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

# REVISED 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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## 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 as well as other relevant laws and decrees. The translations may not accurately reflect the originals.

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 and at a meeting in Paris on 27 April 2012. The Commission wishes to express its appreciation to the Russian authorities for the information provided during the meeting in Paris.

4. *The opinion was discussed at a meeting of the Sub-commission on Fundamental Rights on 15 March 2012. It 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.

7. Caution is called for in drawing conclusions in this sensitive area. The Commission recollects what it has stated before, in its earlier report on Democratic Oversight of the Security Forces,[1] that security agencies tend to be governed by "unpublished rules and by classified policy decisions, which would not and could not be brought to the attention of the public or of the Commission. Deficient legal provisions might well have been corrected in practice or, vice-versa, good legal provisions might not be applied in the intended way in practice."

### B. Background information

8. In April 1995, the Russian Federation adopted a federal law "On Organs of the Federal Security Service in the Russian Federation"[2], 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.

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[1] CDL-AD(2007)016, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), § 51.

[2] Russian Federation Federal Law No. 40-FZ of 3 April 1995.

9. 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[3]. Since 1995, the Law has been amended on several occasions.

10. 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[4]. The new amendments (new article. 13.1 of the FSB law) provide FSB with additional powers to issue *warnings* to individuals and *official requests* to organisations whose actions are deemed to be facilitating threats to the country's security or creating the conditions for crimes. According to the Russian authorities, these preventive measures are aimed at combating extremism and terrorism and at providing increased protection to Russian citizens in general.

11. At the earlier drafting stage, the 2010 amendments were 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. The criticism led to certain amendments being made, and the final text differs from the earlier draft (see below, para. 54).

12. 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

13. 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.

14. 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[5] are of relevance in this analysis.

15. 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

[3] "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*).

[4] 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".

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

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.

16. 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"[6].

17. 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*

18. The Commission adopted an early report on internal security services in Europe on 7 March 1998.[7]

19. 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, in the already mentioned *Report on the Democratic Oversight of the Security Services* [8] The best practices identified in this report as a whole should be of interest to the Russian Federation (and to any other state which wishes to improve oversight). For reasons of space, the present report will only cite the recommendations made and best practices identified which are of most relevance to the Russian Federation.

20. 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[9] on Private Military and Security Firms and Erosion of the State Monopoly on the use of force[10], 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[11]; on Video Surveillance in

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[6] At the UN level, see in particular Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, A/HRC/14/46 General Assembly, 17 May 2010.

http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.46.pdf

[7] 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

[8] 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

[9] 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)*

[10] *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)*.

[11] *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).*

Public Places by Public Authorities and the Protection of Human Rights[12]; on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners[13].

## III. The FSB Law

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

21. 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)[14] 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.

22. 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".

23. 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.

24. 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".

25. Article 10[15] refers to the competence of the FSB to engage in operational/search measures in relation to crimes within FSB jurisdiction. These are set out in another law, namely Article 151 of the Code of Criminal Procedure, which refers to sixty three crimes.

26. High degree of clarity of the law is necessary for an instrument governing the legal framework applicable to the security service.[16]

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[12] *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).*

[13] *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).*

[14] 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)).

[15] "*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".*

[16] In fields with high risks of a danger of abuse or a higher risk of violations of human rights, the ECtHR requires a higher standard of determination (see e.g. *Kruslin*, 24 April 1990, §§ 24-25; 5. 5. 2011, *Editorial Board of Pravoye Delo u. Shtekel*, 5 May 2011, §§ 63-64; see also ECtHR, *Gorzelik and Others v. Poland*, No. 44158/98, 17

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]. Article 4, as already mentioned, refers to compliance with international treaties, and this naturally includes the ECHR. Moreover, under Article 15 of the Constitution, treaties have primacy over laws. Having said this, no specific mention is made of the conditions applicable, under the ECHR, to any limitations of fundamental rights and freedoms rights, in particular, the principles of necessity for an interference, proportionality, and effective remedies.

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*". 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.

