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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

OPINION

ON THE DRAFT LAW ON THE INTELLIGENCE AND SECURITY SERVICE, AS WELL AS ON THE DRAFT LAW ON COUNTERINTELLIGENCE AND INTELLIGENCE ACTIVITY

Adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023)

On the basis of comments by

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I. Introduction

1. By letter of 18 November 2023, the President of the Parliament of the Republic of Moldova requested an opinion of the Venice Commission on the draft Law on the Intelligence and Security Service (hereinafter, "the SIS draft Law", CDL-REF(2023)001), as well as on the draft Law on counterintelligence and external intelligence activity (hereinafter, "the CI draft Law", CDL-REF(2023)002). On 25 November 2022, having learned that the draft opinion was planned for the Plenary Session of March 2023, the President of the Parliament asked that the request be treated as urgent, due to the security situation in the region which had worsened in the last months. On 8 December 2022, the Bureau of the Venice Commission, in light of the arguments provided by the Moldovan authorities, authorised the preparation of an urgent opinion to be issued prior to the Plenary Session of March 2023. However, on 14 February 2023, as the grounds for urgency did not seem to pertain anymore to the draft Laws under consideration, the Bureau in accordance with the rapporteurs decided, with the agreement of the Speaker of the Parliament, to revert to the ordinary procedure.

2. Mr Richard Barrett, (Member, Ireland), Ms Regina Kiener, (Member, Switzerland) and Mr Ben Vermeulen (Member, the Netherlands), acted as rapporteurs for this opinion.

3. On 23 and 24 January 2023, the rapporteurs and Ms Martina Silvestri from the Secretariat held online meetings with representatives of the Parliamentary majority and of the opposition, with the Sub-Committee for the exercise of parliamentary control over the work of the Intelligence and Security Service (hereinafter, "the Sub-Committee"), with representatives of the Intelligence and Security Service (hereinafter, "SIS"), the Bar Association, the President of the Republic, the General Prosecutor's Office, the Minister of Justice, the Ministry of Defence, the Ombudsman, the National Centre for Personal Data Protection, as well as with representatives of the civil society and the private digital communications sector. The Commission is grateful to the Moldovan authorities for the excellent organisation of the meetings and to all these interlocutors for their availability and the written information submitted. On 28 February 2023, the President of the Parliament of the Republic of Moldova submitted a note containing additional information and explanations on the revised draft laws, which are reported and taken into consideration in this text. The Venice Commission did not analyse the newly proposed modifications to the text.

4. This opinion was prepared in reliance on the English translation of the draft Laws. 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. Following an exchange of views with Mr Musteata, Director of the Security and Intelligence Service of the Republic of Moldova, it was adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023).

II. Background

6. According to the request, the draft Laws have been registered on 17 November 2022 as legislative initiatives by members of the parliament and have been made to adapt the Moldovan security sector to the new threats in the region and make the SIS more efficient in preventing the threats to national security, democracy, and the freedom of citizens. The laws are also meant to help ensure a "fair and efficient electoral process".

7. It is unclear whether the CI draft law was a legislative initiative of the President of the Republic of Moldova drawn up with the support of the SIS, as briefly stated in an information note by the parliament.

8. There is currently no specific legislative regulation of counterintelligence and external intelligence activity. The SIS carries out its tasks pursuant to Act n. 59 of 29 March 2012 on

special investigative activity. However, according to the Moldovan authorities, “the tactics and the mechanism for ensuring public order and detecting criminal offences cannot be applied effectively in carrying out the tasks of ensuring State security”. The drafters therefore intend to follow the recommendations of external experts[1] that there “*must be a legislative and institutional separation of the supervision carried out by the legal bodies for the purposes of criminal investigations and surveillance carried out by intelligence services for national security purposes*”.[2]

9. In preparing the draft Laws, the drafters reportedly took over best practices laid down in the legislation of States (Romania, Ukraine, Lithuania, France, Slovakia, Croatia, Germany, Spain, Montenegro and Hungary), and held an exchange of information with “colleagues from France, Romania, the United Kingdom, Poland and Germany”. The Moldovan authorities also referred to previous Venice Commission opinions on security matters in the Republic of Moldova,[3] the Council of Europe Recommendation (2005)10 on “Special Investigation Techniques”[4] and the case law of the European Court of Human Rights (hereinafter, “the Court”).[5]

III. Preliminary remark

10. The Venice Commission remarks that both draft Laws appear to be at a very early stage of development. After having been registered in parliament,[6] a public consultation has been launched in parallel to the drafting of this opinion. There is no adequate explanatory memorandum, giving context and situating the draft Laws in the current and future system.

11. The Venice Commission understands the emergency situation the Republic of Moldova is facing and its legitimate concern for national security. Nevertheless, the Commission warns that legislating on security services in times of emergency carries the risk of granting them excessively broad powers with little democratic oversight. The Venice Commission acknowledges that, in the specific case of the Republic of Moldova and the extraordinary risks to state security, the conferral of robust powers to the security and intelligence service can be justified, within the limits of international human rights standards.[7] Provided that such powers are clearly defined, the Commission recalls that, in light of article 8(2) ECHR, broader powers may be granted in emergency situations in pursuit of protecting national security, following the logic of proportionality between the danger and the interference with fundamental rights, and that derogations are permitted by article 15 ECHR,[8] under the scrutiny of the Court. Specific legislative provisions may also regulate the exceptional powers that can be granted to the security services in emergency situations.

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[1] The Informative Note mentions the opinion of Mr Goran Klemencic, a Council of Europe expert who in 2006 analysed the Law on Operational Investigative Activity.

[2] Informative note on the CI draft Law, page 34.

[3] Venice Commission, Republic of Moldova, CDL-AD(2014)009, Joint Opinion of the Venice Commission and the Directorate General of Human Rights (DHR) and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing certain legislative acts and CDL-AD(2017)009, on the Draft Law n° 281 amending and completing Moldovan Legislation on the so-called "Mandate of security".

[4] Council of Europe, Recommendation (2005)10 of the Committee of Ministers on “Special Investigation Techniques” in relation to serious crimes including acts of terrorism, adopted on 20 April 2005.

[5] The Information Note refers to the judgements in the cases of Klass and Others v. the Federal Republic of Germany, Leander v. Sweden, Kennedy v. the United Kingdom, Rotaru v. Romania, Amann v. Switzerland, Iordachi and Others v. the Republic of Moldova, Krüslin v. France, Malone v. the United Kingdom, and Huvig v. France.

[6] The draft Laws have been registered on 17 November 2022, while the Parliament has requested the Venice Commission opinion on 18 November 2022.

[7] The case law of the European Court of Human Rights, and the UN Human Rights Committee clarifies that human rights obligations under these treaties can extend to counter-intelligence activities conducted wholly or partially outside the territory of a State. See Venice Commission, CDL-AD(2015)011, Report on the democratic oversight of signals intelligence agencies, para. 65.

[8] On 2nd February 2023, the Republic of Moldova has prolonged the state of emergency and notified the Council of Europe accordingly.

12. In addition, the Venice Commission has been informed that other draft laws, connected with the draft Laws under consideration in this opinion, are reportedly being revised by parliament. In particular, the Law on special investigative activity[9] and some amendments to the criminal procedure code relate to SIS activities. The Law on the status of intelligence and security officers[10] is also being revised. The Venice Commission deems it important to harmonise these amendments with the two draft Laws at stake as part of a coherent reform of the SIS mandate and operational system. It therefore appears necessary that the present draft Laws be harmonised with the amendments to the criminal procedure code, the Law on special investigative activity and the Law on the status of intelligence and security officers, in order to avoid possible overlaps or contradictions. In the comments submitted on 28 February 2023 (hereafter also: comments), the Moldovan authorities declared that the approval of the draft laws under consideration before the amendment of the other laws would be beneficial for the purpose of clear demarcation between the counterintelligence activity provided by the former and the criminal investigation activity provided by the latter. The Venice Commission declares its readiness to provide an opinion on the overall framework of the intelligence system of the Republic of Moldova at a later stage, assuming that then a more thorough preparation has taken place. However, in order to support the Moldovan authorities in their effort to create an adequate intelligence system in compliance with European standards, the Venice Commission has identified, without entering into a detailed analysis, a list of potentially problematic issues that already should be taken into account when revising the current drafts.

