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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

OPINION

ON THE LAW ON THE SPECIAL INVESTIGATION SERVICE AND ON THE PROVISIONS OF THE LAW ON PERSONAL DATA PROTECTION CONCERNING THE PERSONAL DATA PROTECTION SERVICE

Adopted by the Venice Commission
at its 137th Plenary Session
(Venice, 15-16 December 2023)

on the basis of comments by

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I. Introduction

1. By letter of 22 September 2023, Mr Shalva Papuashvili, Chairman of the Parliament of Georgia, requested amongst other laws an opinion on two of them, namely the amended Law on the Special Investigation Service (hereinafter referred to as "the amended SIS Law", CDL-REF(2023)054) and on the provisions of the Law on Personal Data Protection concerning the Personal Data Protection Service (hereinafter referred to as, "the PDPS provisions" and "the amended PDP Law", CDL-REF(2023)055).

2. Mr Iain Thornburn Cameron, Mr Eirik Holmøyvik, Ms Mary O'Toole, Mr Pieter Van Dijk and Ms Waltraut Kotschy acted as rapporteurs for this opinion.

3. On 16-17 November 2023, a delegation of the Commission composed of Mr Eirik Holmøyvik and Ms Mary O'Toole, accompanied by Mr Vahe Demirtshyan and Ms Martina Silvestri from the Secretariat, travelled to Tbilisi and had meetings with the representatives of the Parliament (ruling party and opposition), the Head of the Special Investigation Service, the Deputy Head of the Personal Data Protection Service, the Deputy Public Defender, the Chief Prosecutor, as well as with some representatives of civil society and international organisations. The visit took place in parallel with those carried out in the context of the preparation of the opinion on provisions of the Law on the Fight against Corruption concerning the Anti-Corruption Bureau and the joint opinion on the draft amendments to the Election Code and to the Rules of Procedure of the Parliament of Georgia, as well as a series of high-level meetings between a delegation of the Venice Commission, including its Vice-President and its Secretary, and the Georgian authorities. The Commission is grateful to the Georgian authorities and the Council of Europe office in Tbilisi for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the amended SIS Law and on the PDPS provisions of the amended PDP Law. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 16 and 17 November 2023. On 8 December 2023, the authorities submitted their comments to the draft, that are taken into consideration in the following chapters. The draft opinion was examined at the meeting of the Sub-Commission on Democratic Institutions on 14 December 2023, and it was adopted by the Venice Commission at its 137th Plenary Session (Venice, 15-16 December 2023).

II. Background

A. The split of the State Inspector Service in two entities

6. The amended SIS Law and the amended PDPS Law adopted on 30 December 2021 abolished the State Inspector's Service, a body established in 2018 with the mandate to monitor the lawfulness of personal data processing and covert investigative activities as well as to carry out the investigation of alleged crimes in law-enforcement agencies. Instead, two separate institutions were created: the Personal Data Protection Service (hereinafter, the "PDPS") and the Special Investigation Service (hereinafter, the "SIS"). This reorganisation resulted in the early termination of the State Inspector's mandate.[1]

7. In the explanatory notes, the authorities substantiated the amendments, underlining that, although the reform of the State Inspector's Service was implemented in 2018, certain issues had

[1] See also Venice Commission, CDL-AD(2022)037, Urgent opinion on the draft Law on the amendments to the criminal procedure Code of Georgia, para 24.

remained unresolved concerning the effective institutional arrangement of the mentioned field. In particular, the performance of the three main functions of the Special Inspectorate by the same body implied that the latter was authorised, on the one hand, to investigate certain crimes and, on the other hand, to control the legality of personal data processing. Since the investigation of crimes is closely related to the processing of personal data by the investigator, there was confusion between checking the legality of personal data processing by the Service during the investigation and the investigation itself. This situation created a conflict of interests. Therefore, the authorities found it necessary to separate these functions and assign them to two separate independent bodies, which according to them would better ensure the ability to perform these functions in a timely manner.

8. The new legislation was swiftly adopted by Parliament through an expedited procedure. Completing all stages within merely four days, in the period that goes between Christmas and New Year's Eve, the legislation was adopted on 30 December 2021, while the State Inspector in charge was on maternity leave.[2] No consultations, discussions, or public forums were initiated; similarly, no human rights impact assessment was provided.

9. In its 2021 Report, the Public Defender of Georgia expressed grave concern at the abolition of the State Inspector's Service. The Report states that the legislative amendments "do not and cannot provide sufficient guarantees for the institutional independence of the two newly established services" and give rise to "the risk in the future that these services will also be abolished if their respective activities are unacceptable to a particular political group."[3]

10. Several international organisations, including the Council of Europe Commissioner for Human Rights,[4] the United Nations office[5] and the EU Delegation[6], as well as several foreign diplomats in Georgia[7] have urged the ruling party to temporarily halt the process of replacing the outgoing service and instead engage in consultations regarding this initiative. The primary concerns raised revolved around two major issues. First, there were reservations about the exceedingly rapid initiation of the process. Second, there were apprehensions about the intentions to dismiss Service employees, including its leadership.

11. Moreover, a total of 17 NGOs[8] have called on the Georgian government to "stop attacks on independent institutions" following Georgian majoritarian MPs' proposal to replace the State Inspector's Service with the SIS and PDPS. These NGOs stated that the State Inspector's Service has been praised for its "independence and impartiality" by international partners, noting that the body needs to be strengthened instead of being replaced. In particular, giving the agency more independence in conducting investigative actions, as well as increasing its competence and disseminating it to a wider circle of crimes and officials.

12. On 18 February 2022, the OSCE/ODIHR adopted an Opinion on the Legislative Amendments on the State Inspector's Service of Georgia.[9] OSCE/ODIHR expressed concerns about the rushed non inclusive procedure, the potentially adverse impact on allegations of torture, ill-

[2] As reported by several interlocutors during the visit in Tbilisi and online news (e.g. https://bm.ge/en/news/londa-toloraia-quits-maternity-leave-to-defend-state-inspector-service-targeted-by-the-parliament-of-georgia/98529.
[3] The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights & Freedoms in Georgia 2021 pages 11 and 47.
[4] The Georgian Parliament should reject draft legislation undermining the independent functioning of the State Inspector's Service
[5] UN Georgia office expresses "regret" over gov't abolishing State Inspector's Service (agenda.ge)
[6] EU Delegation responds to expedited procedures in the Georgian Parliament relating to the State Inspector's Service and the Judiciary | EEAS (europa.eu)
[7] Foreign dignitaries express concern over proposed replacement of State Inspector's Service (agenda.ge)
[8] NGOs condemn possible replacement of State Inspector's Service by two other agencies (agenda.ge)
[9] OSCE/ODIHR Opinion on the Legislative Amendments on the State Inspector's Service of Georgia, 22 February 2022.

treatment, and deaths in custody and on the selection and appointment of the head of the institution and functional immunity.

B. Judgments of the European Court of Human Rights and decisions of the Committee of Ministers

13. The European Court of Human Rights (hereinafter, the "ECtHR") has found several violations of the European Convention on Human Rights (hereinafter, the "ECHR") committed by Georgia in relation to the lack of effective investigations into allegations of violations of the right to life and of ill-treatment, as well as to failures of the authorities to carry out effective investigations.[10]

14. In March 2022, in the context of the supervision of the execution of a group of judgments,[11] the Committee of Ministers of the Council of Europe (hereinafter, the "CM"), while noting the authorities' explanation that the State Inspector's Service was replaced by two agencies, expressed nevertheless profound concern over the recent developments resulting in the dissolution of the former State Inspector's Service; it called on the authorities to give serious consideration to the impact of these measures on the independence and effectiveness of investigations and to put in place solid guarantees for remedying any adverse effect thereof.

15. In its June 2023 meeting,[12] the CM noted with interest the legislative and institutional measures concerning the Special Investigation Service, including its new function to investigate crimes related to violations established by the ECtHR's judgments. It called upon the authorities to continue updating the CM on further measures to ensure stronger independence and effectiveness of investigations, including by improving the legislative framework and allocating the necessary resources to and building capacities of the institution.

16. Moreover, in its analysis, the CM underlined the importance to follow how effectively the SIS will be able to deal with all its competencies, bearing in mind, among others, the functions entrusted to it in 2021, some of which go beyond investigation of serious human rights violations committed by state agents. The concerns of the CM remained about the exclusion from the SIS's investigative remit of serious human rights violations committed by prosecutors and some senior (political level) officials. The CM also found it important that the adoption of the reform on the separation of prosecutorial and investigative functions be aligned with the Council of Europe standards and contribute to further improvement of investigations carried out by the SIS.[13]

C. Georgia and EU Accession

17. On 3 March 2022, Georgia submitted its application for EU membership. On 17 June 2022, the European Commission issued its Opinion on this application and recommended that Georgia be granted candidate status, once the 12 priorities would have been addressed.[14]

18. On 8 November 2023, the Commission recommended[15] that the European Council grant Georgia the status of candidate country on the understanding that a number of steps are taken. It noted that three of the 12 priorities (on gender equality and fighting violence against women, taking into account the ECtHR judgments on Court deliberations and on appointing a

[10] See for example, ECtHR, Gharibashvili , no. 11830/03, 29 July 2008, Tsintsabadze , no. 35403/06, 15 February 2011, Enukidze and Girgvliani, no. 25091/07, 26 April 2011, Identoba and Others, no. 73235/12, 12 May 2015, no. 21571/05.
[11] See CM, 1428th meeting, Notes and Decisions, (8-9 March 2022) (DH).
[12] See CM, 1468th meeting, Notes and Decisions, (5-7 June 2023).
[13] See CM, Ibid.
[14] European Commission, Opinion on Georgia's application for membership of the European Union, pages 17-18.
[15] European Commission, Georgia Report 2023 (europa.eu), page 13.

Public Defender through a transparent process) have been completed, but that Georgia should *inter alia* review the legislation on the Anti-Corruption Bureau, the Special Investigation Service and the Personal Data Protection Service addressing upcoming recommendations of the Venice Commission.

19. In particular, priority 4 focuses on providing adequate resources and safeguarding the independence of the new SIS and PDPS, as well as the adoption of laws by the Georgian Parliament to enhance the investigative powers of the SIS and improve social protection for the personnel of the PDPS. It also focuses on strengthening the independence of the Anti-Corruption Agency bringing together all key anti-corruption functions to rigorously address high-level corruption cases.[16]

III. Scope of the opinion

20. The request for the opinion of the Venice Commission submitted by the Georgian authorities links it to 12 priorities outlined by the EU for obtaining candidate status. It is not for the Venice Commission to decide whether the law of Georgia meets the criteria set by the EU. The Venice Commission will assess whether the SIS and PDPS have sufficient independence and powers to address crimes committed by the law enforcement agencies and to guarantee personal data protection in an effective manner.

