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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

JOINT OPINION

**OF THE VENICE COMMISSION,
THE DIRECTORATE OF INFORMATION SOCIETY AND ACTION
AGAINST CRIME**

AND

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

ON

**THE DRAFT LAW N° 281
AMENDING AND COMPLETING
MOLDOVAN LEGISLATION
ON THE SO-CALLED “MANDATE OF SECURITY”**

**Adopted by the Commission
at its 110th Plenary Session
(Venice, 10-11 March 2017)**

On the basis of comments by

**Mr Iain CAMERON (Member, Sweden)
Mr Jørgen Steen SØRENSEN (Member, Denmark)
Mr Ben VERMEULEN (Member, the Netherlands)
Mr Ian LEIGH (Expert DHR,
Human Rights National Implementation Division, United Kingdom)
Ms Sophie STALLA BOURDILLON (Expert DHR,
Media Co-operation Unit, United Kingdom)**

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I. Introduction

1. By a letter dated 30 June 2016, the authorities of the Republic of Moldova requested the opinion of the Venice Commission on draft law N° 281 amending and supplementing certain legislative acts in relation to the so-called “mandate of security” (CDL-REF(2016)058), hereinafter “the draft law”. The Commission was subsequently informed that several closely related draft laws are also pending in the Moldovan Parliament.
2. Mr I. Cameron, Mr B. Vermeulen and Mr J.S. Sørensen acted as rapporteurs on behalf of the Venice Commission.
3. Mr I. Leigh and Ms S. Stalla Bourdillon analysed the draft amendments on behalf of the Directorate General of Human Rights and Rule of Law (“the Directorate”).
4. On 2-3 November 2016, a joint delegation visited the Republic of Moldova and held meetings with representatives of the authorities (Government, Parliament, the Prosecutor General’s Office, the Moldovan Intelligence and Security Service), as well as with representatives of the civil society and of international organizations present in the Republic of Moldova. The delegation is grateful to the Moldovan authorities and to other stakeholders met for the excellent co-operation during the visit.
5. The present joint opinion of the Venice Commission and the Directorate, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2016).

II. Preliminary remarks

A. Background

6. The draft law (Draft law n° 281 of 9 July 2014) is aimed at amending the following laws:
 - Law n° 837-XIII of 17 May 1996 on Public Associations (republished in 2007) with further amendments;
 - Law no. 753-XIV of 23 December 1999 on the Security and Intelligence Service (hereinafter “ the law on the Service”), as subsequently amended and completed,;
 - Criminal Code no. 985-XV of 18 April 2002, as subsequently amended and completed;
 - Law n° 54-XV of 21 February 2003 on Counteracting Extremist Activity (hereinafter “the law on extremism”)
 - Code of Criminal Procedure no. 122-XV of 14 March 2003, as subsequently amended and completed (hereinafter “CCP”);
 - Law n° 59 of 29 March 2012 on the special investigation activity, as subsequently amended.
7. The draft law was prepared by the experts of the Ministry of Justice as part of the efforts made by the Moldovan authorities to improve the national legal framework for the protection of the “state security”, as well as to combat extremism. Subsequently, it was registered as a legislative initiative by a number of members of the Moldovan parliament and, in July 2014, discussed in first reading by the Moldovan parliament.
8. The Council of Europe and the Venice Commission had carried out previous relevant expert assessments, in 2016, 2008 and 2014.¹

¹ In 2006, the Council of Europe issued a Review of the 1994 Law on Operative Investigations, in the meantime replaced by the 2012 Law on Special Investigative Activity. The personal data protection issues raised by the Law on the Service were addressed in a separate Opinion issued on 20 February 2006 by an independent expert

9. In 2014, the Venice Commission adopted an Opinion on the draft law on amending and supplementing certain legislative acts, promoted by the intelligence and security service of the Republic of Moldova, jointly prepared with the Directorate General of Human Rights (DHR) and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe,² (hereinafter the 2014 Opinion). The draft law aimed at establishing a procedure for granting the Service authority to carry out special investigative activities outside criminal law (so-called “security mandate”) under the supervision of a judge. The background for the preparation of this draft law was the judgment of the European Court of Human Rights (ECtHR) in the case of *Iordachi and Others v. Moldova* of 14 September 2009³, in which the Court found that “...the system of secret surveillance in Moldova is, to say the least, overused, which may in part be due to the inadequacy of the safeguards contained in the law”. More specifically the Court found that the Moldovan law did not provide adequate protection against abuse of power by the State in the field of interception of telephone communications and that the interference with the applicants’ rights under Article 8 was not “in accordance with the law”.

10. The 2014 Opinion concluded *inter alia* that, while it might be legitimate for the Moldovan authorities to wish to establish such a “security mandate”, certain matters deserved further consideration, including: the thresholds for initiating security investigations; the relationship between such investigations and evidence gathering in criminal cases; the provision of a four-hour timeframe for deciding requests for security mandates; and the effects of security measures not only on the targets of these measures but also on third parties.

11. The current draft law, which reconfirms the intention of the Moldovan authorities to introduce the “security mandate” mechanism, may be seen as a follow-up to the assessment of the draft law examined in the context of the 2014 Opinion. In addition, the Draft law introduces several new, extremism-related, offences into the Moldovan Criminal Code, as well as a number of amendments to the current Law on extremism, aiming at strengthening and elaborating further the Moldovan legal framework for preventing and fighting extremism.

12. That being so, the legislative situation pertaining to the draft law n° 281 and the subject matter to be regulated by it appears to be more complex. During its visit to Chisinau in November 2016 the delegation of the Venice Commission was informed that there were further pending drafts which closely affect the same general areas covered by draft law n° 281. This includes in particular: *Draft law n° 389 of 15.10.2015 on counterintelligence and external intelligence activity*, *Draft law n° 390 of 15.10.2015 amending and completing law n°.170-XVI of 19.07.2007 on the statute of the information and security officer*, and *Draft law n° 391 of 15.10.2015 on the National Intelligence Service of the Republic of Moldova*. Originally prepared by the Service, these drafts had been registered with the Parliament in October 2015 by a member of the Moldovan Parliament.

13. The Commission welcomes the Moldovan authorities’ commitment to duly take into account the recommendations contained in the present Opinion in the forthcoming steps in the examination of both draft law n° 281, and the other related drafts. It seems moreover, that the concerned legislative process has been suspended pending the adoption of this Opinion.

14. Just as importantly, a significant change has recently taken place in the organisational context of the Service. On 23 December 2016, several amendments to the Law on the

commissioned by the Directorate General of Legal Affairs of the Council of Europe. In 2008, the Venice Commission gave an Opinion on the Law on State Secret of the Republic of Moldova (see CDL-AD(2008)008, Opinion on the Law on State Secret of the Republic of Moldova, Venice, 14-15 March 2008).

