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JOINT OPINION

**OF THE VENICE COMMISSION
AND
THE DIRECTORATE OF HUMAN RIGHTS (DHR)
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS
AND RULE OF LAW (DGI)
OF THE COUNCIL OF EUROPE**

**ON THE DRAFT LAW
AMENDING AND SUPPLEMENTING CERTAIN LEGISLATIVE ACTS,
PROMOTED BY THE INTELLIGENCE AND SECURITY SERVICE**

OF THE REPUBLIC OF MOLDOVA

**adopted by the Venice Commission
at its 98th Plenary Session
(Venice, 21-22 March 2014)**

on the basis of comments by:

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I. Introduction

1. In a letter, dated 2 December 2013, the Minister of Justice of the Republic of Moldova requested the opinion of the Council of Europe on the draft Law amending and supplementing certain legislative acts (therein after “the draft law”), promoted by the Intelligence and Security Service of the Republic of Moldova. By a letter of 10 January 2014, the Ministry of Justice requested the Venice Commission also to review the same draft law.
2. The draft law in question proposes amendments to the Law no. 753-XIV of 23 December 1999 on the Intelligence and Security Service of the Republic of Moldova (“the Law on the Service” and “the Service”) as well as to the Law no. 59 of 29 March 2012 on Special Investigative Activity (“the investigation law”).
3. Mr Iain Cameron acted as rapporteur on behalf of the Venice Commission.
4. Mr Ian Leigh, United Kingdom, and Mr Mikael Lyngbo, Denmark, analysed the draft amendments on behalf of the Directorate of Human Rights (“the Directorate”).
5. This joint opinion of the Venice Commission and the Directorate, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).

II. Preliminary remarks

6. An Information Note attached to the draft law, prepared by the Moldovan authorities, clarifies the background to and the purpose of the amendment.¹ This has been most helpful in understanding the intentions of the drafters and explaining the links between the Law on the Service and other relevant specific laws.
7. The present joint opinion is limited to the actual draft law, but the difficulties in separating the legislation on activities of the Intelligence and Security Service from other legislation on state secrets, criminal procedure, criminal law and personal data should be noted.
8. In 2006 the Venice Commission adopted an Opinion on Articles 7 and 10 of a 2005 amendment to the Law on the Service.² That amendment rewrote the duties of the Service. The Commission approved in general the legal framework of the Service, but regretted that “...the exact significance of many provisions can be difficult, if not impossible to grasp on account of the many general references to other legislation, often without further precisions”. That problem has not been fully rectified in the present amendment, a fact which has increased the difficulties of the experts, as it will increase the task of the national authorities, in their interpretation of the Law on the Service.
9. In 2006, the Council of Europe also issued a Review of the 1994 Law on Operative Investigations of the Republic of Moldova.³ That law has now been replaced by the 2012 Law on Special Investigative Activity.

¹ Information note and Draft Law on Amending and Supplementing the Law on Intelligence and Security Service and the Law on Special Investigative Activity (CDL-REF(2014)03).

² Opinion on the Law on information and the Security Service of the Republic of Moldova, adopted by the Venice Commission at its 66th Plenary Session (17-18 March 2006). CDL-AD(2006)011.

³ Directorate General I, Legal Affairs Department of Crime Problems, expert Opinion on Review of the Law on Operative Investigations of the Republic of Moldova, by Goran Klemencic.

10. The personal data protection issues raised by the Law on the Service were addressed in a separate Opinion issued on 20 February 2006 by an independent expert commissioned by the Directorate General of Legal Affairs of the Council of Europe.

11. In 2008, the Venice Commission gave an Opinion on the Law on State Secret of the Republic of Moldova,⁴ which is relevant to Article I.2.(4) of the assessed draft law.

12. In a judgment of 14 September 2009 in the case of *Lordachi and Others v. Moldova* the European Court of Human Rights (ECtHR) found that "...the system of secret surveillance in Moldova is, to say the least, overused, which may in part be due to the inadequacy of the safeguards contained in the law".⁵ More specifically, the Court found that the Moldovan law did not provide adequate protection against abuse of power by the State in the field of interception of telephone communications and that the interference with the applicants' rights under Article 8 was not "in accordance with the law". Telephone tapping was then regulated by the 1994 Law on Operational Investigative Activities, which as mentioned has been replaced by the 2012 Law on Special Investigative Activity. It therefore seems appropriate to review also the present amendment scrupulously for its observation of the European Convention on Human Rights ("ECHR").

13. The particular relevance of Articles 8 and 13 ECHR should be highlighted. The security measures concern a person's 'private life' and 'home' and they involve interference with their 'correspondence'⁶ and the domestic effective remedy for violations of Convention rights required by Article 13, according to the ECtHR case-law, must be effective in practice as well as in law.⁷

14. The 2012 Investigation law has not been presented to the Council of Europe or the Venice Commission for assessment. This would have been desirable, considering the extensive criticism in the *Lordachi* case. It therefore remains unclear to what extent a number of shortcomings have been remedied.

15. The Opinion is based on the English translation of the draft law, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

III. Background information

16. In 2012 Moldova introduced a new Law on Special Investigative Activities, which was meant to be common for the law enforcement authorities and for the state security organs. Experience since then has led the authorities to realize a fundamental difference between investigation within a criminal case of crime already committed (as is the main task of the law enforcement authorities) and the prevention and countering of certain acts that may harm the state security and most frequently is not and will not be part of a criminal case (as is the main task of the Service).

