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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION ON THE LAW ON THE INFORMATION AND SECURITY SERVICE OF THE REPUBLIC OF MOLDOVA

On the basis of comments by

Mr Franz MATSCHER (member, Austria)

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I. Introduction

1. In a letter dated 21 November 2005 addressed to the Secretary General of the Council of Europe, the Speaker of the Parliament of Moldova, Mr Lupu, requested an expert opinion concerning, inter alia, Organic Law No. 177-XVI of 22 July 2005 amending the "Law on the Information and Security Service", No. 753-XVI of 23 December 1999 (CDL(2006)001rev). The Venice Commission was asked to prepare this opinion, and Mr Franz Matscher was appointed as rapporteur.

2. This opinion focuses on the amendments passed on 22 July 2005, which solely concern Article 7 ("The duties of the service") and Article 10 ("The rights of the service"). Nonetheless, since a study of these articles cannot disregard the more general context of the law, the opinion also addresses other matters linked, at least indirectly, to the duties and the rights of the security service and accordingly contains suggestions relating to other provisions of the law.

3. This opinion, drawn up on the basis of Mr Matscher's comments, was adopted by the Commission at its … plenary session (Venice, …2006).

II. General observations

4. The Commission has taken as its basis the English translation of the law, which may not accurately reflect the original version on all points. Some of the issues raised in this opinion may therefore find their cause in the quality of the translation rather than the substance of the provisions concerned.

5. The Commission has not received an explanatory report concerning the amendments passed on 22 July 2005.[1] A document of this kind would help clarify the intentions of the drafters and explain the links between the law and other relevant sector-specific laws (see, in this connection, the comments set out in paragraphs 10 and 12 below). The Commission recommends preparing such a document in future, if only to facilitate interpretation of the law, not least by judicial authorities and international bodies.

6. This opinion does not deal with the personal data protection issues raised by the law, which are addressed in detail in a separate opinion issued on 20 February 2006 by an independent expert commissioned by the Directorate General of Legal Affairs of the Council of Europe (PCRED/DGI/EXP(2006)1).

II. Legal basis, structure and integration of the service in Moldova's legal system

7. According to Article 2 of the law, the legal framework for the activities of the security service is established by the Constitution, the law on the information and security service of the Republic of Moldova,[2] other legislative acts, presidential decrees and Government decisions. Furthermore, the activities of the service, which were formerly performed by the Ministry of

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[1] *The Commission understands that Article 7 on the duties of the security service has been completely rewritten and that the amendments to Article 10 merely consisted in deleting a few phrases, the original wording of which is shown in strikethrough font in document CDL(2006)001rev.*

[2] *The law on the information and security service has Organic Law status.*

National Security,[3] shall be carried out in accordance with the international treaties to which Moldova is a party.

8. Such a legal framework is in principle consistent with the Commission's recommendations,[4] in particular in that the role, tasks and obligations of the security service are enshrined in a law passed by parliament, as are the restrictions on its activities and the main supervisory measures and accountability requirements to which it is subject. A solution of this kind enhances legitimacy and democratic control over these aspects, while offering greater guarantees in terms of stability and legal certainty.

9. Although the general legal framework applicable to the security service seems appropriate, it is regrettable that the exact significance of many provisions of the law on the information and security service can be difficult, if not impossible, to grasp on account of the many general references to other legislation, often without further precisions. Even if it is clear in certain cases that the matter in question is regulated by a special law,[5] uncertainty reigns in many others:[6] Is there just one or a number of other relevant laws ? Can this concern future laws, that is to say legislation which has not yet been passed? May a reference concern lower-ranking instruments such as presidential decrees or even ministerial circulars? Is reference simply being made to other provisions of the law on the information and security service ?

10. In view of the above, the Commission suggests that in future less use should be made of references of this type or, in any case, they should be far more precise, in that the titles of the other legislation, and even the relevant articles, should be mentioned. That would enhance both the clarity of the law and the legal certainty which is to be expected of an instrument governing the legal regime applicable to the security service.

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[3] *See Article 22, paragraph 1. In its report on internal security services in Europe, the Venice Commission already had occasion to point out that security services can be conceived "... as an autonomous body and a separate organ or as part of the Executive directly responsible to a Minister or appropriate committee. In any case, however, the internal security services must be made accountable for their actions within the provisions of the law that regulates them." (CDL-INF(1998)006, conclusion (b)).*

[4] *See the opinion adopted by the Commission on PACE Recommendation 1713(2005) (CDL-AD (2005)033, paragraphs 7-9) and the corresponding reply by the Committee of Ministers inviting the Commission to carry out a comparative study of the legislation on and the practice in respect of democratic oversight of national security in the Council of Europe member states and another study on the constitutional issues involved by the need to ensure civilian command authority over the armed forces in their national and international operations (CM/AS(2006)Rec1713 prov); see also the report on internal security services in Europe adopted by the Commission on 7 March 1998, which states inter alia "It would be preferable that the rules concerning security services be enshrined in the laws of Parliament or possibly even in the Constitution" (CDL-INF(1998)006, conclusion (d)).*

