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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**POLAND**

**URGENT OPINION**

**ON THE LAW ON THE STATE COMMISSION TO INVESTIGATE  
RUSSIAN INFLUENCE ON THE INTERNAL SECURITY OF THE  
REPUBLIC OF POLAND IN THE PERIOD OF 2007-2022  
AND ON THE DRAFT LAW AMENDING THAT LAW**

**Issued on 26 July 2023 pursuant to Article 14a  
of the Venice Commission's Rules of Procedure**

**Endorsed by the Venice Commission  
at its 136th Plenary Session  
(Venice, 6-7 October 2023)**

**On the basis of comments by**

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## I. Introduction

1. By letter of 21 June 2023, the Chairman of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the Law “On the State Commission to Investigate Russian Influence on the Internal Security of the Republic of Poland in the period of 2007-2022” (“the Law”), adopted by the Polish Sejm (Lower House of Parliament) on 26 May 2023 and signed by the President of the Republic on 29 May 2023, and on a draft law amending that Law initiated by the President of Poland (“the amending draft law”) ([CDL-REF\(2023\)027](#)). In view of concerns about the effects that the Law may have on the upcoming parliamentary elections in Poland which will take place this autumn, the Chairman of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe asked the Venice Commission to prepare an urgent opinion so that its recommendations can be taken into account before the start of the electoral campaign.
2. Ms Veronika Bílková, Mr Oliver Kask, Ms Regina Kiener, Mr Martin Kuijer and Ms Katharina Pabel acted as rapporteurs for this urgent opinion.
3. On 23 June 2023, the Bureau of the Venice Commission, acting on the basis of Article 14a of the Rules of Procedure, authorised the rapporteurs to prepare an urgent opinion.
4. Between 7 and 19 July 2023, the rapporteurs, along with Ms Simona Granata-Menghini, Secretary of the Commission, Mr Pierre Garrone and Mr Mamuka Longurashvili from the Secretariat, had online meetings with representatives of civil society, the Commissioner for Human Rights of Poland, representatives of the Research and Analyses Office of the Supreme Court, the Supreme Administrative Court, the Polish Bar Council and the majority in the Senate (Upper House of Parliament, which corresponds to the opposition to the government). The Venice Commission offered to meet with representatives of the Sejm, with the minority in the Senate and with the presidential administration, but those interlocutors were not available for such meetings.
5. The urgent opinion focuses on the most important aspects of the Law and the amending draft law. The absence of remarks on other aspects of the Law or the amending draft law should not be interpreted as their tacit approval.
6. This urgent opinion was prepared in reliance on an unofficial English translation of the Law and the amending draft law. The translation may not accurately reflect the original version on all points.
7. This urgent opinion was drafted on the basis of comments by the rapporteurs and the results of the exchanges with the Polish stakeholders mentioned above. It was issued on 26 July 2023 pursuant to Article 14a of the Venice Commission’s Rules of Procedure and was endorsed by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

## II. Background

8. The draft law “On the State Commission to Investigate Russian Influence on the Internal Security of the Republic of Poland in the period of 2007-2022” was submitted to the Sejm on 1 December 2022 and passed through the third reading on 14 April 2023. Three motions to reject the draft law were submitted during the legislative proceedings but were rejected. On 17 April 2023, the draft law was submitted to the Senate, which rejected it on 11 May 2023. On 26 May 2023, the Sejm voted to overrule the position of the Senate. On 29 May 2023, the draft law was submitted to the President of Poland for signature and signed by him on the same day.
9. The Law entered into force on 31 May 2023. The State Commission established by the Law is empowered to “conduct investigations aimed at clarifying the activities of persons who were public officials or members of the senior management in the period 2007-2022 who, under Russian

influence, acted to the detriment of the interests of the Republic of Poland". This applies, *inter alia*, to persons who carried out official duties, prepared or adopted administrative decisions, took decisions on the recruitment of employees or on the choice of a contractor within the framework of a public authority or a company, had at their disposal public funds or company funds, were involved in the law-making process or the negotiation and conclusion of an international agreement (Article 4.1 of the Law). The Law also applies to other persons "in so far as they have had a significant impact on internal security or have undermined the interests of the Republic of Poland" as regards mass media, spreading fake news, the activities of associations or foundations, trade unions, the functioning of political parties, etc. (Article 4.2 of the Law). A broad range of state institutions – including (counter)intelligence and security agencies, the prosecution authorities, central and local government and the court system – shall provide the State Commission at its request with "access to all files" including classified information (Article 16.1 of the Law). The State Commission may adopt two types of decisions: first, the administrative decision that a person has acted under the influence of the Russian Federation to the detriment of the interests of Poland, following which it may apply "remedial measures" (Article 37.1 of the Law, including most notably the possibility to prohibit a person to hold public functions relating to the use of public funds for a period of up to 10 years) and second, administrative decisions whereby it shall declare that a particular administrative decision was issued under Russian influence affecting the interests of Poland, following which it may annul an administrative decision and may issue legal views and indications to the authority to which the case is referred for re-examination (Article 38 of the Law).

10. The Law has given rise to criticism at the national<sup>1</sup> and the international<sup>2</sup> level. On 2 June 2023, the President of Poland submitted a draft law amending the Law, and proposing the following changes: the deletion of the "remedial measures" mentioned in Article 37 of the Law; stipulating that judicial protection against decisions of the State Commission is offered by the common courts instead of the administrative courts (new Articles 39a and 39b of the Law), adding a clause stipulating that membership in the State Commission shall be incompatible with the mandate of a Member of the Sejm or a Senator (Article 9 of the Law); stipulating that – in the course of the proceedings – the State Commission shall (instead of "may") hold a hearing (Article 22 of the Law); stipulating that the State Commission – and not the Prime Minister – shall adopt its own rules of procedure (Article 51 of the Law). This draft law passed through the third reading on 16 June 2023 in the Sejm and was submitted on 20 June 2023 to the Senate, which rejected it on 14 July 2023. The amending draft law is currently pending – again – before the Sejm, which may overcome the vote of the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Members.

