of the data used.

3.2. Scores, positions, and graphs

Graph 5. *Economic Freedom of the World Index*, 2009-2018.



Source: *The Fraser Institute*, 2020.

While Germany has had a stable score over the last few years, Poland’s score has been declining since 2015. The decline of Poland’s overall score is mainly due to a decline in the area *Legal System and Security of Property Rights*. Starting with an all-time high in 2011 of 6.58, it has declined to 5.91 by 2016. The indicators showing the biggest decreases (2009-2016) in this area are judicial independence (6.17 to 4.91), protection of property rights (6.11 to 5.38), and reliability of police (5.63 to 5.14). Another reason for the decline is the inclusion of the *Gender Disparity*

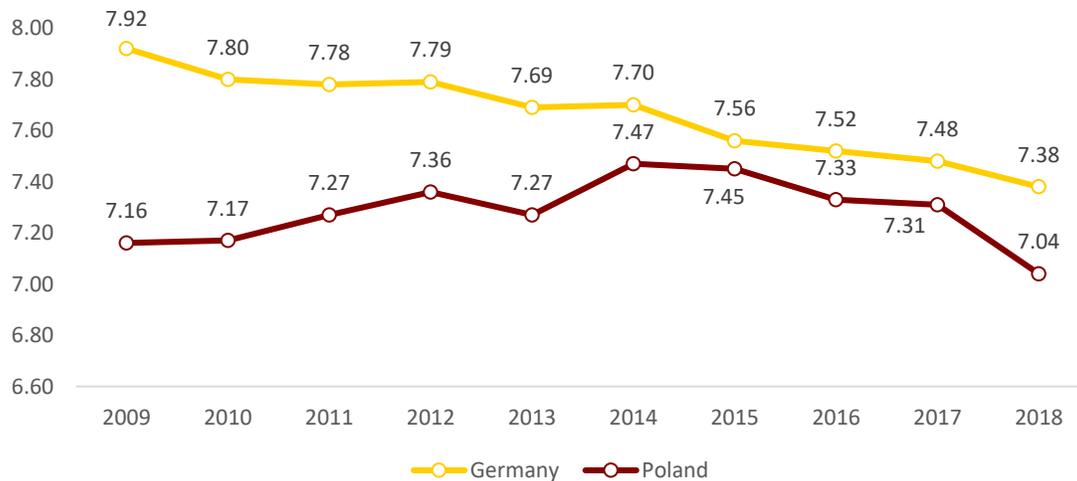
Index in the total score in 2015. According to the *Annual Report 2017*, it fell 4 rankings due to this adjustment¹².

Germany has seen decreasing numbers as well in almost all indicators of these areas, with the exception of military interference in the rule of law and protection of property rights. The decline is derived from data from the *Global Competitiveness Report*, namely in the areas of reliability of police, judicial independence, and regulatory restrictions on the sale of real property.

This decline is congruent with a decline in many other major economies over this time frame.

The reason for Germany's steady total score lies in its improvements in the area of *Regulation* from 6.77 in 2009 to 8.15 in 2016.

Graph 6. *Legal System and Security of Property Rights, 2009-2018.*



Source: *The Fraser Institute, 2020.*

4. The World Bank's Doing Business Index

4.1. Methodology and set-up

The World Bank's *Doing Business Index* captures the regulatory environment affecting small and medium-sized domestic firms in their business activities. It does this by creating standardised

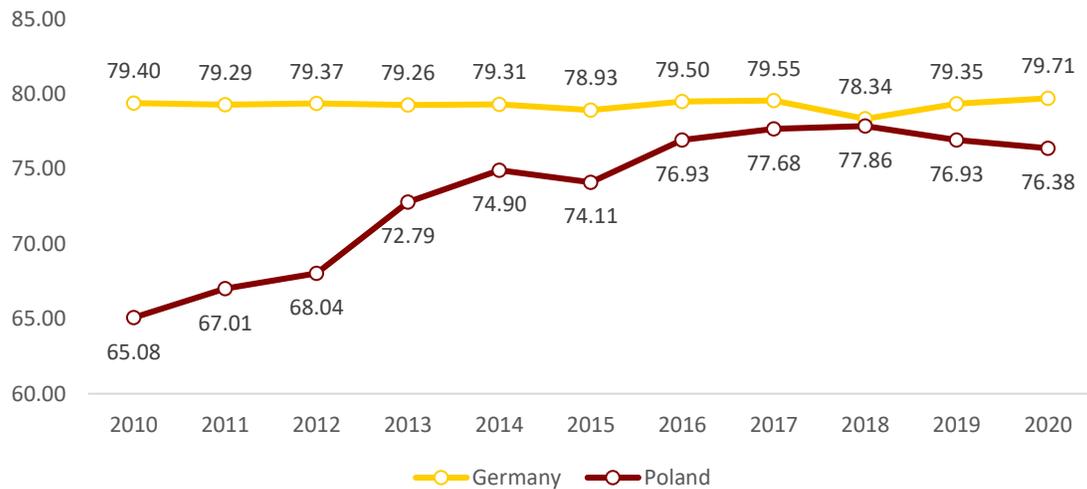
¹² See The Fraser Institute, 2017: 202.

case scenarios that correspond to efficient, transparent, and easy business regulations in 11 areas: *Starting a Business, Dealing with Construction Permits, Getting Electricity, Registering Property, Getting Credit, Protecting Minority Investors, Paying Taxes, Trading across Borders, Enforcing Contracts, Resolving Insolvency, and Labour Market Regulations*. The total indicator is measured as the *Ease of Doing Business Score* which ‘captures the gap between an economy’s performance and a measure of best practice across the entire sample of 41 indicators for 10 Doing Business topics’ (labour market regulations are reported as a separate section). The German and Polish case scenarios are applied in the legislative entities of the capitals, which limits the explanatory power of the results.

4.2. Scores, positions, and graphs

Poland has seen a remarkable rise in its score since 2010. Since 2016, the score has been levelling out at around 77 points. In the same time frame, Germany has been stable at around 79 points.

Graph 7. *Doing Business Index, 2010-2020.*

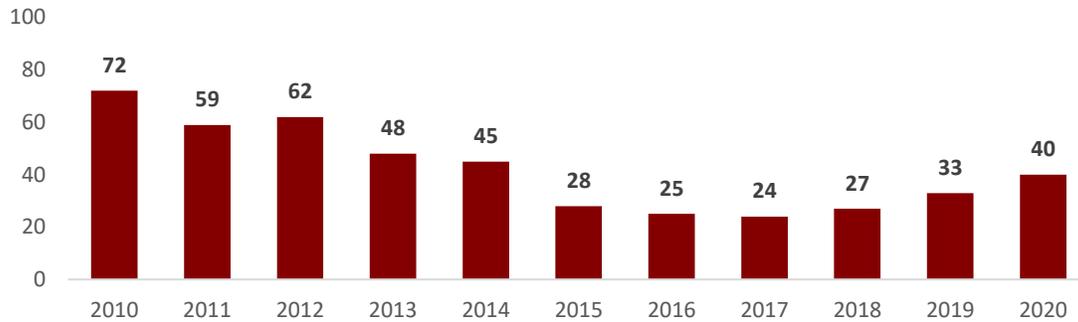


Source: *The World Bank Group, 2020.*

Note: *The methodology changes slightly in some years by including new extensions or other enhancements in the measurement of the single indicators. The intervals in this graph with the same methodology used are: 2010-2014, 2015-2016, and 2017-2020. For more information see: <https://www.doingbusiness.org/en/methodology>.*

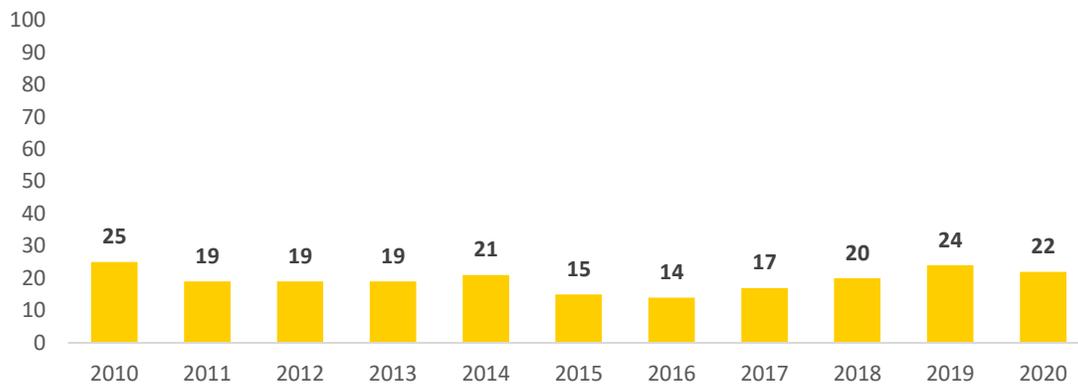
But while these scores seem to convey a positive trend, the picture becomes a different one when looking at the ranking of both countries over time. This allows for an examination of the scores in comparison with the performances of other countries over time.

Graph 8. Ranking of Poland, 2010-2020.



Source: *Tradingeconomics.com*.

Graph 9. Ranking of Germany, 2009-2020.



Source: *Tradingeconomics.com*.

In both legislative entities tested (Berlin and Warsaw), we see a worsening of the ranking since 2015/16.

The indices that measure economic freedom are ambiguous towards Germany's performance. Open markets, sound money, and strong protection of property rights make Germany one of the high performers in economic freedom indexes¹³. Nevertheless, the relatively low scores in tax burden, government spending, and labour flexibility do prevent an equally high rank as in the rule of law index or governance indicators¹⁴ (Germany is ranked 24th globally in *Ease of Doing*

¹³ *Freedom to Trade Internationally*, 8.05; *Sound Money*, 9.48 (The Fraser Institute, 2019).

¹⁴ *Tax Burden*, 60.8; *Government Spending*, 42.3; *Labor Freedom*, 52.8; scores out of 100 (The Heritage Foundation, 2019).

Business). Yet, since the Basic Law in Germany also has a social component, high taxes, an active state, and regulated labour markets are also characteristics of Germany as a social state. Therefore, it is difficult to claim whether economic freedom or social security is more relevant in assessing the rule of law in Germany.

Moving from negative freedom to the notion of positive freedom, that is including social criteria in the rule of law, Germany performs better than many other countries with higher scores in the purely economic freedom indices (e.g. the United States ranks 6th and Germany ranks 20th in the FIEF, but looking at the Social Progress Imperative's *Social Progress Index* (2018), Germany is ranked 9th out of 128 countries, with the United States ranked 25th).

5. European Commission's Special Eurobarometer 489 'Rule of Law'

In the *Eurobarometer* series of public opinion studies in the EU, the European Commission has recently (June 2019) published a special report dedicated to the rule of law. The report has been launched amid concerns about the *measures ... introduced in some EU Member States*, which can be construed as referring to the developments in Poland and Hungary. 27,655 face-to-face interviews concerning the rule of law as broken down into 17 components (including independent judiciary, legal clarity, non-discrimination, anti-corruption regulations, and free media) were conducted, including 1,539 in Germany and 1,013 in Poland. The survey shows that German respondents consider the respective components of the rule of law to be very important, in all the cases more so than EU respondents on average.

In contrast, the rule of law enjoys less recognition in Poland, with all the components of the rule of law except cost and duration of court proceedings rated as less important than on average in the EU. With a single exception¹⁵, both countries score below the EU average on questions related to the necessity of improvement of the respective components of the rule of law, which may be understandable in the case of Germany, but is worrying in the case of Poland. A characteristic difference between the two countries is that the support for the rule of law is more decisive in Germany than in Poland – that is, among those who find it of importance, the majority in Germany find it *essential* (for all components except one, which half of the supporters find *essential*¹⁶), while the majority in Poland find it merely important (for all components).

¹⁵ i.e. the cost and duration of court proceedings in Germany.

¹⁶ i.e. codes of conduct putting limits on politicians criticising courts and judges.

Most recently, the results from the 2020 *Eurobarometer* on the perceived independence of national justice systems¹⁷ showed a substantial gap between both countries. In the case of Poland, only 27% of businesses and 34% of the general public rated the performance of the national judicial system in terms of independence as *good*, compared to, respectively, 73% and 77% in Germany.

B. Legal analysis

Our legal analysis of the rule of law in the economic context involves a structured review of the German and Polish constitutions, relevant parliamentary acts, and other legal acts.

1. Equality, non-discrimination, and other items of general relevance

Germany

The 1949 Basic Law of Germany asserts that the Federal Republic will ensure the rule of law¹⁸. The Basic Law enshrines several unalienable rights and freedoms, putting forth that the Federal Government (*Bundesregierung*) has been – and will forever be – committed to safeguarding the social and democratic republic which was founded from the ruins of World War II.

Articles 1 through 19 of the Basic Law set out the several *basic rights* of each and every person, though one’s rights are not limited to those mentioned.

Article 20 defines the core structural principles of the political system of Germany. The article defines that ‘*The Federal Republic of Germany is a democratic and social federal state*’. The implications of this are:

- democratic sovereignty for the people through elected representatives in a parliamentary system;
- federal organisation of the state territory and division of functions between the *Bundesländer* (federal states) and the federal government;
- rule of law;

¹⁷ Flash Eurobarometer 483 ‘Perceived independence of the national justice systems in the EU among the general public’, January 2020 and Flash Eurobarometer 484 ‘Perceived independence of the national justice systems in the EU among companies’, January 2020.

¹⁸ ‘*The Federal Republic...is committed to democratic, social, and federal principles, to the rule of law...that guarantees a level of protection of basic rights.*’ (Basic Law, Article 23).

- principle of the welfare state, which is not otherwise specified, but in general guarantees a subsistence level high enough to live a life in dignity¹⁹.

A central critical juncture in German history is that of the Nazi regime of 1933-1945, which used the weaknesses of the Weimar republican era to demolish the principle of law in its fundamentals and replace it by the rule by law. To prevent similar developments, the parliamentary council established the ‘eternity clause’²⁰ that would protect individual freedoms and the democratic-federalist political system from change by any political majority.

In a federation of 16 states, the federal government relies on the individual states to enforce not only *Land* laws, but those laws of the entire Federation as passed by the *Bundestag* and *Bundesrat*²¹.

Poland

Poland’s 1997 Constitution anchors the country’s governance system in the rule of law in a number of ways. It establishes Poland as a democratic legal state²² the government of which *acts on the basis ... and within the limits of the law*²³. It binds by law everybody²⁴, asserts the equality of all before the law²⁵, and lays down the principle of non-discrimination, including in the economic sphere²⁶. This principle is further buttressed in the Act on the Implementation of Some European Union Regulations in the Area of Equal Treatment, which forbids differential access to goods and services based on gender, race, ethnicity, and citizenship (Suchorabski, 2019).

All constitutional freedoms (including economic freedom) and rights (including property rights) may only be limited on the grounds of state security, civil order, public health or morality, protection of the environment, and freedoms and rights of others, only by way of a parliamentary

¹⁹ See also Basic Law Article 1.

²⁰ ‘*Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.*’ (Basic Law, Article 79.3).

²¹ ‘*Except as otherwise provided or permitted by this Basic Law, the exercise of state [Federal] powers and the discharge of [Federal] functions is a matter for the Länder.*’ (Basic Law, Art. 30).

²² ‘*The Republic of Poland shall be a democratic state ruled by law*’ (art. 2). The concept of the legal state (*państwo prawne*) is enshrined in the continental legal tradition and is akin to the German *Rechtsstaat*. Italicised citations in English come from the translation of the Constitution published at Sejm.gov.pl.

²³ ‘*The organs of public authority shall function on the basis of, and within the limits of, the law*’ (art. 7).

²⁴ ‘*Everyone shall observe the law of the Republic of Poland*’ (art. 83).

²⁵ ‘*All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities*’ (art. 32.1).

²⁶ ‘*No one shall be discriminated against in political, social or economic life for any reason whatsoever*’ (art. 32.2).

act, and never in a way that defies their very essence²⁷. Professional, apolitical civil service is established to perform the tasks of public administration²⁸.

Everyone has the right to compensation for damage caused by the unlawful action of the government²⁹. This state liability means, for example, that firms may sue and claim damages from the state if a wrongful administrative decision has hurt their business. They can also to lodge a constitutional complaint (*skarga konstytucyjna*) with the Constitutional Tribunal (*Trybunał Konstytucyjny*) against a given law if it is supposed in breach of constitutional freedoms and rights³⁰.

In June 2019, the impaired Constitutional Tribunal (see Section 2 above) ruled that art. 138 of the Code of Offences, which penalises unjustified refusal to provide service, violates the Constitution³¹. The provision had garnered criticism in some quarters as allegedly contrary to the conscience clause, and a motion to review it had been filed by the General Prosecutor (after PiS's recentralisation efforts, the Minister of Justice himself) in a case involving a printer's refusal to print a roll-up for an LGBT foundation. Apart from opening doors to discrimination decades after the rule has been in use and working well, its overturning also undermines the economic dimension of the rule of law by reducing the inclusiveness of transactions. The conscience clause liberally taken may, for instance, be used as an excuse for a refusal to deal, a serious anti-competition practice.

²⁷ 'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights' (art. 31.1).

²⁸ 'A corps of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations' (art. 153.1).

²⁹ 'Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law' (art. 77.1).

³⁰ 'Everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution' (art. 79). See also Sąd Okręgowy w Poznaniu (2019).

³¹ The verdict was taken by a majority of three judges out of five, with two other judges issuing dissenting opinions. Source: Sygn. akt K 16/17 (<http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/10678-odmowa-swadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/>, <http://trybunal.gov.pl/s/k-1617/>); <https://www.rpo.gov.pl/pl/content/tk-uchylil-artykul-chroniacy-przed-dyskryminacja>.

2. Separation and balance of powers

Germany

The separation of powers in Germany is organised into the executive, legislative, and judicial branches of the federal government, as set out in the Basic Law³². The bicameral legislative branch of Germany consists of the *Bundestag*, consisting of members elected directly by the citizens, and the *Bundesrat*, which consists of delegations from each *Bundesland*, appointed by the *Länder* governments. In this way, no bills passed by the *Bundestag*, as representative of the Federation having financial effects on the *Länder*, can become law without the voice of the *Länder* governments. This and the fact that the federal law is mainly enforced by the executive of the *Länder* constitutes Germany as an ‘executive federalist’ state.

While neither the Federal President nor the Federal Chancellor is directly elected by the people, both are subject to scrutiny by the *Bundestag*, a legislative body in which it is highly improbable that a single political party could gain an outright majority, establishing the need for coalition governments and parliamentary supply-and-confidence votes.

In Germany, the *Länder* possess much power in their own right, so much so that the federal government is only able to exercise those powers specifically given to it as stated in the Basic Law, meaning that all policy areas which do not fall within the explicit jurisdiction of the federal government are reserved for the individual *Länder*³³.

Nevertheless, the *Bundestag* remains the main legislative body and whether the *Bundesrat* can effectively object and change laws depends on the nature of the law. The consent of the *Bundesrat* is needed when the laws affect the constitution, the finances of the *Länder*, or the administrative and organisational sovereignty is touched. All in all, the separation of powers between the two federal organs leads to intertwined joint decision-making, which is a central aspect of the German system of checks and balances.

As with the federal government, the governments of the 16 *Bundesländer* also have their own structures to ensure separation and balance of powers, constituting a unicameral legislature, known typically as the *Landtag*, an independent judiciary, and an executive body of cabinet

³² ‘The legislature shall be bound by constitutional order, the executive and judiciary by law and justice.’ (Basic Law, Article 20).

³³ ‘The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation. The division of authority between the Federation and the *Länder* shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.’ (Basic Law, Article 70).

ministers, typically led by a Prime Minister (*Ministerpräsident*) or another form of chief executive³⁴.

The Federal Constitutional Court (*Bundesverfassungsgericht*) is entitled to review any and all laws which may potentially violate the Basic Law³⁵. In the Federal Constitutional Court, 16 judges serve for 12 years, with the *Bundestag* and the *Bundesrat* having the duty to appoint eight judges each. The Federal Constitutional Court (*Bundesverfassungsgericht*) of Germany acts as a guardian of the core principles, undertakes the judicial review of parliamentary acts, and decides over constitutional complaints. Additionally, it has the task of interpreting the basic laws in order to adapt them to the changing social environment. In doing this, the decisions of the court have a political effect on fundamental questions regarding the operating range of politics. By transferring fundamental political decisions to this circle of experts, the German Basic Law limits democratic sovereignty, which itself generates stability, but also limits the scope of discretionary actions³⁶.

Poland

Separation and balance of the executive, legislative, and judiciary branches of government are enshrined in the Polish Constitution³⁷. In cases of competence disputes between the central authorities of the state, the Constitutional Tribunal is called upon for their settlement³⁸. The Constitutional Tribunal serves as the ultimate check of conformity of law with the Constitution, but also with international agreements (for why it is economically important, see Section 9 below)³⁹.

A specialised body, the Supreme Audit Office (*Najwyższa Izba Kontroli – NIK*), oversees the work of the government administration, the Central Bank, and other state organisations according

³⁴ In Berlin, the chief executive is the Governing Mayor (*Regierender Bürgermeister*) and the legislature is the *Abgeordnetenhaus*; in Hamburg, the chief executive is the First Mayor (*Erster Bürgermeister*) and the legislature is the *Bürgerschaft*; in Bremen, the chief executive is the President of the Senate and Mayor (*Senatspräsident und Bürgermeister*) and the legislature is the *Bürgerschaft*.

³⁵ ‘If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed.’ (Basic Law, Article 100).

³⁶ The discussion of this trade-off between Rule of Democracy and the Rule of Law is displayed in Ferejohn and Pasquino (2003) and more critical in Maus (2004).

³⁷ ‘The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers’ (art. 10.1).

³⁸ ‘The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State’ (art. 189).

³⁹ ‘The Constitutional Tribunal shall adjudicate regarding ... 1. the conformity of statutes and international agreements to the Constitution; the conformity of a statute to ratified international agreements’ (art. 188).

to the criteria of legality, economy, expediency, and diligence⁴⁰. Using slightly curtailed catalogues of criteria, it is also competent to control units of self-government⁴¹ and, in matters involving the state's assets, private enterprises⁴².

The Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*), together with his office (currently numbering around 300 employees) (Wilgocki, 2019), acts as an ombudsman and a guardian of civic freedoms and rights, including those of enterprises and consumers⁴³. Recent examples of such involvement include campaigning for prudential use of provisional detention (*areszt tymczasowy*) against entrepreneurs⁴⁴, challenging the Ministry of Justice's legislative project to introduce criminal liability of companies⁴⁵, and intervening with tax authorities on behalf of entrepreneurs⁴⁶.

The President of the NIK⁴⁷, the Commissioner for Human Rights⁴⁸, the President of the Central Bank⁴⁹, judges (see Section 3 below), and members of the National Broadcasting Council (see Section 8 below) cannot belong to political parties or engage in other partisan activity.

Since 2015, the Polish system of checks and balances has been under threat. Apart from incursions on judicial independence described in Section 3 below, the offices of Minister of Justice and General Prosecutor were re-merged in 2016 after a period of separation dating back to 2010.

⁴⁰ 'The Supreme Chamber of Control shall audit the activity of the organs of government administration, the National Bank of Poland, State legal persons and other State organizational units regarding the legality, economic prudence, efficacy and diligence' (art. 203.1).

⁴¹ 'The Supreme Chamber of Control may audit the activity of the organs of local government ... regarding the legality, economic prudence and diligence' (art. 203.2).

⁴² 'The Supreme Chamber of Control may also audit, regarding the legality and economic prudence, the activity of other organizational units and economic subjects, to the extent to which they utilize State or communal property or resources or satisfy financial obligations to the State' (art. 203.3).

⁴³ 'The Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts' (art. 208.1).

