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Actual Issues of Reform of Georgian National Security Sector's Accountability and Oversight System

By its nature and specific obligations, the security assurance system contradicts external control, oversight and accountability principles, because its significant part and decisions are related to secret activities and documents. Therefore, in the democratic governance of national security and oversight of the activities of security institutions, the role of the Parliament, as the highest standing political authority, acting for the interests of the people is extremely important. The Parliament, as the highest legislator sets scopes for the activity, accountability and control of security institutions.

Efficient parliamentary oversight increases the quality of accountability of security institutions and protects the society from arbitrary, inappropriate or repressive governance.

A democratic governance system requires efficient oversight of secret activities. This objective can be achieved, first of all, via independent, powerful institutions and the system that provides oversight of personal data collection. The oversight is not limited to parliamentary oversight only, the development of governmental, judicial and independent institutions is not less important.

This Paper presents experience and analysis of the development of the oversight system over the activities of the security institutions of Georgia and other democratic countries.

The Paper provides the comparative analysis of experiences of Georgian and foreign countries about the oversight of the activities of security institutions and personal data protection in secret activities. The Paper puts some issues for discussion concerning the actual matters of the reform of the control system over the activities of security institutions, providing the considerations about establishing new, independent oversight institutions.

Keywords: *security, personal data, secret activity, counter-intelligence activities, accountability parliamentary oversight*

1. Introduction

Effectively performing and accountable national security system which corresponds to democratic standards is extremely important for state governance. This ensures the protection of society from various threats and its stable and peaceful development.

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In their nature, the security system institutions, come into conflict with the freedoms of individuals and open society. This system, in its essence is against external control, oversight and accountability principles. Nonetheless, the Parliament, as the highest political authority, plays the most decisive role in the democratic governance of national security, law enforcement and oversight of security institutions and their activities. As the highest legislator, it sets frames for the activities, accountability, and control of security institutions¹.

Effective parliamentary oversight increases the quality of accountability of security institutions and protects society from arbitrariness, inappropriate or repressive governance².

Over the last 20 years, the reform of national security system and institutions has become extremely important for Georgia. The security system reform and strengthening of accountability is one of the requirements for the integration of Georgia into Euro-Atlantic structures³.

In Georgia, for a long time, all police, investigation and special service functions were under the roof of the Ministry of Internal Affairs of Georgia, which made it impossible to perform effective oversight of the Ministry. After the reform, even though the security service and counter-intelligence functions were split into different institutions, but the State Security Service still retains operative and investigative competencies. Having these functions under one institution, regardless of their distinguished objectives, made it impossible to perform effective control over the activities of the Service and to check the quality of their accountability.

For the protection of human rights, in particular, personal data whilst performing activities by the security services, a special legislative framework and State Inspector's Office was established. At a later stage, for political purposes, the Parliamentary majority changed the law (on the State Inspector's Service) without giving justified and politically neutral arguments, annulled the State Inspector's Service and dismissed the State Inspector. As it was confirmed later by the Constitutional Court of Georgia, this decision contradicted the Constitution of Georgia⁴. This fact shows how problematic the decisions made with political expediency in the field of security in transitional democracies, can be for the establishment of national interests and democratic standards. It is important to create an oversight system that will minimize political party-driven decisions and the influence on the activities of security institutions, on their control and accountability.

¹ Wills A., Democratic and effective oversight of national security services, issue paper, Council of Europe, 2015, 7-9.

² Alapishvili L., Problems of parliamentary oversight on secret activities of institutes of national security assurance system of Georgia, Journal of Law, #1, 2023, 206 (in Georgian).

³ Communication from the Commission to the European Parliament, the European Council and the Council, *Commission Opinion on Georgia's application for membership of the European Union*, COM(2022) 405 final, 17.6.2022., also, 2023 Communication on EU Enlargement Policy (extract about Georgia), 08.11.2023, <https://www.eeas.europa.eu/delegations/georgia/2023-communication-eu-enlargement-policy-extract-about-georgia_en?s=221> [02.12.2024].and 9 steps to moving the negotiations stage for EU membership: parliamentary control, International Transparency Georgia, 23.02.2024, <<https://www.transparency.ge/ge/blog/9-nabiji-evrokavshiris-cevrobage-molaparakebebis-etapze-gadasasvlelad-saparlamento-kontroli>> [02.12.2024].

⁴ Decision No. 1/9/1673,1681 of the Constitutional Court of Georgia on November 17, 2022 in the case "Linda Toloraya and the Public Defender of Georgia against the Parliament of Georgia".

For developing the security sector oversight system of modern democratic standards, it is important to study the current system as well as to look at the international experience.

2. National Security Sector of Georgia, Systemic Challenges in Accountability and Oversight

The national security sector of Georgia composes the highest level institutions of national security governance: National Defense Council of Georgia, State Security and Crisis Management Council, and governmental level institutions: Ministry of Internal Affairs of Georgia, Ministry of Defense of Georgia, National Security Service of Georgia, Intelligence Service, Operative-Technical Agency, Special State Security Service and Special Penitentiary Service.

Highest-level institutions of national security governance mostly have an advisory function and their mandate includes coordination of the activities of the security system and high-level decision-making in times of crisis⁵.

The mandate of governmental level institutions in charge of national security system is security assurance and to lead the activities of all these institutions with secret methods and means that are related to intervention in human rights.

Governmental level national security institutions are directly accountable to the Prime Minister and the Government of Georgia, as well as to the Parliament of Georgia. These institutions submit annual activity reports to the Prime Minister of Georgia and the Parliament of Georgia. In addition, the head of the relevant security institution presents the annual report of the activity to the parliamentary committee and answers the report-related questions at the plenary session.