### B. Monitoring and supervision of the FSB activities

29. As the Commission noted in its report on Democratic Oversight of the Security Services, "Security agencies must be equipped with considerable technological tools and must enjoy exceptional powers. Governments could easily be tempted to use them to pursue illegitimate aims: for this reason, in order to prevent them from becoming an oppressive instrument for party politics, security agencies must be insulated to some degree from day-to-day political/governmental control. At the same time, this necessary insulation of security services carries with it dangers. While this should not be exaggerated, experience shows that security agencies can develop a "State within a State" mentality. A culture of regarding any non-mainstream political movement as a threat to the State can emerge. In extreme cases, an agency can manipulate the political process by infiltrating political movements, pressure groups, and trades unions, and engage in "psychological operations" and disinformation.This is a danger which is more present in some States than others. Nonetheless, a problem for the personnel of any security agency is that they can develop a "security mindset". Improved democratic scrutiny is thus not simply to protect against abuse of human rights but also to expose the intellectual assumptions and work practices of security personnel to informed criticism. Governmental control of Internal security services is

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February 2004 and *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, 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.

therefore essential to avoid a "State within the State" mentality. It must not however be too tight – or the services may be abusively used to attain illegitimate aims" (paras 59-61)

30. The FSB exercises considerable powers, including police powers which have major implications for the human rights of citizens. The Commission noted in its Report on Democratic Oversight of the Security Services that the Parliamentary Assembly of the Council of Europe has previously expressed a clear preference for separate civilian security agencies without police powers but continued "Undoubtedly, police powers of arrest, search and seizure can, when combined in the same organization with the powers and capabilities of a security agency, create a very powerful institution. However the acceptability of such an institution from the perspective of accountability and the protection of individual rights, depends upon the adequacy of the control structure created to prevent abuse, or overuse, of power. A strong security police which is subject to tight internal controls and control by independent prosecutors, and, when authorizing special investigative measures, control by judges, cannot be said to be incompatible with Council of Europe principles in general, or the ECHR in particular" (at para. 98).

31. According to article 23 of the FSB 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. According to article 1 of the FSB 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. While a presidential power of appointment and dismissal is acceptable, as the Commission has noted in its Report on the Democratic Oversight of the Security Services, this is a power which can be abused and which therefore has to be subject to constraints such as confirmation or consultation procedures in the parliament (paras 135, 191). Executive directions to the agency should be in writing, so as to enable a proper "paper trail" of accountability (para. 192). It is not clear to what extent the President is involved and/or supervises operational activities of the FSB organs. It is presumably the case that the office of the Presidency has little if any time to devote to operational control over the FSB. The President and the government of the Russian Federation are, in any event not "external" controls of the FSB[19].

32. A number of states provide for parliamentary oversight bodies and/or independent expert bodies for internal security agencies. The Venice Commission discussed the mandate and powers of such bodies in detail in its Report on the Democratic Oversight of Security Services (paras 149-194, 218-240). [20] A parliamentary or expert body serves as an important mechanism of accountability where the following criteria are satisfied; its members have developed expertise in security issues, they have access to the necessary secret information, including, where necessary, information on operations, they attempt to hold the executive accountable for security policy and operations while at the same time not revealing information which should genuinely be kept secret, they are able to make recommendations or deliver (edited) reports proprio motu to the parliament and the public. The converse is also true: even if a parliamentary and/or expert body to oversee security exists, if it does not have the necessary powers of investigation, or if it does have such powers on paper, but it does not exercise these, or if its members have not developed sufficient expertise or if they do not act in a bipartisan manner (e.g. MPs from the party of government predominate, and regard criticism of security policy or operations as criticism of the government) then it will not be an effective oversight mechanism. Here it can be noted as regards the Russian Federation that there is a Duma committee on security and anti-corruption. However, apart from adopting the budget (or part of the budget) of

[19] Cf Report on the Democratic Oversight of the Security Services, para 112 "As government departments are both "taskmasters" and "consumers" of intelligence, they cannot either be seen as an "external" control over a security agency".

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

the FSB, it appears to have no competence to do more than request information from the FSB. The Venice Commission has received no information that this committee exercises meaningful oversight over the FSB. [21]

33. There is a "Public Council", an advisory body consisting of 15 members appointed by the Director of the FSB. According to information from the Russian representatives, this body includes members of the Public Chamber of the Russian Federation, heads of several NGOs (civil society, civil rights, charity), religious leaders, senior managers of major telecommunications, technology, transportation and banking entities. The public council inter alia has an advisory role in order to ensure the compliance of FSB with the constitutional rights and freedoms of the citizens of the Russian Federation. In the Venice Commission's opinion, such a body can be a useful channel of communication between the "closed world" of the security agency and the outside world, including civil society. However, it does not have access to confidential information, and so while it may serve several useful purposes, it cannot be described as an "oversight" body.

