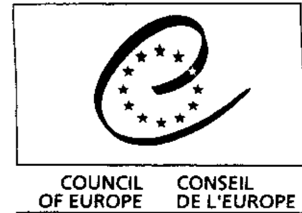

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<u>EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW</u>

(VENICE COMMISSION)

OPINION ON THE PARLIAMENTARY BILL ON THE REGULATION OF THE OPERATION OF PARLIAMENTARY INVESTIGATIVE COMMISSIONS

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Opinion on the Parliamentary Bill on the Regulation of the Operation of Parliamentary Investigative Commissions (CDL (2001) 24).

This bill is an executive order to the constitution. It consummates the constitutional norm set forth in article 77 section 3, article 78 and article 83 section 1. The institution of parliamentary investigative commissions has a lengthy history. The parliaments of various countries envisage the ability to appoint them. The objective of such a commission is to control the executive branch. In turn, its special nature allows it to overcome certain procedural obstacles that exist in other parliamentary commissions. The characteristic trait of these commissions is the fact that they have a special nature on account of their ability to apply a special procedure. This therefore settles the issue that the institution of an investigative commission itself must be anchored in a statute, that is, it must have statutory grounds. The subject matter of this opinion is in fact the bill concerning such a statute.
The selection of a statute as the form to set up the institution of an investigative commission is therefore proper. The title of this statute, however, does give rise to certain doubts. It has been written in the plural. This wording may be misleading. For it could suggest that the idea is to create the grounds to appoint various types of investigative commissions, and thus commissions that differ from one another not only by the subject matter they handle but also, for instance, by the manner in which they are appointed, how they operate or the powers they hold; but, after all, this is not the idea that underlies this statute. This statute, as an executive order to the constitution, is supposed to create the legal grounds for a new institution, that being the investigative commission. Therefore, the objective of this statute is to specify the characteristic traits of such a commission as a special commission with respect to other parliamentary commissions. This statute therefore applies to the general principles of a new type of commission (the course whereby it is established, its composition and its powers). It would therefore be more justified and more suitable to the content of this statute for its title also to refer to the generally specified institution of an investigative commission, and thus for it to be written in the single as opposed to the plural. Whether one, many or no commissions are established would be an issue for the parliament to decide. The statute is only supposed to create conditions such that in circumstances in which the parliament wants to appoint such a commission, the appropriate legal grounds will exist to do so.

Article 4 expressly indicates that the investigative commission shall not be a standing commission in the parliament's internal structure. It will be appointed to review certain matters concerning the public interest (article 2). Such a solution is equitable. Investigative commissions are by their nature special commission, and thus they do not belong to the system of standing parliamentary commissions. The parliament determines when to establish them and the duration of their activity. Such a solution has also been proposed in this bill. The parliament decides to appoint the commission specifying at the same time the commission's duties, composition and operating timeline. The content of article 4 of the bill, however, elicits a number of reservations. This article specifies two circumstances in which the investigative commission is appointed. Paragraph 1 includes a regulation concerning the optional appointment of a commission while paragraph 2 has a regulation on its compulsory appointment. The difference between paragraphs 1 and 2, in principle, boils down to the majority which files the motion to appoint an investigative commission. Paragraph 2 elicits doubts. This is an *ex lege* type of appointing an investigative commission. In circumstances in which a motion is submitted by 1/4 of all the members of the parliament, the parliament is obliged to establish such a commission. One may express fears on whether this type of wording deprives the parliamentary majority, even a qualified majority (3/4) of influence over the establishment of such a commission. The content of article 4 indicates that the submission of a motion by 1/4 of the members leads to a simple automatic action. Even conducting a parliamentary debate over such a motion in light of the wording presented in this document would not alter anything. One could not even proffer a motion to reject this proposal during a parliamentary debate. Such a far-reaching solution, especially in countries that are creating parliamentary precedence and customs with drudgery may be very dangerous. Instead of striving to clarify a given important circumstance, it could form a constituent element of pure political struggle and play a more destructive than constructive role for the entire parliamentary system. This wording may lead to abuse in creating an investigative commission as an instrument for the opposition to fight with the governmental majority. That is why I believe that article 4 should be edited. Paragraph 2, which basically excludes the sensibility of having a parliamentary debate on such a motion, should be amended. According to me, the statute should not create grounds for a motion submitted by parliamentarians, even by ¼ of the members of parliament, to elicit such far-reaching effects and somehow encroach upon the resolution adopted by the parliament.

Article 5 concerns the composition of the commission. The general principles are equitable, namely, implementing the rule of reaching a certain consensus among all the parties in

parliament on the members of this commission, including the ability to vote at a plenary session if such a consensus is not reached. It seems, however, that for the purity of certain principles it would be necessary to indicate expressly in the statute who may not be a member of such a commission. Without making such a statutory reservation, one could encounter the accusation of infracting upon the rights of the parliamentarians. I therefore think that a provision should be included in the body of the statute to indicate what conditions would preclude one from being a member of such a commission. For instance, a member of parliament who is directly affected by a matter at hand, or who has taken or is taking part in any process role whatsoever before some other state body in a given matter, or when there are circumstances which elicit reasonable doubts to his/her impartiality.

