

**SUPPORT TO CRIMINAL JUSTICE REFORMS
IN THE REPUBLIC OF MOLDOVA**



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EVALUATION REPORT

**ON THE IMPLEMENTATION OF THE 2011-2016 REPUBLIC OF MOLDOVA
JUSTICE SECTOR REFORM STRATEGY AND ACTION PLAN:**

**INTERVENTION AREAS 2.1.3 “CLARIFYING THE ROLE AND POWERS OF
PROSECUTING AUTHORITIES AND BODIES CARRYING OUT OPERATIVE
INVESTIGATIONS”
AND 2.1.4 “OPTIMISING PROCEDURES FOR OPERATIONAL INVESTIGATION
AND PROSECUTION”**

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EXECUTIVE SUMMARY

This report comprises an evaluation of the implementation of two intervention areas in the Strategy and Action Plan of Justice Sector Reform of the Republic of Moldova 2011-2016 dealing with special investigative activity. By way of background, it explains the methodology used, the objectives of the Strategy and the European standards relevant to conduct of special investigative activities. An analysis of the log frame provided for the two intervention areas shows that the objectives set for them were essentially identical and that there were significant weaknesses in the indicators given for measuring the outcomes and impact expected from the actions to be taken, as well as a failure to focus on the arrangements needed for implementing the legislative changes to be adopted. The report finds that those changes embody some progress towards complying with European standards but that there also some significant shortcomings in this regard. It also finds certain problems occurring in the implementation of the legislative changes adopted – particularly as regards authorisation and supervision - and considerable weaknesses in the comparative study made of prosecuting bodies. In addition it identifies a need for more training on the new regime for the conduct of special investigative activities and indicates some concerns about institutional capacity and achieving transparency, public trust and better arrangements for collecting statistical data. It recommends various steps that should be taken in connection with the implementation of the two intervention areas and suggests that in future there should be more emphasis on better defining outcomes rather than on listing activities, as well as on the effective implementation of any legislative changes. The report also underlines the need for further legislative changes to ensure that effect is given to European stands and the importance of not weakening any of the requirements in the changes already made.

A. INTRODUCTION

1. This report provides an evaluation of the implementation of two intervention areas – 2.1.3 and 2.1.4 - of the Strategy and Action Plan of Justice Sector Reform of the Republic of Moldova 2011-2016 (hereinafter “the Strategy”¹ and “the Action Plan”²). Both intervention areas are concerned with special investigative activity (formerly referred to as “operative investigative activity”). The evaluation covers the period from the inception of the Strategy and the Action Plan until the end of 2015.
2. Special investigative activity relates to the gathering of information in connection with the criminal justice process through the use of various forms of surveillance, including interception of communications, eavesdropping, video-recording and monitoring of financial activities. Intervention areas 2.1.3 and 2.1.4 deal particularly with the powers provided for such activity, the procedures to be followed for the purpose of undertaking it and certain institutional aspects connected with this.
3. The methodology employed in making the evaluation of the implementation of intervention areas 2.1.3 and 2.1.4 is first explained. There is then an overview of the overall objectives of the Strategy and of the place within it of the two intervention areas being addressed. This is followed by an explanation of the relevant European standards for undertaking special investigative activity, particularly as regards the requirements with respect to this in the European Convention on Human Rights³ (hereinafter “the European Convention”) - as elaborated in the case law of the European Court of Human Rights (hereinafter “the European Court”) – and various recommendations of the Committee of Ministers of the Council of Europe.
4. Thereafter, there is an analysis of the two intervention areas as elaborated in the Strategy and, more particularly, the Action Plan, dealing with the proposed actions and the outcomes/impact anticipated to flow from them, together with prescribed output indicators and indicators for measuring outcomes and impact. The findings of the evaluation are then set out. These focus particularly on the amendments to the Criminal Procedure Code⁴ and the Law on Special Investigative Activity⁵ (hereinafter “the Law”) (including their compliance with European standards), the specific problems relating to implementation in the two intervention areas, the comparative study on prosecution bodies systems, the training provided in connection with the legislative and administrative reforms and the various matters that still need to be undertaken. The report concludes with an overall evaluation of the implementation of the two intervention areas and some suggestions for future steps to be taken.
5. The report has been prepared based on the contributions of the Council of Europe consultants Mr. Mamuka Jgenti⁶, Mr. Jeremy McBride⁷, Dr Ildir Peçi⁸, and Mrs.

¹The Strategy was published as an annex to the Law to Approve the Strategy for Justice Sector Reform 2011-2016 no. 231 of 25.11.2011

²The Action Plan for the implementation of the Strategy for Justice Sector Reform 2011-2016 was approved by the Parliament Decision no. 6 of 25.11.2011

³The European Convention on Human Rights and Fundamental Freedoms was approved on 4th November 1950 and ratified by the Republic of Moldova Parliament Decision no. 1298-XIII of 24.07.1997.

⁴The Criminal Procedure Codeno. 122 of 14.03.2003.

⁵The Law on Special Investigative Activity no. 59 of 29.03.2012.

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Tatiana Puiu⁹ - following a visit to Moldova on 14-16 December 2015¹⁰ - in the framework of the Council of Europe Project “Support to Criminal Justice Reforms in Moldova”, financed by the Danish Government (“the Project”).

6. The authors wish to express their appreciation to all who gave their time to meet with them while undertaking the evaluation. They are also very grateful to the Project team, who made all the practical arrangements and chased up all the information that was needed in the course of preparing the report.

B. METHODOLOGY

7. This section sets out the objectives of the evaluation, the principles that guided it and the process followed in making it. The evaluation was conducted by an expert team comprised of three international and one local consultant¹¹.

1. Evaluation objectives

8. The evaluation of the implementation of two intervention areas – 2.1.3 and 2.1.4 – under Pillar II of the Strategy and Action Plan¹² has the following specific objectives:
 - a. identifying the level of clarification of the role and powers of prosecuting authorities and bodies carrying out operative investigations as a result of the implementation of interventions;
 - b. ascertaining whether the procedures for operational investigation and prosecution have been optimised as a result of the implementation of the interventions;
 - c. identifying the level of improvement of the criminal procedure legislation and to assess whether the contradictions with the standards of protection in the area of human rights and fundamental freedoms have been removed as a result of the implementation of interventions;
 - d. assessing the improvements with respect to the accessibility, efficiency, independency, transparency, professionalism and accountability of the justice sector through implementation of the interventions;
 - e. identifying the level of compliance of justice sector performance with European standards; and
 - f. assessing, where applicable, whether the measures implemented comply with the identified needs of the target groups.

transparency of courts in Moldova”. Co-founder, and Executive Director of the Georgian Institute of European Values (GIEV), Tbilisi, Georgia.

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¹⁰ See, further Section B “Methodology” below and Annex 2.

¹¹ See, para.5 above.

¹² See, the intervention areas in the Annex 1 to the present report.

2. Evaluation principles

9. It is important that the evaluation mission does not produce any biased or unreliable results. The evaluators are, therefore, bound by the principles of impartiality, transparency and professionalism.
10. The evaluators have been strictly impartial and have acted in good faith during the evaluation process. Furthermore, they were not affiliated to any of the institutions and stakeholders responsible for the implementation of the specific intervention areas that were evaluated. Moreover, no bias or sympathy was expressed for the relevant institutions.
11. The evaluation process was carried out with the involvement of all relevant actors and stakeholders, which guaranteed the maximum transparency possible.
12. The evaluators have taken into consideration all relevant materials available and have ensured that their observations are accurate and as comprehensive as possible. Both positive and negative developments have been taken into account.

3. Evaluation process

13. The final evaluation has included desk research and evaluation, on-site monitoring and interviews and the preparation and dissemination of the final report.
14. *The desk research and evaluation* focused on the selection of the relevant legislation, studies and policy papers. To this end legal documents were studied and analysed. These included the relevant Moldovan legislation, the Strategy and Action Plan, the case law of the European Court, various policy papers and recommendations of the organs of the Council of Europe and other international bodies, relevant policy papers of the Moldovan authorities, studies of various civil society organisations and Moldovan authorities, recommendations of the Supreme Court of the Republic of Moldova and training curricula and programmes.
15. *The on-site monitoring and interviews* took place in the period of 14-16 December 2015. The team of experts met with representatives of the following institutions and stakeholders:
 - Mr Nicolae Eșanu, Deputy Minister of Justice;
 - Mr Ghenadie Nicolaev and Miss Liliana Catan, Judges of the Superior Court of Justice;
 - members of Academia;
 - members of Moldova Bar Association;
 - representatives of civil society (IRP, Legal Resources Centre from Moldova, PROMOLEX, NORLAM, Association of Women in Legal Career);
 - representatives of the Hincesti Court (Including the President and an investigative judge);
 - representatives of the Straseni Court (including the President and several investigative judges);
 - representatives of the General Prosecutor's Office;

- representatives of the Ministry of Internal Affairs (including the deputy minister Mr Oleg Babin and Mr Ruslan Olog, Deputy Director, Criminal Investigation Department of the Ministry of Internal Affairs); and
- representatives of the National Anticorruption Centre (including the Director General and the Head of Criminal Investigation Department)¹³.

16. The interviews served as an effective tool to get insight into the implementation of the amendments of the existing legislation and the newly adopted one. However, it should be noted that the expert team did not deploy any quantitative or qualitative empiric research methods. As a result, the information gathered during these interviews could serve only as an indication of positive results as well as negative and problematic developments that might occur in the relevant assessment field. This information should not, therefore, be treated as conclusive.

17. *The report* was prepared on the basis of the above-mentioned materials. It was drafted by the international consultants and the local consultant¹⁴ assisted with its preparation through providing relevant information and proof-reading the final version.

C. THE STRATEGY

18. The Strategy was developed by the Ministry of Justice with both an overall objective and a numbers of specific objectives. It is divided into seven main pillars.

19. The overall objective of the Strategy is:

to build a justice sector which is affordable, efficient, independent, transparent, professional and accountable to society, that meets European standards, ensures the rule of law and the observance of human rights¹⁵.

20. The more specific objectives in the Strategy are to:

- strengthen the independence, accountability, impartiality, efficiency and transparency of the judicial system;
- streamline the pre-judicial investigation process to ensure respect for human rights, ensure the security of each person and crime rate reduction;
- improve the institutional framework and processes to ensure effective access to justice: efficient legal aid, investigation of cases and enforcement of court decisions within reasonable periods of time, upgrading the status of some legal professions related the justice system;
- promote and implement the principle of zero tolerance for corruption events in the justice sector;
- implement measures by which the justice sector would help create a favourable climate for sustainable economic development;
- ensure effective enforcement of human rights practices and legal policies;
- coordinate, determine and define the duties and responsibilities of key actors in the justice sector to ensure inters-sector dialogue¹⁶.

¹³See, the Sschedule of the assessment mission to Chisinau in the Annex 2 to the present report.

¹⁴See para 5 of the Report.

¹⁵Strategy for Justice Sector Reform 2011-2015, p.1.

21. The specific objectives of the Strategy, which inevitably overlap to some extent with each other, are both appropriate in themselves and also entirely consistent with its overall objective.

22. The Strategy has been adopted in the light of dissatisfaction with previous reform initiatives, about which it makes the following general observation:

In spite of substantial institutional changes and in spite of amendments to the legal framework, no integrity of the justice system has been achieved yet, for the reason that these changes haven't ensured a qualitatively new level of activity of the stakeholders in this sector and have not lead to strengthening a justice system that would be equitable, fair and oriented on the necessities of the litigants and providing some high-quality services, accessible for the litigants¹⁷.

23. One of the problems identified as facing the justice sector, as a result of the shortcomings of past reform efforts that is of particular relevance to the present report, is that the pre-judicial phase is unnecessarily complex. However, also of some relevance to it are two of the determining factors considered as making further reform necessary, namely, the low level of public confidence in the justice system and the *quasi-general* perception of high level of corruption in it¹⁸.

24. The main pillars of the Strategy broadly follow its specific objectives and the intervention areas with which this report is concerned thus fall within the second one, which is headed more broadly as "Criminal justice".

25. The intervention areas relating to special investigative activities constitute two of the five that are specified in the "Criminal justice" pillar under the strategic direction headed "Revising the pre-trial concept and procedure"¹⁹. There are, however, four other "strategic directions" for the "Criminal Justice" pillar, all of which could have some potential relevance to special investigative activities²⁰. Nonetheless, such activities are not specifically mentioned in the intervention areas for any of these four "strategic directions".

26. The specific explanation given for revising the pre-trial concept and procedure is that:

One of the problems related to the interlocutory stage is the lack of a concept and a clear procedure, given that the powers of the prosecution bodies are not clearly defined, while the criminal procedure law is contradictory in some respects. There is a *de facto* distinction between the hierarchical subordination of the prosecution to their administrative superiors in

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 5.

¹⁸ *Ibid.*, p. 8-9.

¹⁹ The others are: optimising the institutional, organisational and functional framework of the Ministry of Internal Affairs; revising the status of then Centre for Combating Economic Crimes and Corruption (currently the National Anticorruption Centre); and amending the Criminal Procedure Law to exclude the contradictions between the Law and standards for the protection of human rights and fundamental freedoms.

²⁰ Thus the other four strategic directions are concerned with: enhancing the professionalism and independence of the prosecutorial service; professional capacity building at individual and institutional levels in issues dealing with crime investigations; modernising the system for collection of statistical data and performance appraisal at the individual and institutional levels; and humanising criminal policy and strengthening the mechanism for the protection of human rights.

terms of professional development and disciplinary matters, on the one hand, and operational subordination of the prosecution to the same persons in the context of specific criminal cases, on the other. Similarly, there are cases of doubling of the powers of several criminal prosecution bodies, which leads to a certain chaos in the system.

For these reasons it is necessary to take intervention actions aimed at: improving the criminal procedure law to exclude duplication of powers, strengthening the status and powers of the prosecution, especially the status of the Ministry of Internal Affairs and revision of the status of the Centre for Combating Economic Crimes and Corruption²¹.

27. In addition to listing the five intervention areas, the table set out below this rationale also specifies the relevant indicators of the implementation status²². There are essentially what are termed “output indicators” in the Action Plan. The latter differs from the Strategy in that it additionally specifies particular “Actions”, “Outcomes/impact” and “Indicators for measuring outcomes and impact”, all of which are considered further in Section E of this report.
28. The Strategy states that it was developed “following extensive consultations with the public and key institutions from the justice sector”. However, although not disputing that they were consulted, persons specifically interested in the use of special investigative activities in the Ministry of Interior and the National Anticorruption Centre expressed the view that the reforms did not take into account their concerns. They are, therefore, pressing for some changes to the reforms and the appropriateness of this is considered further below²³. Furthermore, civil society representatives have stated that they were not involved in all the processes leading to the implementation of the intervention areas under consideration.
29. The specific responsibility for implementing the Strategy is placed by it upon the various institutions which it identifies. However, in order to ensure consistent implementation, it also specified that a technical monitoring mechanism should be put in place, consisting of one working group for each of the 7 pillars and the “Strategy Steering Group”. The Ministry of Justice is charged with coordinating the working groups through a specially designated sub-division. In addition, the National Council for Reforming the Law Enforcement Bodies reviews the general annual report on the implementation of the Strategy and advises on the major issues raised for which the sector working groups or the coordination group did not find any solutions.
30. It appears from the meeting with Mr Nicolae Esanu, Vice-Minister of Justice that there are no staff currently serving in the Ministry of Justice who were involved in the elaboration of the Strategy and the Action Plan. As a result there is no institutional memory in the Ministry regarding the objectives and “strategic directions” set out in them.

²¹Strategy for Justice Sector Reform 2011-2015, page 25.

²²“1. Concept paper regarding the pre-judiciary phase developed; 2. Draft amendments to the Code of Criminal Procedure and to other legal acts developed and adopted; 3. Draft amendments to the regulatory framework and implementation plan developed and adopted” (for intervention area 2.1.3) and “1. Study developed and recommendations formulated; 2. Draft amendments to the regulatory framework developed and adopted; 3. Clarified sharing of activities between operative investigation bodies and those carrying out criminal investigation; 4. Trainings carried out for the personnel of relevant authorities” (for intervention area 2.1.4).

²³ See, para. 151 below.

D. RELEVANT EUROPEAN STANDARDS

31. The undertaking of special investigative activities is something that is required or encouraged by a number of Council of Europe treaties and recommendations of the Committee of Ministers. At the same time, since it has the potential to interfere with rights guaranteed by the European Convention, various requirements for the conduct of such activities have been elaborated in the case law of the European Court. Furthermore, certain standards relating to the manner in which these activities are to be undertaken has also been set out in recommendations of the Committee of Ministers, as well as in an opinion adopted by the Consultative Council of European Prosecutors.
32. As well as setting out these different standards, the present section of the report also looks at the specific application of those arising under the European Convention to Moldova prior to the changes connected to the two specific intervention areas under review.

1. Requirements to allow special investigative activities

33. The requirement to have a legal framework that permits certain forms of special investigative activities is now to be found in several treaties adopted by the Council of Europe²⁴. In addition, such a framework has also been encouraged in three recommendations of the Committee of Ministers²⁵.