21. Furthermore, even assuming that proper safeguards of independence and effective powers are granted to these institutions for fulfilling their respective tasks, the Venice Commission underscores that such entities can properly function only in a democracy built upon a strong public trust in State institutions. The mere establishment of these entities, if they are devoid of adequate resources and genuine autonomy and if they are subject to potential influence by various public bodies or officials, both in theory and practice, would render these bodies powerless in fulfilling the mandated goals. The amended laws pose numerous challenges that cast doubt on the autonomous and efficient operation of these services. Failing to address these issues would severely impede their effective functioning.

22. Therefore, the Venice Commission in this opinion focuses first on the law-making process, as an essential element to build public trust in the State institutions; secondly, on the independence of the SIS and PDPS - which encompasses, among others, the security of tenure, the selection/appointment procedures, and the functional immunity of the Heads, Deputies, and staff of the SIS and PDPS. Thirdly, as to the effective powers necessary to fulfil the functions outlined in the laws, the Venice Commission will assess the exclusion of SIS jurisdiction over high-ranking officials, its relationship with the prosecutor's office, the reasonableness of including new unrelated crimes within the jurisdiction of the SIS, as well as the PDPS's authority over covert investigative measures.

23. If this opinion remains silent on other elements of the amended Laws, it does not imply that the Venice Commission agrees with them or that it will not raise them at a later stage.

IV. Analysis

A. The law-making process

24. As reported above, the amended Laws were adopted in a hasty manner, through an accelerated procedure, without public debate and proper parliamentary discussions.

25. According to Article 117(1) of the Rules of Procedures of the Parliament of Georgia, Parliament may consider and adopt a draft law through the accelerated procedure if it involves

[16] Ibid., page 14.

only the introduction of amendments to the law.[17] In addition, Article 117(3) of the Rules of Procedures, stipulates that "A decision on the consideration of the draft law through the accelerated procedure shall be made by the parliamentary bureau, on the basis of a written substantiated request of the initiator of the draft law."[18]

26. In the explanatory note, the authorities mentioned that the reasons for expedited review of the draft law was the imminent end of the ongoing session of the Parliament of Georgia, and the circumstance that the Parliament would start working on the next session from 1 February 2022. Due to the need to timely settle the issue provided by the package of legislative amendments, the adoption of these legislative amendments could not be delayed until spring 2022. However, the urgency of the matter was not substantiated.

27. During the meetings in Tbilisi, the authorities also indicated, referring to the abovementioned provision of the Rules of Procedure, that the choice to follow the accelerated procedure was a political one. They underscored that even if the drafts were to undergo the ordinary procedures, including inclusive public consultations and parliamentary debate, the outcome would remain unchanged, and the drafts would still be adopted in their current form.

28. In this regard, the Venice Commission recalls that under its Rule of Law Checklist,[19] the process for making law must be *"*transparent, accountable, inclusive and democratic*"*. To satisfy this requirement, the public should have access to draft legislation, at least when submitted to Parliament, and should have a meaningful opportunity to provide input.[20] This includes the opportunity to participate in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves.[21] Where appropriate, impact assessments should be made before the legislation is adopted.[22] Moreover, the proposed legislation shall be debated publicly by parliament and adequately justified (e.g. by explanatory reports).[23]

29. Furthermore, the Venice Commission emphasises that an inclusive law-making process is not solely a procedural exercise. Meaningful consultations with both the opposition and the civil society as well as with other stakeholders, are crucial. Hence, the opposition shall have powers to offer political alternatives, to articulate and promote the interests of their voters (constituents), to offer alternatives to the decisions proposed by the government and the majority representatives, to improve parliamentary decision-making procedures by ensuring debate, reflection and contradiction, to scrutinise the legislative and budgetary proposals of the government, to supervise and oversee the government and the administration, and to enhance stability, legitimacy, accountability and transparency in the political processes.[24] Moreover, it is important that the minority should have an opportunity to express its opinion in setting the agenda and deciding which cases should be debated, including the dates of the debate, the timeframe, etc. "It is not conductive to effective and legitimate parliamentary democracy if the majority is able to decide the agenda alone, allowing only those debates with which they are comfortable and delaying or blocking others".[25]

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[17] Parliament of Georgia, Rules of Procedure , Article 117 (1).
[18] Ibid., Article 117(3).
[19] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007rev.
[20] Venice Commission, CDL-AD(2016)007rev, op. cit., Benchmarks A.5.iv.
[21] UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote), para 8.
[22] Venice Commission, CDL-AD(2016)007rev, op. cit., Benchmarks A.5.v.
[23] Venice Commission, CDL-AD(2016)007rev, op. cit., Benchmarks A.5.III.
[24] Venice Commission, CDL-AD(2010)025, report on the role of the opposition in the democratic parliament, para 25.
[25] Ibid., para.108.

30. Additionally, the significance of public debate in the law-making process has been underscored by the ECtHR. While the ECtHR has not addressed the legislative processes in detail, it has nevertheless considered pluralism and freedom of political debate to be the foundation of any democracy.[26] As appears from its case-law, in order to determine the proportionality of a general legislative measure, the ECtHR may examine the quality of the parliamentary assessment of the necessity of the measure,[27] as well as the scope and seriousness of the debate during the relevant law-making process.[28]

31. The Venice Commission has previously noted that the lack of proper deliberations is an intrinsic problem of any accelerated procedure. It is highly critical of rushed adoption of acts of Parliament, regulating important aspects of the legal order, without normal consultations with the opposition, experts and civil society. "This manner of law-making raises doubts as regards the soundness of the substantive outcomes of the reform".[29] Moreover, for laws proposing significant structural changes in human rights bodies, such as the State Inspector's Service, a comprehensive impact assessment, especially from a human rights perspective, is crucial.

32. In this context, the justification of the authorities for the accelerated procedure falls short when relating to laws concerning key institutions dealing with fundamental human rights. In such cases the use of accelerated law-making procedures requires a concrete justification, whereas it appears that there were no compelling reasons for expediting the process while the argument that the legislative changes in question constitute mere amendments rather than distinct new laws does not appear convincing.

33. Moreover, it seems that no "necessity" or "urgent need" existed for splitting the former State Inspector's Service. The Service was established in order to deal with accountability gaps, first, as regards human rights abuses committed by law enforcement officials and, second, as regards the lawfulness of data processing. It also appears to have been given a third role, namely, to monitor law enforcement use of covert investigative techniques (secret surveillance etc.). In fact, the three different remits of the previous State Inspector's Service could in principle coexist as their roles were not internally incompatible.[30] On the contrary, the former State Inspector's Service appears to have functioned as a typical Ombudsman institution, investigating possible maladministration, albeit in a narrow sphere. As an example, in Sweden, the Ombudsman used to perform all three of these functions. Moreover, other countries have opted for similar solutions where supervision over use of covert investigative techniques and data processing are combined.[31]

34. Finally, it needs to be underlined that the use of accelerated law-making procedures is not only problematic in relation to the inclusiveness of the law-making process, as the Venice Commission has stressed in numerous opinions:[32] the hasty law-making without proper

[26] ECtHR, Tănase v. Moldova [GC], no. 7/08, 27 April 2010, para. 154, with further references.
[27] ECtHR, Animal Defenders International v. the United Kingdom [GC], no. 48876/08, 22 April 2013, para. 108.
[28] ECtHR, Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, 6 October 2005, para. 79.
[29] Venice Commission, CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, para 11.
[30] OSCE/ODIHR Opinion on the Legislative Amendments on the State Inspector's Service of Georgia in para. 34 notes that an accompanying Explanatory Note to the amended Laws make reference to a 2018 joint statement of NGOs raising concerns about a possible conflict of interest in having a single institution investigate allegations against law enforcement and data protection. However, the ODIHR report also notes that this statement was issued prior to the commencement of the operation of the Service. On 26 December 2021, the authors of that statement issued a further statement noting that "observations on the institution have clearly proven that no shortcomings have been identified in practice in terms of the compatibility of personal data protection and investigative functions.
[31] See for example, the Review Committee on the Intelligence and Security Services (CTIVD) of the Netherlands, more information available at https://english.ctivd.nl/.
[32] Venice Commission, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paras 16-19; CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of

consultation and impact assessments can also lead to badly written laws, inconsistencies, and lacunae which may have a negative impact on the public trust towards the institutions concerned.

35. In sum, the Venice Commission finds that the adoption of laws of such significance within a brief timeframe, lacking substantial discussions and pluralistic participation to the debate, may lower public trust towards State institutions in general, and the SIS and PDPS in particular. Moreover, it contradicts international standards related to effective and transparent law-making practices, including those regarding protection of rights of the opposition. The Venice Commission, thus, recommends following the principles of transparency, accountability, inclusiveness and democratic debate systematically and rigorously in the law making and, where necessary, making amendments to legislation, Parliamentary procedures or rules to incorporate these standards.

B. Independence of the SIS and PDPS

1. Dismissal of the Head of the State Inspector Service and her deputies

36. According to Article 6(7) of the previous law on the State Inspector's Service, the term of office of the State Inspector shall be 6 years. Article 9 of the same law specifies the cases of early termination of the powers of the State Inspector, which include: the loss of citizenship of Georgia; the failure to perform his/her duties for four consecutive months due to health reasons; an effective court judgment of conviction against him/her; the court's recognition of him/her as a beneficiary of support (unless otherwise determined under a court decision), recognition as missing, or declaration as dead; holding a position incompatible with the status of the State Inspector, or engaging in an activity incompatible with his/her status; voluntary resignation, and death.

37. According to Article 6(11) of the previous law on the State Inspector's Service, the State Inspector shall have one first deputy and two deputies whom he/she appoints by an order. Upon the termination of the powers of the State Inspector, the powers of the first deputy and the deputies of the State Inspector will be terminated as soon as the new State Inspector shall start exercising the powers in accordance with the procedure established by this Law.

38. Article 27^1(1) of the amended SIS law stipulates that "as of 1 March 2022, the State Inspector Service and the State Inspector's position shall be cancelled. As of 1 March 2022, the State Inspector, his/her first deputy and deputies shall be dismissed from offices".

39. On 17 November 2022, the Constitutional Court of Georgia adopted a decision by which it declared invalid the cancellation of the State Inspector's position and the dismissal of the State Inspector and his/her deputies without offering equivalent positions or without payment of fair compensations.[33]

40. The Constitutional Court found that the dismissal of the State Inspector and her deputies was not the least restrictive means of achieving a legitimate goal.[34] Among the less restrictive means

other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organization and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para 74.

[33] Decision of the Constitutional Court No 1/9/1673, 1681 of 17 November 2022.