²CDL-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, promoted by the intelligence and security service of the Republic of Moldova*, 21-22 March 2014

³ *Iordachi and Others v. Moldova*, Application no. 25198/02, judgment of 14 September 2009, para 52

Service were adopted; as a result, while the Service continues to be under the control of the Parliament, its activity is no longer coordinated by the President of the country (amendment to article 1.2 of the Law on SIS). Furthermore, if under the previous text the Director of the Service was appointed by the Parliament on the proposal of the President, henceforth he/she will have to be appointed (by Parliament) on a proposal from at least 10 deputies, and subject to the opinion of the Parliament's Committee for security, defence and public order. These changes may contribute to the Service's democratic legitimacy

15. The purpose of the present Opinion is not to address in an exhaustive and detailed manner all provisions of the draft law n° 281, but to raise the main issues which, in the view of the Commission and the Directorate, would require further consideration. The Opinion will therefore concentrate on the issues of principle. That being said, the formulation of some of the proposed amendments may raise concern in the light of human rights standards - both in relation to key aspects of the security mandate system and in respect of proposed new criminal "extremism" offences – and therefore calls for specific comments. However, in view of the complexity and sensitivity of the matters regulated by the draft law, and taking into account that the assessment is based on the translated provisions, some of the issues raised may find their cause in the translation or in the insufficiently clear, and sometimes difficult to apprehend, relations between the relevant components of the Moldovan legislation and draft legislation.

16. It is important to point out, in this connection, that a number of comments, of a more general nature, will address issues going beyond the actual text of draft law n° 281. These include observations regarding the peculiarities of the Moldovan legal framework for the use of special investigation methods, the powers and the operation system of the intelligence agency, as well as regarding issues raised by the inter-relations between the different legal acts or pending drafts.

17. It is up to the Moldovan authorities to decide on the forthcoming steps in the legislative procedure in respect of the different pending drafts. Regardless of their choice, the substance of the observations and recommendations contained in the present opinion, as well as those contained in the 2014 opinion on the issue of the "security mandate", remains applicable.

B. Standards

18. The draft law has been considered in the light of applicable European norms and principles, notably the European Convention on Human Rights (ECHR) and related case-law, taking into account the particular relevance of Articles 8, 10, 11 and 13 ECHR, the Parliamentary Assembly's Recommendation 1933 (2010) "Fight against extremism: achievements, deficiencies and failures", as well as the recommendations contained in the 2014 Opinion, and prior relevant work of the Venice Commission. This includes the Venice Commission Reports on the Democratic Oversight of Signals Intelligence Agencies,⁴ the Report on the Democratic Oversight of the Security Services,⁵ as well as the opinions it recently adopted in respect of Poland⁶ and Turkey⁷ on related matters, the 2012 Opinion on the Russian

⁴ CDL-AD(2015)011, *Report on the Democratic Oversight of Signals Intelligence Agencies*, 20-21 March 2015)

⁵ CDL-AD(2015)010, *Report on the Democratic Oversight of the Security Services* adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) and updated by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015)

⁶ CDL-AD(2016)012, *Poland - Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts*

⁷ CDL-AD(2016)011, *Turkey, Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law")*

law on extremism,⁸ and the joint opinion adopted in December 2016 on the Moldovan legal framework for combating cybercrime⁹.

III. Analysis

A. Security mandate and security oversight

1. General remarks

Necessity of the “security mandate” as a special investigative tool

19. The Commission acknowledges the complex security context prevailing in the region, which deeply affects the Republic of Moldova and justifies the Moldovan authorities’ serious concerns over potential threats to the state’s security, and in particular its territorial integrity.

20. Notwithstanding these legitimate concerns, a fundamental question is raised by the draft law, namely: to what extent new tools (criminal offences and investigative powers) are necessary when existing statutes, such as the law on investigative activity or the law on extremism, have been supposedly specifically designed to give the police and the security agency the necessary investigative tools. Is there a need for a new system of investigation based on covert measures, parallel to that envisaged by the ordinary criminal procedure? If so, how is one to balance these new tools, with appropriate safeguards?

21. The proposed new “security mandate” (i.e. an authorisation to use special investigative means, surveillance etc.) is to be initiated by the Service, motivated by a prosecutor and issued by a judge. However, there is no necessary connection between this mandate and a specific criminal offence or even “criminal activity”. Instead, the security mandate would be issued in order to enable the Service to carry out special investigative measures, outside of criminal proceedings, “to collect information on possible events and/or actions that may jeopardize the state security [...]”, (see new Article 7¹(1)). Furthermore, quite a large circle of people, identified or unidentified, can be subject to such an operation (see specific comments below).

22. In a democratic state governed by the rule of law, the onus of proof must be on those arguing that the ordinary law on criminal procedure is inadequate in some way(s) to protect the security of the state.

23. One argument which might be made is that the substantive criminal offences, even together with inchoate offences (attempt etc.) do not cover all conduct dangerous to the state. The proposed changes to the criminal code, incorporating new offences and reformulating existing offences relating to extremist activity, indicate that for the Moldovan legislator, criminal provisions concerning some new offences are necessary. Another argument which might be made for a parallel system of security mandates is that the threshold for investigation of criminal offences, even taking into account the fact that inchoate offences can begin much earlier, is set too high and so hinders the effectiveness of the security agencies. The proposed draft law is advancing both arguments simultaneously.

24. A security agency often has the mandate to prevent threats to the security of the state, e.g. terrorist attacks. As such, a security agency is inevitably drawn to investigate what can

⁸ CDL-AD(2012)016, *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)*

⁹CDL-AD(2016)039, Republic of Moldova, *Joint Opinion of the Venice Commission and of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law N°161 amending and completing Moldovan Legislation in the field of Cybercrime*

be called “pre-crime”. However, in a rule of law based democracy, the criminal law serves the purpose not simply of protecting society, but also of imposing fundamental limits on the coercive power of the state. Offences have to be formulated clearly and narrowly, setting out, in objective and general terms, the prohibited conduct. The prohibited conduct should thus be - reasonably - foreseeable. Nor is it sufficient, in a democratic state governed by the rule of law, that law enforcement or security bodies honestly believe that a particular person is engaged in prohibited conduct. Factual indications have to exist before an investigation into an offence, or at least, criminal activity, can be initiated. These factual indications, together with other information, must reach a certain standard, reasonable suspicion, which must be tested by a court before a covert measure infringing human rights can be ordered.

25. How can this be squared with the need, at least on occasion, for a security agency, to try to find out people’s intentions? Of course, the security agency should be able to collect and analyse intelligence regarding societally dangerous phenomena from *open sources* relatively freely¹⁰. However, when it wishes to go beyond this and store intelligence on individuals, or to initiate an investigation against an individual using a coercive measure infringing upon an individual’s human rights (surveillance etc), in accordance with the settled practice of the ECtHR,¹¹ much more stringent standards need to be met.

