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

**GEORGIA**

**URGENT OPINION**

**ON THE DRAFT LAW  
ON THE AMENDMENTS TO THE CRIMINAL PROCEDURE CODE  
ADOPTED BY THE PARLIAMENT  
OF GEORGIA ON 7 JUNE 2022**

**Issued on 26 August 2022 pursuant to Article 14a  
of the Venice Commission's Rules of Procedure**

**Endorsed by the Venice Commission  
at its 132<sup>nd</sup> Plenary Session  
(Venice, 21-22 October 2022)**

**on the basis of comments by**

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## I. Introduction

1. By letter of 1 July 2022, the Administration of the President of Georgia requested an urgent opinion of the Venice Commission on the draft law of Georgia on the Amendment to the Criminal Procedure Code of Georgia adopted by Parliament of Georgia on 7 June 2022 (CDL-REF(2022)024).
2. Mr James Hamilton, Ms Regina Kiener and Mr András Zs. Varga acted as rapporteurs for this urgent opinion.
3. Due to time constraints, it was not possible to travel to Georgia. On 19, 26 and 28 August 2022, the rapporteurs assisted by Mr Taras Pashuk and Mr Grigory Dikov from the Secretariat held online meetings with the Administration of the President of Georgia, the political groups in Parliament, the Supreme Court of Georgia, the Office of the Prosecutor General, the Personal Data Protection Service, the Public Defender's office, the National Bar Association, representatives of the international partners of Georgia as well as with the representatives of civil society. The Commission is grateful to the Council of Europe Office in Georgia for the excellent organisation of the meetings and to all the interlocutors for their availability.
4. This opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. It has been issued in accordance with the Venice Commission's protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 26 August 2022 and was endorsed by the Venice Commission at its 132<sup>nd</sup> plenary session (Venice, 21-22 October 2022).

## II. Background

6. In June 2022 the Parliament of Georgia adopted draft amendments to the Criminal Procedure Code ("the CPC") which:
  - (a) extended the list of crimes eligible for investigation by means of covert measures,
  - (b) prolonged the overall maximum duration of covert measures, and
  - (c) relaxed rules on the notification of persons concerned about the use of covert measures.
7. The President of Georgia vetoed those amendments considering that they excessively extended the powers of the law-enforcement authorities. Before addressing the substance of the amendments to the CPC, it is necessary to describe the overall context and the history of the reform of the legal regime of covert measures in the Georgian legal order.<sup>1</sup>

### A. Covert investigative measures under the Criminal Procedure Code

8. In 2014 Georgia conducted a reform of surveillance activities by the law-enforcement authorities and the national security agencies, involving, among other things, amendments to the CPC. Before their adoption, the amendments to the CPC had been examined in the opinion of the Human Rights and Rule of Law Directorate General of the Council of Europe<sup>2</sup> ("the 2014 DGI Opinion"). The 2014 DGI Opinion characterised those amendments as a significant progress in the improvement of the system of secret surveillance.

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<sup>1</sup> The overview of legislation in this Chapter is based on the unofficial translations of the relevant legal texts available online at Legislative Herald of Georgia (<https://matsne.gov.ge>) or provided to the Venice Commission by the interlocutors.

<sup>2</sup> Directorate General Human Rights and Rule of Law, Data Protection Unit, Opinion [DGI \(2014\)8](#) *On the Draft laws of Georgia relating to Surveillance Activities of Law Enforcement Authorities and National Security Agencies*, 14 February 2014.

9. As a result of the 2014 reform, legal provisions on covert investigative measures were incorporated in the CPC as a new chapter, providing for an exhaustive list of such measures. The list (as further amended) included the following measures: (a) wiretapping and recording of telephone communications; (b) retrieval and recording of information from a communications channel (by connecting to the communication facilities, computer networks, line communications and station devices), from computer systems (both directly and remotely) and installation of respective software in computer systems for this purpose; (c) real-time geo-localisation; (d) monitoring of a postal and telegraphic message/shipment (except for diplomatic mail); (e) secret video and/or audio recording, photographing; (f) electronic surveillance through technical means the use of which does not cause harm to human life, health and the environment (Art. 143<sup>1</sup> of the CPC).