²⁴ Namely, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime adopted on 8/11/1990 ratified by the Republic of Moldova Law no 165-XVI of 13/07/2007 (Article 4 – Special investigative powers and techniques), the Criminal Law Convention on Corruption adopted on 01/07/2002 ratified by the Republic of Moldova Law no 428 of 30/10/2003 (Article 23 –Measures to facilitate the gathering of evidence and the confiscation of proceeds), Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters adopted on 01/02/2004 ratified by the Republic of Moldova Law no 312 of 26/12/2012 (Article 17 – Cross-border observations and Article 19 – Covert investigations) and the Convention on Cybercrime (Section 2 – Procedural law).

²⁵ Thus, Recommendation No. R (95) 13 of the Committee of Ministers to Member States concerning problems of criminal procedural law connected with information technology (adopted on 11 September 1995) highlights the need for laws pertaining to technical surveillance for the purposes of criminal investigations, such as interception of telecommunications, to take account of the convergence of information technology and telecommunications. In addition, it states that the law should permit investigating authorities to avail themselves of all necessary technical measures that enable the collection of traffic data in the investigation of crimes. It also provides that criminal procedural laws should be reviewed with a view to making possible the interception of telecommunications and the collection of traffic data in the investigation of serious offences against the confidentiality, integrity and availability of telecommunication or computer systems. Secondly, Recommendation Rec(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organised crime (adopted on 19 September 2001) calls for the establishment of investigative strategies that target the assets of organised crime groups through inter-connected financial investigations, with those strategies including quick legal mechanisms to lift bank secrecy and adopt provisions under which bankers, fiduciaries, accountants, notaries and lawyers may be compelled by judicial order to produce financial records or statements and, if necessary, give testimony, under appropriate safeguards. Furthermore, it called for the introduction of legislation allowing or extending the use of investigative measures that enable law enforcement agencies to gain insight, in the course of criminal investigations, into the activities of organised crime groups, including surveillance, interception of communications, undercover operations, controlled deliveries and the use of informants. Thirdly, Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism (adopted on 20 April 2005) calls for the taking of appropriate legislative measures to allow, the use of special investigation techniques with a view to making them available to their competent authorities “to the extent that

34. The treaties dealing with special investigative activities do not, however, affect any rights or obligations under other Council of Europe treaties and, in particular, under the European Convention.

35. Indeed, the preamble to the Convention on Cybercrime expressly recognises:

the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy²⁶.

36. Furthermore, one of the three recommendations of the Committee of Ministers encouraging the use of special investigative activities - Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism – specifically provides that the relevant legislation should “in accordance with the requirements of the European Convention” define the circumstances in which, and the conditions under which this activities can be undertaken.

2. The European Convention

37. Of the rights and freedoms guaranteed by the European Convention, the right to respect for private life – under Article 8 – is the one that is most likely to be affected by the undertaking of special investigative activities, given that it entails accessing personal data, intercepting communications and the use of other forms of surveillance²⁷. This will be so as regards both those who the specific target of such activities and those who may be caught up in it through their connection with the target²⁸.

38. Furthermore, in this connection, it is important to keep in mind the view of the European Court that:

Article 8 is not limited to the protection of an “inner circle” in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. It also protects the right to establish and develop relationships with other human beings and the outside world. Private life may even include activities of a

this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution”.

²⁶ Council of Europe Convention on Cybercrime adopted on 23/11/2001 ratified by the Republic of Moldova Law no. 6 of 02.02.2009

²⁷ See, e.g., *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007 (access to data held by a lawyer in respect of third persons suspected of illegal trade in medicaments), *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009 (interception of communications) and *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no.62540/00, 28 June 2007 (surveillance through technical devices which could be used for creating photographs, audio and video recordings and marked objects).

²⁸ See, e.g., *Craxi v. Italy (No. 2)*, no. 25337/94, 17 July 2003 (recording of conversations with family members on matters unrelated to the suspected offences).

professional or business nature ... There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life” ...²⁹

39. In addition, it should be noted that the guarantee in Article 8 is applicable to the systematic collection and storing of data by security services even where that data is collected in a public place³⁰ or concerns exclusively the professional or public activities of the person concerned³¹.
40. However, it should also be borne in mind that special investigative activities can also have the potential to interfere with the right to a fair trial under Article 6 of the European Convention. In particular, the right to defend oneself through legal assistance may be affected where these activities extend to communications between a suspect or an accused and his or her lawyer³². In addition such activities can also have the potential to infringe freedom from self-incrimination where it entails a form of compulsion to obtain a confession or other evidence³³. Moreover, such activities could also give rise to a violation of the right to freedom of expression under Article 10 of the European Convention where it affects those working for a media organisation³⁴.
41. The fact that there has been an interference with rights under Articles 6, 8 and 10 of the European Convention does not, of course, mean that there will automatically be a violation of them. None of these rights is absolute and the European Court has recognised that interferences with or infringements of them may be admissible provided that certain conditions have been fulfilled.
42. In the first place, the particular interference with the right concerned must be in accordance with law.
43. This requirement will obviously not be fulfilled where there is no legal basis for the special investigative activities that have been undertaken³⁵. However, this requirement is not merely a formal one in the sense of there being a legal provision that authorises the activities in question. There must also be actual compliance with the terms of the relevant provision relied upon³⁶ but more fundamentally this provision must, in addition, be both accessible and foreseeable.

²⁹ *Shimovolos v. Russia*, no. 30194/09, 21 June 2011, at para. 64 (case references omitted).

³⁰ E.g., *Peck v. United Kingdom*, no. 44647/98, 28 January 2003, at para. 59.

³¹ See *Amann v. Switzerland* [GC], no. 27798/95, 16 February 2000, at paras. 65-67.

³² See, e.g., *Zagaria v. Italy*, no. 58295/00, 27 November 2007. However, such surveillance for a limited period on account of the danger of collusion was not considered to constitute a violation of Article 6(3)(c) in *Kempers v. Austria* (dec.), no. 21842/93, 27 February 1997.

³³ See, e.g., *Allan v. United Kingdom*, no. 48539/99, 5 November 2002 (recording of prisoner’s conversation with fellow prisoner in same cell where the latter had been coached by the police to obtain an admission by the former in respect to the offence for which he had been arrested).

³⁴ See, e.g., *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003 (which concerned a search designed to identify a journalist’s source who was suspected of having breached professional confidence).

³⁵ As in *Khan v. United Kingdom*, no. 35394/97, 12 May 2000 since, at the time, there was no statutory system to regulate the use of covert listening devices.

³⁶ See, e.g., *Perry v. United Kingdom*, no. 63737/00, 17 July 2003 (in which the video-recording of a suspect was found not to be in accordance with law because it did not comply with certain procedures and safeguards prescribed by domestic law).

44. The accessibility requirement entails that the relevant rules be available to those potentially affected by them, both in a physical sense and in terms of their comprehensibility. The former aspect would not be fulfilled if the rules were not published³⁷ but the latter one does not preclude the need for legal advice in order to understand their effect³⁸.
45. Compliance with the foreseeability requirement is, in practice, much more problematic than with that of accessibility since its focus is on the way in which the legal basis for the particular activities is formulated. It entails a need for the special investigative activities to be based on clear, detailed rules which provide an adequate indication of the conditions and circumstances in which the authorities are empowered to undertake them.
46. Thus, in the case of the interception of communications and other forms of surveillance effected through techniques such as eavesdropping and video-recording will need to be authorised under provisions that prescribe:
- the categories of persons liable to be affected;
 - the nature of the offences for which such activities can be undertaken;
 - the duration of the period for which it can occur;
 - the procedure to be followed for examining, using and storing the data obtained through it;
 - the precautions to be taken when communicating the data to other parties; and
 - the circumstances in which data obtained may or must be erased or the records destroyed³⁹.
47. However, in addition, there must also be adequate and effective guarantees against possible abuse of powers to interfere with the rights under the European Convention. Whether or not, these exist will be assessed by reference to the nature, scope and duration of the possible activities, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law.
48. Sufficient safeguards against abuse have been considered by the European Court to exist where the powers to intercept communications and undertake other, comparable forms of surveillance can be used only:
- to establish facts that are unlikely to be achievable by other methods;
 - to protect national security⁴⁰ or to prevent or uncover serious offences where there are grounds to suspect these are being planned or have been committed;

³⁷ E.g., as in *Shimovolos v. Russia*, no. 30194/09, 21 June 2011.

³⁸ E.g., as in *Autronic AG v. Switzerland*, no. 12726/87, 22 May 1990.

³⁹ See, e.g., *Dumitru Popescu v. Romania (Nos. 1 and 2)*, no. 49234/99, 26 April 2007, *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no.62540/00, 28 June 2007, *Liberty and Others v. United Kingdom*, no. 58243/00, 1 July 2008, *Kennedy v. United Kingdom*, no. 26839/05, 18 May 2010, *Dragojević v. Croatia*, no. 68955/11, 15 January 2015 and *Roman Zakharov v. Russia* [GC], no. 47143/06, 4 December 2015.

⁴⁰ Although the European Court has recognised that threats to national security may vary in character and may be unanticipated or difficult to define in advance, sufficient clarification as to the meaning of “national security” was provided where it was indicated to “activities which threaten the safety or well-being of the State and

- following a written application by senior officers in the relevant service that (a) identifies the persons or objects to be placed under surveillance, (b) sets out the grounds for suspicion and (c) specifies the methods to be used, their proposed duration and the previous investigative steps taken;
 - after the granting of the application by a judge (or other independent authority) and the approval of the activities concerned by a senior minister (although in urgent cases the judicial authorisation may be given up to twenty-four hours afterwards);
 - the initial authorisation can be extended for no more than six months and then only upon a fresh application;
 - the implementation of the surveillance measures is reviewed – for the purpose of ensuring compliance with all the applicable requirements – by a body or official that is either external to the service undertaking them or at least has certain qualifications ensuring his or her independence and adherence to the rule of law;
 - the overall control of the system of surveillance is vested in an independent body⁴¹ rather than someone directly involved in commissioning its use; and
 - the persons subjected to surveillance are notified of this fact following its termination and as soon as this can be done without jeopardising the surveillance’s purpose⁴².
49. It is important to underline that these safeguards are concerned not only with the initial authorisation for the surveillance measures but also with the manner in which they are actually carried out.
50. The efficacy of particular safeguards is, however, likely to be doubted where there is clear evidence that the system of surveillance is being overused⁴³.
51. Moreover, investigating authorities will not be allowed to evade the observance of these safeguards through using private agents to undertake special investigative activities on their behalf⁴⁴.

activities which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means”; *Kennedy v. United Kingdom*, no. 26839/05, 18 May 2010, at para. 159.

⁴¹ Such as special board elected by the Parliament and an independent commission, or a special commissioner holding or qualified to hold high judicial office or a control committee consisting of persons having qualifications equivalent to those of a senior judge.

⁴² Cf. the finding of the European Court in *Roman Zakharov v. Russia* [GC], no. 47143/06, 4 December 2015 that “Russian legal provisions governing interceptions of communications do not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance, and which is particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile telephone communications. In particular, the circumstances in which public authorities are empowered to resort to secret surveillance measures are not defined with sufficient clarity. Provisions on discontinuation of secret surveillance measures do not provide sufficient guarantees against arbitrary interference. The domestic law permits automatic storage of clearly irrelevant data and is not sufficiently clear as to the circumstances in which the intercept material will be stored and destroyed after the end of a trial. The authorisation procedures are not capable of ensuring that secret surveillance measures are ordered only when “necessary in a democratic society”. The supervision of interceptions, as it is currently organised, does not comply with the requirements of independence, powers and competence which are sufficient to exercise an effective and continuous control, public scrutiny and effectiveness in practice. The effectiveness of the remedies is undermined by the absence of notification at any point of interceptions, or adequate access to documents relating to interceptions” (para. 302).

⁴³ See *The Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria*, no.62540/00, 28 June 2007, at paras. 92 and 93.

52. On the other hand, a less exacting approach to the observance of these safeguards may be seen to be all that is required where the particular forms of surveillance involved are less intrusive than ones such as the interception of communications and secret audio and video-recording⁴⁵.
53. The second requirement to be observed if an interference with rights and freedoms under the European Convention is not to constitute a violation of them is that this interference has a legitimate aim. However, given both the treaty provisions and recommendations of the Committee of Ministers, as well as the case law of the European Court, there can be no doubt that this requirement will be satisfied where special investigative activities is undertaken to serve the interests of national security, public safety, the prevention of crime and the protection of the rights of others.
54. Thirdly, the interference must also be necessary in a democratic society if it is not to amount to a violation of a particular right or freedom. However, the application of this requirement – which is essentially concerned with whether or not a particular restriction is proportionate to the legitimate aim being pursued - has not generally been addressed by the European Court in the context of surveillance measures. This is because the requirement, discussed above, that there be adequate and effective guarantees against possible abuse has been found not to be fulfilled and so consideration of the proportionality issue has thus not been necessary.
55. Nonetheless, the existence of such safeguards has also been enough for the European Court to conclude that the particular interference with rights under the European Convention resulting from certain surveillance measures was justified⁴⁶. At the same time, in a recent case where these safeguards were absent, the European Court actually seemed to fuse the legality and proportionality requirements when it held that:

the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the requirements of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society"⁴⁷.

⁴⁴ See *Van Vondel v. Netherlands*, no. 38258/03, 25 October 2007; "The Court would note that the recording of private (telephone) conversations by a conversation partner and the private use of such recordings does not per se offend against Article 8 if this is done with private means, but that by its very nature this is to be distinguished from the covert monitoring and recording of communications by a private person in the context of and for the benefit of an official inquiry – criminal or otherwise – and with the connivance and technical assistance of public investigation authorities" (para. 49).

⁴⁵ Such as the use of a Global Positioning System (GPS) receiver built into a suspect's car that allowed the location and the speed of his car to be determined once per minute. This was seen by the European Court in *Uzun v. Germany*, no. 35623/05, 2 September 2010 to involve the disclosure of less information about a person's conduct, opinions or feelings than other methods of visual or acoustical surveillance. However, it still considered there to be adequate safeguards against abuse regarding grounds of use, duration and judicial control, albeit that the latter two were effected only by the subsequent review that could be exercised by the courts (including a discretion to exclude evidence where surveillance was found unlawful).

⁴⁶ See *Kennedy v. United Kingdom*, no. 26839/05, 18 May 2010.

⁴⁷ *Dragojević v. Croatia*, no. 68955/11, 15 January 2015, at para.101.

This divergence in the European Court’s approach does not seem to be of any practical significance since there is no question about the need for the safeguards concerned actually to exist in order for the possibility of a violation of the European Convention to be precluded⁴⁸.

56. Moreover, this does not mean that being able to establish compliance with the proportionality requirement will never be important. In particular, this could still be important where, for example, a range of surveillance measures were being applied. Certainly, this requirement had to be addressed where a Global Positioning System (GPS) receiver was built into the car of a suspect’s accomplice at the same time as a wide range of other surveillance measures were being applied to the suspect by different authorities⁴⁹. This specific form of surveillance was not considered disproportionate in this case because it concerned very serious crimes, was carried out for a relatively short period and affected the suspect only at weekends when he travelled in the accomplice’s car⁵⁰. The European Court thus emphasised that the suspect in this case could not be said to have been subjected to total and comprehensive surveillance, which by implication should presumably be regarded as disproportionate in at least some circumstances⁵¹.

3. Other standards

57. Considerations that need to be taken into account when conducting special investigative activities have also been elaborated by the Committee of Ministers in several recommendations.

58. The most substantial elaboration of standards is in Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism⁵². These set out general principles, conditions of use, operational guidelines and provisions on training and coordination, as well as in connection with international cooperation.

⁴⁸In *Weber and Saravia v. Germany* (dec.), no. 54934/00, 29 June 2006, it had used the availability of safeguards to find a measure to be necessary in a democratic society having separately addressed the issue of whether it was in accordance with law.

⁴⁹*Uzun v. Germany*, no. 35623/05, 2 September 2010. The use of GPS had been accompanied by other measures of observation, namely, visual surveillance of the suspect, video surveillance of the entry of his house, the interception of telephones in that house and a nearby call box and the interception of his post.

⁵⁰ The offences concerned several attempted murders of politicians and civil servants by bomb attacks. In reaching the conclusion that this surveillance was necessary in a democratic society, the European Court had also emphasised that other, less intrusive, methods of investigation had first been attempted but these had proved to be less effective (para. 78). These methods had involved installing transmitters in the car, which necessitated the knowledge of where approximately the person to be located could be found. The suspect had detected and destroyed them and had also evaded visual surveillance.

⁵¹ In this connection, it should be noted that the European Court emphasised that “uncoordinated investigation measures taken by different authorities must be prevented and that, therefore, the prosecution, prior to ordering a suspect’s surveillance via GPS, had to make sure that it was aware of further surveillance measures already in place” (para. 73). However, it found that at the relevant time there were safeguards in place to prevent a person’s total surveillance.

⁵² These “techniques” are defined as ones “applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons”.

