Strasbourg, 9 October 2023

CDL-AD(2023)041
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

FOLLOW-UP OPINION

TO THE OPINION ON THE DRAFT LAW ON THE INTELLIGENCE AND SECURITY SERVICE, AS WELL AS ON THE DRAFT LAW ON COUNTERINTELLIGENCE AND INTELLIGENCE ACTIVITY
CDL-AD(2023)008

Adopted by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)

on the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Ms Regina KIENER (Member, Switzerland)
Mr Ben VERMEULEN (Member, the Netherlands)

Opinion co-funded by the European Union

Contents

I. Introduction

1. By letter of 17 July 2023, Mr Igor Grosu, President of the Parliament of the Republic of Moldova, requested a follow-up opinion to the Opinion on the draft law on the intelligence and security service as well as on the draft law on counterintelligence and intelligence activity (CDL-AD(2023)008) adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023) ("the March 2023 Opinion"). The Law on Counterintelligence and Intelligence Activity (hereafter "the CI Law") was attached to the letter. The Law on the Intelligence and Security Service (hereafter "the SIS Law") was provided to the Venice Commission on 8 August 2023. On 12 September 2023, additional clarifications were provided in writing by the Intelligence and Security Service (hereafter "SIS"), referring also to the work of and discussions in the working group under the aegis of the Parliamentary Committee on National Security, Defence and Public Order (see paragraphs 10-12 below).

2. Mr Richard Barrett, Ms Regina Kiener and Mr Ben Vermeulen acted as rapporteurs for the present follow-up Opinion.

3. Given the fact that this is a follow-up opinion, no additional country visit or online consultations with the stakeholders were organised. Broad online consultations with all the relevant stakeholders had taken place during the preparation of the March 2023 Opinion.

4. This opinion was prepared in reliance on the English translation of the two adopted laws, as provided by the Moldovan authorities. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background

6. In reply to the recommendations contained in the March 2023 Opinion (CDL-AD(2023)008), the authorities amended both pieces of draft legislation and, following their adoption by Parliament (respectively on 8 June 2023 for the SIS Law and 7 July 2023 for the CI Law), submitted the revised texts for assessment by the Venice Commission.

7. The current opinion aims at assessing the two adopted laws in the light of the previous recommendations of the Venice Commission, thus reviewing to which extent the authorities have taken them into account.

8. In its March 2023 Opinion, the Venice Commission stressed the fact that the draft laws appeared to be at a very early stage of development, while other related pieces of legislation were being revised in Parliament. Therefore, the Venice Commission stressed the need for the drafts to be further developed and harmonised with the other related laws, to avoid possible overlaps or contradictions. The Commission also encouraged the Moldovan authorities to pursue the public consultation with the relevant stakeholders (paragraph 69 of the March 2023 Opinion).

9. In its conclusions, the Commission further identified four main areas of concern and set out an elaborate list of recommendations that should be considered when revising the two draft laws (paragraph 71). The main problematic issues concerned: 1) governance and powers of the SIS; 2) accountability and control (both the internal control by the Director of the SIS and the external control by Parliament and courts, or – in case of criminal matters – by prosecutors); 3) respect of fundamental rights and safeguards; and 4) quality of the law. The extent to which the recommendations regarding these four main problematic issues have been addressed will be analysed in the sections C to F below.

III. Analysis

A. Public consultation

10. The Venice Commission encouraged the Moldovan authorities to pursue public consultation with the relevant stakeholders, in particular, the National Centre for Personal Data Protection, civil society organisations and the private digital communications sector (paragraph 69 of the March 2023 Opinion). It would indeed seem that such consultations have been carried out. The letter of the President of the Parliament of 17 July 2023 requesting the follow-up opinion of the Venice Commission outlines that Parliament has organised extensive public consultations regarding the draft law and invited all stakeholders to provide inputs and improve the draft text. The Parliament received 11 written opinions from civil society organisations, the Ombudsman's Office, the General Prosecutor's Office, Business Associations, the Center for Democratic Control of Armed Forces (DCAF), with the Opinion of the Venice Commission providing the main guidance.

11. The letter of the President of the Parliament furthermore sets out that to facilitate this process, Parliament created a working group (hereafter "the Working Group") that brought together representatives of 24 public institutions, private entities, and civil society organisations. The Working Group held 20 public meetings to examine and debate the drafts. All meetings were broadcast on the Parliament's webpage. In addition, Parliament organised four extended public consultations open to all participants.

12. From the references in the additional clarifications, as provided by the SIS on 12 September 2023, it appears that various proposals made in the consultation process were subsequently discussed in the Working Group and have been to a certain (or even, large) extent reflected in the text of the two adopted laws.

