Position Paper by the Government of Republic of Poland concerning Draft Opinion of the Venice Commission no. 839/2016 on the Act of 15 January 2016 amending the Police Act and certain other acts

The Government of the Republic of Poland wishes to thank the European Commission for Democracy through Law (hereinafter: the Venice Commission) for its draft Opinion no. 839/2016 on the Act of 15 January 2016 amending the Police Act and certain other acts. Polish Government concurs with the Venice Commission appreciating the need for proportionality between ensuring public order and safety by the competent services with privacy of individuals guarantee. However, it should be admitted that using telecommunications data is still more often, an important and effective tool in fighting against serious crimes endangering social life nowadays.

It is of primary importance, that the said Act of 15 January is fully implementing judgement by the Constitutional Tribunal of 30 July 2014 K 23/11 in subject of exercising, obtaining and processing telecommunications data by operation uniformed services, secret services and competent operational inspection bodies. The statutory measure is also following most of nonbinding recommendations given by the Tribunal, as the assessment made by the Polish Constitutional Tribunal is of the first importance to the Government, notwithstanding due consideration given to the principle of the separation of powers.

With the regard to the above, the Government of the Republic of Poland wishes to address a number of assessments made by the Commission providing additional information about the context of Polish legal system.

<u>Points 13, 87 and 88 of the opinion:</u>

It should be stressed that the Police Act as amended in January 2016 is limiting duration of the secret surveillance by Police in several ways.

1. Firstly: limitations rise from the legal principle that secret surveillance is to be terminated as soon as the reasons for its provision ceased to exist.
2. Secondly: the secret surveillance basically is allowed for a period of 3 months. Any prolongation of such surveillance beyond the 3 months period may occur if material grounds for the introduction of such a surveillance still continue to exist.

3. A further extension of the surveillance period (beyond the additional 3 months period) is conditional and may occur only upon acquisition of new relevant information which could contribute to the detection of a crime, gaining access to evidence or identifying the perpetrators of a crime. A district court may decide to extend the period of secret surveillance upon receipt of substantive information on the existence of the evidence.
4. Thirdly: the time of the secret surveillance might be extended only up to maximum 18 months. It is to be noted, that under the previously existing law, there was no such a maximum time limit.
5. It is paramount to highlight the fact that under the new regulations, the conduct of operational control is subject to oversight by organs independent of the services conducting such a control i.e. an independent court and the prosecutor's office.
6. Restrictive nature of conditions which must be met in order to extend the period of secret surveillance results in the fact that such cases are going to occur rarely. At the same time it should be additionally noted, that in cases related to organized criminal groups the time of maximum duration of operational control is likely to be proportionate to the seriousness of potential crimes and risks associated with it.
7. It is to be stressed, that Polish Constitutional Tribunal, referring to the need of creating an independent control mechanisms underlined that it should be done by organ autonomous from the Government which should not have direct or even indirect authority over the officers who reach aforementioned data. According to Constitutional Tribunal, it is the judicial oversight of secret surveillance as provided by courts which is optimal solution and the Polish Government share this position, which has found full expression in the statutory amendment of Police Act as adopted in January 2016.

Point 18 of the opinion:

The new provisions set out an effective mechanism of oversight of secret surveillance and data collection by an independent court. They also provide the possibility of rapid access to metadata. Swift access to such data is the decisive factor in determining the efficiency of its use in the context of preventing and combating crime. This does not deprive the court of effective control over the process. The court is provided with access to all materials upon which a secret surveillance was authorized, as well as already collected metadata. The court thus can verify whether the secret surveillance has been launched on lawful and reasonable grounds and whether the metadata has been collected in a justified case. The court's oversight can be omitted only in relation to collection of data which does not interfere with privacy.

Point 20 of the opinion:

Data that is referred to in this point should be confronted with the fact that there is no central database of mobile phone subscribers which results in the necessity to refer questions often relating to the same person using services to different operators as well as other technical solutions used by telecommunication systems. The data concerning the number of requests for telecommunication data must not be understood as if each request represents different person. Considerable number of requests may apply only to one person.