17. In consequence, the draft law suggests establishing a special procedure for granting the authority to the Service to use special investigative measures outside a criminal case (Article I of the draft law, inserting a new Article 7 (2) into the Law on the Service). This is to be called a "security mandate" and is to be granted by specially appointed judges.

⁴ Opinion on the Law on State secret of the Republic of Moldova, adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

⁵ *Lordachi and Others v. Moldova* §52

⁶ See in particular, *Leander v. Sweden* (9248/81), 26 March 1987; *Rotaru v. Romania*, (28341/95); *Weber and Saravia v. Germany*, (54934/00), 29 June 2006; *Kruslin v. France* (11801/85), 24 April 1990; *Huvig v. France* (11105/84), 24 April 1990; *Valenzuela Contreras v. Spain* (27671/95), 30 July 1998; *Klass and Others v. Germany*, 6 September 1978 (5029/71).

⁷ *Segerstedt-Wiberg v. Sweden*, (62332/00), 6 June 2006; *Al-Nashif v. Bulgaria*, (50963/99), 20 June 2002.

18. The draft law (draft new Article 7 (2) of the Law on the Service) also regulates the access of the Service to financial information outside of a criminal investigation. In this case it is intended that the security mandate issued by a judge will not be required.

19. When the 2012 Investigation law replaced the 1994 Law on Operative Investigation Activity, it apparently omitted an earlier legal regulation of special technical means for obtaining information in a hidden way. The draft law (Article II) is intended a) to reintroduce the prohibiting of use or import, export, design, production or marketing of such equipment by unauthorized persons and b) to re-criminalize violations of this prohibition.

20. The 2012 Investigation Law gave everyone the right to be informed about special investigative measures to which he or she had been subjected. Under the draft law (amendment to Article 20 of the Investigation Law) it is intended to withdraw that right in certain cases in order to ensure state security.

21. The draft law (inserting new Article 18.3 in the Investigation law) will enable the Service to use technical means as part of visual tracking for certain purposes connected with state security.

IV. Article by article analysis

A. Article I. of the draft law

22. Article I of the draft law proposes amendments to the 1999 Law on the Service.

1. Article I.1

23. The amendment will allow the Service to carry out the following measures under a security mandate issued by a judge outside a criminal investigation:

Article 18 paragraph (1) item 1)

- a. research of domicile and/or instalment in it of equipment which ensures audio and video surveillance and recording, photo and videotaping;
- b. surveillance of domicile by means of technical methods which ensure recording;
- c. communication and images interception and recording;
- d. arrest, research, transfer, search or seizure of postal correspondence;
- e. monitoring of connections to telegraphic and electronic communications;
- f. monitoring of control of financial transactions and access to financial information;
- g. documentation with the use of technical methods and means, as well as the localization of surveillance via the global positioning system (GPS) or via other technical mean;
- h. collection of information from providers of electronic communication services.

Article 18 paragraph (1) item 2) c., e., and f.:

- c. control of transfer of money or other extorted goods;
- e. trans-border surveillance;
- f. controlled delivery.

24. In this regard, the Venice Commission and the Directorate note that if offences against the security of the state are framed in a way which requires some tangible, overt act⁸ (as should be the case in a democratic state respecting human rights), then activity potentially damaging to the security of the state may not have reached the threshold of a criminal offence, even a

⁸ Cf Report On Counter-Terrorism Measures And Human Rights, CDL-AD(2010)022, para. 34 “any [new terrorist] offence must address actual facts which it must be possible to ascertain materially and objectively”.

preparatory or other inchoate offence. However, in all cases there must be a concrete factual basis indicating a serious threat to the state⁹.

25. Therefore, it is understandable that Moldova wishes to provide for a mechanism for security investigations outside of the framework of a criminal investigation.

26. However, it should equally be stressed that it is crucial that creating such a mechanism should not undermine the existing safeguards applying to investigations of criminal offences. If the threshold for initiation of a security investigation for a “security crime”¹⁰ is low, the risk of undermining the ordinary criminal procedure safeguards is particularly strong.¹¹

27. In the Law on the Service, the existing Article 7 grants the Service a mandate that includes protection against actions that ‘infringe the constitutional rights and freedoms of citizens and endanger the state’ and assaults on high ranking officials etc. Arguably both of these can be considered as straightforward matters of criminal law rather than the legitimate aim of protecting national security. Therefore their use in these instances without the safeguards of a criminal investigation and trial can only be justified if the phrase “and endanger the state” is read literally to mean that it is only when the threat affects the democratic order, in other words, has reached a certain level of concreteness and seriousness, that it becomes a permissible subject for the attention of the Service. The mandate of, e.g. the Swedish security police, includes investigating assaults on and threats to senior public officials (when these affect the democratic order) as well as actions undermining the exercise of citizens’ constitutional rights. The latter function has the relatively narrow meaning of investigating the activities of organised extremist groups which are hostile to certain groups of citizens or residents, e.g. of a particular ethnic origin.

28. Concerning the narrower matters within the mandate that more clearly fall within “national security”, the questions of whether the amendments satisfy the standards of being “in accordance with law” and “necessary in a democratic society” need to be considered.