13. The Venice Commission welcomes that a comprehensive consultation of all stakeholders has been pursued and considers that its recommendation has been followed.

B. Further elaboration and harmonisation with related laws

14. In its March 2023 Opinion, the Venice Commission stressed the need for the draft laws to be further developed and harmonised with other related laws (cf. paragraph 12 of the March 2023 Opinion referring *inter alia* to the Criminal Procedure Code, the Law on Special Investigative Activity and the Law on the Status of Intelligence and Security Officers), in order to avoid possible overlaps or contradictions (paragraph 69 of the March 2023 Opinion). The adopted laws bring the following changes in this respect:

- The CI Law (Articles 3 and 4) provides for new provisions on external intelligence activities in the military field, which "shall be carried out by the Ministry of Defence through contracted servicemen within its specialised bodies and structures";
- Both laws contain various references to the abovementioned laws and other related laws. For instance, Article 3 of the SIS Law obliges the SIS to carry out activities to prevent, detect and counteract crimes in accordance with the Criminal Procedure Code (with the long list of categories of crimes having been deleted from Article 3, paragraph 3), and with provisions of the Law no. 120/2017 on the Prevention and Combating of Terrorism (Article 3, paragraph 5). Article 1, paragraph 4 and Article 3, paragraph 2 of the SIS Law respectively provide that the work of the SIS is coordinated (by the President of the Republic of Moldova) in accordance with the Law on State Security no. 618/1995 and that the SIS is to develop measures to identify the threats indicated by that same law.

Furthermore, new references are made to Law no. 71/2008 on the Checking of Holders of and Candidates to Public Offices (Article 3, paragraph 11) and the Electoral Code (Article 3, paragraph 21), as well as to the powers of the Director of the SIS being exercised as stipulated under Law no. 170/2007 on the Status of Intelligence and Security Officers (Article 16, paragraph k).

- In Article 1, paragraph 2 of the SIS Law, the scope of the activity of the SIS is described more clearly, that is to ensure the internal and external security of the state, to defend the constitutional order, to contribute to the defence of the national economic system and to ensuring the defence capacity of the state, to combat terrorism and other threats to the security of the state, by using preventive and special means of non-military nature.

15. The Venice Commission welcomes that these references more clearly and systematically embed (counter)intelligence measures and the work of the SIS within the Moldovan legal order and considers that the abovementioned narrower description of the duties of the SIS can be helpful in delineating its activities vis-à-vis those of other agencies. However, without having had the opportunity to assess the relevant other legislation, it cannot say if and to what extent a substantive coordination between all these laws has taken place. The Venice Commission reiterates its readiness, as expressed in paragraph 12 of the March 2023 Opinion, to provide an opinion on the overall framework of the intelligence system of the Republic of Moldova at a later stage.

C. Governance and powers of the SIS

16. In its March 2023 opinion, the Venice Commission noted that the SIS is granted very extensive and undefined powers, including an apparent enforcement role, without providing clear legal remedies or and without explanations concerning the legal consequences or sanctions. It noted with concern that various aspects of intelligence activities were based on SIS departmental regulations, lacking a clear demarcation of the scope of discretion of the SIS in Article 11 of the draft CI Law, and that the Director of the SIS was granted unfettered power by Article 12, paragraph 1, sub 1 of the draft CI Law to directly approve without control a broad range of very intrusive measures. The lack of clarity in the distinction between the activities carried out under the security mandate and those in the context of the criminal investigation raised particular concern. In addition, the Commission suggested that the electoral domain should also be covered, at least to protect the electoral process from covert operations trying to influence the outcome of elections.

17. In order to address the recommendations of the Venice Commission, as outlined in paragraph 71 (a) (i) of the March 2023 Opinion, the following amendments have been made to the two laws:

- As outlined in the clarifications provided by the SIS in September 2023, the remit of the SIS has been conceptually revised as a result of the public consultation and the work of the Working Group, with powers that are not appropriate for an intelligence service having been deleted from the SIS Law. Indeed, the extensive list of duties and obligations of the SIS in respectively Article 3 of the SIS Law (former Article 4 of the draft SIS Law) and Article 6 of the SIS Law (former Article 7 of the draft SIS Law) have been reduced. Instead, Article 3, paragraph 2 of the SIS Law refers to the threats indicated in Article 4, paragraph 2 of the Law no. 618/1995 on State Security and obliges the SIS to develop and implement, within the limit of its competence, a system of measures oriented towards identifying, preventing, and counteracting those threats. In addition, the open-ended formulas listed under the provisions on the duties and obligations of the SIS, such as “exercise other powers established by the legislation in force” (former Article 4, paragraph 22 and Article 18, paragraph q of the draft SIS Law) and “perform other obligations laid down by law” (former Article 7, paragraph m of the draft SIS Law) have been deleted;