10. The new chapter of the CPC introduced stricter rules on the use of covert investigative measures, requiring that the prosecutor should submit a reasoned motion to a court seeking prior authorisation of the measure; a judge should make an assessment of the motion based on a number of requirements and may allow the covert measure for a limited period of time.<sup>3</sup> The CPC imposed the guiding principles in such decision-making processes: covert investigative measures may be ordered if they are provided by the CPC; they may be carried out only in respect of particular categories of crimes and if they are necessary to achieve a legitimate goal in a democratic society, in particular, to ensure national or public security, to prevent disorder or crime, to protect the country's economic interests and the rights and freedoms of other persons; covert investigative measures may be conducted only when the evidence essential to the investigation cannot be obtained through other means or when those other means require unreasonably excessive efforts; the extent (intensity) of implementing a covert investigative measure must be proportionate to its legitimate goal.<sup>4</sup> The Code included the principle of protecting privileged information by stipulating that covert investigative measures against a cleric, a defence lawyer, a physician, a journalist or a person enjoying immunity may be carried out only where this is not related to obtaining information protected by law.<sup>5</sup>

11. The CPC further provided rules regarding the duty of appropriately safeguarding the information obtained as a result of covert investigative actions;<sup>6</sup> the obligation to immediately destroy the information after the termination or completion of covert measures, unless the information is of value to the investigation;<sup>7</sup> the powers of the personal data protection authority in overseeing the covert investigative measures; the *post factum* notification of the persons concerned;<sup>8</sup> and the remedies available to persons concerned.<sup>9</sup>

12. In the following years the rate of judicial authorisations for covert investigation measures remained relatively high: 95.7% in 2018, 94.6% in 2019, 94.2% in 2020.<sup>10</sup> In 2021 the courts fully granted 87.4% of the motions for wiretapping and secret recording.<sup>11</sup>

## **B. Covert measures in other legal contexts**

13. In the Georgian legal order covert measures may be conducted not only within an ongoing criminal investigation based on the CPC, but also in other legal contexts, in particular within the framework of so-called "operational-search activities" and counter-intelligence activities.

14. The operational-search measures are based on the Law of Georgia "On operational-search activities" and they may take place, for example, according to an instruction of the prosecutor

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<sup>3</sup> Art. 143<sup>3</sup>, paras. 1, 2, 5, 10 and 12 of the Criminal Procedure Code.

<sup>4</sup> Art. 143<sup>2</sup> of the Criminal Procedure Code.

<sup>5</sup> Art. 143<sup>7</sup>, para. 2 of the Criminal Procedure Code.

<sup>6</sup> Art. 143<sup>5</sup> of the Criminal Procedure Code.

<sup>7</sup> Art. 143<sup>8</sup> of the Criminal Procedure Code.

<sup>8</sup> Art. 143<sup>9</sup> of the Criminal Procedure Code.

<sup>9</sup> Art. 143<sup>3</sup>, paras. 14 and 15 the Criminal Procedure Code.

<sup>10</sup> Institute for Development of Freedom of Information (IDFI), Covert Surveillance in Georgia 2018-2020, available at: [https://idfi.ge/en/secret\\_surveillance\\_in\\_georgia-practice\\_of\\_2018-2020](https://idfi.ge/en/secret_surveillance_in_georgia-practice_of_2018-2020)

<sup>11</sup> See the available statistics on the website of the Supreme Court of Georgia: <https://www.supremecourt.ge/farulebi>

when a crime or any other unlawful action has been committed or is being prepared and which requires the conduct of an investigation, but there are not sufficient elements to commence such investigation; or according to an order for the search for a person who is hiding from an investigation (which has to be suspended for the relevant period). There are other scenarios in which this law allows for the use of the operational-search measures. The law empowers a number of agencies, including the State Security Service, to carry out, overtly and/or covertly, the operational-search measures.<sup>12</sup> Such measures may consist of collecting information and conducting surveillance.<sup>13</sup>

15. As to the counter-intelligence measures, those are broadly defined by the Law of Georgia “On counter-intelligence activities” as a system of special (operational, operational-technical) activities carried out for non-law-enforcement purposes by special services in Georgia, aimed at detecting and preventing intelligence and/or terrorist acts of special services, organisations of foreign states, a group of persons, or individuals.<sup>14</sup>

16. A list of special counter-intelligence measures which may be applied for those purposes includes: (a) covert video and audio recording; (b) covert filming and photographing; (c) the use of television cameras and other types of electronic equipment; (d) electronic surveillance by way of: (i) secret wiretapping and recording of telephone communication; (ii) the withdrawal and recording of information from the communication channel (by connecting to the means of communication, computer networks, line communications and station equipment) from the computer system (both directly and remotely) and the installation of appropriate software in the computer system for the said purpose; (iii) real-time geo-location; (e) surveillance of postal correspondence; (f) strategic monitoring measure; (g) individual monitoring measure.<sup>15</sup>

17. The organisation of counter-intelligence activities in the country and coordination of activities of special services is entrusted to the Counter-Intelligence Department of the State Security Service.<sup>16</sup> The special services, as well as any other public authorities, must submit to that Department of the State Security Service any data relating to national security interests.<sup>17</sup>

18. In 2015 the State Security Service was separated from the Ministry of Internal Affairs. The Law “On State Security Service of Georgia” adopted in 2015 specifies that the State Security Service shall have, among other things, the competence to carry out operational-search activities, counter-intelligence measures as well as investigative and covert investigative measures.<sup>18</sup>

### **C. Technical implementation of covert measures**

19. In 2017, Parliament of Georgia adopted the Law “On a legal person of public law, the Operational-Technical Agency of Georgia” providing that the Operational-Technical Agency of Georgia (“the OTAG”) would be the exclusive entity<sup>19</sup> to carry out covert measures at the technical level, on behalf of the authorities.