34. As recognised by the Russian Federation inter alia by the establishment of the above advisory body and in the law governing the FSB (Article 6 of which, as already mentioned, requires FSB actions to comply with human rights), it is especially important that, as a rule, controls exist over the activities of security agencies when these agencies take measures, as they must do on occasion, which restrict fundamental human rights. Articles 5, 8 and Protocol 4 Article 2 of the ECHR require authority and controls over police powers such as public order powers, arrest and detention and search and seizure (including access to data held on private data banks). Moreover, as a result of ECtHR case law, there must be clear and specific legislative authority for, and satisfactory systems of control over, the following other FSB powers: the establishment and operation of the FSB's own security data banks, including access of the FSB to data from other public data banks and transfer of data from FSB security data banks to government and other authorised recipients,[22] interception of the content of communications data,[23] access to data specifying duration of calls, numbers calls and other identifying data concerning telecommunications, including use of the internet,[24] bugging, including participatory auditory surveillance, [25] the use of localisation devices[26] and the use of agents and others in infiltration.[27]

35. The FSB use of search of citizens' homes and detention of individuals beyond 48 hours requires court approval, and the prosecutor must be informed. For the powers of interception of the content of communications and of bugging, under the Law on Operative and Search Activities, the FSB seeks court approval directly. Unlike in certain other states, the prosecutor does not act as a "filter" between the security agency and the courts. The need for judicial

[21] The lack of effective Duma mechanisms for investigation of operations of the FSB is illustrated by the *Finogenov and Others v. Russia*. case, nos. 18299/03 and 27311/03, 20 December 2011.

[22] Rotaru v. Romania, *N*o. 28341/95, 4 May 2000. See also Report on the Democratic Oversight of Security Services para. 58 "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 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"

[23] See, e.g. Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, No. 62540/00, 28 June 2007.

[24] See Malone v. UK, 2 August 1984, A/82, PG and JH v. UK, No. 44787/98, 25 September 2001, Copeland v. UK, No. 62617/00, 3 April 2007

[25] Heglas v. Czech Republic, No. 5935/02, 1 March 2007 (inadequacy of legal framework at the time regulating body-mounted listening devices and metering data), Bykov v. Russia, No. 4378/02, 21 January 2009.

[26] Uzun v. Germany, No. 35623/05, 2 September 2010

[27] Sequeira v. Portugal No. 73557/01, ECHR 2003-VI, Taal v. Estonia, No. 13249/02, 22 November 2005, Vanyan v. Russia, No. 53203/99, 15 December 2005, Eurofinacom v. France (dec.), No. 58753/00, ECHR 2004-VII, Khudobin v. Russia, No. 59696/00, 26 October 2006.

authorization for bugging and for communications interception (though not, apparently, for localization devices or to access to data specifying duration of calls, numbers calls and other identifying data) is an important safeguard for human rights.[28] As the Commission has noted before "The mere involvement of judges in the authorization or review process, however, is not always an effective guarantee for respect for human rights. First, the value of judicial control obviously depends upon the *independence*, in both law and fact, the judges possess from the executive in the State. This in turn depends upon the constitutional law and practices of the State in question, and its legal and political culture. Secondly, the value of judicial control depends upon the *expertise* the judges in question have in assessing risks to national security and in balancing these risks against infringements in human rights. Even for a specialised judge, the invocation of "national security" is very potent, conveying as it does a need for urgent and decisive action…It is likely to be a strong-minded judge with considerable prior experience of dealing with previous applications who is able to question the proportionality of the experts' assessments and stand firm against the temptation to balance away integrity almost every time. Psychologically speaking, a tendency to grant authorizations is likely to be strengthened where the State, for example for reasons of separation of powers, has no procedure for checking up on, let alone criticizing, the number and duration of judicial authorizations granted"[29].