2. Article I.2.(1)

29. This paragraph of the draft law defines the concept of “security mandate”, which when obtained authorizes the Service to carry out the special investigative measures without it being part of a criminal trial. It also defines the procedure to be used, which is different from the one used in criminal cases, where the authorization is given by the investigative judge¹² at the request of the prosecutor, or by the prosecutor.¹³

30. The grounds for conducting special investigative measures are regulated by Article 19.(2) which tries to provide an exhaustive list of relatively specific matters within the Service’s competence. It should be stressed that not *all* special investigative measures, irrespective of the degree to which these infringe privacy and other human rights, should be available to investigate *all* of the matters within the Service’s competence. The European standard is to provide for a graded scale of response: the more the special investigative measure is capable of infringing human rights, the tighter should be the controls on its use. A non-differentiated approach to the use of special measures, independent from the level of intrusion into private life is in breach of European standards.

31. It is also crucial that internal procedures are put in place to require *concrete* factual information relating to planning or committing activity threatening national security or endangering public safety before the Service can even start collecting intelligence on

⁹ See, as an example of good European standards in this respect, the consistent practice of the German Constitutional Court, e.g. BVerfGE 113, pp. 348 and 378 f.

¹⁰ As the examples given in the information note provided by the Moldovan authorities (CDL-REF(2014)03) make clear, an important part of the mandate of the Service, set out exhaustively in the quoted legal provisions (i.e. Article 7(a) and (d) of Law no.753/1999 and Article 4(2) of Law no. 618/1995) is the investigation of security crime.

¹¹ See also para. 55 of this opinion.

¹² Concerning the measures mentioned in Article 18.(1).1) of the Law on Special Investigative Activity.

¹³ Concerning the measures mentioned in Article 18.(1).2) of the Law on Special Investigative Activity.

individuals. *Stronger concrete indications* should be required before the Service can start using special investigative measures, and *even stronger concrete indications* should be required before the Service can request use of the measures set out in paragraph 18 (1) 1) of the investigation law.

32. Article 11(g) of the Investigation law¹⁴ provides for a proportionality test. However, the ECtHR found in the *Lordachi* case that the proportionality principle had not been taken seriously in the past. The Venice Commission and the Directorate stress the crucial importance of this proportionality principle, and note that the severe criticism made in the *Lordachi* case entails that this principle must, in the future, be taken more seriously, *inter alia* by the strengthening of institutional mechanisms to ensure that it is complied with.

33. It should also be added that special investigative measures undertaken under a security mandate are in one sense a parallel system of surveillance, but this system is added onto the system provided for in the Investigation law (see Article II.2 of the amendment). The effect of Article 24(1) of the Investigation law is, or seems to be, that all material gathered as a result of special investigative measures is admissible as proof in criminal trials and can later be used in a criminal investigation or trial, for example for terrorism offences. This increases the risk of undermining the ordinary safeguards applicable to criminal investigations. It would be necessary to cover this possibility in one of two ways: either a prohibition on the use of material obtained in this way in legal proceedings could be introduced, or once the material falls within a criminal investigation the ordinary safeguards under the investigation law could apply to it.

3. Article I.2.(2)

34. This provision is, at least in the English translation, unnecessarily complicated and difficult to understand, and should be redrafted. The aim¹⁵ of this draft provision is apparently to regulate all access by the Service to financial information outside of a criminal case without obtaining a security mandate subject to judicial control. This will enable the Service to present binding demands for access to information from financial institutions such as banks. The reason given is that access to financial information would not present an excessive intrusion into private life.

35. In this regard, however, the Venice Commission and the Directorate note that financial information relating to individuals is likely to contain some personal data and, depending on the transactions concerned, may be connected to aspects of private life. The storing and the release of such information will amount to an interference with the right to respect for private life as guaranteed by Article 8 ECHR.¹⁶ As to legal entities, such as companies, even though they may have no “privacy” rights as individuals, they have the right to correspondence under the Article 8. In any event, to allow the Service access to *all* financial records (as opposed to suspicious transaction notifications, as regards money laundering, which it is permissible to provide for) is a system which invites abuse. Nor is it proportional. The removal of external control over the authorisation of these demands would therefore represent a weakening of the safeguards necessary in a democratic society.

4. Article I.2.(3) and (4)

36. The effect of the amendment is to create for the Service a new system for the authorisation of those special investigative measures which involve more significant infringements of privacy. Other measures set out in Article 18(1)2 of the Investigation law will continue to be authorised by prosecutors.

37. The Venice Commission and the Directorate consider that where the safeguards in the area of security are, in practice, placed wholly or largely in the hands of prosecutors, it is even

¹⁴ According to Article 11g) the investigation officer has the following obligations: g) to observe the proportionality between the harmed right and the need of the measure which is carried on.

¹⁵ According to the Information Note

¹⁶ *Leander v. Sweden* 26 March 1987 §48.

more vital that prosecutors are independent judicial officers in law and in fact, and have the necessary competence, legal authority and resources to control, in practice, the actions of the security agency.¹⁷ The Venice Commission has earlier emphasized the importance of Moldovan prosecutors having a sufficient degree of autonomy in their decision-making in general.¹⁸ Going beyond the prosecutorial authorisation to provide for judicial authorization for special investigative measures (such as bugging and communications' interception) is an important safeguard for human rights.¹⁹ As such, the involvement of judges is to be welcomed.