- The long list of rights of the SIS in Article 7 of the SIS Law (former Article 8 of the draft SIS Law) have been cut back, whereby, for example, the rights of the SIS to request natural and legal persons to take appropriate measures" [to remedy deficiencies found regarding matters of national security] and provide "information on their execution (…) and, appropriate, to apply a formal warning" (former Article 8, paragraph 2 of the draft SIS Law) have been deleted. In turn, Article 9 of the draft SIS Law, which was considered problematic for envisaging a new measure called an "official warning" that foresaw undefined "legal consequences" and a notification of the Prosecutor General, has also been removed from the SIS Law (see further on this topic Section E below);
- A clearer distinction has been made between the activities carried out by the SIS under its security mandate and those carried out in the context of a criminal investigation. The provisions on such matters as undercover investigations, controlled delivery (etc.) in Articles 27-35 of the draft CI Law have been removed from the CI Law. The interaction with the Criminal Procedure Code has been clarified, *inter alia* by obliging the SIS to carry out its activities to prevent, detect and counteract crimes in accordance with the Criminal Procedure Code (Article 3, paragraph 3 of the SIS Law). The possibility of using counterintelligence measures "when carrying out special investigative measures, for the purpose of detecting, preventing, curbing crime and ensuring public order" has been removed from Article 18 of the CI Law (former Article 21, paragraph 1(c) of the draft CI Law). As regards the latter, it has been clarified in the additional information provided by the SIS in September 2023 that the deletion of this provision signifies that with the adoption of the CI Law, the SIS will be excluded from the Law on special investigative activities. The paragraph providing that the results of the work carried out under a security warrant cannot be used as evidence in a criminal case has been maintained in the adopted CI Law (Article 18, paragraph 4 of the CI Law, former Article 21, paragraph 5 of the draft CI Law);
- The previously unfettered powers of the Director of the SIS under former Article 12 (now Article 9) of the CI Law have been significantly reduced, by providing that only the "identification of the subscriber or the user of an electronic communications network or of an information society's service" in the context of counterintelligence activities can be done without a court warrant;
- Article 3, paragraph 21 was added to the SIS Law, listing security of the electoral process in accordance with responsibilities in the Electoral Code, as one of the duties of the SIS.

18. The Venice Commission appreciates these substantive amendments to the SIS Law and CI Law, which more clearly define the powers and duties of the SIS, improve the distinction between intelligence activities and activities carried out in the context of a criminal investigation, significantly narrow the powers of the Director to singlehandedly authorise measures impinging on human rights and freedoms and provide the SIS with a mandate in the electoral domain. The Venice Commission's recommendations on these issues have been followed.

19. However, the Venice Commission has also recommended that the departmental regulations of the SIS should have a detailed and clear basis in the CI Law. The Venice Commission understands that this issue has been discussed in the Working Group, but notes that very few changes have subsequently been made to Article 8 of the CI Law (former Article 11 of the draft CI Law) and that it would still seem possible to provide for a far-reaching regulation of specific issues (e.g. time limits for the retention of files, the rules for carrying out covert operations) by departmental regulations of the SIS. In the additional clarifications provided by the SIS in September 2023, it is stated that the given departmental regulations only establish organisational procedures of the SIS and shall not exceed the limits set by law. The regulations furthermore only contain information which – if disclosed – will prejudice the implementation of counterintelligence measures and that the SIS has only taken over the practice expressly provided for by existing legislation in force (i.e., the Law no. 59/2012 on Special Investigative

Activity). The Venice Commission appreciates these clarifications, but without having been provided with the text of the Law on Special Investigative Activity (on which it also notes abovementioned information that the SIS would be excluded from this law) it cannot say that the scope of discretion conferred on the SIS is adequately indicated in statutory legislation. It thus cannot yet conclude that this recommendation has been fully addressed.

20. In paragraph 71 (a) (ii) (and the corresponding paragraphs 25 and 26) of the March 2023 Opinion, the Commission expressed its concern about the risks of politicisation of the SIS and in particular the risk of subordination of the Director of the SIS to the political power. The Commission suggested to provide for material safeguards for the appointment of the Director and its Deputy, based on clear and apolitical criteria. The following changes have been made in the adopted versions of the two laws:

- The SIS is established as an autonomous (instead of a centralised) administrative authority (Article 13, paragraph 1 of the SIS Law), as the Venice Commission recommended in paragraph 25 of its March 2023 Opinion;
- The Director shall be appointed for a term of seven (instead of five) years and may *not* hold two consecutive mandates (Article 14 of the SIS Law, whereas before it was not more than two consecutive mandates under former Article 16 of the draft SIS Law). The conditions for appointment have been slightly changed: The candidate is not and has not been a member of any political party for the previous three years (instead of two years) and must speak Romanian language (instead of "have knowledge of") (see Article 15 of the SIS Law, former Article 17 of the draft SIS Law). The criteria are clearer and tend to depoliticise the appointment. The improved translation of Article 15, paragraph 2 of the SIS Law (in particular subparagraph (h)) also clarifies that termination of the term of office of the Director is limited to the reasons stated in this paragraph and that s/he can only be dismissed in the cases provided for in paragraph 3 of this Article.