Point 31 of the opinion:

1. Under the Polish Law the gathering of telecommunication data serves very concrete purposes: 1) crime detection, 2) crime prevention or 3) saving human lives. Currently a large portion of crimes is being committed with the use of mobile phones and one perpetrator often uses several mobile phones and/or SIM cards. The acquisition of telecommunication data through state services is allowed for the purpose of identifying crime perpetrators and those supporting them. In no way analyzing of the preferences, interests or habits of citizens is allowed. Any potential abuse committed by state services in this context is to be severely punished. It should be noted that any data acquired through secret surveillance and not presenting real value in terms of evidence is to be duly destroyed.
2. Referring to the circumstances in which the Police may acquire telecommunication data as described in art 20 c of the law on the Police, it needs to be stressed that the identification of a large number of perpetrators of serious criminal offences would be much more difficult or not possible. It is particularly true in the case of: murders, kidnappings, extortions, human trafficking, production and trafficking of illegal drugs, activities of organized crimes groups including armed groups.

Point 39 of the opinion:

1. According to the new legal provisions a motion for secret surveillance authorization filed with the court must be supported with persuasive factual grounds for such an authorization. This considerably limits the risk of applying secret surveillance in cases other than those that can be considered as really “serious” on the basis of available information. The exhaustive list of criminal offences (Art 19.) constitutes an important tool in the process of crime detection. Evaluations and controls conducted thus far indicate that secrete surveillance has not been used excessively. For example in 2015 among all the crimes identified by the Police 25,9 % were crimes included in the closed list (Art. 19). In this context 8000 secret surveillance procedures were launched 0,9% out of the totality of identified crimes and 3,7% of crimes included in the list from the Art. 19 para 1 Therefore, there are reasonable grounds to believe,

the secret surveillance was only used in situations when other operational measures proved to be insufficient.

2. With reference to the cited crime of possession of psychotropic substances, it needs to be stressed that under the Polish law the possession of such substances is fully prohibited and the cases conducted in relation to such crimes often reveal connections to organized crime groups operating on an international scale.

Point 40 of the opinion:

The use of secret surveillance is generally limited to the most dangerous crimes. Therefore, there is no analogy with the ECHR case against Moldova. It is also to be stressed, that statutory exclusion of private homes or residences from possibility of applying surveillance methods would result in the transfer of criminal activity there as an asylum for perpetrators of crimes listed in Art. 19 para 1. It is again to be stressed, that secret surveillance may only be introduced by an independent court with the consent of the Prosecutor's office.

Point 43 of the opinion:

Once again it needs to be stressed that statistical data clearly indicate that the concern voiced by the VC in this point is unfounded. Secret surveillance is used only in cases of the most serious crimes as specified in Art 19 para 1 of the Law and only when other means proved to be ineffective.

Point 46 of the opinion:

The provision of Art 19 para 1 was drafted according to the principle of subsidiarity. This means that in a situation where other means and methods of police operational work have been used, the Police, with the consent of the prosecutor and court may apply for secret surveillance. It is to be stressed that crime detection process never starts with secret surveillance but with comprehensive police work *inter alia* with personal sources of information or such proceedings as witness hearings. Secret surveillance might only be subsequently applied for, if information gathered justify it.

Point 47 and 48 of the opinion:

With reference to evidence obtained in the course of secret surveillance, it needs to be stressed that in case, sufficient evidence is available for launch legal proceedings under the penal code or if such evidence may prove significant to an ongoing case, they are transmitted to the prosecutor. The remaining materials are to be duly destroyed in front of an appropriate commission.

Point 68 of the opinion:

The current wording of Article 19 para 7 of the 1990 Act as amended in January 2016 does not allow for application of secret surveillance to an indefinite group of individuals or anonymous individuals. Reference of the said Act to the "subject to which secret surveillance is to be applied" does not mean a group of people but a strictly defined telecommunications terminal equipment being subject to surveillance.

Point 74 of the opinion:

In light of the applicable regulations of the criminal procedure, the court ultimately decides whether materials obtained in course of secret surveillance may be admitted as an evidence in any legal procedure.