[34] According to para. 47 of the decision of the Constitutional Court the legitimate goals in this case are: a more effective institutional arrangement of the State Inspectorate during investigation and undercover investigative activities, both in terms of controlling the legal processing of personal data and expanding the investigative scope, as well as by separating incompatible functions. Avoiding the conflict of interests in the state agency, strengthening the institutional independence of the agencies focused on human rights protection and, ultimately, promoting the protection of human rights.

of achieving such a goal,[35] the Court considered offering the applicant an equivalent position or paying her fair compensation.[36] However, Georgian legislation does not provide for a mechanism that would give the former State Inspector an opportunity for an equivalent position which in this case is either the position of the Head of the SIS or the Head of the PDPS. At that stage, the Heads of the SIS and PDPS had already been appointed by Parliament and the legislation did not foresee the Constitutional Court decision as a ground for their dismissal. Therefore, the possibility of restoring the (former) State Inspector to an equivalent position could not be realised.

41. During the meetings in Tbilisi, the authorities mentioned that the former State Inspector was not a constitutional body, consequently the requirements as regards his/her dismissal were not to be strictly interpreted. In any case, the Venice Commission delegation was informed that the former State Inspector did not even receive any compensation for her early dismissal.

42. The Special Inspector, in light of its mandate, could be considered a national human rights institution, which is the case also for the Head of the SIS and of the PDPS. A core principle regarding human rights institutions is that they enjoy full independence from political power, irrespectively of their status as constitutional or statutory bodies.[37] A key element for guaranteeing such independence is security of tenure, as clearly stated in the Venice Principles for Ombudsman institutions. In particular, the incumbent "shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehaviour" or "misconduct", which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent, and provided for by law".[38] Similarly, the Paris Principles, under "guarantees of independence and pluralism", emphasised the importance of "stable mandate for the members of the national institution, without which there can be no real independence".[39]

43. None of the conditions mentioned in Article 9 of the previous law on the State Inspector's Service were present in the case of dismissal of the former State Inspector and her deputies. Moreover, the practice to dismiss the head of an independent body by changing the law and in contradiction to the exhaustive list of grounds for dismissal, contains a serious risk for the independence of that body, even if a compensation for the dismissal is proposed. The Venice Commission also underlines that the independence of important human rights institutions is not a personal prerogative of its postholders and the mere payment of compensation may, therefore, not redress the negative effect of the early dismissal for the independence of the given body. Moreover, such an approach may have a chilling effect for the wider public and potential beneficiaries of the service and seriously undermine its authority.

44. In this context, it has to be underlined that, even assuming that the stated concerns of a possible conflict of interest in having a single institution investigating allegations against law enforcement and data protection are justified, a question may arise regarding the means and method in achieving these aims. It appears that the most intrusive and radical approach was selected, which is to abolish the State Inspector's Service and terminate the mandate of its office holders prematurely, rather than evaluating the work of the service to identify actual real-life problems in terms of conflict of interest and, if needed, to limit the powers of the State Inspector's Service. The possible argument that the State Inspector's Service is not actually abolished, but

[35] Decision of the Constitutional Court No 1/9/1673, 1681 of 17 November 2022, para 69.
[36] Ibid, paras 65-69.
[37] Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), Introduction, page 2. The core principles of the Ombudsman institution include independence, objectivity, transparency, fairness and impartiality.
[38] Venice Commission, ibid., CDL-AD(2019)005, para 11.
[39] Principles relating to the status of National Institutions (the Paris Principles), UN General Assembly Resolution 48/134, para. 3 of Principle of Composition and guarantees of independence and pluralism.

rather continued through the SIS with some powers transferred to a new institution, the PDPS does not seem convincing in the light of the decision to prematurely terminate the mandates of the director and deputy director; this rather leaves a certain impression of *ad personam* legislation.

45. The dismissal of the director and deputy director of the State Inspector's Office raises an issue of security of tenure, which is vital for an independent institution. While the tenure of office in independent institutions is not absolute, international standards require relevant justification, even when the early termination of office is made by legislation. The derogation to the prohibition of transfer of a judge against the latter's will in case of reform of the organisation of the judicial system[40] does not appear relevant, as in the present case the argument of general reform is less credible due to the circumstances of an accelerated legislative procedure and the fact that termination of offices appears as the most intrusive of several available options.

46. In this context the Venice Commission recalls that in certain exceptional situations, a law may have a direct effect on the mandate of an officeholder. For example, it is conceivable that if the whole institution is terminated, the security of tenure of its head cannot be guaranteed.[41] However, the Venice Commission has previously underlined that institutional reforms should not be launched with the sole purpose of replacing individuals in key positions. In particular, if in the domestic system an institution enjoys some sort of autonomy or, *a fortiori*, is defined as "independent", replacing key office holders in such an institution under the pretext of a legislative reform appears to run counter to the Rule of Law.[42]

47. The Venice Commission therefore finds that the dismissal of the former State Inspector and her deputies undermined the independence of the institution, in contradiction to the principle of the rule of law. It is crucial that effective remedies to ensure compliance with rule of law principles be put in place, including in respect of parliamentary procedures, to exclude such situations in the future. Moreover, although the Venice Commission does not consider that compensation constitutes an effective remedy for the loss of office in such circumstances, the apparent lack of compensation payment to the former State Inspector mentioned in the constitutional court's judgment can only add to the egregiousness of the situation.

2. Selection and appointment procedures of the Heads of the SIS and the PDPS

48. Article 6^1 of the amended SIS law and Article 40^3 of the amended PDP law set the procedure of selection and appointment of the Heads of SIS and PDPS, respectively, according to which they must meet specific criteria: being citizens of Georgia, possessing no prior criminal record, holding a law degree, having at least five years of experience in justice, law enforcement, or human rights, and maintaining a strong professional and moral reputation. Selection involves a competition initiated by the Prime Minister of Georgia, appointing a commission including a representative from the government, the chairpersons of the Human Rights and Civil Integration Committee and of the Legal Issues Committee of Parliament, the deputy chairperson of the Supreme Court, the first deputy or deputy General Prosecutor, the Public Defender or a representative of the Public Defender, a person with relevant experience selected by the Public Defender through open competition from among the members of non-entrepreneurial legal persons, who has work experience in the area of human rights protection and/or in the area of personal data protection.

[40] See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 52.
[41] Opinion No. 1 of the Consultative Council of European Judges, para 57.
[42] Venice Commission, CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, paras 29-30.

49. According to Article 6^1(3) of the amended SIS law and Article 40^3(2) of the amended PDP law, the competition commission convenes with a majority of its members, electing a chairperson during the initial session. Within one week, the commission approves its statute, outlining its procedures and deadlines for nominating candidates for the Heads of the SIS and PDPS. This commission, by majority vote, selects a minimum of 2 and a maximum of 5 candidates for the position, ensuring an equal representation of genders, if possible. Subsequently, the Prime Minister of Georgia nominates 2 candidates to the Parliament for both the election of the Head of the SIS and of the Head of PDPS within 10 days.

50. The Parliament of Georgia shall, no later than 14 days after the nomination of candidates, elect the Heads of the SIS and of the PDPS under the procedures established by the Rules of Procedure of the Parliament of Georgia. According to Article 204^{10}(1) and 204^{11}(1) of the Rules of Procedure, the Parliament shall, "by a majority of the total number of its members and, at the same time, by more votes than another candidate" (presumably by voting for each candidate separately), elect the Head of the SIS and PDPS respectively.[43] According to Article 6^1(8) of the amended SIS Law and Article 40^3(8) of the amended PDP law, the term of office of the Heads of the SIS and of the PDPS shall be 6 years. A person may not be elected to these positions twice in a row.

51. As mentioned above, the Venice Commission finds that the SIS, with its investigative function monitoring law enforcement agents, and the PDPS are "ombudsman like" institutions and the standards enshrined in the Venice Principles[44], the Paris Principles[45] as well as the UN guidelines on National Preventive Mechanisms[46] regarding selection and appointments, security of tenure, functional immunity, and adequate and autonomous funding are equally applicable to both bodies. In this context the appointment for a non-renewable term of six years of the Head of the SIS and the Head of the PDPS is in accordance with the Venice Principles, which sets that the term of office of the Ombudsman shall be longer than the mandate of the appointing body, shall preferably be limited to a single term, with no option for re-election and shall preferably not be stipulated below seven years.[47]

52. As regards the composition of the competition commission, the Venice Commission recalls that the composition of a national institution and the appointment of its members, whether through elections or otherwise, shall be set up according to a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights,[48] both concerning the selection and the appointment process. Appointment should be competence-based, transparent and participatory.[49] The composition of the competition commissions for the Heads of the SIS and the PDPS is defined rather rigorously, and it involves all three branches of government, the prosecution service, the Public Defender and a representative from civil society selected by the Public Defender through open competition. However, given the supervisory task of the bodies concerned, one can question the inclusion of the Government, as well as the prosecution service, since law enforcement officers to be investigated by the SIS or monitored by the PDPS are either hierarchically subordinate to the Government or under supervision of the prosecution service.

[43] According to paras 2 of Article 204^{10}(1) and 204^{11}(1) of the Rules of Procedure of the Parliament, the Prime Minister of Georgia shall present 2 candidates for the Head of the SIS and two nominations for the Head of PDPS.
[44] Venice Commission, op. cit., CDL-AD(2019)005.
[45] Principles relating to the status of National Institutions (the Paris Principles), op. cit.
[46]Guidelines on national preventive mechanisms. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Twelfth session Geneva, 15–19 November 2010.
[47] Venice Commission, op. cit., CDL-AD(2019)005, para 10.
[48] Principles relating to the Status of National Institutions (The Paris Principles), op. cit., para 1.
[49] CM Recommendation (CM/Rec(2021)1) to member States on the development and strengthening of effective, pluralist and independent national human rights institutions, para 4.

53. In light of this, the participation of the General Prosecutor's office in the competition commission does not seem appropriate. Instead, their representative could be replaced by a representative proposed by civil society, considering the significant role the SIS and PDPS play in human rights and data protection and the fact that the current regulations favour the State in the selection panel for the competition commission since it comprises government representatives, parliamentarians, and a prosecutor. Therefore, the Venice Commission recommends that the General Prosecutor's office be excluded from the competition commission responsible for selecting candidates for the Heads of the SIS and the PDPS.

54. It is also unclear why the Head of the SIS requires five years' work experience in data protection[50] and the Head of the PDPS requires five years' work experience in law enforcement. This criterion for appointment could have some relevance only if the two institutions had to work together, which may be taken into consideration for monitoring covert investigative measures, as recommended below.