11. On the day of the signature of the Law on 29 May 2023, the President of Poland referred the Law to the Constitutional Tribunal of Poland for *ex-post* scrutiny.

12. The Law is in force. However, the selection of the members of the State Commission has not started yet.

### III. Legislative process and timing of the adoption of the Law

13. The Venice Commission's delegation was informed that the (first) draft law was formally initiated by a group of deputies rather than by the government. The specificity of this procedure is that, unlike government drafts, deputies' drafts go through a simplified proceeding not involving, for

<sup>1</sup> See, for example, Helsinki Foundation for Human Rights: "[Polish witch-hunt - the Foundation's opinion on the Law on the State Commission for Investigating Russian Influence on Internal Security](https://www.adwokatura.pl/admin/wgrane_pliki/file-uchwala-nra-nr-107-2023-37306.pdf)", 4 May 2023; Resolution No. 107 of the Polish Bar Council: [https://www.adwokatura.pl/admin/wgrane\\_pliki/file-uchwala-nra-nr-107-2023-37306.pdf](https://www.adwokatura.pl/admin/wgrane_pliki/file-uchwala-nra-nr-107-2023-37306.pdf), Position of the Presidium of the National Council of Attorneys at Law ("KIRP"): <https://kirp.pl/stanowisko-prezydium-krajowej-rady-radcow-prawnych-ws-lex-tusk/>

<sup>2</sup> U.S. Department of State: [Concerns Over Potential use of New Polish Legislation to Target Opposition](https://www.state.gov/statement/2023/05/20230529-poland-law), 29 May 2023. [Statement](https://www.state.gov/statement/2023/05/20230530-poland-law) by the European Commission on the Polish law establishing a State Committee for the Examination of Russian Impacts on internal Security, 30 May 2023. [Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee](https://www.state.gov/statement/2023/06/20230608-poland-law), 8 June 2023.

instance, mandatory audits or expert opinions. The fact that three motions to reject the draft law were submitted in the Sejm and were always rejected by a small majority, combined with the fact that the Senate rejected the draft law as such, suggests that the draft law was considered controversial and, therefore, a fast-tracked legislative procedure may not have been appropriate for its adoption.

14. The Law has been adopted shortly before the 2023 parliamentary elections. Although the Law does not expressly amend the electoral legislation, it introduces a new ground of ineligibility to be elected (Article 37 of the Law provides for a 10-year ineligibility for a person found by the State Commission to have acted under Russian influence). Further, it has the potential to harm the reputation of certain candidates having to undergo the verification procedure before the State Commission or to dissuade certain individuals from standing as candidates as a result of the stigmatising effect of a procedure before the State Commission and the publicity surrounding it. In the Venice Commission's view, therefore, the Law can seriously affect the level playing field as well as the course of the elections, thus having a major political impact.

15. Given the short period of time in which the Law was passed, the Venice Commission is not persuaded that the process for enacting the Law was sufficiently transparent, accountable, inclusive and democratic.<sup>3</sup>

#### **IV. Analysis**

##### **A. The necessity of the Law**

16. The Law was adopted with the aim of protecting the interests of Poland against the destabilising effect of hostile activities carried out by, or under the influence of, the Russian Federation.

17. The Venice Commission has previously acknowledged that preventing undue influence of individuals on political, economic and public life is certainly a priority for any state wishing to achieve and maintain a democratic system governed by the rule of law.<sup>4</sup> However, it has at the same time emphasised that “the choice of the means to achieve it is of decisive importance if the system is to be effective while respecting democracy, the rule of law and fundamental rights”.<sup>5</sup> Legislation of the kind under review in the present opinion “risks becoming a dangerous tool in the hands of those in power to harass political opponents”.<sup>6</sup>

18. The Law – and indeed the amending draft law – will have significant *de facto* effects on the (legal) persons concerned: a person may be prohibited from holding public functions relating to the use of public funds for a period of up to 10 years (if Article 37 of the Law is maintained), any administrative decisions taken between 2007 and 2022 may be annulled, a person may be stigmatised and suffer severe reputational damage if the State Commission finds that he or she acted “under Russian influence”.

19. The necessity for introducing such an intrusive non-judicial procedure has not been established. Indeed, nothing in the Law – and the amending draft law - or the discussions held by the Venice Commission delegation with Polish stakeholders shows that the Polish authorities have carried out an in-depth and comprehensive analysis of the existing mechanisms and their possible shortcomings in terms of structure, powers and coordination. It, therefore, remains unclear why the

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<sup>3</sup> See Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, Benchmarks, II.A.5.

<sup>4</sup> See inter alia Venice Commission, Ukraine - Opinion on the Law on the prevention of threats to national security, associated with excessive influence of persons having significant economic or political weight in public life (oligarchs) ([CDL-AD\(2023\)018](#)), para. 13.

<sup>5</sup> *Ibidem*, para. 16.

<sup>6</sup> See Venice Commission, CDL-AD(2023)017, Georgia - Final Opinion on the draft law on de-oligarchisation, para. 41.

current legal framework (criminal law, anti-corruption policies, disciplinary liability, etc.) would not suffice to identify the unwarranted practices the Law aims to discourage.