59. The general principles include the requirement already noted for the circumstances and conditions relating to the use of the techniques to be defined in accordance with the requirements of the European Convention and additionally provide that the techniques should be made available

to the extent that this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution⁵³.

60. Furthermore, there is a requirement for the relevant legislative provisions

To ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or ex post facto review⁵⁴.

61. These two general principles effectively restate, with some greater specificity, the need for compliance with the requirements of the European Convention.

62. Thereafter, there are the following more detailed standards relating to the use of special investigative activities.

b. Conditions of use

4. Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals.

5. Proportionality between the effects of the use of special investigation techniques and the objective that has been identified should be ensured. In this respect, when deciding on their use, an evaluation in the light of the seriousness of the offence and taking account of the intrusive nature of the specific special investigation technique used should be made.

6. Member states should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness.

7. Member states should, in principle, take appropriate legislative measures to permit the production of evidence gained from the use of special investigation techniques before courts. Procedural rules governing the production and admissibility of such evidence shall safeguard the rights of the accused to a fair trial.

c. Operational guidelines

8. Member states should provide the competent authorities with the required technology, human and financial resources with a view to facilitating the use of special investigation techniques.

9. Member states should ensure that, with respect to those special investigation techniques involving technical equipment, laws and procedures take account of the new technologies. For this purpose, they should work closely with the private sector to obtain their assistance in order to ensure the most effective use of existing technologies used in special investigation techniques and to maintain effectiveness in the use of new technologies.

10. Member states should ensure, to an appropriate extent, retention and preservation of traffic and location data by communication companies, such as telephone and Internet service providers, in accordance with national legislation and international instruments, especially the European Convention on Human Rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

⁵³Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism, adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies, Para. 2.

⁵⁴Ibid, para. 3.

11. Member states should take appropriate measures to ensure that the technology required for special investigation techniques, in particular with respect to interception of communications, meets minimum requirements of confidentiality, integrity and availability.

d. Training and coordination

12. Member states should ensure adequate training of competent authorities in charge of deciding to use, supervising and using special investigation techniques. Such training should comprise training on technical and operational aspects of special investigation techniques, training on criminal procedural legislation in connection with them and relevant training in human rights.

13. Member states should consider the provision of specialised advice at national level with a view to assisting or advising competent authorities in the use of special investigation techniques.

14. Member states should make use to the greatest extent possible of existing international arrangements for judicial or police cooperation in relation to the use of special investigation techniques. Where appropriate member states should also identify and develop additional arrangements for such cooperation.

15. Member states are encouraged to sign, to ratify and to implement existing conventions or instruments in the field of international cooperation in criminal matters in areas such as exchange of information, controlled delivery, covert investigations, joint investigation teams, cross-border operations and training. Relevant instruments include, *inter alia*: – the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; – the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (ETS No. 141); – the Criminal Law Convention on Corruption of 27 January 1999 (ETS No. 173); – the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001 (ETS No. 182); – the Convention on Cybercrime of 23 November 2001 (ETS No. 185); – the United Nations Convention against Transnational Organised Crime of 15 November 2000 and the Protocols thereto; – the United Nations Convention on Corruption of 31 October 2003.

16. Member states are encouraged to make better use of existing relevant international bodies, such as the Council of Europe, the European Judicial Network, Europol, Eurojust, the International Criminal Police Organisation (Interpol) and the International Criminal Court, with a view to exchanging experience, further improving international cooperation and conducting best practice analysis in the use of special investigation techniques.

17. Member states should encourage their competent authorities to make better use of their international networks of contacts in order to exchange information on national regulations and operational experience with a view to facilitating the use of special investigation techniques in an international context. If needed, new networks should be developed.

18. Member states should promote compliance of technical equipment with internationally agreed standards with a view to overcoming technical obstacles in the use of special investigation techniques in an international context, including those connected with interceptions of mobile telecommunications.

19. Member states are encouraged to take appropriate measures to promote confidence between their respective competent authorities in charge of deciding to use, supervising or using special investigation techniques with a view to improving their efficiency in an international context, while ensuring full respect for human rights.

63. Certain elements of these standards are also to be found in other recommendations adopted by the Committee of Ministers⁵⁵.

⁵⁵Thus, Recommendation No. R (95) 13 of the Committee of Ministers to Member States concerning problems of criminal procedural law connected with information technology adopted by the Committee of Ministers on 11 September 1995 at the 543rd meeting of the Ministers' Deputies, that data which is the object of legal protection and processed by a computer system - when collected in the course of a criminal investigation and in particular when obtained by means of intercepting telecommunications - should be secured in an appropriate manner. Secondly, Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies provides that the police shall only interfere with individual's right to privacy when strictly necessary and only to obtain a legitimate objective, the collection, storage, and use of personal data by the police

64. However, an entirely separate recommendation - the Role of Public Prosecution in the Criminal Justice System Recommendation rec(2000)19⁵⁶ - is more concerned with the relationship between prosecutors and those carrying out all forms of investigative activity, as well as with the responsibility of prosecutors regarding certain evidence obtained thereby.

65. Thus, as regards the first point, the recommendation states:

22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:

a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;

c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;

d. sanction or promote sanctioning, if appropriate, of eventual violations.

23. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the Public Prosecution and the police⁵⁷.

As such this does not prescribe a particular institutional framework with respect to conduct of investigation in general and special investigative activities in particular.

66. The second aspect of the recommendation that is of relevance to its stipulation that:

28. Public prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence⁵⁸.

67. In addition to these recommendations of the Committee of Ministers, a recently adopted opinion of the Consultative Council of European Prosecutors – Opinion No. 10 (2015) on the role of prosecutors in criminal investigations⁵⁹ - includes the following points particularly concerned with the conduct of special investigative activities;

40. Prosecutors should adjust their activity to the fast evolution of criminality. Within this framework, they should make use of the new techniques available as far as they are in

shall be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes and police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime. Thirdly, Recommendation Rec(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organised crime adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies underlines the need for law enforcement agencies to be provided with the required technology and appropriate training to enable them to implement special investigative techniques.

⁵⁶Recommendation Rec(2000)19, adopted by the Committee of Ministers on 6 October 2000.

⁵⁷Ibid, para 1

⁵⁸Ibid,

⁵⁹Opinion No. 10 (2015) on the role of prosecutors in criminal investigations adopted by the Consultative Council of European Prosecutors of the Council of Europe on 20 November 2015.

conformity with the law, and pay due attention to the need for specialisation and multidisciplinary.

41. Prosecutors should take into account that the use of some of such techniques can also result in restrictions or constraints on the rights of persons: e.g. the use of informants, undercover-agents, the recording of meetings, the surveillance and interception of telephone calls, emails, internet communication, the use of intrusive computer programmes, G.P.S. or scanners, etc.

42. In member States where prosecutors are involved in investigations which use special techniques that are particularly intrusive to private life, they should not resort to such investigative measures except in serious cases, where a serious offense has been committed or prepared, and only if other measures are not usable or appropriate, and “to the extent that this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution” (Rec(2005)10, paragraph 2). Prosecutors should respect, in this context, the principles of proportionality and impartiality, the fundamental rights of individuals as well as the presumption of innocence.

43. In order to achieve an appropriate balance in using these techniques, member States should:

- take appropriate legislative measures to permit and define the limits concerning the use of evidence obtained through the use of these new techniques;
- take appropriate measures to meet the requirements imposed by the ECHR and principles emanating from the case-law of the Court (judicial control, respect for legality, etc.);
- provide proper training for prosecutors and for the staff of the prosecution services, in order to enable prosecutors to make efficient use of new techniques and to facilitate criminal investigations.

68. However, also of relevance to the conduct of special investigative activities is the more general stipulation that:

16. In general, prosecutors should scrutinise the lawfulness of investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, prosecutors should also monitor how the investigations are carried out and if human rights are respected.

4. A ruling by the European Court in respect of the Republic of Moldova

69. The European Court has specifically considered whether or not the undertaking of special investigative activities in Moldova was consistent with the standards that it has elaborated and it has found various shortcomings.

70. This consideration occurred in the case of *Iordachi v. Moldova*⁶⁰, which concerned the risk that members of a non-governmental organisation ran of having their telephones tapped⁶¹. It thus did not deal with all forms of special investigative activity but the findings are of general application. The case was concerned with the legislation in force prior to 2003 but also took account of some changes made afterwards.

71. The concerns raised by the Court related first to the applicability of the powers and the availability of judicial control:

41. The Court finds that the legislation prior to 2003 lacked both clarity and detail and did not satisfy the minimum safeguards contained in the Court's case-law ... Indeed, there was no judicial control over the grant and application of a measure of interception and, as regards the persons capable of being caught by its provisions, the legislation was very open-ended in its

⁶⁰No. 25198/02, 10 February 2009.

⁶¹“Lawyers for Human Rights”, a Chisinau-based non-governmental organisation specialised in the representation of applicants before the European Court.

reach. The circumstances in which a warrant of interception could be issued lacked precision. The Court notes with satisfaction that some major improvements were carried out after 2003...

43. In so far as the initial stage of the procedure of interception is concerned, the Court notes that after 2003 the Moldovan legislation appears to be clearer in respect of the interception of communications of persons suspected of criminal offences. Indeed, it is made explicit that someone suspected of a serious, very serious or exceptionally serious offence risks in certain circumstances having the measure applied to him or her. Moreover, the amended legislation now provides that interception warrants are to be issued by a judge.

44. Still, the nature of the offences which may give rise to the issue of an interception warrant is not, in the Court's opinion, sufficiently clearly defined in the impugned legislation. In particular, the Court notes that more than one half of the offences provided for in the Criminal Code fall within the category of offences eligible for interception warrants ... Moreover, the Court is concerned by the fact that the impugned legislation does not appear to define sufficiently clearly the categories of persons liable to have their telephones tapped. It notes that Article 156 § 1 of the Criminal Code uses very general language when referring to such persons and states that the measure of interception may be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation has been given as to who exactly falls within the category of "other person involved in a criminal offence".

72. Secondly, its concerns related to the duration of particular special investigative activities:

45. The Court further notes that the legislation in question does not provide for a clear limitation in time of a measure authorising interception of telephone communications. While the Criminal Code imposes a limitation of six months ..., there are no provisions under the impugned legislation which would prevent the prosecution authorities from seeking and obtaining a new interception warrant after the expiry of the statutory six months' period.

73. Thirdly, it was concerned about the interests being protected by special investigative activities:

46. Moreover, it is unclear under the impugned legislation who – and under what circumstances – risks having the measure applied to him or her in the interests of, for instance, protection of health or morals or in the interests of others. While enumerating in section 6 and in Article 156 § 1 the circumstances in which tapping is susceptible of being applied, the Law on Operational Investigative Activities and the Code of Criminal Procedure fails, nevertheless, to define "national security", "public order", "protection of health", "protection of morals", "protection of the rights and interests of others", "interests of ... the economic situation of the country" or "maintenance of legal order" for the purposes of interception of telephone communications. Nor does the legislation specify the circumstances in which an individual may be at risk of having his telephone communications intercepted on any of those grounds.

74. Fourthly, the European Court was concerned about the limited judicial control over special investigative activities after they had been authorised:

47. As to the second stage of the procedure of interception of telephone communications, it would appear that the investigating judge plays a very limited role. According to Article 41 of the Code of Criminal Procedure, his role is to issue interception warrants. According to Article 136 of the same Code, the investigating judge is also entitled to store "the original copies of the tapes along with the complete written transcript ... in a special place in a sealed envelope" and to adopt "a decision regarding the destruction of records which are not important for the criminal case". However, the law makes no provision for acquainting the investigating judge with the results of the surveillance and does not require him or her to review whether the requirements of the law have been complied with. On the contrary, section 19 of the Law on Operational Investigative Activities appears to place such supervision duties on the "Prosecutor General, his or her deputy, and the municipal and county prosecutors". Moreover, in respect of the actual carrying out of surveillance measures in the second stage, it would appear that the interception procedure and guarantees contained in the Code of Criminal

Procedure and in the Law on Operational Investigative Activities are applicable only in the context of pending criminal proceedings and do not cover the circumstances enumerated above.

75. Fifthly, it was concerned about the arrangements for screening of data, protecting its confidentiality and dealing with its destruction:

48. Another point which deserves to be mentioned in this connection is the apparent lack of regulations specifying with an appropriate degree of precision the manner of screening the intelligence obtained through surveillance, or the procedures for preserving its integrity and confidentiality and the procedures for its destruction ...

76. Sixthly, there was concern about the arrangements for the overall control over the undertaking of special investigative activities:

49. The Court further notes that overall control of the system of secret surveillance is entrusted to the Parliament which exercises it through a specialised commission (see section 18 of the Law on Operational Investigative Activities). However, the manner in which the Parliament effects its control is not set out in the law and the Court has not been presented with any evidence indicating that there is a procedure in place which governs the Parliament's activity in this connection.

77. Seventhly, the European Court was concerned about the adequacy of protection for communications between a lawyer and his or her client:

50. As regards the interception of communications of persons suspected of offences, the Court observes that in *Kopp* ... it found a violation of Article 8 because the person empowered under Swiss secret surveillance law to draw a distinction between matters connected with a lawyer's work and other matters was an official of the Post Office's legal department. In the present case, while the Moldovan legislation, like the Swiss legislation, guarantees the secrecy of lawyer-client communications ..., it does not provide for any procedure which would give substance to the above provision. The Court is struck by the absence of clear rules defining what should happen when, for example, a phone call made by a client to his lawyer is intercepted.

78. Finally, it was concerned about the apparent absence of sufficiently rigorous judicial scrutiny over requests to intercept communications:

51. The Court notes further that in 2007 the Moldovan courts authorised virtually all the requests for interception made by the prosecuting authorities ... Since this is an uncommonly high number of authorisations, the Court considers it necessary to stress that telephone tapping is a very serious interference with a person's rights and that only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it. The Court notes that the Moldovan legislation does not elaborate on the degree of reasonableness of the suspicion against a person for the purpose of authorising an interception. Nor does it contain safeguards other than the one provided for in section 6(1), namely that interception should take place only when it is otherwise impossible to achieve the aims. This, in the Court's opinion, is a matter of concern when looked at against the very high percentage of authorisations issued by investigating judges. For the Court, this could reasonably be taken to indicate that the investigating judges do not address themselves to the existence of compelling justification for authorising measures of secret surveillance.

52. The Court is of the view that the shortcomings which it has identified have an impact on the actual operation of the system of secret surveillance which exists in Moldova. In this connection, the Court notes the statistical information contained in the letter of the Head of the President's Office of the Supreme Court of Justice (see paragraph 13 above). According to that information, in 2005 over 2,500 interception warrants were issued, in 2006 some 1,900 were issued and over 2,300 warrants were issued in 2007. These figures show that the system of

secret surveillance in Moldova is, to say the least, overused, which may in part be due to the inadequacy of the safeguards contained in the law ...

79. In the light of all these concerns, it is not surprising that the European Court concluded that:

the Moldovan law does not provide adequate protection against abuse of power by the State in the field of interception of telephone communications. The interference with the applicants' rights under Article 8 was not, therefore, "in accordance with the law". Having regard to that conclusion, it is not necessary to consider whether the interference satisfied the other requirements of the second paragraph of Article 8.

E. INTERVENTION AREAS 2.1.3 AND 2.1.4

80. This section is concerned with the way in which the two intervention areas – i.e., clarifying the role and powers of prosecuting authorities and bodies carrying out operative investigations and optimising procedures for operational investigation and prosecution - are elaborated in the Strategy and, more particularly, the Action Plan⁶². It thus reviews the way in which the proposed actions and the outcomes/impact anticipated to flow from them, together with prescribed output indicators and indicators for measuring outcomes and impact, are formulated. In particular, it examines the various objectives and planned results from the perspective of the logical framework approach as a precursor to assessing and evaluating the actual results achieved through implementing this aspect of the Strategy and Action Plan.

81. It is self-evident that the quality of the design for any strategy will be decisive for its ultimate success or failure. The commitment of the Moldovan authorities to employ a logical framework approach for developing the Strategy and Action Plan is thus an appropriate approach. However, in practice, the log frame that was developed for the two intervention areas seems to have been used for presentational purposes rather than as a management and monitoring tool, serving more as a checklist for what has supposedly been achieved than a means of scrutinising the actual effectiveness of the action taken.

82. Certainly, a well-designed strategy using the log frame approach should enable the effectiveness of its implementation to be evaluated by reference indicators of performance that are linked to sets of objectives or results. However, the formulation adopted in the Strategy and the Action for the two intervention areas is somewhat problematic in this regard.

83. In particular, it is difficult to understand the difference between the aims and objectives of each of the intervention area to be evaluated. This was unsurprising given the brevity of both the explanation in the narrative part of the Strategy and the introduction to Action Plan. In essence the overall results/outcome expected for both intervention areas are: (a) the introduction of legal reforms (by amending relevant legislation and preparing necessary surveys); (b) the benefits ensuing from institutional reforms; and (c) capacity building for key personnel. Thus, the objectives for the two intervention areas are, in fact, identical and this was not disputed by any

⁶²See, the intervention areas in the Annex 1 to the present report.

stakeholder interviewed. It would, therefore, have been more appropriate for the log frame to have constituted just a single – and more clearly focused - intervention area that gives a fuller sense of the intended impact.

