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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON
THE FEDERAL LAW
ON THE FEDERAL SECURITY SERVICE (FSB)

OF THE RUSSIAN FEDERATION

On the basis of comments by

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Mr Hubert HAENEL (Member, France)
Mr Jørgen Steen SØRENSEN (Member, Denmark)
Mr Anders FOGELKLOU (Expert, Sweden)

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I. Introduction

1. By a letter of 19 December 2011, the Chair of the Monitoring Committee of the Council of Europe Parliamentary Assembly requested the opinion of the Venice Commission on the Federal Law of the Russian Federation on the Federal Security Service (CDL-REF(2012)011, hereinafter "the FSB Law").

2. The Opinion is based upon the assessment of the English translation of the consolidated version of the FSB law as provided to the Venice Commission by the Monitoring Committee. The translation may not accurately reflect the original version on all points, which may have created misunderstandings of the Law at certain points. Moreover, the law is not accompanied by any explanatory note or "rationale".

3. Messrs Cameron, Haenel and Sorensen acted as rapporteurs. The present Opinion is based on their comments and those provided by Mr Fogelklou, expert, as well as on the information made available to the delegation of the Venice Commission during its visit to Moscow, on 9-10 February 2012.

4. *The opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).*

A. Preliminary remarks

5. The present Opinion is limited in scope and should not be seen as a comprehensive and detailed review of all the provisions of the FSB Law. As suggested by the Monitoring Committee in its request, its purpose was to provide an assessment of the most recent amendments to the Law, in particular those having extended the powers of FSB organs and officers through new instruments - the preventive measures - and to highlight any related issues of concern.

6. The Opinion therefore focuses on the amendments to the FSB Law, mainly Article 13 and the new Article 13.1 of the Law, adopted in July 2010. Nonetheless, since the analysis of the above-mentioned articles cannot disregard the more general context of the law, the Opinion also addresses other matters linked, at least indirectly, to the powers of the security service organs and, accordingly, contains suggestions relating to other provisions of the Law.

B. Background information

7. In April 1995, the Russian Federation adopted a federal law "On Organs of the Federal Security Service in the Russian Federation"[1], defining the role, mission, structures and main responsibilities of the FSB, the principles governing its activities, as well as the FSB main resources and supervision mechanisms. Since 1995, the Law was amended on several occasions.

8. It should be noted that one of the prerequisites to the accession of the Russian Federation to the Council of Europe in February 1996 was to adapt the powers and structure of the FSB to a new legal and democratic framework, in line with the European values and applicable standards[2].

[1] Russian Federation Federal Law No. 40-FZ , Adopted by the State Duma 22 February 1995, Signed by Russian Federation and dated 3 April 1995

[2] "10. The Parliamentary Assembly notes that the Russian Federation shares fully its understanding and interpretation of commitments entered into as spelt out in paragraph 7, and intends: […] xvii. to revise the law on federal security services in order to bring it into line with Council of Europe principles and standards within one year from the time of accession: in particular, the right of the Federal Security Service (FSB) to possess and run pre-trial detention centres should be withdrawn;" (See Parliamentary Assembly, *Opinion No. 193 (1996)1 on Russia's request for membership of the Council of Europe*)

9. On 27 July 2010, as a response to the suicide bombing in Moscow metro in March of 2010, new amendments of the FSB Law were introduced[3]. The new amendments (new article. 13.1 of the FSB law) provide FSB with additional powers to issue *official notices* and *warnings* to organisations and individuals whose actions are deemed to be facilitating threats to the country's security or creating the conditions for crimes. According to the Russian authorities, this legislative measure was aimed at combating extremism and terrorism and at providing increased protection to Russian citizens in general. The Venice Commission was nevertheless informed, during its visit to Moscow, that the prevention measures introduced by the 2010 amendments (the official warnings and requests) have so far not been very widely used in practice.

10. Already at their stage of draft law, the 2010 amendments have been subject to public analysis and comment, both in Russia and internationally. In particular, this initiative was received with strong criticism by the Russian civil society and most of its representative organisations. According to the latter, the new provisions give the FSB back the powers of special services of totalitarian regimes and allow to stifle dissent and to scare political activists away from holding protests and rallies. One could indeed recall that the predecessor of the FSB, the KGB, working in a completely different political and legal climate in 1970's and in the beginning of the 1980's, had preventive measures as one of its main instrument.

11. Further amendments to certain provisions of the FSB Law, on issues relating to the protection of information on the FSB (article 7), the FSB staff (article 16), service in FSB organs (article 16.1) and the FSB organs' own security (article 16.2) were adopted in July and December 2011.

II. General standards relating to security services

12. All provisions relating to the missions and prerogatives of national security services concern, in essence, the relationship between, on the one hand, the preservation of the interests of the nation and, on the other hand, the guarantees of fundamental rights and freedoms of citizens.

13. The human rights obligations of relevance in the analysis of the FSB law flow principally from the European and international standards as defined in the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR) and in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950, with its Protocols. Further international instruments, such as the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and the Shanghai Convention on Combating Terrorism, Separatism and Extremism[4] are of relevance in this analysis.

14. The main ECHR relevant rights are the right to respect for private and family life (Article 8), the freedom of thought, conscience and religion (Article 9), the freedom of expression (Article 10) and freedom of assembly and association (Article 11), as well as the right to a fair trial (Article 6). The FSB Law has to be examined in the light of the permitted restrictions of the above-mentioned rights and freedoms. The Venice Commission recalls that the restriction clauses under the ECHR require for any limitation to the exercise of these a legal basis, a legitimate aim and to be "necessary in a democratic society", i.e. according to the long established jurisprudence of the EctHR to correspond to a pressing social need, be proportionate and be relevant and sufficient.

