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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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COMMENTS

**OF THE INSTITUTE OF LEGISLATION AND COMPARATIVE LAW
UNDER THE RUSSIAN FEDERATION GOVERNMENT**

ON

**THE FEDERAL LAW OF THE RUSSIAN FEDERATION
ON THE FEDERAL SECURITY SERVICE**

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**Comments of the Institute of Legislation and Comparative Law
under the Russian Federation Government
on the Federal Law on Federal Security Service**

Question 1.

Determination and Limits of Interpretation of terms “Security Threat” and “Damage to Security”

The term “security” is stipulated by sub-section “m” of section 71 of the Constitution of the Russian Federation and relates to special competence of the Russian Federation. This content of this constitutional norm is revealed in the Federal law of December 28, 2010 No. 390-FZ On Security (hereinafter – Law No. 390-FZ).

The Law № 390-FZ defines the principles and content of activities ensuring state security and specifies the security types, including the state security. The terms "national security threat", "national security" and "state security" are in a close correlation. In accordance with section 6 of the National Security Strategy of the Russian Federation until 2020 (hereinafter - the Strategy), approved by Presidential Decree of February 5, 2009 No. 537, national, security threat is the possibility of direct or indirect damage to constitutional rights, freedoms, worthy quality and level of life, sovereignty and territorial integrity, sustainable development of the Russian Federation, defense and national security of the state. On the other hand, national security is the state of security for the individual, society and state from internal and external threats, which guarantees the constitutional rights and freedoms, worthy level and quality of life, the sovereignty, territorial integrity and sustainable development of the Russian Federation, defense and national security. Thus, the state security is an integral part of national security.

Activities of the system of the Federal Security Service is aimed at blocking security threats and is carried out in the following areas: counterintelligence activities, combating terrorism, crime, intelligence activities, border operations, guaranteeing the information security, it is aimed at blocking the sources, and thereby reduces the possibility of direct and indirect damage.

The notion of "security damage" in the Federal Law of April 3, 1995 No.40-FZ On the Federal Security Service is not specified. However, there are approaches which permit in certain cases to assess the damage. Thus, in the case of disclosure of information containing a state secret, the damage is determined in the procedure as provided by the Order of the Government of the Russian Federation dated September 4, 1995 No. 870 On Approval of Rules for Referring Information Constituting State Secrets to Different Secrecy Levels.

The boundaries of the interpretation of these concepts are shaped by circumstances prescribed by the Federal Law On the Federal Security Service and other legal acts regulating the activities of the bodies of the Federal Security Service. In our view, such circumstances include the scope of legislative regulation, the composition of subjects authorized to operate in the sphere of guaranteeing state security the volume of which is fixed by legislation of the Russian Federation, the competence of the Federal Security Service, the formal elements of crimes in this area and so on.

Question 2.

Control over the activities of the Federal Security Service: the procedure for its implementation and controlling authorities.

The bodies of Federal Security Service are organs of the executive branch, and therefore they are controlled by the President of the Russian Federation as the head of state vested with considerable powers in relation to the executive branch.

The President of the Russian Federation exercises broad powers over the Federal Security Service, including the implementation of control in accordance with the Constitution and federal laws. In implementing the President's control the important role belongs to the Control Agency of the President of the Russian Federation, whose main functions are: control and checking the execution of federal laws, decrees, orders and instructions of the President and the Chief of the

Presidential Administration by federal executive bodies and officials. In accordance with paragraph 2 of the Decree of the President of the Russian Federation of March 28, 2011 No. 352 On measures to Improve the Organization of the Execution of Orders and Directives of the President of the Russian Federation, the heads of the executive departments are subject to personal responsibility in this sphere.

Control over the activities of the Federal Security Service is also exercised by the Federal Assembly of the Russian Federation as the supreme legislative body with the help of the Council of Federation Committee on Defense and Security and the State Duma Committee on Security.