13. The Venice Commission underlines that the present opinion highlights only the most pertinent problems and that the following remarks should not be seen as an endorsement of what has not been commented upon.

IV. Analysis of the main problematic issues

A. Governance and powers of the SIS

14. The Venice Commission has acknowledged that intelligence is “an inescapable necessity for modern governments”. It has also observed that security services are equipped with considerable technological tools and enjoy exceptional powers and have a natural tendency to over-collect information, and that it is therefore essential to set internal and external limits to their activities.[11] In the comments submitted on 28 February 2023, the Moldovan authorities informed that following the public consultations, changes have been integrated to the draft laws as concerns the establishment of *ex ante* and *ex post* control mechanisms of the SIS activity, so that the political influence or exceeding legal limits can be prevented, as well as investigated, if necessary. Reportedly, changes are also proposed in the governance of the SIS to ensure a clear delimitation and balance in the powers of the SIS Director.

15. The collection of intelligence, including information on individuals, constitutes an interference with individual rights, in particular the right to respect for one’s private and family life, home and correspondence enshrined in Article 8 ECHR, but also other fundamental rights.[12] Hence, it is imperative that the role, functions, powers and duties of security agencies be clearly defined and delimited by the legislation or by the Constitution.[13] Equally, these agencies should be subjected to close oversight.

16. Understandably, security agencies are expected to collect all relevant information on threats to the State, but they must be adequately controlled, in order to avoid that they develop a “State

[9] Act n. 59/2012 on special investigative activity.
[10] Act n. 170/2007 on the status of intelligence and security officers.
[11] Venice Commission, CDL-AD(2015)010, Report on the democratic oversight of the security services, paras. 1 - 4.
[12] See below, Section on fundamental rights.
[13] Venice Commission, CDL-AD(2015)010, op. cit., para. 45.

within the State" mentality. Conversely, governments could be tempted to abuse them. Consequently, it is necessary to allow for a certain degree of autonomy of the security agencies in order to ensure effective governance, provided that guarantees of integrity and political neutrality exist as well as safeguard mechanisms to prevent political abuse.[14] In their comments, the Moldovan authorities have agreed to this consideration and have referred to a number of modifications that have been integrated to the draft laws.

17. The design of the SIS in the two draft Laws results in an agency which is extremely powerful and enjoys a high degree of autonomy, while some risks of politicisation remain. The next paragraphs will provide for examples of these problematic issues. In their comments, the Moldovan authorities have partially agreed to this observation and have declared that the SIS is part of the security, defence and public order system, an integrated system in which the prosecutor's office and the court have the role of ensuring legality and exercising control.

1. Extremely broad powers granted to the SIS

18. The powers granted to the SIS are extremely broad. The lists of the "duties" and "obligations" of the SIS and of the "tasks" of the Director of the SIS are extensive, yet at the same time vaguely worded, and include a large number of catch-all formulas, such as "exercise *other powers* established by the legislation in force",[15] or "perform *other obligations* laid down by law",[16] whereas they should be precisely circumscribed, in order to prevent human rights abuses.[17] In their comments, the Moldovan authorities have partially agreed to this remark and have informed that, as a result of the drafts' approval and finalising process, the lists of the SIS "duties" and "obligations", and the Director's "tasks" will be optimised, and the wordings that can be interpreted incorrectly will be revised.

19. Similarly, the list of "rights" in article 8 of the SIS draft Law is extremely long and open-ended, instead of being clearly defined, and it refers to an apparent enforcement role, without providing clear legal remedies or explanations concerning the legal consequences, or the sanctions that may be applied. In particular, paragraph 1 provides that the Service shall have the right to (italics added): "(2) take measures to prevent facts which undermine national security, to submit to public administration authorities, to natural and legal persons, irrespective of their ownership, proposals to remedy deficiencies found in matters of national security, to *request that appropriate measures are taken and information on their execution to be provided and, where appropriate, to apply a formal warning*"; […] (6) forward to public authorities, other legal persons, irrespective of the type of ownership, *enforceable indications on the removal of causes and conditions contributing to the realisation of threats to national security*; […] (8) require natural persons, persons with positions of responsibility and representatives of legal persons *to appear at the official premises of the Service in order to explain matters relating to the provision of national security* in the areas within the remit of the Service". It is not clear what would happen if the "enforceable indications" or the instructions to take "appropriate measures" or to "appear at the official premises" were not followed. In their comments, the Moldovan authorities reacted by specifying that the list of rights in article 8 of the SIS draft Law concentrates in a single article all the SIS rights that are currently dispersed in various legislative acts, which will ensure a better understanding of the capabilities of the Service to act and will exclude arbitrariness and ambiguous interpretations. However, it is unclear how putting all the SIS competences into one single provision will exclude arbitrariness and ambiguous interpretation.

20. Likewise, article 9 of the SIS draft Law introduces a new measure, called "official warning" which foresees "legal consequences" for the addressee, without explaining what these

[14] Venice Commission, CDL-AD(2015)010, op. cit., paras. 4 - 5.
[15] Articles 4(22) and 18(q) SIS draft Law.
[16] Article 7 (m) SIS draft Law.
[17] See below, section on the quality of the law.

consequences would be. It is therefore not clear what sanctions might follow from an official warning, although paragraph (5) refers to a notification to the Prosecutor General which would suggest that criminal sanctions might be applied. In their comments, the authorities informed that they intend to exclude this provision from the law.

21. The Venice Commission is particularly concerned by the lack of clarity in the distinction between the activities carried out by the SIS under the *security mandate* and those in the context of a *criminal investigation.* Indeed, article 4 of the SIS draft Law seems to make a distinction between the risks and threats endangering national security (paragraph 2) and the prevention of crime (paragraph 3); however, the duties of the SIS listed are partially overlapping and give rise to confusion. The same applies to article 21 CI draft Law, which holds that "The results of counterintelligence measures shall be used: a) in carrying out the tasks of the Service; b) when carrying out other counterintelligence measures; c) when carrying out special investigative measures, for the purpose of detecting, preventing, curbing crime and ensuring public order"[18]. The problematic link between counterintelligence measures and the resulting information and criminal investigations and surveillance, must be examined taking into account the provisions that are most probably included in the criminal procedure code and in the Law on special investigative activity, currently under revision. Reportedly, the SIS activities so far have been predominantly related to the investigation of crime.[19] In their comments, the authorities partially agreed with the observations of the Venice Commission and noted that "the purpose of the counterintelligence activity, in which a security warrant is issued, is to collect qualitative information about security risks and to prevent the actions that jeopardise the security of the state, while criminal prosecution is intended to investigate criminal offences, which points out to an already materialised risk". They also reiterated certain elements provided by the draft laws, such as the duty of the SIS to notify the Prosecutor's Office for the initiation of criminal prosecution, and they made reference to article 273 of the Code of Criminal Procedure which provides for the criminal procedural mechanism to find criminal offences prior to the initiation of a criminal investigation.

22. Article 11 of the CI draft Law (on departmental regulation of intelligence/counterintelligence) is a delegation provision, providing for a far-reaching regulation of specific issues (e.g., the time limits for the retention of special files, the rules for carrying out undercover operations, etc.) by departmental legislative acts of the Service. It is crucial that issues bringing about interferences with the exercise of human rights should be set out in the formal law. The Court held that, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law, "a law which confers a discretion must indicate the scope of that discretion", and it would be contrary to the rule of law for the legal discretion to be expressed in terms of an unfettered power. "Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference".[20] The Moldovan authorities informed the Commission that the draft provision follows the current practice and legal provisions, but nevertheless consider it appropriate to include some clarifications in the draft laws to provide for the limits of the internal powers of the SIS.

