

**The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017**

**I. General remarks**

*Methods of work and main findings*

1. As part of the European Commission's readiness to work with and support the new government of the former Yugoslav Republic of Macedonia in its reform efforts, the Commission has asked the same independent<sup>1</sup> senior rule of law experts ("the group") who prepared a report in 2015 ("2015 report")<sup>2</sup> to assess progress in addressing their previous findings. In this context, the Commission invited the group to formulate recommendations enabling the new government and other institutions to address persistent shortcomings in several rule of law areas. In line with its 2015 mission, the group this time focused on the state of I) the judiciary, II) law enforcement and prosecution, including the interception and oversight system, III) independent, regulatory, supervisory and oversight bodies, IV) media and civil society. This report is confined to a limited number of rule of law areas and does not imply that urgent reform is not required elsewhere.

2. The group examined the situation in the country and drew its conclusions on the basis of a series of meetings conducted in Skopje on 17-21 July 2017 and numerous reports and materials from various sources. During its visit to the country the group met relevant ministers and civil servants, judiciary and prosecution services, independent, regulatory, supervisory and oversight bodies, media, civil society, representatives of the international community as well as representatives of government and opposition parties, relevant parliamentary committees and members of the Constitutional Court. Some information was provided in confidence. Therefore, this report does not reveal sources of information for each finding. However, the group is satisfied that each of its findings is based on sufficiently reliable factual information and materials to confirm their accuracy.

3. This report should be read in the light of the 2015 report. Although some of the shortcomings the group identified two years ago have been addressed, such as the adoption of amendments to the Law on the Ombudsman and a decrease in defamation lawsuits, the failure to implement most of the recommendations is a cause for serious concern. There is an urgent need to make up for lost time.

4. Once again, the group does not systematically suggest specific deadlines for its recommendations. The new government itself has set deadlines for some of its reform actions. As a general rule, recommendations should be implemented without delay following proper preparation (gap analysis, impact assessment) and an inclusive process of consultation to define further the related actions.

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<sup>1</sup> Disclaimer: The views expressed in this document are those of the experts and the team leader and do not necessarily represent the opinion of the European Commission. The group has worked independently, without receiving instructions from any institution as to the contents of its report.

<sup>2</sup> Independent Senior Experts' Group, *The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015*, 8 June 2015, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news\\_corner/news/news-files/20150619\\_recommendations\\_of\\_the\\_senior\\_experts\\_group.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf)

5. As noted previously, in many areas the appropriate regulatory framework is in place. As explained below, however, the considerable gap between legislation and practice, which has different causes, needs to be bridged. In general, the group considers that the behaviour of some office holders might turn out to be the biggest obstacle for proper implementation. There is an insufficient culture of accountability and transparency within state institutions, which is required to promote greater consistency in policy and action, or ensure clarity and foreseeability of law and practice. None of the public or non-governmental bodies should be put under pressure or intimidated in the exercise of their mandate and tasks.

6. The group has noted a change in the political context and a greater commitment this time, among some stakeholders, to address political challenges and proactively assume responsibility. There has also been more openness of interlocutors in speaking about the problems. Non-governmental organisations remain outspoken and are engaging dynamically to contribute to reforms. The group was impressed by the professionalism of many, though not all, of those who work in the judiciary, executive branch and other public services.

### ***Promoting reforms in the interest of the country***

7. Important areas, such as the judiciary, security or media, require systemic reforms based on an inclusive, transparent and cross-party process. The commitment of the government to launch such reforms is welcome as ownership is essential. The entire society should engage in the reform process. Advice should be sought from a broad range of relevant stakeholders. Advisory bodies should be composed on the grounds of expertise and legitimate interest, not political affiliations.

8. Reforms should build upon objective, unbiased assessments of the current situation and the problems to be addressed, taking into account what has or has not been achieved in the past. Current decision-makers should refrain from rejecting as a matter of principle all initiatives undertaken in the past.

