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Strategic Litigation for Rights in Europe: Building Knowledge, Skills and Connections for Legal Practitioners to Use the EU Charter of Fundamental Rights (STARLIGHT)

LEGAL CLINIC ARGUMENTS

RULE OF LAW AND CIVIC SPACE

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The Legal Clinics are a core part of the STARLIGHT programme, where all participants worked in groups to develop legal arguments on a real or potential case. Groups were mentored by their course leads and one case per thematic stream selected for publication.¹

LEGAL ARGUMENTS

FACTS OF THE CASE

This group took a live case – where in June 2023 the European Commission opened an infringement procedure against Poland regarding a new law on the State Committee for the Examination of Russian influence on the internal security of Poland. During the legal clinic and the below legal arguments the group was encouraged to focus on additional legal arguments to those outlined in the Commission’s [press release](#).

In 2023 the lower house of the Polish Parliament (Sejm) adopted a new law establishing a so-called “Commission on Russian influences on the internal security of Poland in 2007-2022” (the Law). The Commission is designed to investigate Russian influence on Polish public officials and other public figures, whose conduct may undermine public security or harm domestic interests. The catalogue of persons who may be liable is vaguely articulated and includes “public officials”, as defined by Polish statutes, and “other persons” whose actions may shape mass media, civil society and political movements. Similarly, the list of Russian “influencers” capable of exercising political leverage and the concept of “influence” is unclearly defined.

Members of the Commission, who require no judicial training, are elected by the Sejm with a simple majority. The Chair of the Commission is appointed by the PM, whose office also provides administrative support to the Commission. The Commission is a court-like institution but placed firmly in the state’s administrative structure. Reinforcing the judicial nature, it conducts hearings, acquaints itself with evidence and orders punishments, including those of a criminal nature, such as banning an individual from performing public functions for 10 years. It has unlimited search and seizure competence, with no judicial or oversight. Hearings are held in public; but can be held in private at the discretion of the Commission. Deliberations are in private and not subject to judicial oversight or the right to appeal, except on formal grounds.

Those accused have no guarantees and no right of defence. They might be punishable for acts not prohibited earlier; they cannot refuse to testify or to provide evidence, there is no presumption of innocence, and no standards of liability. There are no provisions that allow defendants to be accompanied by their lawyers.

¹ *The final legal arguments have been lightly edited but are the work of the group. Experimental legal arguments were encouraged. Readers are encouraged to draw inspiration from the work but should note that there may be some legal inaccuracies.*



LEGAL ANALYSIS

1. Introduction

The Law falls within the scope of EU law and violates the following provisions of EU law and the Charter of Fundamental Rights (CFR):

1. Art.10(2) and 11(1) TEU, Art.20(2)(b) TFEU, Art.11 and Art.12 of the CFR: it is too vague to justify restricting the right to stand for elections.
2. Art.19(1) EU, and Arts.3, 4, 5 and 6 of Directive (EU) 2016/343, with Arts.39(1), 40, 47, 48 and 49(1) of the CFR: it fails to provide adequate legal protection in a field covered by EU law and disregards common minimum standards on procedural rights.
3. Art.2 TEU in its own right: it provides unlimited power to a state body, jeopardising the principle of democracy, separation of powers and compromises legal certainty due to its vagueness.
4. Art.6 of the GDPR or Art.4(1) of the Law Enforcement Directive (EU) 2016/680 ("LED") and Art.8 of the CFR, as the Law provides neither a proper legal basis for processing sensitive data nor a sufficient justification that processing these data falls out of the material scope of the GDPR. If it is proven that instead of the GDPR, the LED applies, there is no clear basis to process personal data and no justification of necessary and proportionality.

2. EU Law arguments

a. Disqualification from public office

Provisions of the Law imposing a sanction to be banned from performing public functions – including standing as candidate in elections – fall **within the scope of Art.20(2)(b) TFEU**. As national law is applicable to EU elections, the Law also falls within the scope of **Arts.10(2) and 11(1) TEU** that provide direct representation of the citizens at Union level.