36. The Venice Commission will content itself with noting that the judges are obliged under the ECHR to scrutinize, critically, applications for the use of special investigative measures from the FSB. This should mean, even allowing for a high degree of professionalism from the FSB in preparing applications, that at least some applications are denied. The ECtHR has set high standards in this respect.[30] The same point can be made as regards the more general power which individuals have to complain to the courts of unlawful activities by the FSB under Article 6 of the FSB law: the relevant ECtHR case-law requires that remedies not only exist on paper but function in practice.[31]

37. In the Russian Federation, as in many other states, a number of important security powers, above all, that of gathering intelligence on individuals is not directly supervised by the courts. The main system of control over the FSB is provided by the prosecutor's general power of supervision under Article 24 of the FSB law,[32] as well as a specific power of supervision over the FSB's use of "operative and search" activities,[33] There is a group of security-screened prosecutors who exercise these powers in practice.

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[28] Report on the Democratic Oversight of Security Services para. 204 "there is an obvious advantage of requiring prior judicial authorization for special investigative techniques, namely that the security agency has to go "outside of itself" and convince an independent person of the need for a particular measure".

[29] Report on Democratic Oversight over Security Services, paras 205-206, 208. See also para. 213, where the Commission, recommended for states which have judicial authorization "that some form of appeal or follow-up mechanism should exist for even judicial authorization of special investigation techniques. It also suggests that, unless special reasons exist, the number of years spent as a judge authorising or reviewing security surveillance should not be too long."

[30] See the criticism of the ECtHR in Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, op. cit and in Iordachi and others v. Moldova, No. 25198/02, 10 February 2009, at para. 51 where the ECtHR noted that there was a lack of safeguards in the law combined with a very high percentage of authorisations issued by the investigating judges combined ("For the Court, this could reasonably be taken to indicate that the investigating judges do not address themselves to the existence of compelling justification for authorising measures of secret surveillance").

[31] See in particular *Segerstedt-Wiberg v. Sweden*, No. 62332/00, 6 June 2006,.

[32] According to information received from the Russian Federation, the new investigative committees do not exercise standing supervision over the FSB. They would, however, investigate allegations that a crimes had been committed by FSB personnel.

[33] Federal law on the prosecutor's office of the Russian Federation of 17 January 1992, as amended, Article 29 provides "Supervision shall be exercised to ensure the observance of human and civil rights and freedoms, compliance with the prescribed procedure for dealing with statements and reports concerning planned or committed crimes, for carrying out operative-and-search measures and conducting investigations, and also to ensure the legality of any decisions taken by bodies carrying out operative-and-search activities, inquiries and preliminary investigations".

38. Prosecutors must obviously have sufficient expertise in security matters, and sufficient authority, to be able to act as a real control over the – of necessity - closed world of the internal security agency. This means inter alia a degree of specialisation. However, there are dangers in this too. As the Commission noted, referring in particular to specialist security judges, but also to prosecutors, there is a risk of "case hardening". "The group of security cleared judges and prosecutors can be so small that it is almost "incestuous", and they may come to identify more with the people with whom they are in daily contact – the security officials – rather than their judicial colleagues. There is a danger that these judges become so used to the types of techniques, information and assessments they see every day that they lose their qualities of independence and external insight through a process of acclimatisation. The necessary awareness of the suspect's rights may gradually be lost over the years spent in the isolated world of security intelligence.[34]

39. The prosecutor may either act proactively, first finding out whether a special investigative power has been used, then demanding to see the file in question, or the prosecutor may demand the file in response to a complaint, As Article 7 of the Law on Operative and Search Activities (and the FSB Law) also provides authority for the FSB to gather and process intelligence on individuals, the prosecutor also has a supervisory role over the FSB's security files. If a citizen complains that intelligence is being unlawfully gathered about him or her, the prosecutor may demand the production of the file (if there is one) and determine if the law is being complied with, including whether the individual's rights are being respected (which should also involve a proportionality control). The prosecutor's right to demand the production of the information they request from the FSB is subject to an exception, under Article 24 of the FSB Law, namely "information on persons having provided or providing assistance to federal security service organs on a confidential basis" (i.e. informers). This exception is not unusual in security contexts, even if situations can presumably arise where, to determine the reliability of the information on which the FSB has acted, it may be necessary to give access to data confirming the reliability of the source. Article 24 also provides a more general exception namely information "on the organization, tactics, methods and means used by federal security service organs to carry out their activity".