9. Designing and adopting reform strategies is one thing, implementing them with determination by concrete acts and changes is another. Sustainable reforms will take time to be properly planned (including on the basis of gap analyses and impact assessments), decided and implemented. Preparation should begin immediately but reforms should not be rushed through. However, the desirability of further assessment and consultation should not delay reforms which have already been agreed or which are long overdue. This includes the recommendations of the 2015 report, which was accepted by all parties, the recommendations of GRECO and the Venice Commission, the outstanding judgments of the European Court of Human Rights, and assessments by the European Commission, including the Urgent Reform Priorities.

### ***Building trust***

10. Trust needs to be rebuilt. There is a widespread perception in the country that in recent years, decisions were politicised, that the parties had taken ownership of the state, that office holders had conflicts of interest and confused their official mandate with their party/personal agenda. The public has to regain confidence that all state institutions and public bodies work in the public interest, within their mandates, respecting the law and complying with high ethical and other professional standards.

11. Officials working in public bodies need to have confidence that they can carry out their duties free from direct or indirect pressure. Public decisions have to be predictable. Legal certainty needs to be re-established.

12. The wiretapping scandal revealed a massive invasion of fundamental rights. Some progress has been made on investigating and prosecuting wrongdoings revealed in the context of the illegal wiretaps; however there have been no judgments. Reforms in the security sector, in particular with regard to the interception of communications, have been delayed after the 2015 report but are now under preparation. It is essential that these actions are pursued as a matter of urgency. Preventing and fighting corruption at all levels and in all areas of public activities needs to become a top priority.

13. Mistakes of the past should not be repeated and one form of state capture must not be replaced by another. Some actions to be carried out in the near future will inevitably turn out to be test cases in this regard.

### ***Legislation, implementation and behaviour***

14. In many areas evaluated by the group, legislation in line with European and other international standards is in place. Modifications in legislation are not always required to address problems and shortcomings. In all areas, the implementation of sustainable reforms primarily requires political will. Where, however, legislative changes are needed, the legislator, despite all legitimate divides between political parties, should deal with them in a responsible manner. The ruling and the opposition parties should seek reasonable cross-party solutions and compromises, in particular where important reforms need a qualified majority in parliament. There should not be a spirit of obstruction, just for the sake of obstructing.

15. Implementation is insufficient, often as a result of poor management of human resources, political interference and a lack of culture of accountability and transparency.

16. Appointments and promotions in all sectors of public activities must be based on qualification and merit. Dismissals should be based solely on objective criteria and must not be applied to "clean" the public service from politically unwanted persons.

17. Accountability is essential and holding a public office at any level requires that the jobholder strictly respects the law and acts within his/her mandate and in the public interest. The group heard credible complaints that individual jobholders, sometimes in key positions, did not behave in line with these requirements. Such behaviour, especially at the top, gives a bad example and also spreads a climate of insecurity and frustration.

18. Fighting impunity requires the establishment of accountability. Wrongdoings and irregularities need to be followed up in with appropriate remedial action and sanctions.

19. While the group has to a large extent focused its work on the functioning of the judiciary, many of the principles underlying its findings and recommendations are applicable to other branches of the public administration.

### ***Democratic institutions and oversight bodies***

20. The election of the new parliament is the moment for a new start. The parliament should fully assume its responsibilities as the key democratic institution of the country. As already stated in the 2015 report "a constructive political dialogue between the government and the opposition beyond all political differences is indispensable for the proper functioning of a parliamentary democracy". If there is – as the group has been reassured – a common understanding across party boundaries that important reforms should be carried out, there should also be a readiness to engage responsibly in the political debate on those reforms with the aim of finding solutions, wherever possible on the basis of a broad consensus.

21. Parliament, and in particular its Committee for appointments and elections, has wide powers with regard to the appointment to key positions in the country. This includes in particular bodies in charge of overseeing state actions in an independent manner as well as key functions in the judiciary. In carrying out these tasks, the parliament has to set an example of objectivity and show responsibility to uphold the interest of the country, beyond party interests. Nominees to such posts should have proven relevant expertise and not be chosen purely on political grounds. Prolonged vacancies in key positions also need to be prevented by planning ahead.