20. The OTAG is under the administration of the State Security Service.<sup>20</sup> The Head of the OTAG is appointed by the Prime Minister.<sup>21</sup> However, it is for the Head of the State Security Service to select at least three candidates and submit them for consideration to a special commission in

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<sup>12</sup> Section 14 of Law of Georgia “On operational-search activities”.

<sup>13</sup> Section 7 of Law of Georgia “On operational-search activities”.

<sup>14</sup> Section 2, para. 1 (a) of Law of Georgia “On counter-intelligence activities”.

<sup>15</sup> Section 9 of Law of Georgia “On counter-intelligence activities”.

<sup>16</sup> Section 7, para. 2 of Law of Georgia “On counter-intelligence activities”.

<sup>17</sup> Section 7, para. 3 of Law of Georgia “On counter-intelligence activities”.

<sup>18</sup> Section 12 of Law of Georgia “On State Security Service of Georgia”.

<sup>19</sup> Section 12 of Law of Georgia “On a legal person of public law, the Operational-Technical Agency of Georgia”.

<sup>20</sup> Section 1 of Law of Georgia “On a legal person of public law, the Operational-Technical Agency of Georgia”.

<sup>21</sup> Section 19, para. 1 of Law of Georgia “On a legal person of public law, the Operational-Technical Agency of Georgia”.

which he or she presides and votes.<sup>22</sup> Moreover, the Head of the State Security Service determines the basic structure of the OTAG and the competence of its organisational units and territorial bodies,<sup>23</sup> exercises governmental control over the OTAG<sup>24</sup>, and has to approve the proposals by the Head of the OTAG for material and technical support and funding, the internal structure, staff list and the salaries.<sup>25</sup>

#### **D. The massive leak of personal data in September 2021**

21. In September 2021 thousands of files containing personal data of clerical leaders, politicians and journalists obtained via allegedly illegal surveillance were published by several Internet-based media platforms. These files also included data from allegedly illegal surveillance on foreign diplomats.

22. Local religious associations publicly objected against the release of the private data concerning the clerics collected through the covert measures.<sup>26</sup> The diplomatic corps accredited in Georgia made a joint statement condemning the wiretapping which in their view constituted a serious breach of the 1961 Vienna Convention on Diplomatic Relations and compromised normal diplomatic work in Georgia.<sup>27</sup> In response, the Minister of Foreign Affairs of Georgia met with the diplomatic corps and confirmed the Government's interest in elucidating the matter. The Minister informed the diplomats that the Prosecutor's Office of Georgia had immediately started an investigation. The investigative measures included, among other things, the determination of the authenticity of the materials disseminated by the media and their origin.<sup>28</sup>

23. On 11 October 2021, the Public Defender of Georgia informed the UN Special Rapporteur on the Right to Privacy about the alleged illegal, large-scale wiretapping and the massive and gross interference with the right to privacy in Georgia and asked him to study and assess the situation of the protection of the right to privacy in Georgia, as well as to visit Georgia for the same purpose.<sup>29</sup>

#### **E. Reform of the data protection authority in December 2021**

24. At the end of 2021 the data protection authority of Georgia was reformed. On 30 December 2021, the Parliament of Georgia adopted a law by which it abolished the State Inspector's Service – a body established in 2018 with a mandate to monitor the lawfulness of personal data processing and covert investigative measures as well as to carry out the investigation of alleged crimes in law-enforcement agencies. Instead, two separate institutions were created: the Personal Data Protection Service and the Special Investigation Service. This reorganisation resulted in the early termination of the State Inspector's mandate. The adoption of the law attracted criticism at the national level and from the international partners of Georgia.<sup>30</sup>

25. The key functions of the new Personal Data Protection Service are the oversight of data protection legislation and monitoring lawfulness of data processing in Georgia. This agency may instruct the data controller or processor to eliminate violations and deficiencies in data

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<sup>22</sup> Section 19 para. 2 and 3 of Law of Georgia "On a legal person of public law, the Operational-Technical Agency of Georgia".

<sup>23</sup> Section 22 of Law of Georgia "On a legal person of public law, the Operational-Technical Agency of Georgia".

<sup>24</sup> Section 29 of Law of Georgia "On a legal person of public law, the Operational-Technical Agency of Georgia".