20. Following the exchange of views with various interlocutors and based on the publicly available information, the Venice Commission understands that in Polish law, there exist at least two mechanisms to identify and address undue foreign influence, based *inter alia* on the intelligence gathered by the Security Services:

- According to the Criminal Code of Poland, acting to the detriment of the interests of the Republic of Poland is akin to the offences enshrined in Chapter XVII (Crimes against the Republic of Poland), encompassing treason, diplomatic treason, espionage or intelligence disinformation. Crimes in this field are time-barred after 20 years (which means that those committed in the period 2007-2022 are still punishable). According to the Polish Criminal Procedure Code, the prosecutor's office initiates an investigation *ex officio* or, based on the information received, if there is good reason to suspect that an offence has been committed.<sup>7</sup> Other provisions in the Criminal Code, such as, for example, the chapters relating to offences against Poland's defence capability, public safety, public order, environment, functioning of the state and local government institutions, administration of justice, elections and referenda, protection of information, credibility of documents, etc., might also be relevant.
- A parliamentary inquiry commission can be set up to investigate a specific matter.<sup>8</sup> Such a commission may consist of up to eleven members. Its composition should reflect the representation in Parliament of the parliamentary clubs and circles. If an inquiry commission considers that its findings justify charging the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces, with having culpably committed, within the scope of their office or in connection with their position, an act violating the Constitution or the law, the inquiry commission shall submit a preliminary motion to bring these persons to constitutional responsibility before the Tribunal of State.

21. According to the information provided to the Venice Commission, there do not appear to have been cases of criminal convictions nor inquiry commissions on the grounds of undue Russian influence in the period of 2007-2022. However, this cannot in itself be an indication that the existing institutional and legal frameworks to deal with undue Russian influence on the internal security in Poland, namely (counter)intelligence and security agencies, prosecution authorities, court systems, as well as criminal law, anti-corruption and anti-money-laundering legislation, disciplinary liability for various office holders, the legal framework applicable to civil servants, liability under civil (employment) law, lobbying regulations, etc.) do not suffice and that there is a necessity to adopt a new Law.

22. The Venice Commission therefore does not see any necessity for creating a new body in charge of investigating past behaviours, which could be dealt with by the criminal justice system or parliamentary inquiry commissions, if appropriate on the basis of information provided by security services. In order to achieve the aim of the Law, other state institutions empowered to guarantee state security should fulfil their tasks.<sup>9</sup>

23. If deemed desirable by the authorities, they could analyse the way the various institutions (intelligence agencies, prosecution authorities, etc.) can work better together in preventing and

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<sup>7</sup> Articles 303-305 of the Criminal Procedure Code.

<sup>8</sup> [Law of 21 January 1999 "On parliamentary commissions of Inquiry"](#).

<sup>9</sup> See Venice Commission, Rule of Law Checklist B.6, para. 62.

eliminating undue foreign influence (for example, if there are legal impediments preventing effective cooperation and information exchange, these should be addressed; bodies working in this field should be obliged to report about the weak implementation by other bodies when there is a reason to suspect that their work has been unduly influenced by other countries etc.). This approach should culminate in a focused strategy to tackle undue foreign influence, recognising the interconnected nature of the problem and allowing for bridges to be built between various fields of law and the institutions that implement them, with due regard to the need to strengthen their independence and effectiveness.<sup>10</sup>

24. The Law is retroactive, applying only to past events, having taken place in the period 2007-2022. and sanctions actions which were not prohibited in the time they were committed.

25. In this regard, it is equally unclear why the Law is limited to incidents of Russian influence between 2007 and 2022. The fact that the competence of the State Commission does not extend to facts taking place from 2023 onwards, despite the ongoing war of aggression of the Russian Federation against Ukraine, puts serious doubts on the necessity to introduce a new mechanism. The Venice Commission deems the necessity of the Law not to be established, but even less so the necessity for its retroactive character, should retroactivity not be already excluded by the application of Article 7 ECHR.

26. The Venice Commission, therefore, concludes that the necessity for introducing such a new mechanism – which is extraordinary, intrusive, retroactive and non-judicial in nature – has not been established. The Venice Commission believes that the Law is in that sense, fundamentally flawed – as is the amending draft law to the extent that it preserves the aim and main features of the Law. The Venice Commission will further address other concerns the Law raises. These concerns, albeit raising equally serious issues, are, in a sense, of a subsidiary nature, since the Law is, at any rate, fundamentally flawed in light of the comments made in this Section.

## **B. Restrictions of fundamental rights**

### *1. Articles 8, 10 and 11 ECHR*

27. Given the scope of the mandate of the State Commission (see above para. 9), the functioning of this new body could interfere with the enjoyment of several rights guaranteed by the ECHR. The most obvious of these are the right to respect for private and family life (Article 8 ECHR) – for example, the reputational damage resulting from the finding that a person acted “under Russian influence”, the right to freedom of expression (Article 10 ECHR) – as regards the State Commission’s work in respect of the media and the spreading of “fake news”, the right to freedom of assembly and association (Article 11 ECHR) – as regards the work of the State Commission in respect of “associations or foundations”, “trade unions, employer’s unions or organisations” and “political parties”, as well as the prohibition of discrimination (Article 14 ECHR)<sup>11</sup> as the work of the State Commission could discriminate on the ground of political opinion, national origin or association with a national minority, because of the extensive powers and lack of control and accountability of the State Commission (see below IV.C).<sup>12</sup> Interferences with rights guaranteed by Articles 8, 10 and 11 ECHR may be justified only insofar as they meet the requirements provided in the second paragraphs of these articles (pursue a legitimate aim, are provided for by law, proportionate to the legitimate aim pursued and necessary in a democratic society). The Venice

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<sup>10</sup> See Venice Commission, [CDL-AD\(2023\)019](#), Republic of Moldova - Final Opinion on limiting excessive economic and political influence in public life (de-oligarchisation), para. 22.

<sup>11</sup> Also as regards Article 1 of Protocol 12 to the ECHR – not signed by Poland.

<sup>12</sup> There may also be an infringement of the right to property (Article 1 of Protocol 1 to the ECHR), as the work of the State Commission could impact commercial activities, for example, by annulling administrative decisions. The Venice Commission will, however, not go into more detail in this respect.

Commission will limit itself to the following observations as regards the requirement that restrictions need to be “lawful”.