Points 75-86 of the opinion:

Taking into account the necessity of ensuring effective prosecution of perpetrators of crimes it would not be justified to exclude people benefiting from professional privileges if there are suspicions as to their crime activities. Also the judgment of the Constitutional Court of 22 November 2004 (SK 64/03 OTK ZU No. 10/A/2004 ps. 107 Vol III, Para 3) deny possibility of immunizing any professional group from general rules of secret surveillance admissibility.

Point 91 of the opinion:

The possibility to use secret surveillance over short periods, e.g. 2 or 3 is not allowed without any supervision. The secret surveillance in case of the utmost urgency is ordered by the police obtaining the agreement of the District Attorney or the General Attorney. Never the less after ordering of operational control in such a case, the immediate approval of the court is required. The same applies to all authorities authorized to use secret surveillance.

Point 93 of the opinion

The "urgency" exception contained in Article 19 para 3 of the Act of 6 April 1990 on the Police is applied only in case of surveillance ordered in relation to offenses listed in the catalog from para 1 of the same Article. So the exception is not contingent upon merely concern about loss of information or obliteration of evidence of a crime, but also upon the fact it applies only to most serious offenses which justify use of the secret surveillance as such.

Point 94 of the opinion

So far, no information from the district courts have been noted that might suggest difficulties with staffing of hearings concerning ordering of surveillance by virtue of Article 19 para 1 or authorization of secret surveillance pursuant to Article 19 para 3 of the Act. Also the concern voiced in the opinion regarding overburdening of judges with requests in this matter and potential risk of irregularities in application of secret surveillance, is not supported with any facts which might suggest reasonable grounds for such an allegation.

Points 95-97 of the opinion:

The judgment of the European Court of Human Rights of 26 April 2007 issued in *Dumitru Popescu v. Romania* (no. 2), no. 71525/01) (ECHR) referenced by the Commission relates to a fundamentally different legal situation than is the subject of this draft opinion. Under the Romanian legislation, it was the prosecutor who authorized application of secret wiretaps. The complainant did not have the right to initiate judicial review in this scope, and the only recourse available to him was an appeal to the superior prosecutor. Meanwhile, under Polish law, secret surveillance can only be applied with the permission of a court. The request of the Police for issue of such permission is effective only when a prosecutor issues a written consent.

There are no grounds for the suggestion as contained in the draft opinion that the prosecutor is not an objective party to the proceedings before the court and that it would be advisable to introduce in these proceedings an additional independent participant i.e. the "privacy advocate". This opinion contradicts with the systemic tasks of the prosecution service, such as upholding the rule of law (Article 2 of the Prosecution Service Act), what excludes approval of requests for secret surveillance without review of formal and substantive grounds for its application. In 2015 prosecutors refused to approve police requests for secret surveillance which were relating to 178 individuals. This shows that the oversight by prosecutor is a real means of limiting police powers.

Points 100 and 102 of the opinion

1. Concerns regarding restricted availability of classified evidence and judgments authorizing secret surveillance are unfounded, given that the provisions of the Polish Code of Criminal Procedure in Article 156 § 1 and 4 guarantee the parties at the stage of judicial proceedings full access to the files of the court case, including classified information.
2. There is also the possibility of a judicial review of the premises upon which, secret surveillance was granted and therefore there is no need for a separate mode of *ex post* complaint in this matter by persons subjected to secret surveillance.

Point 111 of the opinion

The term “regional court” should be changed to “district court” for the sake of consistency in the text (in connection to the use of the term “district court” in point 17 for example).

Point 132 of the opinion

Some of the recommendations contained in the opinion raise essential doubts as to their justification and actual need for implementation of related postulates. In particular, it seems to be hard to reconcile with the requirements arising from the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the Strasbourg Court, as well as the requirements arising from the Charter of Fundamental Rights and the judgment of the Court of Justice in Luxembourg (Grand Chamber) of 8 April 2014 in joined cases C-293/12 and C-594/12, which annuls *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC*.

I. The postulate of inclusion in the law of the principle of proportionality in relation to the application of secret surveillance is irrelevant, as it is already implemented in two aspects: firstly, by restricting admissibility of application of secret surveillance only to serious crimes, which is reflected in the catalog of criminal offenses set forth in Article 19 para 1 of the *Police Act*, and secondly - by the principle of subsidiarity, enabling secret surveillance requests only if other measures have proven ineffective or would not be helpful in prevention of a crime and detection as well as determination of perpetrators of offenses.