38. However, as the Commission has noted before, “[t]he mere involvement of judges in the authorization or review process (...) 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’.²⁰

39. It is recalled in addition that the ECtHR has set high standards as regards a judge’s duty to scrutinize critically applications for the use of special investigative measures.²¹

40. The Venice Commission and the Directorate note in this respect that Article I.2.(3) holds no procedure for the appointment of the judge.²² It may therefore be assumed that the appointment is at the free discretion of the presidents of the courts of appeal. It is arguable whether this sufficiently secures the independence of the judge and the efficiency of the legal control.

41. In addition, according to Article I.2.(4) the judge must have the “...right to access state secrets granted under the Law on State Secret”. It is not clarified in the draft amendment, who shall make the decision about the judges’ right, but that has presumably been solved in the Law on State Secret. The real powers, hence the effectiveness of the judge remains a key concern. This question should not be left to the discretion of the executive power.

42. Ensuring that special judges are seen to be both independent and sufficiently competent to perform their task is especially important where the procedure is one-sided, only between the

¹⁷ Democratic Oversight of the Security Services, CDL-AD(2007)016, para. 110 “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”. See also Opinion On The Federal Law On The Federal Security Service (FSB) of the Russian Federation, CDL-AD(2012)015, para. 40.

¹⁸ CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova, para. 48.

¹⁹ Democratic Oversight of the 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”

²⁰ Democratic Oversight of the 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.”

²¹ See the criticism of the ECtHR in Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria and in Lordachi 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”).

²² See the draft amendment Article III, which only orders the president of courts of appeal to designate judges specifically empowered to issue security mandates.

judge and the Service. According to Article I.2.(4), the Service is to be represented in the court by a specially appointed intelligence and security officer, while the representation of the target person by a lawyer is not foreseen at any stage of the process.

43. There is no provision for a security screened lawyer to raise, where appropriate, aspects of personal integrity. Bearing in mind the criticism Moldova has previously received for the lack of respect shown for the principle of proportionality (above), the institution of such a security screened lawyer should be seriously considered. For example, Swedish experience shows that, while intervention from such a lawyer rarely leads to an application for a special investigative measure being refused by the judge, it does contribute to ensuring that the application for the measure is properly, and comprehensively, prepared, and it can affect the scope, and duration of the measure ordered by the judge.²³ Moreover, it can provide a mechanism for an appeal to higher authority, to balance the Service's right to appeal.²⁴

44. Article I.2(4) also provides that the request for a security mandate must be considered without delay, not later than four hours after submission. This would appear to require the judges in question to be available on a 24-hour basis. This does not seem to be justified, especially in view of the possibility of interim authorisation (see below paras. 59-61). The draft Article does not state how long the judge has to consider the request. Obviously, bearing in mind the degree of intrusion a special investigative measure can entail for the right to privacy, such a decision should not be hurried. It is vital that the judge be able to request whatever supporting documentation s/he considers necessary and to question the Service officer.

45. According to Article I.2.(3), requests for a security mandate can be issued by the Director or a Deputy Director of the Service. This ought to act as a safeguard on the inappropriate use of the power to apply to court. It is regrettable, nevertheless, that Article 13 of the Law on the Service contains no material safeguards for the appointment of the Director and Deputy Directors of the Service on the basis of clear professional and apolitical criteria, or through approval by all the parties represented in the Parliament.

46. The 2012 Investigation law gave everyone the right to be informed about special investigative measures to which he or she had been subjected. Under the draft law (amendment to Article 20 of the Investigation law) it is intended to withdraw that right in certain cases in order to ensure state security. This proposal will have the effect that a possible violation of the rights of the person concerned will never be uncovered. The ECtHR has found such an approach unacceptable and in violation of Article 8.²⁵

47. A refused application cannot be presented on the same grounds relating to the same person to another court (Article I.2.(4) of the draft law). This is an appropriate proposal.

5. Article I.2.(5) and (6)

48. These provisions appear to fulfil the Commission's recommendations regarding the need for a proper "paper trail" as regards special investigative measures²⁶.

49. The details in draft paragraph (5) appear generally to be appropriate and precise - except for the possibility of seeking to use these powers against unidentified persons, which carries the risk of much more general monitoring of transactions.

50. However, the text does not stipulate for how long the information accessed may be kept, how it will be stored, who may have access to it or how it will be destroyed. In those respects, this paragraph does not seem to meet the quality of law test. Moreover it is not clear if, under

²³ SOU (Report of Public Inquiry) 2012:44.

²⁴ See para. 58.

²⁵ *Iordachi and Others v. Moldova* §39, quoting the *Klass and others v. Germany* case and below paras. 76-82.

²⁶ See Report on the Democratic Oversight of the Security Services (CDL-AD(2007)16), adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), para. 192.

paragraph (6) of the draft Article I.2 the judge may impose conditions when granting the mandate.

51. The requirement for approval by a judge is an appropriate safeguard under Article 8 of the ECHR. It is clear, however, from the Court's decision in *lordachi and Others v. Moldova* that evidence will be required that the judge exercises real discretion and powers of supervision²⁷ before this is regarded as an adequate guarantee. The Court in that case discounted the value of judicial supervision in Moldova as virtually all applications for interception were granted by the courts.

52. The role of the judge seems only to be defined in Article I.2.(6) of the draft law, which indicates the information that should be included in the decision of the court. This is mainly factual information. Regrettably, the draft paragraph does not include any provision on the need for the judge to provide justification for interference in private life. This hardly satisfies the requirements related to the role of the judge and his assessment of the existence of compelling reasons for authorizing measures of secret surveillance, as required in the *lordachi* case.²⁸

6. Article I.2.(7)

53. A security mandate may be issued regarding not only an identified person, but also an unidentified one, which might be problematic as regards Articles 8 and 13 ECHR. It is important that the minimum safeguards against abuses of power indicated in the *Kruslin*²⁹ and the *Huvig*³⁰ judgments, in particular those related to the definition of the categories of people subject to the security measure, are guaranteed also in the context of issuing a security mandate against an unidentified person.