[5] *For instance, the many instances in which the law mentions "state secret" are doubtless references to the Law on State Secret, No.106-XIII of 17 May 1994, published in Official Gazette No. 2/5 of 25 August 1994. Since the present opinion relates to the law on the information and security service, it makes no comment on the way in which state secret is regulated by this other law.*

[6] *See, for example, Article 4, paragraph 3; Article 5, paragraph 1; Article 6 paragraphs 1, 2 and 3; Article 7, beginning of sub-paragraph a); Article 12, paragraph 6.*

III. Duties, rights and obligations of the information and security service

11. Article 7, which has been completely rewritten, sets out the duties of the information and security service.[7] The list is a particularly detailed one, since it includes four main duties, the first of which breaks down into a number of measures aimed at discovering, preventing and counteracting eleven activities which endanger state, public and individual security.

12. In these circumstances, it is difficult to see why there is a need to add that the eleven above-mentioned activities endanger state, public and individual security "according to the legislation". Indeed the list, as it appears in Article 7, seems exhaustive, and the reference to "the legislation", without further precisions, can but be a source of confusion.

13. Although the duties in question appear to be fairly traditional for a security service, it is unusual to supply such a detailed list, and other states' laws on the subject rarely follow this kind of approach. This degree of detail may indeed help restrict the security service's margin of appreciation when it comes to determining whether a new duty is covered by the law, but on condition that the measures and duties are described with sufficient clarity and precision. Conversely, this approach also entails a risk of stifling any future change in the security service's

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[7] *Article 7 "The duties of the service" provides:*

" The Service is attributed with the following duties:

a) development and realization, within the limits of its competence, of a system of measures directed at discovering, preventing and counteracting the following actions, which, according to the legislation, endanger the state, public and individual security:

- *actions directed at changing, through violence, the constitutional order, undermining or liquidating the sovereignty, independence and territorial integrity of the country. (These actions cannot be interpreted to the detriment of political pluralism, respect for constitutional rights and freedoms of persons);*
- *activities which contribute, directly or indirectly, to the deployment of military actions against the country or to the unleashing of a civil war;*
- *military actions or other violent actions which undermine the foundations of the state;*
- *actions aimed at overthrowing through violence the legally elected public authorities;*
- *actions that favour the emergence of exceptional situations in the transportation system, telecommunications, at economic entities or entities of vital importance;*
- *espionage, namely the transfer of information which constitutes state secret to other states, as well as the illegal acquirement or possession of information which constitutes state secret with for the purpose of transmitting it to foreign states or anti-constitutional structures;*
- *treason manifested through rendering of assistance to a foreign state in the deployment of hostile activities against the Republic of Moldova;*
- *actions which infringe upon the constitutional rights and freedoms of citizens and endanger the security of the state;*
- *preparation and commission of assaults on the life, health and inviolability of high ranking official persons of the country, state dignitaries and public life figures from other states present in the Republic of Moldova;*
- *misappropriation of armaments, ammunition, combat equipment, explosives, radioactive, poisonous, narcotic, toxic and other substances, smuggling of such substances, their illegal production, use, transportation and storing, if such actions endanger the interests of ensuring state security;*
- *setting up illegal organizations or groups that endanger the security of the state or participation in the activities thereof;*

b) protection of the state secret, exercise of control over the protection and prevention of leakage of information which constitutes state secret and other information of importance for the state;

c) establishment, ensuring the functioning and security of governmental telecommunications systems, development of strategies and realization of national policy in the field of development, management and ensuring the functioning and security of special telecommunications systems;

d) undertaking activities aimed at combating terrorism and the financing and material assistance of terrorist acts."

duties, except by amendment of the law. The point is that, in this field, the emergence of new threats to state security, not expressly foreseen when the law was drafted, is quite possible. All things considered, it accordingly seems that the use of more general terminology covering the principal measures and activities concerned by Article 7 would have been preferable.

14. If the preferred approach continues to be that of a very detailed list of the security service's duties, consideration should be given to improving the wording of certain descriptions of duties, which are lacking in precision, unclear or allow the security service excessively broad powers.