55. Article 6^1(1) of the amended SIS Law requires that the candidate "has no previous criminal record", while, similarly, Article 40^3(1) of the amended PDP Law provides that the candidate "has not been convicted". These two requirements seem to be too strict since this would also cover convictions for misdemeanours like traffic offences or other minor offences e.g., committed by negligence. The Venice Commission recommends modifying these provisions by excluding minor offenses.

56. The competition commission does not mandate the presence of all its members for decision-making, only a majority. This setup might result in crucial independent and external members not being part of the decision-making process. To enhance inclusivity in decision-making, and more importantly, for the sake of reinforcing the independence of the competition commission and public trust in the institutions, the Venice Commission recommends modifying Article 6(1)(4) of the amended SIS Law and Article 40^3(4) of the amended PDP Law by replacing "majority of votes" with "votes of the majority of the members." Additionally, members could be allowed to appoint substitutes in situations where a valid reason justifies their absence.

57. Article 6^1(3) of the amended SIS Law and Article 40^3(3) of the amended PDP Law envisage that the chair of the competition commission is to be elected at the first session, and a week later the commission shall approve a document setting out its formal procedures, including the statute of the commission for the selection of candidates, which shall provide for all procedures of the commission including the time limits and procedure for nominating candidates.

58. The Venice Principles envisage that "the procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law".[51] It is thus important that the rules and procedures governing the commission, and the process by which candidates are to be selected are laid down by legislation. This will ensure that those rules are subject to some democratic oversight and would avoid the possibility of inconsistency of approach in the rules governing procedure and selection of candidates and save the necessity for each commission to 're-invent the wheel' each time candidates are to be selected. Furthermore, considering the extensive powers vested in the Deputies of the Head of the SIS and the Head of the PDPS, which include the ability to replace them, the law should offer specific guarantees for their appointment, ensuring qualifications and gender balance.

59. Consequently, the Venice Commission recommends that the rules and procedures governing the commission, and the process by which candidates are to be selected are laid down by legislation, or by equivalent statutory instrument, which should also include the criteria for the selection or appointment of the Deputies of the SIS and the PDPS.

[50] Article 6(1) para 2 (g) of the SIS amended Law.
[51] Venice Commission, op. cit., CDL-AD(2019)005, para. 7.

60. The selection criteria of candidates for the position of the Head of the SIS, do allow for former law enforcement officers to apply.[52] This carries with it some risk of corporatism, in particular if a candidate is elected directly from the law enforcement to the SIS. To reduce this risk, the Venice Commission recommends envisaging a cooling-off period, for example of 6 months, for person coming from law enforcement.

61. Article 6^1(3) of the amended SIS Law and Article 40^3(3) of the amended PDP Law envisage that the commission is required no earlier than eleven weeks and no later than ten weeks before the expiry of the term of office of the Head of the SIS and the Head of the PDPS to inform the government as to the membership of the commission, while within seven days the Prime Minister is to convene the first session of the Commission. This period is reduced to one week in circumstances where the term of office of the incumbent is prematurely terminated. The Venice Commission finds that the time frames envisaged by the legislation for setting up, devising procedures and decision making by the commission are too short; hence, it recommends extending those time frames.

62. Moreover, it would be difficult for the Public Defender to hold a competition for the selection of his/her nominee to the committee within ten or eleven weeks, given the reasonable requirements for advertisement of the position, the receipt of applications, the holding of interviews and the ultimate selection of a candidate. It would be impossible to complete the task within one week if that became necessary in the case of premature termination of powers of the Head of the SIS (Article 6^1(3)) or the Head of the PDPS (Article 40^3(3)).

63. The Venice Commission recommends that the Public Defender should be entitled to nominate a member of the competition commission without the necessity of holding a competition. The necessary qualifications and experience of this person should be set out in legislation and should include knowledge and experience of ECHR law.

3. Immunity of the Head of the SIS and of the PDPS and their staff

64. According to Article 7^1 of the amended SIS Law and Article 40^5(1) of the PDPS law, the Head of the SIS and PDPS shall be inviolable. Criminal proceedings may be brought against them, and they may be arrested or detained, their place of residence or work, or vehicle may be searched, or their personal search may be carried out only with a prior consent of the Parliament of Georgia. An exception shall be the case when they are caught at the crime scene, which shall be immediately notified to the Parliament of Georgia. If the Parliament of Georgia fails to give consent within 48 hours, the arrested or detained Head of the SIS or the Head of the PDPS must be released immediately. If the Parliament of Georgia gives consent to the arrest or detention, their term of office shall be suspended by a resolution of the Parliament of Georgia until a decree/ruling on terminating criminal prosecution is passed, or a court decision enters into legal force. The personal safety of the Head of the SIS and of the PDPS shall be ensured by appropriate state bodies under the established procedure.

65. According to Articles 181(2) and Article 181^1(2) of the Rules of Procedure of the Parliament of Georgia, the Prosecutor General of Georgia submits a proposal to the Parliament to conduct investigative actions against the Head of the SIS and of the PDPS, respectively. The Procedural Issues and Rules Committee of the Parliament will study and discuss the merits of this proposal within 5 days; it will submit a written conclusion to the Bureau of the Parliament. The Bureau of the Parliament raises the issue for discussion at the next plenary session of the Parliament. After the discussion of the issue at the plenary session of the Parliament, the decision is made by a resolution. In the case of witnessing the Head of SIS or of the PDPS at a crime scene during the

[52] Article 6^1(1) of the SIS amended Law.

period between the sessions of the Parliament, the matter shall be considered in accordance with the procedure established by Article 44, Clause 2 of the Constitution of Georgia.[53] According to Article 130(3) of the Rules of Procedure, a resolution of Parliament shall be deemed adopted if supported by a majority of members attending a plenary session, but not less than one third of the full composition of Parliament, unless otherwise provided for by a legislative act.

66. According to Article 204^{10}(1) and Article 204^{11}(1) of its Rules of Procedure, the Parliament elects the Head of the SIS and the Head of PDPS for a term of 6 years by the majority of the full composition, at the same time, with more votes than any other candidate. The Venice Principles underline that "the parliamentary majority required for removal of the Ombudsperson – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent, and provided for by law".[54] It is evident that obtaining prior consent from the Parliament of Georgia for the arrest or detention of the Head of the SIS or of the PDPS could potentially lead to their removal from office. However, the threshold for the votes required for this prior consent is lower than that needed for their election. The Venice Commission finds that the low threshold of the required votes for a prior consent for arrest or detention of the Head of the SIS and of the PDPS could jeopardise their immunity, potentially undermining their independence. Additionally, there is ambiguity regarding the procedure that will be employed to address this issue. It remains unclear whether the Head of the SIS or of the PDPS will have the opportunity to address the Parliament, to obtain legal representation, and whether the hearings will be held publicly.

67. Therefore, the Venice Commission recommends revising the legislation to ensure that prior consent from the Parliament of Georgia for the arrest or detention of the Head of the SIS and of the PDPS requires a qualified majority of votes.

68. Furthermore, no other employees apart from the Head of the SIS and of the PDPS appear to enjoy functional immunity. In this regard, the Venice Commission recalls that "the Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity)".[55] Moreover, Article 11 of the amended SIS Law and Article 40^{9}(1) of the amended PDP law envisage that any type of influence on the Head of the SIS investigators and servants of the SIS, and the Head of PDPS and employees of the PDPS and illegal interference with their activities shall be prohibited and shall be punishable by law.

69. The Heads of the SIS and the PDPS work through their staff, and, hence, the independence of the institution also requires guarantees concerning the position of the staff. The Venice Commission expressed a positive view on the extension of the immunity to the staff of the Human Rights Defender's office in many opinions.[56] Moreover, the Heads of the SIS and the PDPS may delegate their powers to the deputies (Article 5(1)(d)) of the amended SIS and Article 40^{2}(1)(d) of the amended PDP Law), the deputies exercise the powers of the Head of the SIS or the PDPS when they are absent, or fail to exercise their powers, or when their powers are suspended, or their term of office expires or is prematurely terminated (Article 62(3) of the amended SIS Law and Article 40^{4}(2) of the amended PDP Law).

[53] According to Article 44(2) of the Constitution of Georgia, during the period between sessions, the President of Georgia shall convene an extraordinary session of Parliament at the request of the Chairperson of Parliament, at least one fourth of Members of Parliament or the Government. The President of Georgia shall also convene a special sitting in the course of a regular session. Unless an act summoning Parliament is issued within 48 hours of a written request to convene an extraordinary session, Parliament shall meet within the following 48 hours, in accordance with the Rules of Procedure of Parliament. A special sitting of Parliament shall be held only based on the agenda defined by the initiator and shall close once the agenda has been exhausted.
[54] Venice Commission, op. cit., CDL-AD(2019)005, para 11.
[55] Ibid. para 23.
[56] Venice Commission, CDL-PI(2022)022, Compilation of Venice Commission documents on the ombudsman institution, pages 21-26.

70. Additionally, the Venice Commission finds that not granting the immunity to the staff of the SIS and PDPS would greatly weaken the fundamental purpose of immunity. Even though the conditions for the staff's immunity and its revocation may vary or be more restricted as compared to those governing the immunity of the Head and he/she may have the power to lift the immunity of the staff members in certain circumstances, it is crucial to expand the protection, such as immunity, to the deputies and the staff of the SIS and the PDPS.

71. Consequently, the Venice Commission recommends that not only the Head of the SIS and the PDPS but also the deputies and the core staff, especially the inspectors as regards the PDPS, enjoy functional immunity.

C. Effective powers of the SIS and PDPS

72. The following sections will analyse separately the issues related to the effective powers of the SIS and the PDPS. However, it is worth noting with regard to both services that the amended laws do not foresee any possibility to create special reports. The Venice Commission thus recalls that an expert body which performs general supervisory functions should be able to make special reports[57] apart from producing an annual one. Moreover, the government should not normally be able to control whether a report is published at all, and when it is published.[58] The Commission recommends introducing the possibility for both services to issue and publish special reports whenever they find it appropriate.

1. Jurisdiction of the Special Investigation Service

73. The aim of the SIS, according to the law, is the impartial and effective investigation of crimes defined by Article 19(1) of the amended SIS Law. The Law regulates the principles of activities and guarantees for exercising powers of the SIS; the powers of the Head of the SIS, and the powers of the SIS in the field of investigation of crimes committed by the representative of a law enforcement body, officers or persons equal to them.

74. The amendments also stipulate that the investigative jurisdiction of the SIS is expanded to include, *inter alia*, a crime provided for by the appropriate article of the Criminal Code of Georgia, which is related to a fact of violation of the ECHR, or its additional protocol as established by a legally effective decision of the ECtHR.