⁴⁴ e.g. <https://www.rpo.gov.pl/pl/content/o-zatrzymaniach-i-tymczasowym-aresztowaniu-przedsiębiorców>.

⁴⁵ e.g. <https://www.rpo.gov.pl/pl/content/rpo-krytycznie-o-projekcie-odpowiedzialnosci-karnej-min-spolek>.

⁴⁶ e.g. <https://www.rpo.gov.pl/pl/content/brak-informacji-o-blokadzie-rachunku-bankowego-wystapienie-do-szefa-kas>; <https://www.rpo.gov.pl/pl/content/przepisy-o-kosztach-egzekucyjnych-trzeba-zmienic-trybuna%C5%82-konstytucyjny-podzielil-stanowisko-rpo>.

⁴⁷ 'The President of the Supreme Chamber of Control shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office' (art. 205.3).

⁴⁸ 'The Commissioner for Citizens' Rights shall not belong to a political party, a trade union or perform other public activities incompatible with the dignity of his office' (art. 209.3)

⁴⁹ 'The President of the National Bank of Poland shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office' (art. 227.4).

Moreover, superior prosecutors, including General Prosecutor, can now issue orders to subordinate prosecutors of all ranks. Both changes reduced the independence of the prosecutors to the advantage of the government⁵⁰.

Moreover, in 2015, the Parliament selected new judges to the Constitutional Tribunal, replacing the previous Parliament's nominees. The 'double' judges were subsequently sworn-in by the President, and the government refused to publish the Tribunal's verdict that declared the Parliament's actions in violation of the Constitution and therefore void. Although the parliament, the President, and the government acted unlawfully, the 'double' judges were able to join the Constitutional Tribunal, proving instrumental in sanctioning further unlawful acts of Parliament.

3. The independent judiciary

Germany

The judiciary of Germany entitles all persons to a hearing before a judge⁵¹ who is independent and subject only to the law, along with the right to be represented and counselled by an attorney⁵². In courts of law in Germany, cases are nearly always decided upon by a judge or several judges, as trials by jury occur in extremely rare instances. According to Basic Law Art. 97 'Judges shall be independent and subject only to the law'. In practice though, there have been some concerns that independence could be constricted by the selection process of federal and state judges which is dominated by the executive and legislative. In general, all judges in Germany are selected by politically charged bodies (Groß, 2019).

The judicial systems of the German *Länder* are highly structured and complex, consisting of six types of courts:

- ordinary courts consider criminal offence cases and most civil cases and are organised into four tiers of increasing importance – local courts (*Amtsgerichte*), regional courts (*Landgerichte*), higher regional courts (*Oberlandesgerichte*), and the Federal Court of Justice (*Bundesgerichtshof*). Local and regional courts serve as 'courts of the first instance', while higher regional courts and the Federal Court of Justice serve as appellate courts;

⁵⁰ *Prawnicy oceniają połączenie funkcji prokuratora i ministra sprawiedliwości*, Wirtualny Nowy Przemysł, 03 March 2016, <https://www.wnp.pl/parlamentarny/spoleczenstwo/prawnicy-oceniaja-polaczenie-funkcji-prokuratora-i-ministra-sprawiedliwosci.6359.html>.

⁵¹ 'In the courts every person shall be entitled to a hearing in accordance with law.' (Basic Law, Article 103).

⁵² 'Judges shall be independent and subject only to the law.' (Basic Law, Article 97).

- administrative law courts (*Arbeitsgerichte*) handle cases pertaining to public administration, except for cases under the jurisdiction of social, financial, or constitutional courts;
- financial and tax law courts (*Finanzgerichte*) handle issues relating to finance and taxes;
- labour law courts (*Arbeitsgerichte*) handle disputes within the labour force, such as employer-employee relations and employment contracts;
- social law courts (*Sozialgerichte*) rule on all matters of social security;
- *Land* constitutional law courts rule on matters of the legality of legislation as it pertains to the constitutions of the *Bundesländer*. In addition, a court of lay assessors, which consists of a professional judge and two lay judges, adjudicates certain criminal offences at the local district court.

Poland

The right to a fair, transparent process before an independent court and without undue delay is guaranteed by the Constitution⁵³, and no parliamentary act may preclude vindication of freedoms and rights by way of legal action⁵⁴. The right to appeal is granted to all litigants⁵⁵, respecting the principle of multiple instances (*wieloinstancyjność*)⁵⁶. A safety mechanism, it accounts for the possibility of error made by courts of a lower instance.

The court system in Poland comprises common courts (*sądy powszechne*), which adjudicate most cases⁵⁷, administrative courts (*sądy administracyjne*), which adjudicate in cases involving the public administration⁵⁸, and the Supreme Court (*Sąd Najwyższy*), which supervises the common courts and files motions for the appointment of judges with the President^{59,60}. The common courts deal with horizontal disputes between (economic) actors, while the administrative courts deal with vertical disputes between (economic) actors on the one hand and state bureaucracy on the other. Looked at through an economist's lens, common courts facilitate contract enforcement –

⁵³ 'Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court' (art. 45.1).

⁵⁴ 'Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights' (art 77.2).

⁵⁵ 'Each party shall have the right to appeal against judgments and decisions made at first stage' (art. 78).

⁵⁶ 'Court proceedings shall have at least two stages' (art. 176. 1).

⁵⁷ 'The common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts' (art. 177).

⁵⁸ '[A]dministrative courts shall exercise...control over the performance of public administration' (art. 184).

⁵⁹ 'The Supreme Court shall exercise supervision over common ... courts regarding judgments' (art. 183.1).
'Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary' (art. 179).

⁶⁰ Art. 175. 1. There is also a category of military courts.

from simple cases, such as payment of an invoice, to complex ones, such as development of a start-up, as per venture capital term sheets. The administrative courts, on the other hand, provide a remedy against administrative decisions in a range of business-related matters such as taxation and construction permits. Social participation in the delivery of justice is realised through the involvement of lay judges (*lawnicy*) in first-instance hearings. When adjudicating, they have equal rights as judges⁶¹ and are deployed in labour law cases, among others⁶².

The National Council of the Judiciary (*Krajowa Rada Sądownictwa*, or KRS) safeguards the independence (*niezawisłość*) and autonomy (*niezależność*) of the courts⁶³. These are their two attributes recognised by the Constitution and legal tradition, and they denote, respectively, freedom from undue influence, with judges bound only by the Constitution and acts of parliament⁶⁴, and self-governance of the judiciary as a separate branch of power⁶⁵. Based on a motion by the KRS, judges are appointed by the President for an indefinite period⁶⁶. Owing to the particular role they play in the legal system, judges enjoy a range of special rights. They are irremovable from office⁶⁷ and granted immunity from prosecution⁶⁸. As the only occupational group, they also enjoy a constitutional guarantee of *appropriate conditions for work and ... remuneration consistent with the dignity of their office and the scope of their duties*⁶⁹. An example of economic, incentive-oriented logic applied to the legal realm, this rationale of this rule is to discourage judges from corruption by increasing its opportunity cost. Privileges are offset with restrictions: judges cannot be members of political parties or engage in other partisan activity⁷⁰.

⁶¹ Law on the Functioning of the Common Courts, art. 4; Constitution, art. 182.

⁶² Civil Procedure Code, Section II, art. 47, §2, clause 1.

⁶³ *'The National Council of the Judiciary shall safeguard the independence of courts and judges'* (art. 186.1).

⁶⁴ *'Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes'* (art. 178.1); art. 195.1 paraphrases this for the judges of the Constitutional Tribunal, who are subject to the Constitution, but not to the statutes.

⁶⁵ *'The courts and tribunals shall constitute a separate power and shall be independent of other branches of power'* (art. 173).

⁶⁶ *'Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary'* (art. 179).

⁶⁷ *'Judges shall not be removable'* (art. 180.1).

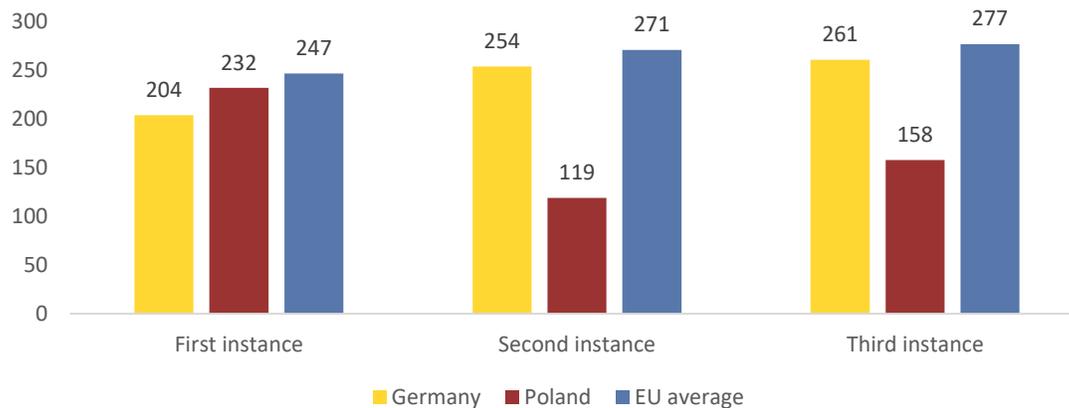
⁶⁸ *'A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained'* (art. 181); art. 196 reiterates this for the judges of the Constitutional Tribunal.

⁶⁹ Art. 178.2; art. 195.2 reiterates this for the judges of the Constitutional Tribunal.

⁷⁰ *'A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges'* (art. 178.3); art. 195.3 reiterates this for the judges of the Constitutional Tribunal.

Polish courts have been long criticised for lengthiness of proceedings (e.g. The World Justice Project, 2011, 2014). However, according to the European Commission’s *Justice Scoreboard*, Polish courts are above-average performers in the EU, with 73 days on average needed to resolve first-instance *civil, commercial, administrative, and other* cases compared to the EU average of 139 days in 2017 (European Commission, 2018)⁷¹. In the same year, to resolve *litigious civil and commercial* cases – which include contract disputes and are thus particularly relevant for enterprises – Polish judges needed less than the judges in the other EU Member States on average in all three instances and less than German judges in the second and third instances (see Graph 10). Despite this, some regress is observed compared to 2010 in both categories of cases⁷².

Graph 10. Average number of days to resolve litigious civil and commercial cases (2017).



Source: European Commission, 2019.

Note 1: While recognising the absence of the ‘third instance’ classification in the Polish legal system, we follow the methodology and classification presented in European Commission (2019) to ensure comparability of the analysis.

Note 2: The EU averages are calculated based on available data from between 21 and 23 Member States, depending on the instance. For the third instance, Italy, at 1,299 days, can be considered an outlier; without it, the average drops to 229 days.

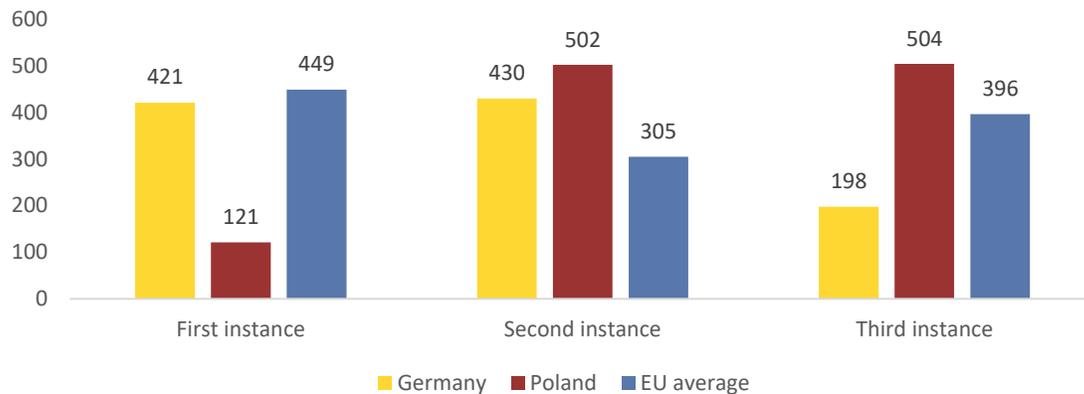
In the other category of adjudication – administrative cases – which is particularly important for business, the picture is different. Polish judges handle cases in the first instances much faster than their colleagues in Germany and other EU Member States but fall back in the second and third instances. When the instances are summed, both countries, as well as the EU average, show

⁷¹ The EU average calculated based on available data from 21 Member States except Cyprus, which, at 1118 days, is an outlier. No data for Germany.

⁷² As judged by historical data on first instance cases since 2010; historical data on the other instances is not available.

similar values. In both Germany and Poland, the level of performance has been stable in recent years⁷³.

Graph 11. Average number of days to resolve administrative cases (2017).



Source: European Commission, 2019.

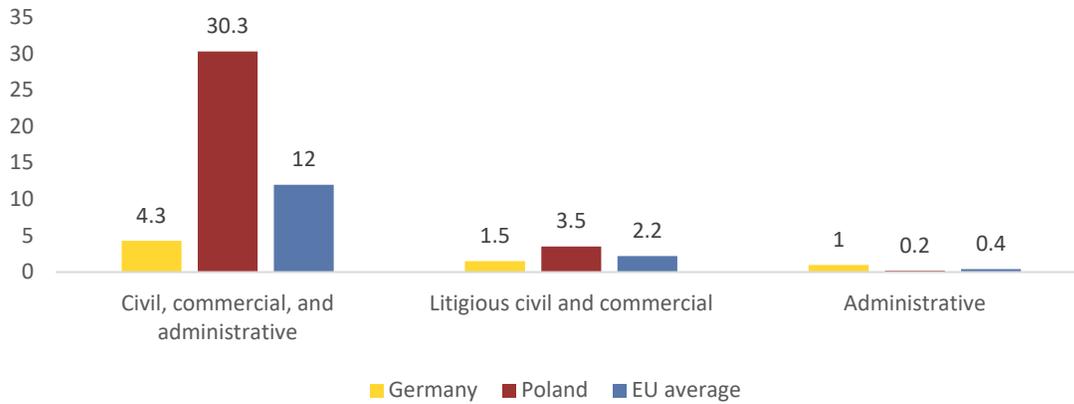
Note 1: While recognising the absence of the 'third instance' classification in the Polish legal system, we follow the methodology and classification presented in European Commission (2019) to ensure comparability of the analysis.

Note 2: The EU averages are calculated based on available data from between 16 and 24 Member States, depending on the instance.

At the same time, Poland has the fourth-highest litigation rate in the EU with regard to *civil, commercial, administrative, and other* cases, at 30.3 per 100 inhabitants, and the third-highest with regard to *litigious civil and commercial* cases, at 3.5 cases per 100 inhabitants in 2017 (compared, respectively, to Germany's 4.3 in 2016 and 1.5 in 2017). The number of administrative cases, on the other hand, is relatively low. See Graph 12 for a summary.

Graph 12. Number of first instance cases per 100 inhabitants (2017).

⁷³ As judged by historical data on first instance cases since 2010; historical data on the other instances is not available.

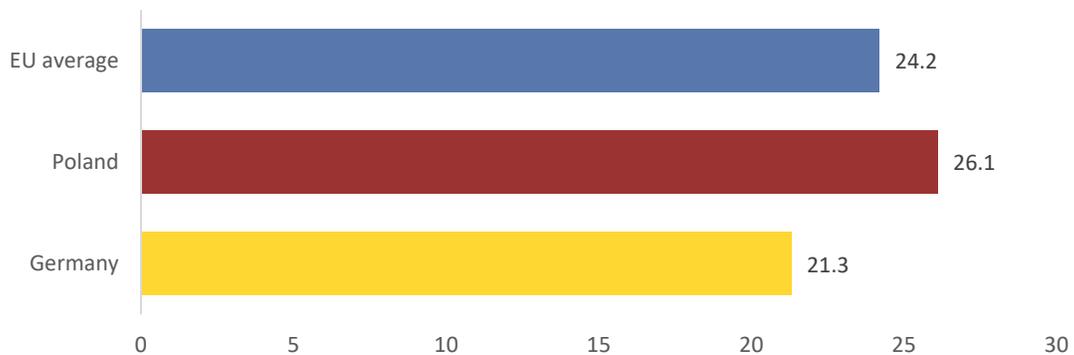


Source: European Commission, 2019.

Note: The EU average is calculated based on available data from between 21 and 23 Member States, depending on the category of case. For the civil, commercial, and administrative cases in Germany data is for 2016.

The high intensity of litigation is not quite offset by the higher number of judges in Poland, at 26.1 per 100,000 inhabitants in 2017, compared to the EU average of 24.2 and Germany's 21.3 (see Graph 13) (the numbers in Germany and Poland appear quite stable over time). This means that Polish courts are relatively overburdened, as confirmed by the rate of resolving (the ratio of cases resolved to filed) of litigious civil and commercial cases of 94% in 2017 (for administrative cases, the ratio was 107%).

Graph 13. Number of judges per 100,000 inhabitants (2017).



Source: European Commission, 2019.

Note: The EU average is calculated based on available data from 27 Member States.

Despite the decent performance, allegations of incompetence and corruption have been used by some political fractions as electoral platforms, most recently in PiS's victorious campaign in 2015. Since then, the executive and the legislature is exerting undue pressure on judges in the public sphere, in ad hoc ways involving aggressive rhetoric as well as in an organised way, as shown by the social campaign *Just Courts (Sprawiedliwe Sądy)* which was used in an attempt to rationalise the changes in the judiciary. Amnesty International (2019) calls the numerous instances of harassing and offending judges a *witch hunt*.

Even more alarmingly, there have been serious and unlawful structural incursions on the independence of the judiciary. The parliament has taken control of the election of members to the KRS and terminated the incumbents' terms. The restructured KRS, suspended by the European Networks of Councils for the Judiciary over concerns about judicial independence (European Networks of Councils for the Judiciary, 2017) and criticised by the Venice Commission of the Council of Europe (Venice Commission, 2018), does likewise not merit the recognition of the Polish judiciary, with the largest judges' association in the country referring to it as *neoKRS* (e.g. Iustitia, 2019). Likewise, the independence of the Supreme Court has been infringed by way of reducing the retirement age of the judges, increasing the influence of the executive, and organisational reshuffling. Finally, the Constitutional Tribunal has been effectively dismantled, as described in Section 2 above.

The infringements of judicial independence was the main premise guiding the decision of the European Commission to launch the procedure under art. 7 of the Treaty on the European Union (TEU) concerning a threat to the rule of law. Infamously, Poland has become the first Member States to find itself in this position.

4. Legal certainty

Germany

Legal certainty is provided for in clearly explained and written laws, statutes, codes, regulations, and judicial rulings⁷⁴. In accordance with legal certainty in Germany, once legislation has become law, it is publicly displayed in the Federal Law Gazette (*Bundesgesetzblatt*)⁷⁵, which is issued by the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*). As with federal laws required to be published in the *Bundesgesetzblatt*, all laws passed by the individual legislatures of the *Länder* are required to be published in their own

⁷⁴ 'Codification provides legal certainty, as legislation contains general principles and guidelines and defines the terminology used.' (*Law Made in Germany*, 2012).

⁷⁵ Art. 82 of the Basic Law (Certification, Promulgation, and Entry into Force).

respective Law and Ordinance Gazettes (*Gesetz- und Verordnungsblatt*) in order to ensure legal certainty is achieved and maintained.

While this is the formal side of legal certainty in Germany, there is another aspect which covers the more substantial question on certainty in the legal system. The guarantee of legal certainty counts in Germany as a fundamental constitutional principle⁷⁶ and is, next to substantial justice, an integral part of the principle of the due course of law.

According to the legal scholar Bernd Oppermann (Oppermann, 2018), legal certainty in itself means nothing. It needs to be contextualised in a ‘constitutionally recognised order’ (*ibid.*), where it serves as a structure ‘for the production of law which makes it possible for the observer to recognise rules of law and to use them to some extent’ (*ibid.*).

Following the continental tradition of civil law, legal certainty does not imply ‘the direct and strict observance of the integrity of any particular object of legal protection’ but ‘the making available of legally institutionalised options’ (*ibid.*).

In economic terms, this means a reduction of transaction costs but at the same time does not come with a rationale that gives absolute prediction on investments since the constitutional order is in Germany also a social order which can adapt to a changing environment and contingent future.

Poland

As an essential condition of legal certainty, no law is in force unless published⁷⁷. The right to information on the government’s actions is enshrined in the Constitution⁷⁸. It is realised by access to documentation and access to and the possibility of recording the sessions of governmental

⁷⁶ Art. 20 (3) of the Basic Law.

⁷⁷ ‘The condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof’ (art. 88.1).

⁷⁸ ‘A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions’ (art. 61.1).

bodies⁷⁹, including of parliament⁸⁰. Court rulings are public⁸¹, as are, with some exceptions, court hearings⁸².

In recent years, public consultations that are envisaged by the Constitution as part of the legislative process have frequently been circumvented by using a simplified procedure involving deputies' legislative initiative rather than ministerial legislative initiative. This removes the legislative from public scrutiny and may also set a harmful precedent for future legislative processes involving direct economic stakes and lobbying.

5. Economic freedom

Germany

Germany's Basic Law does not provide an explicit formulation of a concrete form of the economic system. It is neutral on the politico-economic design but gives some key statements that define the limits and possibilities of the political and economic arrangements. Economic freedom is mainly provided through Articles 2 (Personal Freedom), 9.1 (Freedom of Association), 11 (Freedom of Movement), 12.1 (Occupational Freedom)⁸³, and 14 (Property Rights). These rights limit the scope of political intervention to the degree that a centrally planned economy is not possible as it would contradict the basic rights of private autonomy as defined in the appropriate articles. Economic freedom is therefore guaranteed through individual rights.

Economic freedom ends at the point where market outcomes harm public good (14.2) or are restricted by law (14.1) in order to ensure the functioning of the decentralised organisation of market exchange (e.g. decartelisation). Finally, in its definition as a social state, the Basic Law also limits the activities and outcomes of the economic sphere to a minimum social standard.

German industrial relations are perceived as one of the most efficient in the world. Most of the agreements are settled calmly without any strike measures. The German economy is, therefore,

⁷⁹ *'The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings'* (art. 61.2).

⁸⁰ *'Sittings of the Sejm shall be open to the public'* (art. 113); *'The provisions of ... Article 113 ... shall apply, as appropriate, to the Senate'* (art. 124).

⁸¹ *'Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court'* (art. 45.1).

⁸² *'Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly'* (art. 45.2).

⁸³ *'All Germans shall have the right to choose their occupation or profession'* (Basic Law, art. 12.1).

rarely subject to massive strikes – between 2008 and 2017, on average only 16 days per 1,000 employees were cancelled because of strike actions (to compare: Denmark – 117, the United Kingdom – 21, and Poland – 4)⁸⁴.

The German social partnership model of industrial relations, developed in West Germany after World War II, is based on freedom of association which guarantees the right to organise in trade unions to all workers. German industrial relations are characterised by a dual system of interest representation, which guarantees the effective participation (*Mitbestimmung*) of the workers in the economic process. The two elements of the system are: 1) trade unions and employers are solely responsible for collective bargaining; and 2) works councils constitute the main bodies of employee representations at the workplace level.

In Germany, unified trade unions (*Einheitsgewerkschaften*) without concrete ideological or party-political links became dominant after 1949. They are organised in line with economic branches. The central task of trade unions is collective bargaining. Deriving from Article 9.3 of the Basic Law, freedom of collective bargaining (*Tarifautonomie*) guarantees the right to negotiate agreements in order to ameliorate the economic and working conditions of employees. Collective actions like strikes are hereby explicitly protected by the Basic Law but are, similarly to counter-measures like lockouts, subject to several restrictions. In this case, social partnership is regarded as a *conflict-partnership* or *antagonistic cooperation*. Central collective agreements (*Flächentarifvertrag*) are concluded for whole branches or sub-branches and apply regionally or nationwide to all companies belonging to the employers' organisations that are part of the agreement. The Federal Ministry of Labour and Social Affairs, together with the main representatives of the most important social partners, is entitled to give a collective bargaining agreement the status of generality in the affected branch if the generality is in accordance with the public interest⁸⁵.