The Parliamentary oversight over the national security system covers legislative, political and special control.⁶

The Parliament provides legislative control via its sectoral committees (defense and security committee, committee of legal affairs, human rights committee) and controls the security institutions' performances compliance to security and human rights legislation, requests necessary information and may initiate the legislative amendments on the basis of the analysis.

The political control over the security sector within the scope of parliamentary oversight is performed via the questions asked by MPs and the interpellation mechanism. Answering the question of the Member of the Parliament is mandatory for the security sector officials who are accountable to the Parliament. Interpellation is the obligation to answer the question asked by MPs to the security sector officials who are accountable to the Parliament, which means answering the questions asked at the plenary session of the Parliament.

Special control of parliamentary oversight is performed via the Trust Group of the Parliament of Georgia, which is composed of 5 members including the representatives of the parliamentary opposition. The Trust Group provides oversight of the secret activities and special programs in the area of national security and defense of Georgia.

⁵ Law of Georgia "On the Rules of Planning and Coordination of National Security Policy", Legislative Herald of Georgia, 03/04/2015, Article 1, Article 19¹.

⁶ Regulation of the Parliament of Georgia, Georgian Legislative Herald, 14/12/2018, article 156, 159

Independent, non-political oversight over the national security sector of Georgia and the activities and decisions of its institutions is performed by the institutions established by the Constitution (Constitutional Court, Common Courts, Public Defender, Public Audit Service, Prosecutor's Office) and the Parliament (Personal Data Protection Inspector, Special Investigation Service).

The constitutional Court of Georgia checks the compliance of normative decisions of the Georgian Parliament, Government and security sector with the Constitution and the Common Courts look at the compliance of normative acts, rulings and actions of these institutions with the Law. As for the control of security sector institutions in terms of their secret activities, personal data acquisition and use, it is the competence of Supreme Court of Georgia.

The control of financial and management issues of security institutions and their programs is within the competence of the State Audit Service, and control over the protection of human rights is the competence of the Public Defender.

The Prosecutor's Office is a constitutional institution that conducts investigations and oversees the legality of the decisions of security sector institutions in the course of operative-search activities. The intelligence and counter-intelligence activities of the security institutions and the decisions made are not subject to the supervision of the Prosecutor's office.⁷

The control of the collection and protection of personal data of individuals fall under the competence of the Personal Data Protection Inspector⁸. Oversight of personal data protection and processing as well as secret surveillance conducted by security institutions is also the competence of the Personal Data Protection Inspector.⁹ The mandate of the Personal Data Protection Inspector does not include oversight of compliance of processing personal data by security sector institutions within the scope of intelligence activities.

The control of compliance of security sector institutions and the activities of staff is carried out by a Special Investigation Service, institution independent from the government.

Parliamentary oversight of the security system is weak and ineffective.¹⁰ The special instrument of the Parliament – Trust Group, its creation and activities are managed by narrow political expediency of the political party and not by the interests of national security and parliamentary democracy. Pluralistic participation is not provided in the Trust Group and the opposition mostly has limited access to secret information.

Lack of effective mechanisms of oversight of non-investigative secret activities and operations of the security institutions is the essential weakness of the oversight of national security assurance system of Georgia.

⁷ Law of Georgia “On Counter-Intelligence Activities”, Legislative Herald of Georgia, 11/11/2005, Chapter 5.

⁸ Law of Georgia “On Personal Data Protection”, Legislative Herald of Georgia, 16/01/2012, Article 54, Criminal Procedure Code of Georgia, Legislative Gazette of Georgia, 09/10/2009, Article 1433, Law of Georgia “On Operative-Search Activities”, Legislative Herald of Georgia, 30/04/1999, Article 5.

⁹ Law of Georgia “On Personal Data Protection”, Legislative Herald of Georgia, 16/01/2012, Article 54, Criminal Procedure Code of Georgia, Legislative Herald of Georgia, 09/10/2009, Article 143³, Law of Georgia “On Operative-Search Activities”, Legislative Herald of Georgia, 30/04/1999, Article 5

¹⁰ Sajaia L., Verdzeuli S., M. Chikhladze G., Tatanashvili T., Topuria G., Security Service Reform in Georgia: Results and Challenges, Tbilisi, 2018, 48, 68 (in Georgian).

3. International Practice of National Security System Accountability and Oversight

The latest wave of reforms in the oversight system of security services was mainly due to systemic problems related to exaggeration of power in secret activities of security services, abuse of power, illegal secret surveillance and use of security services for political reasons. The experience of the countries provided below can also be helpful for the reforms in the Georgian security system oversight.

Canada

The reform of Canadian security system was prompted by overreaching decisions and intelligence activities of the powerful institution responsible for Canada's internal security – the Royal Canadian Mounted Police (RCMP) ¹¹, which led to increased public concern and multiple investigations¹². The prime direction of the reform was the systemic separation of the police and limitation of its powers to civilian police mandate and removal of intelligence and other special functions. The creation of a legal framework for internal and external oversight of the police and its activities was also one of the important directions of the reform¹³.

Within the framework of the reform, the law on Security Intelligence Service of Canada led to establishing the Intelligence Service, which was granted authority of information collection/processing as part of intelligence activity. Oversight of the Service meant authorization of its decisions by the Chief Prosecutor.

Within the reform of the Canadian security sector, the scope of oversight over the security sector of Canada was extended and National Security and Intelligence Review Agency (NSIRA) was created.¹⁴ The authority of the newly established agency covers governmental oversight of the activities of all institutions with security and intelligence functions. The Agency has an independent right to define which institution shall be subject to inspection. It also has the power to review intelligence activities without any limits and to participate in obtaining the court warrant for secret activities.

The Chief Operational Officer of national security and Intelligence Review Agency, in consultation with NSIRA members, identifies the need for an operation or special measure and refers to the court for a warrant. Before referring to the court, the final step of internal control is to discuss the need for operation or measure and the court warrant and to obtain the approval of the Minister of Public Security.