Entitling persons to vote and stand as a candidate in elections to the European Parliament (EP) falls within the competence of each Member State (MS), nevertheless, the MS **has to comply with EU law**.² A law that deliberately deprives an EU citizen of their EP voting rights, by an organ other than a court of law, is likely to exceed the member states' margin of discretion.

The logic that a supranational legal source allows a margin of appreciation but with certain requirements is reinforced by jurisprudence from the European Court of Human Rights (ECtHR) in Art.3 of Protocol No. 1 (right to free elections). The ECtHR stated that the right to stand for election is "*inherent in the concept of a truly democratic regime*" (Podkolzina v. Latvia, 2002, § 35). In *Hirst v. UK (No. 2)*³ and held that there was a violation of Art.3, Protocol 1 on account of the automatic and discriminate restriction of the applicant's right to vote due to his status as a convicted prisoner.⁴

The fact that the Law is also applicable to EP elections, jeopardizes the right of Polish citizens to be directly represented at the EU level as foreseen in Art. 10(2) TEU. The Law restricts passive suffrage and the right

² Conf., mutatis mutandis, grand chamber CJEU judgment in Case C-145/04, *Kingdom of Spain v. United Kingdom*, ECLI:EU:C:2006:543, paragraph 78 (emphasis added)

³ 74025/01 [2005] ECHR 681

⁴ This argument was successfully reused later in *Greens and M.T. v. UK, Firth et al. v. UK* and *McHugh et al. v. UK*, as well as in many other rulings against other Council of Europe member states.



to stand for election, which are core tenets of a citizens' ability to actively participate in a democracy's decision-making process of the EU.

Thus, it can be reasonably argued that the Law, whereby a body which is not a court or tribunal (see 2) b) below) deprives a person of his passive right to vote for a significant period of time, without any elements of due process (see 2) b) below), is not in conformity with the provisions set out in Arts.10 (2), 11(1) of the TEU and 20 (2) b) of the TFEU.

b. No judicial remedy and procedural rights

As the Law disregards the principles of *nulla poena*, prohibition of self-incrimination, presumption of innocence, right of defence, publicity of trials and right to effective remedy, **it falls within the scope of Art.19(1) TEU and Arts.3, 4, 5 and 6 of the Directive (EU) 2016/343.**

The Commission acts like a court: it may impose sanctions prohibiting a person from holding public functions for up to 10 years. Art.19 TEU gives concrete expression to the value of the Rule of Law affirmed in Art.2 TEU, entrusting the judicial protection to national courts and tribunals and to the CJEU.⁵ As provided for in Art.19(1) TEU, it is for the MS to establish a system of legal remedies and procedures to give effective judicial protection in the fields covered by EU law.⁶ It thus follows that, every MS must ensure that 'courts or tribunals' ruling on questions related to EU law meet the requirements of effective judicial protection.⁷

The CJEU's jurisdiction in assessing whether a body qualifies as a 'court or tribunal' includes whether the body is (1) established by law, whether (2) it is permanent, (3) its jurisdiction is compulsory, (4) its procedure is *inter partes*, (5) it applies the rules of law and (6) it is independent.⁸ Whether the Commission qualifies as "established by law" is already questionable. The ECtHR identified⁹ two criteria to establish this: (a) the law should determine the substantive criteria and procedure for judicial appointments, and (b) the law must be strictly observed. Commissions members may be selected for the position arbitrarily, therefore, it fails to be established by law.

As stated by the CJEU, a court or tribunal ruling on the application or interpretation of EU law shall meet the requirements essential to effective judicial protection in accordance with Article 19(1) TEU. Such an essential element is independence, as confirmed by Article 47 of the Charter referring to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.¹⁰ Independence presupposes that the Commission exercises its judicial functions autonomously, protected against external interventions or pressure.¹¹ In accordance with the principle of the separation of powers, independence of the judiciary must also be ensured in relation to the legislature and the

⁵ See also the judgments of 5 November 2019, *Commission v Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924, para. 98; of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, para. 108 and of 21 December 2021, *Getin Noble Bank*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2022:235, para. 217

⁶ Note also that the principle of the effective judicial protection is a general principle stemming from the constitutional traditions common to the MS, which has been enshrined in Arts.6 and 13 ECHR and is now reaffirmed in Art.47 of the Charter.