21. The Venice Commission welcomes these changes and considers that its recommendations in paragraph 71 (a) (ii) have been followed.

22. In paragraph 71 (a) (iii), the Commission also recommended that the power of coordination of the President of the Republic and its relation to parliamentary scrutiny should be developed and defined in the law. In this respect, the following change has been made in the adopted version of the SIS Law:

- Article 1, paragraph 4 (former paragraph 3) of the SIS Law now provides that the coordination of the work of the Service by the President of the Republic of Moldova is to be done "in accordance with the Law no. 618/1995 on State Security" and (as before) is subject to parliamentary oversight. The methods by which the President is to achieve this co-ordination have been deleted.

23. The rapporteurs have not been provided with the Law on State Security, so it remains to be seen whether the reference to this law indeed addresses the Venice Commission's concerns. In addition, there is no clarification of the relation of the coordination by the President to parliamentary scrutiny. The Venice Commission can thus not yet say that this recommendation has been followed.

D. Accountability and control

24. As regards accountability and control, the Venice Commission in paragraph 71 (b) made recommendations regarding (i) parliamentary control, (ii) control by the public prosecutors and (iii) judicial control.

(i) Parliamentary control

25. In general, the Venice Commission had criticised (in paragraph 31 of the March 2023 Opinion) the overly wide scope of the information to be communicated by the SIS under Article 6 of the draft SIS Law (now Article 5 of the SIS Law). Furthermore, the Commission recommended that in the area of parliamentary control the SIS should be obliged to provide all data on the number and types of measures carried out, and that the Parliamentary Subcommittee should be required to publish a yearly report on these statistical data. It found that the Subcommittee should also be able to issue a special report to draw public and parliamentary attention to activities which require an urgent response. The possibility to open parliamentary inquiries, which could result in judicial inquiries, when there are suspicions of serious irregularities would also need be considered, subject to requirements of state security. In addition, the Commission recalled its previous recommendation to supplement or replace the "present system of parliamentary oversight with some form of independent expert oversight/complaints body". In response to these recommendations, the following amendments have been made:

- The information in the field of national security that has been obtained because of the activities of the SIS and is communicated to the political forces has been narrowed down: As before, the information shall be communicated to the President of the Republic of Moldova, the President of the Parliament, and the Prime Minister. However, the amendment to Article 5 of the SIS Law (former Article 6 of the draft SIS Law) clarifies and limits this kind of this information (analytic information regarding the strategic problems of the state, data important for the decision-making, in accordance with the competences established by the law). Accordingly, information to the chairs of parliamentary committees is (only) provided according to their field of competence and is restricted to 1) analytic information regarding strategic problems of the state that can be remedied by adjusting legislation or 2) information communicated in the context of parliamentary oversight.
- In the revised version of the CI Law, oversight by the Parliamentary Subcommittee on Parliamentary Oversight over the Work of the Service (hereafter "the Parliamentary Subcommittee") must be "in compliance with the provisions of the Parliament's Rules of procedure, adopted by Law no. 797/1996, and the rules of procedure for the activity of the respective subcommittee, approved by Parliament's decision" (amended Article 42, paragraph 1 of the CI Law, former Article 57 of the draft CI Law). In addition, paragraphs 2 and 3 of Article 42 of the CI Law have been amended substantially and a new paragraph 4 has been inserted, which provides that the Parliamentary Subcommittee shall "*systematically inform*" the Parliamentary Committee on National Security, Defence and Public Order with respect to its activities. Prior to the presentation in the plenary of the annual report on the activities of the SIS, the Director of the SIS shall submit to the Parliamentary Subcommittee - in a closed meeting - a report on the intelligence / counterintelligence activities, which shall be obliged to include the specified information set out in the Law (i.e. the total number of counterintelligence measures ordered, carried out and rejected, for each type of measure, separately; number of initiated special files and classified special files; number of individuals notified on the performance of counterintelligence measures in their regard; data on possible violations admitted[1] by intelligence officers in the execution of the provisions of this Law).
- The provision on parliamentary oversight has also been amended in respect of the information to be provided to the public on the activities of the SIS: Following the examination of the information on the (counter)intelligence activities of the SIS, the Parliamentary Subcommittee shall take note of the submitted information and shall publish the outcomes of the oversight of the (counter)intelligence activities on the official