[3] The 2010 amendments are found in Federal Law No. 238-FZ of 27 July 2010 "amending the Federal Law on the Federal Security Service and the Code of Administrative Infringements of the Russian Federation". The Law was adopted by the State Duma on 16 July 2010 and ratified by the Federation Council on 19 July 2010.

[4] Shanghai Convention on Combating Terrorism, Separatism and Extremism, 15 June 2001, available at: http://www.unhcr.org/refworld/docid/49f5d9f92.html

15. In its *Guidelines on Human Rights and the Fight against Terrorism,* adopted on 11 July 2002, the Committee of Ministers of the Council of Europe indeed underlines the "States' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights".

16. At the same time, in its Recommendation 1713 (2005), adopted in the wake of the events of 11 September 2001, the Parliamentary Assembly of Council of Europe stressed the fundamental importance of the "democratic control of security sector". The recommendation of the Assembly is that the operation of security services must be based on clear and appropriate legislation, supervised by the judiciary, with parliamentary information. Moreover, the use of exceptional procedures must be defined by law in precise limits of time.

Previous Venice Commission reports

17. In a report adopted on 7 March 1998[5] and devoted to internal security services in Europe - adopted before September 11, 2001 and the development, in democratic countries, of public actions for more effectively combating terrorism - the Venice Commission explained:

> *"These matters should be addressed not only from the viewpoint of the State that has an interest and a right to protect its territorial integrity and internal security and stability, but also from the viewpoint of the individual, who has an interest and a right to continue to enjoy his fundamental rights and freedoms that should only be limited in the interests of the common good of the society of which he forms part and for a valid and just reason. The Constitutional order should therefore find the appropriate legal framework within which the overriding interest of the internal and external security of the State can be reconciled with the fundamental rights of the individual."*

18. More recently, the Venice Commission has addressed in detail the challenges faced by states in the efforts aimed at the preservation of their internal and external security, with a particular focus on the accountability and the democratic supervision of security agencies. Its conclusions were summarized in a *Report on the Democratic Oversight of the Security Services* adopted in June 2007[6].

19. The Commission has also touched upon a number of these issues in its reports on counter-terrorism measures and human rights, adopted in July 2010[7] on Private Military and Security Firms and Erosion of the State Monopoly on the use of force[8], as well as in its opinions on Video Surveillance by Private Operators in the Public and Private Spheres and by Public Authorities in the Private Sphere and Human Rights Protection[9]; on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights[10]; on the International legal

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[5] Venice Commission, *Report on Internal security services in Europe, CDL-INF (1998*)006, 7 March 1998, http://www.venice.coe.int/docs/1998/CDL-INF(1998)006-e.pdf

[6] *CDL-AD(2007)016, Report on Democratic Oversight of the Security Forces, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).* See also O*pinion of the Venice Commission on PACE Recommendation 1713(2005) on Democratic Oversight of the Security Sector in Member States*, *CDL-AD(2005)033* and its *Opinion on the law on the information and security service of the Republic of Moldova*, CDL-AD(2006)011

[7] CDL-AD(2010)022, *Report on Counter-terrorism Measures and Human Rights adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010)*

[8] *CDL-AD(2009)038, Report on Private Military and Security Firms and Erosion of the State Monopoly on the use of force, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).*

[9] *CDL-AD(2007)027, Opinion on video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).*

[10] *CDL-AD(2007)014, Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).*

obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners[11].

III. The FSB Law

A. Legal basis, activities and powers of FSB organs. Guarantees for the protection of fundamental rights

20. The Law describes the FSB as the unified central system of federal security service organs in charge of the tasks of safeguarding, within the limits of its competence, the security of the Russian Federation. As stipulated by article 1 of the Law, its activities are directed by the President of the Russian Federation. The Law also indicates that the FSB operates as a federal executive authority (with its territorial organs)[12] and that its head is appointed and dismissed by the President of the Russian Federation. The FSB is divided into various administrative and regional levels etc. as prescribed by article 2 of the Law.

21. The main areas of activity of FSB organs are defined (articles 8-11) as “counter intelligence”, “combating terrorism”, “combating crime”, “intelligence”, “border activity” and “safeguarding information security”.

22. The legal basis governing the activities and operations of the FSB is specified in article 4 of the Law and includes: the Russian Federation Constitution, the 1995 Law, other federal laws and other legal and regulatory acts of the Russian Federation. In addition, FSB activities must be carried out “in accordance with the international treaties” to which the Russian Federation is a party.

23. According to article 5 of the Law, FSB activities are based on the principles of lawfulness; respect for and observance of human and civil rights and freedoms; humanism; a “unified system of federal security service organs and also centralization of their administration”, as well as “secrecy, a combination of overt and covert methods and means of activity”.

24. The general legal framework applicable to the FSB action seems in general to be consistent with the Venice Commission's recommendations[13] and available guidelines in the field. The Venice Commission notes however that the responsibilities and powers of FSB organs (article 12 on the “duties” and article 13 on the “rights” of FSB organs), as well as the control and supervision sytem established under articles 23-24, are defined in very broad terms.