<sup>25</sup> Section 20, para. 2 of Law of Georgia "On a legal person of public law, the Operational-Technical Agency of Georgia".

<sup>26</sup> See news item at the website of Public Defender of Georgia: [Religious Associations of Public Defender's Council of Religions and Tolerance Center Express Protest against Released Secret Materials \(ombudsman.ge\)](https://ombudsman.ge/)

<sup>27</sup> See [Carl Hartzell on Twitter: "Statement of the Diplomatic Corps accredited in Georgia regarding the reported recent wiretappings: https://t.co/XZjccYuHhE" / Twitter](https://t.co/XZjccYuHhE)

<sup>28</sup> See news item at the website of the Ministry of Foreign Affairs of Georgia: <https://mfa.gov.ge/News/davit-zalkaliani-cminda-saydris-nuncios,-evrokavsh.aspx?CatID=5>

<sup>29</sup> See news item at the website of Public Defender of Georgia: [Public Defender Addresses UN Special Rapporteur on the Right to Privacy and Parliament of Georgia \(ombudsman.ge\)](https://ombudsman.ge/)

<sup>30</sup> For more details see OSCE/ODIHR Opinion of 18 February 2022, Georgia: Opinion on the Legislative Amendments on the State Inspector's Service, para.14 et seq. // <https://www.osce.org/odihr/512728>

processing. This may include the request for temporary or permanent termination of data processing, its blocking, deletion, or depersonalisation.

26. The Personal Data Protection Service is empowered, in particular, to monitor covert investigative measures that are conducted under the CPC. This agency receives court rulings authorising covert investigative measures, prosecutor's orders on conducting covert investigative measures due to urgent necessity (these orders are exceptionally taken without prior judicial authorisation, however *ex post* judicial review is ensured within a short time-limit), and written records from law-enforcement bodies on covert investigative measures. The agency verifies submitted documents, compares them with the information provided in the electronic systems, and enters the data provided by the documents in the internal electronic system of registration of covert investigative actions and analyses them. According to the statistical information for the first four months of 2022, the agency used the suspension mechanism of covert wiretapping and recording of telephone communications (via electronic control system) in 53 cases.<sup>31</sup>

27. However, the scope of oversight by the Personal Data Protection Service does not include covert measures when they concern the processing of data defined as a state secret for the purposes of state security (including economic security), defence, intelligence and counter-intelligence activities.

#### **F. Draft amendments to the Criminal Procedure Code and the President's veto**

28. In April 2022, individual members of the parliamentary majority initiated draft amendments to the CPC on the use of covert investigative measures in criminal proceedings. The amendments essentially concerned the following issues: (a) extending the list of crimes which can be investigated with the use of covert investigative measures; (b) extending the permissible duration of a covert investigative measure; (c) introducing the possibility of numerous extensions of covert investigative measures in respect of certain crimes, notably for as many times as those measures are deemed necessary in the on-going investigation; (d) prolongation of the postponement period for notifying the person concerned about the covert measure; (e) introducing the possibility of numerous extensions of such postponement period in respect of certain crimes, notably for as many times as those postponements are deemed necessary.

29. On 7 June 2022, Parliament of Georgia adopted these amendments to the CPC. The adoption of that bill was criticised internally<sup>32</sup> and at the international level.<sup>33</sup> The President of Georgia imposed a veto on those amendments preventing them from taking effect, arguing that the proposed amendments were not balanced and opened the door to disproportionate interferences with human rights and fundamental freedoms, first and foremost the right to respect for private life.

### **III. Analysis**

30. The Venice Commission observes at the outset that freedom of communications and privacy are fundamental values in any liberal society. Moreover, in the digital era, their respect is a significant indicator of how the Constitutions function in practice. In this context, a measure of covert surveillance (whatever are the legitimate aims it serves) should be seen as an exception to the rule (which is the respect of these fundamental values). These exceptions, either constitutional or legislative, should be cautiously worded and narrowly interpreted by the State agencies and the courts.

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<sup>31</sup> Personal Data Protection Service, *Activity statistics of the personal data protection service for 4 month of 2022 (March-June)*, available at: <https://personaldata.ge/en/about-us>

<sup>32</sup> See in that regard the joint statement by NGOs in Georgia: <http://www.hrc.ge/386/eng/>

<sup>33</sup> See the statement published by the Delegation of the EU to Georgia: [https://www.eeas.europa.eu/delegations/georgia/remarks-ambassador-carl-hartzell-following-amendments-criminal-procedure-code\\_en?s=221](https://www.eeas.europa.eu/delegations/georgia/remarks-ambassador-carl-hartzell-following-amendments-criminal-procedure-code_en?s=221)