28. The requirement of “lawfulness” implies not only the existence of a legal basis but also meeting certain fundamental criteria underpinning the quality of this legal basis. The Law must be sufficiently clear and foreseeable. Given the extent the enjoyment of Articles 8, 10 and 11 ECHR are interfered with, the necessity to formulate the law with “sufficient precision” to enable persons to foresee whether the law is applicable to them becomes all the more important.<sup>13</sup> For domestic law to meet these requirements, “it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights, it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise”.<sup>14</sup> While it is true that “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice”, laws nevertheless have to satisfy the requirement of “foreseeability”.<sup>15</sup>

29. The Venice Commission is of the opinion that one of the major flaws of the Law is the vagueness of certain provisions. Thus, for example, the Law does not sufficiently define the concept of “Russian influence” around which the whole Law revolves. Article 2.8 of the Law defines “Russian influence” as “any action by representatives of the public authorities of the Russian Federation and persons linked to them/ carried out by methods, both lawful and unlawful, aimed at influencing the actions of companies or public authorities”. The definition appears as tautological in that it defines “influence” as an “action aimed at influencing” (unless it is an issue of translation). The formulation, moreover, suggests that influence is defined by its aims rather than by its effects. A person acts under Russian influence when representatives of the public authorities of the Russian Federation or persons linked to them have sought to influence his/her action, regardless of whether their efforts have been successful and whether the person concerned has at all been aware of these efforts.

30. The Law does not introduce any criteria that would make it possible to determine when the person actually acts under Russian influence, nor does it require any specific *mens rea* (awareness, special intent, recklessness, etc.). The term “to the detriment of the interests of the Republic of Poland” is not defined in any way either, leaving it unclear which interests are at stake here and what kind (and degree) of detriment the expression covers. The understanding of the Law is made even more confusing by the fact that the term “the interests of the Republic of Poland” seems to be used interchangeably with the expression “internal security” (see Article 4(2) and 5(2)), which, however, is narrower. The interpretation of all these terms and the decision whether an individual case is to be subsumed under the concept of “acting under Russian influence to the detriment of the interests of the Republic of Poland between 2007 and 2022”, is thus left to an almost unlimited discretion of the State Commission. In the absence of clear definitions and criteria, virtually any action carried out in Poland in 2007-2022 could potentially be covered by the Law. The Venice Commission has already stated that “the subjectivity and flexibility of the notion of “national security”, combined with its vital importance to the State, mean that governments have a wide margin of maneuver in this area. They could be tempted to use the security services to pursue illegitimate aims. It is thus necessary to establish mechanisms to prevent political abuse while providing for effective governance of the agencies.”<sup>16</sup> That turns the Law into a very dangerous instrument that can easily be politically abused.

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<sup>13</sup> See, for example, ECtHR, *Rotaru v. Romania*, no. 28341/95, 4 May 2005, paras 57-58; *Amann v. Switzerland*, no. 27798/95, para. 56.

<sup>14</sup> ECtHR [GC], *Navalnyy v. Russia*, no. 29580/12 and others, 15 November 2018, para. 115.

<sup>15</sup> ECtHR, *Huhtamäki v. Finland*, no. 54468/09, 6 March 2012, para. 45.

<sup>16</sup> Venice Commission, [CDL-AD\(2015\)010](#), Report on the Democratic Oversight of the Security Services, para. 5. See also, on the risks of limitations of fundamental rights in the field of intelligence, [CDL-AD\(2023\)008](#), Republic of Moldova, Opinion on the draft

31. Not all incidents of “Russian influence” will lead to a decision in the sense of Article 36 of the Law, but only those “affecting the interests of the Republic of Poland” (and discretionally selected by the Commission). The Venice Commission notes that the formulation used throughout the Law differs in various provisions of the Law. Article 4.1 of the Law speaks of incidents “harming the interests of the Republic of Poland,” while Article 4.2 of the Law speaks of “undermining” the interests. There is a difference between the notions “affecting”, “harming” and “undermining”. This ambiguity creates additional scope for arbitrary actions by the State Commission. Worryingly, Article 36 of the Law uses the broadest of these notions. The combined effect of the terms “Russian influence affecting the interests of the Republic of Poland” is, therefore, a very broad application of the Law.

32. The Law applies to “public officials” and “members of the senior management”. The notions of “public official” and “members of the senior management” are very broad – the former including members of the legislative, executive and judicial branches of government.<sup>17</sup> In particular, the Venice Commission is concerned with the possible application of the Law to the judges, which would put them under the control of an administrative body and hamper the good functioning of justice, including when in charge of the scrutiny of the decisions of the State Commission.

33. The Venice Commission also recalls that decisions which may *ex ante* be seen as being in accordance with internal security may *ex post* be seen as violating it and vice versa. Some influence from different interest groups is inevitable in any society, and lobbying is not in violation of the principle of democracy.<sup>18</sup> Similarly, in trade agreements between Poland and the Russian Federation or Russian enterprises, such influence is inevitable.

34. There are various provisions in the Law that highlight its very broad possible field of application. Article 4.1 of the Law, for example, refers to certain activities which can be clearly associated with the exercise of sovereign power by a state: the involvement in the preparation or the presentation of an official position in an international forum, the involvement in the law-making process, the involvement in the preparation and adoption of administrative decisions. However, the provision also refers to very general and common activities within a company, such as contracts, taking decisions on the recruitment of employees or having company funds at one’s disposal.

35. Thus, the Law is not sufficiently determined; decisions of the State Commission in the implementation of the Law are therefore not foreseeable. That goes against the principle of legal certainty<sup>19</sup>, under which any legal act must “be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct” and “it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power”.<sup>20</sup> This could, in its turn, lead to abuse of powers and arbitrariness, and make any judicial review of the decisions of the State Commission very difficult.<sup>21</sup>

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law on the Intelligence and Security Service, as well as on the draft law on counterintelligence and external intelligence activity, paras 11, 15-16, 17ff.