The members of the Agency are appointed by the Prime Minister of Canada in consultation with the leadership of the Parliament. As a result of the review, the agency submits reports and recommendations to the Prime Minister of Canada and to the ministers whose governance system includes the security institution, activities of which were subject to monitoring. The report sent by the

¹¹ <<https://www.rcmp-grc.gc.ca/en/about-rcmp>> [02.12.2024].

¹² *Barker C., Petrie C., Dawson J., Godec S., Porteous H., Purser P.*, Oversight of intelligence agencies: a comparison of the 'Five Eyes' nations, Research Paper, 2017, 23.

¹³ *Ibid*, 25.

¹⁴ <<https://nsira-ossnr.gc.ca/en/about-nsira/>> [02.12.2024].

Agency to the Prime Minister of Canada is subject to submission by the Prime Minister to the Parliament.

External oversight of the Security System of Canada is provided by National Security and Intelligence Committee of Parliamentarians (NSICOP)¹⁵. The Committee has the following authorities: identifying political, regulatory, administrative and financial scopes for the security sector and controlling their performance¹⁶.

NSICOP Committee is mainly in charge of two types of oversight: oversight of the regulatory framework and oversight of the activities. Moreover, the Committee may review any issues related to national security and intelligence requested by the Minister of the Kingdom. This type of authority of the Committee is called referral oversight.

Oversight of the regulatory framework covers the review, supervision and changes of the legislative, regulatory and financial framework of national security and intelligence.

The mandate for the activity oversight involves the oversight by a committee of Parliament Members of any activities carried out by a national security or intelligence institution.

The Committee does not look at or investigate the individual complaints submitted against national security or intelligence institutions. However, within the competence of its own mandate, if the facts of human rights violation are detected, the Committee will refer the case to an authorized Minister and Prosecutor General for further action.

Germany

In Germany, the intelligence services have been provided by the Constitution Protection Service of Germany (Bundesamt für Verfassungsschutz, BfV) and Military Counter-Intelligence Service (Militärischer Abschirmdienst, MAD) since 1950. Security institutions, in their current form, took a start from 1956, when Federal Intelligence Service BND was established.

The key competence of BND is to manage the external intelligence activity. It is accountable to the Minister of Special Affairs. The competence of the Constitution Protection Service is a counter-intelligence activity internally, in the country and it reports to the Minister of Interior. The mandate of the Military Counter-Intelligence Service involves counter-intelligence function and provision of the internal security within the military powers. The latter is accountable to the Minister of Defense¹⁷.

The coordination and governmental control function of the security institutions of Germany belongs to the head of the Federal Chancellery.

As an additional mechanism of control of the security sector activities, the Independent Control Council (Unabhängige Kontrollrat, UKRat)¹⁸ was established in 2021. The Council consists of 6 members, selected by the Parliamentary (Bundestag) Oversight Committee and appointed by the President of Germany. The Council has two main competencies: legal and administrative. Legal

¹⁵ <<https://nsicop-cpsnr.ca/about-a-propos-de-nous-en.html>> [02.12.2024].

¹⁶ National Security and Intelligence Committee of Parliamentarians Act, S.C. 2017, c. 15, art.8 <<https://laws-lois.justice.gc.ca/eng/acts/N-16.6/FullText.html>> [02.12.2024].

¹⁷ Ruckerbauer C., Legal and Oversight Gaps in Germany's Military Intelligence, June 26, 2024, <<https://aboutintel.eu/germanys-military-intelligence/>> [02.12.2024].

¹⁸ <https://ukrat.de/DE/Home/home_node.html> [02.12.2024].

competence refers to the advance control of secret measures and administrative competence to retrospective control. The Council shall submit a report to the German Parliament, particularly, to its Oversight Committee. The report shall describe the secret surveillance measures implemented by German security sector institutions in the past year, justifying their reasonability and legal compliance.

Parliamentary oversight over the German Security Sector is provided via a few sectoral and special committees and groups. The key parliamentary institutions carrying out parliamentary oversight over the German security sector are the Parliamentary Control Council (Parlamentarische Kontrollgremium, PKGr), G-10 Commission of Parliamentary Control (Parliamentary Control Commission, PKK) and Budgetary Secret Committee Trust Group.¹⁹

Parliamentary Oversight Council (PKGr) provides control over the activity of security services.²⁰ The Council has the right to request detailed information from the Federal Government about the general activities of intelligence services and special operations. At the beginning, to reduce the political influence, the Council did not have a permanent chairperson, but the Council members carried out this authority for 6-month periods.

G-10 Commission supervises the necessity for restricting confidentiality of communication, secret surveillance and control and permits in compliance with article 10 of the Main Law/Constitution of Germany (protection of the free democratic order, state security). The most important authority of the Commission is the decision on termination of the ongoing secret action or secret surveillance initiated by the security service. The Commission members are selected by the Parliamentary Oversight Council.²¹

The Trust Group is formed in the Budget Committee of the German Bundestag, from members of this committee, and its mandate involves budgetary control of programs and activities of security sector institutions, reviewing and approving the draft budget, and controlling the progress and spending of approved budgets and programs.²²

Parliamentary oversight institutions over Germany's security sector have unlimited powers to receive secret information, inspect security institutions and interrogate personnel.

The Netherlands

The Netherlands is one of the first countries to reform its security and oversight system for the provision of human rights protection in secret activities of security services.²³ As a result of legislative changes, in 2002, the Committee of Oversight of Intelligence and Security Services (Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten, CTIVD)²⁴ was established.

CTIVD Committee, in terms of its independence is an unique and original system. The Committee is composed of 4 members out of which one member is the head of the Compliance

¹⁹ <<https://www.bundestag.de/en/committees/bodies/scrutiny/scrutiny-198586>> [02.12.2024].