84. In merging the two intervention areas, their overall objective might thus be rephrased as: “Optimising procedures for special investigative activities (*formerly operative investigative activities*) and prosecution *inter alia* by clarifying the role and powers of investigative and prosecuting authorities”. The need for clarity and focus is something that should be borne in mind in the design of any future strategies and action plans.
85. The first column of the log frame (“Actions”) provides some framework for the stakeholders to understand what was required, as does the column dealing with “Output indicators”. Thus they do provide some possibility for measuring what “tangible product” has been produced. However, it is not really possible for any assessment to be made regarding the substance of what is produced,
86. Thus, although it can be concluded that there have been amendments to the Criminal Procedure Code and other legislation, there is no real basis for judging whether the role and powers of the various actors have been clarified (What are the criteria for this? Is clarification what is intended or compliance with the case law of the European Court as is obliquely mentioned in the “Outcomes/Impact”? What sort of changes are needed to achieve greater effectiveness?) and how exactly is the comparative study to help (It is said to be concerned with optimising prosecution numbers but what determines an optimal number and how are other systems relevant in this regard? In addition, how relevant is such a study for the reform of the regime governing special investigative activities?). Moreover, without identifying what is currently problematic, there is no baseline for measuring improvement. Furthermore, the output of a developed concept for the pre-judiciary phase has no context as to what might be in such a concept. Certainly there are various models for such a phase but what change is intended to be made with respect to the existing one is far from clear.
87. Although correctly formulated objectives are clearly important in themselves, it is the outcome and impact indicators which really enable it to be determined whether the plans for results have in fact been achieved. In particular, it should make it possible to establish what has changed in the lives of individuals, families, law-enforcers, prosecutors, judges, lawyers, victims and other relevant actors as a result of the Strategy and Action Plan.
88. The first entry under “Outcomes/Impact” for intervention area 2.1.3 is somewhat clear given the reference to international standards but it would have been even clearer if there had been some acknowledgement in the Strategy of the specific aspects of those standards not currently considered to be being met. The second entry is ostensibly clear but is undermined by the weaknesses already noted regarding the contribution that the comparative study can be expected to make. The third entry on the effective implementation of their powers might seem appropriate *in abstracto* but how exactly is legislation in line with international standards or a reformed institutional framework meant to bring this about? Certainly there is no indication anywhere as to the shortcomings perceived to exist in the institutional framework. The fourth entry – an

increase in trust – is not problematic in itself but, as will be seen, there are difficulties in measuring this.

89. Although there is no difference in the overall objective for intervention area 2.1.4 and intervention area 2.1.3, the “Outcomes/Impact” for them do differ. Thus the first entry for intervention area 2.1.4 foresees a simplified and optimised procedure but it is not clear where the current complexity and inefficiency lies. The second entry prescribes improved quality of results from investigation and prosecution is not problematic in itself but there may be difficulties in measuring this. The third entry – improved effectiveness, efficiency and transparency for investigation and prosecution procedures – is perhaps partly a repetition of the second one, although transparency is new.
90. The indicators given in the last column for measuring outcomes and impact are particularly weak since there is no real basis for measuring them. This would only have been possible if, at the time the Strategy and Action Plan were adopted, there existed concrete starting point with which some comparison could then be made. In fact, there does not appear to be any data available relating to level of support for special investigative activities, the percentage of respondents feeling satisfied or willing to report corruption cases, levels of victim satisfaction, attitudes of responders regarding efficiency and effectiveness and levels of trust from the period immediately before implementation of the Strategy and Action Plan began. There may be data of complaints submitted to the prosecution, the number of criminal cases adjudicated and prosecution caseloads but it is not evident that a before and after comparison regarding these would actually demonstrate the achievement of any of the “Outcomes/Impact” previously discussed.
91. The outcome indicators in the log frame are thus the most significant weakness of the two intervention areas in the Strategy and Action Plan. Ideally, such indicators should measure the results from the activities and outputs and be realistic and achievable given the capacity and resources available. Compared to impact indicators, which typically represent more long-term and high-level goals that are beyond the immediate control of an individual intervention area, outcomes should be directly linked to the relevant outputs. Although, the outcome indicators include the perceptions and experiences of the intended beneficiaries (judges, prosecutors, policemen, investigators, victims and members of general public), they are not really ones that can be employed since there is no baseline for the quantitative and qualitative measures that they envisage.
92. In designing any extended or new strategy and action plan, it will be important to ensure that the preparation follows the approved logical framework approach. This would “force” an emphasis on better defining outcomes rather than on listing activities. It is not enough to simply produce a logical framework matrix: the log frame approach also needs to involve all stakeholders, including the civil society actors⁶³, in the whole process and give them a sense of ownership in the strategy and

⁶³ There was some suggestion during meetings with stakeholders that the Action Plan was not explicitly discussed with civil society, affecting its expectations about what would be achieved. It was not possible to verify how much involvement civil society had but ensuring that it is adequately represented during the process

action plan. The initial project design stage is in many respects the most fundamental step in the process as it will to a large extent determine the future success or failure of the whole endeavour.

93. Furthermore, it should be noted that the Strategy and Action Plan are focused more on adopting new legislation and amending the Criminal Procedure Code than on the implementation of the new provisions. As a result the implementation of those provisions does not figure in any of the indicators. Indeed, it seems to be assumed that the adoption of a new piece of legislation corresponding to one of the pillars of the Strategy is, in itself, sufficient for it to be considered that a particular action or activity has been implemented. This is clearly an inadequate approach for achieving successful reform. More attention should, therefore, be paid to the measures required for the implementation of legislative changes when specifying indicators for any future strategy and action plan.

F. FINDINGS

1. Introduction

94. The findings of the evaluation are concerned first with the amendments that have been made to the Criminal Procedure Code and the provisions of the Law, considering in particular their compliance with European standards. They then examine some other aspects of the implementation of the two intervention areas before considering the usefulness of the comparative study on prosecution bodies systems and a number of issues concerned with training, institutional capacity, transparency, public trust and statistical data.
95. However, it should also be noted that one output indicator for intervention area 2.1.3 – “Developed Concept for the pre-judiciary phase” – does not appear to have been developed and there does not appear to have been any steps taken to develop such a concept.

2. Amendments to the Criminal Procedure Code

96. The amendments to the Criminal Procedure Code⁶⁴ relating to special investigative activities involve the introduction to it of twenty entirely new articles (Articles 132¹ – 132¹¹, 134¹ – 134⁶ and 138¹ - 138³) and the complete modification of six others (Articles 133-138)⁶⁵. Taken together these changes provide a fairly comprehensive regime for special investigative activities and are in marked contrast to the more limited scope of the provisions in the unamended Articles 133-138, which were concerned with sequestration of correspondence and wiretapping.

of elaborating strategies and action plans such as the present one is clearly important for the ultimate success of such endeavours.

⁶⁴Effected by Law no. 66 of 05.04.2012, Law no. 270 of 07.11.2013 and Law no. 39 of 29.05.2014.

⁶⁵ The comments on these provisions are based on an unofficial translation of them into English.

97. The amendments to the Criminal Procedure Code under consideration in this section did not, however, affect the essential approach to the conduct of investigation, with the discrete responsibilities of prosecutors, inquiry officers⁶⁶ and the police set out in Articles 52, 55, 56 and 57. There have been some amendments to these provisions allowing the withdrawal of cases from a specific prosecutor, but these do not have any bearing on optimising the procedures for special investigative activities envisaged in the two intervention areas.
98. The amendments under consideration begin by defining special investigative activity – which is limited to public and/or secret investigative activities “within the criminal investigation” - and by providing that it can only be carried out if (a) it would otherwise be impossible to achieve the purpose of the criminal process and/or “the taking of evidence may be considerably affected”, (b) there is reasonable doubt with regard to the preparation or commission of a crime that is in the “serious” or higher category⁶⁷ subject to any exceptions provided by law⁶⁸ and (c) “the action is necessary and proportional to the limitation of human rights and fundamental freedoms”⁶⁹. These requirements are cumulative and so all must be fulfilled for any special investigative activity to be undertaken. In some instances there is some elaboration of the second and third requirements in the specific provisions that define each of the various forms of special investigative activity that can be authorised⁷⁰.
99. The approach overall is generally consistent with that required under the case law of the European Court. However, it should be noted that the range of offences for which special investigative activities may be undertaken is still as broad as that considered by the European Court to be of concern in *Iordachi v. Moldova*⁷¹.
100. Thereafter, it is specified that these different forms of special investigative activity require authorisation from either an investigating judge or a prosecutor⁷². Which level of authorisation is applicable varies according to the extent to which the specific activities concerned interfere with the right to respect for private life.
101. Thus, judicial authorisation is required for: searches and/or the installation of equipment for surveillance and audio and video recording; home surveillance through technical recording means; interception and recording of communications and images; retaining, investigating, handing over, searching or seizing postal items; monitoring connections associated to telegraph and electronic communications; monitoring or investigation of financial transactions and access to financial information; documenting by technical means and methods, as well as locating or tracking through

⁶⁶ Inquiry officer (former “operative officer”) represents, according to article 9 para.1 of the Law on special investigative activity, the person who is empowered on behalf of the state to carry out special investigative measures.

⁶⁷I.e., an extremely serious or an exceptionally serious offence.

⁶⁸ The interception and recording of communications, image recording, monitoring or investigation of financial transactions and access to financial information are restricted to only certain offences specified in the Criminal Procedure Code no. 122-XV of 14/03/2003, Article 132⁸(2), 132¹⁰ and 134²

⁶⁹Ibid, Article 132¹.

⁷⁰I.e., in Articles 132⁶, 132⁷, 132⁸, 132⁹, 132¹⁰, 132¹¹, 133, 134, 134¹, 134², 134³, 134⁴, 134⁵, 134⁶, 135, 136-138, 138¹, 138² and 138³ of the Criminal Procedure Code.

⁷¹ See para. 71 above (“more than one half of the offences provided for in the Criminal Code”).

⁷²Criminal Procedure Code, Article 132².

GPS or other technical means; and collecting information from suppliers of electronic communication services.

102. On the other hand, there is only a requirement for authorisation from a prosecutor where the special investigative activities are comprised of: identifying the subscriber, owner or user of an electronic communication system or a point of access to an information system; visual surveillance; following up on the transfers of money or other extorted material assets⁷³; covert investigation; cross-border surveillance⁷⁴; controlled delivery⁷⁵; and purchases for investigation purposes⁷⁶.

103. The requirement for judicial authorisation before undertaking the forms of special investigative activity falling in the first group is consistent with the approach elaborated by the European Court. However, the fact that those forms falling in the second group only require the authorisation of a prosecutor is not necessarily inconsistent with that approach since it would appear that they do not involve any interference with the right to respect for private life⁷⁷. This is true even of the use of covert investigation⁷⁸ but it should be noted that such investigations could be problematic with respect to Article 6(1) of the European Convention the relevant provisions – Articles 136 and 137 – do not provide for operations used in covert investigation to be subject to judicial review or to any other independent supervision⁷⁹.

104. There is provision for undertaking the forms of special investigative activity that require judicial authorisation without such authorisation first being obtained in very limited circumstances

⁷³ I.e., “to hand over or submit goods, banknotes or documents to the person claiming or accepting them, under surveillance and by recording such actions”; Article 135(1).

⁷⁴ This involves activity to identify or track someone who has allegedly committed an offence in another State; Article 138¹ of the Criminal Procedure Code.

⁷⁵ “The controlled delivery shall account for the movement under surveillance of items, merchandise or other values (including substances, methods of payment or other financial instruments) classified as proceeds of an offence or intended for the commitment of an offence within the territory of the Republic of Moldova or outside its borders with the purpose of investigating an offence or of identifying the persons involved in its commitment, if there is reasonable doubt with regard to the unlawful possession or procurement thereof”; Article 138²(1) of the Criminal Procedure Code.

⁷⁶ This “consists in buying services or goods under free movement, subject to restrictions or prohibitions in order to conduct technical - scientific examinations or a judicial expertise or to investigate an offence or identify the perpetrators”; Article 138³ of the Criminal Procedure Code.

⁷⁷ “59. The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life”; *Peck v. United Kingdom*, no. 44647/98, 28 January 2003.

⁷⁸ “40. Mr Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him. 41. In short, there was no violation of Article 8”; *Lüdi v. Switzerland*, no. 12433/86, 15 June 1992.

⁷⁹ This has been considered important by the European Court (e.g., *Khudobin v. Russia*, no. 59696/00, 25 October 2006, para. 135). However, this may be remedied by the trial court's subsequent supervision. Moreover, it should be noted that Article 136(6) provides that “The undercover investigator shall be prohibited to cause the commitment of offences”, which is what gives rise to problems relating to Article 6(1) of the European Convention where undercover operations are involved. Moreover, any special investigative activities falling into the first group requires judicial authorisation where carried out in the course of covert investigation; Article 136(3) of the Criminal Procedure Code.

in flagrant crime cases and when circumstances do not allow any delay and the decision cannot be obtained without the existence of an essential risk of delay that may lead to the loss of information with evidential value or may expose the safety of persons to immediate danger⁸⁰.

In such cases, the activities can be authorised by a prosecutor but the investigating judge must be informed about it within 24 hours and be provided with all the materials giving grounds for the need for it. The investigating judge can then determine whether there are sufficient grounds for the activities and approve its continuation.

105. In addition to the provisions defining when special investigative activities can be carried out,⁸¹ certain, appropriate requirements are specified concerning the documentation to be submitted to the investigating judge or the prosecutor for the purpose of obtaining authorisation⁸².

106. There is a lack of clarity in one of the provisions in the Article dealing with the ordering of special investigative activities in that it states that

The prosecutor leading or conducting criminal prosecution shall rule, by a reasoned order, a special investigative measure to be deployed by the specialised sub-divisions of the authorities, referred to in the Law on special investigation activity⁸³.

This would seem to ignore the need for judicial authorisation in many instances but such an interpretation would be inconsistent with the acknowledgement of the judicial role in other parts of the same Article. It may be that this particular provision relates only to the implementation of the activities once authorised since the prosecutor giving it is presumably different from any involved in authorisation but its formulation ought perhaps to be reconsidered.

107. There is a requirement that the special investigative activities must be initiated on the date indicated in this order or “at the latest, on the expiry date of their authorisation”⁸⁴. However, this provision lacks clarity in that, although the “order” refers to the one issued by the prosecutor that was discussed in the preceding provision, the expiry date for authorisation presumably refers to one specified by the investigating judge or the prosecutor under Article 132² and there is nothing in that provision or any other one in the Criminal Procedure Code dealing with an expiry date⁸⁵. It is important that how such a date is set and how long can elapse before an authorisation expires be specified as this will determine the final date by which special investigative activities that have been authorised must cease.

108. In the general provisions, it is specified that the actual duration of special investigative activities that can be authorised is 30 days, with the possibility of

⁸⁰Criminal Procedure Code, Article 132⁴(3).

⁸¹ See para. 73 above.

⁸²I.e., the instructing procedural documents, interpellations of international organisations or foreign states, rogatory letters; Article 132³(1) of the Criminal Procedure Code.

⁸³Criminal Procedure Code, Article 132⁴(1).

⁸⁴Ibid, Article 132⁴(2).

⁸⁵Even if one could be inferred from Article 132⁴(7) of the Criminal Procedure Code, this is something that should be explicit

extensions for similar periods for up to 6 months. There must be justified reasons for an extension. Furthermore, where the activities have lasted for six months, there cannot be any subsequent authorisation for it on the same grounds and for the same issue other than where undercover agents are being used, new circumstances have occurred or the investigation concerns acts related to organised crime and the financing of terrorist acts⁸⁶. These restrictions on duration are consistent with the approach required by the European Court. However, a shorter maximum overall duration of 3 months is specified in the case of searches and/or the installation of equipment for surveillance and audio and video recording and home surveillance through technical recording means⁸⁷. Furthermore, in both cases it is also specified that the particular activities last for “not more than the duration of the criminal prosecution”, which ought in fact to be a generally applicable limitation on conducting special investigative activities. Nonetheless, the overall restrictions on the duration and renewal of special investigative activities would seem to meet the concerns identified in *Iordachi v. Moldova*⁸⁸.

109. Special investigative activities must be conducted by inquiry officers of the specialised subdivisions of the authorities referred to in the Law⁸⁹. Furthermore, the prosecutor is required to coordinate, lead and control the deployment of the special investigative activities or to appoint a criminal investigation officer to enforce such actions⁹⁰.

110. The inquiry officer that enforces the special investigative activities must submit a report to the prosecutor about their outcome either when these have ceased to be carried out or when the time limit has been reached⁹¹. Moreover, where the activities have been authorised by an investigating judge, the prosecutor shall submit to that judge all the materials that have been collected so that these can be “subjected to the lawfulness checks”⁹². Furthermore, it is stipulated that

If, during the examination of the report, it has been found that the conditions providing for the deployment of the special investigative measures have not been satisfied or that the decided measure breaches, in a disproportionate or obvious manner, the legitimate human rights and interests, or the reasons underlying the interference do not exist anymore, the prosecutor or the investigating judge shall rule the cessation of such measure⁹³.