Works councils are elected by all of the employees and are formally independent of the trade unions. The Work Constitution Act (*Betriebsverfassungsgesetz*) of 1953 constitutes the framework of their action: works councils have rights in relation to company management, including the right to information, hearing, consultation, objection, co-determination, and initiative⁸⁶. If there is disagreement about decisions related to one of these fields, fundamental strategic decisions remain a management decision area but are influenced and controlled by the supervisory board which is composed half of workers' representatives and half of the shareholders.

⁸⁴ See Dribbusch, 2019: 13.

⁸⁵ TVG §5.

⁸⁶ Work Constitution Act: Part Four.

Participation in decision-making and firm organisation has several positive effects on economic performance, including the prevention of high fluctuations and discontent within the workforce, the establishment of trust, and improvement of the information flow between employers and employees. This results in higher productivity and innovation levels⁸⁷.

Competition constitutes the central character of the social market economy. The role of competition policy is to secure free competition and to remove barriers to it. The 1958 Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) constitutes the legal basis of competition regulations. It is executed by the *Bundeskartellamt* which operates independently but is assigned to the Ministry of Economic Affairs and Energy (art. 51). Several laws are applied in this context: prohibition of cartels (art. 3), control of concentrations (art. 35-43), and abuse of market power (art. 19), among others⁸⁸.

The Act Against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb, UWG*) protects ‘competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall protect the interests of the public in an undistorted competition.’⁸⁹ Unfair competition can occur in many ways:

1. by a violation of a statutory provision relevant for the regulation of market conduct;
2. false information (discrediting, false statements, and omission);
3. replication of goods or services;
4. aggressive commercial practices such as harassment, coercion, and undue influence;
5. comparative advertising;
6. unacceptable nuisance, like advertising against the will of the market participant⁹⁰.

While the German Basic Law does not give an explicit definition of economic freedom, the European Treaties are more concrete on this matter. The Treaty on the European Union (TEU) establishes the internal market based on the four freedoms of goods, services, persons, and capital⁹¹. To ensure the functioning of a competitive, open market economy, the EU has exclusive competence on ‘the competition rules necessary for the functioning of the internal market’ (art. 3 of the Treaty on the Functioning of the European Union, TFEU). For example, the laws against unfair market practices in Germany and Poland were initiated through an EU directive⁹².

⁸⁷ See Jirjahn, 2010: 9.

⁸⁸ Competition Act 2017.

⁸⁹ UWG, Section 1.

⁹⁰ UWG, Sections 3-7.

⁹¹ ‘The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.’ (Constitution of Poland, art. 46.2 TFEU).

⁹² Directive 2005/29/EG.

Restrictions on the four freedoms can be established when it is proven that they threaten a public good. This is in line with Article 23.1 of the Basic Law which demands ‘*a level of protection of basic rights essentially comparable to that afforded by this Basic Law.*’

Poland

Economic freedom is entrenched by the Constitution as fundamental to the Polish economic system⁹³. Any restrictions on it are only allowed on the grounds of important public interest⁹⁴, for example in times of natural disaster⁹⁵, and only by way of a parliamentary act⁹⁶.

Competition law and consumer protection in Poland are regulated by several parliamentary acts: 1) Act on Countervailing Unfair Competition from 1993; 2) Act on Competition and Consumer Protection from 2007; 3) Act on Countervailing Unfair Market Practices from 2007; and 4) Act on Claims to Repair Damage Caused by Infringement of the Competition Law from 2017. A monopoly may be established, but only by way of a parliamentary act⁹⁷.

The unfair competition practices include imitating a product (understood as misleadingly mimicking its exterior, not as replicating its functionality), obstructing access to the market (by way of predatory pricing and other exclusionary practices), presenting false or misleading information (including: by way of unfair advertising; as relates to a product’s amount, quality, usability, origin, and price; and to defame a competitor), infringing a trade secret, inciting to dissolve or neglect a contract, and corrupting a public official⁹⁸. The remedies include an injunction to cease the unfair practice to repair its consequences⁹⁹. Criminal sanctions are envisaged in cases of charges involving trade secret infringement, product imitation, and misleading information¹⁰⁰.

⁹³ ‘*A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland*’ (art. 20).

⁹⁴ ‘*Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons*’ (art. 22)

⁹⁵ ‘*The statute specifying the scope of limitations of the freedoms and rights of persons and citizens during states of natural disasters may limit ... freedom of economic activity*’ (art. 233.3).

⁹⁶ Art. 22.

⁹⁷ ‘*Any monopoly shall be established by means of statute*’ (art. 216).

⁹⁸ Art. 3.2 (in general), art. 13 (imitating products), art. 15 (obstructing access to the market), art. 7-10 and 14 (presenting false or misleading information), art. 11 (infringing a trade secret), art. 12 (inciting to dissolve or neglect a contract), art. 15a (corrupting a public official) of the Act on Countervailing Unfair Competition; art. 5 of the Act on Countervailing Unfair Market Practices (presenting false or misleading information).

⁹⁹ Art. 18.1 of the Act on Countervailing Unfair Competition; art. 12.1 of the Act on Countervailing Unfair Market Practices.

¹⁰⁰ Chapter 4 of the Act on Countervailing Unfair Competition.

In some charges, including on circulation of false or misleading information, the burden of proof rests with the defendant.¹⁰¹ Thanks to this, the plaintiff, who is often a consumer, is not deterred by the high costs of trials,¹⁰² and sellers are incentivised for veracity and accuracy, which reduces the search costs of contracting.

The Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*, or UOKiK) is a government agency that settles competition law cases, with appeals heard by the judiciary.¹⁰³ The Polish system of competition law is tightly integrated with the EU system.

Members of the Parliament may not acquire the state's assets or engage in such economic activity as involves benefitting from them.¹⁰⁴ This rule safeguards the level-playing field in the economic sector and prevents private appropriation of public domains.

6. Property rights

Germany

Rights to property, including intellectual property, are protected by Article 14 of the Basic Law. Nevertheless, having and using property '*shall also serve the public good*' (Basic Law, Article 14.2). Similar articles are to be found in some state constitutions, such as those of Bavaria¹⁰⁵ or Hesse¹⁰⁶.

¹⁰¹ Art. 18a of the Act on Countervailing Unfair Competition; art. 13 of the Act on Countervailing Unfair Market Practices.

¹⁰² cf. <https://mojafirma.infor.pl/mala-firma/prawo-konkurencji/251637,Na-kim-spozywa-ciezar-dowodu-przy-nieuczciwych-praktykach-rynkowych.html>.

¹⁰³ i.e. by the Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów*), a division of the Warsaw Regional Court, and by the Warsaw Court of Appeal. Source: https://www.uokik.gov.pl/aktualnosci.php?news_id=11877.

¹⁰⁴ '*Deputies shall not be permitted, to the extent specified by statute, to perform any business activity involving any benefit derived from the property of the State Treasury or local government or to acquire such property*' (art. 107.1); '*The provisions of art. 103-107 shall apply, as appropriate, to Senators*' (art. 108).

¹⁰⁵ '*The entirety of economic activity shall serve the common wellbeing, in particular a guarantee of dignified existence for all and a gradual enhancement of living standards for all sections of the community.*' (Constitution of Bavaria, art. 151.1).

¹⁰⁶ '*The economy of the state has the job to serve the welfare of the people and to satisfy their demand. For this purpose, the law must initiate the measures necessary to steer the creation, production and distribution and to secure everyone a just part of the economical result of all labor and to secure him from exploitation.*' (Constitution of Hesse, art. 38.1).

Expropriation may only be permissible if it pertains to the welfare of the public and results in appropriate compensation¹⁰⁷. Furthermore, Article 15 allows the socialisation of land, natural resources, and means of production under the same conditions as in Article 14.

Intellectual property rights in Germany are protected by the *Urheberrechtsschutzgesetz (UrhG)* (Act on Copyright and Related Rights) and derive from the right to property, freedom of arts, and the right to free development of one's personality of the Basic Law. This applies to literary, musical, pantomimic, dance, artistic, photographic, cinematographic works and illustrations of a scientific or technical nature. The detailed rules of the *UrhG* define:

1. publication rights (the author of a work can determine freely if, when, and how his or her work is issued);
2. exploitation rights (duplication, distribution, and exhibition);
3. remuneration rights (resale remuneration and library royalties)¹⁰⁸.

¹⁰⁷ 'Property and the right of inheritance shall be guaranteed. Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation.' (Basic Law, art. 14).

¹⁰⁸ See UrhG.

Box 5: Conflict about Property Rights in Germany - The Berlin Rent Cap.

The Berlin housing market is under pressure. In the past 10 years, rents have doubled and current construction of new housing is not keeping up with the estimated growth of the city to 4 million people in 2025. The Berlin Senate therefore decided to introduce a rent cap that would freeze all existing rents for the next five years. This sparked a debate about the legality of the cap, since it would limit the right to property of the real estate industry and small-scale house owners.

The constitutional court had declared in July 2019 its decision for the federal rent price break that was introduced in 2015. The court argued for the legality of the act. The price limits in the 2015 act are seen as proportional regarding the social dimension of housing. The right to property does not guarantee for a legal position to be unchangeable over time. Therefore, the rent-break was seen as constitutional which has important implications for the rent cap. Nevertheless, critics still question its proportionality and fear long-term losses of renters or the neglect of the housing substance.

A different question was whether the Berlin state had the legal competences to enact this law. There have been different interpretations of the shared competences between Bund and Länder, with legal experts publishing opposing statements.

In January 2020, however, the federal state of Berlin approved the law on the Revision of Legal Provisions regarding Rent Limitation (*Gesetz zur Neuregelung gesetzlicher Vorschriften zur Mietenbegrenzung*) which officially introduced a five-year rent freeze at the level of 18 June 2019 with further rent adjustments up to 1.3% annually from 2022.

Poland

The establishment of robust property rights was one of the early priorities of the transition. Property rights, indispensable to a market economy, also unlocked the inflow of foreign investments that jump-started the process of modernisation of the Polish economy.

Private property is entrenched by the Constitution as fundamental to the Polish economic system¹⁰⁹, the right to ownership is granted to everyone¹¹⁰, and everyone enjoys the same level of legal protection of their property¹¹¹. Any limitations on property are only allowed by way of a parliamentary act¹¹², for instance in times of natural disaster¹¹³. Any expropriation is only allowed on the grounds of public interest and against fair compensation¹¹⁴; any forfeit may only take place subject to a parliamentary act and a court ruling¹¹⁵.

Taxation, an area that intrinsically limits property rights, is regulated in all its material aspects (subjects, objects, rates, and other principles) by way of parliamentary acts¹¹⁶.

7. Anti-corruption mechanisms

Germany

Corruption as civil servants and political office holders has detrimental effects both politically and economically. The Criminal Code (*Strafgesetzbuch*) of Germany regards all bribes, corruptive actions, or restrictions to fair competitions as illegal and punishable through fines or incarceration¹¹⁷. Chapter 30 of the *Strafgesetzbuch* specifies the illegality of accepting bribes in public cases. §331 covers the act of taking bribes by any person who holds a public office (e.g. politicians, civil servants, and judges, among others) in general, with specific reference in §332 that ‘in return for the fact that he performed or will in the future perform an official act (or judicial ruling) and thereby violated or will violate his official duties’ for the benefit of himself/herself or

¹⁰⁹ ‘A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.’ (art. 20); ‘The Republic of Poland shall protect ownership and the right of succession.’ (art. 21.1).

¹¹⁰ ‘Everyone shall have the right to ownership, other property rights and the right of succession.’ (art. 64.1).

¹¹¹ ‘Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.’ (art. 64.2).

¹¹² ‘The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.’ (art. 64.3).

¹¹³ ‘The statute specifying the scope of limitations of the freedoms and rights of persons and citizens during states of natural disasters may limit ... the right of ownership.’ (art. 233.3).

¹¹⁴ ‘Expropriation may be allowed solely for public purposes and for just compensation.’ (art. 21.2).

¹¹⁵ ‘Property may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court.’ (art. 46).

¹¹⁶ ‘The imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute.’ (art. 217).

¹¹⁷ *Strafgesetzbuch* Chapter 26, §298-302.

a third party. §333 discusses the act of bribing in public instances in general, with a similar reference to the specific incentive in §334¹¹⁸.

Lawyers of confidence are available to every whistle-blower as independent contact persons. They receive notifications containing suspicions of misconduct in public administrations or corruption and forward the matter to the competent authorities for further prosecution.

Criminal law in Germany is determined at the federal level (via the *Strafgesetzbuch*) to ensure that crimes are not handled differently in different *Länder*. Therefore, it matters not whether a person committed a crime relating to corruption in North-Rhine Westphalia or Saxony, because the legal procedure would be handled in the same manner with the same punishments.

Box 6: Corruption in the German procurement system?

In August 2017, a donation of more than EUR 50,100 was given to the Free Democratic Party (FDP) from entrepreneur Verena Pausder, director and creator of the Haba Digital GmbH, which is working to improve the digital competences of elementary school pupils. A year later, the firm wins the assignment for a mobile workshop on digital competences worth EUR 600,000. Although other competitors were available for the task, the decision towards Pausder's firm was made without further market research on alternatives. Soon enough, opposition politicians, alternative entrepreneurs, and non-governmental organisations (NGOs) picked up the story and published a series of statements that were then picked up by the media. In July, the Ministry of Education took back the assignment and provided a new announcement for the task.

This case displays in a good way how checks and balances in Germany can work: through an informed public and a political sphere that puts pressure on politicians. A diverse network of NGOs and a critical media helps to document and investigate affairs like these until finally the authorities have to respond to it. It is less the legal and political pressure than the public social reception of the break of the rule of law that puts the misguided politicians back on track. Holding on to the decision to give the assignment to the Haba Digital GmbH would have damaged its reputation as rule abiding ministry.

¹¹⁸ *Strafgesetzbuch* Chapter 30, §331-334.

Poland

A series of amendments to the Criminal Code between 1998 and 2005 extended enforcement to the private sector and allowed to break-up collusion by dropping prosecution of informants¹¹⁹. A special service, the Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne*, or CBA), tackles corruption in the public and economic sphere¹²⁰.

As a way of preventing corruption in the judiciary, judges are guaranteed suitable remuneration in the Constitution (see Section 3 above). In the legislative process, public consultations are envisaged. This mechanism has the potential to curb corruption by opening up the legislative process to public scrutiny, but it has been underutilised, in particular in recent years (see Section 4 above).

Recruitment for higher posts in the civil service used to take place by way of competition, which ensured inclusiveness and promoted merit-based competition. In 2016, this rule was struck down and was replaced by appointment, while simultaneously the recruitment criteria were lowered¹²¹.

8. Free media

Germany

Article 5 of the Basic Law of Germany ensures all persons the freedom to express themselves in such a manner that does not violate existing laws, including the right to a free press and free media. Censorship is prohibited¹²², with a few exceptions regarding libel, hate speech, defamation, Holocaust denial, and Nazism, among others, as set out within the *Strafgesetzbuch* and appropriate legislation¹²³.

Media in Germany is divided between public and private organisations; there are nine regional public broadcasting agencies in Germany, plus the international broadcaster Deutsche Welle. These ten agencies are organised into one national body, known as ARD (*Arbeitsgemeinschaft*

¹¹⁹ Art. 229, §6 and art. 230a, §3 of the Criminal Code.

¹²⁰ Art. 1.1 of the Act on the Central Anti-Corruption Bureau.

¹²¹ *Służba cywilna: wyższe stanowiska będą obsadzone bez konkursów. Prezydent podpisał ustawę*, PolskieRadio24.pl, 07 January 2016, <https://polskieradio24.pl/42/275/Artykul/1566973,Sluzba-cywilna-wyzsze-stanowiska-beda-obsadzone-bez-konkursow-Prezydent-podpisał-ustawe>.

¹²² 'Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.' Basic Law, art. 5.1).

¹²³ 'These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.' (Basic Law, art. 5.2).

der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland), and are funded through required licensing fees. These public broadcasters are responsible for the essentials of information reporting, but also take part in educational programmes and various entertainment formats.

Free media is necessary to an equally free and functioning democratic society, as journalists are in effect the largest government watchdogs of all. In Germany, it is first and foremost the responsibility of the press, as a community, to regulate itself. The German Press Council (*Deutscher Presserat*) was formed in 1956, during the early years of the Federal Republic, as a means of ensuring journalists adhere to the professional ethics as set out within the German Press Code¹²⁴. The German Press Council represents a type of bottom-up regulation, whereby the journalists are themselves the first line of defence when it comes to inaccurate reporting, and even attacks on the media, by their own colleagues.

Poland

Freedom of media is guaranteed by the Constitution¹²⁵; preventive censorship and licensing of the press are forbidden¹²⁶. The National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji*) acts as a guardian of freedom of speech and the right to information¹²⁷. No member of the National Broadcasting Council may belong to a political party or engage in other partisan activity¹²⁸.

In the last days of 2015, by an amendment of the Act on Broadcasting, the management boards of the state radio and television were subordinated directly to the Minister of State Treasury and, upon the liquidation of the Ministry, to the National Media Council with members elected by the Parliament and the President. The competition-based recruitment of boards and the authorisation by the National Broadcasting Council were dropped. Ever since, the state television has been led by a former member of the ruling party, and the quality and reliability of state television has suffered significantly.

¹²⁴ German Press Council, 2017.

¹²⁵ 'The Republic of Poland shall ensure freedom of the press and other means of social communication.' (art. 14); 'The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.' (art. 54.1).

¹²⁶ 'Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.' (art. 54.2)

¹²⁷ 'The National Council of Radio Broadcasting and Television shall safeguard the freedom of speech [and] the right to information.' (art. 213).

¹²⁸ 'A member of the National Council of Radio Broadcasting and Television shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function.' (art. 214.2).

9. Other

Germany

As a member state of the EU, the United Nations, and various other international and intergovernmental organisations, Germany is bound by international laws. In Section II of the Basic Law, with emphasis on Articles 23, 24, and 25, Germany commits itself to transfer sovereignty to the respective institutions when necessary¹²⁹.

As a member of the EU, Germany and each of the *Bundesländer* are bound by judgements passed by the European Court of Justice (ECJ)¹³⁰. As the most supreme court in the EU, it is the duty of the ECJ to ‘ensure that EU law is being observed and enforced by means of reviewing the legality of the acts of the institutions of the European Union, ensuring that the Member States comply with obligations under the Treaties, and interpreting European Union law at the request of the national courts and tribunals.’¹³¹

Poland

The Constitution subjects the Polish state to international law¹³², which is important for foreign economic actors. For example, it improves the prospects of foreign investors in the country by opening up the possibility of international arbitration in cases of a dispute with the state, and it enables foreign companies to avail themselves of Polish competition law¹³³. This rule is entrenched by granting ratified international agreements precedence over acts of parliament, if in conflict¹³⁴.

¹²⁹ Basic Law, Articles 23, 24, 25.

¹³⁰ Basic Law, Articles 23, 24, 25.

¹³¹ Court of Justice of the European Union.

¹³² ‘The Republic of Poland shall respect international law binding upon it.’ (art. 9); ‘The sources of universally binding law of the Republic of Poland shall be: ...ratified international agreements...’ (art. 87).

¹³³ cf. 4 of the Act on Countervailing Unfair Competition.

¹³⁴ ‘An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.’ (art. 91.1). This rule, under certain conditions, extends to laws adopted by international organisations (art. 91.2).

Part III. Rule of law *de facto*

A. Rule of Law in the economic life of Germany and Poland: sociological results

During June and July 2020, we surveyed 800 businesspeople – 400 in Germany and 400 in Poland – representing small (up to 10 employees) and big (over 10 employees) businesses. Additionally, 12 representatives from small and big businesses in both countries were interviewed on different aspects of the rule of law in their country's economic life. This part of the report presents the main findings of the research. Sociologists are rarely consulted on the rule of law, even though social trust in law and justice is nowadays a standard element of the relevant definitions. Here sociological insight is provided by studying people's reflections on some of the aspects considered crucial to the meaning of the rule of law in entrepreneurial activity as an owner, manager, representative, or in another role.

1. Methodology

For reasons explained below, the results of the research as they stand in isolation of the quantitative component must be interpreted as qualitative reconnaissance into the meaning of the rule of law, and any figures along the way are to be regarded as preparing the reader for the final interpretative hypothesis.

The research reported is based on three types of data collected during June-July 2020.

1. For both Germany and Poland, we conducted semi-structured interviews with 12 business representatives from different sectors, including services and industry (six in each country). The target group included an equal number of women and men and an equal number of people representing small or big businesses. The respective national research teams who conducted the interviews are in possession of the interview records.
2. The quantitative questionnaire survey of businesspeople used the same basic short questionnaires (12 questions). Due to the rising costs related to the Covid-19 epidemic, different sampling methodologies were used.

- a. In Germany, Civey GmbH¹³⁵ conducted a ‘river sampling’. This sampling is entirely digital and consists of a three-step process that allows scientifically valid results to be obtained within a noticeably brief time. The innovative methodology behind Civey’s data collection was developed in cooperation with the Rhine-Waal University of Applied Sciences. Surveys are synchronously integrated on 25,000+ German websites of media partners. Surveys are evenly distributed via URLs to the target group to be surveyed and over the surveyed time. An algorithm decides who is included in the sample. Only the participants verified through the algorithm are taken into account in the result calculations.
- b. In Poland, Opinia24¹³⁶ conducted standard computer-assisted telephone interviewing (CATI) on a random sample of businesspeople from the available register while adjusting the composition of the sample based on the respondents’ company sizes.

The basic difference between the two sampling methods concerns the way in which a respondent is identified. In the German case¹³⁷, the respondent decides her/himself to join the research. She/he is attracted to it through existing web identifiers (URL), e.g. hypertext pages, images, and sound files, and agrees to respond to a survey questionnaire. This means that only web users are contacted¹³⁸. In the Polish case, an existing Bisnode list of business addresses served as the base from which the contacted firms were randomly selected and then asked to agree to the interview¹³⁹. Hence, the Polish study belongs to the traditional family of probabilistic sampling, while the one conducted in Germany, to the newly developing family of non-probabilistic sampling. They differ as strongly as the theory behind them, and, depending on the degree of methodological purity accepted, one should choose differently based on the type of calculations that can be made on the data collected. When conducting research, however, the main consideration is the aim of the study.

Our aim is not to take sides in the on-going methodological debates or test theory; but rather, our research is a reconnaissance into the opinions of German and Polish businesses about the situation concerning the rule of law in the field of economic activity. Businesses in Europe, as a rule, use

¹³⁵ <https://civey.com>.

¹³⁶ <http://opinia24.pl/kontakt.php>.

¹³⁷ For details on methodology see <https://civey.com/whitepaper>.

¹³⁸ With over one million active and verified users per month, Civey claims to have the largest survey panel in Germany.

¹³⁹ Bisnode, an international company active in Poland for 27 years, boasts that its databank contains data on approximately 4,600,000 companies active in Poland (<https://www.bisnode.pl/produkty/bisnode-baza-danych>).

the web, and thus the limitation of the survey to online contact is irrelevant in our research context. The context of the pandemic eliminated another important differentiating factor, as classic face-to-face interviewing suddenly became impossible. While we adapted the format of the semi-structured interviews to the context of the pandemic, conducting them virtually, the online questionnaire limited to twelve closed questions became the main research tool. Also, the reason behind the dynamic increase in interest in non-probabilistic sampling – the alarming decrease in the response rate – makes the use of alternative data collection methods necessary. All these factors have brought the two methods – probabilistic sampling and non-probabilistic online sampling – closer. The difference in the applicability of the statistical analysis to the data nevertheless remains for the following reasons:

- we limit ourselves to a simple comparison of the distribution of responses to the survey questionnaire;
- we warn the reader that we are unable to estimate the representativeness of the data¹⁴⁰;
- the descriptions of the comparisons across Germany and Poland – where different data collection methods were used – are to be considered at best as hypotheses that need to be tested using the same data collection methods, even though it will always remain open to further cross-testing with different methods and different types of databases.