⁷ See the judgments of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 189 and 190 and *Getin Noble Bank*, paragraph 119-120

⁸ See the judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and judgment of 27 February 2018, *Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 38

⁹ In ECtHR *Ilavtsovskiy v Russia* (6945/04, ECHR(2009) 0709, paras 40-41

¹⁰ *Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40-41

¹¹ See, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51; *Margarit Panicello*, para. 37 and *Juízes Portugueses*, para. 44

executive,¹² and that the regime must provide the necessary guarantees in order to prevent political control of the content of judicial decisions.¹³ The Chair of the Commission is appointed by the Prime Minister (PM), and the Commission physically operates from the PM's office. The Commission cannot be considered as an independent "court or tribunal".

Another aspect of independence is that an independent body should be objective and impartial.¹⁴ The Commission exercises two criminal functions during its proceedings: prosecution and adjudication. This implies that it cannot maintain objectivity; it has a vital interest in supporting the prosecution's side, as it is the Commission's own.

Directive (EU) 2016/343 on the presumption of innocence deserves particular attention. According to the CJEU "*defence rights apply not only to criminal proceedings on substance, i.e. trial on the merits of the case, but also to other proceedings where the rights and interests of individuals may be affected*".¹⁵ Furthermore, in *UBS Europe SE, C-358/17* "[T]he rights of the defence must be observed in all proceedings initiated against a person which may well culminate in a measure adversely affecting that person".¹⁶

What constitutes a 'criminal penalty' is based on three alternative criteria, the "Engel criteria" established by the ECtHR.¹⁷ "*The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.*"

In ECHR jurisprudence unjustified procedural rights violations do not necessarily result in a violation of the right to a fair trial, under EU law, however, the procedural rights enshrined in the Directive, i.e. defence rights, are rights on their own and breach of any of these rights requires a remedy.

c. Undue interference with the democratic process

We also argue that the Law **falls within the scope of TEU, Art. 2** -that the EU is founded on "human dignity, freedom, democracy, the rule of law and respect for human rights".

Although there is no precedent in CJEU case law where the value of democracy under Article 2 TEU has been directly applied in infringement proceedings, the normative content of democracy has already been addressed by the CJEU, setting a normative requirement towards MSs. "*[I]t must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.*"¹⁸

The CJEU also stated in *Volker und Markus Schecke*,¹⁹ that the democracy principle '*enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system*'.

¹² see, to that effect, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, para. 35; *A. K. and others*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, para. 124, judgment of 21 December 2021, *Getin Noble Bank*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2022:235, para. 228

¹³ See *Getin Noble Bank*, para. 227

¹⁴ See the judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited of 24 June 2019; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 73, judgment of 19 November 2019 and *A. K. and others*, paragraph 122

¹⁵ Judgment of 8 May 2019, *PI v Landespolizeidirektion Tirol*, C-230/18, ECLI:EU:C:2019:383, para. 80

¹⁶ Judgment of 13 September 2018, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, C-358/17, ECLI:EU:C:2018:715, para. 60

¹⁷ *Engel and Others v. the Netherlands*, judgment of 8 June 1976, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Series A no. 22

¹⁸ Judgment of 27 February 2018, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2018:117, paragraph 232.

¹⁹ 9 Joined Cases C-92/09 and 93/09 *Volker und Markus Schecke* [2010] ECR I-I 1063, paragraph 68

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The investigations and hearings of the Commission may create grave reputational damage for candidates in elections and, by finding that a person acted under Russian influence, could limit the effectiveness of the political rights of persons elected in democratic elections.

d. Data protection

The Law also falls within the scope of **Art.6 of the GDPR** or **within the scope of Art.4(1) LED**.