## A. Quality of the law-making process

31. The standards and best practices of the due law-making process are increasingly the subject of international recognition; they are described in the Venice Commission's Rule of Law Checklist<sup>34</sup>, its Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist<sup>35</sup>, its reports and opinions on specific countries, and reports of the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

32. In particular, under the Rule of Law Checklist,<sup>36</sup> the process for making law must be "*transparent, accountable, inclusive and democratic*". To satisfy this requirement, the public should have access to draft legislation, and should have a meaningful opportunity to provide input.<sup>37</sup> Where appropriate, impact assessments should be made before legislation is adopted.<sup>38</sup>

33. Furthermore, while the European Court of Human Rights (ECtHR) has not addressed legislative processes in detail, it has nevertheless considered pluralism and the freedom of political debate to be the foundation of any democracy.<sup>39</sup> As appears from its case-law, in order to determine the proportionality of a general legislative measure, the ECtHR may examine the quality of the parliamentary assessment of the necessity of the measure,<sup>40</sup> as well as the scope and seriousness of the debate during the relevant law-making process.<sup>41</sup>

34. The draft amendments to the CPC were accompanied by an Explanatory Note which intended to provide reasons for the proposed draft legislation. However, the Note refers basically to the very general goals of the proposed legislation – such as new challenges in "hybrid warfare" and "cyber security threats" as well as to the necessity to ensure effective investigations of crimes against the State and fight against terrorism, organised crime and other serious crimes. These are undoubtedly legitimate purposes. Even if it may not always be possible to present all arguments pertaining to state security matters, the Note does not sufficiently explain the necessity of the specific amendments on covert investigative measures in the current Georgian context. A simple reference to the need to combat terrorism or cybercrime cannot explain why, for example, the time-limits currently provided for covert measures should be extended.

35. Covert investigative measures are extremely intrusive instruments carrying serious threats to human rights and fundamental freedoms. Such measures may affect not only the privacy of communications and, more generally, private life, but also a variety of other human rights. Surveillance measures might affect freedom of expression (especially in the context of the journalistic profession and protection of journalistic sources), freedom of assembly, freedom of religion, the right to a fair trial and specific guarantees of the client-attorney privilege, as well as political rights.

36. During the online meetings there was no suggestion that any impact assessments had been carried out to measure and substantiate the proportionality of those amendments in the light of the risks they pose to the counterbalancing values at expense of which those legitimate aims would be achieved. No in-depth analysis of the current legal regime of secret surveillance measures, its efficiency and its possible defects, has been carried out either, and there is no indication that alternative measures have ever been considered.

37. Proportionality analysis is not a strict mathematical exercise; a legislative proposal may be based also on some reasonable assumptions and approximations. However, explanatory materials to the bill should be sufficiently detailed and supported with reference to specific facts and studies to demonstrate that the legislature engaged in a rational exercise and took the

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<sup>34</sup> Venice Commission, Rule of Law Checklist ([CDL-AD\(2016\)007rev](#)), 18 March 2016.

<sup>35</sup> Venice Commission, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist ([CDL-AD\(2019\)015](#)).

<sup>36</sup> Venice Commission, Rule of Law Checklist, Benchmarks A.5.

<sup>37</sup> Venice Commission, Rule of Law Checklist, Benchmarks A.5.iv.

<sup>38</sup> Venice Commission, Rule of Law Checklist, Benchmarks A.5.v.

<sup>39</sup> ECtHR, *Tănase v. Moldova* [GC], no. 7/08, 27 April 2010, para. 154, with further references.

<sup>40</sup> ECtHR, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, para. 108.

<sup>41</sup> ECtHR, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, para. 79.



question of proportionality seriously. It is very much in the interest of the actors initiating the bill to gain political support for the bill by making clear why the law is considered necessary and to demonstrate that less intrusive solutions have been considered and rejected. In the case at hand such supporting materials are clearly lacking.

38. The lack of such supporting material has to be seen against the background of the serious allegations, made by various actors on the local and international level, about the massive leak of personal data in September 2021, allegedly as a result of secret surveillance by the state authorities (see paragraphs 21 - 23 above).

39. Apart from that, the absence of adequate supporting material is likely to hinder effective participation by the public and civil society in the law-making process. Indeed, most interlocutors of the Venice Commission criticised the quick adoption of the bill (from April until June 2022) and the lack of inclusiveness of the law-making process. Most importantly, it seems that there was no formal involvement of the Personal Data Protection Service or the Public Defender's office in the preparation and discussion of the bill, even though the subject of the amendments related clearly to their field of competence, and they could have brought into the discussion the facts and data which were lacking in the Explanatory Note. The assessment of the bill prepared by the data protection authority in response to a request made by one of the MPs might be insufficient to compensate for the absence of the authority from the parliamentary debate. It appears that the ability of civil society and the public at large to comment on the draft law was also limited.