All these requirements are consistent with the approach that the European Court has elaborated as being necessary to preclude violations of Article 8 of the European Convention and go some way to addressing the concerns that it previously raised in this regard in *Iordachi v. Moldova*⁹⁴.

111. This is equally true both of the duty of the prosecutor must rule on the cessation of the special investigative activities as soon as the grounds and reasons justifying their

⁸⁶Ibid, Article 132⁴(7). This restriction also does not apply to searching the accused.

⁸⁷Ibid, Articles 132⁶(5) and 132⁷(2).

⁸⁸ See para. 72 above.

⁸⁹Criminal Procedure Code, Article 132¹(3).

⁹⁰Ibid, Article 132²(3).

⁹¹Ibid, Article 132⁴(4).

⁹²Ibid, Article 132⁴(5).

⁹³Ibid, Article 132⁴(6).

⁹⁴ See para. 74 above. However, see also para. 114 below.

authorisation have ceased to exist⁹⁵ and the prohibition on ordering and deploying such activities “with regard to the lawful legal aid relations between a lawyer and his/her client”⁹⁶. However, the latter prohibition could prove problematic in practice if there was an attempt by investigating officers to make their own assessment as to whether or not particular lawyer-client relations were “lawful”. This is something that should only be determined by a judge and then any interference with those relations should only be in circumstances that the European Court considers appropriate⁹⁷. It is doubtful, therefore, whether enough has been done to meet the concern raised by the European Court in *Iordachi v. Moldova* with respect to this issue⁹⁸.

112. There are detailed rules governing what must be recorded in respect of each special investigative activity, notably as regards place, duration, the identity of those undertaking it, what was established and, where applicable, the items in relation to which any photos, audio and video recording and other technical means were applied⁹⁹.

113. In addition, where it is established by the investigating judge or prosecutor that the action was enforced in blatant breach of human rights or the scope of the authorisation was exceeded, the records must be annulled and the materials gathered must be ordered to be immediately destroyed¹⁰⁰.

114. A similar response is required where the inquiry officer infringed human rights by the actions performed¹⁰¹ but the distinction between the two provisions is not entirely clear, although the latter one allows an appeal to a higher prosecutor where the assessment of legality is made by a prosecutor. In addition, the assessment is specified to require consideration of the deployment of the activities, their compliance with the applicable requirements and the grounds on which they were ordered, all of which are relevant matters. Nonetheless, as the assessment of legality is not always going to be by a court, this does not address the concern of the European Court in *Iordachi v. Moldova* about the limited judicial control over special investigative activities after they had been authorised¹⁰².

115. There is also provision for notifying persons subjected to special investigative activities but this seems to be limited to cases where they have been found lawful¹⁰³, which does not seem compatible with their rights under Article 8 of the European

⁹⁵Criminal Procedure Code, Article 132⁴(8) and (9). Furthermore, their resumption cannot be ordered. However, it is a little unclear whether the cessation can be ordered without the proposal of the inquiry officer referred to in paragraph (9).

⁹⁶Ibid, Article 132⁴(10).

⁹⁷See, e.g., *Rybacki v. Poland*, no. 52479/99, 13 January 2009.

⁹⁸ See para. 77 above.

⁹⁹Criminal Procedure Code, Article 132⁵(1)-(4). Further details on record-keeping are also found in some of the provisions dealing with specific investigative activities: Article 132⁶(4), 132⁹(6)-(15) and 134(3).

¹⁰⁰Ibid, Article 132⁵(5).

¹⁰¹Ibid, Article 132⁵(6).

¹⁰² See para. 74 above.

¹⁰³Criminal Procedure Code, Article 132⁵(7) thus begins: “If the ordinance/decision has found lawfulness of the special investigative measures”. Article 132⁵(8) additionally provides that: “As of the notification stipulated under paragraph (7), the person subjected to the special investigative measures shall be entitled to take note of the minutes on the deployment of the special investigative measures and of the material information support, as well as of the prosecutor’s ordinance or the decision of the investigating judge, with regard to the legality of the deployed means”.

Convention. On the other hand, the ability to defer notification to the end of the criminal process – which must be by a reasoned decision – is not necessarily inappropriate. However, it would have been better if the provision had specified that the reasoned decision had to be based on the interests of the prosecution.

116. Limited authorisation is given for the use of data obtained through special investigative activities in other criminal cases¹⁰⁴. There is also provision for archiving of data or information which is outside the ambit of investigation or does not contribute to the identification or spotting of particular individuals, if not used in other criminal cases in specially-designated areas that ensure their confidentiality¹⁰⁵. These provisions are consistent with the approach required by the European Court. There does not, however, seem to be any specific provision on the storing of information obtained through special investigative activities that is to be used in the criminal process and thus a concern raised in *Iordachi v. Moldova* has not been addressed¹⁰⁶.

117. There is also provision for destruction of information produced following the deployment of the special investigative activities one year from “the date of the irrevocable decision”¹⁰⁷. It is not entirely clear to which decision this relates but it would seem to be the one taken by an investigating judge after finding the inquiry officer to have infringed human rights by the actions performed¹⁰⁸. In any event, it does not seem to be concerned with the destruction of information after the conclusion of the criminal proceedings to which it is linked, which was also a concern raised in *Iordachi v. Moldova*¹⁰⁹.

118. A great deal of the provisions introduced into the Criminal Procedure relating special investigative activities are clearly consistent with the requirements of the European Convention, as elaborated in the case law of the European Court. However, there are also some provisions which could be better formulated or are in need of clarification. Furthermore, the inclusion of requirements already in general provisions but in a more detailed form in certain provisions on specific activities could be a source of confusion in practice.

119. More fundamentally, there seem to be various matters required by the case law of the European Court – including in *Iordachi v. Moldova* - which have not been addressed in any of the provisions, namely,

- the range of offences for which special investigative activities can be undertaken;

¹⁰⁴Ibid, Article 132⁵(9): “if the crime committed is of the same type or, in respect of terrorist acts, of organised crime or of crimes threatening national security, but not later than 3 months from the date when such information has been produced”.

¹⁰⁵Ibid, Article 132⁵(10). However, “The investigating judge or the panel of judges may request the sealed data, *ex officio*, or at the parties’ request, if there is new evidence indicating that part of such data concern the act that falls within the ambit of the investigation”.

¹⁰⁶ See para. 75 above.

¹⁰⁷Criminal Procedure Code, Article 132⁵(11).

¹⁰⁸ See paras. 113 and 114 above.

¹⁰⁹See para. 75 above. There is also some provision for the destruction of communications that have been intercepted and recorded in Article 132⁹(15) but no criteria governing this are specified.

- the procedure to be followed for storing the data to be used in the criminal process;
- the precautions to be taken when communicating the data to other parties;
- the circumstances in which data obtained may or must be erased or the records destroyed where it has been used in the criminal process;
- the provision for vesting the overall control of the system of special investigative activities in an independent body rather than someone directly involved in commissioning its use¹¹⁰.

120. In addition, there does not seem to be a sufficient judicial oversight over the conduct of special investigative activities for the purpose of ensuring compliance with all the applicable requirements¹¹¹.

121. As will be seen in the following sub-section, these shortcomings have not generally been remedied by the Law. Moreover, the inclusion in the latter of some but not all of the provisions in the Criminal Procedure Code does not lead to clarity in the regime governing special investigative activities.

3. The Law on Special Investigative Activity

122. The Law was adopted in 2012 and replaced one that had been adopted in 1994 (hereinafter the 1994 Law) and which had been considered in the case of *Iordachi v. Moldova*. Its provisions are in many respects the same – in substance if not always formulation - as those in the Criminal Procedure Code¹¹² and both the positive aspects and the shortcomings noted in the preceding sub-section are generally applicable to the Law. However, there are also a number of significant differences or additions to be found in the Law¹¹³.

123. In the first place, the definition of special investigative activity is not limited to procedures connected with the criminal process but extends also to

ensuring state security, public order, protection of rights and legitimate interests of people¹¹⁴

and to

collecting information about possible events and/or actions that may jeopardise state security¹¹⁵.

124. Neither of these objectives are in themselves incompatible with Article 8 of the European Convention but it is recalled that the European Court expressed concern about the lack of precision in essentially the same objectives in the 1994 Law¹¹⁶.

¹¹⁰ See paras. 71, 75 and 76 above.

¹¹¹ See para. 74 above.

¹¹² Notably Articles 14, elements of Articles 18-20 and 22 and Articles 28-30 and 33.

¹¹³ The comments on its provisions are based on an unofficial translation of them into English.

¹¹⁴ Law on Special Investigative Activity, Article 1(1).

¹¹⁵ *Ibid*, Article 2(d).

125. At the same time, the forms of special investigative activity that can be undertaken outside of criminal proceedings are remarkably limited. Thus, none of those that need judicial authorisation are available, nor are certain of those requiring a prosecutor's authorisation, namely, those involving control of the transmission of money or other tangible assets extorted, cross-border supervision and controlled delivery¹¹⁷. It is hard to believe that the forms of special investigative activity that can be used will be particularly effective in ensuring state security and other objectives not linked to the criminal process.
126. Secondly, the Law sets out certain principles for special investigative activities – legality, respect for the rights and freedoms of individuals, opportunity and safety, combining public and secret methods, cooperation with other state authorities and “non-ideologization and impartiality”¹¹⁸ – which are not inappropriate. Certain elements of them can also be found in the provisions of the Criminal Procedure Code.
127. Thirdly, in addition to providing for the right to be informed about being the subject of special investigative activities and for evidence gathered in violation of human rights and freedoms to be legally invalid¹¹⁹, the Law also provides for a right to receive compensation for moral and material damage caused by violation of its provisions and for such violations to be punishable¹²⁰. This is all desirable but it should be noted that two different approaches to notification can be seen in the Criminal Procedure Code and the Law. The former provides for the possibility of deferring notification until the end of the criminal proceedings (but therefore makes it possible before that occurs) whereas the Law does not authorise it before the conclusion of the special investigative activities¹²¹. This contradictory approach is undesirable at least as far as concerns the conducting of special investigative activities linked to criminal proceedings and the one seen in the Code is preferable.
128. Fourthly, the Law includes specific provision for the protection of personal data obtained through special investigative activities¹²². Thus, those having access to this data are required to maintain its confidentiality and there are also restrictions on who may have such access¹²³. This – together with a subsequent provision providing that “data collected during special investigative activity is limited access official

¹¹⁶ See para. 71 above. This report is not concerned with special investigative activities unconnected with a criminal investigation.

¹¹⁷ Law on Special Investigative Activity, Article 18(3). It is unclear what is the position regarding the new forms of special investigative activity that can be authorised by managers of specialised sub-divisions (see para. 133 below) as this states that “The measures referred to in paragraph. (1) item 3) are carried out trial”.

¹¹⁸ Ibid, Article 3. The meaning of “ideologization” is unclear but it may be linked to politically motivated decision-making.

¹¹⁹ Ibid, Article 4(1) and (5).

¹²⁰ Ibid, Article 4(2) and (4).

¹²¹ The subsequent provision on notification in Article 22(6) and (7) of the Law is otherwise the same as that in Article 132⁵(7) and (8) of the Criminal Procedure Code.

¹²² Law on Special Investigative Activity, Article 5.

¹²³ “Access to special file or file materials by other than those people investigating special file is prohibited, except of the Head of the specialised subdivision of that body, within its competence, and of the prosecutor who authorised or required its authorisation to the investigating judge and except of the investigating judge that authorised the special investigation measure”.

information or state secrets”¹²⁴ - seems to have the potential to remedy one of the shortcomings noted above with respect to the Criminal Procedure Code¹²⁵.

129. However, these positive provisions are undermined by another provision that gives inquiry officers free access to data information systems¹²⁶. Whether or not these systems are official or private ones, the absence of any control over the basis on which personal data can be accessed – such as a link to a particular criminal proceeding, clear grounds for believing relevant material is in the system and requirements as to the handling of material that is not relevant – means that a fundamental requirement of data protection is being disregarded. Moreover, there is no general stipulation in the Law governing the circumstances in which data obtained may or must be erased or the records destroyed where the purpose for which it was obtained has been completed whether this is use in the criminal process or for national security objectives)¹²⁷.

130. There is a requirement that special files containing state secrets must be destroyed after their declassification in accordance with the Law on State Secrets¹²⁸. However, it is doubtful if such declassification is meant to be a general practice and so this provision does not do enough to remedy the lacuna that was of concern to the European Court in *Iordachi v. Moldova*¹²⁹.

131. All material gathered in the course of special investigative activities must be put into a special file and registered¹³⁰. It is not clear why the term “special” is used but there is an appropriate requirement to log all who have access to it¹³¹, which could help minimise the risk of data protection standards being breached but is not a substitute for setting out proper criteria governing access.

132. In addition it is also made clear that a special file “cannot be a basis for limiting rights and freedoms provided for by law”¹³². This is entirely appropriate but it is no guarantee that information in the special file might not be used to that end¹³³ and this underlines the importance of effective data protection arrangements being in place, which the Law lacks.

133. Fifthly, the Law specifies the specialised sub-divisions for carrying out special investigative activities, namely, those within or subordinated to the Ministry of Interior, Ministry of Defence, National Anticorruption Centre, Intelligence and

¹²⁴Law on Special Investigative Activity, Article 25.

¹²⁵ See para. 75 above.

¹²⁶Law on Special Investigative Activity, Article 23.

¹²⁷ Even if these matters are addressed in the common rules envisaged in Article 18(6) for, amongst other things the “preservation and destruction of material obtained, measures to ensure their integrity and confidentiality” or in the departmental regulations envisaged in Article 21(3) for the termination and destruction of special files, the use of subordinate rules is not an appropriate way to regulate them.

¹²⁸Law on Special Investigative Activity, Article 21(4).

¹²⁹See para. 75 above.

¹³⁰Law on Special Investigative Activity, Article 21(1).

¹³¹*Ibid*, Article 21(5).

¹³²*Ibid*, Article 21(2).

¹³³The stipulation that “The findings of a special investigative measures specified in art. Article 18(1) point 2) in a special file in another special case is made only with the authorisation of the prosecutor who authorised the original measure” (Article 24(4) may reduce such a risk but it does not eliminate it.

Security Service, Protection and Guard State Service, Customs Service and Department of Penitentiary Institutions of the Ministry of Justice¹³⁴. This list confirms the wider remit envisaged by the Law for special investigative activities than under the Criminal Procedure Code. Furthermore, there are grounds for concern about the stipulation that those officers carrying out special investigative activities do so “independently” except in criminal proceedings¹³⁵ as this may preclude effective supervision over such activities and thus increase the risk of the requirements governing it being observed.

134. Sixthly, there are provisions dealing with the conferral of powers related to the carrying out of special investigative activities, the leaders of the various sub-divisions and the officers within them, as well as the rights, obligations and liability of those officers and the financing of such activities¹³⁶. These provisions do not seem inappropriate, although the meaning of two is not entirely clear¹³⁷.

135. Seventhly, there is provision for engaging persons other than inquiry officers – “employees of confidentiality” – to be involved in special investigative activities but also a prohibition on such arrangements being made with criminal investigators, judges, lawmakers, lawyers and prosecutors¹³⁸. In addition, certain obligations to assist the conduct of special investigative activities are created for individuals and legal entities and powers to extend social protection to those employed in connection with these activities are conferred¹³⁹. These provisions are not inappropriate.

136. Eighthly, although the Law follows the Criminal Procedure Code as regards the forms of special investigative activity that need judicial authorisation, it adds two forms to those for which authorisation can be given by a prosecutor and introduces three new forms for which authorisation can be given by the manager of one of the specialised sub-divisions noted above¹⁴⁰.

137. The two new forms of special investigative activity that prosecutors can authorise are collecting samples for comparative research¹⁴¹ and examining objects and

¹³⁴Law on Special Investigative Activity, Article 6(1). However, only specialised sub-divisions within the Ministry of Internal Affairs and the National Anticorruption Centre can undertake the special investigative activity that takes the form of controlling the transmission of money or other tangible assets extorted; Article 18(4) of the Law on Special Investigative Activity.

¹³⁵Ibid, Articles 6(2) and 9(2).

¹³⁶Ibid, Articles 7-13 and 37.

¹³⁷Ibid, Article 7(3) (“The specialised subdivisions of the authorities carrying out special investigations activity, within their competence, have the right to collect the necessary information characterising people checked on: a) access to information constituting state secrets; b) admission to employment objectives posing a great danger for life and health; c) admission to the organisation and performed special investigative measures or access to materials received during performing these measures; d) the establishment or maintenance of collaboration in organising and carrying out special investigative measures; e) examination by the Licensing Board of the request to receive the license for private detective and/or guard activity; f) ensuring internal security”) and Article 11(e) “Inquiry officer shall: ... e) to follow the rules of conspiracy to exercise special investigative activity”).

¹³⁸Ibid, Article 15.

¹³⁹Ibid, Articles 16 and 17.