Security agencies systems

26. As the Commission has explained in its *Report on democratic oversight of internal security services*¹², some states have purely civilian security agencies, which can gather intelligence using coercive measures, subject to judicial pre-control and parliamentary or expert oversight. The danger in such a system is that there is no need for a link between the conduct investigated and security offences. This danger can be addressed, not simply by tight judicial pre-control and tight *post hoc* oversight, but also by having a relatively small security agency (in comparison to the police), with a relatively narrow mandate and no competence, or powers, to directly investigate crime. When and if a security offence is discovered in the course of such investigations, control over the investigation is to be transferred to the police and the prosecutors, who then gather evidence of the offence and decide whether or not to prosecute.

27. Other states, instead, organize their internal security function in the form of a security police, investigating security offences, subject to the control of prosecutors and, where coercive measures infringing human rights are necessary, of courts. Intelligence gathered during the course of security police investigations, being under the continuous supervision of prosecutors, will usually later be admissible as evidence in subsequent trials. Such a system requires prosecutors who are experts in security crime, have the resources to control effectively security police investigations and possess strong independence and integrity. However, judicial control is often stronger in such a system because the judge is assessing, in accordance with ordinary standards of criminal procedure, whether there exists factual indications, and reasonable suspicion, that a specific offence has been committed.¹³

¹⁰ In this connection, it is important to note that, according to the ECtHR case law, the notion of private life is to be understood broadly and comprises “*even those parts of the information that [are] public*”. See *Segerstedt-Wiberg and Others v Sweden*, Application no. 62332/00, Judgment of 6 Jun 2006, where the fact that “the information had been systematically collected and stored in files held by the authorities”, amounted to an interference (para 72).

See also *Rotaru v. Romania [GC]*, no. 28341/95, ECHR 2000-V: “public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person’s distant past” (para 43).

¹¹ CDL-AD(2015)010, *Report on the Democratic Oversight of the Security Services* adopted by the Venice Commission in June 2007 and updated in 2015

¹² See CDL-AD(2015)010, paras 95-101

¹³ See *Dumitru Popescu v. Romania (no. 2)* (application ns71525/01), Judgment of 27 April 2007, paras 70-86.

28. Satisfactory control and oversight systems can be devised for either basic type of system. What is problematic is where the two systems are combined. This can lead to a low threshold of initiation of intelligence operations and an extensive use of coercive measures. Moreover, combining the two systems can lead to an automatic admissibility of all intelligence gathered as evidence in criminal procedures.

The Moldovan proposal

29. The present Moldovan proposal, as laid down in Art. II of draft law n° 281, introducing two new provisions to the Law on the Service - article 7¹ regulating the "security mandate", and article 7² dealing with the notification of the person targeted by "security mandate" - combines the two types of system, and can therefore be problematic.

30. According to the information received by the Commission, the Public Prosecution Service has created a specialist prosecutorial chamber/department. This is, or will presumably become, expert in security crime. The Commission has, however, previously expressed concerns, in respect of the Republic of Moldova, regarding the independence of the prosecutor from the executive and the institutional framework for maintaining the necessary high level of prosecutorial integrity.¹⁴ A degree of specialization is also provided for in that a specific court, the Chisinau Court of Appeal, is given the task of approving the measure.

31. There are advantages and disadvantages to such a specialisation¹⁵. However, the main problem is the test that the court will have to apply in order to authorise the mandate and the grounds to be taken into account by the court in this context (see the specific remarks below). As the Venice Commission has noted before, where the authorization process is not very strict, the follow-up oversight must be particularly strong.¹⁶

32. Bearing in mind the exceptional powers exercised in Moldova by the Service and existing division and controversies within Moldovan society on the sensitive matter of the country's security policy, the need for some form of guarantee that the Service is not being used against political opponents is important. One important method of ensuring that the Service is not used for political policing is to establish a procedure for parliamentary approval - some sort of super-majority, albeit not unanimity, as this would give parliamentary minorities a veto power - of the appointment of the Service Director.¹⁷ As regards this point, the December 2016 amendment to the Law on the Service is a step in the right direction.

33. However, while achieving consensus over the appointment of the Director is important, some mechanism of continuous independent oversight is also necessary. One way of doing this is to establish a parliamentary oversight body. During its November 2016 visit to Chisinau, the Commission was informed of plans, in the past, to create a sub-committee, under the parliamentary committee on national security, to oversee the Service; regretfully, so far, that sub-committee had not been established. A parliamentary oversight body, depending on how representative it is, its powers, resources and commitment to its task as well as on how good its access is to the necessary secret information,¹⁸ may indeed serve to reassure the political *élite* that political spying is not going on. However, if politicians are lacking in legitimacy in the eyes of the public, a purely political oversight body will probably not be sufficient to reassure the public. Moreover, where the Service is, constitutionally, under the parliament, then whatever body the parliament would establish would not be exercising "independent oversight", but rather "control".

¹⁴ See CDL-AD(2015)005, *Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova*; CDL-AD(2008)019 *Opinion on the Draft Law on the Public Prosecutor's Service of Moldova*

¹⁵ See CDL-AD(2015)010, *Report on democratic oversight of internal security services*, paras 221-224)

¹⁶ See CDL-AD(2015)010, *Report on democratic oversight of internal security services*, paras 4-5

¹⁷ See 2014 Opinion, para 45

¹⁸ See CDL-AD(2015)010, *Report on democratic oversight of internal security services*, paras 158-177

34. An alternative may be to establish a security-screened expert body possibly with political representation on it, and/or with respected members of civil society.¹⁹ Moldova has not followed the earlier Commission recommendation on creating such a follow-up expert monitoring body. However, even if such a body is created, it is doubtful whether it could compensate for the dangers posed to human rights when the threshold for authorisation is low, and combined with the admissibility, as evidence, of all intelligence gathered, even if this is made subject to conditions (namely those set out in Criminal Procedure Law, Articles 2 and 93).²⁰ The Venice Commission and the Directorate therefore consider that, even if strong *post-hoc* oversight could be put in place, this would not be able to compensate for an authorization process if this, in practice, would rely on the expertise, professionalism and integrity of the Service itself and the same qualities of the specialist prosecutor.

2. Specific remarks

35. As a preliminary observation, one may note that, although the authority under a security mandate is still far-reaching, the aim of the draft law seems to be, at least in some ways, to accommodate the recommendations contained in the 2014 Opinion. These improvements are to be welcomed. However, a number of problems remain.