75. According to the amendments, crimes which are revealed in the process of investigation of the facts of ill-treatment, also become the subject of investigation of the SIS. These are the crimes related to the destruction of possible evidence, illegal detention, exceeding official authority and cases of official fraud (Articles 147, 332, 333, 341 and 369[1] of the Criminal Code of Georgia). Furthermore, violent crimes related to elections (Articles 162-163 and 164[4] of the Criminal Code) will be investigated by the SIS only in case they are committed by law enforcement officers.

a. Relations between the SIS and the prosecutor's office

76. Article 2 of the amended SIS Law describes the SIS as an independent state body whose aim is impartial and effective investigation of crimes defined by Article 19(1) of the Law. According to Article 19(4) of the amended SIS Law, if the SIS has information that any investigative body is investigating a criminal case falling within its investigative jurisdiction, the relevant deputy Head of the SIS may request the case materials for review and apply to the supervising prosecutor in writing with a substantiated proposal for transferring the criminal case falling within the investigative jurisdiction of the SIS from another investigative body for investigation. If the supervising prosecutor considers inexpedient the transfer of the case to

[57] Venice Commission, CDL-AD(2015)010, Report on the democratic oversight of the security services, para 239.
[58] Ibid., para 34.

the SIS, the Head of the SIS shall, not later than within 24 hours, apply in writing to the Chief Prosecutor of Georgia with a substantiated proposal on the transfer of the criminal case to the SIS for investigation. The proposal of the Head of the SIS or his/her deputy shall be reviewed within 24 hours after application by the Chief Prosecutor, who has no duty to substantiate a rejection.

77. Similarly, the Chief Prosecutor has the power to transfer the case to another investigative body,[59] to terminate a criminal prosecution and/or investigation or to suspend a criminal prosecution,[60] without justification. The authorities in their comments of 8 December 2023 state that other provisions of the Georgian criminal code (Article 3(16) and Article 106(1)) require that prosecutors, including the Chief Prosecutor, must substantiate his/her decisions. The Authorities agree that that the amended SIS law can be strengthened to reflect this requirement.

78. As the Venice Commission found in a previous opinion on Georgia, the role of the prosecution's office within the criminal procedure can be characterised as having a significant level of influence. Rather than simply overseeing criminal investigations, the prosecutor's office actively carries out these investigations and plays a crucial role in the decision-making process at all stages of the investigation.[61] The authorities state that this is not the case in respect of the SIS and because of the timing of the adoption of the previous opinion the Venice Commission was unaware of the existing wide investigative competences of the SIS. However, the amended SIS law does not address the matters raised in the previous opinion and it appears that the prosecutors keep having wide powers over the investigations, including those conducted by the SIS. This could compromise the independence of investigations conducted by the SIS, considering its unique nature. In their comments of 8 December 2023, the authorities informed the Venice Commission that there is a legislative reform in progress, in line with the Venice Commission Opinion.[62] In particular, the Parliament of Georgia adopted the amendments to the Criminal Procedure Code on the separation of prosecutorial and investigation competencies by first hearing. It is expected that the amendments will pass the remaining second and third hearings and turn into legislation in 2024 which will further expand the investigation competence of the SIS.

79. The Venice Commission underlines that independent and effective investigation of serious criminal offences allegedly committed by state officials is part of the state's positive obligations under the ECHR. The ECtHR in numerous judgments has emphasised that for an investigation to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.[63] This means not only a lack of hierarchical or institutional connection but also practical independence.[64] In this regard, the applicable requirements do not call for the persons and bodies responsible for the investigation to enjoy absolute independence, but rather that they be sufficiently independent of the persons and structures whose responsibility is likely to be engaged.[65]

80. As a consequence, for the SIS to have sufficient powers to effectively achieve its objectives, its independence from the prosecutor's office is crucial. In this context, the Venice Commission emphasises that the independence of an institution is not merely a standalone objective; it entails

[59] Article 19(5) of the amended SIS Law.
[60] Article 33(6)(a) and (g) of the Criminal Procedure Code of Georgia.
[61] Venice Commission, CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, paras 8 and 10.
[62] Venice Commission, Ibid., CDL-AD(2019)006.
[63] ECtHR, Gharibashvili v. Georgia, no. 11830/03, 29 July 2008, para 61, Barbu Anghelescu v. Romania, no. 46430/99, 5 October 2004, para 66.
[64] ECtHR, Ergı v. Turkey, 28 July 1998, Reports 1998-IV, paras 83-84.
[65] ECtHR, M. B and Others v. Slovakia, (45322/17), 1 April 2021, para 91.

empowering that independent body to enhance its effectiveness in addressing challenges and fulfilling its missions as outlined by the law. In this sense, it is relevant to recall that in a previous opinion,[66] the Venice Commission recommended that the authority of the prosecutor to supersede the investigator's decision should be accompanied by a mandatory requirement to provide a written justification for it. Thus, if these powers had to stay within the hands of the Chief Prosecutor, there should be at least a requirement to thoroughly justify the related decisions. In their comments of 8 December 2023, the authorities indicated that, according to the Criminal Procedure Code of Georgia (Article 33(3)), a superior prosecutor may annul, amend, or replace an unsubstantiated decision of a subordinated prosecutor. In addition, the authorities underlined that throughout the existence of both, the State Inspector's Service first and the SIS later, it has never happened in practice that the Prosecution Service transferred the case to another investigation agency or suspended a criminal prosecution. During the same period, the Prosecution Service terminated several criminal prosecutions and investigations, but this did not involve situations when the SIS or its predecessor had a dissenting opinion.[67] It has also never happened in practice that the supervising prosecutor or the Prosecutor General rejected the SIS proposal to transfer the case from another agency to the SIS for investigation. However, in order to exclude any such possibility, the duty to substantiate the rejection to transfer the case to the SIS as well as the decision to transfer the case to another investigative body should be explicitly stipulated by law.

81. Within this framework, it is important to highlight that even the concept paper on "Separation of Investigative and Prosecutorial Functions Reform of the Criminal Procedure Code", submitted by the Georgian authorities for an opinion of the Venice Commission in 2019, underlined the need to clearly separate the responsibilities of investigators and prosecutors as defined by the Criminal Procedure Code of Georgia. The concept paper mentioned that "this legislation creates the risks of ineffective investigative and prosecutorial activities and makes it rather difficult to identify specific person responsible for undue investigation".[68]

82. In addition, the SIS itself, in its 2022 annual activity report, explicitly mentioned that the prosecutor performs functions that, at certain stages of the investigation, would be desirable to be performed by the investigator. "It is advisable to carry out separation of the functions of the investigator and the prosecutor in practice, so that the independence of the investigator and the investigative body is gradually ensured. At the same time, it is necessary to begin training the investigators to ensure effective implementation of the new powers granted after the separation process".[69]

83. Additionally, the European Committee for the Prevention of Torture (CPT) found that the Prosecutor's Office maintains full control over the investigation process, deciding which entity conducts the investigation as well as that the decision to terminate an investigation can only be appealed to a higher prosecutor, not a court, leaving the Prosecutor's Office in complete control.[70] The authorities in their comments of 8 December stated that the CPT report does not accurately describe the current situation. They referred in their comments to Article 106(1) of the Criminal Procedure Code of Georgia as providing victims with a right of appeal to a court

[66] Venice Commission, CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, para 34.
[67] The authorities also informed that, according to the Judgment of the Constitutional Court of Georgia adopted on 23 September 2021, on the case "Giorgi Tsertsvadze v. the Parliament of Georgia", it is unconstitutional to transfer a case from one investigation agency to another, when, based on a reasonable complaint, the employee of the latter agency is implicated in the commission of ill-treatment.
[68] Venice Commission, CDL-REF(2019)004, Georgia - Concept of the reform of the Criminal procedure code regarding the relationships between the prosecution and the police - stages of investigations under the Georgian Law (explanatory note), p.1.
[69] https://sis.gov.ge/en/page/reports/2023, page 124.
[70] CPT 2019 report on Georgia, https://rm.coe.int/1680945eca, para 14.

in respect of prosecutors' decisions. They state that since the adoption of the CPT report in March 2019, the jurisdiction of SIS has been further strengthened. This appears however, to be a reference to the amended SIS law under consideration in this opinion.

84. Moreover, the Public Defender of Georgia in its 2021 Report criticised the prosecuting authorities in respect of their failure to bring prosecutions at SIS's instigation.[71] In their comments of 8 December 2023, the authorities underlined that the reasoning of all four cases was the insufficiency of evidence to start prosecution, which was substantiated and explained by the supervising prosecutor in writing. In parallel, in all cases, the supervising prosecutor issued the recommended action for obtaining the additional evidence. Notably, concerning three persons, the State Inspector's Service did not appeal the decision of the supervising prosecutor before the Prosecutor General, nor had it challenged the recommended action or submitted the new proposal to start prosecution. These facts demonstrate that the State Inspector's Service shared the justification of the prosecutorial decision and the recommended action. Regarding the fourth person, the State Inspector's Service appealed the decision of a supervising prosecutor about not starting a prosecution, but it was not granted. An explanation of reasons was provided to the State Inspector's Service in writing. After three months, the necessary evidence was obtained in the case and the fourth person was prosecuted.

85. The Venice Commission finds that the prosecutor's wide powers to decide on the jurisdiction of the SIS, combined with the exclusion of prosecutors in general from SIS's remit in respect of certain serious crimes, and the Chief prosecutor from all crimes (see the chapter below), jeopardise the independence and effectiveness of the SIS, and tend to undermine the primary functions of the SIS. In this context the Venice Commission finds that even if new legislation strengthened the independent investigative powers of the SIS, including the power to investigate crimes allegedly committed by prosecutors including the chief prosecutor, the SIS should still have an independent prosecutorial function, as it will put beyond doubt any question of the independence of the service from those it is charged to investigate. Such an approach would significantly diminish the risk of conflict of interest and abuse of power when investigating the cases and would increase the effectiveness of the SIS.

86. Therefore, the Venice Commission recommends revising Article 19 of the amended SIS Law as well as other laws where necessary, to grant the SIS prosecutorial power, the authority to transfer cases to its jurisdiction, as well as the power to initiate and terminate investigations.

b. Exclusion of High-ranking officials from the jurisdiction of the SIS

87. According to Article 19(1) of the amended SIS law, investigative jurisdiction of the SIS shall *inter alia* apply to certain crimes[72] if they have been committed by a representative of a law enforcement body, or by an officer or a person equal to him/her.

88. Article 3(1)(h) (Definitions of terms) of the amended SIS Law stipulates that for the purposes of this Law, the term "representative of the law enforcement body" shall mean an

[71] The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights & Freedoms in Georgia 2021, page 48 and 49.