### ***Assuming responsibility and taking advice***

22. All institutions in the country have a duty to assume their respective responsibilities and to carry out their tasks. The European Union, the international community as well as individual countries and institutions stand ready to provide advice, as they have done in the past. However, at the end, the responsibility for addressing shortcomings and for making progress lies with the institutions of the country. Should the government consider given advice unclear or should it have doubts on the feasibility of recommended actions, it should seek clarification proactively and without delay.

23. The group's own recommendations in this second report follow the same approach as its recommendations in the first report. They are addressed to various bodies and institutions in the country as well as to all political actors, both in the government and in the opposition. They are not exhaustive. They are not intended to substitute for recommendations made by other bodies previously. They address systemic shortcomings and should enable the country to improve the overall situation.

### ***Promoting European values - the way forward***

24. The group recalls what it has already underlined in its 2015 report. Democracy, equality and respect for human rights and for the rule of law are among the fundamental values on which the European Union is founded. Strictly respecting these values is therefore essential for a candidate country. Meeting essential standards of democratic governance, ensuring transparency in public affairs, guaranteeing the freedom of media as well as fighting corruption need therefore to be ensured as overriding objectives in each of the areas the group has focused on. Obviously, they are equally important in other areas of public affairs.

25. All segments of the society – including all parliamentary groups, public institutions, the media and civil society – have a role to play in addressing the issues raised in this report and helping to get the country's reform process back on the right track.

## **I. Judiciary**

### ***(a) Politicisation of judiciary***

26. Only one of the twelve recommendations from 2015 in the area of judiciary and prosecution has been implemented. That was the recommendation to maintain the Academy for Judges and Prosecutors as the sole point of entry to the judiciary, which necessitated no more than continuance of the status quo.

27. Many of the practices denounced in the 2015 report have continued. The control and misuse of the judicial system by a small number of judges in powerful positions to serve and promote political interests has not diminished in any significant respect. These judges have continued to bring pressure on their more junior colleagues through their control over the

systems of appointment, evaluation, promotion, discipline, and dismissal which have been used to reward the compliant and punish those who do not conform. This has been described as a type of "state capture" but is perhaps more precisely characterised as the capture of the judiciary and prosecution by the executive power.

28. It remains to be seen how the situation will develop following the formation of the new government. Although there is a need to reform certain procedures, notably the systems for disciplining and evaluating judges, the problem is not generated primarily by bad laws and legal structures. The laws and structures in place are such that the judicial system could function properly if all the judges acted properly. On a more positive note, despite the misbehaviour of a minority, many of the judges do their best to administer justice honestly and fairly.

29. While the new authorities would be entitled and are indeed duty-bound to take action against those who are proven to have abused their position, a general vetting of all judges is not recommended as judicial misbehaviour is by no means universal. This minority of politically-influenced judges should be subject to effective professional and ethical rules and, where evidence is available to prove criminal responsibility, should be made criminally liable for their misconduct. Any judges dismissed for proven misbehaviour should be barred from practising law at any level.

30. There is a danger that some in the new government may be tempted, under the excuse of acting against wrongdoers, to replace judges who have misbehaved with others willing to act for them in a similarly unacceptable manner. Suggestions that the judiciary needs to be "cleaned" are therefore unhelpful. It is essential that the new authorities stand back, respect the separation of powers and allow the judiciary to function as an independent arm of government administering justice fairly and impartially and operating fair and effective systems of judicial self-government unencumbered by any outside interference.

31. One particular aspect of the organisation of the judiciary, which was manipulated to facilitate abuse and which was the subject of recommendations in the 2015 Report, is the system of assigning cases to judges which is supposed to be done in a random manner using an automated system (ACCMIS). However, there are credible indications that this system has frequently been interfered with in order to ensure the allocation of sensitive files to particular judges. This can be done in a number of different ways. Firstly, a judge who is not trusted can be transferred to a different section in a court (for example, transferred from criminal to civil cases), as appears to have occurred in the Skopje Basic Court I (Criminal Court). Secondly, cases are not assigned to judges who are on leave or otherwise unavailable. It was indicated that some judges have arranged to be unavailable when sensitive cases are allocated because they seek to avoid pressure being brought to bear on them. Thirdly, differences in the treatment of cases brought under the old pre-2013 Law on Criminal Procedure and the new 2013 Law may have been used to facilitate some manipulations of the system. Fourthly, the system can be overridden by persons having access to it such as presidents of courts. The group was informed that this has happened.