Finally, as the rule of law is a multidimensional concept, it needs to be separated into several different components. Therefore, while accounting for the definition of the rule of law as discussed in earlier in the report (see *Defining the rule of law* for more information), we operationalised it by specifying seven key rule of law elements to be considered for our sociological study. These include:

- independence of judiciary;
- certainty and stability of law;
- corruption prevention;
- access to legislators;

¹⁴⁰ In fact, the representativeness of ‘river sampling’ in general is under permanent debate in the professional world of public opinion research. In 2015, the American Association for Public Opinion Research updated its guidelines concerning reporting measures of precision from nonprobability samples: ‘For some surveys (e.g., exploratory, internal research) estimating precision may not be important to the research goals. For other surveys precision measures may be relevant, but the researcher may not have the statistical resources to compute them. Under the AAPOR Code, it is acceptable for researchers working with nonprobability samples to decline to report an estimate of variance. In such cases, it may useful to note that the survey estimators have variance, but there has been no attempt to quantify the size.’ (https://www.aapor.org/getattachment/Education-Resources/For-Researchers/AAPOR_Guidance_Nonprob_Precision_042216.pdf.aspx).

- clarity and congruency of law;
- transparency of law-making;
- access to justice.

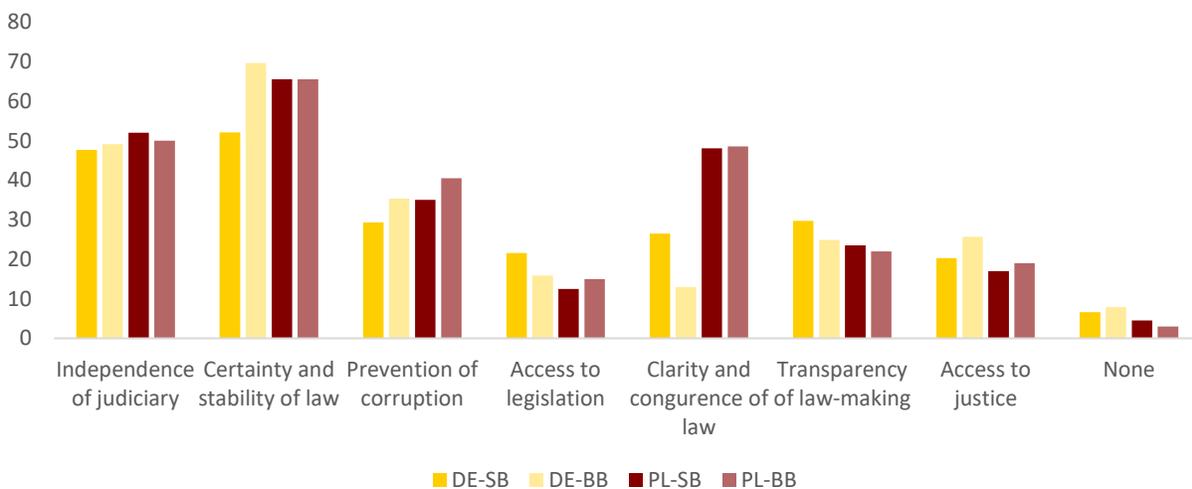
2. Results

This section presents our findings in a comparative manner – both between the countries and groups of respondents (i.e. representatives of small business [SB] and big business [BB]). The latter comparison is methodologically pure as the same methodology was used in order to find the respondents. Further, the comparison is made between business classes from the two countries. Yet, the analysis of these relative results needs to be carried cautiously as to account for the methodological differences discussed above.

2.1 Key aspects of the rule of law in the economic context

When it comes to the importance of the rule of law elements in business, ‘*certainty and stability of the law*’ and ‘*independence of judiciary*’ were selected by the majority of participants independently of the country and size of business. The national samples, however, differ with ‘*prevention of corruption*’ and ‘*transparency of law-making*’ ranking third for German large and small businesses, respectively. In the case of Poland, ‘*clarity and congruence of law*’ occupied the third position for both small and large businesses.

Graph 14. Distribution of answers to Question 8: ‘Which aspects of the rule of law are the most important for the successful management of an enterprise?’ (in %).



Note: the choice of participants was limited to up to three elements.

In Germany, small businesses mentioned ‘*certainty and stability of law*’ as the most important aspect of the rule of law significantly¹⁴¹ less often than big businesses. The opposite, however, was true as regards ‘*clarity and congruence of law*’, with small (but not big) businesses finding it the most important the smallest number of times. In Poland, no significant differences were found between small and big businesses as to the importance of the seven attributes of the rule of law in our list.

In a cross-country perspective, representatives of small businesses in Germany attributed significantly lower importance to the ‘*independence of judiciary*’, ‘*certainty and stability of law*’, ‘*prevention of corruption*’, and ‘*clarity and congruence of law*’ compared to Poland. Yet, they more often than the latter selected ‘*access to legislation*’, ‘*transparency of law-making*’, and ‘*access to justice*’ as the most important aspects of the rule of law. When big businesses from both countries are compared, the only significant difference is evident as regards ‘*clarity and congruency of law*’, which was more often of importance for Polish big businesses.

The insights from the interviews confirm that the rule of law as seen from the business perspective is not necessarily the same in terms of legal or political points of view: ‘*The rule of law is one thing that builds trust - trust that I can rely on my counterpart, that I am also secure in certain situations. Trust, I think, is the basis for doing business. If I did not have the feeling that my customer would pay for his goods, for example, or that my supplier would deliver after I had paid, then no business relationship, no business at all, would be possible. For me, that is the rule of law. I know that he [the supplier] is obliged to do so, I have paid in advance - I can rely in good conscience on [the supplier] delivering, in other words creating trust, which is essential for me*’ (DE-1). It is evident that the rule of law as perceived by the respondent is a trust-creating, hence transaction cost-reducing, device. This perspective is clearly aligned with the theoretical account of the rule of law within the new institutional theory as discussed in the first, *de jure*, part of the study.

Along similar lines, another German respondent added the following: ‘*By the rule of law I understand that one has solid and reliable boundary conditions. That starts with property and contracts. But it is also about labour law, which means that you can be very precise in your orientation on what are the rules; you can rely on them being observed; and if not, that you can ensure that they are observed. For me, that is a definition of the rule of law. But whether you like*

¹⁴¹ In this report, ‘significance’ means the difference between dichotomised variables as measured by Fisher’s exact test of significance with $p = 0.05$ or less. As for the precaution, it needs to be stressed that it does not involve the fulfilment of the theoretical presumptions of such test but is used for convenience instead of any other arbitrarily chosen criterion of taking the numerical difference between the distribution of responses into account.

[rules] or not is another question. They are simply a reliable framework for entrepreneurial activity' (DE-2). This notion of the rule of law as a framework has been echoed in the definition provided by one of the big businesswomen from Poland (PL-2) quoted further on.

There are, however, more structured visions of the rule of law in occurrence, including the following: *'For me, the rule of law also means, first and foremost, a certain degree of certainty and stability of law. In other words, the guarantee of independent courts, compliance with the separation of powers, and the independence of courts. All in all, a reliable administration of justice that does not judge according to the political situation. And, of course, comparable to Germany, a kind of the Constitution or basic law, which, so to speak, lays down the guidelines to which the state must also adhere. For me, the rule of law does not only mean that the courts pronounce justice independently, but also that there is no arbitrariness on the part of the legislature, nor any arbitrariness on the part of the executive bodies'* (DE-3). While here the basic referent is the certainty of law, the definition refers to the entire system of the legal state and its individual elements.

Further, *'the rule of law is actually the framework that is set by the state, by the community that the state is supposed to represent, with the rules it contains, and also sanctions or support measures. I think the state should not be the better entrepreneur. That is also the catchword. Instead, it should define the rules by which people try to enforce the rules so that every actor in every area adheres to them and enforce sanctions if the [rules] are violated. The state should also, where things are perhaps not going so well and the state sees opportunities, try to bridge or compensate for structural or temporary deficits with support so that the economy in our country can keep pace with the economies of competing countries. The framework is important, the rules are important. For me, that is the rule of law, including enforcement'* (DE-5). As discussed further, there is, however, a clear contrast between the levels of trust in Germany and Poland.

Another respondent, somewhat puzzled by the question, stated the following: *'That means that we have such a state where the legal system works [and] is not corrupted because all the organs, both legislative and executive, work well together and are independent of each other and cannot be influenced, in the sense that they cannot be corrupted'* (DE-6).

When confronted with the Polish term *'praworządność'*, our Polish respondents reacted almost uniformly by stressing the rules and abidance by the rules. *'I consider the rule of law ('praworządność') to be the strict compliance with the rules'*, said PL-1, who represents a Polish branch of an originally German and now large international company. An Armenian immigrant who owns a restaurant in Poland (PL-3) responded similarly: *'One should do as it is written in law ... How possibly one can make a business without the law? You must know fiscal laws, how to employ, how to lay off [the staff] ...'*. Another interviewee (PL-2) further explained that

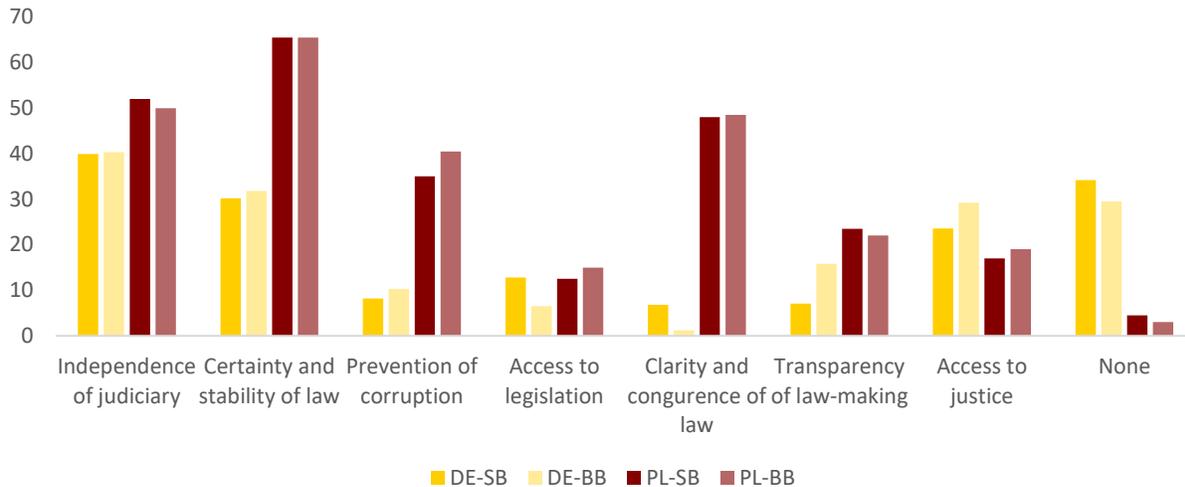
‘praworządność’ is equally significant in business as it is in the private life: ‘It determines the frame of functioning, so in its absence, people would behave in a completely opposite way’. She considered that this external restraining frame needed to be filled inside by a strong ethical position, meaning the business ethic as well. The respondent PL-4 (with an engineering background) listed the following characteristics of the functioning of the rule of law when he compared the situation in Poland with the one in the United States, where he worked for 10 years: ‘Firstly, law is equal for everybody. But, secondly, it is clear, transparent, easy to understand, and stable. The law does not change so often’.

Much more developed is the position taken by a businesswoman with a social-scientific academic background (PL-1) who manages a large private educational agency in Poland: *‘I think that this ‘praworządność’ has two aspects. First one is the hard one that is the abidance by the binding law, legislation, the Constitution and [...] competence of the particular law-making and law applying bodies. But the second element is associated with the intuitively understood law, that is the widely conceived honesty, respecting – for sure – the human rights, women’s rights, and – I should say – a certain basic order that functions, principles of democracy, tri-partition of power. It is certainly for me the manner in which the laws are made. [...] This is that the legislative process is to be made in the proper timing and planned; that there would be the time for consultations, social or, say with social partners or with the Council for Social Dialogue; that there would be time to learn these legal drafts; that there would be time to add comments, amendments by the opposition in a normal and not a crazy way. In all this [...] there is also the elementary honesty [...] and non-abuse of the law to promote the interests of one group, which is not to use the law in an instrumental way’.*

2.2 Rule of law performance – deficits and surpluses

Some of our respondents mentioned the country’s performance in terms of the rule of law within the discussed definitions. Such was the case of one of the German interviewees (DE-6) who stated the following: *‘For me, at the end of the day in Germany, compared to other countries, the term has actually been very well poured into life. [...] There are probably people everywhere who are corrupted by power and who try to corrupt just like others. But compared to Poland we live here in a paradise concerning the law’.* Our survey findings, however, underline a fair degree of criticism towards the state of the rule of law in Germany with about a third of both small and big business representatives stating that *‘none’* of the rule of law aspects is being fulfilled in the country.

Graph 15. Distribution of answers to Question 7: ‘Which aspects of the rule of law in your country are most fulfilled?’ (in %).



As for Germany, the responses of small business representatives differed significantly from that of the representatives of big businesses as regards the assessment of the main attributes of the rule of law. Specifically, they more often appreciated the state of ‘*access to legislation*’, ‘*clarity and congruence of law*’, and ‘*transparency of law-making*’, while the opposite is true for the ‘*access to justice*’ element. In Poland, the small businesses appreciated less ‘*independence of judiciary*’, ‘*prevention of corruption*’, and ‘*access to legislators*’ relative to the big businesses.

When comparing the opinion of both classes across the countries, representatives of the small businesses in Germany appreciated ‘*independence of judiciary*’ and ‘*transparency of law-making*’ better compared to Poland. The latter, in turn, had a higher relative appreciation for the state of ‘*prevention of corruption*’, ‘*access to legislation*’, ‘*clarity and congruence of law*’, and ‘*access to justice*’ in the country. When comparing German and Polish big businesses, the only difference is apparent as regards the ‘*transparency of the law-making*’, which has been significantly less often appreciated in the case of Germany.

The results presented in Graph 15, however, need to be interpreted cautiously. The choice of respondents has been limited to not more than three out of seven attributes of the rule of law. Under such a limitation, selection is affected by the perceived significance of the elements. Thus, for example, corruption prevention needs might have not been recognised by the sample as important as for the respondent DE-6. This is why the results of our survey need to be discussed in conjunction with the findings of the in-depth interviews and the results from the previous

question that dealt with the significance of these attributes in the economic functioning of a business.

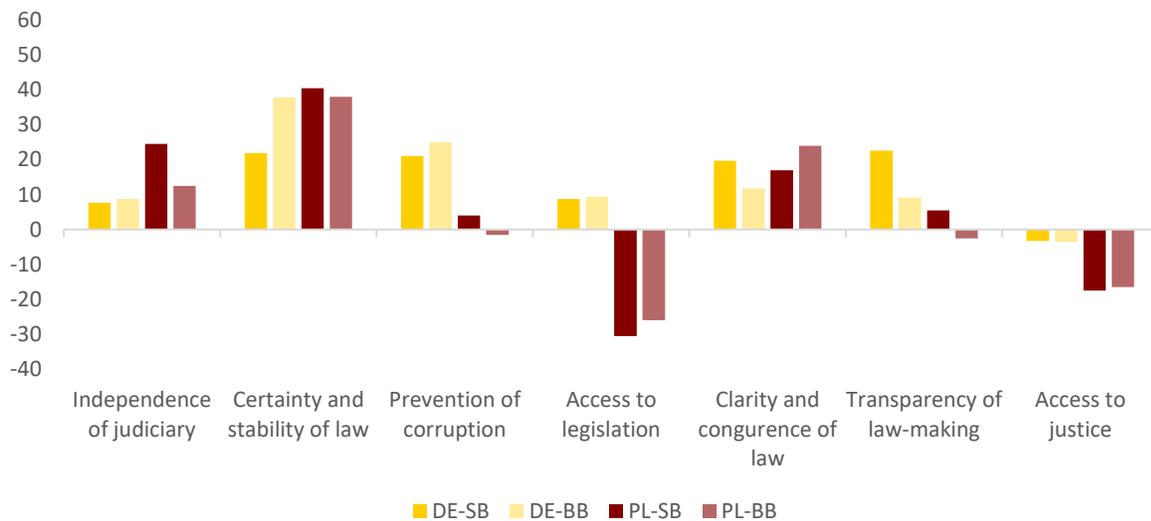
PL-1 criticised the recent rule of law situation as a *‘dishonest application of the law that may transpire in all spheres of living, including economic life. If one does not abide by general law such as the Constitution, why should not we do it in [economic] sphere? This foments great anxiety [...] which may be more felt in some areas. Not in my branch as it is not regulated by the State but if one is active [...] in the areas of energy, finances, [...] non-public health service, then, in reality, there is a risk [!] that at some moment one wakes up to the totally new order, where there is no room for activity or the business is taken over or nationalised. I think that [such anxiety] is very widespread. Secondly, the courts. If the independence of judiciary is so tightly limited, it might appear dangerous in a situation of a dispute, especially if the State Treasury is the opponent [...]’*. The respondent also shared a story about the public inspections that suddenly arrived to control the agency she was in charge of. When asked if such situations applied to the courts as well, she answered: *‘I think yes, yes. As our reality shows, there are the attitudes of the invincible judges and those judges who follow the career path exploiting this moment. These are [...] purely human factors. Someone may be motivated by the fear and not necessarily by the career. Yes, certainly I think that if this administration of justice is not or may not be independent, it would create a great barrier to the economic activity’*. She further shared an example of a large foreign company that had withdrawn from Poland because of the above-mentioned insecurity.

International comparisons have been made if personal experience allowed. PL-4, who is active in a small entertainment and gastronomy business in the countryside and was already cited on this point, compares the state of the rule of law in Poland with that in the United States, where he worked for 10 years: *‘[In the US], firstly, law is equal for everybody. But secondly, it is clear, transparent, easy to understand and is stable. The law does not change so often. With us, [in Poland], in course of the last 5-6 years (since we have the new government), I have the impression that the law is changing, new laws are signed overnight and next week my bookkeeper calls me and tells that I should not do the things in that way but rather in a different way. Oh, I have a better story. I paid PLN 4,000 for new cash registers [even though] I had bought the old ones 4 years ago. [...] With such an unpredictability and change of rules [...] as an honest entrepreneur, I have the impression that the government is trying to clean me out the whole time’*. In another interview, an Armenian immigrant, now a gastronomic entrepreneur (PL-6), positively compared the rule of law in Poland with the situation in Armenia when asked about the use of the courts: *‘I do not know why but I heard that it takes a very long time to take anything through a court [...] If one compares it with Armenian courts, it is also difficult there’*. The respondent describes his attempt to recover a house nationalised by the Bolsheviks in 1918. *‘Our [Armenian] judge told me: ‘You should go to the President and ask him because I cannot decide. If I give you [the*

affirmative] *decision, then the thousands will arrive [asking the same]’. So, in comparison, the situation [in Armenia] is worse.’*

If the demand for the rule of law had been determined by the distribution of answers to Question 8 on the importance of the various elements of the rule of law, a simple step forward would be an assessment of the discrepancy between how often a parameter is considered as important and its availability, that is, the frequency of answers to Questions 7 and 8 as presented below.

Graph 16. Deficit/Surplus of the attributes of the rule of law (in %).



In both countries, the deficit in ‘*certainty and stability of law*’ is the largest or almost the largest independent of the size of business.

Similarly to the Polish experience invoked before, these concerns also appear in Germany (DE-4): ‘*There is now a new law from the tax office, which is actually valid since the end of December 2019. There is also a transitional period that will soon expire. That is something I would have to take care of. So the tax office now also wants to access all the cash register data. In principle, [...] each individual cancellation is documented and recorded. The tax office can then actually ask at any time, why was it cancelled at that time? I have the feeling that new laws are coming all the time. So, I am very much involved in this everyday business. There are always new regulations on packaging and food labelling. At the moment I have the feeling that if you are such a small company and you do not have your own [legal] department to take care of all these things, it is a bit difficult to keep up with all the regulations.*’

Table 1. Ranking of the rule of law attributes in terms of deficits/surpluses of performance.

	DE-SB	DE-BB	PL-SB	PL-BB
Independence of judiciary	5	5	2	3
Certainty and stability of law	2	1	1	1
Corruption prevention	3	2	5	4
Access to legislators	6	4	7	7
Clarity and congruency of law	4	3	3	2
Transparency of law-making	1	6	4	5
Access to justice	7	7	6	6

Note: The Table presents the ranking of each attribute of the rule law in terms of the deficit/surplus of performance presented in Graph 16. The ranking is provided for each target group on a scale from 1 to 7 (i.e. total number of attributes analysed) with '1' corresponding to the highest gap between how often a parameter is considered as important and its availability (that is the frequency of answers to Questions 7 and 8) and '7' – to the lowest gap, respectively.

As Table 1 shows, countries differ strongly as to the ranking, with the ‘*independence of judiciary*’ ranking first in Poland and near the bottom (uniformly fifth) in Germany. Yet, there is a certain uniformity with the ‘*accessibility of justice*’ ranking the lowest or almost the lowest in both countries. This means that ‘*accessibility of justice*’ was more often assessed as one of the three best functioning attributes of the rule of law while being less often mentioned among the three most important elements. This aspect is discussed in detail in the further sections focused on the analysis of business attitudes towards courts in dispute settlement.

Further, the difference between frequency rankings in our four samples can be measured with Spearman’s rho coefficient of correlation as presented in Table 2 below.

Table 2. Spearman’s rank order (rho) correlation between samples.

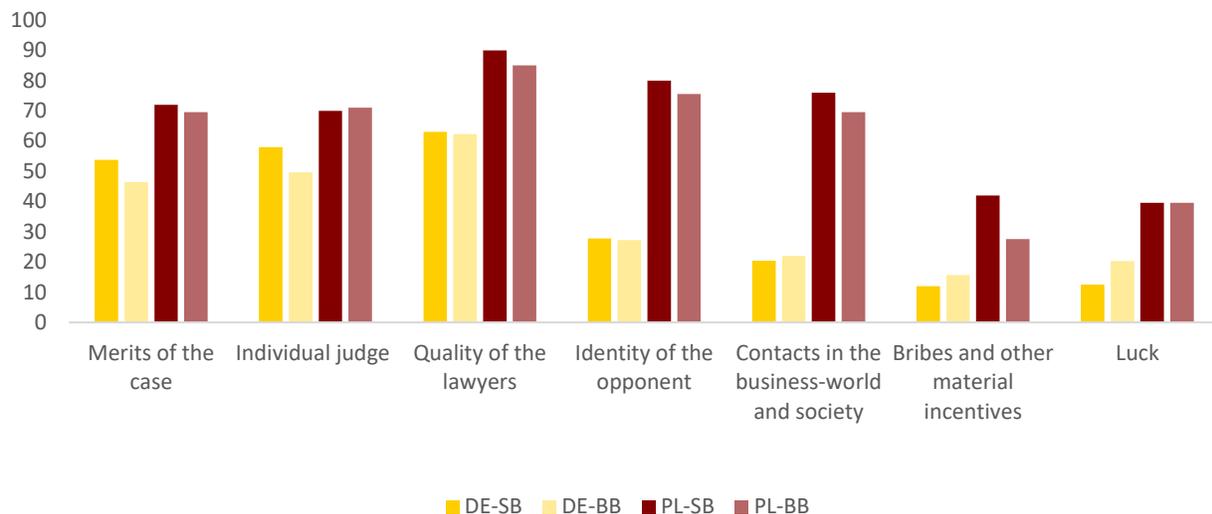
	DE-SB	DE-BB	PL-SB	PL-BB
DE-SB	x	0.429	0.536	0.500
DE-BB		x	0.214	0.643
PL-SB			x	0.929 ***

The orders of frequency differ between the samples as correlations between the rankings are statistically insignificant. The only exception is the correlation between the rankings of Polish small and big businesses (Spearman’s rho = 0.929, p <.002), which showed a high concordance of the order of frequency between two Polish samples. Polish businesses can, therefore, be seen as relatively more homogeneous.