[72] Criminal Code of Georgia, Article 144^1 – Torture, Article 144^2 – Threat of torture, Article 144^3 – Humiliation or inhuman treatment, Article 332 (3) (b) – Abuse of official powers using violence or a weapon; Article 332 (3) (c) – Abuse of official powers by offending personal dignity, Article 333 (3) (b) – Exceeding official powers using violence or a weapon, Article 333 (3) (c) – Exceeding official powers by offending personal dignity of the victim, Article 335 – Providing explanation, evidence or opinion under duress, Article 378 (2) – Coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence, and coercion of a convicted person in order to interfere with the fulfilment of his/her civil duties.

employee of the Prosecutor's Office,[73] an employee of the Ministry of Internal Affairs (except for the Minister him or herself), employee of the State Security Service (except for the head of the Service), an employee of the special law enforcement structural division of the Defence Forces, an employee of the investigation division of the Ministry of Justice, an employee of the special division of the Special Penitentiary Service – the State Sub-agency under the Ministry of Justice, an employee of the investigation service of the Ministry of Finance.

89. During the meetings in Tbilisi, the authorities explained the exclusion of the Chief Prosecutor by the regulations of Article 48 of the Constitution of Georgia, which designates the Chief Prosecutor as an "impeachable" official. According to this article, no less than one-third of the total Members of Parliament have the right to initiate impeachment proceedings against the President of Georgia, a member of the Government, a judge of the Supreme Court, the General Prosecutor, the General Auditor, or a member of the Board of the National Bank. Impeachment may occur if the actions of the official in question violate the Constitution or exhibit signs of criminal behaviour. In such cases, the Constitutional Court is responsible for evaluating the matter and providing its conclusion to Parliament within one month. If the Constitutional Court's finding confirms a violation of the Constitution or signs of criminal behaviour by the official, Parliament must deliberate and vote on the official's impeachment within two weeks from receiving the conclusion. As conveyed by the authorities, following impeachment, any investigative body can investigate in respect of the Chief Prosecutor, as the individual will no longer hold public office.

90. However, this Constitutional provision does not specify which body shall gather the evidence (initial investigation or investigation) in such cases. If this function remains within the purview of the Prosecutor's Office, it will be problematic due to the obvious conflict of interest. Furthermore, the Constitution does not outline any impeachment procedure for the head of the State Security Service of Georgia who like the Chief Prosecutor, according to Article 3 of the amended SIS Law, is also beyond the jurisdiction of the SIS.

91. The case law of the ECtHR makes it clear that in all cases where a law enforcement operation leads to the loss of life or limb, there is a need for a full and independent investigation.[74] Moreover, where investigation of possible law enforcement wrongdoing must rely on law enforcement itself, there is an obvious problem of lack of independence. Many countries have therefore established specialised investigative bodies, either entirely independent,[75] or as a self-contained section within the police/prosecutorial authority,[76] or with rules to establish a degree of functional independence (e.g., special rules on appointment of the head of the body, separate budget lines etc.).[77] In view of this, the Venice Commission finds that the aim of the establishment of a special investigative body should be to provide an independent and impartial investigations of abuse of power by law enforcement. Considering this, excluding senior law enforcement figures from the definition of "representatives of the law enforcement body" risks undermining the effectiveness of the SIS.

92. Further, pursuant to Article 19(1)(c) of the amended SIS Law, it seems that all prosecutors are excluded from the remit of the SIS in respect of several serious crimes.[78] No reason has been

[73] Except for the Chief Prosecutor of Georgia and a prosecutor of a structural unit carrying out Procedural Supervision of Investigation at the Investigation Division of the SIS of General Prosecutor's office.
[74] ECtHR, Mustafa Tunç and Fecire Tunç v. Turkey [GC], no. 24014/05,14 April 2015, para 169, Armani Da Silva v. the United Kingdom [GC], no. 5878/08, 30 March 2016, para 229.
[75] Such as the English Police Independent Office for Police Conduct: https://www.policeconduct.gov.uk/.
[76] Such as the Swedish Avdelningen för särskilda utredningar: https://polisen.se/om-polisen/granskning-och-utredning-av-polisen/sarskilda-utredningar/.
[77] Such as the Norwegian spesialenheten for politisaker: https://www.spesialenheten.no/english/.
[78] Article 108 – Intentional killing, Article 109 – Intentional killing under aggravating circumstances, Article 111 – Intentional murder in a state of sudden, strong emotional excitement, Article 113 – Murder exceeding the self-defence limits, Article 114 – Murder exceeding the degree required for seizing a perpetrator, Article 115 – Incitement to suicide, Article 116 – Killing by negligence, Article 117 – Intentional infliction of serious harm to health,

presented in the explanatory note for the exclusion of the prosecutors from the SIS jurisdiction regarding the above-mentioned crimes. Moreover, some of these crimes potentially may be connected to the professional activity of prosecutors and may include elements of abuse of power. These regulations are problematic, especially in the light of the provision of the amended SIS Law (Article 19(2)), according to which it is the prosecutor who, after conducting urgent investigative actions, shall decide on remit the case to the SIS.

93. The Venice Commission thus recommends extending the jurisdiction of the SIS to encompass crimes related to serious human rights violations allegedly committed by high-ranking officials.

94. Article 19(1)(d) of the amended SIS Law includes new crimes in the jurisdiction of the SIS.[79] Unlike other crimes to be investigated by the SIS, there is no mention about these crimes be committed by a representative of a law enforcement body.

95. The official statistics provided by the SIS show that only half of the crimes it investigated involved law enforcement bodies. According to the official statement of the SIS of 17 October 2023, since its establishment, it has initiated criminal prosecutions and revealed 139 individuals in various crimes, among which 62 were law enforcement officers who faced criminal charges for ill-treatment and violence. Furthermore, 65 persons were exposed to crimes related to the disclosure of personal life secrets and offenses against human rights and freedoms. Additionally, 12 persons were charged with unlawful interference with journalists' professional activities.[80]

96. The Venice Commission believes that adding new crimes to the jurisdiction of the SIS which are unrelated to law enforcement officials and are committed by private individuals will inevitably divert the focus of the SIS from its primary remit: effectively investigating crimes involving law enforcement. The newly mentioned crimes in Article 19(1)(d) of the amended SIS Law are typically within the purview of other law enforcement bodies, like the police, and do not align with the primary role of the SIS.

97. The Venice Commission therefore recommends specifying that the offenses mentioned in Article 19(1)(d) of the amended SIS Law will be investigated by the SIS solely if perpetrated by representatives of law enforcement bodies.

98. Article 19(1)(e) of the amended SIS Law broadens its jurisdiction to cover crimes that would violate ECHR rights, provided these rights have been established by a legally effective ECtHR decision. While this expansion corresponds to the initial purpose of establishing the SIS, it creates ambiguity regarding the determination of alignment of a crime with established ECHR rights and lacks clarity on who holds the authority to make a conclusive decision in this matter. The

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Article 118 – Intentional infliction of less serious harm to health, Article 120 – Intentional infliction of minor harm to health, Article 121 – Intentional infliction of serious or less serious harm to health in the state of sudden and strong emotional excitement, Article 122 – Infliction of serious or less serious harm to health by exceeding the self-defence limits, Article 123 – Infliction of serious or less serious harm to health by exceeding the degree necessary for seizing an offender, Article 124 – Infliction of serious or less serious harm to health by negligence, Article 126 – Violence, Article 126[1] – Domestic violence, Article 137 – Rape, Article 138 – Another action of a sexual nature, Article 139 – Coercion into penetration of a sexual nature into the body of a person, or into another action of a sexual nature, Article 143 – Unlawful imprisonment, Article 144 – Taking a hostage, Article 150 – Coercion, Article 150[1] – Forced marriage.

[79] Those are the crimes provided for by Articles 153-159 of the Criminal Code of Georgia. Notably, Encroachment upon freedom of speech; Unlawful interference with the journalist's professional activities; Unlawful interference with the performance of divine service; Persecution; Disclosure of personal or family secrets of information on private life or of personal data; Violation of the secrecy of private communication; Violation of secrecy of personal correspondence, phone conversations or other kinds of communication.

[80] The Special Investigation Service exposed 139 persons in various crimes since its establishment | News | sis.gov.ge

responsibility for this determination may potentially rest with the prosecutor, as outlined in the other provisions of Article 19.

99. Consequently, the Venice Commission recommends assigning the decision-making authority on whether a particular crime aligns with the ECHR rights to the SIS.

2. The Personal Data Protection Service

100. From the outset, it should be noted that the piece of legislation submitted to the Venice Commission is an extract of the amended PDP Law. Notably, it consists of the provisions under Chapter V[1], "The Principles of Activities of the Personal Data Protection Service and Guarantees of the Exercise of Powers, the Powers of the Head of the Personal Data Protection Service, his/her Election, Inviolability, Incompatibility of Positions and Termination of Powers", and Chapter V[2], "Powers of the Personal Data Protection Service in the Field of Data Protection and Monitoring the Conduct of Covert Investigative Actions". Therefore, the analysis of the Venice Commission will concern only the organisation of the PDPS, its function, powers and activities, as well as those of its Head and Deputies, without looking at the full PDP discipline. Hence, the Venice Commission underlines that in certain circumstances, the way in which the PDP is regulated may affect the actual powers of the PDPS and alter the considerations expressed in this opinion.

101. Overall, the new provisions concerning the PDPS largely follow the amended SIS Law in terms of regulating the Service's principles, its functional immunity, incompatibility with other roles, the selection process, the dismissal process of the head of the service, the submission of the annual report, etc. In these respects, the concerns about the SIS legislation equally apply to the PDPS, as it has been indicated in the previous sections, where relevant.