32. While the log of the system would keep a record of any such interference, no proper audit of the system has ever been carried out. Neither the Judicial Council nor the Supreme Court, each of which would have power to order such an audit, has ever done so. It would appear to be possible even now to carry out a full audit of the use of the system to ascertain whether, and if so, when and at whose instigation the system of random allocation has been departed from. The objective of such an audit should be to establish proof, if any, of wrongdoings and such an audit should be carried out without political influence, if necessary with the input of an international institution or persons.

33. A weakness in the existing system is that a number of different actors, including the Judicial Council, the Supreme Court, the Presidents of courts, and the Ministry of Justice have a shared responsibility for and access to the system, as well as for its audit (except for the presidents of courts). It is recommended that a single person be granted access to alter the assignment of cases or any system of assigning cases, that the system keep a log of the reason for every such intervention, and that such interventions and their reasoning be subject to a right of public access.

34. A number of judges informed the group about direct interference through instructions either from senior members of the judiciary or even directly from political elements, allegedly accompanied by threats of serious consequences. A number of judges who had been and in some cases still were the subject of disciplinary proceedings believed that those proceedings had been motivated by their refusal to conform to such instructions. Some judges who had failed to act as demanded claimed they were subsequently transferred to a different type of work and either given very little work to do or else overloaded with cases such that their caseload became impossible to process, thus leading to disciplinary proceedings on grounds of poor performance. The fact that similar experiences were recounted by different persons gives credence to these reports. The existence of such practices would help to explain the very high rate of dismissals from the judiciary in the country over the last decade.

35. In its 2015 report, the group recommended that particular attention should be paid to the proper functioning, sufficient staffing and independence of administrative courts, bearing in mind their specific mandate of controlling public administration and, in particular, the important role in reviewing decisions by the State Election Commission. Unfortunately, this has not been addressed and the administrative courts remain underfunded, inadequately staffed, left to work in poor conditions and without adequate training.

36. The process of drawing up a judicial strategy to be implemented over a period of years has been initiated. This will require wide consultation with stakeholders, including the Association of Judges as the only representative body for judges. While this initiative is welcome, where clear proposals for urgent reform have already been developed this process should not delay their implementation. The proposals identified by GRECO and the Venice Commission and in the 2015 report of this group need to be implemented without any further delay as do the measures necessary to comply with judgments of the European Court of Human Rights.

#### ***(b) Judicial Council***

37. The Judicial Council is a key institution exercising the power to affect in a profound way, and even to terminate, the career of every judge in the country. Its functions include the appointment, evaluation, promotion, discipline and dismissal of all judges. It is defined in the Constitution as "an independent and autonomous institution of the judiciary", the purpose of which is "to ensure and guarantee the independence and autonomy of the judiciary". In reality, the manner in which the Council evaluates and disciplines judges serves to undermine rather than to guarantee their independence and autonomy.

38. The Council consists of the President of the Supreme Court, the Minister of Justice (both without voting rights), eight judges elected by their peers, and five members elected by the parliament who need not be judges. At present, one of these five is in fact a judge. Of this latter component two, who must be jurists, are nominated by the President. The Venice Commission has criticised the preponderance of judges on the Council as creating a risk of

corporatism.<sup>3</sup> It recommended that appointments to the Council should be depoliticised and that the judicial component could be reduced in number while remaining a substantial element or a majority. It also recommended that the "lay" members should not include judges.<sup>4</sup> Neither this recommendation nor the one stipulating that in relation to the appointment of lay members a clear test should be developed as to what is meant by "a distinguished lawyer", were implemented.

39. In 2015, the group recommended that the Judicial Council should exercise its duties without any political interference, either direct or, equally importantly, indirect, and that it should be more proactive in defending judges against interference and attack affecting their independence, including by strengthening the communications capacities of the Judicial Council and the courts. The recommendation has not been implemented.