54. A security mandate may be issued in case a person prepares, attempts to commit or has committed an act specified in Article 7 a) and d) of the Law on the Service or in Article 4 para. (2) of the Law on State Security,³¹ which more or less covers the entire range of duties of the Service. In view of the wide range of criminal matters that fall under these provisions there is a risk that the security mandate could be used extensively as an alternative to criminal investigation, thus depriving the persons affected of the normal criminal procedure safeguards.

²⁷ *lordachi and Others v. Moldova* §§47, 51 and 52

²⁸ *lordachi and Others v. Moldova* §§47 and 51.

²⁹ *Kruslin v. France* 24 avril 1990, §35.

³⁰ *Huvig v. France* 24 avril 1990, §34.

³¹ "Article 4. Threats to state security

(1) By threats to state security are meant all actions, conditions and factors that imply a danger to the state, society and personality.

(2) A particular danger for state security present the following:

a) actions aimed at changing the constitutional system through violence, subversion or suppression of the sovereignty, independence and territorial integrity of the state. These actions cannot be interpreted to the detriment of political pluralism and exercising constitutional human rights and freedoms;

b) activities that contribute directly or indirectly to conducting military action against the country or launching of a civil war;

c) military actions and other violent actions that undermine the foundations of the state;

d) actions that favor the occurrence of extraordinary events in transport, telecommunications, at economic units and those of vital importance;

e) espionage, transmitting information constituting state secrets to other countries and obtaining or illegal possession of information constituting a state secret for the purpose of its transmission to foreign states or unconstitutional structures;

f) betrayal manifested through aid to a foreign state in implementing hostile activity against the Republic of Moldova;

g) actions aimed at the violent overthrow of the legally elected public authorities;

h) actions that violate the rights and liberties of citizens and threatening state security;

i) preparing and committing terrorist acts, attempts to the life, health and inviolability of the country supreme officials or of statesmen and leaders of public life from other countries while they are in the Republic of Moldova;

j) theft of weapons, ammunition, combat equipment, explosives, radioactive materials, poisons, narcotics, toxic and of other nature, smuggling of these, their illegal production, use, transportation and storage, if by these activities insurance are affected state security interests;

k) forming of illegal organizations or groups that endanger the national security or participation in their activities;

l) cases of organized crime and / or corruption, undermining state security."

55. A security mandate may also be issued regarding persons who "... in any way, contributed or contribute to committing those acts" (i.e. acts specified in Article 7 a) and d) of the Law on the Service or in Article 4 para. (2) of the Law on State Security). The wording seems to indicate that it goes beyond the normal criminal responsibility. The Venice Commission and the Directorate reiterate in this regard that, when the threshold for initiating a security investigation is low, the risk of undermining the ordinary criminal procedure safeguards is particularly strong. In the *Lordachi* case the ECtHR found the term "...other person involved in a criminal offence" to be too imprecise³² and the same seems to be the case here.

7. Article I.2.(8)

56. The initial period of authorization is a maximum of 6 months. Although this is expressed as a maximum period, meaning that shorter periods are possible,³³ it is a long period. For example, the period of authorization of telecommunication interception or bugging in Sweden and Denmark is one month.

57. The provision allows for indefinite extensions of three months each. There is a danger that this could allow, in effect, permanent measures. In *Lordachi and Others v Moldova* (para. 45) the Court noted disapprovingly a comparable lack of limits about indefinite interception.

8. Article I.2.(9)

58. The decision of the specially appointed judge can be appealed to the President of the Supreme Court of Justice within 5 working days. It must be understood that the President is to act in person as an appeal judge. Evidently, the appeal can only apply to a refusal to grant a security mandate partly or fully, as there is no representation for the target person.³⁴ The danger here is that the institutional system seems to be biased in favour of granting the application. The judge suffers no risk of criticism if s/he grants the application, but may face such criticism if s/he refuses it. This could be corrected if a security screened lawyer were provided to protect personal integrity values, and this lawyer were also given the right to appeal when s/he considers that an application for a security mandate should not have been granted, or should have been subject to tougher conditions as to its scope or duration.

9. Article I.2.(10)

59. In cases of urgency, when time does not allow a decision to be obtained from a judge, the decision to authorize a measure temporarily can be taken by the Director or a specially empowered Deputy Director of the Service. This decision should subsequently be presented within 24 hours to a judge for approval. If the judge decides against granting the mandate, he orders the measure to be terminated and the destruction of the "material carrier"³⁵ of information along with the materials accumulated during the conduct of special investigative measures". This provision seems not to cover all potential situations. For instance the material seized during a secret search can hardly be destroyed.

60. The conditions indicated in draft paragraph (10) for emergency access to special measures without judicial authorisation also appear rather generous, referring to "risk of delay leading to loss of relevant information", bearing in mind that under draft paragraph (4) examination of the request for a security mandate by a judge is to take place within 4 hours. A more precise definition or limited criteria relating to this condition would be necessary in order to ensure meeting the quality of law test.