40. However, the main question-mark regarding the prosecutor as the primary means of supervision of the FSB does not concern the above exceptions, nor the authority and powers of the prosecutor but rather the independence of the prosecutor. While accepting, in principle, that a security agency with police powers can be controlled by prosecutors, the Commission in its Report on the Democratic Oversight of Security Services stressed that prosecutorial independence must exist both in law and in fact. The Commission stated that "Depending upon the constitutional structure and legal culture of the State, prosecutors possess varying degrees of independence from both the agency and government direction and can be a useful control over the security agency, to the extent that its work involves gathering evidence for prosecution. However, prosecutors in a State which are not, formally and in practice, a part of the independent judicial branch are nonetheless a part of the executive and as such can only be seen as an "internal" control" (para. 110).

41. The Commission has previously scrutinized the Federal Law on The Prokuratura (Prosecutor's Office) Of The Russian Federation of 17th January 1992 (as amended).[35] The Commission noted that the "position of individual prosecutors with respect to their superiors seems weak and not in compliance with [Committee of Ministers] Recommendation (2000) 19 … it seems that dismissal is by decision of the head – there is no provision for appeal at least in this Law" (at para. 70). It noted the Prosecutor General "has complete power to issue binding orders to the entire Procuracy, that he appoints and dismisses the key figures …that the Prosecutor General cannot be removed unless the President seeks his removal and that the criteria for removal are not specified" (para. 60). It considered that the extent of the

[34] Report on Democratic Oversight over Security Services, para 213.

[35] CDL-AD(2005)014 Opinion on the Federal Law on The Prokuratura (Prosecutor's Office) of the Russian Federation.

Prosecutor General's power is very great indeed. Furthermore, the Commission pointed to the relationship between the Procuracy and the Presidency.

42. In the light of the above, the Venice Commission considers that the supervision of the FSB by the prosecutors does not qualify as an "external" mechanism of control.

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

#### a) Generally

43. As previously indicated, Federal Law No. 238-FZ of 27 July 2010 amends article 13.1 to provide the following:

> *"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.*
>
> *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" .*

44. 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."*

45. The Venice Commission will begin by noting 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. The Venice Commission 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[36]. As the ECtHR has held, the protection of the right to life *"may also*

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

*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*"[37].

46. 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.[38]. The Venice Commission recalls that, according to article 2 of the Constitution of the Russian Federation "[m]an, his rights and freedoms are the supreme value".

47. New article 13.1 thus provides FSB with competences and powers in relation to the use of two instruments as specific forms of preventive measures: issuing warnings to individuals and official notices (formal requests) to organisations, including non-governmental organisations whose actions are deemed to be creating the conditions for crime. The Venice Commission will deal first with warnings.

**b) Warnings**

48. 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 (above, para. 25). Warnings are meant to be used in cases of conduct which is preparatory to crime, but not sufficient to be criminalized under Article 30 of the Criminal Code. The warning serves the purpose of putting the subject on notice that s/he is "approaching the criminalized area". One situation in which a warning might be issued is where the FSB discovers that an individual has announced on the internet his intention to commit a terrorist act. The Law does not specify exactly what information is required before a warning can be issued, referring only to "objectively and materially ascertainable facts". However, Federal Security Service Decree no. 544 of 2 November 2010 (CDL-REF(2012)022) provides some more detail in this respect. Para. 3 of the decree provides that" The presence of sufficient and duly and previously confirmed information on specific acts of physical individuals creating conditions for the committing of crimes shall provide grounds for issuing an official warning: outwardly showing (verbally, in writing or in some other manner) the intention to commit a distinct crime in the absence of any indication of the preparation of the crime or an attempt to commit the crime; establishing preparations for a crime of minor or medium gravity or directly aimed at the committing of such crimes in the absence of any indication of an attempt to commit the crime". The decree also specifies (in appendix 2) which officials in the FSB may issue a warning. This consists of senior officials, however, it is still a relatively large group of people.[39]

49. The responsible officials are to take a decision as to whether to issue an official warning within ten days after they 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. Federal Security Service Decree no. 544 provides for clear routines for ensuring that physical persons are notified of warnings and for registering warnings.