In the absence of clear definitions and criteria, the Commission has access to any personal and sensitive data of the person subject to its procedure. Although more elaboration is needed on this point, judgement of 8 December 2022, *VS v Inspektor v Inspektorata kam Visshia sadeben savet*, Case C-180/21 is a useful starting point.

3. EU Charter of Fundamental Rights

When read in conjunction with the above EU laws there are several violations of the CFR:

a. Protection of Personal Data - Art.8 CFR

The Commission has unfettered powers to search and seize personal data without any judicial oversight. The legal basis for the processing of personal data must be specified.

In the Digital Rights Ireland Ltd CJEU case (Joined Cases C-293/12 and C-594/12), the CJEU ruled on Art.8 CFR, stating that although public security is a fundamental objective of general interest, it does not justify broad and indiscriminate measures, further adding that *"the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards"*.

b. Freedom of Expression and Information - Art.11 and Freedom of Association - Art.12 CFR

In *La Quadrature du Net*, the CJEU stressed that legislation restricting fundamental rights should identify the circumstances and conditions in which it applies *"thereby ensuring that the interference is limited to what is strictly necessary"* (Joined Cases C-511/18, C-512/18 and C-520/18). In addition, the ECtHR has consistently held that there is little scope for restrictions on political speech (*Brasilier*) or on debate on matters of public interest (*Sürek*), including for leaders and activists involved with NGOs, which are recognised for their role as *"public watchdogs"* (*Animal Defenders International*).

The close similarities between the right to freedom of expression and the right to peaceful assembly, allow to argue that an unjustified limitation of the former inevitably leads to limiting the latter (see *Women on Waves and Others*).

The ECtHR concept of *"chilling effect"*, which is understood as a case having an effect going beyond the individual instances, resulting in persons being dissuaded from exercising their rights for fear of being subject to sanctions, can also be useful in this case. The notion of *"chilling effect"* has been used in freedom of assembly-related cases (e.g. *Navalny v. Russia*, 15 November 2018), and has a clear relevance here.

c. The right to vote and stand in EP and municipal elections - Art.39(1), Art.40 CFR

The broad targeting of publicly relevant figures under the vague concept of Russian *"influence"* puts electoral participation at high risk, as it alters the political landscape by indirectly limiting the free exercise of the right to vote.

Such limitations need to constitute a proportionate interference. The ECtHR case law developed from *Hirst* onward that effective review procedures on the suspension or revocation of passive electoral rights must be made available.

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In the case at hand, the vagueness of the Law, lack of judicial oversight and review mechanisms would allow arbitrary and indefinite suspension of the right to stand in elections.

d. The right to an effective remedy and a fair trial - Art.47(1), 47(2), 48(2), 49(1) CFR

In *M. Johnston v Chief Constable of the Royal Ulster Constabulary* (C-222/84) and *Evropaiki Dynamiki* (T-461/08) the CJEU recognised that the rights to an effective remedy and to a fair trial stem from the fundamental right to effective judicial protection. Both the rights covered by article 47 CFR constitute the ground for the current Directives on procedural rights. A similar argument can be raised in relation to defence rights, also considering that in *Akzo Nobel Chemicals* (c-550/07) the CJEU emphasised that “*in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of EU law laid down in Art.48(2) of the Charter*”.

The denial of principles of legality and proportionality appears in clear violation of modern criminal law theories and the common constitutional tradition of the EU MS.

e. Conclusion

The law on the *Commission on Russian influences on the internal security of Poland in 2007-2022* violates EU law, including the abovementioned provisions of the Charter of Fundamental Rights of the EU. Consequently, the European Commission should refer the matter to the Court of Justice of the EU under Art.258 TFEU. In addition, the Commission, as guardian of the Treaties, should apply to the CJEU for the prescription of any necessary interim measures under article 279 TFEU, which should include immediate and unconditional suspension of the application of the abovementioned law by the Republic of Poland.