[1] The term 'admitted' – confessed, acknowledged - is confusing. Presumably the term 'committed' is meant. The Venice Commission would welcome this to be clarified.

website of the Parliament (paragraph 6 of Article 42 of the CI Law). If the Parliamentary Subcommittee has reasonable suspicions of the commission of serious violations in the (counter)intelligence activities of the Service, it may request the performance of a parliamentary inquiry or may notify the Prosecutor General (paragraph 7 of Article 42 of the CI Law). The annual report on the activity of the Service shall necessarily contain a part on the (counter)intelligence activities carried out by the Service and the measures undertaken by the Service following the recommendations of the Parliamentary Subcommittee (paragraph 8 of Article 42 of the CI Law).

26. The recommendations of the Venice Commission have thus been followed: The information to be provided by the SIS is more clearly defined; the SIS is required to report on the number and type of counterintelligence measures ordered; the Parliamentary Subcommittee publishes outcomes of their oversight; there is the possibility of a parliamentary inquiry or notification of the Prosecutor General in case of suspicions of serious irregularities.

27. The recommendation of the Venice Commission to supplement or replace the present system of parliamentary oversight with some form of independent expert oversight/complaints body has not been followed. The Venice Commission regrets this, as that would be a valuable supplement to parliamentary oversight. However, in the additional clarifications provided by the SIS in September 2023 mention is made of *ex post* control of (counter)intelligence activities, in the form of a Special Control Commission, which reportedly includes two judges and a prosecutor, which will be verifying the SIS' compliance with the relevant legislation when carrying out counterintelligence activities. As this Special Control Commission is not mentioned anywhere in the CI Law or SIS Law and no further information has been provided on its establishment, composition and mandate, the Venice Commission cannot yet conclude that this recommendation has been followed.

(ii) Control by the public prosecutors

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

29. In the additional clarifications provided by the SIS in September 2023, the position of the Venice Commission regarding the control carried out by prosecutors being relevant for criminal matters only is supported. Mention is made of the Prosecutor's Office having full powers to investigate any possible crime committed in the context of (counter)intelligence measures (with additionally again a reference being made to the abovementioned Special Control Commission of which one prosecutor is reportedly a member). Regarding the absolute power of the SIS to grant access to state secrets by prosecutors, the additional clarifications from September 2023 refer to Law no. 245/2008 on State Secrets which lays down the exact conditions and limits for granting access to state secrets and clarify that the SIS would only check the compliance with these conditions and limits. Any refusal to grant access is subject to appeal to a court, which has full powers to annul the refusal. Furthermore, in the revised SIS Law, the provision on prosecutorial oversight (Article 32) makes it clear that information on the organisation, forms, tactics, methods and means of operation of the Service shall not be subject to control by the public prosecutor, except in cases where the violation of the rules regarding the performance of the indicated activities constitutes a crime.

30. In light of the foregoing, the Venice Commission considers that its recommendations on prosecutorial control have been followed.

(iii) Judicial control

31. The Venice Commission recommended that for the (counter)intelligence measures submitted to judicial warrant, the provision foreseeing that a non-specialised judge is deciding alone, in a short delay, on extremely complex matters, should be revised. In the view of the Venice Commission, the measures that were foreseen under Article 12, paragraph 1(1) of the draft CI Law should be automatically subjected to effective judicial review, except in duly justified cases established by law. In addition, the control of legality *ex post* foreseen in article 60 of the draft CI Law should be revised to become effective. As a possible solution, and elaborating on one of its previous recommendations, the Venice Commission suggested to consider the appointment of a panel of external independent experts, having access to all secret information, and authorised to raise arguments on behalf of people that are unknowingly targeted by counterintelligence measures, as well as to refer to the judicial system in case she/he would deem this appropriate.