36. In new Art. 7¹(1) of the Law on the Service, a security mandate is defined by reference to Art. 18, para (1) (1) of the current Law on special investigation activity. This means that a mandate authorizes the use of the most extensive means of surveillance, including search of homes, installation of appliances on audio and video supervision and recording, retention and search of post, GPS locating and perusing, etc. A corresponding amendment (a new para 3¹) is introduced to Art. 18 of the Law on special investigation activity, enabling the Service to carry out special investigation measures outside of criminal proceedings. The measures in question, while aimed at responding to a legitimate national security aim,²¹ obviously imply serious interferences with a number of ECHR rights, especially Article 8 and, in view of their chilling effect, Articles 9, 10 and 11, and/or because of the risk of discriminatory application, problematic in the light of Article 14. Their intrusive nature is indicated by the fact that, as opposed to other measures permitted under Art. 18, they can only be authorized by a judge (investigating judge), at the request of the prosecutor.

37. In the 2014 Opinion, the Venice Commission deemed it “understandable” that Moldova “wishes to provide for a mechanism for security investigations outside the framework of a criminal investigation” (para 25). At the same time, the Commission pointed to the fact that introducing the security mandate carries the risk of undermining existing safeguards applicable to the investigation of criminal offences, creating the risk that the weaker safeguards which accompany security investigations may be used to circumvent stronger safeguards for normal criminal investigations (para 26). Another, related, issue was whether, and if so, subject to what

¹⁹ See recommendation in 2014 Opinion, para 81

²⁰ “Article 2. Criminal Procedural Law. [...] (4) Legal norms of a procedural nature contained in other national laws may be applied only if they are included in this Code. (5) In the course of criminal proceedings, laws and other regulations that cancel or limit human rights and freedoms, that violate the independence of justice or the principle of the adversarial nature of criminal proceedings or that contradict unanimously recognized norms of international law or the provisions of the international treaties to which the Republic of Moldova is a party shall not have legal force.”

“Article 93. Evidence.[...] (2) In a criminal proceeding, the following actual data established through the following means shall be admitted in evidence: 1) the testimonies of the suspect/accused/defendant, injured party, civil party, civilly liable party, witnesses; 2) an expert’s report; 3) material evidence; 4) transcripts of the criminal investigation or of judicial inquiry; 5) documents (including official ones); 6) audio and video recordings and pictures; 7) technical and scientific and medical and forensic reports.

(3) The actual data may be used in a criminal proceeding as evidence if they were obtained by the criminal investigative body or any other party in the proceeding in line with the provisions of this Code.

(4) The actual data obtained through operative investigative activities may be admitted in evidence only if they are managed and verified through the means specified in para. (2), in line with the provisions of procedural law observing the rights and liberties of the person or limiting certain rights and liberties upon authorization by the court. ”

²¹ Such security mandate appears relevant in relation to “possible events and/or actions that may jeopardize the state security.”

safeguards, material gathered by means of security investigations can be incorporated into criminal prosecutions.

Conditions for court authorization of a security mandate

38. As indicated in new Art. 7¹(8)(a), the key condition for the issuing of a mandate is that there is “*a person, both identified and unidentified, on whom information exists that he/she is preparing, is undertaking attempts to commit or has committed*” certain actions listed under Article 7 of the Law on the Service and under the Law on state security (Law n° 618-XIII of 31 October 1995).

39. The categories of persons concerned by special investigation based on a security mandate are defined very loosely. These include (Art. 7¹(8)):

“a) a person, both identified and unidentified, on whom information exists that he/she is preparing, is undertaking attempts to commit or has committed one or more deeds indicated in Art. 7 letter a) or d) of this law or in Art. 4 para (2) of the Law on state security no. 618-XIII of 31 October 1995;

b) a person, both identified and unidentified, on whom information exists that he/she is receiving or is sending information or goods from/to persons mentioned under letter a) of this paragraph or are intended for these persons;

c) a person, both identified and unidentified, other than those mentioned under letter a) and letter b) of this paragraph, if there is information that the communication devices, the domicile or the goods of this person are used by persons mentioned under letter a) and/or letter b) of this paragraph for the purposes mentioned under letter a);

d) a person, both identified and unidentified, other than those mentioned under letters a)–c) of this paragraph, if his/her monitoring may lead to the disclosure of the location of persons referred to under letter a) and/or letter b) of this paragraph or of their full identity.”

40. The key seems to lie in the notion “on whom information exists”, used in paras (a)–(c), which would seem to imply, although there is a need to produce factual circumstances in support of the issuing of a security mandate (new Art. 7¹ para (6)(d)), a much lower threshold is applicable than the standard under ordinary criminal procedure measures. This assumption is confirmed by the very broad provision in new Art. 7¹(8) para (d), under which a security mandate may be ordered in respect of a person based on the mere assumption that his/her monitoring “may lead to disclosure...”; this would actually mean that such monitoring could be allowed in respect individuals having no information on or no link whatsoever with the commission of an action “likely to jeopardize the state security”. It should be recalled that, as emphasized in the 2014 Opinion (para 31), it is crucial that “*internal procedures are put in place to require concrete factual information relating to planning or committing activity threatening national security or endangering public safety before the Service can even start collecting intelligence on individuals. Stronger concrete indications should be required before the Service can start using special investigative measures, and even stronger concrete indications should be required before the Service can request the use of the measures set out in paragraph 18 (1) 1) of the investigation law.*” (see also para 53 of the 2014 Opinion on the minimum safeguards to be guaranteed, in line with the relevant ECtHR case law,²² against abuses of power in relation to issuing a security mandate in respect of an unidentified person).

41. The problem in draft law n° 281 seems to persist. In this context, it is important, leaving aside the potential involvement of some expert oversight bodies, to stress that the practical effect and value of involvement of the courts, in such matters, very much depends on the nature of the legal conditions to be checked. If such a low threshold is maintained, and no effective proportionality test is provided for, the actual impact of court involvement appears to be quite dubious (see para 32 of the 2014 Opinion, where reference is made to the problem of proportionality, including the severe criticism made in this respect in the ECtHR judgement in

²² See in particular *Kruslin v. France* 24 avril 1990, para 35 and *Huvig v. France* 24 April 1990, para 34.

the *lordachi* case).²³

Access to financial records

42. Concerns also remain over Article 7¹ (2) of the draft law, which allows the Service access to all financial transactions and financial information, outside of a criminal investigation, without a security mandate, and therefore in the absence of any external control. One could even argue that data transfer requirements create a potential for *mass* surveillance, actually becomes such generalized surveillance if the threshold requirements for permitting access to this data are set low, and the personal data of many people not under suspicion are in fact accessed in this context. The provision appears problematic and should be revised in the light of the proportionality requirements of Article 8 ECHR (see 2014 Opinion, para 35 and recommendation (b)).

