



Position of the Management Board of the THEMIS Association of Judges of 31 May 2023 on the Act on the State Commission for Investigating Russian Influences on the Internal Security of the Republic of Poland in 2007–2022 of 14 April 2023

(Journal of Laws of 30 May 2023, item 1030)

The Management Board of the THEMIS Association of Judges notes with the utmost concern the signature by the President of the Act on the State Commission (hereinafter: the Commission) for Investigating Russian Influence on the Internal Security of the Republic of Poland in 2007–2022 of 14 April 2023 (hereinafter: the Act) and its subsequent referral to the Constitutional Tribunal.

The Act is unconstitutional in whole. As pointed out by the Ombudsman, its analysis results in the conclusion that the aim of the Commission, which is a body of public administration, is to stigmatize and subject public officials, managers of business entities and anyone who is inconvenient to the authorities, to punishment by means of decisions that are equivalent in their content to criminal measures. In our opinion, the Commission's objective is to influence the outcome of the parliamentary elections in the interests of the current authorities. Furthermore, it is aimed directly against the leader of the parliamentary opposition, as is clear from its justification, which states, among other things: *'It simultaneously cannot go unnoticed that Donald Tusk's government in 2007–2014 pursued quite a different policy with respect to the Russian Federation. It is referred to as a reset in the relations with Russia, which, after all, was conceptually developed in Germany, by Angela Merkel's government.'*

According to Article 126, para. 2 of the Constitution, the President of the Republic of Poland ensures compliance with the Constitution. By signing this Act, President Andrzej Duda has shown that his overriding goal is for the political camp from which he originates to win the next parliamentary elections, even if the means to this end is to repeatedly breach the Constitution. The signature of the Act and its subsequent referral to the Constitutional Tribunal will guarantee that it enters into force, the Commission will be appointed and the 'punitive measures' it imposes will become enforceable, even before the autumn elections. A later, possible finding by the Constitutional Tribunal that the Act was unconstitutional will be irrelevant. Notwithstanding this, the Constitutional Tribunal has ceased to be an effective guardian of the Constitution anyway, among other things, as a result of President Duda's earlier actions (swearing in of stand-in judges).

The real motive for the appointment of the Commission is the fact that, despite having had full control over the special services for the past eight years, and despite repeated insinuations in the public media about opposition politicians allegedly collaborating with Russia, the current ruling camp has been unable to gather evidence of this which would stand a chance of being positively verified before the still largely independent judiciary.

This is why a special Commission is to be set up as a politicized body of an administrative nature combining accusatory and judicial functions, which will be composed of people to whom the Act assures impunity and which will issue final decisions imposing sanctions of a defamatory and repressive nature, in breach of the right to an independent and impartial court, the right of defense, the principle of the presumption of innocence, the prohibition of retroactivity of the law and the principle of definiteness of offences, *de facto* excluding the affected people from political life, which will not be subject to substantive judicial review. Any decision of this kangaroo court will constitute the basis for Poland's liability for damages before the ECtHR.

The adoption of this Act is also grossly in conflict with European law (e.g. judgment C 40/21 of the CJEU), as its application can unjustifiably, through the application of disproportionate sanctions, prevent taking up office in the European Parliament.

Concern about the content and objective of the Act has already been expressed by the US State Department, as well as the European Commission. Conflicting and weakening the position of the Republic of Poland in a situation of the ongoing war at our border is a violation of the constitutional duty to uphold the sovereignty and security of the state. The work of the Commission will further weaken Poland's position on the international arena and exacerbate the conflict with the EU caused by the rule of law crisis. Paradoxically, the establishment of the Commission will be received positively in the Russian Federation, which is keen to weaken NATO, the EU and Poland.

This law is a further blatant means of influencing the electoral process in Poland. The executive branch has already appointed election commissioners who are dependent on it, changed the electoral law, including making it difficult for Poles abroad to vote, and has illegally elected judges to a new chamber in the Supreme Court, which will decide on the validity of the elections. The authorities control the state media, which report news in accordance with the ruling party's line, giving no chance of presenting objective information. Illegal methods of surveillance are used against opposition politicians, including through the use of 'Pegasus' spyware and a chain of hotels controlled by the secret service.

All this means that Poland is no longer a state governed by the rule of law, while the Act signed by the President is a glaring example of this.

Management Board of the THEMIS Association of Judges

A link to the legal opinions on the above law can be found at:

<https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/ustawy-uchwalone-przez-sejm/ustawy-uchwalone-przez-sejm/ustawa,1507.html#collapseOpinie>