2.3 Impartiality of justice

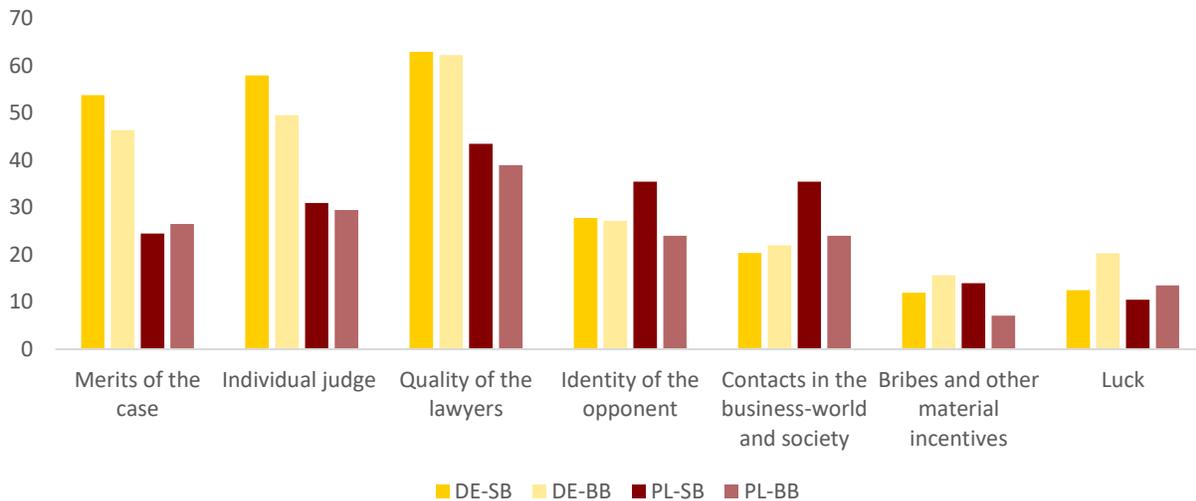
As observed by one of the respondents quoted above, the impartiality of justice is grounded in the independence of the judiciary. In a wider meaning, it is not only independence from the other branches of government but also from all other people, including the disputing parties and their pecuniary or other temptations (including one’s personal humour and passions) that might distract the judge from the task of impartial decision-making based solely on law and justice. Whatever remains hidden within the judge’s conscience, the business public is not always positively impressed by the judicial performance of impartiality as manifested in Graphs 17 and 18 below¹⁴².

Graph 17. Distribution of answers to Question 3 (option a): ‘Imagine that your company has a legal case against another company in a court. In your opinion, which factors have an impact on who wins a case in court?’ (in %).



¹⁴² Due to the unplanned difference in the way the question was posed and coded in both countries, we must content ourselves with two options: (a) the assumption that answers 3 to 5 in the Polish study equal the choice of a given factor from the binomial choice offered in the German study and (b) in my personal opinion, a more reasonable selection of choices for answer 5 (‘certain’) in the Polish study as equivalent of the choice of an attribute in the German study. This why we limit ourselves to the general conclusions that are consistent for both options.

Graph 18. Distribution of answers to Question 3 (option b): ‘Imagine that your company has a legal case against another company in a court. In your opinion, which factors have an impact on who wins a case in court?’ (in %).

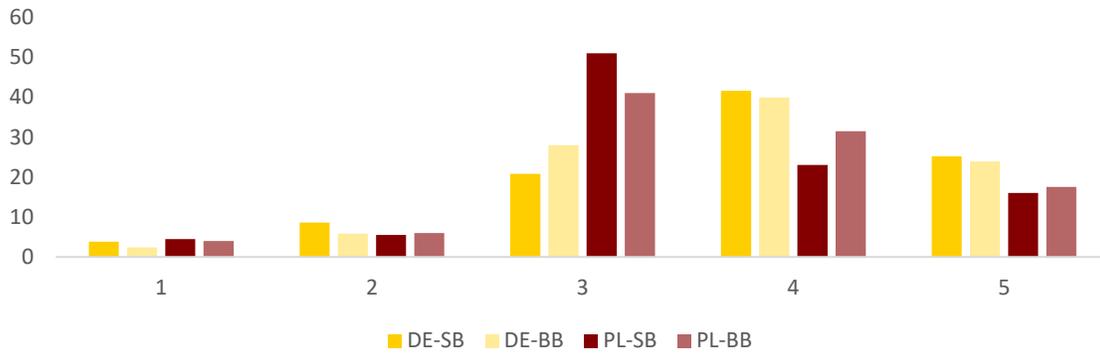


In both countries, however, independently of the options (a) or (b) and the size of the business, the most frequent assumption is that the ‘*quality of the lawyers*’ is the main condition of success in the court. In Germany, it is followed by the personality of judge and the ‘*merits of the case*’, while in Poland the ‘*position of the opposing party*’ and the ‘*social capital that parties dispose of*’ are more often regarded as important. As for the more rarely mentioned factors, neither of the countries under comparison is free from suspicions of bribery or other material incentives behind judicial decisions, though such suspicions are more frequent in Poland, especially among small businesses (only in option a).

The making of a judicial decision that concludes the case at least at the given stage is one thing. Another thing is its implementation. Accordingly, we asked respondents about the chances of effective implementation.

In no country is there a significant difference between small and big businesses with regard to predicting the implementation of the court decision. In both countries, businesses are more optimistic as to the chances of the verdict being implemented in practice, but German businesses are significantly more optimistic in this respect (independently of size) than the Polish ones.

Graph 19. Distribution of answers to Question 4: ‘Let’s assume your company has won a case of this kind in court. How likely, according to your knowledge and experience, is the court verdict to be implemented in practice?’ (in %).

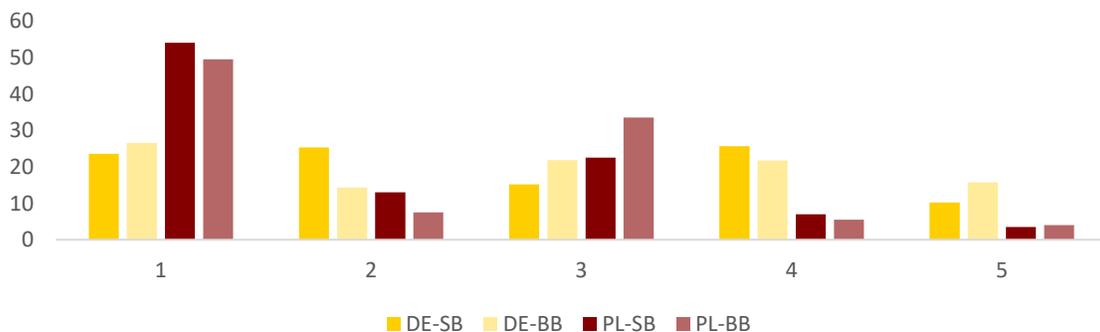


Note: range from 1 (unlikely) to 5 (certain).

2.4 Rule of law in relations with the state

One obvious understanding of the rule of law dates back to times of monarchy when the principle of ‘*non rex regnat sed lex*’ was raised against the absolutist rulers. In this interpretation, the law is above the state administration. The simple test of the state of the rule of law, therefore, is whether the administration abides by the law when dealing with businesses and this was exactly the question we asked respondents.

Graph 20. Distribution of answers to Question 9: ‘How often did you experience that the administration did not follow the rules that govern the relation between administration and enterprises?’ (in %).

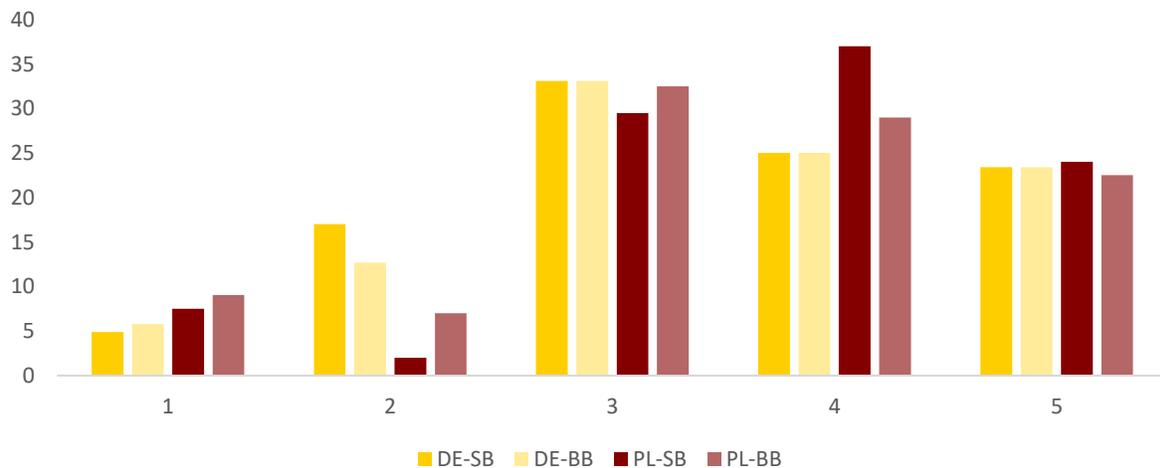


Note: range from 1 (unlikely) to 5 (certain).

The minority of the respondents are on the pessimistic side of the diagram while the majority are optimistic or in the middle position with significant national difference. Polish businesses independent of size are more optimistic as to the legality of the administration than German businesses.

When one of the interviewed respondents (PL-1) was asked about the relationship between the rule of law in citizen-state contacts and business-state contacts, she stressed the continuity between the two: *‘I think that, despite different matters, the relations between business and the state have a lot to do with the rule of law. [...] For instance, there is a legislative proposal [...] allowing that in some circumstances the state may take a firm under its control if the [the entrepreneur] is for instance abusing the law according to a state’s organ [...] This is disciplining the business through the law [...]so] If we do not like a certain entrepreneur [...] and we found something on him, we can take over his business [...] I invented this example to show how law may be used in a disciplinary way against the business in a very discretionary way.’* It is obvious that the public appearance of such legislative ideas in the times of the ‘good change’ (as the ruling parties are calling the abrupt reformation of the Polish state) foments suspicion and distrust on the market. Another possible threat is the preferential treatment of public companies. The respondent also mentioned legislation that risks to undermine fair competition, for instance in the banking sector, where the state is developing policies to nationalise banking.

Graph 21. Distribution of answers to Question 5: *‘According to your knowledge and experience, how likely is it that in adjudicating a dispute between a company like yours and the public administration, the court would act biased and pass the verdict in favour of the administration?’* (in %).

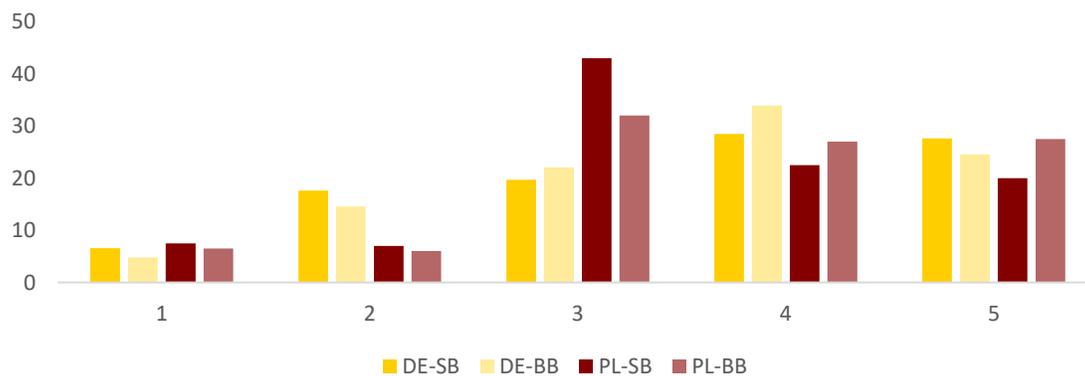


Note: range from 1 (unlikely) to 5 (certain).

In both countries, businesses suspect that in cases of disputes with administration, the courts would favour public administration. We found, however, that German small businesses were less pessimistic than the Polish ones in this regard.

If, nevertheless, the company wins such a trial, the majority of respondents in both countries believe that the verdict would be implemented, with German businesses being significantly more optimistic. However, small businesses in both countries were found to be less optimistic compared to big businesses.

Graph 22. Distribution of answers to Question 6: ‘Let’s assume your company has won a case of this kind (against the administration) in court. How likely, according to your knowledge and experience, is the court verdict to be implemented in practice?’ (in %).



Note: range from 1 (unlikely) to 5 (certain).

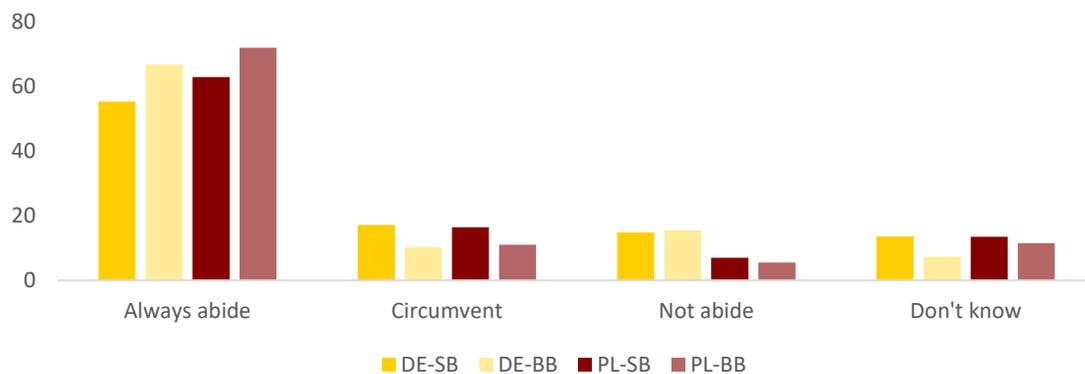
The reality of the rule of law, however, is the world of social interactions that might be – and sometimes are – legally interpreted. In relations between business and the state, it holds true as the sincere explanation of a German small businessperson (DE-4) illustrates: ‘*What I have noticed is that it is extremely important to have a good connection to the controlling organs. For example, the food inspectors who have been coming to us annually for years to check that everything is in order. I get along quite well with them. I consciously tried to find a good level with her because, if in doubt, I can call or email and say: ‘Hey, I am not quite sure if this is the right way to design our labels. Is that the law? Can you look over it and tell me if it fits or not?’ Then that is what she does. Then she says that everything is okay or that we have to look over it again. [Q]: So your experience in dealing with state examination authorities was rather positive then? [A]: Yes, it is like always in life. It is actually absolutely dependent on how you face people. As an entrepreneur you are constantly being tested. There are audits from the pension insurance, health insurance, tax office, general auditing or sometimes only certain areas of accounting. Personally, it is always important for me to have people who check my things on the phone at least once. If anything is*

unclear, I always tell them to contact me so we will sort it out. I think it is important for you to see that you actually have someone who is a good person and who really makes an effort to do everything right. You will then be more merciful if it is not in compliance with the law. You then see that [the officer] did not do it on purpose. Of course, ignorance does not protect from punishment blah, blah, blah. But when you then see that [the officer] really tried hard and maybe something did not work out quite right, you make some improvements and then it is okay. If [the officers] notice that you want to [improve] and you are polite and friendly and do not see them as evil per se but simply as people who do their job and simply represent the tax office, then they are nice.’ This is a clear example of a casual and informal way of addressing regulations that is the core of the sociology of law and in clear contrast with the restrictive and worrisome perception of regulations in Poland.

2.5 Rule of law as abidance by law

On the other side of the spectrum is the abidance of the law by the business itself. This is the most commonly used indicator of legality among sociologists of law, who usually analyse the law in reference to individuals either as citizens or private individuals (Podgórecki , 1966; Fuszara and Kurczewski, 2016; Kurczewski and Fuszara, 2017). Thus, by asking business representatives how they act in the face of laws considered unfair, we are able to raise the issue of legalism within an important yet little explored area.

Graph 23. Distribution of answers to Question 11: Do you agree with the statement: ‘Enterprises should always abide by the law, even if they think it is unfair?’ (in %).



German small businesses were found to be the least inclined to strictly abide by the law. When comparing these figures with our knowledge and findings on Polish society, one is stricken by a

much higher rate of declared legalism among the business representatives compared to the average population as surveyed in the representative samples.

The following story shows how for the general public, as the majority of business representatives are, law abidance may become almost an obsession unless interaction with the official legal field is supported by legal professionals. *‘It is really a bit hard for me right now. I have the feeling that in my everyday life I have to concentrate all my energy on constantly paying attention to the rules I have to implement, the laws I have to obey, and the things I have to adapt in my everyday work to comply with the whole thing. Sometimes I wish I had a little more time to be creative in my profession, to be able to say that I have new ideas for the shop. Things may not be like this right now because of Corona but what can I do for the customers in my [grocery store]? A large part of my energy at the moment goes into thinking that I still have to work [things] off and we have to be à jour [in the store] with the new legislation and so on.’ (DE-4).*

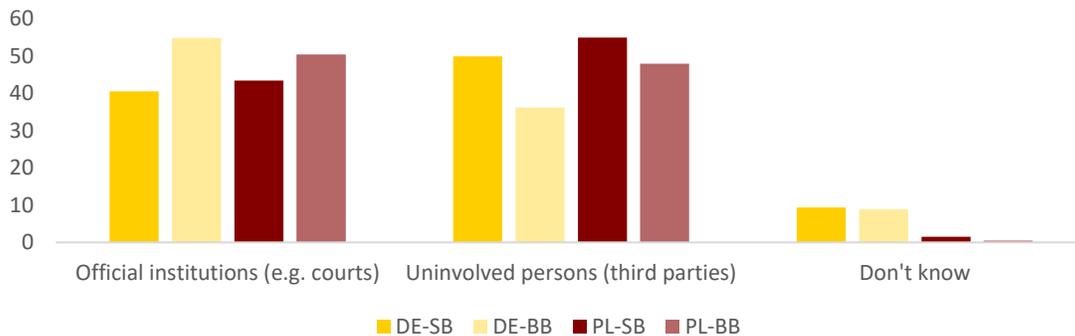
This also applies to interactions with employees as labour law is a specific area where business representatives regularly deal with legal expectations: *‘In our line of business we also do temporary work and, of course, [rule of law] is quite pronounced there. We need a permit to hire out workers, to get which we have to meet certain requirements. You have to apply for it and you only get it for three years. [...] If you do not default, it is converted into a permanent one. So, this job is very much characterised by the rule of law. People from the licensing authority also come here and check the documents to see whether we are doing everything right.’ (DE-2).*

2.6 Authoritative Court of Informal Settlement?

We have already presented the critical opinions on the functioning of justice, especially in Poland. The most critical view was expressed by PL-2: *‘Perhaps when it comes to the law, the judges are brilliant. But please believe me, when the entrepreneur comes before the court [dealing with business issues], this is truly embarrassing experience. [Judges] do not have knowledge about the economy at all yet decide. Same is true for the labour courts. I had to deal with labour courts several times and this was an embarrassing experience. It cannot be the case for somebody who deals with laws – and here I think that [rules] should be absolutely reformed though, of course, not in the way as it is done now [by the government] – [...] as if a medical doctor would know medicine in a general way and would start the surgery not knowing how to operate.[...] Not to speak of the time it takes.’* Although the professional quality of the judiciary was not questioned by other respondents, they have raised other negative aspects when discussing the meaning and functioning of the rule of law in Germany and Poland. These included costs, time, and the need for legal professionals to assist.

The mistrust in the judiciary also derives from the professional nonchalance exhibited by judges who are dealing with thousands of similar cases, each of which is important for the plaintiff and the opponent. This aspect has been well depicted by DE-1, a representative of a relatively small yet formerly big business, when recalling a dispute in which the opposite side’s claims had been non-verbally ridiculed by the judge who: ‘[...] *put pressure on us and we agreed [...] in the end. I was totally perplexed by what happened. My lawyer then explained to me that he experienced this every day in most of his cases because in a settlement the judge dictates two sentences into his recording device: ‘Hereby party XXX agrees to the settlement, 50:50, the case is closed.’ [The lawyer] then get this again in writing, word by word because it was recorded. The case is now closed. But if [the judge] had to pronounce a judgement and actually justify it [...], maybe [the judge] could use an expert. This would mean that [the judge] would have much more work to do and would have come out with 16-17 pages decision at the end. A trifle of EUR 150 is not worth it for [the judge]. He put me under so much pressure with that decision simply [...] because [the judge] shied away from the work. I do not see the judge as necessarily responsible but rather the legal system which is designed that way and with such bureaucracy. That is when I learned that getting justice and being right are two different things. [This situation] made me angry and shattered my confidence in the legal system.’*

Graph 24. Distribution of answers to Question 12: ‘What do you think is better if your company has a dispute with another?’ (in %).



In general, German representatives of small businesses were the least inclined to use the court or another official dispute settlement agency. If hesitant responses are excluded, the figures for the court acceptance ratio¹⁴³ stand at 0.1 and 0.2 for German small and big businesses and 0.12 and 0.02 for Polish small and big businesses, respectively. These results underline the intrinsic

¹⁴³ Defined as the difference between (a) % choosing the court and (b) % choosing the informal mediation divided by the sum of (a) + (b).

inclination of small businesses in both countries for informal dispute settlement. Similarly, the results of the 2014 survey of the representative national sample in Poland showed comparable figures (52%). People in better social positions, however, were found more often inclined to use the courts than people in lower social positions (Kurczewski and Fuszara, 2017).

As one of the German representatives of a small business explained: *‘I always prefer informal [settlement]. I think that [German] courts are so busy with people who want to push through banalities. So, I am always informal first. That is the way we tried with all [disputes] and that I would try in the [dispute] with state. My gut just tells me that the state is not very informal. So, I cannot imagine that the state will sit down at the table with me and find a compromise. Well, as I have come to know the state, it is extremely pedantic. So, if I have a reason to go to the court, the state will be very sure that it is in the right. That is why I do not think there will be a settlement. [Q]: What if there is a dispute between different economic actors? [A]: Then I would definitely try [informal settlement]. I would have hope, especially in [disputes] among entrepreneurs. We have also had 1 or 2 [disputes] where we found compromises and have not had to go to court [...]. And we always found an out-of-court settlement. Entrepreneurs are not as subjective as customers who want to push a [dispute] through out of principle. [Customers] are buying and want the maximum return at the lowest cost. A lawsuit that ends up at 50:50 does not help anyone. [Entrepreneurs] are more objective, so [disputes] are definitely out of court.’ (DE-1).*

Another small business entrepreneur stated the following: *‘[...] most of the dealers we work with we have been working with for years. So here too, it is important to me that we have long-term and trusting business relationships. And most of them are, so you accept [informal settlement] without hesitation. [...] So sometimes we say: ‘Ok we cannot understand but because we have already had such a long, good, and trusting working relationship, they are now accommodating us. I do not know, then we either have a credit on the next order or we get something transferred back or something like that’. This happens quite often. [Q]: So, there has never been a legal dispute? [A]: Nah, that is it if you are referring to litigation stories. [...] We have only had litigations so far because of the food labelling ordinance. [...] But that was really the state just telling us: ‘Okay, you behaved badly, that is not right!’ And in other litigation stories, we were warned by private warning firms, so that did not end up in court and was mostly settled between the lawyers.’ (DE-4).*

This story illustrates the classical knowledge about the use of courts in business and, more generally, in society. A level of tolerance for mutual flaws is needed if parties are interested in

the continued chain of transactions. Hence, one prefers not to upset the working relations by involving official institutions.¹⁴⁴

As a counterexample, it is good to quote here another story told by a Polish businesswoman (PL-2). She described the history of market development in Poland after the transformation from a state command economy into the market economy since the late 1980s. The German company she worked for had difficulties with finding reliable business partners as it was worthy for many to take a pre-payment and simply disappear without performing the contract. It took a number of years until a network of reliable partners was developed and the risk this occurring again became statistically irrelevant.