61. In fact, interim authorization procedures can be abused. For example, US President George W. Bush argued that there was an inherent executive power to authorize foreign surveillance, despite the existence of a specialist court, the Foreign Intelligence Surveillance

³² *Lordachi and Others v. Moldova* §44.

³³ See para. 30-31 concerning the proportionality principle.

³⁴ Article I.2.(4)

³⁵ The meaning of the word "carrier" is not clear

Court (FISC), because of the dangers to national security that a delay due to an application to FISC would entail. But the FISC could authorize, and had in fact authorized, warrants immediately, in an oral procedure over the telephone, and this argument was subject to heavy criticism from constitutional law scholars.³⁶ A system of interim authorisation would only be permissible, if the subsequent judicial review of the emergency access is performed in a scrupulous manner and the judge may request whatever supporting documentation s/he considers necessary.

10. Article I.2.(11)

62. The request, the decision and other materials related to the file on security mandate constitute a state secret.³⁷ This seems uncontroversial.

B. Article II. of the draft law

63. Article II of the draft law deals with the measures being available to the Service. The provision amends some of the articles in the Investigation law.

1. Article II.1.³⁸

64. The provision amends Article 18 paragraph (3) of the Investigation law, which regulates the measures to be carried out within and outside a criminal procedure. The present reading is: "The measures provided for at paragraph (1) point 1) as well as those provided for at paragraph (1) point 2) letter c), e) and f) are carried out only within a criminal procedure, pursuant to the Criminal Procedure Code of the Republic of Moldova. The other measures provided for at paragraph (1) point 2) are carried out both within and outside of a criminal procedure. The measures provided for at paragraph (1) point 3) are carried out outside of the criminal procedure".

65. The amendment will add a new Article 18 paragraph (3) item 1):

"The Intelligence and Security Service, in case of gathering information about possible events and / or actions that can jeopardize the state security, may carry out measures provided for in para. (1) item 1) and item 2) letters c), e) and f) outside the criminal trial".

66. The measures which are thus authorized according to Article 18 paragraph (1) item 1) are:

- a. research of domicile and/or instalment in it of equipment which ensures audio and video surveillance and recording, photo and videotaping;
- b. surveillance of domicile by means of technical methods which ensure recording;
- c. communication and images interception and recording;
- d. arrest, research, transfer, search or seizure of postal correspondence;
- e. monitoring of connections to telegraphic and electronic communications;
- f. monitoring of control of financial transactions and access to financial information;
- g. documentation with the use of technical methods and means, as well as the localization of surveillance via the global positioning system (GPS) or via other technical mean;
- h. collection of information from providers of electronic communication services;

and according to Article 18 paragraph (1) item 2) c., e., and f.:

- c. control of transfer of money or other extorted goods;
- e. trans-border surveillance;
- f. controlled delivery.

³⁶ Letter from constitutional law scholars to Congress, 2 February 2006, available at http://w2.eff.org/Privacy/Surveillance/NSA/law_prof_response.pdf

³⁷ Probably referring to the 1994 Law on State Secret.

³⁸ The English translation has a sub-headline "a.", which is not in the Moldovan original.

67. The use of these measures by the Service will in the future be authorized through the security mandate mentioned in Article I. The measures in themselves are generally appropriate and usual for a security service, if the conditions established by the ECHR and the case law of the ECtHR are fulfilled, inter alia proportionality (see above para. 32) something which is particularly important bearing in mind the effect on third parties these measures can have. The core of human dignity must also be protected.³⁹

68. In the case of *lordachi*,⁴⁰ the Court found that the definition of categories of persons liable to have their telephones tapped according to Article 156 paragraph (1) of the Criminal Code was too imprecise in including “other persons involved in a criminal offence”,⁴¹ It also found that the legislation did not provide for a clear limitation in time of a measure authorizing interception of telephone communication⁴² and that “national security” and other relevant concepts had not been clearly defined.⁴³ Whether that has been remedied in other laws falls outside the scope of this Opinion.

2. Article II.1.2.

69. The draft replaces in Article 18 (5) the words “...other technical means are available if they have been authorized as provided by law” by the words “...other technical means including specially designed ones for the hidden obtaining of information”. Other differences between the present and the draft provision seem to be mere differences in translation. This seems to be uncontroversial.

3. Article II.1.3.

70. The intention is to add three new paragraphs (5¹)-(5³), giving the Government the right to decide about classification, import, export, design, production, marketing and use of special technical means designed for the hidden obtaining of information. The underlying reason for these controls - to protect individual privacy - is appropriate and commendable. The prohibition of the use of special technical means for covert information gathering by private citizens appears sensible. However, bearing in mind that paragraph (5³) proposes that the general use of such equipment is to be forbidden by law, it is essential to more clearly specify in the law what equipment is to be covered and the penalties for unauthorised conduct. The expression “special technical means for hidden obtaining of information” is vague and potentially covers an exceptionally broad range of equipment. The provision naturally cannot be a substitute for a properly drafted criminal offence.

4. Article II.2.

71. Article 20 of the Investigation law establishes the procedure for authorization of special investigative measures. The draft provision aims to introduce derogation for the measures carried out by the Service, which should be authorized only according to the Law on the Service. This is appropriate.

5. Article II.3.

72. According to Article 4(1) of the Investigation law, the prosecutor must normally, after a special investigative measure has been brought to an end, inform the persons who have been subjected to the measure. The person exposed to such measures has the right to get acquainted with the minutes and the legality of the decision. The amendment proposed by Article II.3 of the draft law will exempt cases when informing the person “would affect national security”. Such a decision not to inform the target person apparently will be definitive.