¹⁴⁰See, para. 125 above.

¹⁴¹This is defined in Article 31 of the Law on Special Investigative Activity, as: “Collection of samples for comparative research is to detect, raising physical and material support conservation of information (objects,

documents¹⁴². Neither would seem to involve any interference with the right to respect for private life and so the fact that authorisation is by a prosecutor rather than a judge is not problematic.

138. The three forms of special investigative activity that can be authorised the manager of one of the specialised sub-divisions are: questioning¹⁴³; collecting information about people and events¹⁴⁴; and identify the person¹⁴⁵. Only the second of these seems to have the potential to interfere with the right to respect for private life and only then if the documents, materials and databases being accessed are not in the public domain. Subject to it being confirmed that only documents, material and databases in the public domain will be accessed, there does not seem to be any reason to be concerned about the authorisation for these forms of special investigative activity being given by a manager rather than a judge or prosecutor.

139. Ninthly, the reasons for carrying out special investigative activities are more extensive than those in the Criminal Procedure Code and the additions do not seem to be limited to cases where the activities are not linked to criminal proceedings. Thus, the additional reasons are:

- 1) unclear circumstances on the initiation of the criminal investigation;
- 2) the information, become known, on:
 - a) prejudicial act in preparation, to commit or committed and the persons who are preparing, committing or committed it;
 - b) people who are hiding from criminal investigation or the court or the persons that evade to enforce the criminal punishment;
 - c) the trace missing persons and the need to establish the identity of unidentified bodies;
 - d) the circumstances that endanger the public order, military, economical, environmental or other nature of the security of the state;
 - e) the circumstances that endanger the safety of the undercover investigator or his/her family members¹⁴⁶.

Furthermore, these reasons are not really consistent with the objectives set out at the beginning of the Law¹⁴⁷ and are not comparable to the documentary character of the other “reasons” in the same provision¹⁴⁸. There is a need for the scope of these

substances) to compare these samples with materials that already have specialised subdivisions or for subsequent detection of identical objects especially objects of interest”.

¹⁴² This is defined in Article 32 Law on Special Investigative Activity, as: “(1) research consists of objects and documents in its assessment, the scientific, for signs of criminal activity, in studying the content, in oppose to other objects and documents necessary to determine the objective reality. (2) Research objects and documents shall be made by officers of investigations involving, as appropriate, the specialist who has knowledge for their study”.

¹⁴³ This is defined in Article 34 Law on Special Investigative Activity, as: “the direct communication of the inquiry officer and other persons authorised by it to people who have or have information about facts, events, circumstances or persons of interest”.

¹⁴⁴ This is defined in Article 35 Law on Special Investigative Activity, as: “acquiring information about individuals and legal facts, events, circumstances of interest by studying direct documents, materials, databases, the preparation of applications for individuals and businesses that have information or have nominated”.

¹⁴⁵ This is defined in Article 36 as: “to establish identification of the person after static signals (fingerprints, blood and saliva composition, odor and traces of traces left at crime scene) and dynamic (walking, flourish, mimicry, etc...) And through photo-robots and other methods giving way to determine who the likely increased”.

¹⁴⁶ *Ibid*, Article 19(1).

¹⁴⁷ See, para. 123 above.

¹⁴⁸ *Ibid*.

additions to be clarified and, if necessary, to be modified so that there is no extension of the basis for undertaking special investigative activities in connection with criminal proceedings.

140. Tenthly, the procedure for authorisation, including commencement and duration are essentially the same as those under the Criminal Procedure Code, with appropriate adaptations for authorisation by the manager of a specialised sub-division. However, a significant omission is the absence of any prohibition on special investigative activities with respect to relations between a lawyer and his/her client. Although the provision in the Criminal Procedure Code is far from adequate¹⁴⁹, there is a need to ensure that these relations are protected even where the special investigative activities are not concerned with criminal proceedings and the Law should thus be amended accordingly.

141. Eleventhly, there are provisions for ruling on the legality of special investigative activities¹⁵⁰ but, unlike those in the Criminal Procedure Code¹⁵¹, there is no express indication that this is to be conducted by the investigating judge even in those cases where the activities were authorised by a judge. As a result there would be a further weakening of the already limited judicial control over special investigative activities after they had been authorised, which was a matter of concern for the European Court in *Iordachi v. Moldova*¹⁵².

142. Finally, the Law has four provisions concerned with control and coordination of special investigative activities. The first relates to parliamentary scrutiny¹⁵³, the second and third to control by the prosecutor¹⁵⁴ and departmental heads¹⁵⁵ and the fourth to a Coordination Council to be formed by the General Council¹⁵⁶.

143. The arrangements for parliamentary scrutiny involve an annual report by the Attorney General to the Commission on National Security, Defence and Public Order on the number of special investigative activities authorised, the number of them that were cancelled and the results of these activities. In addition, the Commission is authorised to order the submission of additional information on specific activities of investigation¹⁵⁷. Although this is somewhat more specific as to the manner in which Parliament effects its control¹⁵⁸ than under the 1994 Law, there is no real indication as to what the Commission can do with the information that it receives and, in particular, how it can influence the future conduct of special investigative activities. It is

¹⁴⁹ See, para. 111 above.

¹⁵⁰ Law on Special Investigative Activity, Articles 22 and 26. The latter provision deals with appeals against a ruling.

¹⁵¹ See para. 114 above.

¹⁵² See paras. 71 and 74 above.

¹⁵³ Law on Special Investigative Activity, Article 38.

¹⁵⁴ *Ibid*, Article 39.

¹⁵⁵ *Ibid*, Article 40.

¹⁵⁶ *Ibid*, Article 41.

¹⁵⁷ However, the rider to this provision - "except for special cases where it considers that the report submitted is incomplete" (Article 38(4)) - does not seem entirely coherent.

¹⁵⁸ Article 18 of the Law on Special Investigative Activity had provided that: "Scrutiny, on behalf of Parliament, of operational investigative activity shall be exercised by the relevant permanent parliamentary commissions. The authorities which exercise operational investigative activities shall submit information to these commissions in accordance with the law".

doubtful, therefore, whether enough has been done to address the European Court's concern in *Iordachi v. Moldova* about the ineffectiveness of the control exercised over special investigative activities¹⁵⁹.

144. The control over special investigative activities that is envisaged as being exercised by prosecutors entails the compilation of an audit by superior prosecutors that is based “on complaints filed by persons whose rights and legitimate interests allegedly were violated”¹⁶⁰. The compilation of such an audit may be facilitated by the access given to the superior prosecutors to information constituting state secrets¹⁶¹ but there is no indication as to what consequences should follow from such an audit – such as disciplinary measures, revisions to procedure or the provision of training – and it is doubtful whether the superior status of the prosecutors is sufficient to guarantee the independence of such a review that has been seen as necessary in the case law of the European Court¹⁶².
145. The control to be exercised by departmental heads is specified as being through “requiring the control of special cases”¹⁶³, which gives no indication as to what is involved substantively. In any event, a departmental head would not satisfy the test of independence as elaborated in the case law of the European Court.
146. The provision for coordinating special investigative activities through a Coordination Council, composed of the Attorney General and the heads of specialised sub-divisions, does not seem inappropriate. In particular, such an arrangement could contribute to preventing someone from being subjected to total and comprehensive surveillance, which could be disproportionate in certain cases¹⁶⁴.
147. Overall, the Law does not really do much to remedy the shortcomings seen in the Criminal Procedure Code as regards compliance with European standards. Indeed, it makes the task of securing this somewhat more problematic since (a) individual provisions are not always coherent, (b) the duplication with provisions in the Criminal Procedure Code is confusing because of the difference in the formulations used, and (c) the structure is hard to follow because there is duplication in respect of some but not all the provisions of the Code.
148. It is understood that there is a need for the Law as well as the Criminal Procedure Code because the former deals with special investigative activities outside the criminal process. However, given the limited forms of such activities that can be undertaken outside of the criminal process, the complexity in the organisation of the Law's provisions seems excessive for the goal being pursued. In these circumstances having such parallel sets of provisions is bound to make the task of those seeking to use special investigative activities or to control its use especially difficult.

¹⁵⁹ See, para. 76 above.

¹⁶⁰ Law on Special Investigative Activity, Article 39(2).

¹⁶¹ *Ibid*, Article 39(3).

¹⁶² See, para. 74 above.

¹⁶³ Law on Special Investigative Activity, Article 40(2).

¹⁶⁴ See, para. 56 above.

149. There is nothing in the Law that can be regarded as having any bearing on optimising the procedures for special investigative activities envisaged in the two intervention areas.

4. Problems with implementation

a. Introduction

150. It can be seen from the preceding two sub-sections that some of the concerns raised by the European Court in the *Iordachi* case have been satisfactorily addressed by the new legislative framework for special investigative activities effected by amendments to the Criminal Procedure Code and the adoption of the Law. However, there are also still a number of issues concerning this framework which do not satisfy the requirements of the right to respect for private life and the right to a fair trial, enshrined respectively in Articles 8 and 6 of the European Convention on Human Rights. These issues may well have a negative impact on the implementation of this new framework. It is, therefore, important to highlight certain problems relating to its implementation that have been identified, notwithstanding that implementation does not actually figure as a concern for the two intervention areas¹⁶⁵.

151. Some interviewees suggested that a problem affecting the implementation of special investigative activities under the present legal framework was that they could only be conducted “within the criminal investigation”, that is, where such an investigation had already been instituted. As a result there were some proposals being advanced by those concerned with law enforcement for further amendments to be made to the Criminal Procedure Code. However, there was no substantiation as to why this requirement presented a real problem in practice. Certainly, it was never explained why there should be a need to conduct such activities in situations for which there was no reasonable suspicion about the preparation or commission of a crime and the no criminal basis for them under the Law¹⁶⁶ was not applicable. There was some suggestion that a complaint could not form the basis for a criminal process without the information first being checked but that seems an unduly restrictive approach that does not take account of the particular circumstances of a case since law enforcement officers may already have some other corroborating information available. Moreover, the desire to be able to undertake special investigative activities in connection with supposed criminal offences without first initiating the criminal process - which the proposals for reform seem to reflect - does not accord with European standards.

152. The analysis in this section starts with a brief description of the three-prong approach to investigation and the special file¹⁶⁷. This lays down the basis for the discussion of certain issues related to the practice relating to authorisation and supervision of special investigative activities, as well as that concerned with the notification and appeal procedures. As the use of certain special investigative activities in the context of contraventions and the lack of uniform implementation of

¹⁶⁵See, para. 93 above.

¹⁶⁶See, para. 123 above.

¹⁶⁷Law on Special Investigative Activity, Article 21(1). See also para. 131 above.

the law have also been found to be problematic, a discussion of the relevant issues concludes the present sub-section of the report.

153. It should be noted here that the discussion below is based on the findings of the expert team during the mission in Chisinau on 14-16 December 2015. As noted in the methodology section¹⁶⁸, these findings cannot be regarded as conclusive since the interviews conducted with the various stakeholders reflect neither a quantitative nor a qualitative empirical research methodology. They are mere indications of problems, which may arise during the implementation of the new legislative framework.

b. Three-prong approach and the special file

154. In theory the prosecutor leads the prosecution and investigation. However, in practice there are three authorities charged with the investigation:

inquiry officers → criminal investigation officers → prosecutor

155. The inquiry officers gather information in an operative way. They conduct the special investigative activities and are subordinated to and supervised by investigators. In theory the prosecutor also supervises the inquiry officers but, in practice, this does not occur. There are various reasons why this is so. One of them is that the operative and criminal investigation officers have different administrative structures and supervision systems¹⁶⁹. Another reason appears to be the lack of human resources within the prosecution service. Certainly, representatives of the General Prosecution Office claimed that the prosecution service had too many ‘Chiefs and Bosses’ and not enough personnel who actually conduct and supervise criminal investigations. The particular problems in this regard with respect to the supervision of the use of special investigative activities are discussed further below.

156. The material gathered in the course of special investigative activities is put in a special file, which is administered and controlled by the inquiry officers and to a certain degree by the criminal investigation officers. Information gathered in an operative way is also put in the special file. However, there is no common view shared by all the stakeholders on the exact contents and status of the special file. In particular, it is unclear whether the special file forms part of the investigation file or whether this is something which is only used by the inquiry officers as a basis to start the investigation.

157. Furthermore, concern was expressed by representatives of civil society and of the Bar Association about the potential for the special file system to facilitate abuses of special investigative activities, such as through the extraction of confessions and the gathering of evidence illegally. However, it was not possible to substantiate or dismiss these concerns in the course of the evaluation. *The scheme of distribution of tasks and duties among investigating authorities is not entirely clear and it may create confusion among the authorities themselves on one hand and the general public on the other.*

¹⁶⁸ See, para. 16 above.

¹⁶⁹ Law on Special Investigative Activity, Article 6(1); see also para. 133 above.

c. *Authorisation and supervision*

158. As has already been noted, the European Court expressed concern in the *Iordachi* case about the limited judicial control that existed in Moldova with respect to special investigative activities¹⁷⁰. The legitimacy of this concern was also effectively acknowledged by the Moldovan judges whom the experts met since they claimed that, prior to the amendments of the Criminal Procedure Code and the adoption of the Law, a one page motion stating that ‘based on trustworthy information authorisation is requested’ was sufficient for such authorisation to be granted. However, according to these judges, the approach had now changed now. Thus, in their view authorisation was no longer granted blindly and, indeed, it would be refused in the case of requests that were not properly substantiated. Nonetheless, statistics would seem to paint a different picture since they show that requests for the interception of communications are still being overwhelmingly granted by the courts¹⁷¹. As a result, the concerns expressed by the European Court do not yet seem to have been satisfactorily addressed in practice.

159. The three-prong approach to investigation and the existence of a special file may also give rise to certain problems related to the effective supervision of the special investigative activities after these have been authorised. As already noted in the previous section¹⁷², there are several sub-divisions vested with the power to deploy special investigative activities. Also the Law stipulates that the officers of these sub-divisions may carry out special investigative activities independently except in criminal proceedings¹⁷³. In principle, inquiry officers are obliged to give the CDs made in the course of tapping telephones (or other material collected as a result of the use of other special investigative activities) to the prosecutor.

160. However, each layer in the investigation chain has its own hierarchy, which filters the information that may be passed on to the prosecutor. Certainly, there is no common vision governing how all these layers should cooperate with each other. As a result, the prosecutor in a particular case will not always have access to the special file relating to it. Whether he or she does have such access often depends on his or her personality, his or her relationship with the investigator or operational officer and the type of information contained in the special file. This may have a number of adverse consequences for the supervisory role that the prosecutor or the judge can play with respect to the deployment of the special investigative activities following their authorisation.

161. Firstly, neither the prosecutor nor the judge may properly exercise their powers relating to the “lawfulness check”¹⁷⁴. Even where the prosecutor is given access to the

¹⁷⁰*Iordachi v Moldova*, No. 25198/02, 10 February 2009, paragraphs 41-44 and 47. See also paras. 71 and 74 above.

¹⁷¹The percentage of requests granted since 2009 have been as follows: 98.8% in 2009, 99.2% in 2010, 98.7% in 2011, 97.6% in 2012, 98.66% in 2013, 98.47% in 2014 and 97.5% in 2015. See page 14 of S Macrinici and V. Gribincea, *Interceptarea convorbirilor telefonice în Republica Moldova: progress sau regres?*, an analytical document prepared by the Legal Resources Centre from Moldova (available at <http://crjm.org/wp-content/uploads/2016/01/CRJM-DA-Interceptari.pdf>).

¹⁷² See, para. 133 above.

¹⁷³ Law on Special Investigative Activity, Articles 6(2) and 9(2).

¹⁷⁴ Article 132⁴(4) of the Criminal Procedure Code.

special file, the material to which such access is allowed seems likely to have been subject to some filtering by the hierarchy of the investigation machinery. This inevitably affects the performance of the prosecutor's duty to inform the judge about the deployment of the special investigative activities in the context of the discharge by the judge of his or her own "lawfulness checks"¹⁷⁵. As a consequence, the concerns raised by the European Court in the *Iordachi* case about the absence of effective judicial control of special investigative activities have clearly not been addressed.

162. Secondly, the roles of the prosecutor in guaranteeing that information contained in the special file should not be used to limit rights and freedoms provided for by law and in authorising the deployment of data collected in the special file for another special case are necessarily also being undermined¹⁷⁶.

163. Thirdly, it will not be possible to enforce the provisions of Article 132⁵(5) and (6) of the Criminal Procedure Code with respect to declaring minutes and activities null and void if neither the prosecutor nor the judge have effective access to the special file¹⁷⁷.

164. Another problem of implementation, unrelated to the special file or the approach to the investigation, concerns the limited time that judges have at their disposition to decide on the prolongation of special investigative activities or their ex ante legalisation. The judge is supposed to decide on these matters within 4 hours of receiving the relevant motion¹⁷⁸. However, this time frame was suggested by the judges whom the experts met to be sometimes insufficient, especially when the intercepted material relevant to the prolongation or legalisation request takes much longer than 4 hours to review¹⁷⁹. This view reflects the uncertainty in the relevant legal provisions about what should be done in the course of this review¹⁸⁰; should it be to listen to the whole of the material already tapped - which usually takes far longer than the 4 hours period - or to review the legality of the use of tapping (or other special investigative activities) and also the necessity of the prolongation? In the latter case, the 4 hours should be sufficient if the judge focuses on the mentioned purpose of the review and if he or she is selective in listening the interceptions: i.e., was the person tapped the right one or were there any procedural guarantees infringed during

¹⁷⁵ Ibid, Article 132⁴(5).