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

[38] See Preamble of the Council of Europe Convention on the Prevention of Terrorism, CETS No. 196: 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.

[39] "Director of the FSB of Russia; deputies of the Director of the FSB of Russia, heads of services of the FSB of Russia and their deputies, heading/supervising sub-divisions of the FSB of Russia, authorised to carry out operational/search activities; heads and chief administrators of departments, centres and directorates of the FSB of Russia, and of directorates of services and centres of the FSB of Russia, authorised to carry out operational/search activities; chief administrators of directorates of the FSB of Russia covering individual regions and constituent entities of the Russian Federation; chief administrators of directorates and heads of department holding equivalent powers of the FSB of Russia within the Armed Forces of the Russian Federation, other forces and military units and their administrative bodies; heads of the border service directorates of the FSB of Russia".

50. 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" (i.e. a more senior level of the FSB and a prosecutor's office)[40].

51.The Law specifies that the prosecutor must be informed first. Only after that step an "official warning" may be issued. The main purpose of this is to give the prosecutor the opportunity to determine whether the conduct has, in fact, already crossed the threshold into the criminalized area. The use of a warning is thus subsidiary to the criminal law.

52. The Venice Commission has been informed, that, since 2010, only 26 warnings have been issued. No appeals against these have been made to the courts.

53. A number of issues arise in connection with warnings. The wording of the English translation of the provision – "compliance is mandatory" – together with the change which was made to Article 19.4 of the Code of Administrative Offences can give the impression that an administrative penalty is applicable in the event that the FSB consider that the warning has not been complied with. However, a warning does not fall within the definition of "official order or request" under Article 19.4 (see further below, para 62). Thus, there is no administrative penalty for non-compliance with a warning. However, according to information received by the representatives of the Russian Federation, if there is a later criminal prosecution, and the court considers that a crime has been committed, in sentencing, the court will take into account all the circumstances of the case. Thus, the fact that a warning has been issued and not complied with can be taken into account as an aggravating factor in sentencing (though it does not serve to convert an offence into an aggravated offence).

54. The "Explanatory note" to this amendment, which is an integral part of the law and which thus is binding, can also, in its English translation, cause some confusion. It provides that *"[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 provision, introduced in the final text of the amendment adopted in 2010, appears to deal only with the *imposition* of the penalty, not its *applicability*, and, moreover, only as regards citizens. However, the purpose of this provision is only to make it doubly clear that non-compliance with a warning is not backed by a penalty, and the Russian Federation government assures the Venice Commission that the use of the word "citizen" does not mean *e contrario* that penalties *are* applicable to non-citizens.

55. The question arises, despite the absence of a penalty, whether warnings can be criticized on other grounds. Here it should be noted that other states might also permit their security bodies to contact people who are believed to be involved in, or planning, security crime, and to warn them informally. By formalizing the use of warnings, the Russian Federation allows a degree of transparency in the use of the device. Moreover, the fact that only certain officials in the FSB may issue warnings means that there is a proper "paper trail" – assuming the clear routines of registration etc. set out in Federal Security Service Decree no. 544 are properly followed by all this group of officials in practice.

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[40] 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)"

56. On the other hand, a warning means that a certain "grey zone" between what is legal and not legal has been created. Warnings have to be seen together with legislation dealing with "speech crimes", especially offences criminalizing extremist speech. The Venice Commission considers 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. In general it can be noted that if a state has already enacted legislation which places strong limits on the rights of freedom of expression and association, then a warning, being a preventive measure, and so dealing with "pre-crime", risks going beyond the restrictions permissible under the ECHR. It is inevitable that a security agency, even if it acts with professionalism, will not always be correct in its risk assessment that person X, or phenomenon Y in concrete circumstances Z constitutes a threat to the state. On the contrary, it should be recollected that security agencies have a natural tendency to "err on the side of caution" and over-assess threats.[41] Thus, if mistakes are made, or overuse occurs, then this can and will "chill" legitimate exercises of the rights of freedom of expression and association.

57. 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.