³⁹ See, in this respect, BVerfGE 109, 279, 311 fff.

⁴⁰ *lordachi and Others v. Moldova* §44.

⁴¹ See para. 55 of this Opinion.

⁴² *lordachi and Others v. Moldova* §45.

⁴³ *lordachi and Others v. Moldova* §46.

73. In this regard, there is no provision in the draft law indicating the authority (the Service? the Judge?) that should decide whether informing the person would affect national security or any procedure for that decision.

74. Furthermore, the Venice Commission and the Directorate note in the first place that, “affect” is a very vague term: “damage” national security would be more appropriate. It is permissible not to notify in cases where damage to national security would result. However, even this can easily be subject to abuse.

75. At any rate it must be recalled that the ECtHR in the *Iordachi* case⁴⁴ pointed out that “...where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 would to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions (...). The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25, since otherwise Article 8 runs the risk of being nullified.”

76. The ECtHR has in the *Klass* case⁴⁵ established that even if the interference has been justified, and even though not informing the individual once surveillance has ceased cannot itself be incompatible with this provision, the person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardizing the purpose of the restriction.

77. In a case against Bulgaria⁴⁶ the Court stated that in the context of secret surveillance an effective remedy under Article 13 means a remedy that is as effective as it can be having regard to the restricted scope for recourse inherent in such a system. As regards the availability of remedies after the termination of the surveillance, the Court noted that the Bulgarian law did not provide for notification of the persons concerned at any point in time and under any circumstances. The result of this lack of information was that those concerned were unable to seek any redress in respect of the use of secret surveillance measures against them. The Court therefore concluded that Bulgarian law did not provide effective remedies against the use of special means of surveillance and there had therefore been a violation of Article 13 of the Convention.

78. Thus, a decision never to inform the person would leave the person without right of recourse. The same would be the result if the decision is taken under circumstances which do not comply with the conditions indicated in paragraphs 75-76. A system of temporary postponements with a test relating to the continuing threat to national security would however probably comply with the ECHR.

79. Good European practice is to provide for some form of safeguards to avoid abuse. For example, the German system for security surveillance provides that in any case where the agency considers that notification would damage national security, the reasons for this have to be communicated to, and approved by, the independent oversight body, the G10 Commission. An alternative is to provide for an independent complaints system, where a person who suspects that he or she has been subjected to unlawful surveillance, can secure an investigation of this. The Moldovan system of parliamentary oversight has been the

⁴⁴ *Iordachi and others v. Moldova* §39, quoting the *Klass and others v. Germany* case

⁴⁵ *Klaas and Others v. Germany* §58 and Ana Salinas de Frias: Counter-terrorism and human rights in the case law of the European Court of Human Rights p.127.

⁴⁶ Association for European Integration and Human Rights and *Ekimdzhiev v. Bulgaria* 28 June 2007 §§99-103

subject of criticism in the past, *inter alia* on the basis that the parliamentarians have shown no interest in practice in monitoring the Service.⁴⁷

80. The system of control over special investigative measures, according to Article 26(1) of the Investigation law is to complain to a prosecutor. However, this remedy is not independent, as the prosecutors under the Investigation law are the body which authorizes the use of special investigative measures. The relevant ECtHR case-law requires that remedies are independent and do not only exist on paper but function in practice. Nor is it appropriate to provide for a remedy or recourse to a prosecutor against a judge who has, or is suspected of having (since the measure will be secret) issued a security mandate.

81. In view of the above comments, the Moldovan authorities should consider, as a matter of urgency, the creation of a genuine independent expert oversight and/or complaints body, to replace the function under Article 26(1) of complaint to a prosecutor. This would also be an opportunity for the Republic of Moldova to evaluate the existing system of parliamentary oversight over the Service, a matter related to, but outside the scope of the present opinion. If Moldova takes this opportunity to consider whether it wishes to supplement, or replace the present system of parliamentary oversight with some form of independent expert oversight/complaints body, the Directorate and the Venice Commission are at its disposal.

82. Finally, according to the Information Note⁴⁸ it will also be possible to avoid informing the target person in cases where the information can “endanger the performance of another investigation”. This interpretation is however not in accordance with the draft amendment to the Law on the Service, which only refers to “national security”. It is recommended that the concerned provisions be harmonised.

6. Article II.4.

83. This draft provision adds to Article 29 (Visual Surveillance)⁴⁹ of the Investigation law, the words “...with or without use of technical means other than those special ones intended for the hidden obtaining of information”. According to Article 18 (1)2b) of the Investigation law, “visual surveillance” is a special investigative measure which can be carried out with the authorisation of the prosecutor and within and outside a criminal procedure. The aim of this draft amendment seems to be to exclude the use of technical means intended for the hidden obtaining of information from visual surveillance measures. The use of technical means intended for the hidden obtaining of information should then be authorised by the special judge in the procedure of security mandate. This is commendable.

84. However, Article 29 would then allow the use of audio, video and other technical means in visual surveillance of a person without using the procedure of the security mandate (and thus without the authority given by a judge). This might be problematic in relation to Article 8 of the ECHR. The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not necessarily give rise to an interference with the individual's private life.⁵⁰ For example, individuals passing through public spaces where CCTV (Close-circuit television) routinely operates cannot claim that this automatically constitutes an interference with their private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations.⁵¹

⁴⁷ Andrei Iovu, Parliamentary Oversight Of The Information And Security Service In The Republic Of Moldova, Policy Brief, DCAF Young Faces 2012.