Duration of authorized special investigation measures. State secrecy access

43. The duration of the initial maximum period of authorisation of special measures has now been limited to 30 days from the previously proposed 6 months, and the concerns over the possibility of indefinite extensions of authorisation have been addressed by setting a maximum of two years in total (new Art. 7¹(9)). Both of these are positive developments.

44. Under new article 7¹(4), both the prosecutor and the judge will have explicit access to state secrets, access which is, obviously, absolutely necessary for a meaningful control over coercive measures. This is a further welcome improvement.

Emergency Procedures

45. The draft provisions have been improved by tightening the requirement for destruction of material if the emergency authorisation is not confirmed (new Art. 7¹(11)).

46. However, other concerns have not been or are not sufficiently addressed. This includes the definition of the exceptional circumstances²⁴ when special investigation measures can be ordered without a security mandate, as well as the mismatch between the period authorised for emergency authorisation and new Art. 7¹(5) providing for hearing applications within 4 hours before a designated judge. If applications are required to be heard²⁵ within 4 hours (a very tight time frame), why should it be justified to permit emergency authorisations lasting up to 24 hours? Since these provisions are dealing with an exceptional procedure, it is recommended to reconsider them with a view to provide the needed clarity and consistency (see also 2014 Opinion, para. 60).

47. Furthermore it is recommended to state explicitly in the law, since neither appears in the draft, that the emergency authorisation automatically lapses after 24 hours, and that all material collected should be destroyed if no application is submitted within that time to a judge, in breach of Art 7¹ (11).

Notification requirements

48. The inclusion of a duty to notify *ex post facto* a person subject of special investigative measures (new Article 7²(1)) goes some way to meet the concerns expressed in the 2014 Opinion (para 46, and recommendation (h)). It is also a positive development that the decision

²³ The ECtHR stressed in the case *Roman Zahkarov v. Russia*, Application no. 47143/06, judgment of 04/12/2015 (para. 262) that the authorizing judge must be able to determine if there is reasonable suspicion.

²⁴ See *Roman Zahkarov v. Russia*, para 266, noting that “[t]he domestic law does not limit the use of the urgency procedure to cases involving an immediate serious danger to national, military, economic or ecological security”.

²⁵ “The examination of the approach on the issue of security warrant shall be conducted no later than four hours after the submission thereof, in closed session, with the participation of the prosecutor and the investigation officer.” (new Art. 7¹(5))

not to notify must ultimately be approved by the judge who issued the security mandate (new Art. 7²(4)).

49. However, the condition to be met is that there are “reasonable grounds” to consider that notification would, for example, jeopardize another ongoing investigation (new Article 7²(3)). This appears to be a very low threshold since, as pointed out in the 2014 Opinion (para 46), non-notification may mean that a violation of rights will never be uncovered. Such an effect would be in violation of Article 8 ECHR.²⁶

50. To address this problem, the following suggestions, which would provide additional safeguards, could be considered:

- A requirement to periodically review whether the grounds for non-notification still exist. ECHR jurisprudence permits *deferral* of notification,²⁷ whereas Article 7²(3) seems to envisage a single review which can decide against notification once and for all;
- Inclusion, as suggested in recommendation (h) of the 2014 Opinion, of a procedure by which a lawyer representing the person affected interests can challenge these decisions. The right of appeal given to the Prosecutor does not address this point;
- (Possibly) the application for deferral of notification could be heard by a different judge than one who authorised the security mandate in the first place. This would allow for a fresh look at the facts.

51. Another option would be to give the task of determining whether or not notification can occur to an independent oversight body, should such a body be created (see 2014 Opinion, para 79).

Appeal against the decision to issue a security mandate

52. The 2014 Opinion noted also (para 58) that there was no appeal available to the targeted person to challenge the decision to issue the security mandate and recommended that the institution of a security screened lawyer to represent the target person be considered. This concern does not seem to have been addressed. As emphasized in the 2014 Opinion, there is a danger that the system appears as being “biased in favour of granting the application”, and this should be avoided by providing an appeal opportunity to the target person when s/he considers that a security mandate should not have been granted, or should have been subject to tougher conditions as to its scope or duration.

Involvement of the Director/Deputy Director of the Service

53. Considering that the Director and Deputy Directors of the Service were those empowered to request the special judge to issue a security mandate, the 2014 Opinion recommended that material safeguards should be provided for their appointment on the basis of clear and apolitical criteria, or approval by all the parties represented in the Parliament. No precise indication is given in Draft law n° 281 concerning the person entrusted with the responsibility to request the security mandate or to authorize the request²⁸. Article 7¹ (5) only states that the examination, by the judge, of the request for security mandate is conducted with the participation of the prosecutor and the investigation officer. This being said, the new appointment system to the position of Director of the Service introduced in December 2016 constitutes a clear improvement.

²⁶ *Iordachi and Others v. Moldova*, §39, quoting the *Klass and others v. Germany* case and below paras 76-82.

²⁷ *Klass and others v. Germany*, Application no. 5029/71, Judgment of 6 September 1978, para 58

²⁸ According to the draft law examined in the 2014 Opinion, the request for mandate had to be authorized by the Director of the Service.

B. Extremism Provisions

54. Article III of the Draft Law n° 281 contains important amendments and additions to the provisions of the Criminal Code: a number of new extremism offences are being introduced, as well as definitions for several key concepts of relevance for the fight against extremism. At the same time, Art. IV of draft law introduces corresponding amendments to the 2003 Law on extremism, in particular with regard to the “main notions”, the principles guiding the fight against extremism, the entities responsible for counteracting extremist activity, extremist materials, the individuals’ responsibility for conducting extremist activities etc.

55. As introductory remarks, Moldova’s territorial integrity and political independence is undoubtedly subject to serious threats. The challenge for the Moldovan legislature is to provide for criminal offences which are sufficiently adequate and flexible to deal with the multiple ways in which violent extremists can threaten the state, while at the same time living up to the fundamental principles of a democratic state governed by the rule of law (including foreseeability of the criminal law), and the freedoms of information, expression, assembly and association, as well as the right to privacy - which are the lifeblood of any democracy. The offences linked to extremist organizations are widely drafted and give cause for concern. However, both qualifying an organisation as extremist and the related offences presuppose a final court decision taken in accordance with the procedures in amended Art. 6 of the law on extremism, which is some form of safeguard.

1. Definitions of extremist organisations and extremist activity

56. Art.1 (a) of the 2003 Law, *extremist activity* includes activity of a public or religious association, of a media outlet or of another organisation or individual for the purpose of planning, organising, preparing or committing certain actions targeted, *inter alia*, at “humiliating the national dignity”, or “propagating exclusivism, superiority or inferiority of citizens by the criterion of their attitude towards religion or by the criterion of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin”.