102. The following sub-sections will address the supervisory role of the PDPS over the use of covert investigative techniques and will provide further observations regarding some specific provisions.

a. The monitoring of covert investigative measures

103. As reported in a previous opinion (hereinafter, the "2021 Opinion"),[81] Georgia has a recent history of massive leak of personal data which allegedly occurred in September 2021.[82] It is worth recalling that "covert investigative measures are extremely intrusive instruments carrying serious threats to human rights and fundamental freedoms. Such measures may affect not only the privacy of communications and, more generally, private life, but also a variety of other human rights. Surveillance measures might affect freedom of expression (especially in the context of the journalistic profession and protection of journalistic sources), freedom of assembly, freedom of religion, the right to a fair trial and specific guarantees of the client-attorney privilege, as well as political rights."[83]

104. Whereas the Georgian legal framework provides for judicial control over the procedure for applying covert investigative measures and the judge is required to make an assessment of the necessity of the covert measure and to authorise it only as a last-resort measure, the 2021 Opinion stated that many interlocutors had raised concerns about the poor quality of judicial control.[84]

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[81] Venice Commission, op. cit., Georgia, CDL-AD(2022)037.
[82] Ibid., paras. 21-23.
[83] Ibid., para. 35.
[84] Ibid. para. 56. The 2021 Opinion also mentioned "factors as (i) the practice of allocating very little time to examining such requests, (ii) the high workload of a judge, and (iii) the high approval rate of motions for covert measures. In that latter regard, it is notable that the approval rate during the last years has ranged from 87% to 95% (see paragraph 12 above), even though it could be argued that this statistical data, if taken in isolation, could

105. In this context, it is important to recollect that the ECtHR has heavily criticised certain other post-communist states for the limited scope of judicial authorisation of surveillance measures.[85] It has been common that the courts in these states do not, in fact, check whether there are "concrete indications" in the material submitted in the concrete case supporting law enforcement's assessments that there are "reasonable grounds" for suspecting involvement in serious crime. Instead, the review has been of a purely formal nature such as does the criminal code/code of judicial procedure provide for surveillance for the offence at issue in the present case, has the correct procedure been followed in the case etc. This type of "judicial authorisation" is not, in fact, much of a safeguard, and the ECtHR has found in those cases that it violates Article 8.[86]

106. In this situation, the Venice Commission concluded that other safeguards ensuring the accountability of authorities for covert measures acquire even higher importance, and that a follow-up supervisory control exerted by an expert body would play an important role.[87]

107. That such a follow-up function needs to be performed is normal in the sphere of investigation of organised crime, partly because these types of investigations do not necessarily result in prosecutions. Surveillance is also usually authorised at a relatively early stage in an investigation, and courts only determine if there is reasonable suspicion for launching surveillance. There is thus a need for "follow-up" monitoring, looking at what sort of evidence (if any) emerged from the operation. This type of oversight has more of a "lessons learnt" or "identifying patterns" purpose, as well as reassuring the public that the surveillance tool is not being overused. The follow-up control examines past authorisations, matching the initial suspicions with the product obtained. As such it acts as a forward-looking mechanism, recommending improvements in how targeting decisions and data gathering priorities are made in the future, to minimise interference with human rights.

108. The effect of the amended SIS and PDP Laws appear to modify the function of the SIS as regards human rights abuses committed by law enforcement officials and move the functions of monitoring the lawfulness of data processing and law enforcement use of covert investigative techniques (secret surveillance etc.) to the PDPS. These two functions are connected, as secret surveillance is one important means by which data is gathered, which is then processed and retained.

109. As regards the function of monitoring the lawfulness of law enforcement data processing, which now resides with the PDPS, it should be made clear that the skills needed for monitoring the accuracy, reliability, etc. of speculative/subjective data, such as those processed by the police (suppositions, suspicions, etc.), are different from "normal" data processing (hard data/facts). While it is naturally possible for the staff of the PDPS to develop this type of expertise, greater resources, and presumably a considerable period of time, will be necessary for the Georgian PDPS to develop the necessary expertise. Other countries have opted for similar solutions where supervision over use of covert investigative techniques and data processing are combined in a specialist oversight body.[88] When the two functions are assigned to different bodies, it is not

be a manifestation of exemplary well-founded motions. Another issue could be the technical knowledge and expertise which a judge should possess in order to efficiently examine the requests in this specialised area. Moreover, it is unclear to what extent in practice judges examine primary materials of the case and what sort of justification with reference to the specific facts of the case the prosecuting authorities have to provide in order to obtain a court authorisation."

[85] Ekimdzhiev and Others v. Bulgaria, App. No. 70078/12, Judgment 11 January 2022, Haščák v. Slovakia, App Nos. 58359/12, 27787/16 and 67667/16, Judgment 23 June 2022

[86] ECtHR, Ekimdzhiev and Others v. Bulgaria, App. No. 70078/12, 11 January 2022, paras. 400-406 and 419(d); Haščák v. Slovakia, App Nos. 58359/12, 27787/16 and 67667/16, 23 June 2022, paras. 90-91.

[87] Venice Commission, op. cit., Georgia, CDL-AD(2022)037, para. 57.

[88] E.g., the Netherlands CTIVD, although this oversees only the security and intelligence services, not the police, which is the opposite of the situation in Georgia.

uncommon that a specialist oversight body in police/security matters shares competence to monitor data processing with another, more general, data protection body (which usually has supervision over both the public and private sectors).[89]

110. However, it is, at the least, very unusual for the PDPS, which is a general data protection body, to exercise a follow-up function of monitoring police use of covert investigative techniques. If one looks at the other functions of the PDPS,[90] there are no obvious points of contact with such a function of oversight of covert surveillance, for which quite different competences are required.

111. Following the information gathered by the rapporteurs during the visit in Georgia, as well as the statistics provided by the PDPS,[91] it appears that the "monitoring" by the PDPS of metadata requests is largely of a formal character ("The Service verifies submitted documents, compares them with the information provided in the electronic systems, and enters the data provided by the documents in the internal electronic system of registration of covert investigative actions and analyses them"). It is not clear what the "analysis" consists of. The same can be said about the "monitoring" of covert operations ("In addition to the mentioned mechanisms, the Service uses electronic and special-electronic control systems to monitor covert wiretapping and recording of telephone communications during the covert investigative actions, whereas for the monitoring of the activities carried out at the central databank of electronic communications identification data the electronic communication system for controlling the central databank of identification data is used"). There is no mention of examining the supporting documentation for launching covert operations or examining the product of the surveillance operations (the intercepted conversations etc.), in light of the criteria that should have guided the judicial authorisation in the first instance.[92]

112. Mindful of the doubts as to the efficiency of the judicial control and the need for effective safeguards against abuse in the context of covert investigative measures, the Venice Commission finds that the SIS, being better equipped to investigate abuses by law enforcement agents, would be in a better position to carry such follow-up function, in close coordination with the PDPS (obviously, with exception of the investigative measures carried out by the SIS itself). The Commission therefore recommends adopting the necessary amendments to enable this.

b. Some technical observations of specific PDP provisions

113. This section provides a series of observations, proposals and recommendations on various technical aspects of the provisions on the PDPS for the national authorities to consider for improving the current legal text in light of European standards and practice.

114. In the first place, there is no explicit legal provision establishing the PDPS in conformity with Article 15 of the modernised Convention 108+,[93] as the independent institution in charge of supervising the processing of personal data in Georgia. Moreover, a clear reference to the tasks and powers of this institution as defined in Chapter V.2 should follow immediately after the legal establishment of the Service, together with a basic provision saying that the Service is headed by one person, who is elected according to Article 40^3.

[89] E.g., the Swedish Security and Integrity Protection Board shares the task of monitoring data processing with another body, the Swedish Authority for Privacy Protection, which performs the function of data protection more generally.

[90] According to Article 4011, the Personal Data Protection Service shall monitor the legality of data processing in Georgia. The main fields of activity of the Personal Data Protection Service in this area shall be: a) consulting on issues related to data protection; b) reviewing applications related to data protection; c) checking the legality of data processing (inspection); d) providing information to the public on the state of data protection in Georgia, important events related thereto, and raising the awareness.

[91] Statistics of the activities of the Personal Data Protection Service of Georgia for 9 months of 2023, page 6.

[92] Requirements established by Article 143 of the Criminal Procedure Code.

[93] CM/Inf(2018)15, Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data, adopted by the Committee of Ministers at its 128th Session on 18 May 2018.

Article 40[2] – The Powers of the Head of the Personal Data Protection Service

115. The Service and its functioning should have an internal democratic character. It is, therefore, proposed to include wordings which provide that the Head of the PDPS shall have consultations with other persons or bodies within the organisation when managing the Service and taking decisions on issues related to the activities of the Service, and in particular before issuing individual legal acts, including resolutions, orders and instructions.

116. As regards the powers of the Head of the PDPS, the procedures and rules by which s/he shall be guided are not clearly indicated. The Venice Commission recommends integrating the relevant provisions in the law or making due reference to the regulatory texts if they already exist.

117. Moreover, a clear provision could be inserted for pragmatic reasons in order to empower employees of the Service to act on behalf of the Head.

Article 40[3] – Election of the Head of the Personal Data Protection Service and his /her term of office

118. Furthermore, it is advisable to provide that candidates should not (continue to) perform a function in a political party.

119. In paragraph (7), the words "or before the termination of his/her term of office" would seem to create a contradiction with the beginning of this paragraph, where election "before the expiry of the term of office of the current Head" is regulated. The text should probably read "or after the termination of his/her term of office".

Article 40[4] – First Deputy and Deputy Head of the Personal Data Protection Service

120. The appointment of the First Deputy and the Deputy Head of a data protection supervisory authority by the Head itself is rather unusual. In most European countries the deputy head is appointed in a similar procedure as the Head of the supervisory authority**,** as s/he should have the same qualities as the Head of the Service. However, there is no explicit provision, neither in the Convention 108+ nor in the GDPR,[94] which would prohibit a solution as foreseen in the Georgian law. Nevertheless, in view of the fact that the First Deputy and Deputy Head may replace the Head, the law should also provide certain guarantees for their appointment by the Head, including that of qualification and gender balance.

Article 40[6] – Incompatibility of the position of the Head of the Personal Data Protection Service

121. It would be useful to start this article with a more general formulation, such as "The head of the personal Data Protection Service will not engage in any incompatible occupation, whether gainful or not" in order to avoid that special situations are not covered by the provision on incompatibility.

Article 40[7] – Termination of powers of the Head of the Personal Data Protection Service

122. Paragraph (1)(e) needs additional provisions concerning who is competent to decide whether a different occupation indeed took place, and whether this occupation was indeed incompatible. Termination of office can only take place as soon as these questions have been finally decided by the competent authority.

Article 40[8] – Organisational and financial support of the Personal Data Protection Service

123. Although Paragraph (3) foresees that "expenses allocated from the state budget of Georgia for the Personal Data Protection Service compared to the amount of budget funds of the previous

[94] General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

year may be reduced only with the prior approval of the Head of the Personal Data Protection Service", the Venice Commission recommends involving the PDPS in the decision-making process on its budget (e.g. by providing that the PDPS proposes a budget to the Parliament, or at least to ensure that the PDPS would be heard in the Parliament when the allocation of budget is debated).

Article 40[9] – Independence of the Personal Data Protection Service

124. The importance of independence of the PDPS has been thoroughly highlighted above. In view of those considerations, the scope of independence of the PDPS should also be formulated in a broader way, such as "The Service shall act with complete independence in performing its tasks and exercising its powers in accordance with this Law. Concerning the supervision of lawful data processing, the Service shall not be subject to any orders from other state bodies or officials."

125. In addition, independence is also an attitude of the person concerned. Therefore, the employees working for the Service should be obliged to resist any influence. So far, the GDPR contains a very balanced formulation dealing with this topic, which could be applied to the amended PDP Law for example by continuing Art 40[9](1) as follows: "The management and the employees of the service shall remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody outside of the Service. Any attempt to influence decisions of Members of the Service is illegal and shall be punishable by law."