23. Article 12(1)(1) of the CI draft Law (on counterintelligence measures) provides that a large number of measures, clearly impinging on fundamental rights, may carried out upon the simple authorisation of the Director of the SIS, without any conditions of necessity or proportionality, without judicial or other forms of external control, neither *ex ante* nor *ex post*, without the

[18] See also art. 5 SIS draft Law: "In order to carry out its tasks in the field of ensuring national security, the Service shall carry out: a) external information activity; b) counter-informative activity; c) special investigative activity, if it participates in the investigation of criminal offences"; as well as art. 7g SIS draft Law: "at the request of the criminal prosecution services, to assist in prosecuting acts, which according to Article 4 fall within the remit of the Service" and 9(5) SIS draft Law: "The Prosecutor General shall be notified of the affixing of the official warning".
[19] See below the section on the control of prosecutors.
[20] ECtHR, Malone v. the United Kingdom, 02.08.1984, application no. 8691/79, para. 68.

obligation to notify the targeted person, even after the operation is concluded, and without clear limitations or requirements as to the modalities of implementation. The measures include: “a) access to financial information or monitoring of financial transactions; b) identification of the subscriber, owner or user of an electronic communications system or an access point to an information system with or without the input of electronic communications service providers; c) visual tracking and/or documentation by technical methods and means as well as tracking or tracking through the global positioning system or other technical means; d) control of the transmission of money or other tangible or intangible values and the provision of services; e) undercover investigation; f) controlled delivery; g) collection of samples for comparative research; h) research of objects and acts; i) acquisition of control; j) investigating rooms, buildings, parts of land or means of transport, if this does not constitute a breach of home; k) the operational experiment”. Such an unfettered power disregards legal certainty, proportionality and the right of access to a court, and is clearly contrary to the rule of law, one of the basic principles of a democratic society.[21] In their comments, the Moldovan authorities agreed with the observations of the Venice Commission and declared that the Parliament will revise the list of counterintelligence measures that can be authorised by the Director of the SIS with specific *ex ante* control. Also, they noted that “the main role for the *ex post* control by a special commission is to check whether the use of this measures was made accordingly”.

24. Finally, the Venice Commission notes that the electoral domain seems to be excluded from the scope of activity of the SIS, although the request of the Moldovan authorities explicitly refers to the fact that the drafts would help ensuring a “fair and efficient electoral process”. In the view of the Venice Commission, the electoral domain should be covered, at least partially, in the context of covert operations trying to influence the outcome of elections. In their comments, the Moldovan authorities agreed with the observations of the Venice Commission and informed that the Parliament will revise the draft law as to reflect this comment.

2. Risks of politicisation of the SIS

25. In article 1 of the SIS draft Law, the SIS is described as an “autonomous” authority of the central public administration. This is compliant with the fact that the SIS should not be seen as purely a tool of the executive: on the one hand, autonomy entails a freedom of action within the draft Laws and other relevant laws, the Constitution and international obligations of the Republic of Moldova, and, on the other hand, the Service is not subject to direction or control by political authorities of the state, but supervised and overseen by judicial, parliamentary or other independent bodies.[22] It is noteworthy that the description of the SIS in article 15 of the SIS draft Law does not repeat the reference to autonomy. Lest this cause confusion the reference to autonomy of the SIS should be repeated.

26. The Venice Commission also notes that the Director is described in article 16(6) of the SIS draft Law as independent in the exercise of his or her mandate and it is further indicated that he or she is irremovable during his/her term of office, except for the grounds listed in article 17 of the SIS draft Law for termination of the term of office of the Director. Security in office stands as a safeguard so that the President of the Republic or the Government or the Parliament cannot influence the Director of the Service in the exercise his or her functions; however, the nature and scope of the “revocation” which is listed in Article 17(2)(h) among the grounds for termination of the Director’s mandate remains unclear.[23] In addition, the Venice Commission recalls its previous

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[21] ECtHR, Malone v. the United Kingdom, 02.08.1984, application no. 8691/79, para. 68. See also Ozdil and Others v. The Republic of Moldova, 11.06.2019, application no. 42305/18, para. 66. The Venice Commission Rule of Law Checklist (CDL-AD(2016)007) addresses the issue under several aspects: on foreseeability of the law, and the need for precisions, see II.B.3 and in particular para. 58; on the abuse of discretionary powers, see II.C.2 and, on collection of data and surveillance, II.F.2.
[22] See below the section on control.
[23] Article 17(2)(h) and the provisions for removability set out at article 17(3) of the SIS draft Law.

recommendation to provide for material safeguards for the appointment of the Director and his or her Deputy on the basis of clear and apolitical criteria.[24]

3. Unclear role of the President of the Republic

27. Article 1(3) of the SIS draft Law provides that the "work of the service is coordinated by the President of the Republic and is subject to parliamentary scrutiny. Coordination by the President of the Republic of Moldova shall be achieved through: the annual determination of priority directorates in the field of national security, the division of tasks within the remit of the Service, the determination of the types of information to be presented and the manner in which they are presented, and the assessment of the performance of the tasks assigned". The Venice Commission remarks that there are no elements in the draft Law to establish how far the coordination power of the President of the Republic goes and how it interacts with the parliamentary scrutiny. In their comments, the Moldovan authorities reported that "[a]ccording to art. 87 of the Constitution of the Republic of Moldova, the President of the country is the supreme commander. SIS is part of the national security and defence system and do follow under the command of the president. Also, SIS director seats in the Supreme Security Council lead by the President of the Country. The draft laws establish clear responsibilities of the President in setting out the national security priorities broader tasks for the Service within the limits of the law".

B. Accountability and control

28. The rules establishing the accountability and control system of the SIS are set out in Chapter VII of the SIS draft Law and Chapter VI of the CI draft Law respectively. The two drafts should be harmonised.

29. Overall, the draft Laws establish a fourfold system of control:

i. internal control operated by the Director and the Deputy Director,[25]
ii. parliamentary scrutiny carried out by the Subcommittee for Parliamentary Control over the work of the Service of the Committee on National Security, Defence and Public Order (hereinafter, "the Sub-Committee)",[26]
iii. control by the public prosecutors,[27]
iv. judicial control.[28]

30. As it stated in the previous sections,[29] the internal control exercised by the Director cannot be considered a reliable safeguard against abuse of power, as it is based on internal departmental regulations, basically established by the Director himself or herself,[30] granting him/her an excessively wide margin of discretion and unlimited decision-making power, and with respect to severely intrusive measures.[31] In this respect, the Venice Commission has previously stated that it is "absolutely essential" that norms concerning the internal security services be as clear and concise as possible so that the tasks they can lawfully engage in are clearly defined, and that the regulations should only be allowed to be kept secret to the extent that it is absolutely necessary.[32]

31. As to external control, it is relevant to note that the SIS has a duty to communicate the information obtained to certain recipients (President of the Republic, President of Parliament,

[24] Venice Commission, Republic of Moldova, CDL-AD(2014)009, op. cit., para. 91(c).
[25] Article 59 CI draft Law.
[26] Article 31 CI draft Law and article 57 SIS draft Law.
[27] Article 58 CI draft Law and article 32 SIS draft Law.
[28] Article 60 CI draft Law and brief reference in article 30 SIS draft Law.
[29] See above, section on the enormous powers of the SIS and in particular articles 11 and 12(1) of the CI draft Law.
[30] Article 11 CI draft Law.
[31] Article 12(1)(1) CI draft Law.
[32] Venice Commission, CDL-INF(98)6, Internal Security Services in Europe, page 7; and Venice Commission, CDL-AD(2015)010, op., cit., para. 108.