57. The meaning of the phrase “humiliating the national dignity” is unclear; it is equally unclear what the boundaries of “propagating exclusivism, superiority or inferiority [...]” are in comparison to acceptable public discourse. As already indicated by the Venice Commission in previous opinions, in order to qualify such actions as “extremist activity”, the definition should expressly require the element of intentional violence²⁹. In the absence of any element of violence³⁰, these categories of actions are too broad to be qualified as extremist and, for the sake of legal clarity and foreseeability, should be redrafted.

58. The definition of *extremist organisation* (both in the 2003 Law and in the proposed new text), since it cross-refers to “extremist activities”, also suffers from the same lack of clarity; to avoid too wide discretion in its interpretation and application, it should also be revised. It is important to recall that “[w]here definitions are lacking the necessary precision, a law such as the Extremism Law dealing with very sensitive rights and carrying potential dangers to individuals and NGOs can be interpreted in harmful ways”.³¹

²⁹ See CDL-AD(2012)016, *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation*, para 35-36. See also, Venice Commission, CDL-AD(2008)026, *Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, paras 50-58

³⁰ The Commission notes that deliberate actions aimed at inciting national, racial, or religious hostility, discord, or differentiation, are already criminalized under Article 346 of the Moldovan Criminal Code.

³¹ See CDL-AD(2012)016, para 75

2. Entities responsible for countering extremist activity

59. The allocation of responsibility, in new Art 4(1) of the Law on extremism, to the Service, as the “specialised state body” which “shall prevent, detect and break extremist activity”³² appears as problematic, bearing in mind the broad definition of “extremism” in the 2003 Law and the special powers and secrecy available to the Service.³³

60. It is noted in this connection that Art. 8 of the Law on extremism (“Inadmissibility of the use of electronic communication networks and systems to carry out extremist activities”), as amended by Article IV of the draft law n° 281, has been considerably expanded. Far-reaching measures are provided in relation to the use of “electronic communication networks and information systems” and specific powers have been assigned to the Service. These include the power to order provisional denial of the access to the material denoting extremism or, upon court decision, final or up to one-year denial of the access, on the country’s territory, to the respective information system or to certain components thereof (Article 8 paras 3) to 9)).

61. The providers of network or services are required to act within 4 hours of the request by the Service. This could end up being a very burdensome timeframe for providers³⁴. Moreover, nothing is said as to possible sanctions if providers are not able to comply with the request of Service within 4 hours.

62. Once the court has delivered its decision, the providers have 24 hours to comply. Here too, this is a tight timeframe, as it is hard to predict the time needed by providers to deny access to material online. In addition, in the absence of more specific indication of the types of situations envisaged, the one-year denial of the access “in the event that two or more extremist materials have been placed in the information system”, may be seen as disproportionate.

63. Besides, the category of “information system” seems to be very broad, as it appears to include “webpage, portal, forum, social network, blog, etc.”³⁵

64. The technical procedure for denying access is not provided for in the draft law n°281, but rules of procedure should be developed jointly by the Ministry of Information Technology and Communications and the Service, and approved by the Government. It remains to be seen whether these rules will take into account the human rights implications (freedom of expression, right to privacy) of such access denial measures. From this perspective, adequate human rights safeguards should be provided by the law, in relation to both the procedures leading to the issuance of access denial order and the orders’ implementation. Due attention should be paid to relevant recommendations made in the 2016 Joint Opinion on Moldovan legislation on combating cybercrime.

3. Draft Amendments to the Criminal Code

65. As already mentioned, it is important to note the positive aspect that the provisions of the

³² The General Prosecutor’s Office, central and local public authorities, relevant ministries (of interior and defence) and the State Protection and Guard Service, as well as the Custom Service, are further institutions designated by the law to act in this sphere, within their competence.

³³ See, on the need for counterbalancing safeguards under Articles 8 and 13 ECHR, 2014 Opinion, as well CDL-AD(2015)010, Venice Commission *Report on democratic oversight of internal security services*.

³⁴ Increased clarity would also be needed in relation to the notion of “mass media”. As mass media appear to bear a responsibility for dissemination of extremist materials (see Art. 7 on the “responsibility of mass medium for dissemination of extremist materials and pursuit of extremist activity”), it would be crucial to determine whether the categories of mass media and those of electronic communication networks and information systems (addressed under Art.8) overlap.

³⁵ By way of example, the *UK Terrorism Act 2006*³⁵ provides that hosting providers should react within 2 days, but also that the fact that the hosting provider has taken every reasonably possible step to secure that the material ceased to be available to the public should be taken into account to characterise endorsement of the material. See section 3 <http://www.legislation.gov.uk/ukpga/2006/11/section/3>

Criminal Code regulating extremism offences are only applicable in relation to organizations and materials as defined in new Art. 134¹⁴ of the Criminal Code. This provision defines extremist organizations and materials as those on which there is a final court decision qualifying them as extremist under the Law on extremism.

66. Beyond the lack of clarity already mentioned in relation to the key terms of “extremist organizations” or “extremist activities”, the main problem appears to be the definition³⁶ of the new offences themselves: in many aspects, they seem too broad, lack clarity and may open the way to different interpretations. At the same time, it is positively noted, that the responsibility for conducting extremist activity is to be established in all cases under judicial control (see Law on extremism, both the law in force and the proposed amendments: Article 6 - responsibility public associations, religious cults or other; Article 7 - responsibility of mass media institutions; Article 12 - responsibility of citizens).

4. New offences

Serious endangerment of the security of Moldova

67. New Art. 337¹, added to the Criminal Code by Article III.2 of the draft law, imposes drastic sentences (imprisonment from 12-20 years) for serious endangerment of the security of Moldova. The offence is defined as an act “*committed intentionally by a citizen of the Republic of Moldova, a foreign citizen or a stateless person to the detriment of sovereignty, independence, territorial inviolability, state security or defence capacity of the Republic of Moldova*”. It must be “manifested” in one of the actions mentioned in subsections a) – c), all involving support of an “unconstitutional entity”.

68. Such entity is defined in new Art. 134¹⁵ as “*the structure created outside the constitutional and legal regulations of a state, on a territory, not recognized by the state and by most countries in the world.*”

69. Taking into account that the offence involves “disclosures” (transfer, theft or collection of information, see subsections a) – c)), while the “legitimate aim” test would seem to be satisfied³⁷ (since the limitation is for the purpose of national security), there are serious doubts whether the amendment would meet the “prescribed by law” requirement under Art 10.2 ECHR.