Article 40[11] – Main fields of activities of the Personal Data Protection Service in the area of data protection

126. A competence to fine controllers or processors because of violations of the PDP Law is not clearly mentioned as a main field of activities of the Service. Nor does the text mention supervision of data transfers to third countries as a "main field of activities" of the Service. Considering the importance of this topic according to the standard of the GDPR, it might be advisable to add this field of activities.

127. It is also not clear from this provision whether the PDPS covers the whole field of data processing, both in the public and in the private sphere. The latter seems to be the case, on the basis of the information provided during the visit in Tbilisi. However, the legal text should explicitly state this.

128. In addition, a provision is lacking stating that the PDPS is not competent with respect to processing carried out by bodies acting in their judicial capacity, as stipulated in Article 15(10) of the Convention 108+ and Art 55(3) GDPR.

129. More generally, the main fields of activities are rather narrowly and vaguely described. Other essential tasks of the Service, such as handling complaints from data subjects; cooperating with other supervisory authorities; monitoring developments that have an impact on data protection; monitoring and enforcing the application of the data protection law (i.e. in general, not limited to the power to issue fines); and developing instruments for international data transfers could be added to this provision.

130. Moreover, the principle that all decisions of the Service, which have direct impact on the rights or legal duties of legal subjects, should be appealable before a competent court,[95] is of such general significance that it should be mentioned in a second paragraph in the general provisions of Article 40[11] and not only *en passant* in Art 40[14](6).

Article 40[12] – Review of the application of the data subject by the Personal Data Protection Service

[95] See Article 15(9) of Convention 108+ and, even more strict, Article 78 GDPR.

131. Concerning complaints of data subjects against controllers or processor of their data, the text does not contain a provision stating that the reviewing of complaints of data subjects by the DPDS shall be free of charge (or at least "without excessive expense").[96]

132. Moreover, it might be advisable to add a provision enabling the Service to refuse to deal with complaints, where requests are manifestly unfounded or excessive, in particular because of their repetitive character. The supervisory authority should, however, bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

133. Paragraph (5) provides for the possibility to suspend proceedings for acquiring more information. This is understandable considering the very tight time frame for deciding on the case. However, there should also be a limit for suspension and, most important, the possibility to appeal to a court, if the time frame is not complied with by the Service.

134. As to the procedure of dealing with complaints, paragraph (7) states that as a result of reviewing the case, the Service "shall take a decision on the use of one of the measures provided for by Article 40[14]". This does not cover all possible situations. Very often complaints refer to past happenings which cannot be influenced anymore by "measures" to be taken. In these cases, it is necessary, however, to state in a legally binding way, whether a certain data processing operation took place in violation of the law. Such a decision of the PDPS would be important in any future court proceedings concerning damages for unlawful processing of personal data and also in any future procedure about fining the controller or processor of the unlawful processing.

Article 40[13] – Inspection by the Personal Data Protection Service

135. The text providing that an inspection shall be carried out also "based on the application of an interested person" seems to create a right of the data subject that a certain controller or processor be inspected. Whatever anybody reports to the supervisory authority, it is the authority which decides whether inspection is necessary or not. Neither Convention 108+ nor the GDPR foresee a right to have controllers or processors inspected by the supervisory authority. This should be clarified.

136. In addition, it may be expected that the time limits mentioned in paragraphs (4) and (5) will prove to be too short in certain cases. It is proposed to give the Service some more room for granting an extension for well-argued reasons.

Article 4014 – Use of measures by the Personal Data Protection Service

137. In paragraph 1(f), it is not clear what "impose administrative liability" means. Following the information gathered during the meeting in Tbilisi, it seems that the PDPS has the power to fine the perpetrators. In Article 15(2)(c) of the Convention 108+, a competence of the supervisory authority to fine controllers or processors for violating data protection law is explicitly mentioned and Art 58(2)(i) of the GDPR stipulates that it is mandatory for a supervisory authority to be entrusted with the power to fine. It is therefore recommended to specify the meaning of imposing administrative liability in this sense.

138. The actions which the Service may take in case of non-compliance as described in paragraph (3) should be defined more clearly. The reference to "the relevant legislation" contains insufficient guidance to the Service, also concerning the order it has to follow in applying to one of the bodies mentioned. The text is cryptic about the consequences of a controller or processor not complying with an order of the Service. Is the order of the supervisory authority in itself a legal act which is binding and can be enforced, or is a further legal act (decision) of a "court, a law enforcement body and/or a supervisory (regulatory) state institution" necessary for enforcement? If the latter is the case, this would be a serious shortcoming of the Georgian system as the standard for a supervisory authority is the power to pass decisions which are directly

[96] See Article 9(1) e of Convention 108+.

enforceable.[97] According to paragraph (6), compliance with decisions of the Service in the field of data protection shall be mandatory. This suggests that such decisions are directly enforceable. Again, it is not easily understandable why the Service should, according to paragraph (3), apply to a court or other institution when a controller or processor does not comply with a decision of the Service.

Article 40[16] – Monitoring of the conduct of covert investigative actions and the activities carried out in the electronic data identification central bank

139. The powers the Service in paragraph (7) go very far. As a rule, this kind of powers require judicial authorisation. It is recommended to at least provide for appeal to a court in summary proceedings to challenge the action of the Service, unless the urgency of the matter does not allow for it, in which case *post factum* review should be possible. It is also recommended to provide for a special supervision procedure if access to "state secrets" is at issue.

140. Considering the provision in Article 40[11] saying that "the Personal Data Protection Service shall monitor the legality of data processing in Georgia", one would assume that the Service is fully entitled to monitor all data processing activities of all state bodies, including those of the law enforcement sector, except for the data processing of courts. Therefore, it is not clear why two special cases of monitoring are named in Art 40[16]. Is the reason for having these provisions that the technical means of access to the processing in the course of monitoring shall be defined (e.g., "through the electronic control system" or "through the electronic system of monitoring of the electronic data identification central bank")? Or is the reason that covert investigative actions may only take place if accompanied by monitoring by the Service?

141. Finally, on a general note, the terminology used in the Law is often unclear and vague, bringing about confusion or leaving a too broad margin of interpretation. It is recommended to review and clarify several of these terms, at least as far as the English translation is concerned, such as (non-exhaustive list): "subordinate normative act" and "an order" (Article 40[2](2)), "resolution" (Article 40[5](2)), "recipient of support" (Article 40[7](1)(d)), "impose administrative liability" (Article 40[14](1)(f)), "the lawful request", "the measures stipulated by law", "to apply to the court" (Article 40[17](1),(3) and (8) respectively), etc.

V. Conclusion

142. By letter of 22 September 2023, Mr Shalva Papuashvili, Chairman of the Parliament of Georgia, requested an opinion of the Venice Commission on the amended SIS Law and on the PDPS provisions of the amended PDP Law. The amended Laws abolished the State Inspector's Service – a body established in 2018 with the mandate to monitor the lawfulness of personal data processing and covert investigative activities as well as to carry out the investigation of alleged crimes in law-enforcement agencies. Instead, two separate institutions were created: the PDPS and the SIS. This reorganisation resulted in the early termination of the State Inspector's mandate. The new legislation was swiftly adopted through an expedited procedure within merely four days, without proper parliamentary discussions or public debate.

143. The opinion request refers to "priority 4" outlined by the EU for obtaining candidate status, which focuses on providing adequate resources and safeguarding the independence of the new SIS and PDPS, as well as the adoption of laws by the Georgian Parliament to enhance the investigative powers of the SIS and improve social protection for the personnel of the PDPS. Given the stated aim of the amended laws, the opinion focuses first on the law-making process that is an essential element to build public trust in the State institutions; secondly, on the independence of the SIS and PDPS; thirdly, on the effective powers necessary to fulfil the functions outlined in the laws.

[97] See Article 15(2)(d) of the Convention 108+, and, more strictly, Chapter VI of the GDPR.

144. First and foremost, the Venice Commission finds the dismissal of the former State Inspector and her deputies at odds with the principle of the rule of law, and to exclude such situations in future, effective remedies shall be put in place, including in respect of parliamentary procedures.

145. The Venice Commission also finds the adoption of the amended laws within a brief timeframe, lacking substantial discussions and pluralistic participation to the debate contradicting international standards. Hence, the Commission recommends following rigorously the principles of transparency, accountability, inclusiveness, and democratic debate in the law-making process, and where necessary making amendments to legislation, Parliamentary procedures or rules to incorporate these standards.

146. In addition, the Venice Commission makes the following key recommendations:

Reporting powers of the SIS and the PDPS

a. To introduce the possibility for both services to issue and publish special reports whenever they find it appropriate.

Selection and appointment procedures of the Heads of the SIS and PDPS

b. To modify Article 6(1)(4) of the amended SIS Law and Article 40^3(4) of the amended PDP Law by replacing "majority of votes" with "votes of the majority of the members".
c. To regulate by legislation or by equivalent statutory instrument the rules and procedures governing the commission, and the process by which candidates are to be selected.
d. To address all other recommendations made in the section on the selection and appointment procedures of this Opinion.

Immunity of the Head of the SIS and the PDPS and their staff

e. To ensure that prior consent from the Parliament of Georgia for the arrest or detention of the Head of the SIS and the PDPS requires a qualified majority of votes and to extend functional immunity to the deputies and the core staff of the Services, especially the inspectors as regards the PDPS.

Relations between the SIS and the Prosecutor's office

f. To revise Article 19 of the amended SIS Law and other laws if necessary to grant the SIS prosecutorial power, the authority to transfer cases to its jurisdiction, as well as the power to initiate and terminate investigations.

Exclusion of high ranking official for the jurisdiction of the SIS

g. To revise the jurisdiction of the SIS to encompass crimes related to serious human rights violations allegedly committed by high-ranking officials; and to provide that the offenses mentioned in Article 19(1)(d) of the amended SIS Law will be investigated by the SIS solely if allegedly perpetrated by representatives of law enforcement bodies; to assign the decision-making authority on whether a particular crime aligns with the ECHR rights to the SIS; and specifying that offences under Article 19(1)(e) of the amended SIS law will be investigated by the SIS solely if allegedly perpetrated by representatives of law enforcement bodies.

Monitoring of covert investigative measures

h. To give the SIS competence to carry out a follow-up function to monitor covert investigative measures, in close coordination with the PDPS (with exception of the investigative measures carried out by the SIS itself).

Power of the PDPS

i. To specify the meaning of “imposing an administrative liability” in Article 40(14) of the PDPS provisions, to make clear that the PDPS has power to fine controllers or processors for violating data protection law.
j. to address also all other issues reported in the section on the specific PDPS provisions.

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