32. The adopted versions of the two laws provide for several amendments regarding judicial control of (counter)intelligence activities:

- Article 9, paragraph 1 (1) (former Article 12 paragraph 1(1)) of the CI Law reduces the counterintelligence measures that may be authorised by the Director or Deputy Director of the SIS to one: The identification of the subscriber or user of an electronic communications network or of an information society's service, which means that pursuant to part 2 of this paragraph all other counterintelligence measures of the SIS are subject to a judicial warrant;
- A new Article 17 of the CI Law now provides for *ex post* judicial control of counterintelligence measures by the judges who authorised the measure in question, within 10 days following the completion of the measure by the SIS, whereby it is *inter alia* provided that if the judge establishes that the rights of an individual or the provisions of the court warrant have been violated, the judge can declare the outcomes of the counterintelligence measure to be void and notify the Prosecutor General's Office to investigate the violations;
- The SIS Law contains a new Article 31 which provides that judicial control over the Service shall be carried out in the context of authorising counterintelligence measures and examining the legality of the acts and actions of the Service. A similar article was already included in the CI Law (Article 45, former Article 60). The scope of these articles nevertheless remains unclear: They do not seem to have an autonomous meaning but appear to refer to the issuing of a judicial warrant for counterintelligence measures and the *ex post* control of such measures by the judge who has authorised the measure under Article 17 of the CI Law;
- According to the transitional provisions in Article 48 (former Article 61) of the CI Law, the presidents of the Chișinău Court of Appeal and the Supreme Court of Justice shall establish the number of judges entitled to issue court warrants and examine appeals for the purpose of this law, shall appoint the respective judges and organise the process of random distribution of the SIS's requests/appeals.

33. The Venice Commission welcomes the improvements to the system of judicial control of (counter)intelligence measures, in particular the fact that there is only one measure which can be authorised without a judicial warrant and the clearer provisions on *ex post* judicial control of all measures subject to a judicial warrant.

34. However, regarding the judicial warrant, while the additional clarifications of September 2023 state that the deadline for the judge to examine the application has been revised, from Article 12, paragraph 4 of the CI Law (former Article 15, paragraph 6 of the draft CI Law), it would seem that a judge is still required to examine the request for a judicial warrant within 24 hours, with the judicial warrant having to be transmitted no later than 24 hours after submission of the request

and a reasoned ruling having to be issued within 48 hours (pursuant to paragraph 9 of the same article). Furthermore, with regard to the specialisation of judges, it is unclear whether the concerns of the Venice Commission have been addressed with the changes to Article 48 (former Article 61) of the CI Law, and if now no longer a single judge, not specialised in intelligence and security service issues, decides alone on complicated judicial warrants and appeals within a short amount of time. In the additional clarifications provided in September 2023, the SIS outlines that determining the number of judges empowered to examine the requests by the SIS and the allocation of specific applications to specialised judges is a matter for the court in question. Finally, as regards the possibility of a panel of external independent experts, the clarifications provided in September 2023 again refer to the Special Control Commission. As before, without further references in the two laws to this Commission and more comprehensive information on its establishment, composition and mandate, the Venice Commission cannot conclude that all its recommendations on judicial control have been followed.

E. Respect of fundamental rights and safeguards

35. In paragraph 71 (c), the Venice Commission made several recommendations with regard to respect of fundamental rights and safeguards. First, in paragraph 71 (c) (i), the Commission recommended that supervisory control by a judge or an independent body always be provided, and that it should come into play at least at one of the following stages: prior to the action (authorisation), during the action (continuous oversight), or after completion of the action (*ex post* control).

36. As outlined in Section D (iii) above, in the adopted laws, judicial control is provided at two stages of the (counter)intelligence activities, with a more explicit *ex post* control now provided in the new Article 17 of the CI Law as well as an *a priori* control provided for in Article 9 (Former Article 12) of the CI Law; Article 12 (Former Article 15) of the CI Law; Article 45 (Former Article 60) of the CI Law; and Article 3 (Former Article 4) para. 3 of the SIS Law, which also refers to the Criminal Procedure Code and thus presumes some sort of judicial control. The Commission's recommendation in para. 71 (c) (i) of the Opinion can thus be considered to have been followed.

37. Second, in paragraph 71 (c) (ii), the Venice Commission recommended that the law must provide for the necessity, at some stage, to inform a person about special measures targeting him or her.

38. Already in Article 23 of the draft CI Law it was provided that, for those counterintelligence measures subject to a court warrant, an individual would be notified within five days of closing the respective files. Such notification was however not foreseen for counterintelligence measures authorised by the Director of the SIS. This is maintained in Article 20 of the adopted CI Law. However, the number of measures that the Director of the SIS can now take without a judicial warrant is reduced to one: The authorisation to identify a user of an electronic communications system (Article 9, paragraph 1, subparagraph 1 of the CI Law, as compared to Article 12 of the draft CI Law). It is thus ensured that the target of counterintelligence measures is habitually notified. The recommendation has in substance been followed. However, when it comes to the specific identification measure approved by the SIS Director, when the identification of a person also includes establishing the presence of electronic communication means with this person at a given time (Article 21, paragraph 1 of the CI Law), it may be intrusive, which would imply that a notification following the closing of the file is nevertheless recommendable.