40. In the light of these considerations, the Venice Commission strongly recommends that in the further law-making process on this draft law, the abovementioned drawbacks be duly addressed by the legislator, notably: (a) the supporting material on the bill be elaborated in greater detail to substantiate the necessity and proportionality of the proposed legal provisions, demonstrating the lack of efficiency of the current system and including a consideration of alternative measures; (b) the relevant public authorities, including the Ombudsperson and the Personal Data Protection Service be formally involved in the parliamentary discussion on the bill; and (c) the parliamentary debate should be accompanied by a further public discussion ensuring meaningful exchange.

## **B. List of crimes eligible for covert investigative measures**

41. The draft law introduces several amendments to the existing procedure of authorisation of covert measures and notification thereof. The Venice Commission will first analyse these amendments, and then, in Section E, examine the procedural framework of the covert surveillance which does not change under the draft amendments, but may be relevant in assessing their proportionality.

42. Specifying in law a list of certain crimes eligible for investigation by covert measures is an important law-making technique to narrow the scope of discretion of the law-enforcement authorities in this highly intrusive area, and to provide legal safeguards against abuse.

43. Under the current legislation of Georgia, covert investigative measures may be applied for the investigation of intentional "serious crime" or "particularly serious crime" as well as to a number of other crimes expressly mentioned in article 143<sup>3</sup>, para. 2 (a) of the CPC. The concepts of "serious crime" and "particularly serious crime" are the same as in the Criminal Code of Georgia which distributes all crimes, depending on their gravity, into three categories: "less serious crime", "serious crime" and "particularly serious crime". The Criminal Code uses the gravity of sanction (notably the length of possible imprisonment) as the criterion for such categorisation.

44. Under the case-law of the ECtHR, the States are not required to set out exhaustively, by name, the specific offences which may give rise to interception; however, sufficient detail should be provided on the nature of the offences in question.<sup>42</sup>

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<sup>42</sup> ECtHR, *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010, para. 159; *Roman Zakharov v. Russia*, no. 47143/06, 4 December 2015, para. 244.

45. The proposed legislation extends the scope of crimes covered by the provisions relating to the secret investigative measures to a large number of crimes which are not in the “serious” category in the domestic classification. The members of the parliamentary committee explained to the Venice Commission that those crimes were added to the list to counter hostile foreign state activities as well as to combat organised criminality. Some of the crimes added to the list may indeed be seen as connected with such threats (such as human trafficking, smuggling, blackmail, intimidation, and drug-related offences, for example). In those cases, covert surveillance may be seen as essential to successful investigation and prosecution. However, this is not the case in respect of some other crimes added to the list – for example, the crimes of “violation of human equality”<sup>43</sup> or “racial discrimination”<sup>44</sup> which appear to be quite broadly defined in the Criminal Code and cover a wide variety of scenarios. The reasons for the inclusion of those offences in the list are not evident and in the absence of any detailed analysis in the preparatory material (see paragraphs 34 - 37 above), the expansion of the list appears not sufficiently supported.

46. In sum, the category of “less serious crimes” as it is used in domestic law (which includes crimes that still may be serious enough in particular circumstances), when applied for the purposes of defining their eligibility for covert measures, is overly heterogenic. A more differentiated approach on the use of covert measures is advisable in this context: thus, instead of one list of eligible crimes, sub-lists might be provided for (depending on the nature of the crimes, their complexity and gravity).

### **C. Duration of covert investigation measures**

47. According to the current version of Art. 143<sup>3</sup>, para. 12 of the CPC, a court may authorise a covert investigative measure, for the first time, up to one month; it can be further extended for no longer than two months; then it may be extended again “one more time, for no longer than three months, upon a motion of the General Prosecutor of Georgia”. This provision was deemed ambiguous by some of the interlocutors; it could be interpreted as meaning that the overall duration of the covert measure is either six or three months in total. The Explanatory Note states that in judicial practice the provision was interpreted incorrectly by limiting the overall duration only to three months, instead of six months, as it was intended by the legislator. It has to be noted that in DGI Opinion of 2014 the analysis was based on the assumption that the overall duration of covert measure would amount to six months and that that duration was not considered as excessive.<sup>45</sup>

48. Under the draft amendments, the covert investigative measure may be conducted, as a rule, in three stages. At the first stage, the measure shall be conducted under a court order based on a reasoned motion of a prosecutor for an overall duration not exceeding 90 days. At the second stage a new court order is needed based on a reasoned motion of a superior prosecutor for no more than 90 days. At the third stage a court order based on a reasoned motion of the General Prosecutor of Georgia or First Deputy General Prosecutor of Georgia for a further period of up to 90 days is required. This gives a total of 270 days. In addition to this general procedure, the bill provides that further extensions would be possible for another period of 90 days in the context of international criminal cooperation.