Prime Minister and Chair of the Parliamentary Committee on National Security, Defence and Public Order).[33] This provision seems overly wide as it does not limit the amount or type of information to be communicated, and it does not seem to be applicable as such considering the volume and technicality of intelligence information. In their comments, the Moldovan authorities informed that the main purpose of the rule is to clarify the legal beneficiaries of the SIS intelligence information and that only the analytical intelligence and data of primary importance are communicated. The authorities also expressed the intention to clarify the meaning of the provision, in order to exclude arbitrariness.

32. The following sections present the most problematic issues related to the system of external control.

1. Parliamentary control

33. The parliamentary scrutiny appears rather superficial as the Sub-Committee seems to have a simply statistical role,[34] being excluded from a proper supervision of relevant activities of the SIS, including special files and pending operations. Although members of the parliamentary subcommittee may submit questions about the intelligence/counterintelligence activity carried out by the Service in the previous year, this may be made ineffective since information on ongoing operations explicitly excluded from the report and, according to the information provided by the Sub-Committee during the online meetings, the SIS has the right to refuse access to any information by asserting the State secret. The role of the Sub-Committee is consequently reduced to the production of a yearly report, which is not necessarily published.

34. The Venice Commission recommends that the SIS be obliged to provide all data on the number and types of measures carried out in the previous year and that the Sub-Committee be required to publish a report on these statistical data. The Sub-Committee should also be able to issue a special report to draw public and parliamentary attention to activities which require an urgent response.[35] The possibility to start parliamentary inquiries, which could result in judicial inquiries, when there are suspicions of serious irregularities, should also be considered, subject to the requirements of state security. In addition, considering the limited effectiveness of the current form of parliamentary control as reported during the online meetings, the Commission recalls its previous recommendation to supplement or replace the “present system of parliamentary oversight with some form of independent expert oversight/complaints body”.[36] In their comments, the Moldovan authorities agreed with the recommendation of the Venice Commission and expressed their intention to modify the draft laws accordingly.

2. Control by the public prosecutor

35. The control carried out by the prosecutors should be relevant for criminal matters only. Article 58(2) of the CI draft Law foresees such control “on the basis of complaints lodged by persons whose rights and legitimate interests are presumed to have been infringed or of their own motion, where the public prosecutor has become aware of the infringement when carrying out counterintelligence measures, if such acts may constitute criminal offences”. However, in most cases, it will be impossible for the targeted individuals to know that their rights may have been violated.[37] In addition, the Venice Commission expresses concern over the ambiguity of the word “presumed” inasmuch as it is unclear whose presumption it is referring to (the prosecutor’s or the

[33] Article 6(1)(a) and (b) SIS draft Law.
[34] Article 57 CI draft Law.
[35] Venice Commission, CDL-AD(2015)010, op., cit., para. 177.
[36] Venice Commission, Republic of Moldova, CDL-AD(2017)009, op. cit., para. 97.
[37] See below, section on fundamental rights and safeguards, issue of notification.

complaining party) and the draft law does not require any level of evidentiary support for the complaint.

36. Moreover, for the prosecutors to acquire the right of access to state secret, it is necessary to undergo the process of verification of holders and candidates for public offices, which is carried out by the SIS itself, with the obvious consequence that the SIS may refuse non-compliant prosecutors. In their comments, the Moldovan authorities noted that the access to information classified as state secret is made on the basis of Law no. 245/2008 on state secrets, and that "the vetting is carried out with regard to criteria strictly determined by the law, and the Service provide an opinion only with regard to the lack or existence of these criteria, without accepting or rejecting someone from being appointed for a position".

37. Article 32(2) of the SIS draft Law excludes completely from the prosecutorial scrutiny any information on the organisation, forms, tactics, methods and means of operation of the SIS. This should be changed, and SIS be subjected to possible prosecutorial scrutiny, inasmuch as its actions can also constitute a criminal offence. In their comments, the Moldovan authorities express the intention to modify the provision in order to clarify that criminal investigation should be carried out in case of criminal offences.

3. Judicial control

38. The control carried out by judges consists in "checking whether the counterintelligence measures to issue the court warrant are well founded or when assessing the legality of actions carried out in the absence of a judicial warrant".[38]

39. In the cases where a court warrant is required,[39] the judge is allowed a very short time to decide: the examination of the request takes place during the day on which it was submitted[40] and the conclusion is drawn up "immediately, but not later than 24 hours after it has been delivered"[41]. The file submitted may be incomplete ("the judge may be presented with material confirming the need to carry out those measures, without those measures being annexed to the request").[42] In exceptional circumstances, the judge may be informed afterwards, within 24 hours from the order of the measure, after the latter has been carried out, and should be provided with all material that substantiated the need to carry out the request and "the circumstances which *have not allowed it to be remembered*".[43] Nowhere is it explicitly mentioned that the judge has the possibility to ask for further information and the "material confirming the need to carry out those measures" is a formula that is too vague. The Venice Commission recalls that the legislation must elaborate on the degree of reasonableness of the suspicion against a person for the purpose of authorising an intelligence measure and it should contain safeguards other than the simple impossibility to achieve the aim of national security.[44] In the comments, the Moldovan authorities noted that the draft provision has been drafted on the basis of the current provision regarding the authorisation of special investigation measures (article 305(3) of the Criminal Procedure Code). The authorities also express the intention to amend this draft provision by specifying that the judge may request additional information before issuing a decision. They also note that the judge remains free to refuse the court warrant in case of an insufficiently substantiated file. In addition, the authorities consider that article 15 of the CI draft Law settles "in detail" the procedure and the grounds for issuing a court warrant and article 16 determines the categories of persons in connection to whom a court warrant may be issued, and it also establishes exhaustively the categories of acts in connection to which a warrant may be issued.

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[38] Article 60 CI draft Law.
[39] Listed in listed in article 12(1)(2) CI draft Law.
[40] Article 15(6) CI draft Law.
[41] Article 15(9) CI draft Law.
[42] Article 15(6) CI draft Law.
[43] Article 15(11) CI draft Law.
[44] ECtHR, Iordachi and Others v. Moldova, 10.02.2009, application no. 25198/02, para. 51.

40. The judge competent to issue the warrant is “a judge of the Chisinau District Court specifically empowered to do so”.[45] This means that it would be a single judge, not necessarily specialised in intelligence and security service issues, without the possibility to rely on an independent expert, on matters which tend to be extremely complex and critical, such as the collection of information from providers of electronic communications services including metadata that may amount to bulk interception and mass surveillance. In addition, it is stipulated that the judge “will obtain according to law, the right of access to state secret”,[46] which special power, as already mentioned above,[47] is granted by the SIS itself. According to the Constitutional Court,[48] judges cannot be submitted to the verification carried out by the SIS. But it is not clear whether the SIS may still refuse to grant a judge access to state secret on other grounds, as article 60 of the CI draft Law (Control by judges) is silent about it, unlike article 58 of that law (control by public prosecutor). At any rate, the Commission recalls that safeguards must be put in place for the principle of independence of the judge to be respected. In their comments, the Moldovan authorities express the intention to modify the draft provision taking into account the remarks of the Venice Commission as regards the competent judge to issue the warrant. They also clarify that “[t]he draft does not regulate the possibility of mass surveillance or interception of all communication. Both counter-intelligence measures – the collection of information from operators and the interception of communications are targeted measures, referring to a single subject. For each separate subject a separate mandate is needed, excluding the collection of date from an indefinite number of people based on a mandate”.

41. The Venice Commission also observes with concern that there is no provision for effective judicial control of the measures foreseen under article 12(1)(1) of the SIS draft Law, which do not require a judicial warrant. Regardless of the fact that most of those measures are so wide and intrusive that they should not be permitted without a judicial warrant in the first place, except in duly justified cases established by law, the control of legality *ex post* foreseen in article 60 of the CI draft Law is merely theoretical and generic. Indeed, article 23 of the CI draft Law, which sets out the rules for informing the targeted person of counterintelligence measures, *only* deals with those measures for which a judicial warrant is required. This implies that the person targeted by counterintelligence measures carried out without judicial control would never be informed about them. Hence, even though a complaint mechanism is theoretically provided for people “whose rights and freedoms have been violated”[49] or “whose rights and legitimate interests are presumed to have been infringed”,[50] those persons would never be aware of such infringements, except accidentally. As stressed by the Court, independent control, preferably by a judge, must be ensured for all intelligence measures.[51] The Venice Commission recommends that judicial control for the measures foreseen by article 12(1)(1) of the CI draft Law should be activated automatically after the measures have been carried out.