39. Third, in paragraph 71 (c) (iii), the Commission expressed the view that when a measure is known to the targeted person, it should be possible to impugn the measure in front of a competent independent appeals authority. In the absence of any notable amendments to the two laws in this respect, it seems that this recommendation has not been followed.

40. Fourth, in paragraph 71 (c) (iv), the Commission recommended that the instrument of an official warning, which seems to have criminal legal consequences, should be duly correlated with procedural safeguards. The provision on official warning (former Article 9) of the SIS Law has been deleted from the SIS Law. The Venice Commission welcomes that the recommendation has thus been honoured.

41. Fifth, in paragraph 71 (c) (v), the Venice Commission recommended that the provisions regarding the collection of information from providers of electronic communications and the assistance they are expected to provide to the SIS be revised in light of the requirements of necessity and proportionality in terms of respect of the right to property, private life and data protection, but also with respect to freedom of expression. In the adopted laws changes have been made, in order to make clear that the duty of the providers to cooperate comes with a duty to compensate them, in addition to the obligation (which already existed under the draft law) for such cooperation to be based on a contract or verbal agreement with the providers (Article 7, paragraph 3 of the SIS Law). The Venice Commission notes furthermore with satisfaction that the possibility for the SIS to oppose technological upgrading of electronic communications providers has been removed from former Article 7, paragraph 11 of the draft CI Law (replacing this with a six months' notification in Article 9, paragraph k of the SIS Law). Moreover, it would appear that the authority to collect information from specifically providers only concerns meta-data, and not the content of communications (Article 27, para. 1 of the CI Law). It may be said that these provisions fulfil the Commission's recommendation.

42. Sixth, in paragraph 71 (c) (vi), the Commission recommended that specific exceptions to the implementation of intelligence measures must be foreseen for lawyers and journalists. The new paragraphs 6 and 7 of Article 12 (former Article 15) of the CI Law now contain specific exceptions regarding lawyers and journalists, providing that counterintelligence measures are not to be authorised with regard to the "legal relations of legal assistance between lawyers and their clients" and "journalists, for the purpose of establishing their sources of information". If such information is accidentally collected, it is not be used and to be destroyed, pursuant to authorisation of a judge (paragraph 8 of Article 12 of the CI Law). The recommendation of the Venice Commission has thus been followed.

43. Finally, in paragraph 71 (c) (vii), the Commission held that, as a rule, the legislation on data protection should apply also to counterintelligence activities, with narrowly defined exceptions. In Article 47 (former Article 55 of the CI Law) now provides that intelligence activities shall be carried out "pursuant to the provisions of the legislation on the protection of personal data, taking into account the peculiarities of this law [the CI Law]". The Venice Commission welcomes this amendment but considers that the reference to "*taking into account the peculiarities of this law*" would need to be further clarified.

44. In general, the Venice Commission appreciates that fundamental rights are now more clearly embedded in the legislation on the SIS and (counter)intelligence activities. Various other amendments attest to this. For example, Article 2 of the SIS Law adds the principle of proportionality to the list of guiding principles for the SIS, in a similar way as this was already included in the principles for carrying out (counter)intelligence measures in the CI Law. Article 6 of the SIS Law now provides that the SIS must not only operate in strict compliance with the national legislation and international treaties to which the Republic of Moldova is a party, but also that SIS must "respect fundamental rights and freedoms". Similarly, Article 24 of the SIS Law also requires individuals collaborating with the SIS to do so. Furthermore, Article 1 paragraph 4 of the CI Law makes it clear that carrying out (counter)intelligence activities by the SIS for a purpose other than those indicated in the Law (with Article 10, paragraph 10 of the CI Law setting out the grounds for counterintelligence measures) is prohibited. Counterintelligence measures and the external intelligence measures cannot be carried out outside a special file, the prerequisites of which are also set out in the law (see Article 6 of the CI Law). This strengthening of the principle

of legality in this respect is to be welcomed. Moreover, pursuant to Article 11 of the CI Law, when authorising counterintelligence measures, the Director of the SIS (or the Deputy Director) is required to consider – besides the validity of the request – if the requested measure pursues a legitimate aim and is proportionate (in relation to the need for it to be carried out and the restriction of the rights or freedoms of an individual, as guaranteed by law) and is to refuse authorisation of the counterintelligence measure if they find that the submitted approach is groundless, does not pursue a legitimate aim or is disproportionate. Similar clarifications are made in relation to the procedure for authorising counterintelligence measures pursuant to a court warrant in Article 12, paragraph 5 (former Article 15) of the CI Law. These amendments are welcome additions to the two laws.