<sup>17</sup> Articles 2.1 and 2.2 of the Law, which refers to Article 115 § 13 of the Criminal Code, according to which public officials are the President of the Republic of Poland; a deputy to the Sejm, a senator, a councillor; a judge, a lay-judge, a state prosecutor, a notary public, a court executive officer, a professional court probation officer, a person adjudicating in cases of contraventions or in disciplinary authorities operating in pursuance of a law; a person who is an employee in a state administration, other state authority or local government, except when he performs only service-type work, and also other persons to the extent in which they are authorised to render administrative decisions; a person who is an employee of a state auditing and inspection authority or of a local government auditing and inspection authority, except when he performs only service-type work; a person who occupies a managerial post in another state institution; an official of an authority responsible for the protection of public security or an official of the State Prison Service; a person performing active military service.

<sup>18</sup> Venice Commission, [CDL-AD\(2013\)011](#), Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying). See also [Recommendation CM/Rec\(2017\)2](#) of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making (Adopted by the Committee of Ministers on 22 March 2017 at the 1282nd meeting of the Ministers' Deputies). See also PACE [Resolution 1744\(2010\)](#), Extra-institutional actors in the democratic system.

<sup>19</sup> See Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, Benchmarks, II.B.3.

<sup>20</sup> Venice Commission, [CDL-AD\(2011\)003](#), Report on the Rule of Law, para. 45.

<sup>21</sup> See Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, Benchmarks, II.C.

36. In conclusion, the condition of lawfulness has not been fulfilled. Legislation of the kind under review in the present urgent opinion can easily become a tool in the hands of the majority to eliminate political opponents. The establishment of a commission where the “accused” is publicly interrogated by an administrative body on vaguely defined grounds is incredibly dangerous. It could easily be abused to brand political opponents (or, more generally: people who are, for whatever reason, disliked) as “enemies of the state”, eroding the democratic process,<sup>22</sup> diminishing the plurality in the political landscape,<sup>23</sup> and fuelling a sense of general distrust in the public. A decision by the State Commission finding that the acts of a person were “under Russian influence” will most certainly have significant *de facto* effects on (the career of) the person concerned or the commercial endeavours of a company. This is even more problematic as the Commission may base its assessment on classified information, even if it is “top secret” (to which it has unlimited access), without having to reveal the source, with an impact on the right to be heard of the person concerned.

## 2. *The right to free elections*

37. Article 37 of the Law, by giving the power to the State Commission to decide on “a prohibition of holding public functions relating to the use of public funds for a period of up to 10 years”, introduces a very severe restriction to the right to be elected in the sense of Article 3 of Protocol 1 to the ECHR.<sup>24</sup> No justification for the interference with the right to stand for elections is given due to its vagueness and the absence of identified necessity (see above)

38. The Venice Commission is also particularly concerned by the adoption of the Law just a few months before elections. A candidate running for election may be subject to a check or a proceeding by the State Commission and may be stigmatised by the proceedings and/or by the decision of the State Commission. This may amount to an infringement of his/her right to equality of opportunity.<sup>25</sup> Moreover, the Venice Commission sees the risk that the State Commission may, due to the politicised nomination procedure in the Sejm, misuse its competences to conduct proceedings against specific persons (candidates) in the pre-election period. This would also apply if the amending draft law were to enter into force.

## C. **The powers of the State Commission and the applicable procedure**

39. The State Commission carries out checks and conducts proceedings (Article 20.1 of the Law in conjunction with Article 4). No criteria as to the choice of the cases to be selected are contained in the Law.

40. These “checks” are, in reality, investigations. To that end, the State Commission has “access to all files” of a broad range of state institutions – including intelligence agencies, the prosecution authorities and the court system (Article 16.1 of the Law). In addition, the (President of the) State Commission may lodge a request with the public prosecutor to search premises or to seize property in order to secure evidence (Article 17 of the Law). There are a few noteworthy issues in this regard: the State Commission can demand access to court files of *pending* cases and only in Articles 18 and 19 of the Law is the State Commission’s competence “linked” with the checks and proceedings referred to in Article 20 of the Law (which raises the question whether the competence in Article 16

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<sup>22</sup> See inter alia Articles 2 and 10 [TFEU](#).

<sup>23</sup> See the 2023 [Reykjavik Principles for Democracy](#), point 10.

<sup>24</sup> See also Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.1.1. See also *ibid.*, II.2.b: fundamental elements of electoral law should in principle not be open to amendment less than one year before an election. At any rate such a rule should not be applied even to further elections.

<sup>25</sup> Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.2.3.

of the Law is in any way limited to the exercise of the State Commission's task as described in Article 20 of the Law).

41. Based on these investigations, the State Commission may initiate proceedings "in the event of a prima facie case of Russian influence" (Article 20.3 of the Law) in which case it "may" hold a public hearing (Article 22 – cf. the amending draft law, which stipulates that the State Commission "shall" hold a public hearing). The (legal) person concerned will be notified by the State Commission of the initiation of such proceedings (Article 21 of the Law). The notification will contain at least "a description of the alleged Russian influence, an indication of the legal basis and the details of the parties to the proceedings known to the Commission on the date of the initiation of the proceedings" (Article 20.4). The law does not however stipulate that the person concerned will be granted access to the complete file which is at the disposal of the State Commission.

42. As regards the proceedings themselves, the law remains silent on the possibility of legal representation, the power for the person concerned to have witnesses or experts heard (also in light of the equality of arms principle), the standard of liability and the standard of proof to be applied in the proceedings, etc. It is equally remarkable that persons under consideration by the State Commission may not refuse to testify or provide evidence (Article 25 of the Law).

43. The Venice Commission notes that the State Commission can demand access to court files of pending cases. For the Venice Commission, this goes against Article 6 ECHR since an administrative body is able to conduct parallel proceedings to those of the court system (see below IV.D).

44. As a result of the proceedings, the State Commission "shall issue an administrative decision" whereby it shall state that the action of the person concerned "was an action under Russian influence affecting the interests of the Republic of Poland" respectively that "an administrative decision has been issued under Russian influence" (Article 36 of the Law). The State Commission shall adopt decisions by a simple majority with a quorum of at least 5 members (Article 15.1 of the Law).