4. The possibility to establish a mechanism of control by an independent expert

42. Considering the complex domain of counterintelligence measures and in particular the collection of bulk metadata, as well as the risks connected to it (mass surveillance, unlawful espionage of political adversaries, etc.), some other options of independent oversight should be explored, as previously suggested by the Venice Commission.[52]

[45] Article 15(2) CI draft Law.
[46] Art. 15(4) CI draft Law.
[47] See above, section about the control by prosecutors.
[48] Constitutional Court Decision of 5 December 2017 on some provisions of Law No 271-XVI of 18 December 2008 on the verification of holders of candidates and public offices.
[49] Article 12(2) SIS draft Law.
[50] Article 58(2) CI draft Law.
[51] ECtHR, Klass and Others v. Germany, 06.09.1978, application no. 5029/71, para. 56; Iordachi and Others v. Moldova, 10.02.2009, application no. 25198/02, para. 42.
[52] Venice Commission, Republic of Moldova, CDL-AD(2017)009, op. cit., para. 97.

43. For example, an external independent expert body could be given access to all secret information and be enabled to raise arguments on behalf of persons that are unknowingly targeted by counterintelligence measures as well as to refer the issue to the judicial system in case that expert body deems it opportune.

C. Fundamental rights and safeguards

44. As initially observed, the action of the security services inevitably interferes with individual rights. However, as the security services act for the protection of national security, it can be assumed that they pursue a legitimate aim.[53] It is to be determined whether their action or the powers conferred to them are proportionate to such legitimate aim and necessary in a democratic society. During emergency situations, derogations under article 15 ECHR and article 4 ICCPR permit more significant interferences with the exercise of fundamental rights, under the due scrutiny of the Court and the UN Human Rights Committee.

45. The fundamental rights particularly at risk in this domain are the right to private and family life, home and correspondence (art. 8 ECHR), especially as concerns privacy and data protection (see also Convention 108+), the right to a fair trial (art. 6 ECHR) and to an effective remedy (art. 13 ECHR), the right to freedom of expression (art. 10 ECHR), the right to liberty and security (art. 5 ECHR), as well as the right to property (art. 1 Protocol 1 ECHR). All these rights are equally recognised by the Moldovan Constitution (articles 15-53).

46. Besides the issues already raised in previous sections, there are additional problematic issues from the specific perspective of potential infringements on human rights.

47. To start with, the wording of article 9(4) of the CI draft Law "[t]he initiation of the special file cannot serve as a basis for limiting the human rights and freedoms provided for by law" is incorrect inasmuch as it doesn't recognise that the opening of the special file in itself is already an interference with human rights, as it stores personal information of an individual, while the question would be whether such storage is necessary and proportionate.

48. The counterintelligence measures that may be carried out with the sole authorisation of the Director of the Service[54] constitute a serious interference with the right to private life (see, in particular, undercover investigation,[55] or visual tracking and tracking through the global positioning system[56]). The Venice Commission recalls that, according to the case-law of the Court, it is in principle desirable to entrust supervisory control to a judge; alternatively, supervision by non-judicial bodies may be considered compatible with the Convention, provided that the supervisory body is independent of the authorities carrying out the surveillance and is vested with sufficient powers and competence to exercise an effective and continuous control.[57]

49. The Venice Commission therefore highlights the necessity to provide for a supervisory control by a judge or an independent body. The review and supervision of the intelligence measures come into play at three stages: prior to the action (*ex ante* authorisation), during the action (continuous oversight), and after completion of the action (*ex post* control).[58]

50. As to the authorisation procedure, it must provide adequate guarantees for individual's rights. In its previous opinion, the Venice Commission had already identified as a main issue the fact

[53] As to the requirement "in accordance with the law", see below, the section on the quality of the law.
[54] Article 12(1)(1) CI draft Law, already reported above in the section about the power of the SIS. See also correlated articles 24 - 35 CI draft Law.
[55] See also related articles 28 – 29 CI draft Law.
[56] See also related article 26 CI draft Law.
[57] ECtHR, Klass and Others v. Germany, 06.09.1978, application no. 5029/71, para. 56.
[58] ECtHR, Roman Zakharov v. Russia, 04.12.2015, application no. 47143/06, para. 233.

that there was no possibility for the target person to appeal against the decision to issue the authorisation to use special investigative measures and had suggested to consider the institution of a security screened lawyer to represent the target person.[59] In their comments of 28 February 2023, the Moldovan authorities reacted to the possibility to establish such mechanism, in consideration of the fact that the warrant is issued by the judge and the process is secret. The Commission notes that in the current drafts not all measures are authorised by a court warrant. In addition, the Commission underlines that "[t]here is empirical evidence that such privacy advocates in law-enforcement and internal security surveillance can have some significance in helping to ensure that the parameters of investigations really are drawn as narrowly as possible."[60]

51. As regards the *ex post* control, after the measure is completed, the issue of notification to the target is strictly connected to the effectiveness of remedies before the court and the existence of effective safeguards against abuse.[61] As already noted above,[62] for measures approved by the Director of the SIS, no system of notification to the target is provided.[63] While acknowledging the Court finding that an effective remedy "must mean a remedy which is as effective as can be having regard to the restricted scope for recourse inherent in any system of secrete surveillance",[64] the Venice Commission reiterates the remark of its previous opinion that it is not permissible to provide for the possibility never to inform a targeted person about special measures. "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." [65] In their comments, the Moldovan authorities requested to be provided with comparative examples of other European states having a mechanism of informing the target person who has been the object of investigation for measures with a low level of interference with private life. They also expressed the intention to set up an *ex post* control over the counter-intelligence activity by a special committee that will have the right to check the grounds of all the counter intelligence measures and provided an initial version of the text.

52. The Venice Commission has previously observed that the right to an effective remedy is a "variable requirement" mainly depending on the seriousness of the alleged violation of a Convention right, and that it "could not be interpreted so as to nullify the efficacy of the measures of secret surveillance already found to be compatible with the protection of privacy set out in Article 8".[66] However, when a measure is known to the alleged victim, it should be possible to impugn that measure in front of a competent independent appeals authority.[67] This is particularly relevant for those powers of the SIS which imply an enforcement role,[68] and in particular for the mechanism of the official warning,[69] where no procedural safeguards are provided. As to the latter in particular, the Commission expresses its concern that the presumption of innocence (article 6 ECHR) may be hampered by the "affixing of the official warning",[70] which seems to have criminal legal consequences if not obeyed, albeit these consequences are not described in the draft Laws. Moreover, if the measures that can be requested by the SIS to public authorities under Article 8 of the SIS draft Law result in the deprivation of liberty of individuals, all relevant safeguards and guarantees against arbitrariness should be put in place in compliance with article

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[59] Venice Commission, Republic of Moldova, CDL-AD(2014)009, op. cit., para. 91(f).
[60] Venice Commission, CDL-AD(2015)011, op. cit., footnote 73, see also paras 17 and 99.
[61] ECtHR, Roman Zakharov v. Russia, 04.12.2015, application no. 47143/06, para. 234
[62] See above, section about the judicial control.
[63] Article 23 CI draft Law.
[64] ECtHR, Klass and Others v. Germany, 06.09.1978, application no. 5029/71, para. 69.
[65] Venice Commission, Republic of Moldova, CDL-AD(2014)009, op. cit., par 91(h).
[66] Venice Commission, CDL-AD(2015)010, op. cit., para. 129.
[67] ECtHR, Rotaru v. Romania, 04.05.2000, application no. 28341/95, para. 69; see also, Al-Nashif v. Bulgaria, 20.06. 2002, application no. 50963/99, paras. 137-138.
[68] See above, section on the SIS powers.
[69] Article 9 SIS draft Law.
[70] It is not clear what the term "affixing" means in this context.