The Russian Government as the supreme executive organ also controls the activities of the Federal Security Service on aspects related to its competence. In accordance with Section 12 of the Federal Constitutional Law of December 17, 1997 No. 2-FKZ On the Government of the Russian Federation – the Government of the Russian Federation has the right to abrogate acts of federal executive bodies or suspend the application of these acts. Moreover, such abrogation or suspension may be carried out both in view of illegality and inexpediency of the acts of federal executive bodies, including the Federal Security Service. The Government within its control competence may abrogate both regulatory and individual acts of the Federal Security Service.

Within the limits as determined by the Constitution of the Russian Federation and federal laws control over the activities of the Federal Security Service is carried out also by the courts.

The judicial control over legality is exercised by all bodies of the judicial system, established by the Federal Constitutional Law On Judicial System of the Russian Federation.

Individual and collegial actions (decisions) of government agencies, resulting in violation of rights and freedoms of citizens, creating obstacles to the implementation of citizen's rights and freedoms, may be appealed in courts. The procedural obligation to prove the legality of the disputed action (decision) is imposed on officials, whose actions are appealed (Federal Law of April 27, 1993 No. 4866-1 On Judicial Appealing against Actions and Decisions Violating Rights and Freedoms of Citizens).

Public prosecutor's supervision

Supervision over the execution of laws by the bodies of the Federal Security Service of the Russian Federation is exercised also by the Procurator General of the Russian Federation and procurators authorized by him.

Public procurator's supervision over the execution of laws by the Federal Security Service is implemented on the basis of the Federal Law of January 17, 1992 No. 2202-1 (as at November 21, 2011 No. 329-FZ) On the Procurators Office of the Russian Federation).

The public procurator supervision does not embrace the information about persons providing assistance to the Federal Security Service on a confidential basis, as well as on organization, tactics, methods and means of implementing the activities of the Federal Security Service.

Question 3.

Measures and guarantees for the protection of fundamental human rights in the activities of the Federal Security Service (the possible restrictions of fundamental rights - the conditions, order, authorities competent to make decisions or to submit proposals to apply such measures (in the case of counter terrorism), limitation of rights in the event of emergency (without court decision), additional applicable law (specific acts), legal remedies, protection of citizens (any person in such cases).

The constitutional principle of rule of law state imposes on the Russian Federation the duty to acknowledge, respect and protect human rights and freedoms as the supreme value on the Russian Federation, which supposes the establishment of such legal order, which guarantee to anyone state protection of his/her rights and freedoms (Section 1, Part 1, Section 2, 17 and 18, Section 45, Part 1, of the Constitution).

However, by virtue of the provisions of Section 55(3) of the Constitution the rights and freedoms may be limited by federal law only in view of necessity to protect the constitutional system, morality, health, rights and lawful interests of other persons, national defense and state security. For example, Sections 9 - 11.1 of the Federal Law On the Federal Security Service specifically provides that actions for implementation of tasks assigned to the bodies of the Federal Security Service limiting citizens' right to privacy of correspondence, telephone conversations, postal, telegraph and other messages sent over the networks of electricity and postal service, inviolability of residence shall be permitted only by judicial acts in accordance with the legislation of the Russian Federation and other federal laws.

In addition, the regulation of certain activities is carried out on the basis of blanket prescriptions, directing to the norms of the Federal Law of August 12, 1995 On Operational-Investigative Activities. This law stipulates that the operational-investigative activities that limit rights of citizens vested in Section 23 of the Constitution shall be permitted only by a court decision. The law also indicate the conditions under which such judgment can be made. These conditions are associated with the presence of information about:

- signs of preparation and commitment of a wrongful act for which a preliminary investigation is required;
- persons who prepare, commit or have committed a wrongful act for which a preliminary investigation is required;
- events or actions that threaten the state, military, economic and environmental security of the Russian Federation (Section 8(2) of the Law).

At the same time wiretapping of telephone and other conversations are allowed only in respect of persons suspected or accused of committing grave and especially grave crimes, and persons who may have information about these crimes.