70. First, the definition of an “unconstitutional entity” is entirely unclear. What is a “structure”? What does it mean to be created “*outside the constitutional and legal regulations of a state*”? Is it a requirement that the state not recognising the structure and the territory on which the structure created are of the same state? How can it be determined that “most countries of the world” do not also recognize the structure? Would this for example cover certain international NGOs? And what does it mean to be “created on a territory, not recognized by that state and by most countries of the world”? Presumably, this provision is intended to apply to organisations such as IS and/or to separatist movements and to make implicit reference to territories such Transnistria; however, the proposed formulation does not appear to fulfil the quality requirements of the law.

71. Second, the offences described in subsections (a) – (c) are vague and, to avoid any arbitrary interpretation and application, should clearly be specified. What, for example, does it mean to “*assist the administration of an unconstitutional entity in conducting hostile activities against the Republic of Moldova*”? The offence is widely framed. Does it include, e.g. working for the health service or the post office in Transnistria? Also, what does “hostile activities” mean and who is to define this? If for example certain international NGOs may be perceived as unconstitutional entities, such a provision (prescribing imprisonment from 12-20 years) appears

³⁶ The reports of the former, and present, UN Special Rapporteur on Protection of Human Rights while combating terrorism provide useful advice on drafting these types of offence.

³⁷ ECHR case law has treated official secrecy legislation as meeting this standard e.g. *Hadjianastassiou v Greece* 20 EHRR 301, paras 141-47

quite unacceptable. However, if these offences are meant to cover espionage, then possibly the sanction is not disproportionate.

Illegal actions threatening constitutional regime, state integrity/territorial inviolability

72. New Art. 340¹ imposes severe sentences (from fine to 18 years of imprisonment depending of the specific circumstances) for “*illegal actions threatening the constitutional regime, the independence, the integrity of the territorial inviolability of the Republic of Moldova*”.

73. The offence is defined as “*actions aimed at changing the constitutional regime of Moldova, at undermining, suppressing or eliminating sovereignty, independence, territorial integrity or inviolability thereof contrary to the provisions of the Constitution of Moldova.*”

74. This is clearly an inadequate definition of an offence carrying such severe sentences, as there is no concrete and specific description of the prohibited actions. Presumably, some qualification lies in the term “contrary to the provisions of the Constitution of the Republic of Moldova”, but this will need to be described much more specifically. This is all the more important given that the Constitution itself, in its article 142 on the limits of the constitutional revision, allows revision of its provisions “regarding the sovereignty, independence and unity of the state, as well as those regarding the permanent neutrality of the State”, and this, “only by referendum with the vote of the majority of the registered citizens with voting rights”. It is thus recommended to specify the concrete actions which are to be covered by this offence.

75. Depending on the actions charged, new Art. 340¹ would seem potentially to interfere with Article 10 ECHR. From this perspective as well, while it appears to satisfy the “legitimate aim” test, it raises concerns in terms of “quality of law”. For example, there are such concerns about the definition of an “unconstitutional entity” (see above).

Appeals threatening the constitutional regime

76. Proposed new Art. 341 of the Criminal Code falls within the scope of Article 10 ECHR, since it refers to “appeals”. Here again, there are concerns in terms of “quality of law”: dissemination “through various ways” is unclear, as well as the definition of an “unconstitutional entity” (see above).

77. Moreover, doubts may be raised as to whether the limitation of the right to expression under Article 10 ECHR, bearing in mind the potential breadth of the offence (see below), is “necessary in a democratic society”. As it results from the discussions held in Chisinau, this offence seems to intend to criminalise appeals aiming at changing the constitutional regime that are procedurally improper (such as the staging of an unconstitutional referendum on regional separation).

78. The question raises, however, as to whether simply organizing a referendum - contrary to the laws of the Republic of Moldova - would be an offence punishable by 3-7 years imprisonment, as provided by the new Art. 341 (3)? From the proportionality perspective, a graded response should be applicable to activities which, although threatening to the territorial integrity of the country, are carried out without violence - e.g. by simply declaring the result of such an unlawful referendum as null and void.

79. More generally, while identifying ways to provide for sufficient criminalization of violent separatism, those criminal law tools should not be used against legitimate political opposition, including non-violent opposition to the existing political structure (e.g. advocating a federal system of government, or increased autonomy to regions, local authorities etc.). From the same perspective, while it may be considered as legitimate for the Service to monitor, by means of open sources, and in conformity with ECtHR standards on data processing and other related safeguards, even non-violent separatism (e.g. to determine possible links between non-violent

and violent separatism), it would be disproportionate to use the criminal law against non-violent political opposition or non-violent expression of a different view of the constitutional regime.

80. Also, potential foreign influence in politics is undoubtedly a real concern and one shared in many Council of Europe states; however, such concern can be tackled in other ways than through criminal liability (e.g. residence requirements, bans on foreign donations to political parties, restrictions on foreign ownership of licensed media).

81. In view of the above comments, it is recommended, in case the offence is retained, that its wording be revised so as to include a specific defence for advocacy of non-violent constitutional change.

82. The severity of punishment would also need to be considered, especially in relation to the enhanced penalties. The offence is punishable by up to 3 years' imprisonment. More severe penalties apply if two or more persons are involved (up to 4 years), or where the conduct is at the request of a foreign state or of an "unconstitutional entity". These are harsh, and arguably disproportionate, penalties bearing in mind the scope of offence and its potential application to non-violent separatism.

Creation, participation to, management or organisation of activity of an extremist organisation

83. The offence introduced by proposed new Article 346¹ of the Criminal Code constitutes a *prima facie* interference with Article 11 ECHR, at least in some cases. However, Article 11 may not apply to some organisations falling within the definition of "extremist organisation", cf *W.P. and Others v. Poland*.³⁸

84. While the limitation appears to have a legitimate aim (the protection of rights and freedoms of others), as in the case of other new offences, there are concerns in terms of "quality of law", in particular in relation to the meaning of "contributing in every way" and the definitions of "extremist organisation" and "extremist activities" (see comments above).

85. Here too, the severity of sanctions would also need to be considered in order to assess whether the "necessity" criterion is met. "Joining the membership" or contributing in "every way" to the activity of an extremist organisation is punishable by up to 3 years' imprisonment. Creation of an association with the intention of conducting extremist activities is punishable by up to 5 years' imprisonment. These terms would need to be clarified. What does it mean to "join the membership"? Obviously, organizations such as the ones referred to will usually not have formal membership regimes. And what does it mean to "contribute in every way"? Would this for example cover mere statements of support (in private or public) of such organizations? It is recommended to specify which specific actions are prohibited, e.g. raising/ giving finance, permitting use of premises, etc.³⁹

Dissemination and use of materials of extremist nature

86. This offence, in new Article 346² of the Criminal Code, covers importation of materials of extremist nature for sale or dissemination, production and possession (punishable by imprisonment of up to 6 months) and use of materials of extremist nature in public in order to urge pursuit of extremist activities⁴⁰ (punishable by imprisonment up to 1 year). The defence for educational, scientific, artistic purpose or provision of information on historical or current events

³⁸ Application no. 42264/98, decision on the admissibility of 2 September 2004, concerning the refusal by the Polish authorities to allow the creation of an association with statutes including anti-Semitic statements; the Court held that the applicants could not benefit from the protection afforded by Article 11 ECHR.