49. Moreover, in respect of a certain number of crimes (enumerated in the draft) extensions would be possible as many times as it is deemed necessary for the investigation. This special list includes, for example, murder, unlawful imprisonment, human trafficking, taking a hostage, torture, threat of torture, inhuman treatment, crimes related to organised ‘criminal underworld’ and organised criminal gangs, crimes related to treatment of nuclear or radioactive substances, engagement of minors in selling pornography, drug trafficking, crimes under the chapters dealing

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<sup>43</sup> Article 142 of the Criminal Code of Georgia.

<sup>44</sup> Article 142<sup>1</sup> of Criminal Code of Georgia.

<sup>45</sup> See Opinion [DGI \(2014\)8](#), cited above, p.20.

with violations of constitutional structure and state security of Georgia, violations of the legal regime of the occupied territories, and terrorism.

50. It follows that, in trying to correct a wrong interpretation of the current legal provision, the bill goes far beyond the time-limit of six months which might have constituted the original meaning of the law, and which had been seen as adequate. The possibility of numerous extensions of covert measures for certain crimes – as many times as it will be necessary for the investigation – appears excessive. Moreover, the proposed legislation does not seem to distinguish between investigations into crimes having an element of terrorism or hostile state interference and those regarded as common crimes. In the absence of any justification for these novel provisions and any more nuanced approach in granting extensions, it is difficult to comprehend the necessity of such a substantial increase of the duration of covert measures.

#### **D. Notifications about covert investigative measures**

51. The bill further proposes amendments to the procedure for notification about the covert measures. Most significantly, it refers to a list of crimes (which is the same as the one mentioned in paragraph 49 above) and provides that the notification about the use of covert investigative measures may be postponed in those cases for as many times as is necessary to avoid a threat to State security, public order and in interest of legal proceedings. In those cases, notification of person concerned may be extended by no more than 12 months for each occurrence.

52. It has to be recalled that under the Council of Europe recommendations in this field, where data concerning an individual have been collected and stored without her or his knowledge, and unless the data are deleted, s/he should be informed, where practicable, that information is held about her/him as soon as the object of the police activities is no longer likely to be prejudiced.<sup>46</sup> The Practical guide on the use of personal data in the police sector provides that in order to avoid prejudice to the performance of police functions or public prosecution services, or to the rights of individuals, even if restrictions or derogations to the right to information were applied, information should be provided to the data subjects as soon as it no longer jeopardises the purpose for which the data was used.<sup>47</sup>

53. It has to be stressed that timely notification to the person concerned is a necessary condition for the effective use of remedies against surveillance measures. Under the case-law of the ECtHR, notification is not an absolute requirement; narrow exceptions are possible<sup>48</sup> provided that a state has a general complaints procedure to an independent oversight body with adequate powers and scope of review.<sup>49</sup>

54. However, no such efficient oversight authority seems to exist in Georgia (see the analysis below) and the proposed amendment risks turning the non-notification option into the general rule rather than an exception. In such circumstances, the draft provisions introducing open-ended system of non-notification do not appear appropriate.

#### **E. Judicial control and institutional oversight**

55. The questions of the scope of crimes eligible for investigation by covert measures, the duration of those measures and notifications about them should be assessed in the context of legal safeguards surrounding the use of the covert investigative measures.

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<sup>46</sup> Council of Europe, *Recommendation No. R (87) 15 of the Committee of Ministers to Member States Relating the use of personal data in police sector*, 17 September 1987, para. 2.2.

<sup>47</sup> Consultative committee of the Convention for the protection of individuals with regard to automatic processing of personal data, *Practical guide on the use of personal data in the police sector* (T-PD(2018)01), 15 February 2018, page 6.

<sup>48</sup> ECtHR, *Roman Zakharov*, cited above, para. 287

<sup>49</sup> ECtHR, *Kennedy v. the UK*, cited above, para. 167

56. The CPC has provided a legal framework for the judicial control over the procedure for applying covert investigative measures. The Code requires the judge to make an assessment of the necessity of the covert measure and to authorise it only as a last-resort measure. Nevertheless, many interlocutors have raised concerns about the poor quality of judicial control, referring to such factors as (i) the practice of allocating very little time to examining such requests, (ii) the high workload of a judge, and (iii) the high approval rate of motions for covert measures. In that latter regard, it is notable that the approval rate during the last years has ranged from 87% to 95% (see paragraph 12 above), even though it could be argued that this statistical data, if taken in isolation, could be a manifestation of exemplary well-founded motions. Another issue could be the technical knowledge and expertise which a judge should possess in order to efficiently examine the requests in this specialised area. Moreover, it is unclear to what extent in practice judges examine primary materials of the case and what sort of justification with reference to the specific facts of the case the prosecuting authorities have to provide in order to obtain a court authorisation.