¹⁷⁶ See para.132 above. The judges at the Strasenii court claimed never to have had any access to the materials in the special file.

¹⁷⁷ See, paras. 113 and 114 above.

¹⁷⁸ Criminal Procedure Code, Article 305(3). Interviewees from the Ministry of Interior suggested that in the past there had been a problem of judges failing to meet the deadline but they did not regard this as a current one.

¹⁷⁹ In some cases there may be between 25 and 50 hours of recorded material.

¹⁸⁰ On the one hand, Article 132⁹ (15) of the Criminal Procedure Code provides: "The investigating judge shall issue a conclusion stating his/her opinion on the *compliance with the legal requirements in the interception* and recording of communications by the criminal investigation prosecuting body and shall decide which of the recorded communications are to be destroyed, appointing the persons in charge with such destruction. On the other hand, Article 305 of the Code states: "(4) Within the set timeframe (within 4 hours from receipt of the motion) the investigative judge shall open the hearing, announce the motion to be examined and verify the authority of the participants in the proceeding. (5) The prosecutor who filed the motion shall justify the reasons and answer the questions of the investigative judge and participants in the proceeding.(6) If persons whose interests are affected by the motion or their defence counsels and representatives participate in the hearing, they shall be allowed to give explanations and to take knowledge of all the materials submitted for the examination of the motion. (7) *Following the control over sufficiency of the motion* the investigative judge shall authorise in a ruling the criminal investigative action or the special investigative measure or the coercive procedural measure or shall reject the motion" (emphasis added).

the first tapping? However, in some cases it may not be possible for the judge to determine properly whether or not prolongation or legalisation would be justified without listening to the whole of the material already tapped.

165. There is clearly a need for either greater clarity in the relevant provisions or guidance regarding their application from the Supreme Court of Justice- which is entitled to issue explanatory notes and to unify the judicial practice - as otherwise the necessary scrutiny of requests for prolongation or legalisation is unlikely to be sufficiently rigorous to comply with the requirements of European standards.

d. *Notification and appeal*

166. Both the Law and the Criminal Procedure Code require that the person subjected to special investigative activities be notified by the authorities of their use¹⁸¹. However, the problems identified in the previous section of the report¹⁸² with regard to the legislation are also reflected in practice. Thus, persons subjected to special investigative activities are either not informed at all about the use of such activities or notified too late. The consequence thereof is that the person subjected to special investigative activities is not able to (effectively) exercise his right to appeal enshrined in Article 313 of the Code.

e. *Use of special investigative activities in contraventions cases*

167. In the previous section it was noted that the special investigative activities can still be deployed in cases of serious, very serious and exceptionally serious crimes¹⁸³, which meant that the European Court's concern in the *Iordachi* case about the applicability of special investigative activities to a wide range of offences¹⁸⁴ had not been met. Nonetheless, the threshold for the use of special investigative activities is supposed to entail the possibility of a sentence of 12 years' imprisonment or more being imposed on the offence concerned¹⁸⁵.

168. Nonetheless, despite the inadequacy of this limitation for the purposes of the European Convention, there were also some instances reported during the mission of the use of certain special investigative activities being authorised in the context of the investigation of mere contraventions. Although the authorities interviewed did not all have about such authorisations being given, it should be noted that the possibility to seek an authorisation to search a domicile does still exist in the Contravention

¹⁸¹ Article 132⁵ of the Criminal Procedure Code and article 4 of the Law on Special Investigative Activity.

¹⁸² See, paras. 115 and 127 above.

¹⁸³ See, para. 99 above.

¹⁸⁴ See, para. 71 above.

¹⁸⁵ Thus, Article 16 of the Criminal Code no. XV of 18/04/2002 states: "(4) Serious crimes are considered acts for which criminal law provides for a maximum punishment by imprisonment for a term of up to 12 years inclusively. (5) Extremely serious crimes are considered crimes committed with intent for which criminal law provides for a maximum punishment by imprisonment for a term of more than 12 years. (6) Exceptionally serious crimes are considered crimes committed with intent for which criminal law provides for life imprisonment". This does not, of course, apply to the authorisation in the Law to use special investigative measures outside the criminal process; see paras. 123 and 125 above.

Code¹⁸⁶. Such a possibility would seem to be inappropriate in light of the decisions of the European Court concerning Article 8 of the European Convention in general and its ruling in *Iordachi* case in particular.

f. Non-uniform implementation of the law as a result of its fragmentation and lack of clarity

169. Despite the improvements of the legislation discussed in the previous section there are still concerns about its clarity and thus the uniform application of its provisions. Certainly, some of the authorities interviewed expressed concerns about the ambiguity of the legislation and about which provisions to use in particular situations. This ambiguity leaves open the possibility open for judges being improperly influenced and being able to manipulate situations so as to unjustified decisions in favour of suspects.

170. There was also some uncertainty as to whether or not certain measures amounted to special investigative activities. Thus, the Hincesti court cited – without giving a specific reference – an example connected with the tracing of a stolen telephone. The prosecutor had treated this as a procedural measure while the Hincesti Court had refused to authorise it because it had considered this to be a special investigative activity in a respect of a matter that did not fulfil the serious crime requirement prescribed in the Criminal Procedure Code. However, the view taken by the Court of Appeal was that the tracing in this case was a procedural measure and had permitted this to be undertaken.

171. The Supreme Court has issued a recommendation with the purpose of unifying the interpretation and the practice concerning special investigative activities¹⁸⁷. The issuing of the recommendation was triggered by reported cases in which inquiry officers had tried to (ab)use special investigative activities outside the framework of the Criminal Procedure Code. Nevertheless, this recommendation is very general in nature and does not contain any specific and detailed instructions on the use of the special investigative activities. Recommendations of the Supreme Court are, in any event, not mandatory for the lower courts.

172. Before the adoption of the amendments to the Criminal Procedure Code and of the Law, appeals concerning the authorisation of special investigative activities were only heard by the Supreme Court. However, such appeals are now determined by the Appeal Courts¹⁸⁸ and this may result in contradictory decisions. This is unfortunate as the development of a more uniform judicial practice could provide the sort of vital

¹⁸⁶ Articles 425 and 426 of the Contravention Code no. 218-XVI of 24/10/2008.

¹⁸⁷ Supreme Court Recommendation 38 on the actions that can be carried out from the moment of notification or self-notification of the competent authority till the initiation of criminal investigation, 23 April 2013. Its purpose is stated as follows: “In order to observe uniform practice on the application of criminal procedural legislation, which regulates what procedural actions can be performed from the moment of notification or self-notification of competent authority about the preparation or commission of a crime before the start of criminal prosecution, the Criminal Board of the Supreme Court explains: restoring legal order, by application of criminal sanctions to those who have committed harmful acts, is achieved through the prosecuting authorities and the courts in criminal proceedings”.

¹⁸⁸ Article 305 para 8 of the Criminal Procedure Code

guidance required for the proper exercise of powers that necessarily impinge upon the enjoyment of human rights.

5. The comparative study

173. A study was undertaken by the General Prosecutor's Office for the purposes of implementing intervention area 2.1.3's second point, namely, "Preparation of a comparative study on the systems of prosecuting bodies, in order to optimise their number and, where appropriate, preparation of the draft law amending certain legal acts. Defining the role and powers of prosecution bodies and of bodies conducting operative investigation activities".
174. The resulting study was entitled *Comparative study on the systems of criminal prosecution bodies, in view of their optimisation* and is divided into five sections.
175. The first section contains the introduction and also describes the objective of the study, as mentioned above.
176. The second section provides a brief description of the four main prosecuting bodies in Moldova, namely the Prosecutor's Office, the Ministry of Internal Affairs, the National Anticorruption Centre and the Customs Service. This description does not go beyond providing a very condensed summary of the legal framework regulating these bodies.
177. The third section is dedicated to a description of the prosecution models in certain European Union Member States. Those selected are; Austria; France; Germany; Italy; the Netherlands; Romania; Spain; Sweden; and the United Kingdom. The description of these different models again does not go beyond summarising some of the relevant legal provisions. However, there is no explanation as to why the study chose to focus on these models and not on others. Moreover, the nature of the content of the description in respect of each for each country seem to be different. Thus, there is no consistent methodology on this point.
178. The fourth session is dedicated to '*issues of compared law on the systems of prosecuting bodies at national and international level. Common and different regulations*'. The section concludes that the Moldovan model has several similarities with the systems of Romania and the Russian Federation. However, while the Romanian model was analysed in the previous section, this is the first occasion on which that of the Russian Federation appears in the study. Although some sort of rudimentary legal comparative analysis is found in the first paragraph of this section concerning the similarities between Romania and Moldova, no reason is given for the view that the Moldovan system is also similar to that of the Russian Federation. No use is made in this section of the description of the other models examined in the previous section for the purpose of this comparative analysis. As a result the value of this section suffers from the lack of any proper methodology on undertaking comparative legal research.

179. In the fifth section there are a number of conclusions and recommendations. In particular, it is concluded that the system of criminal prosecution in Moldova complies to a large extent with the requirements and standards set out in Recommendation No. R. 95(12) of the Committee of Ministers to Member States on the Management of Criminal Justice¹⁸⁹. However, this appears to be the first reference in the study to this Recommendation and no analysis is provided to support the conclusion that the Moldovan system complies with it. Furthermore, there is no reference to more recent recommendations of the Committee of Ministers concerning the system of criminal prosecution, such as Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system¹⁹⁰. Moreover, it is also concluded that the Moldovan system is also similar to that of Lithuania, Poland, Romania and Spain but, as there was no analysis of the Lithuanian and Polish systems in the third section, it is not clear on what basis such a conclusion has been reached.

180. The study ends with some recommendations, which are not a logical consequence of the discussion in the preceding sections. However, the recommendations are not exactly related to the main objective of the study, namely, the optimisation of the number of the prosecution bodies. Furthermore, the particular recommendations of relevance to the conduct of special investigative activities are rather broad in character and give no indication as to how they are to be applied in the specific context of the legislative reforms and their subsequent implementation¹⁹¹.

181. Overall the study suffers from a lack both of consistency and of a clear methodology. Moreover, there is no depth to the analysis provided and there is no foundation for the conclusions that have been drawn. Furthermore, it is not clear whether these conclusions have shaped the legislative reforms that have been adopted. Certainly, no suggestion in that regard was made by any of those interviewed. Nonetheless, the study could serve as very brief guide to some of the main prosecution systems found in the Member States of the European Union for those who would like some introduction to those systems.

6. Training and other matters

182. The actions envisaged for intervention areas 2.1.3 and 2.1.4 are formally deemed to have been implemented. This assessment is based on the making of the relevant changes to legislation and the production of the comparative report. However, as has

¹⁸⁹ Adopted by the Committee of Ministers on 11 September 1995 at the 543rd meeting of the Ministers' Deputies.

¹⁹⁰ Adopted by the Committee of Ministers of the Council of Europe on 6 October, 2000.

¹⁹¹ Namely, that institutional measures should be taken “in order to detach the activity carried out by the criminal prosecuting bodies from other types of activities, such as the activity of the police, of the endorsing bodies and of those carrying out operative investigation activities, other activities pertaining to other subdivisions”; “more reliable and more efficient systems should be implemented to allow for the collection, maintenance, use and dissemination of the information in the criminal justice area and to ensure the required protection of personal data”; “procedures should be established at an interinstitutional level for collaboration and cooperation between criminal prosecuting bodies in the framework of criminal prosecution investigations”; and “the powers that the police bodies may use in criminal prosecution investigations and their subordination to the criminal prosecuting bodies should be clearly defined”.

been seen in the previous section of the report, the implementation of the reforms cannot be regarded as entirely satisfactory.

183. In addition to the need for further legislative changes to meet the requirements of European standards, there is also a need for some other follow-up action to be taken if the objectives set in the Strategy and Action Plan are to be properly realised. This follow-up action comprises the training of those involved in the criminal justice process, institutional capacity and certain issues relating to transparency, public trust and statistical data. Certain steps in this regard have already been taken but further ones are still required.

a. Training

184. “Trainings carried out for the personnel of relevant authorities” was one of the output indicators envisaged in intervention area 2.1.4 of the Action Plan.

185. Following the adoption of the amendments to the Criminal Procedure Code and of the Law, the National Institute of Justice of the Republic of Moldova (“the National Institute of Justice”)¹⁹², and the Stefan cel Mare Police Academy (“the Academy”)¹⁹³ have carried out trainings on special investigative activities either as a separate topic or within the curricula dealing with the Code as part of the initial training for future judges, prosecutors and staff members of the Ministry of Internal Affairs.

186. According to the information received from the National Institute of Justice, it carried out 19 activities during the period 2013-2015 in which 199 serving judges and 235 serving prosecutors were trained, along with some 24 inquiry officers and lawyers¹⁹⁴. No comparable data was obtained from the Academy.

187. Various non-governmental and international organisations active in the Republic of Moldova either provide financial support of the training institutions or conduct trainings for legal professionals themselves. Some of the training undertaken by the National Institute of Justice had the support of such organisations but the latter do not seem to have directly implemented any training on special investigative activities.

188. The impression gained from interviews during the visit to Moldova, supported by the available data in respect of trainings, was that with judges and prosecutors had gained sufficient familiarity with the new regime for conducting special investigative activities and that the problems identified in respect of the conduct of such activities¹⁹⁵ could not be correlated with any lack of training and/or knowledge about the application of relevant rules and procedures. Nonetheless, it would be desirable

¹⁹² This was established by Law on National Institute of Justice 152-XVI of 8 June 2006, with responsibility for both the initial training of candidates for the positions of judges and prosecutors and their continuing training after appointment.

¹⁹³ The Academy has had the status of the high educational institution of the Republic of Moldova since 10 March 2005. The initial and continuous trainings of police officers of the Ministry of Internal Affairs are mainly ensured by it.

¹⁹⁴ See, Annex 3.

¹⁹⁵ See, paras. 154-172 above.

for the National Institute of Justice to continue to elaborate and deliver the separate training module on the use and application of the special investigative activities.

189. The same conclusion could not be reached with regard to the training for staff of the Ministry of Internal Affairs. Thus, a number of interviewees emphasised that the training possibilities for police investigators and operatives needed to be better applied. This would also seem to be confirmed in a report by the Ministry itself, which stated that:

there are difficulties with the staff with the required experience and training to perform investigation tasks. Staff motivation is not satisfactory, especially for functions that require very high specialisation. As a result, quality of the staff is not fully satisfactory, which affects fulfilment of their duties¹⁹⁶.

190. There is clearly a need for further training on special investigative activities for the staff of the Ministry of Internal Affairs and of other law-enforcement agencies. The problem of having sufficiently qualified/experienced trainers is something that might benefit from seeking external assistance in developing the capacity of trainers.

b. Institutional capacity

191. The effective implementation of the regime governing the use of special investigative activities depends not only on those working for the different agencies involved knowing and understanding the applicable rules but also on them having the actual capacity to discharge their respective responsibilities.

192. As has already been noted, optimisation of the number of prosecutors was an element of the outcomes for the two intervention areas, albeit without any indication as to how this related to the legislative reforms. Optimisation of the judicial map through merging and abolishing courts without any change in the number of judges is also being proposed¹⁹⁷.

193. There is a need to ensure that any process of optimisation does not have an adverse impact on the processes related to the conduct of special investigative activities. This is especially important as regards the process of authorisation as compliance with European standards requires effective scrutiny of applications to undertake such activities¹⁹⁸. Certainly, some investigative judges from regional courts have expressed concern about the ability to meet the time-limits for determining such applications made by prosecutors.

194. However, the manner in which such applications are prepared – ensuring that the relevant points and supporting material are clearly highlighted - could also facilitate

¹⁹⁶Report on the functioning of the Ministry of Internal Affairs of the Republic of Moldova from 2015, http://www.mai.gov.md/sites/default/files/document/attachments/raport_af_05.09_final_2.pdf

¹⁹⁷“Feasibility Study on Court Optimisation” presented to the Ministry of Justice and the Superior Council of Magistracy in July 2015 by the Legal Resources Centre from Moldova in collaboration with USAID ROLISP, the Justice Management Institute and Urban Project Institute [<http://crjm.org/wp-content/uploads/2015/08/Moldova-Court-optimiz.pdf>]

¹⁹⁸ See, para. 78 above.

more expeditious decision-making. It may, therefore, be that effective training in preparing submissions is a more significant consideration but there is clearly a need to monitor closely the implementation of any optimisation of the courts to ensure that it does not lead either to well-founded applications not being granted or to unfounded ones being authorised without proper scrutiny.