²⁰ <<https://www.bundestag.de/webarchiv/Ausschuesse/ausschuesse18/gremien18/pkgr>> [02.12.2024].

²¹ <<https://www.bundestag.de/webarchiv/Ausschuesse/ausschuesse18/gremien18/g10>> [02.12.2024].

²² <https://www.verfassungsschutz.de/EN/about-us/mission-and-working-methods/supervision-and-oversight/supervision-and-oversight_article.html?nn=1021058#Start> [02.12.2024].

²³ *Eijkman Q., Van Eijk N., Van Schaik R.*, Dutch National Security Reform Under Review: Sufficient Checks and Balances in the Intelligence and Security Services Act 2017?, 2018, 11, 35-40.

²⁴ <<https://english.ctivd.nl/about-ctivd>> [02.12.2024].

Review Department and the remaining 3 members are the members of the Oversight Department. The Chair of CTIVD Committee is also the Chair of the Oversight Department. The Compliance Review Department of the Committee has three members.

CTIVD committee members are appointed by the King's decree, and the ministers are also involved in the process. The selection of the candidate for membership of the committee is carried out collegially: by the Vice President of the State Council, the Chairman of the Supreme Court and the Ombudsman. The selected candidates are called to the House of Representatives of the Dutch Parliament. After interviewing the nominated candidates, the Internal Affairs Committee of the House of Representatives selects and presents to the House of Representatives 3 candidates for committee membership. The House of Representatives shall decide the issue of candidates for membership by voting and forward the list of supported candidates to the Ministers of General Affairs, Royal and Home Affairs and Defense. Ministers have to choose the candidate for membership from a list supported by the House of Representatives and submit to the King for final appointment.²⁵ The term of office of CTIVD committee members is 6 years.

As it may seem, essentially, the Committee consists of 7 members, however, in order to separate the Committee and its departments and to provide independence, the Dutch legislators justified such legislative solution.

CTIVD Committee, in accordance with its functions, consists of two departments. They are: the Oversight Department and the Complaint Review Department.

The competence of the Oversight Department of CTIVD involves oversight of legal compliance of the activities of the Dutch security institutions, General Intelligence and Security Service (AIVD) and Military Intelligence and Security Service (MIVD) and the competence of the grievance department is to review the complaints and reports about the inadequate actions of General Intelligence and Security Service (AIVD) and Military Intelligence and Security Service.²⁶

The Independent Authority providing oversight of secret and investigative activities of security institutions is the Oversight Committee of Power Abuse (Toetsingscommissie Inzet Bevoegdheden, TIB).²⁷ The committee consists of three members and the members have deputies. The Committee activity is supported by the Secretariat. By law, two members of the Committee shall be the judges. The committee is institutionally independent from all branches of the Dutch government, although the presence of judges in its structure makes this body a quasi-judicial institution.

To ensure the independence of TIB Committee, the recruitment procedure for members is similar to the recruitment procedure for CTIVD Committee members. TIB Committee members' term of office is 6 years. Same person can be appointed as a member for two terms.

The Committee is the body authorizing security institutions for computer extraction of data, DNA research, obtaining information from telecommunications companies, and targeted or general secret listening of telecommunications facilities. The security institution applies for initial authorization to the competent Minister (Minister of Home and Royal Affairs or Defence) and after

²⁵ <<https://english.ctivd.nl/about-ctivd/members-and-staff>> [02.12.2024].

²⁶ Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 46.

²⁷ <<https://www.tib-ivd.nl/>> [02.12.2024].

obtaining the Minister's permission, the matter is reviewed by the TIB Committee²⁸. The committee verifies the legal compliance of the minister's approval from the point of view of necessity, proportionality, subsidiarity and purpose and makes a binding decision to be implemented. Only after the final positive decision of the Committee can the security institution carry out an authorized operation.

Further oversight of the activities or operations authorized by TIB Committee, during their proceeding or after their completion is provided by CTIVD Committee.

CTIVD Committee and TIB Committee draft and submit annual reports about the activities and results in the areas under their mandate.

There is a special Intelligence and Security Services Committee in the House of Representatives for parliamentary oversight of the activities of Dutch security institutions. The Committee consists of the leaders of 5 largest political groups represented in the House. In addition, the House of Representatives may appoint 2 additional members from the leaders of other parliamentary groups on the recommendation of the Committee. Committee meetings are closed and kept confidential because the members have access to secret information provided by security institutions and ministers. Apart from the general oversight of security institutions, the Committee has the right to review and respond to violations identified by the Grievance Department of the CTIVD Committee. The committee shall submit annual, public reports to the House of Representatives.

Denmark

The reform of the oversight system of the activities of Danish security institutions began in 2014. Along with judicial, parliamentary and governmental oversight, it was decided to create an independent institution – The Danish Intelligence Oversight Board, TET.²⁹ Authorization of the secret activities of Danish security institutions is the competence of the Court, however, the oversight of other issues is provided by the Board³⁰.

The Danish Intelligence Oversight Board is composed of five members who are appointed by the Minister of Justice following consultation with the Minister of Defence and the Parliamentary Committee of Intelligence Services. The chairman, who must be a High Court judge, is selected by the Presidents of the Danish Eastern and Western High Courts within their discrete right. The candidate selected by the Presidents of High Courts is appointed by the Minister of Justice to the position of the Board member and the chairperson.

The Board oversees the process of interception of communications, protection of personal data and data analysis, disclosure and deletion of information by security institutions. The Board's mandate includes oversight of the process of obtaining, storing and processing information about air flight passengers by security institutions.

²⁸ Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 46.

²⁹ <<https://www.tet.dk/the-oversight-board/?lang=en>> [02.12.2024].

³⁰ Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 39.

The Intelligence Oversight Board of Denmark has an investigative competence too and may study the legal compliance of information collection and ownership matters by security institutions on the ground of application submitted by physical or legal entities.