³⁹ The International Commission of Jurists (*Assessing Damage, Urging Action*, 2009, pp.133-136) has expressed concern over the vagueness of similar legislation in other countries and its effect on the right of freedom of association.

⁴⁰ "Materials of an extremist nature" or "extremist material" as defined in Article 134¹⁴, which cross-refers to 2003 Law on extremism. 'Extremist activities.' as defined in Article 1 of Law no. 54-VX of 21 February 2003, as amended.

(para 3) is to be welcomed.

87. In so far as the provision may cover expression constituting “hate speech”, some forms of hate speech have been treated as falling outside Art 10 by virtue of Art 17 ECHR (abuse of rights).⁴¹ Should this offence be treated as interfering with Art 10 ECHR, there might be concerns as to whether the limitation is “prescribed by law”, in view of the issues raised by the definition of “extremist material” and “extremist activities” or by terms such as “use in public” (presumably not simply possession?)

Propagation of the Nazi, racist or xenophobic ideology, or symbols thereof

88. New Article 346³ of the Criminal Code covers importation for sale or dissemination, production and possession of such ideology, punishable by imprisonment of up to 6 months (para (1)). “Propagation by any means” is punishable by up to 3 years and disqualification from certain offices up to 5 years.

89. To the extent that this offence falls under article 10 ECHR (see above), the doubts expressed in 2015 by the Moldovan Constitutional Court over the vagueness of what constitutes Nazi symbols⁴² are relevant and suggest that the “prescribed by law” test is not fully met. The defence in para 3) - for educational, scientific, artistic purpose or provide information on historical or current events - is relevant in assessing proportionality and accords with *Jersild v Denmark*⁴³.

90. Article 11 ECHR is possibly also relevant if the penalties imposed could prevent a convicted person holding office in an association. In practice, however, if the original conviction satisfies Article 10 ECHR, it is likely that a bar on holding office would satisfy Article 11 ECHR. Protocol 1, Article 1 ECHR is also relevant in so far as the confiscation of the concerned material is a potential sanction. If the “prescribed by law” and the proportionality tests are met, then the provision is ECHR compatible.

C. Draft Law n° 281 and other (draft) laws

91. In the opinion of the Venice Commission and of the Directorate General, it is essential to provide for clear relationship between new laws (parallel pending drafts regulating the same or very closed matters), as well as between new laws and existing laws.

92. In particular, the relationships between draft law n°281, draft law n°389 on counterintelligence and external intelligence activity and draft law n° 391 on the National Intelligence Service of the Republic of Moldova, and between these drafts laws and the 2012 Law on special investigation activity, as well as the provisions in the Moldovan Criminal Procedural Code dealing with the special investigative activity, seem unclear and the conceptual approach of the different texts not entirely (or not sufficiently) harmonized.

93. Regardless of the choices which will be made (among the different drafts) by the Moldovan legislator, it will be crucial to propose - as a framework for recourse to special investigation measures and for the operation of the intelligence service - clear, coherent and well-ordered regulations, based on consistently defined concepts and procedures, supported by a coherent institutional framework and coupled with adequate human rights safeguards. Comments made about intelligence measures, in this and in previous reports, as well as criticism expressed in relation to “security mandates”, are applicable to many of the provisions contained in the above drafts/laws and should adequately be taken into account.

⁴¹ *Pavel Ivanov v. Russia*, 20 February 2007 (decision on the admissibility), para 23

⁴² <http://www.constcourt.md/print.php?l=en&idc=7&id=700>

⁴³ *Jersild v Denmark*, Application no. 15890/89, Judgment of 23 September 1994, paras 33-37

IV. Conclusions

94. The draft law understandably aims at improving and strengthening the Moldovan legal framework pertaining to the protection of state security and the fight against extremism, in the light of increasing threats in these fields. It regulates the use of special investigation measures outside criminal proceedings, under the authority of a “security mandate” granted by a judge, a new mechanism for security investigations intended for the Moldovan Security and Information Service. This mechanism has already been the subject of a previous joint Opinion, adopted in 2014. In addition, the draft law proposed new extremism-related offences and a more elaborated legal framework for countering extremist activities.

95. It seems clear that the proposed amendments are meant, *inter alia*, to accommodate some of the recommendations made in the 2014 Joint Opinion of the Venice Commission and the Directorate. Welcome improvements include the limitation (to 30 days) of the duration of the initial maximum period of authorisation of special measures with a maximum of two years for authorisation renewal, as well the access of concerned prosecutor and judge to secret information, instrumental for a meaningful control over coercive measures.

96. However, a number of key aspects still need to be addressed in order to bring the draft fully in line with existing standards, including more general concerns with regard to the accountability of the Service in the 2014 Opinion. The authorities are invited in particular to implement, in the subsequent steps of the legislative process, the following recommendations:

In relation to the security mandate

- a. to provide sufficiently clear and precise conditions for court authorisation of a security mandate requiring *inter alia* factual indications of criminal activity, reasonable suspicion and a narrower definition of the categories of persons concerned by special investigation based on a security mandate;
- b. to specify the circumstances for emergency authorisation and to provide reasonable timeframe for subsequent review by the judge;
- c. to better specify the grounds for deferring notification to the person targeted by the security mandate and strengthen related safeguards, including by adequate mechanisms for periodical review of the non-notification decision and an effective right to challenge this decision, as well as the decision to issue the security mandate;

In relation to extremism-related provisions

- d. to provide clearer, more specific and narrow definitions for the (scope of the) proposed new extremism offences, in the light of the comments contained in the present Opinion, so as to ensure that they adequately respond to the ECHR requirements of “quality of law” and proportionality;
- e. to review the measures authorised under the draft amendments for combating extremist activities carried out through electronic communication networks and systems, with a view to strengthening human rights safeguards and avoiding excessive burden on providers of electronic communication networks and systems.

97. More generally, in relation to the remaining concerns regarding the accountability of the Service, the Venice Commission and the Directorate reiterate their recommendation addressed to the Moldovan authorities already in 2014, to evaluate the existing system of oversight of the Service and consider ways to improve it and make it more effective, including by considering supplementing, or replacing the present system of parliamentary oversight with some form of independent expert oversight/complaints body.

98. Taking into account the existence of parallel pending (competing) drafts dealing with intelligence and security matters, it will be crucial, in order to avoid arbitrary and abusive interpretation and practice, to ensure clarity and consistency of the future legislation, both as regards concepts, procedures and institutional aspects.

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