5 ECHR. In their comments, the Moldovan authorities reiterate that the mechanism of the official warning will be excluded from the draft and in the other cases of deprivation of liberty, this "may occur only in accordance with the Code of Criminal Procedure or the Contravention Code".

53. In addition, as regards the official warning, the Venice Commission recalls that it has already emphasised in previous opinions that when official warnings touch upon freedom of expression (of an individual or an association) they must comply with the requirements of Articles 10 and 11 of the ECHR, to ensure that any restrictions they may introduce to fundamental rights stem from a pressing social need, are proportionate within the meaning of the ECHR, and are clearly defined by law.[71]

54. As to the collection of information from providers of electronic communications,[72] the provision allows for an unlimited power to access all sorts of electronic communications, with or without the assistance of the operator. Likewise, the SIS not only establishes its own information systems but has also the right to generally access, free of charge, information systems, electronic communications networks, information resources and databases of law enforcement bodies, public authorities, undertakings, institutions and organisations, irrespective of their ownership.[73] It is worth noting that, albeit the measure requires a judicial warrant, if the SIS was in a position to carry it out without the assistance of an operator, there would be absolutely no entity to ascertain the actual existence of the judicial warrant. In addition, there is no provision for private service providers to challenge or appeal an order to turn over subscribers' data. These provisions appear to be clearly disproportionate. In their comments, the authorities informed that they intend to specify in the draft provision that the access concerns only information systems and databases created and run by the state, so as to exclude the private information systems of the companies. The authorities also refer to several Laws and Government Decisions[74] providing that all information systems have a tracking mechanism of access and operations. The authorities underlined that the SIS together with the institutions keeping these data bases shall establish internal rules and shall keep track of the access of data bases by intelligence officers in order to exclude arbitrariness. The authorities further note that "art. 41 of the CI Law, regarding the collection of information from the providers of electronic communication services was based on identical provisions of art. 1344 CPP, which is in force".

55. These provisions are particularly problematic, not only from the perspective of private life and correspondence, but also because of the chilling effect they may have with respect to freedom of expression, as the fear of constant surveillance could affect the content and modalities of their communication. The Venice Commission recalls that according to the case law of the Court, secret surveillance of citizens, characteristic of the police state, is tolerable under the Convention only to the extent strictly necessary for the protection of democratic institutions.[75] In this context, it must be reminded that a law on measures of secret surveillance must provide the following minimum safeguards against abuses of power: (i) a definition of the nature of offences which may give rise to an interception order and the categories of people liable to have their telephones tapped; (ii) a limit on the duration of the measure; (iii) the procedure to be followed for examining, using and storing the data obtained; (iv) the authorisation procedures; (v) supervision of the

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[71] Venice Commission, CDL-AD(2012)016, Opinion on the Federal Law on combating extremist activity of the Russian Federation, para. 65; but also: CDL-AD(2011)026, Opinion on the compatibility with universal human rights standards of an official warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee.
[72] Article 41 CI draft Law.
[73] Article 27 SIS draft Law.
[74] Law no. 216/2003 on the integrated automatic information system for the record of crimes, criminal cases and persons who have committed crimes; Law no. 185/2020 on the automatic information system for the record of contraventions, contravention cases, and persons who have committed contraventions; GD 388/2022 on the approval of the Concept of the Information System „State Register of Cyber Security Incidents"; GD 416/2021 on the approval of the Regulation regarding the maintaining of the State Register of arms, instituted by the Automatic Information System „State Register of arms, etc.
[75] ECtHR, Szabò and Vissy v. Hungary, 12.01.2016, application no. 37138/14, paras. 72-73.

implementation of secret surveillance measures; (vi) the precautions to be taken when communicating the data to other parties; (vii) the circumstances in which recordings may or must be erased or destroyed; and (viii) notification of interception of communications and available remedies.[76]

56. The Venice Commission notices that no specific exceptions to the implementation of intelligence measures are foreseen for lawyers and journalists. These two categories are considered by the Court as deserving special protection. Normally, lawyers should not be targeted in the exercise of their professional activity and if their communication in this area is inadvertently collected, it should be destroyed under supervision of an external oversight body.[77] As to journalists, they should either enjoy the same protection as lawyers, or a very high threshold should be set before approving intelligence operations against journalists, combined with procedural safeguards and strong external oversight.[78] In their comments, the Moldovan authorities express the intention to modify the draft provision taking into account the concerns of the Venice Commission.

57. In this context, it is relevant to note that also the measure of blocking an access point connected to an information system or electronic communications networks[79] should be more narrowly construed and be submitted to close supervision of the judge who issued the warrant, especially if the equipment of journalists, bloggers, media outlets or other media actors were to be affected. This is important not only from the perspective of confidentiality of the sources but also with respect to freedom of expression and information, as it may affect, for example, the use and functioning of websites and other online platforms. During the online meetings, the representatives of private digital communications companies questioned the efficacy of the blocking measure. They felt that this measure was ineffective since the targeted user could easily connect through a different access point, and thus the provision is an inefficient burden on the companies.

58. Finally, the Venice Commission is seriously concerned by those provisions[80] which give the SIS the right to request private service providers to grant *access to their premises and equipment* (movable and immovable property, other objects and documents), *free of charge* (although some contradictory provisions foresee compensation for cost or damage),[81] on the basis of a simple *oral agreement*, *without time limitation* (24 hours, seven days a week). The SIS can also ask *to be provided with* or *to be given direct access* to an *unlimited amount and type of information* (that may not be refused on the grounds that it constitutes restricted information) and under an extremely *tight deadline* (24 hours). These provisions are clearly disproportionate in terms of respect of both the right to property (art. 1 Prot. 1 ECHR) as well as data protection (art. 8 ECHR and Convention 108+[82]).[83] A wider margin of manoeuvre may be acceptable in the context of emergency situations, subject to due and narrowly defined legislative provisions. In their comments, the authorities only partially agree to these findings and declare that the provisions "establish only the organising process and the technical preconditions to carry out the counter-

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[76] ECtHR, Roman Zakharov v. Russia, 04.12.2015, application no. 47143/06, paras. 231 and 238-301.
[77] ECtHR, Klass and Others v. Germany, Kopp v. Switzerland, 06.09.1978, application no. 5029/71, paras. 73-74, and, Erdem v. Germany, 05.07.2001, application no. 38321/97, para. 65.
[78] Venice Commission, CDL-AD(2015)011, op. cit., paras. 101 – 103. See also ECtHR, Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands, 22.11.2012, application no. 39315/06, paras. 98-102.
[79] Article 44 CI draft Law.
[80] Articles 8(4) and 27 SIS draft Law; and articles 7, 25 and 41 of the CI draft Law.
[81] See above, section on the powers of the SIS.
[82] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108). See also, Venice Commission Rule of Law Checklist (CDL-AD(2016)007), op. cit., pages 31-33, II.F.2.
[83] See the requirements established in Roman Zakharov v. Russia, 04.12.2015, Application no. 47143/06, reported above, but also the Court of Justice of the European Union, Digital Rights Ireland (Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others) and the joined cases Tele2 Sverige and Watson, concluding that unlimited range of data subjects for data retention amounts to a breach of the principles of strict necessity and proportionality.

intelligence measures. The data that are to be submitted to the Service are technical data concerning the organising activities of the provider and the technical category held by them, as well as the manner of interconnection of the systems of the Service with those of the providers. No provision of the ones invoked establishes any exception to the need of the court warrant for the collection of data concerning the private life. Art. 7 para. (2) of the CI Law establishing the obligation of the providers of postal services and the providers of networks and/or services of electronic communications does not imply the access to information on the private life of persons." The authorities also observe that the obligations of the providers already exist in many other normative acts[84] and that since 2008 no criminal investigation has been carried out with respect to alleged abuses on the part of state authorities, including of SIS, as concerns the managing in bad faith of the obligations of the providers.