15. For instance, although it is justifiable to provide that the security service may be called upon to counteract hostile action aimed at causing serious disruption to vital sectors of the private economy, the fifth sub-paragraph of Article 7 a) of the law appears to be couched in too broad terms since it covers all private economic sectors without distinction. Article 11, paragraph 1 of the European Convention on Human Rights, which includes trade union freedom as a specific aspect of freedom of association, indeed guarantees the freedom of trade unions to protect the occupational interests of their members, and the ability to strike represents one of the most important means of action in this respect.[8] Although more extensive restrictions of trade union freedom and the right to strike may be laid down in respect of certain essential services such as the energy supply sector - particularly gas and oil production - an outright ban on strike action or even compulsory arbitration with a view to ending lawful strike action in such services cannot in any circumstance be considered to amount to an interference corresponding to a pressing social need and proportionate to the legitimate aim pursued.[9] Consequently, employees of transport, telecommunications or other private enterprises of vital importance must in principle also be able to assert their rights deriving from trade union freedom, including the right to strike, at least to a certain extent. This principle is all the more valid in the case of employees of private enterprises devoid of vital importance. The law on the information and security service of the Republic of Moldova therefore cannot drain these rights of their substance by permitting the security service to impose virtually discretionary restrictions on their exercise, which the fifth sub-paragraph of Article 7 a) does not seem to exclude.

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[8] *See the European Court of Human Rights' judgment of 6 February 1976 in the case of Schmidt and Dahlström v. Sweden, Series A No. 21, pp. 15 and 16, paragraphs 34-36.*

[9] *See the inadmissibility decision taken on 27 June 2002 by the Third Section of the Court in the case of the Federation of Offshore Workers' Trade Unions and Others v. Norway, no. 38190/97, C, 2. See also the conclusions of the European Committee of Social Rights of 30 September 2004 (Conclusions 2004-1 on Article 6, paragraph 4 of the Revised Social Charter, p. 44) concerning the prohibition of strikes in the energy, telecommunications and health sectors under Bulgarian law: "The Committee recalls that the partial or total withdrawal of the right to strike in the case of services that are essential to the community is in conformity with Article 6§4 of the Revised Charter so long as it satisfies the requirements of Article G, which authorises restrictions on the right to strike that are prescribed by law, serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals (see Conclusions I, p. 40). In this case the Committee considers that prohibiting strikes in these sectors is prescribed by law. Such a restriction could also be deemed to serve a legitimate purpose since strikes in these sectors, which are essential to the community, could pose a threat to public order, national security and/or public health. However simply banning strikes, even in essential sectors, cannot be considered proportionate to the specific requirements of each of them and therefore necessary in a democratic society. The most that might be considered in conformity with Article 6§4 of the Revised Charter would be the introduction of a minimum service requirement in these sectors".*

16. At the same time, the possibility for the service to take measures to counteract activities which infringe citizens' constitutional rights and freedoms and endanger state security[10] appears too general in nature and should be either clarified or purely and simply withdrawn if the activities in question are already covered by other provisions of Article 7 a) of the law.

17. It is acceptable that the security service should be able to take action to combat misappropriation, smuggling, illegal production, use, transportation and storage of the objects and substances mentioned in the tenth sub-paragraph of Article 7 a) of the law, as those activities can unquestionably pose a danger for state security.[11] However, the reference in the same provision to "other substances", without any further qualification, seems too imprecise since it could encourage the security service to seek to combat trafficking in numerous substances which do not justify its involvement, engendering a risk of interference in the action of the police and prosecution services.

18. At a more general level, it should be pointed out that the activities of the security service, as ensuing from the duties assigned to it under Article 7 of the law, will almost inevitably result in certain infringements of human rights and fundamental freedoms. The state is of course entitled to pass legislation restricting these rights and freedoms, notably the freedoms enshrined in Articles 8 and 10 of the European Convention on Human Rights, in the interests of national security.[12] It must be recalled that it nonetheless does not enjoy an unlimited discretion to subject persons within its jurisdiction to secret surveillance, as, where adequate and effective guarantees against abuse are lacking, a secret surveillance system designed to safeguard national security poses a risk of undermining or even destroying democracy on the ground of defending it and the state may not, in the name of the struggle against espionage and terrorism, adopt whatever measures it deems appropriate.[13] It is accordingly particularly important to read Article 7 of the law in correlation with Article 4, which appropriately points out that the security service's operations must ensure observance of human rights and fundamental freedoms (see, in this connection, the comments set out in paragraph 24 below).

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[10] *See the eighth sub-paragraph of Article 7 a) of the law. The reference to "state security" in this connection seems unnecessarily repetitive since mention is already made of state security in the introductory sentence of Article 7 a).*

[11] *The reference to "state security" in the tenth sub-paragraph of Article 7 a) is again repetitive since mention is already made of state security in the introductory sentence of Article 7 a).*

[12] *In its Klass and Others v. Germany judgment of 18 November 1978 (Series A no. 78, p. 23, § 48), which concerned a law permitting restrictions on the secrecy of correspondence, post and telecommunications, the Court laid down the following principles regarding anti-terrorism measures: "... Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime." See also the Erdem v. Germany judgment of 5 July 2001, application no. 38321/97, paragraphs 61-70, ECHR 2001-VII (extracts).*

[13] *See the Leander v. Sweden judgment of 26 March 1987 (Series A no. 116, p. 22, paragraph 60) and the Klass and Others v. Germany judgment of 18 November 1978 (Series A no. 78, p. 23-24, paragraphs 49 and 50).*

19. The obligations and rights of the security service are stipulated in Articles 9 and 10 of the law. As with its duties, particularly detailed lists are given, which may make it difficult to apply the law to new situations, unless these provisions are amended by adding to them as and when the need arises.