45. The State Commission may inform the competent authorities to initiate *inter alia* criminal or disciplinary proceedings (Articles 6.2 and 34 of the Law – the latter provision enabling the State Commission to give such notification already "in the course of the proceedings" before the State Commission).

46. The Law, in its Article 37, foresees three "remedial measures": a) the withdrawal of a security clearance or the imposition of a ban on obtaining a security clearance for a period of up to 10 years from the date of the administrative decision; b) a ban on exercising functions involving the disposal of public funds for up to 10 years; and c) revocation of a weapon permit for a period of up to 10 years from the date of the administrative decision.

47. The State Commission has the power to change or annul administrative decisions (Article 38.1). Noteworthy in that regard is the provision in Article 38.2 of the Law stating that the "legal views" of the State Commission as regards an administrative decision that – according to the State Commission – was taken under Russian influence, are binding for the authority which issued the decision and is called to re-examine the case. The annulment of administrative decisions taken between 2007 and 2022 may create severe practical difficulties and uncertainty and have serious knock-on effects on the rights of third parties, who have no right to make observations or to challenge the annulment as it affects them. The power of this extraordinary body raises serious concerns with regard to the principle of legal certainty. The competences of the State Commission are not limited in that regard even if the administrative decision in question has undergone a judicial review. This would go against the rule of law even if the State Commission consisted only of persons with a law degree or even judges, which is not provided by Article 9.2 of the Law.

## D. Nature of the State Commission and right to a fair trial

### 1. The applicability of international treaties on the right to a fair trial

48. The question arises whether Article 6 ECHR is applicable to the State Commission. The Venice Commission recalls that according to the “Engel test”, introduced by the ECtHR in 1976,<sup>26</sup> the criminal nature of a procedure is to be defined by three criteria: a) classification in domestic law; b) nature of the offence and c) severity of the penalty that the person concerned risks incurring.

a) The State Commission is qualified by the Law as “a public administration body” (Article 3.1 of the Law) and domestic law classifies the procedure before the State Commission as an administrative procedure; however, the classification in domestic law is of only relative weight and serves as a starting point.<sup>27</sup>

b) The nature of the offence is assessed in light of various factors, including whether the proceedings are instituted by a public body with statutory powers of enforcement,<sup>28</sup> whether the legal rule has a punitive or deterrent purpose,<sup>29</sup> whether the legal rule seeks to protect the general interests of society usually protected by criminal law,<sup>30</sup> or whether the imposition of any penalty is dependent upon a finding of guilt.<sup>31</sup> Despite the fact, that the conduct is not defined as an offence by the Law, such an act is akin to the offences enshrined in Chapter XVII of the Criminal Code of the Republic of Poland (Crimes against the Republic of Poland), encompassing treason, diplomatic treason, espionage or intelligence disinformation (referred to in para. 20 above). The offence established by the Law thus shall be considered criminal in nature.

c) The severity of the penalty is determined in light of the maximum penalty provided in the law for the given offence.<sup>32</sup> Taking into account the relevance of the “remedial measures” provided for in Article 37 of the Law<sup>33</sup> for the exercise of the fundamental individual rights by the person concerned (see above IV.B), the severity of the measures seems equivalent to those applying to criminal offences.

49. The Venice Commission concludes that the second and third criterion of the “Engel test” both suggest that the procedure before the State Commission established by the Law is criminal in nature. That entails that the guarantees of the fair trial foreseen in international treaties (Articles 14 and 15 of the ICCPR and Articles 6 and 7 of the ECHR) are applicable.

50. The amending draft law proposes to limit the competences of the State Commission by a) replacing the “remedial measures” (Article 37 of the Law) with a statement by the State Commission that a person has been found to have acted under Russian influence (Article 36 of the Law), b) exempting lawyers, clergymen and mediators from the obligation to serve as witnesses (Article 29a of the Law), and c) removing the provision on clerical confidentiality (Article 31.2 of the Law).

51. The Venice Commission notes that the reformulation of the “remedial measures” would not deprive the procedure before the State Commission of its criminal nature and would not suspend the application of the fair trial guarantees: The second and third criteria laid down in *Engel*, are

<sup>26</sup> ECtHR, *Engel and Others v. the Netherlands*, no 5100/71, 8 June 1976, paras 80-85.

<sup>27</sup> ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011, para. 39; *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, no 68273/14, paras 84-85.

<sup>28</sup> ECtHR, *Benham v. the United Kingdom*, no. 19380/92, 10 June 1996, para. 56.

<sup>29</sup> ECtHR, *Öztürk v. Germany*, no. 8544/79, 21 February 1984, para. 53.

<sup>30</sup> ECtHR, *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, no. 47072/15, 23 October 2018, para. 42.

<sup>31</sup> ECtHR, *Benham v. the United Kingdom*, no. 19380/92, 10 June 1996, para. 56.

<sup>32</sup> ECtHR, *Campbell and Fell v. the United Kingdom*, nos 7819/77 7878/77, 28 June 1984, para. 72.

<sup>33</sup> See para. 9 above.

alternative and not necessarily cumulative; for Article 6 ECHR to be held to be applicable, it suffices that the offence in question should by its nature be regarded as “criminal” from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere.<sup>34</sup> All the concerns raised above would thus remain applicable. Concerning the professional privilege of confidentiality, the new Article 29a of the Law would certainly be a step in the right direction, as is the removal of the provision on clerical confidentiality. Since, however, Article 32 of the Law would not be modified, it is unclear whether Article 29a of the Law would in any way shield persons with the privilege of professional confidentiality from the risk of having this privilege lifted by the State Commission.