58. 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*".[42] 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. The Russian warning system differs from, e.g. the UK system of "official notices" issued under section 2 of the Prevention of Terrorism Act 2006, in relation to internet material considered to be inciting or glorifying terrorism. The publication of this material is already a criminal offence, but the person who is formally in charge of an internet site may not in fact have posted the material in question, and may not agree with the views expressed in it. Here the object of the notice is to inform the person of the criminal nature of the material and to inform him/her that failure to remove it speedily will mean that s/he will be regarded as endorsing the material, and so be liable to prosecution.

59. 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"*[43]. The area of criminal law, or in this case, quasi-criminal law, requires a

[41] CDL-AD(2007)016, *para. 58* "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 intelligence can do to the vital values of democratic societies". See also §§ 86 and 208.

[42] Venice Commission, *Report on counter-terrorism measures and human rights*, CDL-AD(2007) para. 32.

[43] *Gillan and Quinton v. UK,* Application No. 4158/05, 12 January 2010, para 77.

high degree of precision. 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).

60. Although a warning may be appealed to a higher level of the FSB, a prosecutor's office, or the courts as indicated above (para 49) only the courts fulfil the requirements of Article 6. Unlike the situation in relation to an official request (below para 68) it is not clear what an appeal can accomplish in practice in relation to a warning. As already noted, even when a formal possibility of appeal exists, courts, in Russia like elsewhere, tend to experience difficulties in practice in questioning the experts' determinations that a given conduct is a security threat.

61. Warnings in any event appear to have been used sparingly (above para. 52). As explained above, the acceptability of warnings depends upon whether they are "chilling", or potentially can "chill", the exercise of rights protected under the Russian constitution and the ECHR, in particular under Articles 9 to 11 ECHR. The Venice Commission will thus content itself with noting that whether or not warnings are in compliance with the ECHR will depend in how they are, now and in the future, used in practice.

### c) Official requests

62. An official request can be issued "to eliminate causes and conditions facilitating the carrying out of threats to the security of the Russian Federation". The concerned organisations are "*bound to comply"* with the request which is thus an order. Unlike a warning, a request is backed by an administrative penalty under Article 19.4 of the Code of Administrative Offences which is applicable if the request is not complied with. The penalty is up to 15 days imprisonment or a fine for a physical person or a fine for a legal person. Although the penalty is classed as administrative in nature under Russian law, the penalty of up to 15 days imprisonment should be seen as "criminal" within the meaning of the case law of the ECtHR.[44]

63. The request can be directed against "establishments, organisations, regardless of their ownership", i.e. both public and private bodies.

64. It is not difficult to understand how the English translation of the basis for issuing a request can give rise to disquiet. Moreover, the fact that private companies, and NGOs, may be the subject of official requests can also raise questions. In its English translation, the basis for the request can be read as permitting the FSB to prescribe conduct in the future, perhaps even in an area protected by a fundamental right, such as freedom of expression. Here reference can usefully be made to the Court's judgment in *Hashman and Harrup v. UK*,[45] 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).

[44] 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).

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

65. However, if one instead reads the competence to issue an official request as closely linked to, and limited by, the FSB competence to investigate serious security crimes, it is clear that official requests, even when backed by a penalty, have a legitimate area of application. A private company, such as a company running a public transport facility (e.g. an airport) may have in its possession video tapes which might be of crucial importance to the FSB in investigating a security crime, such as a terrorist bombing.

66. Moreover, even outside of the area of investigation into specific security crimes, in dealing with the more general of responsibility of the FSB to prevent security crime, there can be a legitimate area of application of the provision *as regards government departments and administrative agencies*. Combating corruption is within the competence of the FSB. 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. 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. Where there is a pre-existing legal obligation for government departments or administrative agencies to maintain a high degree of physical and cyber-security, reduce vulnerabilities to corruption etc. then it is obviously legitimate for the FSB to point out vulnerabilities in structures and routines etc. and to require corrective measures to be taken, backed by an administrative penalty. 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, it should be stressed that 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.).

67. The problem with official requests is the same as with warnings, namely the wide basis for issuing official requests which, actually or potentially, can include official requests concerning activity protected by fundamental rights, in particular the freedoms of association and expression. Companies and associations are entitled to these (and certain other) rights under the ECHR.[46] An administrative fine applies for non-compliance, which makes the potentially chilling effect even more apparent (even if, as follows from the wording of Article 19.4 of the Code of Administrative Offences, the penalty of imprisonment may not be imposed upon an officer of a corporation, association or other legal person).