The Intelligence Oversight Board of Denmark (TET) may require Security Sector institutions to delete information under their possession. The Board is also entitled to present its considerations to the security institutions about the problems detected in their activities and offer recommendations for their solution. The information about the Board's recommendations is also sent to the Ministers of Justice and Defense. Where the security institution disagrees with the Board, it has to provide arguments to the Board and respectively, to the Minister of Defense or Justice for the decision. If the Minister does not share the Board's views, the issue will be referred to the Committee of Intelligence Services of Danish Parliament.

Finland

The reform of security sector institutions of Finland led to establishing of the Intelligence Oversight Committee (Tiedusteluvalvontavaliokunta, TiV)³¹ with special functions in the Parliament, on the one hand and to creating an independent Intelligence Ombudsman Institute (Tiedusteluvalvontavaltuutetun, TVV),³² on the other hand.

The Intelligence Oversight Committee oversees the operations of civil and military intelligence, the progress of secret surveillance, ongoing secret activities and completed operations.

The committee supervises (a) the appropriate implementation and expediency of the intelligence activities, (b) controls and evaluates the priorities of the intelligence activities, (c) monitors and promotes the exercising of basic and human rights in the intelligence activities and (d) prepares the reports. The Committee prepares and accomplishes the conclusions and reports drafted by the Intelligence Ombudsman within the scope of its oversight function.

The Intelligence Oversight Committee is structured with the Members of the Finnish Parliament with 11 permanent and 2 substitute members.

When a Member of Parliament is proposed as a member or deputy member of the Intelligence Oversight Committee, he or she shall request the Data Protection Ombudsman to check if there is operative information and records in the operative database of the Finish Security Service on the MP in question. The Data Protection Ombudsman informs the requesting MP, the chair of the MP's parliamentary group and the Secretary-General of the Parliament about his or her findings regarding the existence of data concerning the MP in the information system. The decision about appointing the candidate is made only after receiving the information.

Warrant for secret surveillance of the security sector institutions is the competence of the Court, however, oversight of such ongoing operations and activities is also the competence of an independent institute – the Intelligence Ombudsman. The Intelligence Ombudsman, following the consultation with the Intelligence Oversight Committee of the Parliament is appointed by the Finnish Government for 5-

³¹ <<https://www.eduskunta.fi/EN/valiokunnat/tiedusteluvalvontavaliokunta/Pages/default.aspx>>[02.12.2024].

³² <<https://tiedusteluvalvonta.fi/en/home>> [02.12.2024].

year term of office. The Finnish Government also appoints the chief specialist in consultation with the Intelligence Oversight Committee who may replace the Intelligence Ombudsman when s/he is absent.

The Intelligence Ombudsman oversees the legal compliance of intelligence information collection methods and use of this information as well as the legality of other intelligence operations managed by security sector institutions of Finland.

France

France began the reformation of its oversight system of security institutions in 2007.³³

In 2007, for the purposes of ensuring parliamentary oversight of the security sector activities, the French legislature passed a law and created the Parliamentary Delegation of Intelligence (Délégation Parlementaire au Renseignement, DPR).³⁴ The Delegation is composed of four representatives from both Houses of the Parliament, among whom are the chairs of the houses of internal security and Defense Committees. Other members of the Delegation are selected by the Presidents of Houses of French Parliament from MPs in consideration of the pluralist representation principle.

DPR provides parliamentary oversight over secret, secret and intelligence activities. Herewith, DPR exercises control over the ongoing security matters of security institutions, their activities and challenges related to secret activities. DPR mandate involves the authority to audit the intelligence and security institutions' budgets. DPR has unrestricted access to any information of the security institutions.

Oversight of French Security Institutions is provided by National Oversight Commission for Intelligence-Gathering Techniques, an institution that is independent from the Government and the Parliament (La Commission Nationale de Contrôle des Techniques de Renseignement, CNCTR).³⁵ In France, secret listening of security institutions is controlled by the court, however, the Commission has to justify the need and legality of oversight. The Commission control means ex-ante inspection and authorization of secret listening and issuing approval for the executive institute/Ministry. Only after that, the case is referred to the court. The latter checks the legal compliance, justification and proportionality.

CNCTR verifies whether the intelligence-gathering techniques implemented within the operational chain for collecting and exploiting information are used in strict compliance with legislation. As a "reliable third party", it provides democratic and neutral control of the intelligence activity. The Commission reports on its findings to **Parliament** and the **public**, except for the information related to intelligence methods.

The Commission is composed of 9 members. To ensure the independence of the Commission and to balance public governance, **two deputies** and **two senators** are selected from Parliament

³³ Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 19.

³⁴ <<https://www.assemblee-nationale.fr/dyn/16/organes/delegations-comites-offices/delegation-renseignement>> [02.12.2024].

³⁵ <<https://www.cnctr.fr/en>>, [02.12.2024].

Chambers and appointed by the President of the respective chambers. Two members are selected from the State Board and appointed by the Vice-President. Two judges of the Cassation Court of France are appointed by the President and one member who has to be the Communications specialist is appointed by the President of the Republic on the proposal of the President of the French Telecommunications Regulatory Authority.

The term of office for members is **six years**. However, the term of office for CNCTR members presented by the Parliament is limited and MPs are solely appointed for the duration of their term of office within their relevant chamber (five years).

Where the relevant security institution disagrees with the negative conclusion of the Commission on the use of intelligence technique or operation, the matter will be referred to the Prime Minister of France and if the Prime Minister agrees with the institution's position, the Commission will transfer the issue to the State Council of France (High Authority authorized to provide for the law in governance) for final decision.