## 2. *Application of the right to a fair trial to the State Commission*

### a) The composition of the Commission

52. The State Commission is a “public administration body” (Article 3.1 of the Law) which shall be composed of nine members (Article 9.1 of the Law). The members of the State Commission shall be appointed by the Sejm for an indefinite period. The Sejm also has the power to dismiss them. Candidates shall be proposed by parliamentary clubs (from the Sejm or the Senate). The eligibility criteria are set in Article 9.2 of the Law: a member of the State Commission shall have Polish nationality and enjoy full public rights; have full capacity to perform legal acts; have not been convicted, with a final effect, of an intentional offence or an intentional fiscal offence; comply with the requirements laid down in the Law of 5 August 2010 on the protection of classified information as regards access to “strictly classified” information; have a university degree or the necessary knowledge of the functioning of public authorities; have a good reputation; have agreed to stand as a candidate. A law degree is not required. The procedure of the appointment of the members is on the other hand, not elaborated in the Law and will therefore be decided by the Speaker of the Sejm (leaving open the possibility that the appointment is made by a simple majority with no guarantee that the opposition is represented).

53. The chair of the State Commission shall be appointed by the Prime Minister (Article 11.1 of the Law), who will also determine its rules of procedure (Article 12.7 of the Law)<sup>35</sup> and whose Chancellery will provide the State Commission with “the substantive, legal, organisational and technical as well as clerical and office services” (Article 3.2 of the Law) and will cover expenses related to its activities from its budgetary chapter (Article 3.3 of the Law). In addition, the Commission may decide to have “an authorised staff member of the Chancellery of the Prime Minister” carry out its checks (Article 20 of the Law).

54. While Article 9.9 of the Law provides that the members of the State Commission shall be independent in the exercise of their functions, their appointment procedure as well the dependence of their work from the Chancellery of the Prime Minister make them *de facto* dependent on the legislative and executive branches of power and give the State Commission the appearance of a clearly political body even without political balance in the representation. Moreover, they “may not be held liable for their activities falling within the scope of their duties in the Commission” (Article 13 of the Law), and they neither underlay disciplinary procedures nor are submitted to a supervisory body such as the National Council of Justice, so they are free to make (even unfounded) allegations without consequence.

55. The amending draft law proposes to make the membership in the State Commission incompatible with the office of Member of the Sejm or the Senate (draft Article 9.2(a)). Although

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<sup>34</sup> See ECtHR, among others, *Lutz v. Germany*, no. 9912/82 25 August 1987, para. 55; *Öztürk v. Germany*, no. 8544/79, 21 February 1984, para. 54.

<sup>35</sup> Cf. the amending draft law according to which the State Commission itself selects its chair and adopts its Rules of Procedure (draft amendments proposed to Articles 50.1 and 51 of the Law).

such a provision on incompatibility would be an improvement, it should also be stressed that this does not adequately guarantee the independence of the State Commission from the legislative and executive branches of powers. Nothing in the Law prevents an active politician from becoming a member of the State Commission if that person is involved in local politics or a member of the European Parliament, a former member of Parliament, or a member of a political body at the infra-state level.

56. In conclusion, the State Commission, as envisaged by the Law – wielding the broad powers and competencies as discussed in Section IV.C, based on broad and vague notions as described in Section IV.B – is an extraordinary, highly political body given the appointment procedure of its members and its dependence on the Chancellery of the Prime Minister.

b) Other aspects of the right to a fair trial

57. The Venice Commission notes that several of the guarantees of a fair trial according to Article 6 ECHR are not respected in the procedure foreseen by the Law due to the following reasons:

- The procedure before the State Commission reveals several irregularities. Persons under consideration by the State Commission may not refuse to testify or provide evidence (Article 25 of the Law), which contradicts the privilege against self-incrimination. These persons, moreover, do not enjoy the guarantees of the right of defence, such as the right to have an advocate or the right to legal aid. The Law does not indicate the standard of liability and the standard of proof that should be applied in the proceedings. The State Commission acts as both a public prosecutor carrying out *ex officio* verifications (Article 20.2 of the Law) and, at the same time, deciding on the matter.
- Notarial, advocacy, legal counsel, medical or journalistic confidentiality may be lifted by the State Commission if this is necessary to protect important interests of the Republic of Poland or to protect internal security, and it would be excessively difficult to establish the circumstances on the basis of other evidence (Article 32.1 of the Law). It is up to the State Commission to determine whether these conditions are met. The Venice Commission recalls that “The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State”.<sup>36</sup> The same applies to the protection of medical and journalistic confidentiality. The Law fails to recognise the special importance of these forms of professional confidentiality.<sup>37</sup> The Law is in that sense at odds with international standards. The Venice Commission also notes that a different approach is adopted with respect to clerical confidentiality, which cannot be lifted (Article 32.2 of the Law). Such a differentiated approach to various groups of persons who have the obligation of confidentiality due to their profession appears random.

58. The Venice Commission concludes that the Law violates several fundamental guarantees of the fair trial; it also interferes with other human rights, notably the right to private life encompassing the professional privilege of confidentiality – Article 8 ECHR -, freedom of expression – Article 10 ECHR -, freedom of association – Article 11 ECHR - and possibly the principle of non-discrimination – Article 14 ECHR). Moreover, the Law is at odds with the principles of the separation of powers and checks and balances, since judicial competences are entrusted to an administrative body which is part of the executive, and which is not guaranteed independence as a tribunal.

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<sup>36</sup> CCBE, [Code of Conduct for European Lawyers](#), 2008, para. 2.3.1.

<sup>37</sup> For medical confidentiality, see, for instance, ECtHR, *Panteleyenko v. Ukraine*, no. 11901/02, 29 June 2006. For journalist confidentiality, see ECtHR, *Voskuil v. the Netherlands*, no. 64752/01, 22 February 2008; and [Recommendation No. R\(2000\)7](#) of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.

### **E. Judicial protection against the decisions of the State Commission**

59. According to the Law, the State Commission shall adopt administrative decisions (Article 14(1) and Article 36 of the Law). These decisions are subject to review by administrative courts under the Law “On Proceedings Before Administrative Courts”. This appeal does not have an automatic suspensive effect. For the decision to be suspended, the person concerned should lodge a separate request for temporary protection.