25. Similarly, although the notion of crime under FSB jurisdiction is adressed under article 10[14] of the Law, the list of crimes and related FSB tasks contained in this provision is not exhaustive, since further tasks may be assigned to FSB organs “*by federal laws and other*

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[11] *CDL-AD(2006)009, Opinion on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners adopted by the Venice Commission at its 66th Plenary Session (17-18 March 2006).*

[12] In its *Report on Internal Security Services in Europe*, the Venice Commission already had occasion to point out that security services can be conceived "... as an autonomous body and a separate organ or as part of the Executive directly responsible to a Minister or appropriate committee. In any case, however, the internal security services must be made accountable for their actions within the provisions of the law that regulates them." (CDL-INF(1998)006, conclusion (b)).

[13] See the Opinion adopted by the Venice Commission on PACE Recommendation 1713(2005) (CDL-AD (2005)033, paragraphs 7-9); see also the *Report on Internal Security Services in Europe* which states *inter alia*: "It would be preferable that the rules concerning security services be enshrined in the laws of Parliament or possibly even in the Constitution" (CDL-INF(1998)006, conclusion (d)).

[14] “*Federal security service organs shall carry out operational/search measures for the purposes of detecting, preventing, suppressing and exposing espionage, organised crime, corruption, illegal trading of arms and drugs and smuggling presenting a threat to the security of the Russian Federation and crimes whose investigation and preliminary examination are placed within their jurisdiction by law, and also for the purposes of detecting, preventing, suppressing and exposing the activities of illegal armed formations, criminal groups, individuals and public associations aiming to forcibly change the constitutional system of the Russian Federation.*
Federal security service organs may be assigned other tasks in the sphere of combating crime by federal laws and other legal and regulatory acts of federal state authorities”.

legal and regulatory acts of federal state authorities". The same applies to the FSB areas of activity, which are listed in article 8 of the Law but may be extended to include other fields of action "by federal legislation". The Law leaves the regulation of procedural and operational aspects of the FSB to the federal executive authority for security, which seems to have a wide margin of decision in this respect.

26. More generally, the Law contains numerous references to other legislation and/or lower-ranking instruments, without indication on whether these are already existing or future pieces of legislation[15]. In the opinion of the Venice Commission, less extensive use of such references and increased precision - including the exact titles and provisions of the other relevant laws and regulatory norms - would help increase both the clarity of the Law and the legal certainty which is to be expected from an instrument governing the legal framework applicable to the security service[16].

27. The protection and respect of fundamental rights represents an essential condition for the operation of security services as part of a democratic society and requires solid and specific guarantees. The Venice Commission therefore welcomes the inclusion of a specific provision in the Law (article 6), which requires the State to ensure respect for human rights in the action of the security service organs[17]. It nonetheless notes that the guarantees contained therein are very general and seem to rely on provisions of other parts of the legislation of the Russian Federation, which are not clearly identified. It finds regrettable in particular that no mention is made of the strict conditions applicable, under international law, to any limitations of fundamental rights and freedoms rights.

28. The Venice Commission recalls that, "[w]hen a measure restricts human rights, it must be defined as precisely as possible and be necessary and proportionate to the aim pursued" (see *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism*, Guideline III.2). Moreover, as the Venice Commission has indicated in its *Report on counter-terrorism measures and human rights*[18], "*the introduction of legal provisions providing for the limitation of human rights and a fortiori for derogation from such rights, should be subjected to parliamentary approval or, in urgent cases, to posterior parliamentary control, while measures and action by which such limitations or derogations are applied, should be under independent review for their legality, necessity and proportionality*". In addition, as the Commission further stressed in its report, that the general principles of legality, necessity and proportionality concern both the legislation itself and its implementation in practice. In other words, it is fundamental, in order to ensure effective protection of fundamental rights, that FSB organs and officers take adequately into account in their action - in particular when implementing legislative provisions allowing limitations to such rights - the requirements of necessity and proportionality, and that their action is subject to independent control.

29. The Commission notes in this connection that the provisions of article 6 are rather elliptical[19] regarding the remedies available to victims of human rights violations by FSB officers and the accountability of FSB agents "misusing their authority or exceeding their official powers". While these general guarantees are in principle in keeping with the recommendations

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[15] See, for example article 9.f), article 9.1.c), article 10, article11, article 13.1, article 14, article 15, article 16.2.

[16] In fields with high risks of a danger of abuse or a higher risk of violations of human rights, the ECtHR indeed requires a higher standard of determination (see *Kruslin*, 24 April 1990, §§ 24-25; 5. 5. 2011, *Editorial Board of Pravoye Delo u. Shtekel*, 5 May 2011, §§ 63-64; see also *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, Judgment of 26 October 2000, para 84, on the "quality of the law").

[17] "*The State shall guarantee observance of human and civil rights and freedoms in the implementation by the Federal Security Service of its activity. The restriction of human and civil rights and freedoms shall not be permitted except in cases provided for in federal constitutional laws and federal laws".*
Any person believing that their rights and freedoms have been violated by federal security service organs or their officials shall be entitled to complain of the actions of those organs and officials to a higher authority of the Federal Security Service, a prosecutor's office or a court."

[18] Venice Commission*, Report on counter-terrorism measures and human rights,* CDL-AD(2010)022, 5 July 2010.

[19] *"Any person believing that their rights and freedoms have been violated by federal security service organs or their officials shall be entitled to complain of the actions of those organs and officials to a higher authority of the Federal Security Service, a prosecutor's office or a court".*

of the Venice Commission, the way in which article 6 - combined with other relevant provisions of the Russian Federation legislation - is applied in practice is decisive in determining whether there is full compliance with the ECHR and the relevant ECtHR case-law which requires that remedies not only exist on paper but function in practice.[20] In the absence of adequate information on the numbers and frequency of the cases of human rights violations by FSB officers brought before the courts or handled by prosecutors or by the FSB hierarchy, and the results of these, it was not possible for the rapporteurs to conclude that adequate control exist in practice, as required by the case law of the ECtHR.