Belgium

In the process of reforming the oversight system for security sector institutions, Belgium created an interesting and efficient system.³⁶

Parliamentary oversight of the security sector is carried out by the Intelligence Monitoring Committee of the Lower Chamber of the Parliament. The mandate of the Intelligence Monitoring Committee of the lower Chamber of the Belgian Parliament, together with the general oversight of the activities of the security sector institutions, includes the review of the reports of the Standing Committee for Oversight of Intelligence Institutions (Vast Comité van Toezicht op de inlichtingen-en veiligheidsdiensten), which has an independent, quasi-judicial and investigative function on the security sector and making decisions on policy or legislative issues.³⁷

Key institution of oversight of the activities of the security sector institutions is the first permanent standing Committee which is independent in its activity. The Committee is composed of three members who are selected by the Parliament for 6-year term of office. It is important to note that the chairperson of the First Committee has to be a judge. The institutional part of the Committee is provided by the Secretariat, administration and investigation offices. The first Committee has a full and unlimited access to the activities of security institutions, operations and any related information. The Committee plays a function of the Appeals instance when the decisions on access to state secrets and inspection are appealed.³⁸

In addition to overall oversight of the activities and operations of security institutions, the committee's authority includes the authorization of secret surveillance conducted by security institutions. In this area, the committee is equipped with the same powers as courts in other countries.

³⁶ Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 25.

³⁷ <<https://www.comiteri.be/index.php/en/standing-committee-i/role>> [02.12.2024].

³⁸ Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU. Volume I: Member States' legal frameworks, 2017, 40-43.

In addition, the committee is authorized to suspend the operation or the methods of operation used by the security institute in case of non-compliance.

The investigative function of the First Committee involves two key areas: investigation of the activities and decisions of the security institution and criminal prosecution of the employee of the security institution by the court order. The investigation of the activities and decisions of the security institution can be initiated by the committee itself, the parliament, the minister, or the public institution or based on a citizen's complaint.

4. Analysis of the Efficiency of Current System of the Parliamentary Oversight of Security Institutions of Georgia and Justification of the Need for Reform

For the efficiency of the parliamentary oversight over the secret activities of the Government, it is critical to hold public discussions and debates between various groups represented in the Parliament. The debates at the Committee or plenary sessions are normally held on a public session followed by a Parliamentary resolution, recommendation or regulation/decreed.³⁹

Holding informed debates in the process of parliamentary oversight over secret activities of the Government is quite limited since MPs do not have access to classified information.⁴⁰ However, the representative of the executive government called to the Parliament has such access and s/he may talk about the issues containing secret information to the Members of the Parliament.

Therefore, even if the Parliamentary group, committee or plenary session is closed, the attendee MPs will still have no access to secret information, will not receive necessary information from the Government representative called to the session, which, on its part, makes it impossible to obtain the recommendation or the resolution of the Parliament, to review reports and to discuss the issue of the responsibility of the official who is accountable to the Parliament.

For the parliamentary oversight of secret activities of the government, it is of particular importance to grant and delegate to the government the authority of legal regulation of state secrecy. This issue is particularly important for real and effective parliamentary oversight of the government's secret activities. The government shall not have the possibility of making a decision about the access rights of the MP to state secrets without justification and, most importantly, not be accountable for it before the Parliament of Georgia or the court.

The Parliament of Georgia exercises oversight of the secret activities of the Government via a number of mechanisms: control of enforcement of normative acts, checking compliance of secondary legislation with primary law, political debates, interpellation, Minister's hour and thematic inquiries.

The control over the enforcement of normative acts is the competence of relevant sectoral committees of the Parliament. The Parliamentary committee, in order to accomplish this mission, controls the status of legislative acts (secondary legislation, laws) and identifies the problems. The conclusion made by the Committee about the enforcement of the law adopted by the Parliament may

³⁹ Schierkolk N.Y., *Parliamentary Access to Classified Information*, Geneva, 2018, 19-25.

⁴⁰ Law of Georgia "On State Secrecy", *Legislative Herald of Georgia*, 12/03/2015, Article 20, Regulations of the Parliament of Georgia, *Legislative Herald of Georgia*, 14/12/2018, Article 157

lead to discussions at the plenary sessions and finally, to the Parliament's resolution. Herewith, depending on the scale of violation, the process of controlling the normative act enforcement may result in the questioning of the responsibility of the executive government officials.

Unlike the control of enforcement of the normative act, the mechanism of studying the compliance of secondary legislation with primary law authorizes the sectoral committee of the Parliament and there is no need to further discuss the issue on the plenary session of the parliament. This mechanism of parliamentary oversight over the government's activities is quite flexible and efficient compared to the control of enforcement of normative acts because the decision (in the form of a task or a recommendation) is made by the Committee.

Special mechanism for the parliamentary oversight over the Government's activities is interpellation, within which the MPs question the Government or its officials who are called to the Parliament hearing and held accountable to the Parliament. They are obliged to give answers to the questions in a written form too. Besides, an integral part of the interpellation mechanism is the discussion of the issue in the plenary session of the Parliament in the format of a debate, usually in an open session. The effectiveness of this mechanism of parliamentary oversight over the secret activities of the government depends on the access of MPs to secret information, on the one hand, and on the provision of secret information during parliamentary debates and the possibility of conducting informed debates, on the other hand.

In absolute majority of NATO member states, MPs have unlimited access to secret information and exercising of this right does not depend on the decision of some executive government institution which is subject to Parliamentary oversight. MPs can access secret information depending on their status, high legitimacy and official position. In 7 member states of NATO, MPs who are the members of special or sectoral committees or occupy some position in the Parliament, can access the secret information.⁴¹

In democratic countries, the fact that politicians and MPs, trusted by public, have access to secret information, ensures democratic management of the security system, efficient Parliamentary Oversight and Accountability of the Security Sector.