F. Quality of the laws

45. In paragraph 71 (d) (i) and (ii) of the March 2023 opinion, the Venice Commission criticised the quality of the laws, as numerous provisions of the two draft laws were vague, broadly worded, and unclear, and thus did not satisfy the foreseeability requirement. The main issues included undefined notions opening the way to ambiguous interpretations and going as far as extending the SIS mandate beyond the notion of national security, the blurred scope of the two draft laws and unclear provisions, which meaning was difficult to detect, possibly also due to translation inaccuracies.

46. When looking at the undefined notions mentioned in paragraph 62 of the March 2023 Opinion, the Venice Commission appreciates that some of these have been deleted (for example, the Legal Beneficiaries Service in former Article 18(k) of the draft SIS Law), others have been amended or translated more accurately (in particular those mentioned in paragraph 67 of the March 2023 Opinion). It is welcomed that the mandate of the SIS is refocused on national security, with references to the "national interest" having been removed from Article 3 of the SIS Law (former Article 4 of the draft SIS Law), even if not all corresponding notions (as mentioned in paragraph 63 of the March 2023 Opinion) have been removed from the CI Law (see for example Article 34 of the CI Law, former Article 46 of the draft CI Law), and that some provisions have been moved from one law to the other, making the interaction between the two laws clearer (and thereby reducing the danger of the two overlapping laws contradicting one another). In the clarifications provided in September 2023, it is reiterated that most of the notions are defined by other legislation (for example, "unconstitutional entity" in Article 1(3) of the CI Law can be found in the Criminal Code). However, it is not clear if this is the case for all notions (referring again to paragraph 62 of the March 2023 Opinion, the word "intelligence" is not clearly distinguished from the term "information"; the term "counterintelligence" is not defined etc) and it is thus difficult to assess if the recommendation in this respect has been fully implemented, notwithstanding the assurances provided in the additional clarifications received in September 2023 that all notions have been reviewed by the Working Group.

IV. Conclusion

47. Following the Opinion of the Venice Commission on the draft law on the intelligence and security service as well as on the draft law on counterintelligence and intelligence activity (CDL-AD(2023)008) adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023) ("the March 2023 Opinion"), the Moldovan authorities amended the two draft laws in light of the received recommendations. The Law on the Intelligence and Security Service was subsequently adopted by the Parliament on 8 June 2023 and the Law on Counterintelligence and Intelligence Activity was adopted on 7 July 2023. The authorities subsequently requested a follow-up opinion of the Venice Commission on the two adopted laws.

48. The Venice Commission wishes to express its appreciation for the efforts of the Moldovan authorities to implement the recommendations of the March 2023 Opinion and to bring its Law on the Intelligence and Security Service and its Law on Counterintelligence and Intelligence

Activity in line with Council of Europe standards, against the background of a challenging security situation in the Republic of Moldova. The Venice Commission finds it commendable that the majority of the recommendations of the March 2023 Opinion have been followed.

49. In all four main areas of concern identified in the March 2023 Opinion significant improvements have been made. This includes (but is not limited to):

- the comprehensive consultation of all stakeholders that has been carried out;
- the improved harmonisation of the two laws with each other and with other relevant legislation (even if, without having assessed other laws, the Venice Commission cannot comment on the extent to which all relevant laws in the area of intelligence activities have now been harmonised);
- a clearer definition of the powers and duties of the SIS;
- a clearer distinction between intelligence activities and activities carried out in the context of a criminal investigation;
- a limitation of the powers of the Director of the SIS to singlehandedly authorise measures impinging on fundamental rights;
- the provision of a mandate to the SIS to address covert operations intending to influence the outcome of elections;
- the improvements to parliamentary oversight and judicial control (both *a priori* – with almost all counterintelligence measures now being subject to a judicial warrant - and *ex post*); the removal of the instrument of an “official warning”;
- the specific exceptions now provided for lawyers and journalists;
- the applicability of the legislation on personal data protection to intelligence activities (even if the restriction of the applicability of the legislation on personal data protection “taking into account the peculiarities of” the Law on Counterintelligence and External Intelligence Activity would need to be clarified).

50. However, a few recommendations have not been followed in full. In particular, the Venice Commission would have welcomed the establishment of an independent expert oversight/complaints body. From the additional clarifications provided by the authorities in September 2023, it would nevertheless seem that such a body is being contemplated or may even be in the process of being set up, which is a welcome development. Furthermore, improvements can still be made as regards the legal basis for the scope of discretion conferred on the SIS (i.e. the issue of departmental regulations), clarification of the coordinating role of the President of the Republic and its relation to parliamentary scrutiny, providing a possibility to targeted persons to impugn before a tribunal an intelligence measure if this becomes known to them and a clarification of various notions used in the two laws which may or may not be further defined in other laws.

51. The Venice Commission remains at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.