The course for convening and running the meetings of the commission does not give rise to greater doubts. There is, however, a number of ambiguities concerning the procedure itself of the proceedings, and also the relationship of the proceedings taking place before the commission to the proceedings underway before judicial or prosecution bodies. (Besides the very general article 2 paragraph 2) The appointment of every investigative commission always elicits doubts about having surpassed the boundaries of separation of powers. For this reason it is extraordinarily important for the statute to specify precisely the mutual relationships between the judicial and prosecution bodies and the commission. This is one of the objectives of such a statute. Otherwise, there will be conflicts over powers; furthermore, there is the danger of violating the principles of due process of law that have been molded. This bill does not give a response to a number of material questions concerning these issues. For example, may the commission conduct proceedings in circumstances when prosecution or judicial proceedings are underway concurrently? Is the commission bound by any of the findings in some other proceedings? May the commission evaluate the conformance of judicial adjudications with the law? These issues are extremely important and the statute must regulate them but this bill fails to resolve them.[1]

[1] The Polish Investigative Commission Act ratified by the parliament on 21 January 1999 was challenged by the President to the Constitutional Tribunal for, among other reasons, the fact that it permits the commission to conduct proceedings that have been concluded with a legally-binding decision by some other body of public authority. In fact, the President referred to the argument of violating the principles of judicial independence and the separation of powers. The Constitutional Tribunal did not share the President's stance. It stated that the objectives of judicial proceedings differ from the commission's proceedings. The objective of judicial proceedings is to adjudicate on a given person's criminal accountability. In turn, the objective of the investigative commission is to examine the activity of a given body of public authority, in particular to establish the scope and causes of the irregularities in its operation. In undertaking proceedings that have been concluded

The issue of interrogations before the commission is a very delicate matter for every investigative commission. The bill correctly refers to the Penal Code and the Code of Penal Procedure (articles 3, 13 and 15) in all these cases. In this light, however, one may have reservations on whether the commission's entitlements are not too far-reaching. In particular, this applies to the sanctions that may be imposed on witnesses. The wording of article 15 paragraph 4 (the relevant sanctions provided for in the Penal Code and the Code of Penal Procedure are applied with regard to those individuals summoned as witnesses) shows that the commission is entitled to impose such sanctions. Material doubts arise here. Should a parliamentary commission actually have such far-reaching entitlements? Is this not a case in which the boundaries of separation of powers have been surpassed too excessively, even if it is taking place on the base of the Code of Penal Procedure? It would be more reasonable from both the point of view of protecting human rights and the principles of a state ruled by law for the commission to apply to the court to mete out an order-keeping penalty, as opposed to the commission imposing this penalty itself. In turn, the commission could lodge a complaint if the application of the order-keeping penalty were to be rejected. I would propose that you consider changing article 15 in this direction. I think that such procedural safeguards are necessary and conform to a greater extent to the universal principles of protecting human rights, even though they may protract the commission's proceedings.

Article 21 concerns the commission's cooperation with the Office of the General Prosecutor. Such cooperation is necessary on account of the nature of the commission. This bill proposes a solution whereby the General Prosecutor designates one or two prosecutors to cooperate with the commission. These prosecutors are assigned to the commission permanently until the proceedings are completed. This elicits my doubts. One should consider whether this is the best solution both from the point of view of the correctness of the operation of the prosecutor's office and the work of the investigative commission. I think that a better solution than permanently designating and somehow ascribing a prosecutor to the commission would be for the commission to request that the General Prosecutor conduct specified activities. In this case there would be no doubts under what course of action and what instruments the prosecutor may use.

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by a court with a legally-binding decision, the Commission may not express its viewpoints on how the court adjudicated the case, nor may it challenge the justification of judicial adjudications. (Decision of the Constitutional Tribunal of 14 April 1999, OTK 1999/3/41). For this reason, however, the provisions of the statute must be precise and unequivocal.

The provisions concerning the commission's final report also give rise to certain ambiguities (article 2 paragraph 2 and articles 19 and 20). Article 19 indicates that the commission's work ends with the final report in the form of a public report. This report may also occasionally contain conclusions. The question arises who may distribute this report and to whom? May the commission distribute the report itself, or should it accomplish this with the intermediacy of the parliament? The provisions are ambiguous in this area and require more precision. Article 19 specifies that the Commission **delivers** the final report in the form of a public report. In turn, Article 20 asserts the following: having been introduced to the report, the Parliament takes the decision **to deliver** the report to the relevant bodies. Furthermore, article 2 paragraph 2 also states that the conclusions drawn by Parliamentary Investigative Commissions are not mandatory for the courts, but they are reported to the prosecutor's office. I think that these articles should be edited so that they do not give rise to doubts that the external distribution of the report is accomplished with the intermediacy of the parliament, and that the commission does not perform this task independently. This appears to be the underlying sense of article 20, although this is not completely clear. This should therefore be stated with greater precision. One should assume, however, that the distribution of the conclusions (mentioned in article 2 paragraph 2) is handled by the commission itself. I believe, however, that it would be a better solution if paragraph 2 of article 2 were to be incorporated in article 19.

In summary, I believe that the fundamental points I mentioned above in this bill should be edited and written with greater precision. The ambiguities in this area may lead to tensions and violations of the recognized principles of a state ruled by law and the separation of powers.