In consideration of all the aforementioned, the efficiency of the Parliamentary Oversight over the Government's security-related activities can be increased by a large-scale, consensus-based reform that involves the following:

- i. Adoption of a legislative act by the Parliament that will be a framework for accountability and oversight of the security system;
- ii. Changing the admission system of MPs to state secret and eliminating the dependence on the unsubstantiated will of special services,
- iii. Defining the format of Parliamentary reports of security institutions and defining the content frame by the Parliament, annually or by a single standard of the law
- iv. Submission of secret draft legal acts of security institutions to the Trust Group and making them effective only by issuing positive conclusions.

⁴¹ Schierkolk N.Y., *Parliamentary Access to Classified Information*, Geneva, 2018, 19-23.

- v. Reducing party influence on the formation and activities of the parliamentary trust group. All interested political groups represented in the Parliament must have a representative in the Parliamentary Trust Group, who will undertake the obligation to protect state secrets. Moreover, exercising of the powers of the Trust Group members (requesting and receiving information, initiating and discussing issues) shall not depend on the decision of the majority.
- vi. Creation of the institute of a special speaker of the Georgian Parliament whose competence will involve the oversight of security institutions and their activities, control of the performance of law on State Secrecy and the Parliamentary reports of security institutions and submission of alternative reports to the Parliament (committee, fraction, majority and minority). The mandate of the special speaker shall include the oversight of human rights protection and legal compliance in secret activities of security institutions. To ensure the independence of the Special Speaker, s/he shall be appointed by a broad consensus (a high quorum, with the mandatory condition of the support of a minimum number of the opposition), his term of office shall exceed the term of office of the Parliament, and the recommendations shall be mandatory for implementation by all institutions.
- vii. Organizing/establishing the annual security conference by law. The conference will be a mechanism/format for ensuring oversight of the secret activities and the accountability of the security system. Within the scope of this mechanism, all constitutional institutions and the representatives of all sectoral governmental institutions, the Special Speaker, interested academic media or non-governmental institutions will submit reports about ongoing progress and challenges.

5. Analysis of Accountability of Governmental Institutions of national security System and Efficiency of the Current Control System of their Activities and Justification of the Need for Reform

The Mandate of national security institution involves investigative, operative-search, operative-technical, counter-intelligence or police functions which makes it impossible to ensure efficient oversight. These functions essentially differ from each other, in terms of their objectives and legitimate goals as well as by activity methods. This extremely complicates the separation of the functions performed by these institutions. On their part, the complexity of separating the activities makes it ineffective if not impossible to provide oversight over the activity and to ensure prosecution or judicial control.

Considering that there is a special Operative-technical Agency established by law for the technical support of a significant part of secret activities in Georgia, and all security institutions carrying out secret activities apply the services of this Agency, it is critical not only to have judicial control over the secret activities but also to ensure the agency's independence, neutrality and objectivity.

The head of the State Security Service can influence the activities of the Operative-Technical Agency and the decisions of the head of the Agency. However, the fact that the State Security Service

is an institution implementing investigative, operative-search and counter-intelligence activities shall be taken into account, which means that the control of the Operative-technical Agency by such an institution significantly reduces its independence⁴². At different times, the matters of the oversight system of secret activities were subject to Constitutional Court proceedings. One of the matters to which the standard set forth by the Constitutional Court of Georgia relates is the high standard of independence of institutes performing secret activities from the institutions providing security. According to the Constitutional Court judges, the independence of the Operative-Technical Agency is not sufficiently provided and the State Security Service has some mechanisms to control the Agency and its activities, foreseen in different legislative acts.⁴³

Even the Prosecutor's Office cannot exercise efficient oversight over the secret activities of Georgian security institutions. The Prosecutor's office assigns a task and issues a protocol describing the results of secret activity, without having the competence or mechanisms for overseeing the process. This fact was confirmed by the representative of the Prosecutor's Office in the proceeding of the constitutional suit in the Constitutional Court of Georgia.⁴⁴ Interestingly, secret activities carried out within the counter-intelligence operations are different from the secret investigation activities and are characterized by lower quality of effective oversight.

There is a risk of human rights violations in the period between ex-ante and ex-post oversight of secret activities. The period from the beginning to the end of the authorized secret activity, i.e. the course of the secret action and the process of processing and using the data obtained after completion is the weakness, for the effective oversight of which, in addition to the external supervisory mechanisms, the development of effective internal control mechanisms is important, because the internal control structure guides the activities and inspections selectively and in parallel of the secret activity.

Due to these problems, the source for the risk of human rights violation in secret activities may become the public servant of the same institution that is involved or has relation or information about the secret activity, as well as the risks and facts of violation.

Secret activities performed by security institutions belong to the category of state secrets. An employee of a security institution who may have information about the facts of a violation or misconduct has some restriction and cannot provide information, fearing that the question of his responsibility for disclosing state secrets may arise. An example of the real ground of this risk is a direct provision in the law on "Operative-Investigatory Activities". Thus, there are no guarantees for whistleblower protection in the Security Institute.

⁴² Law of Georgia "On the State Security Service of Georgia", Legislative Herald of Georgia, 07/08/2015, Article 19, 29.

⁴³ Decision #1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, "Open Society Georgia Foundation", "Transparency International – Georgia", "Young Lawyers Association of Georgia", "International Society for Fair Elections and Democracy" and "Human Rights Center" against the Parliament of Georgia", II-33, 41, 65, 96.

⁴⁴ Lawsuit of the Public Defender of Georgia against the Parliament of Georgia, case #1630.

