



THE MOST IMPORTANT ISSUES REGARDING

THE ACT ON THE COMMISSION ON RUSSIAN INFLUENCE

The Act drastically breaches both the constitutional order and the European (treaty and convention) order.

Breach of the Constitution:

- 1) **Article 2** (principles of a democratic state governed by the rule of law), Article 10 (the separation of powers, as well as checks and balances), Article 173 (the court authority's separateness, independence of the other authorities of the courts and tribunals);
- 2) **Article 175** – only the courts in Poland handle the administration of justice. Therefore, only they can adjudicate on criminal liability and impose penalties and penal measures (in the meaning of criminal law). The so-called 'remedies' provided for in this Act, such as the prohibition to exercise public functions, are nothing more than the penal measures referred to in the Penal Code;
- 3) **Article 45**, the right of every citizen to a fair and public hearing of his case by an independent and impartial court;
- 4) **Article 42**, the principle of *nullum crimen sine lege*, or in other words **there is no crime without a law**. Only the perpetrator of an act that is prohibited under the sanction of a penalty by an Act of law which was in force at the time it was committed may be held criminally liable. The Act creates new 'crimes' (although it does not formally call them crimes) by extending liability retroactively to 2007, when they did not exist and were not defined by an Act of criminal law. This also breaches the principle of *lex retro non agit* – **the law does not apply retroactively**;
- 5) **Article 42** – **the presumption of innocence**. Everyone is presumed innocent until proved guilty **by a final court judgment**. Also, **the right to a defence** provided for in Article 42. The Act does not provide for the ability to appoint a defence counsel at all. And this is not at all obvious, as the Act creates a completely new hybrid procedure before a body that is neither administrative nor judicial, where decisions are made about someone's criminal liability and punitive, repressive measures are imposed;
- 6) **Article 78**, **the right to appeal** against the first-instance decision. The Commission formally operates in an administrative-law regime. Therefore, there should be a right of appeal to a body of a second instance. Meanwhile, there is no such right. Only a complaint may be filed with the voivodship administrative court. The substantive decision of the commission is not re-examined there; it is not possible to verify the evidence, hear witnesses, etc. There is only a formal review of the proceedings before the commission on the basis of the provisions of this unconstitutional Act. In other words, nothing substantive can be contested.

Furthermore, the range of entities that can be held accountable before this commission (Article 4 of the Act) is legally unlimited – **the media, NGOs, trade unions, employers' organisations, critical infrastructure, the healthcare system and border protection** (social

organisations and activists providing assistance, for instance at the Belarusian border). Likewise, the scope of matters is defined so vaguely that almost any case can be addressed.

The Commission can demand **any documents and information** from all bodies, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Central Anticorruption Bureau, the Prosecutor General, all prosecutors, the Supreme Audit Office, the Supreme Court, the Supreme Administrative Court, all other courts, bodies of government administration and local governments. It can demand data from the Police, such as phone records, correspondence etc.

The Commission can instruct the public prosecutor to conduct **dawn raids or seize items**.

People entitled to **professional privilege** (lawyers or journalists) may be questioned by the commission – interference with secrecy is covered more broadly than in the Criminal Procedures Code.

Only so-called hearings before the commission **are public**, unless the commission arbitrarily decides to disable the openness. The commission can decide not to allow the media to attend sessions.

There are also violations at the level of international treaties and conventions. Starting with the breach of Article 2 of the EU Treaty, which provides that ‘The Union is founded on the values of respect for human dignity, **freedom, democracy, equality, the rule of law** and respect for human rights, including the rights of persons belonging to minorities.’ The functioning of the commission and its competences threaten freedom of elections, equality, pluralism, the rule of law, namely the fundamental principles of the EU.

There is no effective remedy against the commission’s decisions before an independent court; there is no effective judicial protection. This breaches Article 19 of the Treaty and Article 47 of the Charter of Fundamental Rights.

Furthermore, it breaches Article 49 of the Charter of Fundamental Rights (the principle of no crime without a law, as above in Article 42 of the Polish Constitution).

A **recent ruling of the CJEU of 4 May 2023** in the Romanian case, *T.A.C.*, C-40/21, which applied to taking away the right to hold a public post (this applied to the office of mayor) by a non-court (a state agency), is relevant here. The Luxembourg Court held that, if a repressive measure is of a punitive nature (just like the ‘remedial measures’ here in the Act on the commission), it violates Article 49 of the Charter of Fundamental Rights, namely Union law. The case could therefore be the subject of infringement proceedings, namely an application from the European Commission to the CJEU, also with **an application for an interim measure** (there is an EU element here, because the person who is subject to the prohibition imposed by the commission would not be able to stand for election to the European Parliament or other EU functions).

From the point of view of the **European Convention on Human Rights**, we have here a clear violation of Article 6 of the Convention, the right to an independent and impartial court established by law.