68. The safeguard against this is the possibility of appeal, under article 6 of the FSB Law, to a higher level of the FSB, the prosecutor and the courts. As already noted, only the courts fulfil the requirements of Article 6 ECHR. As already noted in connection with warnings (above para 60) courts experience difficulties in practice in reviewing security decisions. With official requests, however, the right of appeal serves a more obvious purpose, as the courts, applying the principles of legality and proportionality formally speaking have the competence to annul the request and/or vary or annul the penalty. The Venice Commission will, again, content itself with noting that the wide formulations used in the law ("to eliminate causes and conditions facilitating the carrying out of threats to the security of the Russian Federation") means that there is a potential for official requests backed by penalties to be used outside of their legitimate spheres of application. If, now or in the future, official requests are used to prescribe conduct for associations or corporations which would interfere with their fundamental rights of freedom of association or expression, then this would not be in accordance with the ECHR.

[46] See e.g. Comingersoll S.A. v. Portugal, No. 35382/97, 6 April 2000.

## IV. Conclusions

69. The Venice Commission stresses at the outset 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. However, 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.

70. The Venice Commission has examined the text of the Law on the Federal Security Service (FSB). It finds that it calls for the following remarks:

a) As regards the legal basis governing the activities of FSB organs, it is defined in the Law with reference to the Constitution and several other legal texts, including the code of criminal procedure. The Law lacks an explicit requirement to duly respect the principles of necessity and proportionality and to provide for effective remedies. In the Venice Commission's view, this matter would benefit from a higher degree of clarity.

b) As regards the monitoring and supervision of the FSB activities, the Venice Commission has previously indicated as a general rule that firstly it is necessary to establish mechanisms to prevent political abuse while providing for effective governance of the agencies. Overall, the objective is that security and intelligence agencies should be insulated from political abuse without being isolated from executive governance. Secondly the rule of law must be respected. Agencies must be subject to legal control. As in other areas of public administration, one key task of the parliament is, by means of statute, to delegate authority to the executive but also to structure and confine discretionary powers in law. The challenge for oversight and accountability is to adapt or devise processes that command democratic respect at the same time as protecting national security. At the level of review, it is absolutely necessary to have external mechanisms to bridge the barrier of secrecy and provide assurance for the executive, legislators and the public that operations are being carried out effectively, lawfully and in accordance with policy.

   In Russia, oversight of the FSB is exercised by the President of the Russian Federation, the Federal Assembly, the government and the judicial bodies. The President and the government are not "external" controls. The Duma Committee on security and anti-corruption, besides adopting the budget or part of the budget of the FSB, seems to be empowered merely to request information. A "Public Council" with an advisory role in order to ensure the compliance of FSB with the constitutional rights and freedoms of the citizens, may be a useful channel of communication but, in the Venice Commission's view, it cannot be described as an oversight body, notably because it does not have access to confidential information. Judicial control, both preventive and subsequent, of individual measures may instead represent a safeguard for human rights, provided that the judges possess an appropriate level of expertise and experience. As concerns the control of the gathering of intelligence and the use of operative and search activities, it is carried out by specialised, security-screened prosecutors. While prosecutors may indeed represent a useful control over the security agency to the extent that its work involves gathering evidence for the prosecution, the Venice Commission has previously stated that prosecutors may only be seen as an "external" control if they are formally and in practice a part of the independent judicial branch. The Venice Commission has previously found that the Russian prosecutors are strongly subjected to the hierarchical control of their superiors and of the Prosecutor-General. Against this background, the Venice Commission does not find that they represent a mechanism of "external" control.

c) As regards the prevention measures, warnings addressed to individuals do not carry sanctions and may be appealed also in court. Nevertheless, they intervene in a "grey zone" situated between what is legal and what is illegal, and may be used in an arbitrary manner, thus risking having an undue chilling effect on the exercise of fundamental

rights and freedoms. Official requests addressed to organisations instead do carry sanctions and, although they may be appealed, their potential chilling effect is even greater. In the Venice Commission's view, therefore, the prevention measures set out in the Law have the potential to impinge on fundamental rights, depending on how they are applied in practice.