In view of the aforementioned, the efficiency of the accountability and the activities of the governmental institutions of national security System can be achieved via a reform that takes into account the following:

- i. Separating the investigative function from the institutions performing secret activities and developing an investigation office subject to efficient prosecution and judicial control. In Georgia, there are three secret activities of different meanings and standard (investigation, operative-search activity and intelligence, and operative-technical activity) and out of them, only the investigative or operational-search activities are subject to the oversight of Court or Personal Data Protection Inspector
- ii. Reforming the Operative-technical Agency into an independent and accountable institution that provides technical support. The Agency must have a supervisory board whose members are selected by a commission and which is independent from political institutions. The main function of the council shall be to supervise the legal compliance and human rights standards of the agency's decisions and activities, as well as to listen to periodic reports of the Agency's leaders, which may lead to raising the question of the responsibility of the Agency's leadership. In addition, where the violation is detected, the Council shall be able to suspend the activity/event and have the right to appeal to the court to check its legality.
- iii. Increasing the effectiveness of the whistleblower's institute to ensure the prevention and suppression of human rights violations in secret actions. It is obligatory for the employees of institutes carrying out secret activities equipped with counter-intelligence or operational-search powers to protect state secrets. If they fail to protect state secrets, this may become the subject of various heavy responsibilities. There is a need to strengthen the whistleblower protection and responsibility system.

6. Analysis of the Efficiency of the Current Control System of National Security Institutions by Independent Institutions and Justification of the Need for the Reform

Independent, non-political oversight of the activities and decisions of national security institutions is provided by the institutions established under the constitutional law (constitutional court, common courts, public defender, audit service) and the Parliament (personal data protection inspector, special investigation services).

The ex-ante and post-ante control function of secret activities is under the judicial system. Herewith, the competence and the capacity of the court differ in the area of control of secret investigation activities and counter-intelligence secret activities.

Judicial control of secret investigation and operative-search activities belongs to the mandate of first-instance courts and the control of counter-intelligence secret activities is the competency of the Supreme Court of Georgia.

Besides, the objectives of secret investigative or operative-search activities also differ from the objectives of counter-intelligence activities. The key purpose of the first is to prevent crime, to respond and prosecute the person committing the crime and the key purpose of counter-intelligence

action is to detect and prevent the threats to the country arising from the intelligence work of foreign states. As we can see, most of the results of counter-intelligence activities may not result in criminal justice, which means that there will be little ex-post judicial control. However, there can be some information in the administration of the institute equipped with a counter-intelligence function, which is not subject to effective systemic control.

The rules for processing state secrets are formulated by the Government of Georgia and the authority to control the performance against these rules in public or private institutions belongs to the State Security Service. Personal data can be a state secret. Personal Data Protection Service does not participate in drafting the regulations for the information processing system of state secrets and does not have a mandate to issue recommendations, while the security institutions do participate in developing these regulations and standards. Moreover, the Personal Data Protection service cannot control how this information is processed which leaves this part of activities of security institutions without external oversight.

In view of all the aforementioned, strengthening of the efficiency of the independent control system of national security institutions can be achieved via reform that covers the following:

- i. Creating a quasi-judicial, professional institute of ex-ante control of counterintelligence secret activities (e.g. independent committee of intelligence oversight) by legal act. The commission shall be authorized to issue warrants for secret activities and to control the protection of human rights in the process. The Commission will discuss the issue of granting a permit/warrant only on the ground of substantiated petition of the head of the security institution. In our opinion, the Commission shall consist of 5 members, 2 of whom should be judges. The selection and appointment of members shall be ensured by an independent commission created via a multi-stage procedure; the selection shall be based on a public competition. Judges who are members of the commission shall not participate in the process of authorization of secret activities, and their competence shall be to check, suspend or terminate ongoing secret activities based on the permission granted if the fact of violation of human rights or permit terms and conditions are detected. The selection process of Commission members may be based on the same provision that concerns the formation of the commission in the acting law,⁴⁵ which provides for the formation of the commission by engagement and participation of wider society. It is important for the Commission and the Court to publish statistical data on secret activities performed within the scope of investigative as well as counter-intelligence activities.
- ii. The Court will retain the competence of oversight of secret activities (investigation, operative-search, operative-technical. With regard to intelligence operative-technical activities, the court will remain an ex-post oversight institute that will control the legal compliance of using results and protection of human rights. This mandate of the court will be valid for the whole period until the information exists. Institutionally, this competence can be granted to representatives of the Supreme Court of Georgia or Second Instance Courts, to whom the cases will be assigned

⁴⁵ The Law of Georgia "On Property Restitution and Compensation of Victims of the Conflict in the Former South Ossetia Autonomous District", Legislative Herald of Georgia, 29/12/2006, <<https://matsne.gov.ge/document/view/23050?publication=4>> [02.12.2024].

on a random selection principle. Besides, special office structured with professional, qualified specialists shall be established in the court. It will be obligatory for the security institution to submit periodic reports to the judge and the judge will have the authority to conduct unplanned inspections with the help of the office itself or personal data protection agency staff (specialist called for the task). If any violation is detected, the Judge shall be entitled to decide on the remedy and the responsibility of the violator. Besides, the court will publicize the statistical data of secret activities carried out within investigation or counter-intelligence activities.

- iii. Institutional strengthening of personal data protection inspector. As a professional authority for introducing uniform standards and oversight, the personal data protection inspector shall be entitled to develop standards for assigning/processing the information with a status of a state secret and to provide oversight over the performance of these standards.

7. Resume

The stable development of the State and society greatly depends on the work of security institutions. The biggest part of their work is not public. Moreover, if the secret activities and personal data of these security institutions are compromised, it will jeopardize democracy and human rights protection. Nonetheless, it is extremely important to have a new vision about the accountability of the security institutions and the importance of the oversight system that looks at their activities. This requires reform.

The effectiveness of the democratic oversight of the security sector can be achieved by a common and joint valid mechanism. Herewith, for making unbiased decisions (politically or within the agency), it is very important to create new institutes and new formats of security sector oversight and control at the parliamentary and governmental levels, also strengthening independent institutions and creating new oversight mechanisms. According to the democratic standards, the security sector which is actionable and accountable can provide the stability and development of the society and will not undermine democracy.

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