195. The workload of prosecutors could also be affected by any process of optimisation, particularly if such a process led to a reduction in their number. Thus, in meetings with representatives of the General Prosecutor's Office it was suggested that the number of prosecutors rather needed to be increased in order to deal efficiently with the workload, and in particular it was suggested that more prosecutors were needed to be engaged in procedures relating to the conduct of special investigative activities. However, it was not possible to verify how well-founded such suggestions are. Certainly, they are not necessarily rebutted by the fact that Moldova – with “around 700 prosecutors” – has almost 21 per 100,000 inhabitants, nearly twice the European average of prosecutors, since the numbers required depend on factors such as their specific roles and the functions performed by other bodies.

196. Nonetheless, some structural changes are under consideration by the Supreme Council of Prosecutors and more can be expected once the new Law on Prosecution Service is adopted. It may well be that some changes could lead to more effective working practices and thus justify some reduction in the overall number of prosecutors. However, there has been no indication that there is anything particularly related to the conduct of special investigative activities – in which prosecutors not only have a role in seeking its judicial authorisation but also are supposed to authorise it themselves and to supervise its implementation by investigators – that would warrant some reduction in that number. This does not mean that there is no room for efficiency gains with respect to these different responsibilities and the possibility of making them should not be evaded. At the same time there is a need to ensure that the implementation of any general structural reforms does not result in a failure to comply with the standards governing special investigative activities.

c. Transparency, public trust and statistical data

197. The issues of transparency, public trust and statistical data all have a bearing on the successful implementation of the objectives of the Strategy and Action Plan, including the two intervention areas under consideration.

198. Transparency is critical for promoting and raising awareness about the benefits and practical implications of actions already taken with respect to the Strategy and Action Plan and for developing any further ones that may be required. In this connection, setting, maintaining and extending the communication with the civil society representatives in the implementation process should continue to remain a priority for the authorities. There is no doubt that the contribution civil society can make in both respects is invaluable but especially as regards providing expertise and consistent support in developing complex studies linked to the Strategy and Action Plan. Certainly, in some instances the implementing institutions do not have the necessary capacities required for such studies. Moreover, civil society has an important role to

play in the process of monitoring the effectiveness of actions that have already been implemented.

199. It is clear that there have been important efforts to involve civil society both through the conclusion of memoranda of understanding to establish partnerships¹⁹⁹ and through ensuring its participation in sectorial working groups and in some of the inter-institutional groups that have had responsibility for developing important normative acts²⁰⁰. However, this does not seem to have occurred in the case of amending the Criminal Procedure Code and adopting the Law. There is a need, therefore, to ensure that a more consistent approach is followed regarding the involvement of civil society in the implementation of the Strategy and Action Plan and in particular the two intervention areas under consideration.

200. Public trust is rightly identified as an indicator for measuring the outcomes and impact of the Strategy and Action Plan. The importance of this is underlined by the low level of trust which civil society maintains that the population has with regard to law-enforcement agencies and the judiciary, particularly when it comes to the use of special investigative activities. However, this perspective – even if well-founded - is primarily impressionistic as there have been no reliable public opinion surveys undertaken either before or since the implementation of the Strategy and Action Plan, a weakness already noted with respect to the log frame for the two intervention areas²⁰¹.

201. According to the latest review of the implementation of the Strategy, the failure to initiate any surveys stems from “insufficient human and financial resources”²⁰². It is now proposed to address this problem through seeking the assistance of development partners. This will not, of course, allow for any comparison to be made with the position before implementation of the Strategy began but, if carried out, such surveys should provide some idea as to the level of public trust at least from when they are started and then show whether it changes thereafter, whether for better or worse.

202. The high-level coordination and monitoring of implementation of the Strategy is supposed to be ensured by the National Council for Reforming the Law Enforcement Bodies. In particular, it is charged with reviewing the general annual reports on implementation and with advising on major issues which the sectorial working groups or the co-ordination group have not found solutions.

203. However, the position with respect to data about the implementation of the Strategy and Action Plan remains problematic. Although there are figures relating to applications to undertake special investigative activities²⁰³, there is no other data available which could form the basis for evaluating the outcomes and impact of the

¹⁹⁹Such as with the Centre for Analysis and Prevention of Corruption, Checchi, Institute for Penal Reforms, the Legal Resource Centre from Moldova and UNICEF Moldova.

²⁰⁰Such as those concerning advocacy, juvenile justice and the prosecution service.

²⁰¹ See paras. 83-91 above. However, the *Report on observance of human rights in the Republic of Moldova in 2013* by the Centre for Human Rights of Moldova cites some general surveys to similar effect regarding the justice system as a whole (p. 217).

²⁰²*Annual Report on the Implementation of the Justice Sector Reform Strategy for the Years 2011-2016* (2014), p. 41.

²⁰³See n. 172 above.

actions taken in the two intervention areas. In particular, there is no statistical data relating to changes in the number of submitted to the prosecution complaints, the percentage of respondents expressing willingness to approach prosecutors to report on corruption cases, the percentage of respondents who feel satisfied with prosecuting authorities and bodies carrying out special investigative activities or the level of victim satisfaction.

204. The absence of such data is real impediment to assessing the effectiveness of the actions already taken. This absence is also likely to inhibit the development of a positive view of such change that has occurred, whether on the part of those involved in implementing them or the public at large. Without reliable statistical data, particularly as regards the application of special investigative activities, the level of public confidence in the justice system will not improve and there will not be an informed basis for judging whether any other reforms are necessary. It is, therefore, of the utmost importance that the statistical deficiency be remedied, even if it will never be possible to provide a comparison of the situation before and after the implementation of the Strategy and Action Plan.

G. CONCLUSIONS AND SUGGESTIONS

205. The actions required for intervention areas 2.1.3 and 2.1.4 can be regarded as having been completed in a formal sense since there have certainly been amendments made to the Criminal Procedure Code, the Law has been adopted and a comparative study on prosecution bodies has been prepared. However, as the previous sections indicate, it is questionable whether there are really two discrete intervention areas.

206. More importantly, one output indicator for intervention area 2.1.3 – “Developed Concept for the pre-judiciary phase” – does not appear to have been developed and there do not appear to have been any steps taken to develop such a concept. Furthermore the various indicators for measuring outcomes and impact are deficient in that there is no real basis for measuring them. Moreover, no steps have been taken so far even to try and give effect to them, such as through gathering any relevant statistics that might be available or through seeking even an impressionistic view of the attitudes of various stakeholders to the changes that have been made.

207. In addition, the legislative changes that have been made only partly remedy the shortcomings identified by the European Court in the *Iordachi* case with respect to the regime governing the undertaking of special investigative activities. This is particularly so as regards:

- the range of offences for which such activities can be undertaken;
- the circumstances in which data obtained may or must be erased or the records destroyed where it has been used in the criminal process;
- the procedure to be followed for storing and erasing data;
- the existence of sufficient judicial oversight for the purpose of ensuring compliance with all the applicable requirements; and
- the overall control of the system by an independent body.

208. These shortcomings are exacerbated by the lack of clarity of many provisions in the Law and by the inclusion in it of some but not all of the relevant provisions in the Criminal Procedure Code.
209. As a result the legislative reforms that have been carried out still have not fully given effect to the requirements of European standards for the conduct of special investigative activities.
210. The two intervention areas are not concerned with the implementation of the legislative reforms but, in practice, the effectiveness of the “lawfulness check” to be made by judges and prosecutors does not seem entirely satisfactory. Moreover, other responsibilities envisaged for judges and prosecutors are undermined by difficulties in gaining access to the special file. In addition, there is uncertainty as to what is expected of judges in the period allowed for determining whether or not to prolong or legalise special investigative activities.
211. “The comparative study on the systems of criminal investigation bodies, in view of their optimisation”, prepared in 2012 by the General Prosecutor’s Office of the Republic of Moldova has some useful information in it of a fairly general nature. However, it suffers from a lack of consistency and depth in its analysis, a clear methodology and appropriate foundations for the conclusions drawn.
212. Although some useful training has been undertaken on the conduct of special investigative activities under the new regime and in the light of European standards, the principal beneficiaries have been judges and prosecutors and much more is still required for other law enforcement personnel.
213. The optimisation of the number of prosecutors was an element of the outcomes specified for the two intervention areas but no changes relating to this number have so far been made. However, it is not evident from the legislative reforms adopted that any change in this number would be a necessary consequence of them. Nonetheless, insofar as such optimisation does eventually occur, there is a need to ensure that such structural changes do not affect the capacity of prosecutors to comply with European standards governing the conduct of special investigative activities. This consideration is equally applicable to any steps as regards optimisation in the courts.
214. Finally, there is a need for greater consistency with respect to the involvement of civil society in the implementation of the two intervention areas, as well as for efforts to gauge the levels of public trust in the conduct of special investigative activities and to collect data concerning the effectiveness of the actions that have so far been taken.
215. In designing any extended or new strategy and action plan, there should be more emphasis on better defining outcomes rather than on listing activities and on ensuring that all stakeholders have a real sense of ownership in what is being proposed.
216. Furthermore, more attention should be given to the effective implementation of any legislative changes that will be made. It should not be assumed – as the present Strategy and Action Plan seem to do - that a particular action or activity has been implemented merely by making such changes. The measures required for the

implementation of legislative changes should, therefore, be amongst the indicators specified in any future strategy and action plan. Such measures should include the provision of appropriate training for all involved in the conduct of special investigative activities.

217. However, further legislative changes are certainly required since the amendments to the Criminal Procedure Code and the adoption of the Law are not, as has already been noted, sufficient to give effect to European standards governing the conduct of special investigative activities. Making the necessary adjustments to these measures should be a priority and, at the same time, further consideration of weakening the present regime – such as by dispensing with the need for a criminal investigation to be initiated before special investigative activities can be undertaken – should be abandoned.

218. Notwithstanding the various problems identified above, it should be noted that there are real improvements in the legislative changes already made and a greater appreciation of the requirements of European standards for special investigative activities. Taking the various steps that have just been outlined should ensure that those standards are observed both in law and in practice.

Annex 1

Action Plan for the implementation of the Justice Sector Reform Strategy for the years 2011-2016

EXTRACT

Specific intervention area 2.1.3. Clarifying the role and powers of prosecuting authorities and bodies carrying out operative investigations / Implementation deadline: The year 2012 / **Status of implementation: Implemented**

| Actions | Outcomes/Impact | Output indicators | Indicators for measuring outcomes and impact |
|---|--|---|---|
| <p>1 Develop draft amending the Criminal Procedure Code no. 122-XV of 14 March 2003 and other draft normative acts aiming to clarify the role and powers of prosecuting authorities and bodies carrying out special investigation works Implementation deadline: 4/ 2011/ Status of implementation: Implemented</p> <p>2 Conducting a comparative study on the prosecution bodies systems aiming to optimize their number and, where appropriate, develop a draft amending certain legislation / Implementation deadline: 4/ 2013 / Status of implementation: Implemented</p> | <ul style="list-style-type: none"> • Established comprehensive regulatory and institutional framework clarifying the role and powers of prosecuting authorities and bodies carrying out special investigation works is in line with the international standards • Implementation of the recommendation of the comparative study on the prosecution bodies systems resulted in changes in the legislation optimizing the number of prosecutors • The adopted legal and institutional framework enables prosecuting authorities and bodies carrying out special investigation works to implement effectively their powers • Increased trust in prosecution and bodies carrying out special investigation works | <ol style="list-style-type: none"> 1. Developed Concept for the pre-judiciary phase; 2. Developed draft amendments to the Code of Criminal Procedure and to other legal acts; 3. Developed and adopted draft amendments to the institutional framework and a developed Plan of implementation. | <ul style="list-style-type: none"> • Level of support (percentage of responders responding positively) for the legal changes among legal experts, prosecutors and bodies carrying out special investigation • Change in the number of submitted to the prosecution complaints / signals per year (before and after legal changes) • Percentage of respondents (disaggregation by territory, social and economic status) that feel satisfied with prosecuting authorities and bodies carrying out special investigation works • Percentage of respondents expressing willingness to approach prosecutors to report on corruption cases • Increased level of victim satisfaction |

Specific intervention area 2.1.4. Optimizing procedures for operational investigation and prosecution / Implementation deadline: The year 2012 / **Status of implementation: Implemented**

| Actions | Outcomes/Impact | Output indicators | Indicators for measuring outcomes and impact |
|---|--|--|---|
| <p>1 Develop draft amending the Criminal Procedure Code no. 122-XV from 14 March 2003, the draft law on special investigation activity and other normative acts aiming to optimize the procedures for operational investigation and prosecution Implementation deadline: 4/ 2011 / Status of implementation: Implemented</p> | <ul style="list-style-type: none"> • Simplified and optimized procedures for operational investigation and prosecution • Improved quality of the results of the operational investigation and prosecution • Improved effectiveness, efficiency and transparency of the procedures for operational investigation and prosecution | <ol style="list-style-type: none"> 1. Developed study and formulated recommendations; 2. Developed and adopted draft amendments to the regulatory framework; 3. Clarified ratio between activities to be carried out by operative investigation bodies and the ones carried out by criminal investigation; 4. Trainings carried out for the personnel of relevant authorities. | <ul style="list-style-type: none"> • Percentage of justice sector public officials (prosecutors, investigators, policemen, judges) who approve the introduced changes disaggregated by institution and level of position • Change in the number of criminal cases adjudicated by the courts in 12 month period • Change in the ratio of prosecution caseloads in courts disaggregated by territory • Number of responders who believe in the increased efficiency and effectiveness of the legal proceedings • Level of public trust in the results of the operational investigation and prosecution |

Annex 2

SCHEDULE OF THE ASSESSMENT MISSION TO CHISINAU

14 December, 2015

- Meeting with Council of Europe team.
- Meeting with members of Moldova Bar Association: Mrs Natalia Moloșag, the Dean of MBR, Gheorghe Malic, attorney, former head of the Criminal Investigation Department, and academia Mr Gheorghe Ulianovschi, associate professor (docent) from Moldova State University.
- Meeting with NGOs: Mrs Daniela Groza – Josanu - IRP, Mr Pavel Postica - Promolex, Mr Jogeir Nogva, Mrs Dumitrita Bologan - NORLAM, Mrs Veronica Mihailov-Moraru - Association of Women in Legal Career.

15 December, 2015

- Meeting with the representatives of the Straseni Court.
- Meeting with the representatives of the Ministry of Internal Affairs.
- Meeting with Vice-minister of Justice – Mr Nicolae Esanu.
- Meeting with the representatives of the Superior Court of Justice: Mrs Liliana Catan, and Mr Ghenadie Nicolaev.

16 December, 2015

- Meeting with the representatives of the Hincesti Court.
- Meeting with Mr. Vladislav Gribincea, Executive Director of the Legal Resources Centre from Moldova.
- Meeting with the representatives of the National Anticorruption Centre: Mr. Viorel Chetraru, Director of the National Anticorruption Centre and Mr Bogdan Zumbreanu, Head of the Criminal Investigation Department.
- Meeting with the representatives of the General Prosecutor's Office.
- Wrap up meeting.

Annex 3

TRAINING ACTIVITIES ORGANISED BY THE NATIONAL INSTITUTE OF JUSTICE RELATING TO SPECIAL INVESTIGATIVE ACTIVITIES 2013-2015

2013

Activities: 10

Beneficiaries: 208 persons (71 judges, 137 prosecutors and 3 other categories)

3 Seminars “Special investigative activity. Special investigative activities within the criminal investigation activity” (26th, 28th February, 15th March).

- Participants 87(22 judges, 65 prosecutors)
- Organised in partnership with the Program ROLISP, USAID

7 Seminars “Examination of complaints against the actions and illegal acts of the criminal investigative body and the body conducting special investigative activity(5th, 21st February, 6th, 27th March, as well as from the state budget – 4th April, 2nd, 5th December).

- Participants 122 (49 judges, 72 prosecutors, 3 another categories).
- Organised in partnership with the Program ROLISP, USAID as well as from the state budget.

2014

Activities: 5

Beneficiaries: 152 persons (79 judges, 49 prosecutors, 4 criminal investigation officers, 17 lawyers and 3 other categories)

2 Seminars “Special investigative activity in corruption cases” (27th, 28th February).

- Participants 63 (38 judges, 25 prosecutors)
- Organised in partnership with ABA ROLI.

2 Seminars “The investigation and examination of corruption cases: special investigative activity, evidences, issues at the trial stage” (30th, 31st October).

- Participants: 66 (31 judges, 11 prosecutors, 4 criminal investigation officers, 17 lawyers and 3 other categories)
- Organised in partnership with ABA ROLI.

1 Seminar “Examining complaints against the actions and illegal acts of the criminal investigation body and the body conducting the special investigative activity” (30th April).

- Participants:23 (10 judges, 13 prosecutors)
- Organised by NIJ in partnership with Council of Europe.

2015

Activities: 4

Beneficiaries: 98 persons (49 judges, 49 prosecutors)

4 Seminars “Tactics of carrying out the special investigative measures. Examining complaints against actions and illegal acts of the body exercising special investigative activity” (25th February, 25th March, 5th October, 23rd November)

- Participants: 98(49 judges, 49 prosecutors)
- Organised by NIJ