B. Monitoring and supervision of the FSB activities

30. According to article 23 of the Law, monitoring and supervision of the FSB activities is to be exercised by the President of the Russian Federation, the Federal Assembly of the Russian Federation, the Russian Federation Government and judicial bodies within the limits of their competence. In addition, individual deputies/members of the Federation Council and deputies of the State Duma of the Federal Assembly are entitled to obtain information on the FSB activity.

31. The monitoring system established by the Law in principle corresponds to the Commission's recommendations[21], in particular since provision is made for external supervision involving the executive, legislative and judicial authorities. Nevertheless, article 23 is too general and contains no information on the procedures under which the control can be carried out, the definition of which is left to other pieces of the legislation. In the Commission's view, it would be beneficial, for the sake of clarity and transparency, to specify in the FSB Law itself the actual modalities, periodicity and publicity conditions under which the control can be performed.

32. The FSB exercises considerable powers, with major implications for the human rights of citizens. It is thus necessary to have strong oversight mechanisms. As it has already recommended in the past[22], the Venice Commission considers that, to enhance further the role of the Parliament in this system of control, it is necessary to provide the power to monitor the proportionality and the appropriateness of the FSB activities to a special parliamentary commission with clearly defined responsibilities and powers. Alternatively, or in addition, a permanent form of supervision of the FSB operational measures - by an independent expert body, again with appropriate powers - is necessary to strengthen the democratic supervision of the FSB action[23].

33. Increased clarity is also recommended as to the role assigned to the President of the Russian Federation in the control system. It should be recalled that, according to article 1 of the law, "*the activity of federal security service organs shall be directed by the President of the Russian Federation*", who appoints and dismisses the head of the federal executive authority for security. It is not clear to what extent the President is involved and/or supervises operational activities of the FSB organs. The President is not an "external" control of the FSB. In any event, the office of the Presidency has little if any time to devote to operational control over the FSB. Similarly, very little is said by the Law with regard to the supervision by the Prosecutor General of the legality of the FSB actions. This too is an internal mechanism of control. As previously indicated, given the limited amount of information available in this respect, it was not possible for the rapporteurs to conclude that adequate control exist in practice, as required by the case law of the ECtHR.

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[20] See in particular *Segerstedt-Wiberg v. Sweden*, No. 62332/00, 6 June 2006, Association for European Integration and Human Rights and Ekimdzhiev v. Bulgarien, No. 62540/00, 28 June 2007.

[21] See the Commission's *report on internal security services in Europe (CDL-INF(1998)006, conclusion (h)).*

[22] See CDL-AD (2006)011, *Opinion on the Law on the Information and Security Service of the Republic of Moldova*, 23 March 2006, *CDL-AD(2007)016, paras 149-194.*

[23] See *CDL-AD(2007)016 paras* 218-240.

C. FSB powers under the 2010 amendments - The prevention measures

34. As previously indicated, the Federal Law No. 238-FZ of 27 July 2010 has essentially amended article 13 of the FSB Law devoted to the "Rights of federal security service organs". In its newly introduced sub-paragraph d.2, article 13 stipulates that the FSB may *"issue a physical individual with an official warning, with which they are bound to comply, of the inadmissibility of actions creating conditions for the committing of crimes for which detection and preliminary investigation is placed by Russian Federation legislation within the jurisdiction of the federal security service authorities, in the absence of grounds for criminal prosecution."*

35. Furthermore, article 13.1 has been added dealing with the "use of prevention measures by federal security organs", with the following wording:

> *"Preventive measures used by the federal security service authorities shall include the lodging of a request to eliminate causes and conditions facilitating the carrying out of threats to the security of the Russian Federation and the issuing of an official warning, with which compliance is mandatory, of the inadmissibility of actions creating conditions for the committing of crimes for which detection and preliminary investigation is placed by Russian Federation legislation within the jurisdiction of the federal security service authorities.*
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> *In the presence of sufficient elements uncovered in the operational activities of the federal security service authorities which point to causes and conditions facilitating the carrying out of threats to the security of the Russian Federation, the federal security service authorities shall lodge with the corresponding state authorities or administrations of enterprises, institutions and organisations, regardless of their form of ownership, and also with public organisations, a request, with which those bodies are bound to comply, to eliminate said causes and conditions facilitating the carrying out of threats to the security of the Russian Federation.*
> *[…]*
> *A request to eliminate causes and conditions facilitating the carrying out of threats to the security of the Russian Federation or an official warning of the inadmissibility of actions creating conditions for the committing of crimes for which detection and preliminary investigation is placed by Russian Federation legislation within the jurisdiction of the federal security service authorities may be appealed against before a court and the authorities indicated in Article 6 of the present Federal Law" .*

36. At the same time, through the Federal Law No. 238-FZ, an amendment was also made to the Code of Administrative Offences of the Russian Federation, which Article 19.4 now contains the following provision :

> *"4. Failure to obey a lawful order or request given or made by an officer of the federal security service authorities in the performance of their duties and also hindering an officer in the performance of their duties*
> *- shall be punishable by an administrative fine in the case of a citizen of between five hundred and one thousand roubles or administrative arrest for a period of up to fifteen days; or a fine of between one thousand and three thousand roubles in the case of an official; or a fine of between ten thousand and fifty thousand roubles in the case of a legal person."*

a) Scope, grounds, legal limits

37. The Venice Commission is fully aware that the Russian Federation is the object of extremely serious threats in relation to internal and external terrorism, organized crime and/or manifestations of extremism. It has already stated in the past that the security of the State and its democratic institutions, as well as the safety of its population, are a legitimate aim and

represent vital public and private interests that deserve protection, if necessary at high costs[24]. As the ECtHR has held, the protection of the right to life *"may also imply in certain well-defined circumstances a positive obligation on the part of the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual"*[25].