59. A further concern raised by representatives of private digital communications companies is that technological innovation might be stalled if the government is not ready or able to upgrade to the newest software. The normative provision under article 7(11) of the CI draft Law implies that the SIS could veto modernisation of technology by the private service providers. Instead, there should be a consultative forum for discussion of current technical difficulties and future technical developments so that the SIS can adapt to planned changes. In their comments, the Moldovan authorities inform that "this provision is present in the national normative framework of 2008, and since then there has been no blockage on the part of SIS regarding the modernisation of the providers, all the unclarities having been overcome in a process of cooperation in good faith on the part of the providers and the SIS".

60. The legislation on data protection does not apply to the processing of personal data in the context of counterintelligence activity.[85] The approach should rather be the opposite, the legislation on data protection being the rule, with narrowly defined exceptions. The Venice Commission also recalls that according to the Court's case law, the non-compliance with the order of a data protection/freedom of information authority to reveal information by an intelligence agency results in a violation of articles 6 and 10 ECHR.[86] In their comments, the Moldovan authorities react by referring to the derogation from the legal regime of the personal data in the case of their processing for the defence of the state's security, in light of art. 9 para. 2 subpara. a) of the Convention for the protection of individuals with respect to the automatic processing of personal data of 28.01.1981, as well as with reference to item (16) of the preamble of the Regulation (EU) 2016/679 of the European Parliament and the Council regarding the protection of natural persons in connection to the processing of personal data and the free movement of such data. The Venice Commission recalls that the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), signed by the Republic of Moldova on 9 February 2023, does not provide for such a general derogation anymore[87].

D. The quality of the law: clarity, accessibility and foreseeability

61. In order for individuals to be protected against abuses in the exercise of rights and freedoms, the security services must exercise their power in accordance with the law. This is prescribed by

[84] Law on electronic communications no. 241/2007 (art. 20 para. 2), the Law on the special investigation activity no. 59/2012 (art. 16, especially para. 2), a joint Order of the Law enforcement authority that approves the Regulation on the manner of organising and carrying out of the special investigation measures in the electronic communication networks, from 2020 (which replaced a similar Regulation from 2008, both orders are published in the Official Journal).

[85] Article 55(2) CI draft Law: "The processing of personal data in the context of the intelligence/counterintelligence activity is not subject to personal data protection legislation".

[86] ECtHR, Youth Initiative for Human Rights v. Serbia, 25.06.2013, application no. 48135/06.

[87] Article 11 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223).

article 54(2) of the Moldovan Constitution[88] and is in line with the case law of the Court, according to which the law has to fulfil certain qualitative criteria, in particular, minimum standards of clarity, accessibility and foreseeability.[89] A rule is foreseeable if it is formulated with sufficient precision to enable any individual to regulate his or her conduct.[90]

1. Undefined notions

62. The Venice Commission observes that several provisions of the draft laws make use of undefined notions or phrases which open the way to ambiguous interpretations, such as (italics added) "*unconstitutional entities or individuals*"[91] and "*unconstitutional entities or structures*",[92] or "the determination of the *types of information* to be presented and *the manner in which* they are presented",[93] "*extremist* ideas and values",[94] or "determine, within the limits of its competence, the manner in which the Service transmits information obtained in the outcome of the work of the *Legal Beneficiaries' Service*".[95] The word "*intelligence*" itself is not clearly defined in the texts and thus is not clearly distinguished from the term "*information*", although both terms appear numerous times. Likewise, the term "counterintelligence" is not defined and appears to refer to the notions of "internal security" or "protection of the constitution". In the comments submitted on 28 February 2023, the Moldovan authorities remark that the majority of the notions used are defined by other legislative acts, including recently adopted (for example, anti-constitutional entity – Criminal Code), but they are disposed to adjust the terminology and to remove the vague notions.

63. In some cases, this vagueness goes as far as extending the SIS mandate beyond the notion of national security, notably when referring to the broad concept of "*national interest*",[96] e. g. (italics added) "influencing, supporting and/or adopting decisions for purposes *contrary to the national interest*" and "illegal management, degradation or destruction of or disabling access to economic resources of *national interest*",[97] "to obtain information relevant to the provision of state security *or the creation of conditions conducive to ensuring and promoting strategic interests* and the successful implementation of the Republic of Moldova's national security policy",[98] "the need to obtain information in the interest of ensuring the security of the Republic of Moldova, *enhancing its economic, technical and scientific potential* or defensive, *creating the conditions for the promotion of its foreign and internal policy*".[99]

64. The issue is amplified by the use of generic, open and broad formulas for describing the activities of the SIS, for instance in the following provisions (italics added): "The tasks of external intelligence activity are intended to […] *protecting and promoting the strategic interests* of the Republic of Moldova and its partners",[100] and "(1) The service shall be authorised to *create, procure, own and use specific means, methods and sources for the planning, collection, verification, processing, analysis, evaluation, retention and exploitation of the information data needed* to carry out the external intelligence activity. (2) In carrying out the external intelligence activity, the Service shall apply *operational methods and measures, technical and informative*

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[88] Constitution of the Republic of Moldova, Article 54(2), "The exercise of the rights and freedoms may not be subdued to other restrictions unless for those provided by the law".
[89] ECtHR, Amann v. Switzerland, 16.02.2000, application no. 27798/95, para. 50; Rotaru v. Romania, 04.05.2000, application no. 28341/95, para. 52.
[90] ECtHR, Malone v. the United Kingdom, 02.08.1984, application no. 8691/79, para. 66; Amann v. Switzerland, 16.02.2000, application no. 27798/95, para. 56.
[91] Article 1(3) CI draft Law.
[92] Article 4(1)(b) SIS draft Law.
[93] Article 1(3) SIS draft Law.
[94] Art 4(1)(o) draft SIS Law.
[95] Article 18(k) SIS draft Law.
[96] Article 4(1)(b) SIS draft Law.
[97] Article 4(1)(r)(s) SIS draft Law.
[98] Article 1 CI draft Law.
[99] Article 13(5) CI draft Law.
[100] Article 46(1) CI draft Law.

measures and influence measures specific to the type of activity, as well as appropriate technical and operational means to ensure the planning, collection, verification, processing, analysis, evaluation, retention and exploitation of information data".[101]

65. Overall, the SIS draft Law articulates the functions / objectives of the SIS, the separate lists of powers / rights, the lists of duties / obligations and then measures / activities in a confusing manner. The long lists of "duties",[102] "obligations"[103] and "rights"[104] of the SIS do not seem to correspond to clearly distinct categories.

66. It follows that the scope of the SIS draft Law is insufficiently defined, which is even more evident when assessed in combination with the CI draft Law, due to the very significant overlaps between the two texts, not only when it comes to the *duties/obligations/rights* of the SIS and the *activities* described in the CI draft Law,[105] but also concerning the *principles*,[106] the *persons collaborating with the SIS*,[107] or the *regime of control*,[108] the *power to second SIS staff to other offices*,[109] the *verification role of the SIS regarding candidates or holders of public offices*.[110] Such overlaps could possibly become even more prominent when considering also SIS activities included in the Law on special investigative activity and in the criminal procedure code, which are reportedly being revised in the parliament at the moment. In the comments submitted on 28 February 2023, the Moldovan authorities agree with adjustment of the texts of both draft laws and their correlation with other laws in force.