57. The Venice Commission heard such criticism from numerous sources; thus, the doubts about the effectiveness of the judicial control might not be devoid of substance. In such a situation, other safeguards ensuring the accountability of authorities for covert measures acquire even higher importance. The Venice Commission has stated that in the area under examination there may exist the following basic forms of State accountability: parliamentary, judicial, expert accountability and complaints mechanism.<sup>50</sup> The Commission has also suggested putting in place a model incorporating both a judicial authorisation mechanism and a follow-up supervisory control exerted by an expert body.<sup>51</sup>

58. There are doubts whether there is an effective system of non-judicial oversight in Georgia. There seems to be no adequate parliamentary mechanism of overseeing secret surveillance: as reported at the meeting in Parliament, the competent parliamentary committee has in practice limited itself by a perfunctory examination of the yearly reports of the secret service without making further inquiries about the use of the secret surveillance techniques. The Public Defender (ombudsperson) does not have sufficient supervision powers in this field. The new data protection authority has far-reaching oversight powers which are however focused on one specific aspect: lawfulness of processing of the personal data. It is remarkable that the data protection authority is empowered to suspend covert investigative measures. However, the Venice Commission has no information about the overall efficiency of the agency's work in this area.

59. Moreover, the data protection authority does not have power to oversee the covert measures conducted for the reasons of state security (including economic security), defence, intelligence and counter-intelligence activities. This may become a serious limitation in practice because at the technical level the covert measures, both within the criminal investigations and within other contexts, are implemented by the same technical agency of the State Security Service, the OTAG (see paragraph 19 above).

60. The OTAG is under the administrative competence of the State Security Service with many important powers on its functioning belonging to the State Security Service (see paragraph 20 above). It remains unclear if the OTAG operates on the basis of clear and strict regulations prescribing rigorous separation of data gathered for different purposes. Moreover, there appears to be no appropriate system of accountability and oversight regarding this technical agency and the State Security Service in general.

61. With the exclusive role of the OTAG in implementing covert measures, the boundary between the legal regimes on covert measures (see paragraphs 13 - 18 above) becomes blurred. As a result of this technical overlap, the covert investigative measures may be used by the State Security Service in a wider, non-criminal context, such as broader "intelligence" gathering. Moreover, given the mandate of the State Security Service in conducting covert measures for

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<sup>50</sup> Venice Commission, *Report on democratic oversight of the security services*, [CDL-AD\(2007\)016](#), 11 June 2007, para. 78.

<sup>51</sup> *Ibid*, para. 239.

security reasons, the processing of covert investigative measures on the prosecutor's behalf may well be covered by the surveillance on broad security grounds and therefore be effectively shielded against oversight by the personal data protection authority which has no monitoring powers in the security area.

62. In conclusion, in view of doubts as to the efficiency of judicial control, coupled with allegations of unlawful mass surveillance and leaks of personal data, as well as the insufficient oversight and complaints mechanism, there appears to be no justification for extending the scope of crimes eligible for investigation by covert measures, relaxing the overall terms of covert measures and notification about them.

#### **IV. Conclusion**

63. The President of Georgia requested an urgent opinion of the Venice Commission on the draft law on the amendments to the Criminal Procedure Code of Georgia concerning the procedure for the use of covert investigative measures. Those amendments were adopted by Parliament of Georgia on 7 June 2022 and then vetoed by the President.

64. The Venice Commission considers that the draft law under examination was adopted in a hasty procedure, and it requires impact assessment and more profound elaboration to substantiate the necessity and proportionality of the proposed provisions. Moreover, the overall oversight mechanism of the secret surveillance measures seems to be inadequate. The Venice Commission therefore makes the following recommendations:

- for the sake of a more transparent, rational and inclusive legislative process, it would be essential to have formal consultations with the relevant stakeholders and civil society before deciding on any draft bill in further legislative procedure;
- the draft law requires a convincing justification for extending the list of crimes eligible for investigation by covert measures, prolonging the overall duration of covert measures and relaxing rules regarding the notification of persons concerned by the used covert measures;
- this draft law shows the need for a comprehensive revision of the covert surveillance systems based on different legal regimes which, however, overlap on the technical level. Such overlaps create a risk of abuse in the highly sensitive area of covert measures. The Venice Commission recommends revising the overall legal framework of oversight of the covert surveillance (including the quality of judicial control in specific cases and the general oversight mechanisms) before embarking on the discussion about the specific proposals contained in the draft law.

65. The Venice Commission remains at the disposal of the Georgian authorities for further assistance in this matter.