38. However, States not only have the duty to protect state security, and the individual and collective safety of their inhabitants; they also have the duty to protect the (other) rights and freedoms of those inhabitants. Real security in a society governed by democratic principles and the rule of law also means adequate protection and respect of human rights and fundamental freedoms for all[26]. Both the ECHR and other human rights treaties provide to a great extent the mechanisms for ensuring the compatibility between the fight against threats to security and respect for human rights. The Venice Commision wishes to recall that, according to article 2 of the Constitution of the Russian Federation "[m]an, his rights and freedoms are the supreme value".

39. New article 13.1 provides FSB with competences and powers in relation to the use, under extremely loosely formulated conditions, of two instruments as specific forms of preventive measures: issuing official notices (formal requests) and warnings to organisations and individuals whose actions are deemed to be creating the conditions for crime.

40. One instrument is "*the lodging of a request to eliminate causes and conditions facilitating the carrying out of threats to the security of the Russian Federation*". This instrument may be used towards "*corresponding state authorities or administrations of enterprises, institutions and organisations, regardless of their form of ownership, and also with public organisations*". This presumably means that the said requests may only be used in relation to legal (as opposed to physical) persons, public authorities, private and public enterprises, non-governmental organisations, legal persons irrespective of their form of ownership or associational form.

41. The second form of preventive measure is the "*issuing of an official warning, with which compliance is mandatory, of the inadmissibility of actions creating conditions for the committing of crimes for which detection and preliminary investigation is placed by Russian Federation legislation within the jurisdiction*" of the FSB. This instrument may be used towards "*physical individuals*". This presumably means any individual, whether private citizen, public sector official etc.

42. The instrument may be used for the purpose of preventing the committing of crimes for which detection and preliminary investigation is placed with the FSB. There is no exhaustive list of such crimes in the FSB Law. Nevertheless, since the jurisdiction of the FSB is broad, a large number of acts might be relevant and the provision will obviously apply, at the least, to those broadly defined crimes indicated in article 10 of the Law[27]. Moreover, since, in article 10,

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[24] *Cf. CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations, § 5.*

[25] *ECtHR, Osman v. United Kingdom,* Judgment of 28 October 1998, § 115 and *ECtHR, LCB v. UK,* Judgment of 9 June 1998, §36.

[26] See Preamble of the Council of Europe Convention on the Prevention of Terrorism, CETS No. 196*: "Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law".* See also CDL-AD(2007)016, *Report on the Democratic Oversight of the Security Services: "The protection of internal security must include the protection of the fundamental values of the State which, for a liberal democratic State, means inter alia democracy and human rights: However, in practice, the values of freedom and security can easily be perceived as opposing values" §58.*

[27] Federal security service organs shall carry out operational/search measures for the purposes of detecting, preventing, suppressing and exposing espionage, organised crime, corruption, illegal trading of arms and drugs and smuggling presenting a threat to the security of the Russian Federation and crimes whose investigation and preliminary examination are placed within their jurisdiction by law, and also for the purposes of detecting, preventing, suppressing and exposing the activities of illegal armed formations, criminal groups, individuals and public associations aiming to forcibly change the constitutional system of the Russian Federation. (as per Federal Law No. 153-FZ of 27.07.2006)

Federal security service organs may be assigned other tasks in the sphere of combating crime by federal laws and other legal and regulatory acts of federal state authorities.

reference is made to other "federal laws and other legal and regulatory acts of federal state authorities", such as the Law on Extremism having rather wide scope, there is potential for a wider application of the preventive instrument.

43. The Venice Commission notes that the new provisions lack clarity on what exact types of actions or events should be seen as causing or facilitating conditions for carrying out threats to the security of the Russian Federation or for committing crimes relevant for the FSB action.

44. No concrete examples are provided in this respect. On the contrary, through the Law, a certain "grey zone" between what is legal and not legal has been created, which is particularly worrying. This legal uncertainty opens the doors to potentially too wide interpretation and application of the preventive measures by FSB organs and officers and abuse of fundamental rights such as those protected under Articles 8 to 11 ECHR. It is indeed hard to imagine what kind of activities which would make the FSB law relevant are not protected by the ECHR (freedom of expression, freedom to form organisations or to organise demonstrations, freedom of thought, conscience and religion, and the right to respect for private and family life).

45. The preconditions stipulated by the Law for the use of both instruments are also problematic. In the case of an official warning, the requirement is "the presence of sufficient and previously confirmed information" on acts of physical individuals creating conditions for the committing of crimes for which investigation and preliminary examination are placed by the Russian Federation legislation within the FSB jurisdiction, and in the absence of grounds for their criminal prosecution. This presumably means that warnings are meant to be used in cases of conduct which is not criminalized or which cannot be proven to amount to an offence under existing criminal legislation. Under the Law, the prosecutor must be informed first. Only after that step an "official warning" may be issued[28].

46. The ground for an official request would be the "presence of sufficient elements uncovered in the operational activities" of the FSB "which point to causes and conditions facilitating the carrying out of threats to the security of the Russian Federation".