2. Unclear provisions

67. The meaning of several provisions appears difficult to understand, possibly also due to translation problems. That is the case for the following examples (italics added): "The *company* is informed of the work of the Service through the official page of the Service",[111] "which establishes, by means of a final declaratory act, the issuing/adoption by the latter of an administrative act, the conclusion, directly or through a third party, of a legal act, the taking or participation in the taking of a decision without resolving the actual conflict of interest in accordance with the provisions of the legislation regulating the conflict of interest",[112] "Law on counter-*information* and external *information* activities"[113] (possibly referring to *intelligence*), "*tracking or tracking*",[114] "[e]xtra-judicial examinations shall be *carried out and carried out* in accordance with the legislation in force",[115] "detecting, preventing and countering *external or external* risks and threats to national security, *mitigating or mitigating* their consequences should they materialise".[116]

V. Conclusion

68. The President of the Parliament of the Republic of Moldova has requested an opinion of the Venice Commission on the SIS draft Law as well as on the CI draft Law, with the aim of making

[101] Article 48(1) and (2) CI draft Law.
[102] Article 4 SIS draft Law.
[103] Article 7 SIS draft Law.
[104] Article 8 SIS draft Law.
[105] Articles 5, 7 and 13 CI draft Law.
[106] Article 2 CI draft Law and article 3 SIS draft Law.
[107] Article 6 CI draft Law and Chapter V SIS draft Law.
[108] Chapter VII SIS draft Law and Chapter VI CI draft Law.
[109] Article 7(3) CI draft Law and article 18(m) SIS draft Law.
[110] Article 13(8) CI draft Law and article 4(2)(k) SIS draft Law.
[111] Article 13(1) SIS draft Law.
[112] Article 17(3)(d) SIS draft Law.
[113] Article 5(2) SIS draft Law.
[114] Article 26(2) CI draft Law.
[115] Article 51(5) CI draft Law.
[116] Article 46(1) CI draft Law.

the SIS more efficient in preventing the threats to national security, democracy, and the freedom of citizens, in consideration of the new threats in the region. On 28 February 2023, the President of the Parliament of the Republic of Moldova submitted a note containing additional information and explanations on the revised draft laws, which are reported and taken into consideration in this text. The Venice Commission did not analyse the newly proposed modifications to the text but appreciates that the authorities are prepared to take various critical observations into account.

69. In light of the fact that the draft Laws appear to be at a very early stage of development, while other related pieces of legislation are being revised in the parliament, the Venice Commission stresses the need for the present draft Laws to be further developed and harmonised with the other related laws, in order to avoid possible overlaps or contradictions. The Commission also encourages the Moldovan authorities to pursue the public consultation with the relevant stakeholders, including, in particular, the National Centre for Personal Data Protection, the civil society and the private digital communications sector.

70. In the current security context of the Republic of Moldova, the Venice Commission warns that legislating on security services in times of emergency carries the risk of granting them excessively broad powers with little democratic oversight. Nevertheless, the Venice Commission acknowledges that the conferral of robust powers to the security and intelligence service, in the specific case of the Republic of Moldova and the extraordinary risks to state security, may be justified, within the limits of international human rights standards. Provided that such powers are clearly defined, the Commission recalls that, in light of article 8(2) ECHR, broader powers may be granted in emergency situations in pursuit of protecting national security, following the logic of proportionality between the danger and the interference with fundamental rights, and that derogations are permitted by article 15 ECHR, under the scrutiny of the Court. Specific legislative provisions may also allow for exceptional powers that can be granted to the security services in emergency situations.

71. On the basis of a preliminary analysis, which is not intended to be thorough nor exhaustive, the Venice Commission has identified the following list of problematic issues that should be taken into account when revising the current draft Laws:

a. Governance and powers of the SIS: the Venice Commission highlights that it is imperative that the role, functions, powers and duties of security agencies be clearly defined and delimited by the legislation setting them up, or by the Constitution.

   i. The SIS is granted very extensive – and undefined - powers, including an apparent enforcement role, without providing clear legal remedies or explanations concerning the legal consequences or sanctions. The SIS departmental legislative acts should not be empowered to regulate any aspects of the intelligence activities without a very detailed and exhaustive basis in the formal law. The unfettered power granted by article 12(1)(1) of the CI draft Law to the Director to directly approve without control a broad range of very intrusive measures, clearly impinging on fundamental rights, is contrary to the rule of law, one of the basic principles of a democratic society, and should be revised. The lack of clarity in the distinction between the activities carried out under the security mandate and those in the context of the criminal investigation is of particular concern. In addition, the electoral domain should also be covered, at least in connection with the issue of covert operations trying to influence the outcome of elections.

   ii. There is a risk of subordination of the SIS Director to the political power and the Venice Commission recalls its previous suggestion to provide for material safeguards for the appointment of the Director and its Deputy, on the basis of clear and apolitical criteria.

iii. The power of coordination of the President of the Republic and its relation to parliamentary scrutiny should be developed and defined in the law.

b. Accountability and control: the Venice Commission considers that the internal control exercised by the Director of the SIS should be limited and defined by clear and concise norms and that the regulations should only be allowed to be kept secret to the extent absolutely necessary. As concerns external control of the SIS activities:

i. Parliamentary control: the SIS should be obliged to provide all data on the number and types of measures carried out, and the Sub-Committee should be required to publish a yearly report on these statistical data. The Sub-Committee should also be able to issue a special report to draw public and parliamentary attention to activities which require an urgent response. The possibility to open parliamentary inquiries, which could result in judicial inquiries, when there are suspicions of serious irregularities should also be considered, subject to requirements of state security. In addition, the Commission recalls its previous recommendation to supplement or replace the "present system of parliamentary oversight with some form of independent expert oversight/complaints body".

ii. Control by the public prosecutors: the control carried out by the prosecutors should be relevant for criminal matters only. The SIS should not have an absolute power in granting the right to access to state secret to prosecutors in charge of controlling SIS activities. Information on the organisation, forms, tactics, methods and means of operation of the SIS should not be excluded from the prosecutorial control if it implies a criminal responsibility.

iii. Judicial control: for the measures submitted to judicial warrant, the provision foreseeing that a non-specialised judge is deciding alone, in a short delay, on extremely complex matters, should be revised. The measures foreseen under article 12(1)(1) of the CI draft Law should be automatically subjected to effective judicial review, except in duly justified cases established by law. In addition, the control of legality *ex post* foreseen in article 60 of the CI draft Law should be revised in order to become effective.

As a possible solution, and elaborating on one of its previous recommendations, the Venice Commission suggests considering the appointment of an external independent expert, having access to all secret information, and enabled to raise arguments on behalf of people that are unknowingly targeted by counterintelligence measures, as well as to refer to the judicial system in case she/he deems it appropriate.

c. As to the respect of fundamental rights and safeguards, the Commission recommends that:

i. supervisory control by a judge or an independent body be always provided, and it should come into play at least at one of the following stages: prior to the action (authorisation), during the action (continuous oversight), or after completion of the action (*ex post* control);

ii. as remarked in its previous opinion, the law must provide for the necessity, at some stage, to inform a person about special measures targeting him or her;

iii. when a measure is known to the targeted person, it should be possible to impugn the measure in front of a competent independent appeals authority;

iv. the new provision on official warning, which seems to have criminal legal consequences, should be duly correlated with procedural safeguards;

v. the provisions regarding the collection of information from providers of electronic communications and the assistance they are expected to provide to the SIS be revised in light of the requirements of necessity and proportionality in terms of respect of the right to property, private life and data protection, but also with respect to freedom of expression;

vi. specific exceptions to the implementation of intelligence measures must be foreseen for lawyers and journalists;

vii. as a rule, the legislation on data protection should apply also to counterintelligence activity, with narrowly defined exceptions.

d. Quality of the law: numerous provisions of the two draft Laws are vague, broadly worded and unclear; thus, they do not satisfy the foreseeability requirement. Main issues include:

i. Undefined notions opening the way to ambiguous interpretations and going as far as extending the SIS mandate beyond the notion of national security. The scope of the two draft Laws, especially when assessed together, turns out to be blurred, due to the overlaps between the two texts, the confusion between the long lists of duties, obligations and rights of SIS, as well as its functions / objectives and its measures / activities.

ii. Unclear provisions, whose meaning is difficult to detect, possibly due also to translation inaccuracies.

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