With these conditions in cases of urgency endangering the state, military, economic or environmental safety, the conduct of search operations may be allowed on the basis of a well-grounded decision of one of the heads of the bodies conducting operational-investigative activities (law-enforcement agencies, the Federal Security Service and etc.), provided the requirement of the mandatory notification of a judge is fulfilled within 24 hours (48 hours - if there is a threat to life, health, property of individuals, with their written consent). If, within 48 hours upon receipt of such notification, the judge decides not to permit the appropriate operational and investigative activities, its conduct should be stopped.

In accordance with the Resolution of the Plenum of the Supreme Court of the Russian Federation of October 31, 1995 On Some Issues of Application of the Constitution by Courts in Rendering Justice, the results of operative-investigative activities related to the restriction of citizens' constitutional right to privacy of correspondence, telephone conversations, postal, telegraphic and other messages can be used as evidence in cases only if there is a permission of the court on conducting such activities and verified by the investigative authorities in accordance with criminal procedure legislation.

Question 4.

The activities of the Federal Security Service and protection of personal information.

One of the types of activities of the security authorities is to ensure information security, which is realized with respect to such type of information as personal information.

The Russian Federation has signed the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and ratified it by the Federal Law of December 19, 2005 No. 160-FZ. Section 7 of the Convention provides that the state must undertake security measures for protection of personal information.

In order to implement the provisions of the Convention the Federal Law On Personal Information was adopted.

In accordance with Section 19 of the Federal Law, the operator is obliged during the processing of personal data to take necessary legal, organizational and technical measures, to ensure their adoption and to protect personal data against unauthorized or accidental access, destruction, alteration, blocking, copying, delivery, dissemination of personal data, as well as other illegal actions in respect of personal data.

The Government of the Russian Federation, taking into account possible harm to subjects of personal information, the volume and content of the processed personal data, type of activities, in the exercise of which personal data are processed, the relevance of threats to the security of personal data, establishes:

- 1) The levels of protection of personal information during their processing by personal data information systems, depending on the security threats of the data;
- 2) The requirements for the protection of personal data during their processing in the personal data information systems, implementation of which ensures the prescribed levels of protection of personal data;
- 3) The requirements for material media of biometric personal data and storage technologies of such data outside personal data information systems.

Structure and content of requirements for the protection of personal data for each of the levels of security, organizational and technical measures to ensure the security of personal data during their processing in the information systems of personal data are established by the Federal Security Service of Russia and the [Federal Service for Technical and Export Control](#) of the Russian Federation within their competence.

The control and supervision over the organizational and technical measures ensuring the security of personal data during the processing of personal data in governmental information systems of personal data are carried out within their competence by the Federal Security Service of Russia and the [Federal Service for Technical and Export Control](#) of the Russian Federation, but they do not have the right to study or to be acquainted with personal data processed in such information systems.

Question 5.

Liability of officers of the Federal Security Service in excess of their official duties related to the violation of human rights.

In case of violation of human rights and freedoms by officials of the bodies of the Federal Security Service, the head of the body of the Federal Security Service, the procurator or the judge must take steps to restore the rights and freedoms, to compensate damage and to attract guilty persons to liability under the laws of the Russian Federation (Section 6 of the Federal Law On the Federal Security Service).

A person has the right to appeal actions of the bodies of the Federal Security Service and their officials not only in court proceedings but also in higher organs of the Federal Security Service and the Procurator's Office.

The judicial procedure of appealing is most regulated by law.

The responsibility of the bodies of the Federal Security Service and its officials occurs in case of:

- Violation of the rights and freedoms of citizens;
- Creating obstacles to the implementation of citizen's rights and liberties;

- Illegal imposition of responsibility or liability.

The Law On Appealing Against the Actions and Decisions, Violating Rights and Freedoms of Citizens" (Section 4) gives the right to file a complaint against actions (decisions) in violation of rights and freedoms, either directly to the court or the higher organ.

The damage caused to a citizen by illegal actions of the bodies of the Federal Security Service during the initial inquiry and preliminary investigation shall be compensated according to the rules laid down by Civil Code and by-laws.

For example, Section 1070 of the Civil Code of the Russian Federation provides for liability for harm caused by illegal actions of organs of inquiry, preliminary investigation, prosecution and trial.