47. It is well-known that, both in states where there is a civil security agency and in states with a security police, a part of their work is identifying structural security vulnerabilities in government agencies and corporations involved in some way with security, usually defence contractors. These vulnerabilities can also have to do with staff organisation and training in various ways (openness to bribery by organised crime, agents of foreign powers etc.), in particular as regards procurement, but also physical security against, e.g., terrorism and infrastructure security, in particular vulnerability to cyber attacks. For the FSB to point out proactively vulnerabilities in structures and routines etc. is of course perfectly legitimate. Combating corruption is within the competence of the FSB and corruption within the government agencies could facilitate terrorist acts in sensitive areas such as the military. In such circumstances and in the course of its investigations the FSB indeed may have collected "sufficient and previously confirmed information" on individuals suspected of corruption. Nevertheless, the duty of the FSB and other agencies should be to start a criminal investigation and not to stop such phenomena with an official request or a warning.

48. Also, detecting and preventing offences against national security means, for an internal security agency, monitoring those suspected of involvement in terrorism, including incitement of terrorism. However, as the Venice Commission stated, in the context of intelligence gathering *"[t]his involves collecting information on individuals, which immediately raises the issue of respect for individual rights. The vulnerability of democratic societies combined with the diffuse nature of the threats against them means that intelligence is wanted on everything which is, or can become, a danger. Unless external limits are imposed, and continually re-imposed, then the natural tendency on all agencies is to over-collect information. Internal limits will not suffice because, while the staff of a security agency should set limits on the collection of data, it is not primarily their job to limit themselves and think about the damage which over-collection of*

[28] See CDL-AD(2007)016, §§ 201-213, for the value, and limitations, of judicial authorisation of special investigation techniques.

intelligence can do to the vital values of democratic societies, in particular, the enjoyment of the rights of freedom of expression, association, privacy and to personal integrity"[29].

49. The Venice Commission notes, on a more general note, that in a democratic society it is crucially important to try to maintain a relatively clear dividing line between activities which are not simply desirable, but vitally necessary for the maintenance of this society (such as freedom of speech) and dangerous behaviour which, for one or other reason, society has found necessary to criminalize.

50. Seen in this perspective, the concept of the criminal law is itself a safeguard for human freedom. If, and only if, something is sufficiently dangerous to society, can the legislature choose to criminalize it. Moreover, certain material and procedural conditions must be fulfilled in the criminal law in a society governed by the rule of law. The dangers posed by terrorism are real; however, the risk of mistaken application of terrorist offences against innocent people who for one reason or another are suspected of having "evil intentions" is also real.

51. In general, security offences have a tendency to "begin" early. When combined with the general part of the criminal law (attempt, conspiracy, aiding and abetting), relatively little may be required in the way of concrete suspicion that a specific security offence is ongoing. As a general issue of criminal policy, any offence introduced to deal with terrorism (and, *mutatis mutandis,* any other security offence) may not simply criminalize subjective intent, but must also address "*actual facts which it must be possible to ascertain materially and objectively*".[30]

52. Moreover, while a state party to the ECHR has a broad discretion as to what to criminalize, and how to go about doing so, when criminalization encroaches upon the protected area of rights, this discretion is not unlimited. The ECtHR in a large number of cases has discussed the standards necessary to satisfy the "accordance with the law" requirement in the Convention. As the Court stated, *"[t]he level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed"* [31]. The area of criminal law, or in this case, quasi-criminal law, requires a high degree of precision. There is no doubt that the penalty of up to 15 days imprisonment would be seen as criminal in nature within the meaning of the Court's case law.[32] The *Gillan and Quinton* case concerned a power to stop and search a pedestrian, without reasonable suspicion, if a police officer considered it "expedient for the prevention of acts of terrorism". There are thus some parallels with Article 13.1. The Court found "a clear risk of arbitrariness in the grant of such a broad discretion to the police officer … There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention" (§ 85).

53. The Venice Commission notes that, for an official warning to be issued under article 13, there has to be insufficient grounds (an "absence of grounds") for criminal prosecution, which means that such a measure is subsidiary to the criminal law.

54. The Russian Federation is a party to the Council of Europe Convention on the Prevention of Terrorism and also has a battery of legislation criminalizing preparation etc. of terrorism and other security offences. Thus, any overt act in furtherance of a security or terrorist offence is, together with the necessary criminal intent, likely already to be a criminal offence. Bearing in

[29] Venice Commission, *Report on the Democratic oversight of the Security Services*, CDL-AD(2007)016, para. 58.
[30] Venice Commission, *Report on counter-terrorism measures and human rights*, CDL-AD(2007) para. 32.
[31] *Gillan and Quinton v. UK,* Application No. 4158/05, 12 January 2010, para 77.
[32] See, e.g. *Menesheva v. Russia*, no. 59261/00, March 9, 2006, *Galstyan v. Armenia*, No. 26986/03, November 15, 2007. In Galstyan, the court concluded that "the indication afforded by national law is not decisive for the purpose of Article 6 and the very nature of the offense in question is a factor of a greater importance" (at para. 56). The court further argued that "loss of liberty imposed as punishment for an offense belongs in general to the criminal sphere." (at para. 59). The defendant was sentenced to three days of imprisonment and risked the maximum sentence of 15 days, which the court determined was sufficient to consider the defendant's alleged offense to be "criminal" for the purposes of the Convention (at para 60).

mind the existence of criminal offences expressly directed at preparatory acts, the question arises of what sort of preparatory conduct the administrative offence in article 13.1 is aimed at. In other words, are any "objectively and materially ascertainable facts" (see § 51 above) necessary before an official warning can be issued? Are official warnings directed against preparatory acts to preparatory acts? In which case, can we speak about "conduct" at all? What is it that distinguishes this "conduct" from simple (suspected) intention, i.e. thoughts?