⁴⁸ See para. 6 of this Opinion.

⁴⁹ According to Article 29 of the Investigation law, « Visual surveillance is disclosure and registration of the actions of the person, of certain real estate, of transport means and of other objects. »

⁵⁰ See, for example, *Herbecq and the association “Ligue des droits de l’homme” v. Belgium*, applications nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-B, §92

⁵¹ *Peck v. UK* 28.1.2003 §59

85. The European Court of Human Rights has also treated systematic GPS tracking of an individual in the course of a sustained criminal investigation as falling within the scope of Article 8 and therefore in need of legal authority and appropriate safeguards in order to satisfy Art. 8.2. For this reason, it would have been appropriate also to regulate GPS tracking in the draft law.⁵²

86. Moreover the compilation and storing of information about an individual obtained by any of these means would also constitute an interference with Article 8. Indeed, in both the *Rotaru*⁵³ and the *Amann*⁵⁴ cases, the compilation of data by security services on particular individuals, even without the use of covert surveillance methods, constituted an interference with the applicants' private lives.

87. As noted above, the use by the Service of these powers would be placed outside the control of an investigative judge or the prosecutor (which applies to other categories of special investigative activities under Article 20). This means that the only relevant controls or safeguards are those contained in the Law on the Intelligence and Security Service of the Republic of Moldova No 753-XIV of 23.12.99. It is of concern, bearing in mind the applicability of Article 8 of the ECHR to some of the uses of these powers, that the 1999 Law does not contain explicit safeguards or provide for independent bodies to which individuals can complain about the Service's actions above the general control of the courts and prosecutor (Articles 20 and 21 of the 1999 Law). As explained in paragraph 35, the European Court of Human Rights expects some form of remedies that are effective in practice to be in operation, although this can take a variety of forms.

C. Article III. of the draft law

88. The provision orders the Presidents of the Courts of Appeal to designate judges specifically empowered to issue security mandates and to initiate the procedure of granting them the right of access to state secrets. Regrettably, this provision fails to indicate both the procedure or and the criteria for the selection of these judges, which is problematic.⁵⁵

V. Conclusions

89. The draft law aims at adapting the provisions regulating the activities of the Service to the reality of its functions. It regulates a number of special investigative activities outside criminal proceedings through establishing a concept of security mandate, which is to be granted by a judge.

90. Provided that the criticism made by the Venice Commission and the Directorate are properly taken into account, it is legitimate that the Moldovan authorities wish to establish a new mechanism for security investigations to enable the Service to perform the special investigative measures (set out in the 2012 Investigation law) outside of the framework of a criminal investigation.

91. The Venice Commission and the Directorate have examined the draft law and have identified the main issues which need to be addressed by the authorities of Moldova in order for the draft law to meet international standards:

- a. The mandate of the Service concerning the protection against actions that "infringe the constitutional rights and freedoms of citizens and endanger the state" and "assaults on high ranking officials" (Article 7 of the 1999 Law on the Service) should be interpreted narrowly in order to limit the scope of the mandate to concrete acts based on facts and

⁵² *Uzun v. Germany* (2 September 2010, appl. no. 35623/05).

⁵³ *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V

⁵⁴ *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II

⁵⁵ See the comments under Article I.2.(3) of the draft law.

which have reached a certain level of seriousness to be considered as a real threat to democratic order.

- b. The access of the Service to all financial records of individuals and legal entities without any security mandate (Article I.2.(2) of the draft law) is problematic with regard to the proportionality requirements of Article 8 ECHR as it removes the external control over the authorisation of special investigative measures provided by Article I. of the draft law.
- c. Material safeguards should be provided for the appointment of the Director and Deputy Directors of the Service (Article I.2.(3) of the draft law) on the basis of clear and apolitical criteria, considering that they are empowered to request the special judge to issue a security mandate.
- d. The security mandate can be issued as regards “persons who (...) in any way, contributed or contribute to committing those acts” (Article I.2.(7) of the draft law). The wording needs to be more precise. It must also take into account the criticism of the ECtHR in the Iordachi case as regards the vagueness of the term “(...) other person involved in a criminal offence”.
- e. The length of the initial maximum period of authorisation of special measures - 6 months - as well as the possibility for an indefinite number of extensions by three-monthly periods (Article I.2.(8) of the draft law) should be reconsidered.
- f. There is no possibility for the target person to appeal against the decision to issue the authorisation of the use of special investigative measures (Article I.2.(9) of the draft law). The institution of a security screened lawyer to represent the target person should be considered.
- g. The conditions indicated for emergency access to security measures without an authorisation of the judge (Article I.2.(10) of the draft law) should be defined more precisely to ensure meeting the quality of law test.
- h. It is not permissible to provide, as the draft law does (Article II.3 of the draft law), for the possibility never to inform the target person about special measures taken in his or her respect, if this “affects” national security. The target person should be informed when the measure comes to an end, except when the information would damage (not merely affect) national security, in which case a system of temporary postponements with a test relating to the continuing threat to national security could be envisaged. It is recommended to provide for safeguards in order to avoid any abuse: an independent body could be created for the review of the decision not to inform the target person.

92. The Venice Commission and the Directorate are ready to provide any further assistance to the Moldovan authorities, should they request it.