Meanwhile, the damage caused to a citizen by unlawful conviction, unlawful criminal prosecution, unlawful use of preventive measure of detention or recognizance not to leave, unlawful bringing to administrative responsibility in the form of administrative detention, as well as damage caused to a legal entity as a result of unlawful bringing to administrative responsibility in the form of suspension of activities shall be compensated at the expense of the Treasury of the Russian Federation, and in cases stipulated by law - by the Treasury of the subject of the Russian Federation or municipal treasury in full scale, regardless of the guilt of officials of investigating organs, procurators' office and courts, in the manner as prescribed by law.

Compensation for damage caused to citizens by illegal actions of state and public organizations, as well as officials in the performance of their duties, is carried out according to the rules established by the Regulation on Compensation for Damages Caused to Citizen by Unlawful Actions of Inquiry, Preliminary Investigation, Prosecution and Trial Authorities (approved by Decree of Presidium of the Supreme Council of the USSR on May 18, 1981 No. 4892-X).

The Regulation is the acting legal act, which may be applied in part not contrary to the new Criminal Procedure Code, which entered into force on July 1, 2002.

Question 6.

Powers of officers / investigators in the case of use of "preventive measures" (Amendment 2010); persons authorized to make decisions, the established order, the possibilities of appeal; on addressing requests to public and private agencies and organizations with respect to "eliminating the causes that contribute to threats to security" of the country; the question of the direction of official warnings to individuals in respect of "the inadmissibility of actions that create conditions for commitment of a crime", an investigation and a preliminary examination which is administered by the Federal Security Service in view of absence of grounds for criminal prosecution.

The above mentioned powers of such persons are based on Section 13.1 of the Federal Law of April 3, 1995 No. 40-FZ On the Federal Security Service. In this section, the federal executive authority in the field of security (Russian Federal Security Service) is authorized to establish the procedure for making representations and declarations of official warnings. In accordance with the competence of Federal Security Service of Russia as established by the Order of November 2, 2010 No. 544 (with amendments dated June 6, 2011) "On Presenting Official Warnings about the Inadmissibility of Actions that Create Conditions for Crime, Investigation and Preliminary Investigation of Which is Assigned by the Legislation of the Russian Federation to the Power of the Federal Security Service" (the act was registered in the Russian Ministry of Justice on November 08, 2010 No.18902). The above mentioned act approves the order of presenting the Federal Security Service official warnings, including the method of its handing (delivery), the list of categories of the heads of the Federal Security Service bodies authorized to declare an official warning.

As the grounds for declaring official warnings serve sufficient and mandatory pre-verified information about specific actions of the individual, creating conditions for the commitment of crime:

showing outwardly (verbally, in writing or otherwise) the intention to commit a specific offense in the absence of preparation for a crime or attempted crime;

preparing moderate and grave offenses or directly committing actions leading to such crimes when such actions may not be classified as the attempt to commit a crime.

Question 7.

The regulatory framework (laws and regulations) to carry out intelligence operations and the usage of special methods and tools (specific documents?).

The content of intelligence operations are based on the Federal Law On External Intelligence, which stipulates the sphere of activity of the Russian Federation foreign intelligence service, principles and goals, means and methods of intelligence activities.

The legal basis for intelligence operations is formed by the Constitution of the Russian Federation, Federal Law of January 10, 1996 No. 5-FZ On External Intelligence. Section 3 of the Law No. 5-FZ stipulates that foreign intelligence agencies of the Russian Federation within the limits of their competence and in accordance with the laws of the Russian Federation shall issue regulations governing their activities.

Intelligence activities in Russia are carried out by the Russian Foreign Intelligence Service, External Intelligence Service of the Ministry of Defense of the Russian Federation, bodies of the Russian Federal Security Service. The order of intelligence activities and the use of special methods and means in carrying out intelligence operations are established by regulations of appropriate federal security executive bodies.