Both the above statutorily specified criteria set up an abstractly expressed test of the principle of proportionality (paragraph 132 mistakenly refers to a "probability test"), which in relation to a specific case is supplemented with the element of freedom of judicial decision in the matter of a request for ordering of secret surveillance. The court decides on the merits of a request on a discretionary basis, which follows from the fact that Article 19 para 1 of the *Police Act* provides that "*a district court **may**, by way of decision, order secret surveillance*". Wide power of appreciation of the court makes sufficient room for probability test to be applied by judges.

The court is not bound by the legislator with an obligation to order secret surveillance even in case of occurrence of substantive and formal premises for advancing of such request, which proves possibility of consideration by the court in every case if there are circumstances weighing against application of surveillance, even though formal and material conditions exist for requesting its application.

Therefore, granted by the legislature discretion to the court when allowed secret surveillance together with other two statutory requirements (formal and substantive),

constitute jointly constructing an effective mechanism to eliminate requests for ordering of secret surveillance failing to meet the requirements deriving from the principle of proportionality.

It should be underlined that in relation to the provisions governing the premises and mode of ordering of secret surveillance, the *Act of 15 January 2016 amending the Police Act and certain other acts* did not introduce any changes reducing the guarantee merit of these regulations.

In this situation, it is not entirely comprehensible that the opinion of the Venice Commission, supposedly concerning only this amendment, should cover legal solutions introduced prior to its entry and functioning in this shape for many years.

II. The proposal "*to complement the system of judicial pre-authorization of the "classical" surveillance with additional procedural safeguards*", such as a "*privacy advocate*", who would be "an independent legal professional, having necessary technical skills and the security clearance, who is not institutionally related to the police and the prosecutor's office, (paragraph 97), is a proposal of limited functionality, and raising threats to the regularity of the procedures leading to the ordering of secret surveillance and the effectiveness of this surveillance.

Introduction of additional entities, not equipped with the necessary institutional authority, empowered to substantively review the material justifying a request for ordering secret surveillance, raises problems with securing confidentiality of this procedure and impossible to eliminate risk of leakage of information shared with the court along with a request.

The fact should be noted that such a solution which would constitute peculiar evidence of disbelief in the reliability of performance of processional duties by Polish judges, would inevitably lead to significant prolongation of the procedure leading to a decision on a request, threatening the core objectives of investigative-intelligence operations, which are to prevent a highly possible crime and promptly apprehend perpetrators of committed crimes.

The postulated in the opinion of the Venice Commission introduction of the principle of adversarial debate in proceedings in the matter of a request for ordering of secret surveillance means a major reorientation of these proceedings.

The question should be to what extend, if at all, this model is operating in the law of Member States of the Council of Europe, as well as the question of whether such a postulate was formulated by the Venice Commission in previously issued opinions, and if so - to what effect.

III. Another postulate difficult to accept is that of introduction in relation to secret surveillance of a "*system of automatic ex post supervision by an independent body*". The guidelines contained in paragraph 105, referring to the nature and tasks of such a body, are vague to say the least, failing to zoom in on systemic authority and the manner of

shaping of such a body, the manner of exercise by this body of "automatic" supervision of ongoing secret surveillance, and the nature of legal measures that would serve this body, as well as the relationship of their implementation vs. the prior decision of a court, modified or reversed by a decision of a non-judicial body, in the event of a substantial divergence of assessments between the court and the non-judicial body.

It is a surprising fact that in the situation of pronouncement by the Venice Commission of the view on "*weaknesses in the general supervision of secret surveillance*" (paragraph 107), the Commission does not put forth, even alternatively, proposals to introduce solutions strengthening the effectiveness of supervision exercised by courts, thus a body of clearly identifiable systemic authorization and constitutionally protected guarantees of independence, but rather calls for creation of a new structure of underdetermined substance, whose situation in the legal order in a manner that does not result in appearance of unnecessary competitiveness with the judicial authority would be extremely difficult. The question remains whether this type of solution has an effectively functioning model in other Member States of the Council of Europe?