The decision also relies on direct economic calculations of the relative costs of the involvement of official institutions, as discussed by DE-1: *‘So the legal protection would do that. But then I would have to pay EUR 600-700 a month. I have many locations now. With each location, it gets more expensive. I would have to pay EUR 1,000 a month for legal protection. That means that I would have to pay for three or four cases a month at least. [...] Otherwise, I might as well pay [the disputes] off and not have to do the work. [...] Legal protection just does not make sense because it is cheaper to pay people off than to go to court. Legal protection has never made sense to us.’*

Another respondent (DE-5) also stressed the time factor: *‘However, if a wrong decision or wrong demands are made by authorities, the question always arises whether we take legal action against it or we fulfil them, although we think it is impossible to be done. And the result of the considerations is always that one fulfils the allegedly or actually unjustified demand because it is still faster than to dispute the legal process. Because the legal process takes forever. Take non-paying tenants who, according to the law, have to vacate the apartment. One strives to get this tenant out of the apartment, but it takes [...] nine months in the best case. And in the case of building authorities, that is two years because demands are made on the office for the protection of historical monuments that would not even have to be made. One could sue against it. Then an expert must come. That costs a lot of money and takes a lot of time. It is uneconomical to proceed against it now. From an entrepreneurial point of view, in my field. There are certainly also areas where it makes sense to take action against it. But I have not had to deal with that yet.’*

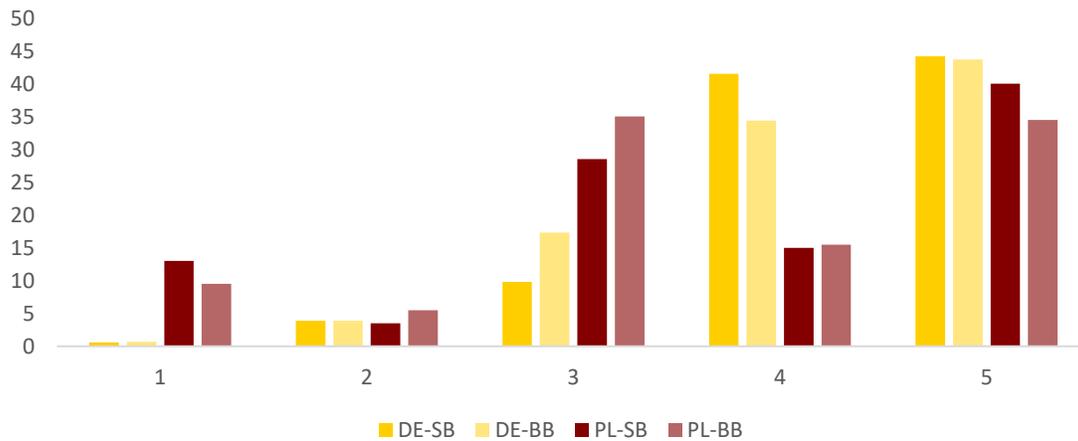
¹⁴⁴ This was the major point in the classic Stewart Macaulay report on the use of law in the American automobile industry as well as in the comparison with the Polish socialist industry as studied by J. Kurczewski and Frieske, K. Macaulay, S. (1977). *Elegant Models, Empirical Pictures, and the Complexities of Contract*, *Law & Society Review*, 11: 507-528.

The same note struck us in one of the Polish interviews (PL-3): ‘*When there is [...] an arbitration tribunal [...] or alike, the talks are always held first. Various kinds of talks. [...] In negotiations, the case is always that each of the parties is willing of something and is afraid of something else. Only if negotiations are running well and we know who is willing what and who is afraid of what, there is a chance for settlement.*’

2.7 Law and the epidemic crisis handling

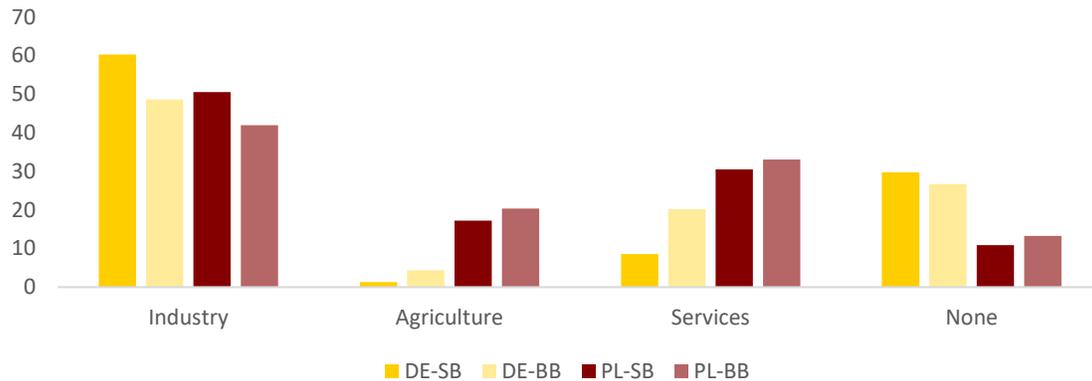
Conducting research during the ‘first wave’ of the COVID-19 pandemic, we had to account for the crisis context. With no doubt, it influenced our findings, albeit it is too early to estimate the potential impact. Of many issues that may be raised with regard to legal intervention during the crisis, expectations of differential treatment of specific sectors are of particular relevance for the discussion of the rule of law. It is important, however, to remember that the pandemic dynamics and state reactions differed significantly between the countries. The interpretation is also influenced by the fast development and instability of the situation in both Germany and Poland.

Graph 25. Distribution of answers to Question 1: ‘*How likely is it that in future legislation or regulation by government and parliament a particular business sector will be given preferential treatment at the expense of others?*’ (in %).



Note: range from 1 (unlikely) to 5 (certain).

Graph 26. Distribution of answers to Question 2: ‘And if you expect bias, which economic sector do you estimate receives preferential treatment by the government after the corona pandemic?’ (in %).



In both countries, businesses predicted the likely preferential treatment of the industry and services sectors. The latter, in particular, was significantly more often selected by Polish businesses. A German respondent from a the small business side (DE-1) described the situation as follows: ‘[...]Most jobs are actually in SMEs. [...] That is where most of the jobs are but they are not as polarised as large public limited companies, for example. If I really look at this Lufthansa deal for nine billion, I understand the intention that Germany must have a linear progression and everything, but there are certainly political reasons for that. But if I were really an artist now, for example, for whom [earnings] really have just dropped to zero, or I am in contact with trade fair organisers [..who] more or less hardly noticed and at the same time, nine billion is somehow put into Lufthansa, it is difficult to communicate. [...] It is certainly true that some are more equal than others. Depending on which lobbyist is the strongest at the moment.’

Some Polish respondents from big businesses were also outwardly critical of the pandemic-induced regulations, especially the lockdown, which hit small businesses hard (particularly, entertainment and gastronomy). This is well illustrated by a diatribe against the lockdown by PL-2: ‘We got here [in Poland] 1,600 deaths [from coronavirus]. What we are talking about for four months? The whole of Poland is locked. Billions of PLN had been thrown in the mud. [...] Most companies will not survive as [the government] had done nothing [...] Polish government had reacted on time and gave much money instead of saying: ‘We are giving you money and the time to think about new business schemes because the reality shall never be the same [as before].’ After four months, a guy from travel business that had been really hit, stands up and tells that he wanted to continue as he still did not have a new business. And asks for more money! [...] But

man, what did he do in these four months in order to save his business? What other areas of activity he entered?'

She comments on the recent case of the urgent purchase of medical supplies by the Ministry of Health from a previously unknown firm that did not fulfil the terms of the contract nor return the payment received from the Ministry: *'This is not even problem of the rule of law [...] but professionalism. If somebody in any company acted in such a way [...] Here we deal with the public money, with big orders [...] one may prepay an unimaginable amount of money to an incredible company [...] For me it is a criminal [case]! And simultaneously they introduce the law that says that the responsibility is removed from persons acting in order to improve security and health during the pandemics. I am asking what their intents are.'* The suggestion in the question is obvious.

While the representatives of small businesses did not discuss whether the macro-level sanitary policies were reasonable, they instead focused on the details of the particular sanitary restrictions that limited their activity. They report, in particular, having adapted to the new rules (e.g. social distancing, among others) following the initial shock. Nonetheless, they remain critical of the ways the central public agencies reacted to the financial hardships of the pandemic situation. PL-6, for example, pointed to the incongruence between the policies of ZUS (Social Insurance Institution) and those of the fiscal authorities: while ZUS had temporarily frozen payments for entrepreneurs, the fiscal authorities demanded payment for the period with null income.

Yet, certain pandemic-related regulations allowed for abuse of the rule of law on the business side. One Polish respondent (PL-1) stated that while exploiting public support programmes, certain employers were lowering salaries. Another respondent shared a story of how companies were starting new similar businesses on the day following the official declaration of their insolvency because bankruptcies were not being registered. This of course allowed these companies to escape their financial responsibilities and spoiled trust in the market.

Another opportunity in the German context was discussed by DE-4: *'[...] Then some of my friends from the restaurant business said that if I had applied for the subsidies, I would definitely get them. But I thought, even if I had the right to do so, I would be ashamed to apply for it because I have a really good income. [...] But I do not think it is unfair if you would say to me: 'Ok, you still earn well, then maybe you could cut a few percentages and just give that to those who are not doing so well.'* Such an ethical component of the rule of law has also been stressed by other respondents, while being most often omitted from the formalistic legal philosophy.

In our interview schedule, the basic question was: *'And would you say it is also an aspect of the rule of law that as an entrepreneur or as a person with property in times of crisis, you also take*

on more social obligations and try in a self-determined way for the benefit of the general public, perhaps to enforce regulations at the expense of your profit, to reduce fees?’

The opinions on the role of the rule of law in the critical period vary. They include a discussion of the role of the state as evident in the following remarks by DE-5: *‘[...] it is difficult to say anything because the state's own obligations are not reduced. Because it would be [somewhat appropriate] if you said that the rent is reduced. But we have costs, we have employees, who must continue to be paid. Whether they are there or not. One could lay them off completely in a short time but that is not the case. They have to be there. [...] we have to keep the product running. If there is a pipe damage now, we cannot say: ‘Yes, sorry, the company is closed for two weeks. Put a plug in it or think of something else.’ We have to improve our service in the housing industry. When I think about it, I think that the state should take over [...] and then the social responsibility component comes through [...]. I believe that it is cheaper than saying now that every businessman should reduce its prices [...]. We have seen that Lufthansa does not make any sales for two months, so it is ready. That was a company that bought up other airlines. It bought up the Austrians, bought up the Lauda, bought up Swiss, bought up everything. [Lufthansa] had two months, two lousy months, no income, and then it is down [...]. So, what are [Lufthansa’s] options for a social response? And with others, it may not be quite so crass, but it is still the case that [companies] have to continue to fulfil their obligations. So, we were allowed to suspend our tax advance, but we still have to pay it later. I think social responsibility should be placed above the state. I am not saying that companies should not get involved. But for a reasonably balanced level to be reached [...] you should get it from the state in retrospect and here we are again with the framework conditions of the state.’*

2.8 Rule of law as a condition for foreign investment

In some of our interviews, it was possible to ask a general question demanding an overall judgment: How important do you think the rule of law is for economic development? To provide for a broader discussion, we extended the question beyond the German-Polish context and included a global actor with a weak rule of law performance – China – as a case study.

‘Well, I think it is extremely important and I think you have to give countries time to develop. So, there is also a change taking place. China of today is not China of 60 years ago. The more [China] opens up, the more other countries will invest there. And there are more international companies there today than there were 20 or 30 years ago. I think that with each step towards more rule of law, China will also attract more investments. [...] For me, that is absolutely connected. The rule of law is very important for investment and growth. So, it is also important in China. I prefer to invest when I know my investment is secure. But it can also be a strength. If they build a highway, it will be built. In Germany, they will discuss it for 15 years. Well, I see a similar situation with

our constitutional state. [...] They have dragged it out so long that the proceedings have now been dropped. You lose your faith in justice.' (DE-1).

But some, calling themselves conservatives, point to the unpredictability of the politico-legal context that would deter them from a hypothetical investment, like in the statement by DE-2: *'I would not put these concerns aside at all, because we are very conservative here. [...] I could not imagine entering into a commitment where such [rule of law] boundary conditions are not fixed, where I have to reckon with the threat of arbitrary action by the authorities or state measures. I would not do that. [...]. But what happens when the wind changes? I follow a little bit what the automobile industry does. I used to work in the industry and there are of course big levers that are operated. There are subsidies for these and subsidies for those and then suddenly the domestic electric vehicles are subsidised and then nobody gets in. It can happen very quickly that something changes there and that would be too risky for me. [Q]: Okay, then, so to speak, the security of having laws that cannot be touched is more important than investment and a powerful state as in the case of China, for example?[A]: Personally, I would feel that way.'*

Another representative from small business is simply examining the balance of power between a foreign investor and the state: *'I think it is very, very problematic, especially for small businesses. As a large company, I would at least have an economic power with which one could reach agreements when faced with disputes. As a small business owner, I would not want to expose myself to this risk'* (DE-3). So only powerful (or criminal) businesses will invest in the unruly state which still must offer certainty and stability to attract foreign direct investment. And it does, as the Polish respondent with experience in a large international company comments, saying that there is hypocrisy on part of the West: *'China [...] discovered the golden mean. They separated guarantees of safe investments from the safeguards for the whole [Chinese] society. [...] They exploited the Western hypocrisy as, on one side, there is all this concern about the rule of law and, on the other side, the long queue of foreign investors. [...] I think that greed is the danger for civilisation. [...] They would adapt to anything and everything will be justified.'* (DE-2).

But if we listen carefully to what another German small business representative says in terms of the international differentials of the risk-taking behaviour, it is obvious that we come back to stability and certainty of law as the commonly shared attribute of the rule of law. *'It certainly depends on the state and how it behaved in the past. Is the state structured in such a way that it is more likely to make the right decisions? Even if the rule of law is not so strong, it has its own rules. And, in the case of abuse, it also takes more drastic action than a constitutional state. In China, I believe that many companies that benefit from this cannot ignore the market. There was also the time of counterfeiting, and yet the companies invested there because the expectations of profit were significantly higher than the risk. I could not imagine anything similar in Congo, in Myanmar or anywhere else. Because there the consistency is not there.'* (DE-5).

Respondents from Polish big businesses take this element of differentiation from the local perspective when speaking of China. *‘I think it is of colossal importance’* – says DE-1: *‘I am speaking from the perspective of somebody who worked in a global company. We had been doing what [we are doing now] as the Polish chapter of the local company. And this company left the Polish market exactly when the government changed, and the present government withdrew itself from the private-public partnership. As this global company had several foreign owners (Australians, British and then Americans), I had an experience working with different owners within the Anglo-Saxon system. And all but above all the Americans have had, I would say, a decalogue [...] of what are the indispensable conditions of business activity in a given country. And I remember that when Americans were taking over, although it was under the previous [liberal] government, Poland was at the dark end in the ranking together with South Korea and Saudi Arabia. It means that [Poland] had been treated as the high-risk country in terms for corruption [...] already then. I remember that under the Due Diligence Procedure I had to present many more documents and proofs that we are acting transparently, law-abiding, honestly, ethically etc. [...]. Already then I had a feeling that despite rankings we are seen with suspicion in the business [...] So now, especially in the present situation, I think [rule of law] is of great importance when it comes to deciding whether to invest [in Poland] and in what way [...]. Statistics show that since the PiS government assumed power, there is a fall in the long-term investments [...] and a rather ‘hit and run’ investment dominates.’* (DE-1).

And the differential treatment of countries is reflected in another businesswoman’s comment on Western investments in China: *‘This [rule of law] is of colossal importance. Since Poland acceded to Europe [...] in 2004 there was a sudden outburst of foreign investment in Poland. The confidence in European legal order is great. The firms entering Poland had been certain that the international law is at their defence, not any local one. Not only ‘incentives’ offered by a state determine the decisions on investments. [...] very often it is the internal company’s strategy. The product must be produced first at a location where there is the demand and from which it may be transported to the neighbouring countries and not at another hemisphere that would lead to transportation costs killing the profit.’*

Thus, the relationship between the rule of law and investment decisions is seen in general as derivative of the economic calculus in which the rule of law itself is not the highest value unless certainty and stability are secured in any way. Otherwise, ‘hit and run’ tactics pay off.

3. Conclusions

When it comes to the importance of the elements of the rule of law for business, *‘certainty and stability of the law’* and *‘independence of the judiciary’* were most often recognised as the most

important components independent of the country and business size. The opinions of the national samples, however, differed significantly with regard to the other elements of the rule of law.

Further, while being uniformly recognised as the most important aspect of the rule of law, *'certainty and stability of the law'* also suffers from the highest supply deficit in both countries. This implies a relatively lower level of business representatives' satisfaction with the fulfilment of this element by the state. More importantly, however, we find a significant degree of criticism towards the state of the rule of law in both countries. The representatives of the small and big businesses in Germany, in particular, stand out with about one-third of them stating that *'none'* of the listed rule of law elements is being fulfilled in the country.

Concerning trust in the state and the judiciary system, in particular, we find *'quality of the lawyers'* being the most frequently recognised as the most important condition of success in court. The results from Poland, however, underline a relative distrust in the judiciary system with the *'position of the opposing party'* and *'social capital that parties dispose of'* being among the most important factors in the trial. On the other hand, the survey results and insights from the in-depth interviews in Germany showcase a relatively higher degree of trust. Yet, neither of the countries under comparison is free from suspicion of bribery or other material incentives behind a judicial decision.

As to the abidance of the public administration by law, we found German businesses to be more pessimistic with this regard independent of the business size. When analysing this result in the context of the recent political conflict in Poland, it is important to consider that the experience accumulated by the respondents comes from a lengthier time period, hence it has not necessarily been significantly affected by the recent breaches of judiciary independence in the country.

At the same time, it is apparent in both countries that official institutions and courts are often associated with high costs in terms of time and money. For small businesses, in particular, this tendency results in a higher inclination to resort to informal mediation and negotiation. The respondents also noted a need to improve the economic expertise and professional diligence of the judiciary.

One of the most important findings includes a high inclination to strictly abide by the law among Polish firms, especially big business representatives. This underlines structural differences in the perception of the rule of law and its role in society. As confirmed by the interviews, Polish firms perceive the rule of law and its execution by the state in a restrictive if not punitive perspective, which contributes to insecurity. The responses of the German interviewees, however, showcase the supportive and transaction cost-reducing properties of the rule of law, hence a more positive reception and higher trust in the state.



Finally, while the effects of the COVID-19 pandemic on the rule of law in these countries have yet to be fully realised, we find an almost unanimous expectation of preferential treatment to the industry and services sectors by future government regulations.

B. Rule of Law and its Effect on the German and Polish Economy: empirical results

1. Methodology and Data

In order to examine the effect of the rule of law on economic outcomes in Germany and Poland, we fashion a two-step approach to first estimate the drivers of the rule of law and plug in these results into a second equation examining the relationship between standard attributes, the rule of law, and economic improvement.

For the first step, we are immediately hindered by the reality that there is, as of yet, no concrete economic theory of the determinants of the rule of law. A first attempt came from Hartwell (2018), who noted that previous econometric attempts at working towards the drivers of the rule of law tended to equate democracy with rule of law, and thus focused on determinants of democracy rather than the rule of law *per se*. Papers such as Acemoğlu and Robinson (2005), Csordás and Ludwig (2011), and Moller and Skaaning (2014) focused on the role of economic development, political legitimacy, and general political trends globally in forging democracy. Unfortunately, many of the variables which have come out of this literature take a long and somewhat obsessively cultural view of democracy's genesis, focusing on mostly time-invariant attributes such as dominant religion, country size, or colonial origin (while other time-invariant determinants tend to be very clustered around specific events, for example, in urbanisation).

However, while there is some overlap between the two, it is not one-to-one, meaning that a country can be a democracy but still have only a tenuous grasp on the rule of law (as voters discover they can support candidates against the rule of law). Moreover, the rule of law is a much more volatile metric than the overall presence of democracy, meaning it is more likely to be influenced by short- and medium-term drivers as well as longer-term cultural attributes. In order to separate out rule of law from democracy, we need to fashion a specification which focuses on the issues which drive rule of law specifically. Such a baseline model would be similar to Hartwell (2018) but would also allow for issues related to the availability of data for our two countries:

$$(1)RoL_{it} = \alpha + \beta POL_{it-1} + \gamma MACRO_{it-1} + \delta INTERNATIONAL_{it} + \theta \Delta MONEY_{it} + \varepsilon_i$$

The dependent variable, *Rule of Law (RoL)*, is the 'rule of law' indicator taken from the Varieties of Democracy (V-Dem) database (Coppedge et al., 2019). The measure itself attempts to answer the question, 'to what extent are laws transparently, independently, predictably, impartially, and equally enforced, and to what extent do the actions of government officials comply with the law?' (*Ibid.*: 232). In terms of practicality, it is a continuous index with values from 0 to 1 comprised of several sub-indices, including compliance with the highest court, judicial independence,

transparency in laws, and other important facets of the rule of law. Given its focus on legal indicators exclusively, it makes an excellent baseline measure for measuring the extent of the rule of law in Germany and Poland.

Extending Hartwell (2018), rule of law is presumed to be a function of four categories of independent variables, shown in *Equation 1*: political determinants, macroeconomic determinants, international organisations, and monetary regime-specific determinants. We delve into them deeper below, with summary statistics of all indicators shown in Table 3.

Table 3. Summary statistics of variables.

Variable	Obs	Mean	Std. Dev.	Min	Max
Rule of law	374	0.701	0.279	0.121	0.994
Income-based capital per worker	155	1.832	1.589	0.109	5.614
Exports to GDP	262	0.127	0.139	0.013	0.626
Change in GDP	332	0.019	0.052	-0.509	0.182
CPI change	307.000	20.638	361.181	-1700.000	5140.60
Primary school enrolment per capita	284	1200.677	399.665	350.000	1799.00
Regulation of participation	320	1.931	13.162	0	5
Government crises	442	0.195	0.702	0	6
Political concentration	300	0.626	0.318	0.135	1
Polity 2	310	0.216	7.956	-10	10
EU Member	441	0.181	0.386	0	1
EU Accession	441	0.023	0.149	0	1
GATT/WTO Member	442	0.281	0.450	0	1
NATO Member	442	0.199	0.400	0	1
OECD Member	442	0.195	0.396	0	1

Political Determinants

The rule of law is in many ways dependent upon the current arrangement of political institutions (Hartwell and Urban, 2020), and thus it is natural to take into account these institutions in determining the level of the rule of law. Democracy and rule of law, as noted, are usually conflated due to the overlaps between the two, but there is no argument that democracy contributes to higher levels of the rule of law (De la Croix and Delavallade, 2011). We thus include the Polity V

‘polity2’ measure to capture if Poland or Germany were at that particular moment in time more or less democratic.