Access to information about the activities of government agencies is regulated by the Law of the Russian Federation of July 21, 1993 No 5485-1 On State Secrets, according to which (Section 5(4)) information in the field of intelligence, counterintelligence, and operational and investigative activities, including information of the forces, facilities, sources, methods, plans and results of intelligence, counterintelligence and operational-investigative activities, as well as data on the financing of these activities, if these data reveal the above information constitute a state secret.

It should be noted that the Decree of the President of the Russian Federation of August 10, 2011 No 1075 approved a list of information about the activities of the Russian Federal Security Service, which shall be posted in the Internet. Presidential act with the same content (Decree of August 10, 2011 No. 1074) provides the same requirement for the information about the activities of the External Intelligence Service.

Question 8.

The powers of the Federal Security Service against administrative violations in the sphere of its competence.

Federal Security Service is not only the executive authority, endowed with certain functions of intelligence, but also the law enforcement agency.

Unlike criminal and criminal procedure measures aimed at curbing a crime, administrative measures are mainly used to prevent and combat anti-social offenses that could turn into a crime.

In accordance with the sections 23.10 ("The border authorities") and 23.45 ("The authorities exercising control over the provisions of protection of state secrets") of the Code of Administrative Offences of the Russian Federation, officials of the Federal Security Service bodies are authorized to consider cases on administrative offenses stipulated by these sections.

At the same time, Section 28.3 of the Code of Administrative Offences of the Russian Federation officials of the Federal Security Service bodies are authorized to file protocols on administrative violations as specified in this section (for example, paragraphs 14, 56).

In addition, Section 27.1 of the Code of Administrative Offences of the Russian Federation provides the right to officials of the Federal Security Service to apply measures ensuring the proceedings of administrative offenses (Section 27.1 of the Code of Administrative Offences of the Russian Federation), as well as to establish and to impose administrative penalties for administrative offenses (Section 3.2 of the Code of Administrative Offences of the Russian Federation).

Question 9.

Measures to ensure personal safety of the Federal Security Service (Amendment 2011).

Measures to ensure personal security of the bodies of the Federal Security Service are stipulated by the Federal Law of July 18, 2011 No. 241-FZ On Amendments to Certain Legal Acts of the Russian Federation. They are actually limited to the requirements addressed to persons entering military service, the federal civil service or the work in the Federal Security Service.

Under the Act the military and civilian personnel of the bodies of the Federal Security Service have to pass:

- Physiological studies, testing the use of narcotic drugs and psychotropic substances, alcohol, drug or other toxic dependency, thus checking their suitability for service or work in the organs of the Federal Security Service and conformity to qualification requirements;
- The procedure of registration for admission to information constituting state secrets;
- The check that is associated with ensuring the personal safety of the bodies of the Federal Security Service organs, including the use of technical and other means, without harm to human life and health and without causing harm to the environment.

This researches, testing and inspections are carried out in cases, in the procedures and terms, which are determined by the head of the federal executive authority in the field of security.

The consent of citizens of the Russian Federation entering the military service, the federal civil service, the work in the Federal Security Service, working as the military and civilian personnel of the Federal Security Service bodies to be subjected during their work to researches, tests and inspections is laid down, respectively, in contracts for military service, the contracts of employment and so on.

It is prohibited for military and civilian personnel of Federal Security Service bodies to place in the media, information and telecommunications in the Internet information (including photos, videos and other materials) about themselves, other employees of the Federal Security Service bodies, which allows to reveal departmental personnel belonging to the composition of the Federal Security Service bodies, its performance, the activities of the Federal Security Service, except as provided by regulations of the Russian Federation, normative legal acts of federal executive authority in the sphere of security.

Citizens of the Russian Federation entering military service, the federal civil service or the work for the Federal Security Service bodies, the military and civilian personnel of the Federal Security Service bodies shall submit to the departments of personnel the information relevant to ensuring security of the Federal Security Service bodies in accordance with a list of the cases and procedures, which are determined by the head of the federal executive authority in the sphere of security.

Military and civilian personnel of the Federal Security Service bodies is permitted to establish contacts with foreign nationals on the terms and conditions determined by the head of the federal executive authority in the field of security.