20. Regarding the security service's rights, the amendments of 22 July 2005 resulted in two changes to Article 10, both of which would seem to imply that the security service has been deprived of its formerly recognised powers to initiate criminal investigations and bring prosecutions concerning certain offences. The service's entitlement to have at its disposal a provisional detention facility has also been withdrawn. These changes can be regarded as steps in the right direction on condition that the powers in question are transferred to the prosecution service and the criminal courts, with the result that the general guarantees afforded by criminal procedure apply in the situations under consideration. However, the Commission is not in a position to issue a more detailed opinion on this matter, since no corresponding reform of the Criminal Code has been referred to it. In addition, it notes that the security service has not been deprived of all of its criminal-law powers, since Article 8, paragraph 1 c) of the law seems to assign it responsibility for conducting certain criminal investigations.

IV. Control and supervision of the activities of the information and security service

21. According to Article 20 of the law, control and supervision of the security service's activities is to be exercised by Parliament, the General Prosecutor's Office and the courts, taking account of their respective spheres of competence. In addition, the security service is required to submit reports on its activities to Parliament, the President and the Government. Lastly, the security service's financial activity is subject to the control of the Chamber of Accounts.

22. The control established under Article 20 of the law and other relevant provisions in principle corresponds to the Commission's recommendations,[14] in particular since provision is made for external supervision involving the executive, legislative and judicial branches.

23. Special mention must be made of parliamentary supervision, as provided for in the law. A Special Commission for the Control of the Security Service has been set up, which is composed of representatives of all political parties present in Parliament and which enjoys wide-ranging powers, laid down in an Appendix to the Law on the Information and Security Service. The Venice Commission understands that this special commission was effectively established in December 2005 as a sub-commission of the Commission for National Security, Defence and Public Order. This recent development seems to be consistent with a reinforcement of Parliament's role in such matters, which constitutes a positive trend.[15]

V. Protection of individuals' rights and the service's liability

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[14] *See the Commission's report on internal security services in Europe (CDL-INF(1998)006, conclusion (h)).*

[15] *See, in this respect, the opinion adopted by the Commission on Recommendation 1713(2005) of the Parliamentary Assembly of the Council of Europe, which points out that the need to increase the efficiency of internal security services must go hand in hand with "... parallel strengthening of democratic intelligence oversight [which] should also be seen as necessary and a priority." (CDL-AD(2005)033, paragraph 9).*

24. Article 4 of the law requires the security service to respect human rights and fundamental freedoms in the performance of its activities. The Commission would point out that, where they impose restrictions on duly recognised rights, the contracting states indeed enjoy a certain margin of appreciation, but the latter is not unlimited. It is the European Court of Human Rights which ultimately decides whether a restriction is compatible with the European Convention. To be deemed compatible, an interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued (see, in this connection, the comments set out in paragraph 18 above).

25. The way in which Article 7 combined with Article 4 is going to be applied in practice will accordingly be decisive when it comes to determining whether there is full compliance with the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights by the security service, the various supervisory bodies and the authorities affording remedies and means of redress. In this context, it is to be welcomed that Article 4 is supplemented with important guarantees for citizens who consider that their rights have been infringed by the service, as regards their entitlement to appeal to a higher body within the service, the public prosecution service and the ordinary courts. Similarly, the principle of the service's liability and its obligation to compensate damage caused by illegal action taken by its staff are explicitly enshrined in the same article. These guarantees, which are in keeping with the Venice Commission's recommendations, justify a globally positive assessment.[16]

VI. CONCLUSIONS

26. As amended in July 2005, the law complies overall with the international standards applicable in this field and is consistent, in many respects, with the Venice Commission's earlier conclusions and recommendations on the subject.

27. The excessively detailed list of duties, rights and obligations of the security service, resulting *inter alia* from the amendments passed in July 2005, nonetheless poses certain problems linked to both a lack of clarity and precision in the wording of certain duties and the rigidity it engenders regarding the law's adaptation to new situations. In addition, the connections between the law on the information and security service and other relevant legislation should be clarified so as to enhance legal certainty.

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[16] *See the Commission's report on internal security services in Europe (CDL-INF(1998)006, conclusions (i) and (m)).*