Another area of promise as a key determinant of executive constraints relates to political competition, as Besley et al. (2016) and Karakas (2016) show that leaders who have a lower probability of being replaced are less likely to introduce reforms that constrain the executive with predictable and transparent rules. To examine these effects, we utilise several indicators, each capturing different facets of the political landscape: first, the Polity V ‘Regulation of Participation’ measure is used, referring to the binding rules on when, whether, and how political preferences are expressed. This indicator can proxy for the number of veto points, which has been shown to be crucial in preserving the rule of law (Tsebelis, 1995) and is coded so that higher values correspond with more regulation of participation. Additionally, a variable for political concentration is also included, constructed from data from the Cross-National Time-Series (CNTS) Data Archive. This measure is formed as the ratio of seats of the largest party in parliament to the total seats available, resulting in a percentage between 0 and 1; higher levels of concentration are expected to result in lower levels of rule of law.

Krone (2014) offers an extensive list of political and social determinants of the rule of law, including (as noted above) ethnolinguistic fractionalisation (EF), which, while theoretically sound (countries which have high levels of EF tend to have lesser-quality institutions, as in Butkiewicz and Yanikkaya [2006]) suffers from data availability issues. Instead, we focus on the role political volatility may play in disrupting rule of law, with the rapid turnover of governments inducing uncertainty and an attempt to change the rules in one’s favour quickly before being turned out again. To capture this possibility, we include the CNTS measure of ‘major government crises’, which refers to situations with the potential to bring down the current government (but stops short of events such as overthrows or *coup d’états*).

Macroeconomic determinants

Political institutions can be either the generator and guarantor of the rule of law or its destructor, but they also may be aided by prevailing economic conditions and the fiscal stance of a government. For example, democracy and rule of law tend to be associated with economic growth, and thus including a suitable proxy for economic activity could isolate these effects (Skaaning, 2010). In the first instance, we include a measure for real GDP growth, taken from the Maddison Historical Statistics database and augmented by real GDP growth data for the past decade calculated from the World Bank. Our theory is that richer countries should be correlated with higher executive constraints and higher levels of rule of law.

Human capital is also a possible determinant of the rule of law, as a more educated populace is likely to demand transparency and predictability in their dealings with authority. Given the

coincidence of political participation in both countries and the move towards universal education, we utilise the per capita enrolment rates for primary education as a proxy for human capital, on the theory that it was not until widespread schooling at the most basic levels (including literacy) took hold that substantial political change could be effected. The data here comes also from the CNTS database, supplemented in recent years with data from the statistical bureaus of both Poland and Germany.

As the last indicator in this vector, trade can be a boon to democracy: Acemoğlu et al. (2005b) note that countries which engage in free trade create commercial interests which act as a counterbalance to political institutions, creating checks, balances, and rule of law. Their analysis only applies to non-absolutist countries, however, as countries which began with relatively more free political institutions saw their opening increase, while those who had monarchies which were absolutist saw little to no gain economically from trade – and the crown was able to control trade, making it less effective in forcing the adoption of the rule of law. Indeed, highly export-dependent countries may also create a stream of rents to attract politicians, which can then aggrandise power to themselves but remain reliant on trade to maintain power; as Rogowski (1987) noted, trade-dependent developing economies often result in the most punitive of executive power (he says ‘serfdom or slavery’) in order to maintain competitiveness. Thus, while trade can have a beneficial effect on a developed economy, for a country at earlier stages of development, exports, in particular, can be associated with less executive constraints. With Poland and Germany having undergone stages of absolutism in their history, it is less likely that trade was able to contribute to the rule of law.

International organisations

Membership in international organisations may have two effects on the rule of law, both salutary: first, setting ones sight on membership of an organisation may push along the development of the rule of law, providing a goal for a country (as with EU accession for Poland as part of its post-communist transition), and second, maintaining membership might require maintaining a level of rule of law (although the EU fails here as a specific example, again in the case of Poland). On the other hand, it is possible that only certain international organisations might facilitate rule of law (such as economic ones, see Chyzh [2017]) or, even more likely, international organisations instil inertia in a country, meaning that rule of law no longer moves forward and even may backslide as the costs of removing a member is prohibitive. To capture these possible external effects on rule of law, five organisation-specific dummies are utilised in the various specifications which follow:

- *EU Accession*: A dummy taking the value of 1 for each year that a country was in Accession status (i.e. had already signed the Treaty to accede) and 0 otherwise;

- *EU Membership*: A dummy taking the value of 1 for each year that Poland or Germany was a Member State of the EU, 0 otherwise;
- *GATT/WTO*: Coded as 1 for each year that the country was a member of either the General Agreement on Tariffs and Trade (GATT) or its successor, the World Trade Organization (WTO);
- *NATO*: A 1 is recorded for each year that the country was a member of the North Atlantic Treaty Organization (NATO), 0 otherwise; and
- *OECD*: A dummy taking the value of 1 for each year that the country was a member of the Organisation for Economic Cooperation and Development (OECD).

We anticipate that all of these may have a positive effect, although EU membership may be the most problematic, given Poland's opposition to the EU in the post-2015 era.

Monetary regime-specific determinants

Finally, as shown in Hartwell (2018), monetary policy can also have a massive impact on the rule of law, as profligate monetary policy leads to an increase in non-market transactions and increases the power of the state (see also Koyama and Johnson, 2015). To capture these effects on rule of law, included in the regressions is the change in inflation rates (as measured by the consumer price index in each country); it is hoped that this variable will proxy for overall monetary policy stance in a country, albeit likely with a lag.

The estimator utilised for the baseline regressions (with the RoL variable) is a standard fixed-effects regression with the country (Poland or Germany) as the absorbing variable to capture time-invariant country-specific attributes. As the time series for each country runs for over a hundred years, the well-known biases in fixed-effects regressions are alleviated. Additionally, given that these econometric methods are being utilised in an environment where endogeneity may be an issue (given feedback among institutions and to/from macroeconomic variables), we also include a series of Granger causality tests to ascertain in which direction the Granger causality may run. The standard caveats apply for the interpretation of Granger causality – not strict causality but instead, as Granger himself preferred, an explanation of ‘precedence’ in sequential relationships – but more important for this examination, the Granger tests allow us to check for the strong exogeneity of the variables. Put more simply, the Granger causality test acts as a block exogeneity test, confirming if our variables are exogenous within this specification. This is crucial, as Plümper and Troeger (2019) remind us, fixed-effect specifications are unbiased only under a strict exogeneity assumption (which Granger causality, being modelled through a vector autoregression [VAR], test for).

As the ultimate question we are interested in solving is the effect of the rule of law on economic outcomes, for the second step, we utilise a modified version of the Two-Stage Residual Inclusion

(2SRI) approach, which utilises residuals from our initial regression of determinants of rule of law as additional regressors in the subsequent, second-stage regression relating our economic outcome of interest with rule of law and other covariates (see Terza et al. [2008] for an excellent discussion of the benefits of 2SRI). For this examination, we take productive investment as the metric of economic success, given that every growth model has investment as either the core driver of the economy (neoclassical growth models) or as a key driver of growth (endogenous growth models). For this model, however, we focus on productive investment, which is calculated (as in Van Leeuwen and Földvári [2013], where the base of this data comes from) as ‘income-based capital per worker’, or the capital accrued over the lifespan of a worker whose income increases over time. Thus, with this measure of investment as a dependent variable, we have a specification which can be shown as:

$$(2) Y_{it} = \overbrace{\vartheta RoL_{it-n}} + \mu MACRO_{it-1} + HumanCapital_{it} + \varepsilon_i$$

Where Y is our per capita capital measure, RoL is the residuals from the rule of law equation (1), and $MACRO$ is a vector of macroeconomic attributes drawn from the literature. Data is particularly difficult to come by for the 19th century in Germany or even the early 20th century in Poland on investment, and thus this specification will be parsimonious indeed. In particular, under the Macro vector, we will include real GDP growth, electricity production (to proxy for industrial manufacturing), growth of exports (to proxy for demand for serving markets beyond one’s own, as well as to alleviate any non-stationarity), and increases in the currency in circulation (to proxy for inflation).¹⁴⁵ The *Human Capital* vector takes an additional measure, secondary school enrolment per capita, to proxy for the demand for the specific type of capital which we are measuring. It would be ideal in this situation to also have financial sector measures to capture the supply of capital, including interest rates or measures of financial depth; unfortunately, in order to utilise such data, we would have entailed substantial losses of observations, as information such as domestic credit is only available starting in the 1990s for Poland (and the 1970s for Germany). Additional work needs to be done in obtaining data of a longer time series to make this feasible.

As with the first specification, and in the absence of suitable instruments across the two countries, we eschew the use of dynamic panel models in favour of a fixed-effects specification. Given that we are utilising fitted values from the first stage, standard errors are calculated using bootstrap methods with 500 repetitions.

¹⁴⁵ As change in the consumer price index (CPI) was utilised in constructing the fitted rule of law, we shift to a more immediate indicator of monetary policy, namely currency in circulation. Such a measure is likely to be far more responsive to demand for investment and also more immediate in terms of central bank monetary policy, and thus is superior in this specification.

2. Results

The results of the various models for the first stage regression, delving into the determinants of rule of law, are shown in Table 4, with the results of the Granger causality tests shown in Table 5. Starting with the dependent variable of *RoL* (Table 4), we have six different models, one which includes each international organisation in a stepwise manner and one which has all of the international organisations brought together. As can be seen across the six models, countries which have more open political systems consistently have a higher level of rule of law, as higher regulation of participation results in lower results on the RoL index for both Poland and Germany. The incidence of government crises is also statistically significant, with each crisis resulting on average in a two-percent drop in the rule of law index; political concentration also correlates negatively with rule of law, although it is only marginally significant in half of the specifications (including the final one, including all international organisations). Finally, the statistical significance of democracy in determining rule of law is consistently large, with each increase in the Polity 2 indicator corresponding to an additional two percentage point increase in the rule of law index.

With regard to the macroeconomic variables, for the most part, the variables behave as anticipated, although exports are insignificant in most specifications and growth of GDP (rather than its level) is associated with lower levels of rule of law, while more urban countries also tend to see more constraints on the executive. Primary school enrolment was perhaps the strongest statistical correlate with rule of law (albeit with a small economic influence), subject to caveats noted below. Similarly, the monetary variable has a consistently negative effect on rule of law, albeit at a similarly small level of economic significance.

The final vector of determinants, international organisations, are shown across each specification: taken singly, only OECD and NATO membership appear to be correlated with rule of law, with both EU accession and EU membership not significant and GATT/WTO membership having almost zero effect. When all organisations are included, however (Column 6), OECD membership retains its significance but there is also an effect of being an EU accession state, likely capturing Poland's experience in the 1990s and early 2000s. Both of these effects are significant at the 5% level, but the possible overlap between organisations should give some pause on the definitive nature of these relationships.

The Granger causality tests for these variables are shown in Table 5, confirming the exogeneity of the right-hand side variables; in particular, democracy and political concentration appear to Granger-cause rule of law, rather than the other way around. The only problematic variable that emerges from this examination is primary school enrolment per capita, which shows as weakly endogenous (being Granger-caused by rule of law at the 10% level). However, when this specific variable is eliminated from the regressions (not shown for reasons of space), the relationship

among the other variables of note does not change, with the only shift being in the OECD regression, where the OECD variable appears to pick up the effects of high levels of education. Otherwise, the weak endogeneity of school enrolment does not appear to bias the results unduly.

Table 4. First-stage results, rule of law as the dependent variable.

	1	2	3	4	5	6
<i>Political variables</i>						
Regulation of participation	-0.003	-0.003	-0.003	-0.003	-0.003	-0.003
	6.54***	6.01***	6.15***	5.30***	5.84***	5.32***
Government crises	-0.03	-0.02	-0.02	-0.03	-0.02	-0.02
	3.47***	3.45***	3.16***	3.58***	3.18***	2.82***
Political concentration	-0.02	-0.03	-0.03	-0.03	-0.04	-0.04
	1.22	1.53	1.76*	1.31	1.79*	1.82*
Polity 2	0.02	0.02	0.02	0.02	0.02	0.02
	8.80***	10.29***	9.64***	10.21***	10.17***	9.62***
<i>Macroeconomic variables</i>						
Change in exports/GDP	0.49	0.51	0.48	0.51	0.50	0.47
	1.54	1.68*	1.63	1.59	1.66*	1.50
Real GDP % change	-0.39	-0.37	-0.37	-0.38	-0.38	-0.38
	2.41**	2.35**	2.34**	2.27**	2.37**	2.38**
Primary school enrolment per capita	0.0001	0.0001	0.0001	0.00009	0.0001	0.0001
	2.75***	2.59***	3.10***	2.25**	2.82***	2.72***
<i>Money</i>						
CPI change	-0.00005	-0.00004	-0.00004	-0.00005	-0.00004	-0.00005
	2.13**	2.09**	2.32**	2.32**	2.11**	2.37**
<i>International Organisations</i>						
EU Accession	0.03					0.04
	1.51					2.18**
EU Member		0.02				0.01
		1.35				1.02
OECD Member			0.05			0.02
			2.90***			1.99**
GATT/WTO Member				0.006		0.004
				0.33		0.23
NATO Member					0.04	0.02
					2.02**	1.63
F stat	218.57	159.21	163.23	172.4	157.71	176.28
R-squared	0.807	0.807	0.81	0.806	0.808	0.811
N	217	217	217	217	217	217

Note: Absolute value of t-statistics under coefficients. *, **, *** denote significance at the 10%, 5%, and 1% level respectively. Panel fixed-effects regression with robust standard errors.

Table 5. Granger causality tests of all variables in Model 1 (RoL as the dependent variable).

Null Hypothesis:	Obs	F-Statistic	Prob.
Regulation of Competition does not Granger Cause Rule of Law	301	0.04671	0.9544
Rule of Law does not Granger Cause Regulation of Competition		0.02552	0.9748
GDP Growth does not Granger Cause Rule of Law	285	3.06207	0.0484**
Rule of Law does not Granger Cause GDP Growth		1.56722	0.2104
EU Membership does not Granger Cause Rule of Law	364	0.07609	0.9268
Rule of Law does not Granger Cause EU Membership		2.14073	0.1191
EU Accession does not Granger Cause Rule of Law	364	0.04244	0.9584
Rule of Law does not Granger Cause EU Accession		0.22669	0.7973
Exports to GDP does not Granger Cause Rule of Law	254	0.66665	0.5143
Rule of Law does not Granger Cause Exports to GDP		1.84821	0.1597
GATT/WTO membership does not Granger Cause Rule of Law	364	1.16651	0.3126
Rule of Law does not Granger Cause GATT/WTO Membership		0.81678	0.4427
Change in CPI does not Granger Cause Rule of Law	294	0.30099	0.7403
Rule of Law does not Granger Cause Change in CPI		0.05193	0.9494
Democracy (Polity 2) does not Granger Cause Rule of Law	295	136.077	0.000***
Rule of Law does not Granger Cause Democracy (Polity 2)		1.15484	0.3166
Political Concentration does not Granger Cause Rule of Law	285	17.1707	0.000***
Rule of Law does not Granger Cause Political Concentration		1.24023	0.2909
Primary School Enrolment does not Granger Cause Rule of Law	267	0.29451	0.7451
Rule of Law does not Granger Cause Primary School Enrolment		2.62654	0.0742*
NATO membership does not Granger Cause Rule of Law	364	0.13137	0.8769
Rule of Law does not Granger Cause NATO membership		2.30286	0.1014
Government Crises does not Granger Cause Rule of Law	364	1.91611	0.1487
Rule of Law does not Granger Cause Government Crises		0.92462	0.3976
OECD Membership does not Granger Cause Rule of Law	364	0.11189	0.8942
Rule of Law does not Granger Cause OECD Membership		2.23678	0.1083

Note: *, **, *** denote significance at the 10%, 5%, and 1% level respectively. Pairwise Granger causality tests performed with 2 lags, chosen from an unrestricted VAR and standard information criteria.

Choosing the model to base our second-stage on can be done in a number of ways, but we rely on tried and true methods and utilise commonly referenced information criteria. In particular, we examine which model in the first stage minimises the Akaike Information Criterion (AIC). Of the six models shown in Table 3, the AIC (as well as the Bayesian Information Criterion) is minimised for model 3, including the OECD dummy. Thus, we save the residuals from this regression and utilise them in the second-stage regression, shown in Table 6.

Table 6. Second-stage results, rule of law and investment.

	1	2	3
<i>Political variables</i>			
Rule of Law (-1)	0.92		
	3.02***		
Rule of Law (-2)		1.01	
		2.68***	
Rule of Law (-3)			0.89
			1.51
<i>Macroeconomic variables</i>			
Real GDP % change	-1.12	-1.21	-1.07
	1.30	1.15	1.01
Electricity production	0.00003	0.00004	0.00004
	11.87***	12.01***	12.49***
Change in currency	-0.15	-0.18	-0.17
	0.93	0.97	0.95
Growth of exports	12.49	12.25	11.89
	3.36***	3.17***	3.00***
Secondary school enrolment	0.002	0.002	0.002
	6.97***	6.63***	6.96***
C	0.56	0.57	0.57
	7.57***	7.16***	7.06***
R-squared	0.95	0.95	0.95
n	124	121	118

Note: Absolute value of *t*-statistics under coefficients. *, **, *** denote significance at the 10%, 5%, and 1% level respectively. Panel fixed-effects regression with predicted rule of law from the first stage regression. Standard errors are done by bootstrapping, 500 replications for each model.

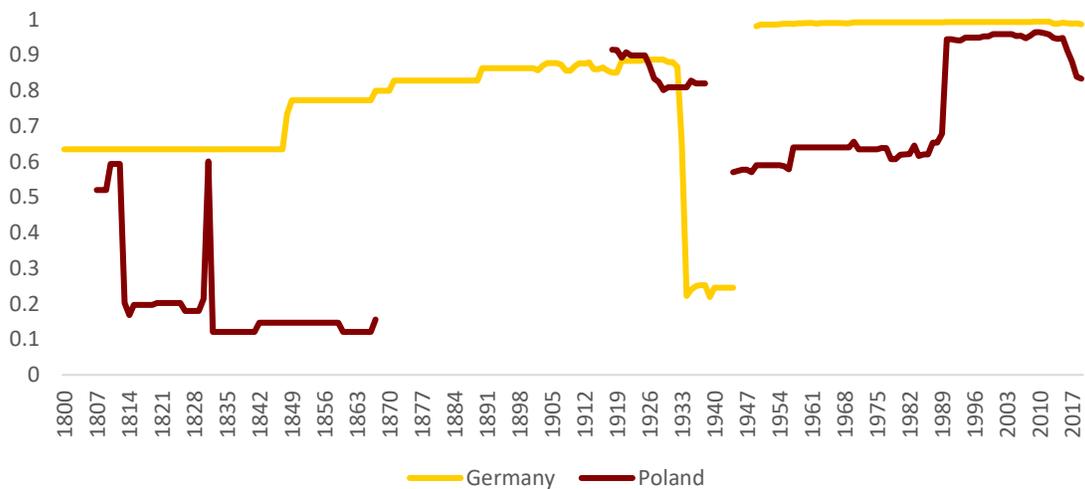
The results of the second-stage, as noted, relate investment (as measured by income-based capital per worker) to a number of macroeconomic metrics in addition to our constructed rule of law measure. Shown in Table 6, the results of the fixed-effects model show the importance of the temporal element of the rule of law in determining investment, as both the first lag of the rule of law and the second lag have a significant effect on investment in the following periods. Given the

scaled nature of the investment variable and the fitted rule of law variable, the effects here need some interpretation.

Considering the historical performance of both Poland and Germany (see Graph 27), the shift from the current level of rule of law in Poland to its historical maximum (i.e. 0.964 in 2009-2010) would result in an increase in its income-based capital per worker of an additional USD 3,216.40 (in 1990 constant USD). A further increase to the maximum level of rule of law experienced in Germany (i.e. 0.994 in 2012 Germany) would result in an additional USD 6,720.95 per worker. Similarly, if rule of law in Germany was to increase from its current level (i.e. 0.989 in 2018) to its 2012 maximum, the country would see a gain in capital of about USD 1,190 per worker.

Conversely, if Poland and Germany were to suffer lower levels of rule of law, their workers would see a sizable decrease in capital. In the case of Poland, the shift to its 1986 level would lead to a loss in capital of USD 11,240.12 per worker. Similarly, German workers would see USD 7,911.78 less capital if the current level of rule of law in the country would decline to today's performance of Poland.

Graph 27. Historical levels of rule of law in Poland and Germany, 1800-2019.



Source: Varieties of Democracy (V-Dem) dataset.

The effects on income-based capital per worker begin to peter out the further away we examine the level of rule of law (starting in year 3 and persisting for years after that), meaning that the domino effects of poor rule of law are substantial indeed as well as immediate. Put simply, given the opportunity cost – not just today but in future years – of foregone investment, recent year rule of law is crucial for building up an adequate level of investment for workers.

3. Conclusions

Using a novel 2SRI estimation on a new database of Polish and German variables, we found that level of rule of law can be predicted strongly by both political and macroeconomic conditions. Plugging these results into an equation relating investment to rule of law, we found that rule of law does indeed also positively impact investment, quite substantially over the life cycle of a worker and almost immediately. These results show how decisions affecting the rule of law have longer-term ramifications for a country, and that lower levels of rule of law can ultimately result in far lower levels of investment and, hence, development.

Summary and Conclusions

By combining the insights of our *de jure* and *de facto* analyses of the rule of law and its social reception, we find intrinsic divergences in terms of the understanding and the execution of the rule of law in Germany and Poland.

Our sociological results, in particular, show that many Polish firms consider rule of law as formal rule-obedience which is primarily their responsibility *vis-à-vis* the state. At the same time, the state is largely mistrusted by Polish business representatives with '*position of the opposing party*' and '*social capital that parties dispose of*' being recognised as two of the most important factors for a successful trial in 35.5% and 24% of cases by small and big businesses, respectively. Such distrust towards the Polish state helps explain why large portions of Polish society are relatively indifferent to breaches of the rule of law by the government with regard to judiciary independence, political opposition, and free media, among others. When analysed from a historical perspective, these findings can probably be related to the long periods under foreign rule (168 years in the 19th and 20th centuries), including the old imperial powers and, more recently, the Communists. In Germany, on the other hand, firms view the rule of law more as an instrument at their disposal, to be used *vis-à-vis* business partners and the state. This perception is not devoid of critique, with about one-third of small and big business representatives in Germany stating that '*none*' of the rule of law elements is being adequately fulfilled in the country.

These assumptions find their corroboration in the in-depth interviews conducted in both countries. For instance, one of the Polish respondents described the situation with regard to the rule of law in the country as a '*dishonest application of the law that may apply in all spheres of living, including economic life. This foments the great anxiety [...] which may be more felt in some areas. [...] in reality, there is a risk that at some moment one wakes up to the totally new order, where there is no room for an activity or the business is taken over or nationalised.*' This, in turn, is contrasted by the perception of the state actions in Germany: '*[...] the state should also [...] try to bridge or compensate for structural or temporary deficits with support so that the economy in our country can keep pace with the economies of competing countries. The framework is important, the rules are important [...]*.' In addition, one of the stories shared by a German respondent showcased both trust in the state and a casual, informal way of addressing regulations that is at the core of sociology of law: '*What I have noticed is that it is extremely important to have a good connection to the controlling organs. [...] I think it is important for you to see that you actually have someone who is a good person and who really makes an effort to do everything right.*'

This comparison shows underlying divergences, as the statement about the situation in Poland shows a perception of uncertainty, including with regard to property rights, while in Germany there appears to be more trust in the state and recognition of its contribution to the rule of law. Thus, there is a clear contrast between the evaluation of the performance of the rule of law and the role of the state in both countries. While many companies in Poland confuse the ‘rule of law’ for ‘strict rule-obedience’, the German perception is significantly closer to the understanding of the rule of law as a device primarily in the service of society (including in its economic capacity).