55. Furthermore, the wording of article 13.1 as regards the scope of the official warning can be read as specifying the undesired behaviour in the past (which should not be repeated) and/or the desired behaviour in the future. In either case, the warning appears to be directed at future conduct. Here reference can usefully be made to the Court's judgment in *Hashman and Harrup v. UK*,[33] concerning the power of a magistrate to "bind over" a person "to be of good behaviour", in which the Court noted that "It is a feature of the present case that it concerns an interference with freedom of expression which was not expressed to be a "sanction", or punishment, for behaviour of a certain type, but rather an order, imposed on the applicants, not to breach the peace or behave *contra bonos mores* in the future. The binding-over order in the present case thus had purely prospective effect" (§ 35). The ECtHR went on to find a violation of the Convention, notwithstanding the fact that the order was made by a judicial officer (a magistrate).

56. Thus, if and to the extent that an official warning concerns conduct which comes within the scope of a Convention right, such as freedom of expression or association, the future-orientation of the warning, together with its actual or potential wide scope, can undoubtedly violate the Convention. This is strengthened by the fact that official warnings under article 13.1 are issued by an administrative official, and not by a judge.

57. As stipulated by article 13.1, the concerned organisations are "*bound to comply"* with the request which must be identified as an order, backed by a penalty. A competence to order a *government department* to take certain measures so may not be exceptional in European perspective, but a competence to order a *private* body ("establishments, organisations, regardless of their ownership") seems problematic. A private body can be under strong economic pressure to comply with *advice* from the security agency, as otherwise it is unlikely to be eligible for defence contracts, but this is a quite different matter from being subject to an *order* backed by an administrative penalty.

58. As far as the official warning is concerned, it is meant to set out "the inadmissibility of actions creating conditions for the committing of such crimes". The order is issued by the head of the FSB or their deputy. The order is thus of an administrative nature.

59. It is true that, in some European states, offences constructed in a similar way can be found in certain regulatory areas of law, such as environmental law: where an inspector considers that regulations on, e.g. emission of harmful chemicals, are not being followed, s/he can specify corrective measures to be taken within a period of time. Failure to comply with this order may be punishable by a fine (appealable, or reviewable, by a court). However, this is to ensure compliance with an *existing* and *objectively verifiable* legal duty (not to pollute the environment, to provide a safe working place etc.). This situation is quite different from the present case.

60. The Venice Commission notes that the 2010 Federal Law no. 238-FZ of 27 July 2010 "Amending the Federal Law "On the Federal Security Service" also amended the Code of Administrative Offences of the Russian Federation by adding a new § 4 to Article 19.3 of the Code. According to this new paragraph, "*failure to obey a lawful order or request given or made by an officer of the federal security service authorities in the performance of their duties and also hindering an officer in the performance of their duties - shall be punishable by an administrative fine in the case of a citizen of between five hundred and one thousand roubles or administrative arrest for a period of up to fifteen days; or a fine of between one thousand and three thousand roubles in the case of an official; or a fine of between ten thousand and fifty thousand roubles in the case of a legal person*".

[33] No. 25594/94 25 November 1999.

61. It appears however that, as stipulated by the "Explanatory note" to this amendment, *"[t]he provisions of paragraph 4 of the present article shall not apply to citizens in the event of preventive measures being taken against them in accordance with the Federal Law "On the Federal Security Service*". This exception, introduced in the final text of the amendment adopted in 2010, is to be welcomed as it implies, as indicated by the Russian authorities during their dialogue with the Rapporteurs, that no sanctions would be applied to individuals for non-compliance to the warning issued in their respect.

62. However, it is not enough that there is a practice of not imposing sanctions on individuals, if the potential to do so - and so the deterrent effect - continues to exist. This is particularly serious because of the chilling effect this can have on protected human rights, such as freedom of association and expression. As already mentioned, it is legitimate, indeed advisable, to give a security agency the power to make recommendations to government departments and corporations involved in some tangible way with security matters (eg as contractors) to take specified measures to improve physical and infrastructure security and reduce vulnerability to corruption. Bearing in mind the special threats that the Russian Federation faces of corruption and terrorism, it may even be permissible to go further and give the FSB a power to order that specific measures be implemented by government departments and corporations, backed by an administrative penalty. But the provision as it stands – applying to loosely defined conduct ("inadmissibility of actions creating conditions for the committing of crimes)", and encompassing also individuals - is unacceptably wide and creates a considerable potential for abuse. Its scope should thus be radically reformulated

b) Implementation procedure

63. Although the major criticism which can be made of the preventive measures relates to their scope, the Venice Commission also wishes to raise question-marks relating to the implementation procedure. The Venice Commission notes that directors or deputy directors within the FSB are through the Law given the power and duty to issue an official warning to the person or persons whose behaviour or acts could create conditions for committing crimes as previously mentioned. They should take a decision as to whether to issue an official warning within ten days after have been informed about the possible threat from a person or group of persons, and issue the warning to the individual concerned no later than 5 days from the date of the decision. No list of possible instructions that may be imposed on persons or organisations is provided, which gives wide discretion to the FSB authorities in deciding what exact measure they should impose.

64. As stipulated by the Law, the detailed procedure for the implementation of the two instruments "*shall be established by legal and regulatory acts of the Federal executive authority in the security sphere*". According to the information obtained by the Venice Commission, a new legal Act was introduced in November 2010[34] explaining in more specific terms in which situations the two instruments may be issued and how relevant procedures should be implemented in practice. The Venice Commission has nevertheless not been provided with this act. In its opinion, it is of particular importance that the new provisions provide clarity on what exact types of actions may be considered as an intention to commit a crime or preparation to the crime, and what actions may be considered as creating conditions facilitating threats to the state's security, as well as on what "the presence of sufficiently and previously confirmed information" on such actions means. Increased clarity with regard to any time limits to be taken into account for eliminating conditions that may lead to committing a crime, once the FSB warning is being issued, would also be recommended.