60. The amending draft law initiated by the President four days after the signature of the Law by the same President proposes to replace judicial review by administrative courts with judicial review by common courts: a court of appeal (Article 39a) and, subsequently, the Supreme Court (Article 39b).

61. The Venice Commission wishes to make the following observations at this point.

- Concerning the ongoing debate on the independence of the Polish judiciary, the Venice Commission notes that a series of recent ECtHR judgments revealed infringements of the right to a tribunal established by law. These violations occurred in a wider context which the ECtHR described as a rule of law crisis consisting of “successive judicial reforms aimed at weakening judicial independence”.<sup>38</sup> In its Decision of 7 June 2023 concerning the execution of the Reczkowicz group of cases, the Committee of Ministers firmly underlined Poland’s unconditional obligation to execute the Court’s judgments in these cases, regardless of any obstacles existing within the domestic legal system, including the case-law of the Constitutional Tribunal. The Committee exhorted the Polish authorities to rapidly elaborate measures to: (i) restore the independence of the NCJ (National Council of Justice) through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (ii) address the status of all judges appointed in deficient procedures involving the NCJ as constituted after March 2018 and of decisions adopted with their participation; (iii) ensure effective judicial review of the NCJ’s resolutions proposing judicial appointments to the President of Poland, including of Supreme Court judges, respecting also the suspensive effect of pending judicial review; (iv) ensure examination of the questions as to whether the right to tribunal established by law has been respected, without any restrictions or sanctions for applying the requirements of the Convention.<sup>39</sup>
- It appears more logical to entrust judicial protection against administrative decisions (Article 14.1) by “a public administration body” (Article 3.1) to administrative courts, especially as regards the power of the State Commission to change or annul administrative decisions.
- There appears to be unclarity as regards the applicable legal framework for the courts conducting the judicial review if the draft new law would enter into force: Articles 39a and 39b refer to the Code of Civil Procedure, while Article 40 refers to the Code of Administrative Procedure, and it is unclear why the amending draft law refers to civil law and not to criminal law.

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<sup>38</sup> See, for example, ECtHR: *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, concerning the Disciplinary Chamber of the Supreme Court; *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, concerning the Chamber of Extraordinary Review and Public Affairs of the Supreme Court; *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022, concerning the Civil Chamber of the Supreme Court; *Broda et Bojara v. Poland*, nos. 26691/18 et 27367/18, 29 June 2021; *Grzęda v. Poland [GC]*, no. 43572/18, 15 March 2022, in which the GC of the ECtHR held that the judiciary as a result of successive judicial reforms has been exposed to interference by the executive and legislature and its independence has been substantially weakened. Various of the ECtHR judgments are based on the understanding that there have been manifest breaches in the appointment process of judges, as a result of the fact that the reformed National Council of Justice (NSJ) can no longer be considered a body that is independent from the legislative or executive powers. This line of reasoning is arguably applicable to all judicial formations that contain judges appointed by the reformed NSJ. See also the most recent Judgment of the Grand Chamber of the Court of Justice of the European Union: [European Commission v Republic of Poland \(5 June 2023, C-204/21\)](#), where the CJEU considered that the adoption by Poland, on 20 December 2019, of a law amending the national rules relating to the organisation of ordinary courts, administrative courts, and the Supreme Court infringes various provisions of EU law.

<sup>39</sup> See [CM/Del/Dec\(2023\)1468/H46-18](#)

## V. Conclusion

62. The Venice Commission recognises the legitimacy of the efforts aimed at countering undue foreign influence but considers that the approach taken by the Law is not appropriate. The necessity for introducing the new mechanism established by the Law on the State Commission which is extraordinary, intrusive, retroactive and non-judicial in nature – has not been established, which already leads to the conclusion that the Law should be repealed in its entirety and its flaws would not be remedied by the amending draft law.

63. The Venice Commission is particularly concerned about the overly broad scope of application of the Law and the fact that core notions in the Law are formulated in an excessively vague manner. This means that the State Commission – which due to the appointment procedure of its members and its *modus operandi* resembles a body of a political nature – enjoys a virtually unlimited discretion when applying the law. Due to these shortcomings, the Law does not offer any guarantees against political misuse, and it may have an influence on the electoral process. It may lead to the violation of numerous procedural and substantive human rights and is also at odds with the principles of legal certainty, the separation of powers and checks and balances.

64. The Venice Commission is also particularly concerned about the adoption of the Law just a few months before the parliamentary elections. A candidate running for election may be subjected to an examination by the State Commission and may be stigmatised by the proceedings and/or by the decision of the State Commission, and even deprived of the right to stand for elections for ten years.

65. The Venice Commission finds that the legislation of the kind under review in the present urgent opinion could easily become a tool in the hands of the majority to eliminate political opponents. The establishment of a commission where the “accused” is publicly interrogated by and administrative body on vaguely defined grounds is extremely dangerous. It could easily be abused to brand political opponents (or, more generally: people who are, for whatever reason, disliked) as “enemies of the state”, eroding the democratic process,<sup>40</sup> diminishing the plurality in the political landscape,<sup>41</sup> and fuelling a sense of general distrust in the public. A decision by the State Commission finding that the acts of a person were “under Russian influence” will most certainly have significant *de facto* effects on (the career of) the person concerned or the commercial endeavours of a company. This is even more problematic as the Commission may base its assessment on classified information, even if it is “top secret” (to which it has unlimited access), without having to reveal the source.

66. In light of these conclusions, the Venice Commission cannot but consider that the Law should be repealed in its entirety and that the amending draft law cannot remedy its fundamental flaws. The Venice Commission, therefore, recommends that the authorities of the Republic of Poland consider revoking the Law at their earliest convenience to prevent it from having a negative impact on the level playing field in the context of the upcoming elections.

67. The Venice Commission remains at the disposal of the Polish authorities and the Parliamentary Assembly for further assistance in this matter.

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<sup>40</sup> See *inter alia* Articles 2 and 10 TFEU.

<sup>41</sup> See the 2023 [Reykjavík Principles for Democracy](#), point 10.