In comparison with Polish firms, the attitude of German firms is closer to the spirit of the social contract and also shows an implicit awareness of the advantages of the rule of law as theoreticized by new institutional economics. For instance, at least three interviewees from Germany clearly highlighted the transaction cost-reducing properties of the rule of law, which are realised via insurance against uncertainty and facilitated dispute resolution, among others. This perception is again in contrast with the stressed and strenuous way that Polish businesses address regulations.

The above-mentioned divergences certainly affect further development of the rule of law in both countries and their economic performance. Thus, in consideration of the transaction cost-reducing properties of the rule of law recognised by the German respondents and the lesser degree of uncertainty as to the state’s action and intentions, one can expect higher levels of investments, hence economic development in the long term. This assumption is further confirmed by our empirical findings. We discover, in particular, that the shift from the current level of rule of law in Poland to its historical maximum (i.e. 0.964 in 2009-2010) would result in an increase in its income-based capital per worker of an additional USD 3,216.40 (in 1990 constant USD). Similarly, if rule of law in Germany was to increase from its current level (i.e. 0.989 in 2018) to its 2012 maximum, the country would see a gain in capital of about USD 1,190 per worker. Conversely, if Poland and Germany were to suffer lower levels of rule of law (i.e. shift for Poland from its current level to 1986, and for Germany – from its current level to today’s level in Poland), their workers would see USD 11,240.12 and USD 7,911.78 less capital, respectively.

More importantly, we find substantial and immediate domino effects of poor rule of law as the impact on capital begins to loosen from the third year on. Put simply, given the opportunity cost – not just today but in future years – of foregone investment, recent year rule of law is crucial for building up an adequate level of investment for workers.

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Annex I. Supplementary literature review

The following supplementary literature review sheds more light on the connection between the rule of law and economic outcomes. It also prepares ground for the next stage of the research, which will be dedicated to the social perception of the rule of law as a determinant of economic outcomes.

Empirical approach

The impact of judicial independence on economic growth is analysed by **Feld and Voigt (2003)** in their paper *Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators*. The authors present two indicators: a *de jure* indicator based on legal documents and a *de facto* indicator ‘focusing on the factually ascertainable degree of judicial independence’. Data was gathered via a questionnaire that was e-mailed to different country experts – among them lawyers, Supreme Court judges, law professors and NGO activists. Experts were asked to provide general information on the judiciary’s legal structure rather than assessing the factual situation in their country. To reduce complexity, the study only focuses on the highest court of each country. Voigt and Feld use a sample of 75 countries for the *de jure* indicator and 66 countries for the *de facto* indicator. They find that the *de facto* judicial independence has a positive effect on GDP growth, but the *de jure* indicator does not. In the latter, Poland scores 0.693, ranking 29th, while Germany ranks 25th with a score of 0.729. In the *de facto* index, Germany scores 0.800, ranking 16th, and Poland is not included in the calculation due to a lack of available information.

Licht et al. (2007) investigate the impact of culture on the rule of law. They build their analysis on the hypothesis that the cultural orientation of a society and modes of wielding power are closely intertwined. Societies whose cultures stress individualism and moral equality between individuals are more likely to promote the rule of law, non-corruption, and democratic accountability. What follows, upon reversion, is that within societies which view the individual as part of a hierarchical order, enforcement is more community- than law-based. To measure cultural orientation for 50 countries, Licht et al. use the *pronoun drop license rule* as an instrumental variable for the effect of national culture on the rule of law, non-corruption, and democratic accountability. The *pronoun drop license rule* allows to omit the pronoun in certain languages (e.g. in Japanese, Chinese, and Slavic languages). Its presence or absence in a language was shown by linguists Kashima and Kashima (1998) to correlate with a cultural orientation focused on social embeddedness versus on autonomy, respectively.

Additionally, Licht et al. integrate cultural value dimensions provided by Schwartz (1994, 1999) and Hofstede (1980, 2001) for robustness checks – for instance, intellectual autonomy, individualism, and uncertainty avoidance. They find a strong and systematic correlation between cultural values, particularly between the dimension of autonomy versus embeddedness, and norms of governance. The authors identify two ‘cultural mega-regions’: English-speaking and West European nations on the one side and the remaining regions on the other side. Within the first group, compliance with norms of governance is significantly higher than within the second.

Metelska-Szaniawska (2016) measures the *de jure* – *de facto* constitutional gap in post-communist countries and its determinants and effect on the economy. To compute this gap, seven fundamental rights have been taken into account: the freedoms of movement, association, expression, the press, and religion; the prohibition of torture; and the right to habeas corpus. The *de facto* state of those rights lies in the extent to which they are effectively enforced. The indicators used to measure them are taken from the Freedom House’s Freedom of the Press database¹⁴⁶ for the freedom of the press variable and from the CIRI database (Cingranelli et al., 2014) for the other variables and have been rescaled to vary between 0 and 1. The *de jure* variables are provided by the Comparative Constitution database (Elkins et al., 2014). The constitutional gap is then computed by deducting the *de facto* variables from the *de jure* ones, thus a positive gap reveals the underperformance of the constitution, which means that the constitution announces more protection of fundamental rights than what it ensures in practice. The statistical analysis first shows that the gap is positive for every post-communist country studied, and for most of them, this gap is not decreasing over time. Two groups of countries have been identified: former Soviet countries in Asia plus Belarus and Russia, with a gap fluctuating around 0.6, and the rest of the sample, for which the gap oscillates around 0.3. In the second part of the study, the author conducted an econometric analysis to identify the effect of this gap on the efficiency of the post-communist countries in implementing economic reforms. The latter variable is obtained through the aggregation of six structural reforms indicators (EBRD 1994-2013). The results of the regressions under the fixed and random effects models show that the constitution gap has a significant negative impact on economic reforms.

Haggard and Tiede (2011) begin their article *The Rule of Law and Economic Development: Where are We?* by discussing four different channels through which the rule of law can lead to economic development: security of person, property rights, and contractual enforcement; checks on governments; and control of corruption. Their examination of relevant empirical work reveals certain measurement problems, including the differences between the *de jure* and the *de facto* institutions and subjective indicators (i.e. based on evaluations from experts, citizens, and investors, among others) vs. objective indicators (such as inclusion of ‘discrete features of

¹⁴⁶ Freedom House. 1990-2015a. Freedom of the Press. Freedom House, Washington, D.C.

political institutions’). Haggard and Tiede touch upon an ongoing controversy between researchers who argue in favour of objective measurements (e.g. Glaeser et al. [2004], because of the risk of bias in subjective measures) and those who question them.

After conducting a cluster analysis on a sample involving 74 developing and transition countries – including Poland – the authors find that correlations of the various rule of law indicators are not as high as one might expect. Furthermore, the authors replicate the findings of Acemoğlu, Johnson, and Robinson (2001) and Barro (1997), highlighting various weaknesses in both approaches. They explain their findings with the suggestion, that ‘indices and subjective measures may be capturing informal institutions’ or capturing complementarities among institutions.

A balanced view on the relationship between the rule of law and economic development is advocated by **Chen and Deakin (2015)**. In their article *On Heaven’s Lathe: State, Rule of Law, and Economic Development*, the authors interpret the state of the rule of law as both an effect and cause of economic development. The underlying idea is that ‘the state and the market are emergent, co-evolving and mutually stabilising social systems, which both express and shape the strategic behaviour of agents’. Instead of understanding informal institutions and the rule of law as substitutes, Chen and Deakin view them as ‘complementary mechanisms for promoting growth’. They underpin their hypothesis with the Chinese case: a system of interpersonal trust (*guanxi*) promoted economic growth in China, but as the economy grew, the limits of *guanxi* became clear – and thus, demand for formal rules developed. Furthermore, Chen and Deakin make use of leximetrics and empirical evidence from middle-income countries to illustrate their argument.

Knack and Keefer (1995) studied the impact of institutions on economic performance. In this scope, they used two aggregated indicators from the International Country Risk Guide (ICRG) and Business Environmental Risk Intelligence (BERI) to account for the quality of institutions. The former includes the variables *Expropriation Risk*, *Rule of Law*, *Repudiation of Contracts by Government*, *Corruption in Government*, and *Quality of Bureaucracy*, the latter uses the variables *Contract Enforceability*, *Infrastructure Quality*, *Nationalisation Potential*, and *Bureaucracy Delays*. These variables were aggregated into two indicators, one for ICRG and the second with BERI variables. The authors run an ordinary least squares (OLS) regression with the GDP growth over the period 1974-1989 as the dependent variable. The results give strong evidence that institutions have a significant positive impact on economic growth.

In their paper, **Keefer and Shirley (2000)** also stress the importance of efficient and reliable institutions to ensure a trustful environment for investors, which can lead to higher economic growth. They provide evidence of the crucial role of the quality of institutions measured by the level of contract security and property rights. The study indeed demonstrates that the combination

of institutions of high quality and poor macroeconomic policies lead to better growth rates than the reverse combination.

In an attempt to study the impact of corruption on economic growth, **Mauro (1995)** uses data from the Business International (BI) firm over the period 1980-1983. In order to insure against measurement errors, nine variables are aggregated into two indicators. The first indicator, *Bureaucratic Efficiency*, is composed of the BI variables *Judiciary System*, *Bureaucracy and Red Tape*, and *Corruption Indices*. The second indicator, called *Political Stability*, gathers the indices *Institutional Change*, *Social Change*, *Opposition Takeover*, *Stability of Labour*, *Relationship with Neighbouring Countries*, and *Terrorism*. Mauro performs an OLS regression with investment level (1960-1985) as the dependent variable. The regression shows a significant positive effect of bureaucratic efficiency on the investment rate. The author also conducts a 2SLS regression using the ethnolinguistic fractionalisation (ELF) index as an instrument to find an even higher effect of bureaucratic efficiency on investment. In the second part of the study, the author regresses the growth rate on bureaucratic efficiency. The results show a significant impact of bureaucratic efficiency on growth: ‘one-standard-deviation improvement in the bureaucratic efficiency index is associated with a 1.3 percentage point increase in the annual growth rate of GDP per capita’. This effect is however lower than in the previous regression: one-standard-deviation increase in the bureaucratic efficiency index increased the investment rate by 4.75 percent of GDP. Because the use of the ELF index as an instrument helps control for endogeneity, the study provides evidence that ‘bureaucratic efficiency actually causes high investment and growth’. Another conclusion the study was able to draw is that ‘bureaucratic efficiency may be at least as important a determinant of investment and growth as political stability’.

In their paper, **Clague et al. (1995)** provide a then-innovative tool to measure the enforceability of contracts and the security of property rights. The authors first explain the theoretical importance of contract enforcement by arguing that it is crucial for some particular type of transactions called ‘non-simultaneous transactions’, which are not characterised by self-enforcement of the contract between the two parties. A non-simultaneous transaction can occur when someone lends money and expects the return of the principal and the pay-out of the interest at a later date, or when the buyer and supplier are far away and the good has to transit a long distance. It should be noted that countries where there is no enforcement of the loan contract by a third party do not often have a sophisticated capital market. Thus, it is argued that the lack of contract enforcement from the government hinders investments and economic growth. Second, in order to measure the third-party contract enforceability, the authors display their innovative measurement related to the use of currency by economic actors. They argue that ‘enforcement problems underlying the use of different forms of money and credit mirror enforcement problems underlying trade in goods and services’. Indeed, in case of deficiency of contract enforcement, economic agents will be more prone to use currency for their transaction because borrowing from

financial institutions is not considered secure. On the contrary, in a society that ensures contract and property rights, currency is usually only dedicated to small transactions. Those societies are characterised by a complex banking system and numerous financial intermediation services. Financial instruments are considered safer than currency. Therefore, the efficiency of contract enforcement can be approached, according the authors, by ‘the relative use of currency in comparison with ‘contract-intensive money’.’ Contract-intensive money (CIM) is defined ‘as the ratio of non-currency money to the total money supply’. When citizens trust the enforcement of contracts by a third party, they will allow their money to be held by financial institutions and CIM will then be higher. The econometric analysis reveals that CIM is positively correlated with investment. This impact is still significant when controlling for variables such as the effect of inflation and the real interest rate.

Rodrik et al. (2002) find that the quality of institutions is more important than geography and trade in determining national incomes. The indicator used to measure institutional quality is from Kaufmann et al.(2002). It is composed of the protection of property rights and the strength of the rule of law. The index oscillates between -2.5 and 2.5 with a mean of -0.25. The authors use OLS and 2SLS to regress the log of GDP per capita in 1995 on the geographical, institutional, and trade openness variables. The regressions give evidence to conclude that the impact of institutions on GDP per capita is much greater than of geography and trade openness. When the regression is run and the institution variable controlled for, trade openness has almost always no significant impact on income. It is relevant to notice that the quality of institutions is reinforced by the level of trade. This conclusion is drawn by regressing institutional quality and trade on each other to find that ‘a unit increase of trade increases institutional quality by 0.23 units’. The positive effect of institutions on trade is however higher: when institutional quality increases by one unit, the trade share goes up by 0.77 units.

In his paper *How (Not) to measure institutions*, **Voigt (2013)** presents the challenges of identifying and measuring institutions. In order to do so, a concrete definition has to be in place so the danger of mistaking institutions with policy choices/outcomes or just measuring collective behaviour is prevented. For him, aggregate measures as ‘the rule of law’ are ‘too broad and fuzzy to contain meaningful information’ (Voigt, 2013: 2). To measure the effects of a whole set of institutions, like the rule of law, all the single institutions need to be aggregated and weighted which results in further difficulties. Voigt argues for assessing institutions as precisely as possible by using all the objective information available on it. First, after assessing the *de jure* situation, one should look at the *de facto* behaviour to assess the institutions completely. The *de facto* behaviour can be heavily influenced by informal institutions that need to be included in the analysis. ‘When trying to estimate the (economic) effects of institutions, this possibility should be reflected by incorporating a number of covariates proxying for these informal institutions; otherwise, the danger of omitted variable bias looms large’ (Voigt, 2013: 22).

Theoretical approach

In the article *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, **Deakin et al. (2017)** strengthen the above-mentioned argument that law consists of both state intervention and customary arrangements – and place themselves in the tradition of legal institutionalism, which involves two ontological claims: first, law involves the state and customary arrangements, and second, law accounts for many of the rules and structures of modern capitalist society. In discussing the nature of law, they argue that law constitutes ‘the economic institutions of capitalism’ and ‘accounts for many of the rules and structures of modern capitalist society’ – and criticise conceptions which downplay the role of the state. Instead of overemphasising the role of customary law (as for example Hayek did), the authors advocate a ‘hybrid’ view on law: that is, law as manifestation of ‘private (spontaneous) and state (designed) elements’. Deakin et al. underline their argument by reviewing the institutions of property and the firm – both understood as ‘creatures of the law’. They close their discussion with a short overview of the differences and similarities between legal institutionalism, original institutionalism in economics, and new institutional economics and conclude: ‘Legal institutionalism draws from all these traditions, but gives particular emphasis to the role of the state in the legal system, and to the constitutive role of law in social and economic life.’

A large body of literature on institutions and economic development is reviewed and discussed by **Gagliardi (2008)**, with a focus on new institutional economics. In the article *Institutions and Economic Change: A Critical Survey of the New Institutional Approaches and Empirical Evidence*, she discusses the main theoretical works and approaches around the keyword institutionalism – for instance, the historical approach, the comparative approach, and the imperfect information theory. In a second step, Gagliardi reviews empirical studies on institutions and economic outcomes – underlining that they have been ‘hampered by the lack of information on countries’ institutional quality and also by problems related to its measurement’.

A more practice- and goal-oriented approach is pursued by **Khan (2017)**. Under the telling title *How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?* Khan reviews the rule of law with a view to its contribution to sustainable development. She finds the rule of law important for all the dimensions of such development: economic, social, as well as environmental. For Khan, formal rules are not enough. For that development to be attained, human rights and the concept of justice must be recognised within any conception of the rule of law. In positing this, Khan touches implicitly on the difference between the rule of law *de jure*

and *de facto* when she writes: ‘True justice looks at reality, not simply rules’ – but without further developing it.

In this text, *Institutions and Economic Development: Theory, Policy and History*, **Chang (2011)** criticises the mainstream approach of new institutional economics. For him, the dominant discourse often uses simplistic arguments and models that are not in line with real-world complexities. First, he argues, the new institutional economists ‘almost exclusively assume that the causality runs from institutions to economic development, ignoring the important possibility that economic development changes institutions’ (Chang, 2010: 475 ff.). For example, institutions can also be influenced by new agents of change resulting out of the economic development. These agents can demand higher quality or cost-intensive institutions that provide more transparency and accountability. Second, the assumption that liberalised institutions provide for more economic growth has been criticised in many theories and studies and should therefore be used with caution. Third, the institutions-growth relationship is often regarded in linear terms that are uniform across time and space. As one example he gives, strong intellectual property rights can have negative effects ‘by making technological diffusion overly costly, by preventing cross-fertilization of ideas’ (Chang, 2010: 481) or putting developing countries in situations that are otherwise detrimental for their economic growth.

Finally, he takes a look at the empirical evidence that has been collected in new institutional economics and criticises them for taking mostly cross-section studies into account ‘which lump every country from Swaziland to Switzerland’ (Chang, 2010: 483). Time series can offer better insights in the relationship between institutions and economic development. Also, current research is not looking to ‘identify and measure institutions that may help growth but do not fit into the liberalization narrative’ (Chang, 2010: 484). Another challenge is the measurement of the institutional quality if those measurements are in general influenced by the state of business. Regarding conceptual composites like the rule of law, he sees difficulties in mixing up variables ‘that capture the differences in the *forms* of institutions (such as democracy, independent judiciary absence of state ownership and the *functions* that they perform (such as rule of law, respect for private property, government effectiveness, enforceability of contracts, maintenance of price stability, the restraint on corruption)’ (Chang, 2010: 485).

Historical approach

Tamanaha (2004) begins his book *On the Rule of Law: History, Politics, Theory* with the tone-setting conclusion that ‘the rule of law ... stands in the peculiar state of being the preeminent

legitimizing political ideal in the world today, without agreement upon precisely what it means’. To shed light on the vague and blurred concept of rule of law, Tamanaha leads through the history of the rule of law tradition, from Ancient Greece (Plato, Aristotle), the Roman Empire, the Middle Ages, to the modern era, discussing the different idea(s) applied to the concept. Tamanaha dedicates another chapter to liberalism, stating that ‘liberal systems cannot exist without the rule of law’ – although the opposite direction, he claims, is possible.

Other

A classical study within socio-legal research, expounding the relationship between law and social norms, is **Macaulay (1963)**. Macaulay observes that businessmen pay little attention to detailed planning or legal sanctions in their business relationships. Interviews with 68 ‘*businessmen and lawyers shed light on their practice of legal ignorance: in order to keep things simple, businessmen often prefer to rely on ‘a man’s word’ in a brief letter, a handshake, or ‘common honesty and decency’ – even when the transaction involves exposure to serious risk*’. Business partners also aim to settle disputes without the involvement of lawyers or references to the contract – as both are perceived as inefficient and bad for business. Businessmen prefer to solve problems themselves and directly between each other in order to keep their relation intact. One interviewee answered also that lawyers would not understand the ‘*give-and-take needed in business*’. Macaulay’s results suggest that in the presence of effective social sanctions inside the community, contract law becomes in most situations superfluous and can even have negative consequences. Nevertheless, contracts are still used when the advantages of planning and legal sanctions outweigh the disadvantages.

Annex II. Rule of the Economic life: Survey Questionnaire

[Introduction] This questionnaire will be used in a study of the relationship between the rule of law and economic activity, and your involvement will help us to understand that connection. Please draw only on your personal experience and answer to the best of your knowledge.

1. We will begin with present circumstances: In your opinion, how likely is it that in future legislation or regulation by government and parliament to support economic growth and counter the consequences of the recent pandemics that a particular business sector will be given preferential treatment at the expense of others?

0 (unlikely).....1.....2.....3.....4.....5 (certain)

2. And if you expect bias, can you say against whom? (small firms, big companies, sectors [e.g. finance, agriculture, etc.]
3. Looking into the reality of the world of business, please imagine that your company has a legal case against other company in a Polish (German) court. In your opinion, which factors would have an impact on who wins a case in court?

AND please read out the factors that in your view could potentially have an impact. Please tell me, with regard to each one of them, whether this factor is of primary importance, secondary importance, or without impact.

To assess the importance of each of the aspects listed below, please use the following scale from 0 (no impact) to 5 (of primary importance)

Does it depend on:

- (1) Merits of the case

0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)

- (2) The individual judge

0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)

- (3) The quality of the lawyers

0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)

-
- (4) The identity of your opponent
0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)
- (5) Who you know and your position in the business world and in society in general?)
0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)
- (6) Bribes and other material incentives
0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)
- (7) Luck
0 (no impact at all).....1.....2.....3.....4.....5 (of primary importance)
- 4.** Let's assume that your company had won a case of this kind in court. How likely according to your knowledge and experience is the court verdict to be implemented in practice?
0 (unlikely).....1.....2.....3.....4.....5 (certain)
- 5.** According to your knowledge and experience, how likely is it that in adjudicating a dispute between a company like yours and the public administration that the court would be biased in favour of the administration in its verdict?
0 (unlikely).....1.....2.....3.....4.....5 (certain)
- 6.** Let's assume that your company had won a case of this kind (against administration) in court. How likely according to your knowledge and experience is the court verdict to be implemented in practice?
0 (unlikely).....1.....2.....3.....4.....5 (certain)
- 7.** How do you assess on the scale from 0 to 5 the actual performance of your country when it comes to:
- (1) Independence of the judiciary from orders and pressures from the administration.
0 (extremely weak).....1.....2.....3.....4.....5 (extremely strong)
- (2) Stability of the law, that is a high degree of certainty that law concerning business activity under normal conditions will not change suddenly.
0 (extremely stable).....1.....2.....3.....4.....5 (extremely unstable)
- (3) Prevention of corruption among the public functionaries.

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- 0 (extremely poor).....1.....2.....3.....4.....5 (extremely good)
- (4) Opportunities for the business organizations to present their case before the administration and legislatures.
- 0 (extremely bad).....1.....2.....3.....4.....5 (extremely good)
- (5) Clarity and congruency of the legal rules and prescriptions concerning business.
- 0 (extremely bad).....1.....2.....3.....4.....5 (extremely good)
- (6) Transparency of government decision-making.
- 0 (extremely bad).....1.....2.....3.....4.....5 (extremely good)
- (7) Ease of access to the courts in terms of time and money.
- 0 (extremely bad).....1.....2.....3.....4.....5 (extremely good)
- 8.** And what of the already listed circumstances is in your opinion most important when running a business? (please select up to 3)
- (1) Independence of the judiciary from orders and pressures from the administration.
- (2) Stability of the law, that is a high degree of certainty that law concerning business activity under normal conditions will not change suddenly.
- (3) Prevention of corruption among the public functionaries.
- (4) Opportunities for the business organizations to present their case before the administration and legislatures.
- (5) Clarity and congruency of the legal rules and prescriptions concerning business.
- (6) Transparency of government decision-making.
- (7) Ease of access to the courts in terms of time and money.
- 9.** In your company's experience, does it happen that a public office or agency does not abide by rules that govern its relations with your company?
- 0 (never).....1.....2.....3.....4.....5 (always)
- 10.** Please tell us what rules have been (and if applicable, most often) transgressed?

11. We approach the end of our survey by asking first a general question about respect for the law. Which statement (1-4) represents the view you like best?

- (1) We should always abide by the law, even if we think it is unfair.
- (2) If we encounter laws that we believe are unfair, we should only superficially abide by them but in practice try to circumvent them.
- (3) We should not abide by the laws we find unfair.
- (4) I have a different opinion (please say what it is).

12. In general, what do you think is better if your company has a dispute with another:

- (1) that an official institution (e.g. court), which has the power to enforce its decision, resolves the dispute, or
- (2) when uninvolved persons (third parties), who can only offer advice, resolve the dispute?

Thank you for your cooperation!