[34] Order of 2 November 2010 n° 544, registered with the Russian Ministry of Justice on 8 November 2010 (n° 18902) and subsequently amended on 6 June 2011.

c) Control and supervision. Court review

65. Under the final paragraph of article 13.1, the requests and warnings in question "may be appealed against before a court and the authorities indicated in article 6 of the present Federal Law" [35]. In practice, those other authorities mentioned by the article 6 of the Law (a higher authority of the Federal Security Service and a prosecutor's office) are of limited if not without relevance in the present case, as only courts fulfil the requirements enshrined in Article 6 ECHR. From this perspective, the appeal before the prosecutor's office is an "internal" remedy (see CDL-AD(2007)016, §110 and §129).

66. One might argue that the human rights dangers inherent in an official warning or a request are mitigated by the fact that warnings can be appealed as indicated. Nevertheless, one may wonder whether, when article 6 states that the restriction of human and civil rights and freedoms shall not be permitted except in cases provided for in federal constitutional laws and federal laws, article 13.1 is such a case. In any event, the Venice Commission does not consider that the supervision and court review provisions mitigate the problems with the wide scope of the two instruments, which involves a considerable potential for abuse and arbitrariness.

67. Moreover, given the specific nature of the instruments under examination - the preventive measures - there is also room for doubt as to whether the courts are, in these particular circumstances, able to constitute a genuine remedy. The basis for and scope of review of an official warning is not clear. It would be logical to conclude that the determination made by the director or deputy director that the warning has not been complied with can be reviewed. It is unclear however whether the initial determination made by the FSB director or deputy director that the individual is committing "actions creating conditions for the committing of such crimes" may also be reviewed. As the content of the order is "the inadmissibility of actions", the assumption is, as already mentioned, that the object of the order must take steps to change his or her behaviour. Similarly, it is not clear from the Law whether the *proportionality* of the order, and/or the reasonableness of the change of conduct expected may be reviewed. As the Venice Commission has noted in its *Report on the democratic oversight of the security services*, in practice it is very difficult for an ordinary court to question security determinations and the proportionality of security measures.[36] The difficulty involved in ensuring effective judicial remedies in this area means that very great caution should be shown before wide powers are granted to security agencies. In order to constitute an effective remedy, it would seem necessary to provide for a wide scope of judicial review, both on paper and in practice.

68. The Venice Commission has therefore considerable doubts about the reality and, given the particularly loose conditions indicated by the Law, the effectiveness of the court control provided for in article 13.1.

69. Even assuming that there is evidence that the judicial review has both a wide scope and is working in practice, for the reasons set out above the power to issue an official warning in itself would be likely to violate the ECHR, if it attempts to prohibit future conduct within the scope of a right protected under the ECHR, such as freedom of expression or association.

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[35] According to Article 6 of the FSB law: « […]Any person believing that their rights and freedoms have been violated by federal security service organs or their officials shall be entitled to complain of the actions of those organs and officials to a higher authority of the Federal Security Service, a prosecutor's office or a court. (as per Federal Law No. 15-FZ of 07.03.2005)
[…]In the event of a violation of human and civil rights and freedoms by federal security service organ staff, the head of the respective federal security service organ, a prosecutor or a judge shall be bound to take measures to restore those rights and freedoms, grant compensation for the damage caused and prosecute the perpetrators as provided for in Russian Federation legislation.
Federal security service organ officials misusing their authority or exceeding their official powers shall incur liability as provided for in Russian Federation legislation.
(as per Federal Law No. 15-FZ of 07.03.2005)"

[36] CDL-AD(2007)016, paras 204-213.

70. In the light of the above comments, the Venice Commission is of the view that article 13. 1 and further related provisions of the Law need to be reviewed and radically amended in order to ensure their compliance with the applicable standards. This should include reconsidering the wide scope of these measures with a view to narrowing them down or even abandoning them.

IV. Conclusions

71. The Venice Commission stresses that it is commonly accepted that the development of more efficient means and measures to safeguard the state's security and ensure its citizens' protection against the dangers of extremism, terrorism or organised crime represents in itself a legitimate aim.

72. The FSB Law of the Russian Federation contains several positive elements, such as the general requirement that FSB activities be carried out "in accordance with the international treaties" and the explicit reference to the imperative of the human rights protection as part of the principles underlying the FSB action.

73. Nevertheless, the instruments introduced by legislator in 2010 (the preventive measures - official warnings and notices) seem to be very far-reaching and to carry the potential of serious infringements of fundamental rights. It is especially problematic, for the interpretation and subsequent application of the FSB Law, that its provisions suffer from vagueness and lack of legal clarity in relation to key aspects of the newly introduced instruments: scope and grounds for issuing warnings and notices, related procedural rules and remedies available. In the Commission's view, it is of utmost importance for the Russian authorities, in order to guarantee compliance of the new instruments with human rights standards and the fundamental requirements of legality, necessity and proportionality, to conduct a thorough review of the Law and provide clarity/adequate amendments to the provisions having raised concern.

74. In addition, in view of its vagueness, the system of monitoring and supervision of the FSB activities should be reviewed in order to ensure that it fully responds to the requirements of a democratic control of security services.

75. The Venice Commission remains at the disposal of the Russian authorities, should they need further assistance.