40. Members of the Council serve in a full-time capacity. There are many critics of this arrangement. One argument against this arrangement is that members lose touch with their judicial colleagues and the profession.<sup>5</sup>

41. While the composition and the functions of the Judicial Council are not out of line with the practice in many other states, it should be borne in mind that there is no generally recognised model for such institutions.<sup>6</sup> There are a number of issues which frequently arise in very small jurisdictions such as whether the expense of a full-time Council is necessary or justifiable, and how to avoid the risk of nepotism and cronyism in a society where the relevant actors all know one another. For example, it might be desirable that the suitability of appointments be checked by independent persons rather than made directly by persons who know the candidates. It is also necessary to ensure that conflict of interest rules are robust. It is neither practical nor appropriate for such issues to be addressed definitively in this report, but the matter should be examined in detail in the context of the forthcoming justice strategy.

42. The Judicial Council's primary role is that of ensuring and guaranteeing the independence and the autonomy of the judiciary. There are a number of steps which the Council failed to take in this regard. One of these should have been the proper supervision of the system of random assignment of cases. The Council failed absolutely in this regard.

43. Another duty which the Council not merely neglected but actively disregarded was the duty to ensure that the judicial system of the country was in compliance with the standards of the European Convention on Human Rights. In its 2015 report, the group recommended that judgments and decisions of the European Court of Human Rights (ECtHR) should be strictly and speedily implemented and a list of practical and effective measures should be designed in each case or category of cases. Although the Council was assiduous in its pursuit and

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<sup>3</sup> Opinion of the European Commission for Democracy through Law on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, CDL-AD(2014)026, 13 October 2014, at paragraph 76.

<sup>4</sup> Opinion of the European Commission for Democracy through Law on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, CDL-AD(2014)026, 13 October 2014.

<sup>5</sup> As the Venice Commission noted in its opinion "although the "permanent" status of members of the Judicial Council may be seen as an additional guarantee of their independence, it may also have the opposite effect: "judicial" members of the Judicial Council will not anymore feel themselves as a part of the judiciary and will act more in line with the more political wing of the Council represented by the lay members." (Opinion of the European Commission for Democracy through Law on the laws on the disciplinary liability and evaluation of judges of the former Yugoslav Republic of Macedonia, CDL-AD(2015)042, 21 December 2015 paragraph 66, footnote 43.)

<sup>6</sup> See the Report of the European Commission for Democracy through Law on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004 at paragraphs 28-32).

punishment of judges who missed deadlines, ostensibly on the grounds that a delay could constitute a breach of the human rights of litigants, when in a series of judgments given on 7 January 2016, the European Court of Human Rights held that the practices of the Council in regard to its own disciplinary proceedings had themselves infringed human rights, the Council took no steps to remedy that breach so far as concerned the position of the individual applicants or to restore the applicants to the position they would have held but for the breach. The applicants remain dismissed from their positions and nothing has been done either to rescind their dismissals or to re-commence disciplinary proceedings on a proper basis, assuming such a procedure would now be possible. This failure amounts to a serious dereliction of duty on the part of the Council and its members.<sup>7</sup> The procedures in question which allowed members of the Judicial Council both to initiate a complaint and vote on it, had previously been criticised in the 2013 GRECO report as well as by the Venice Commission.

***(c) Appointment, Evaluation and promotion***

44. The recommendation to maintain the Academy for Judges and Prosecutors as the sole point of entry to the Judiciary has been respected. It is important that the independent role of the Academy be maintained and respected and that the implementation of the recommendation continues. Appointment of judges continues to be performed by the Judicial Council following training of candidates in the Academy. The Judicial Council votes on the appointment of each individual candidate. The Judicial Council informed the group that in practice it appoints all the persons who successfully complete the course of study of the Academy. However, legally, it could choose to reject the candidacy of a graduate of the Academy without having to justify its decision. It is difficult to see the purpose of retaining such a power with the Council, especially in the absence of criteria for the exercise of this function. Such a veto power, if it is to be retained at all, should be exercised only for a reason specified in the law, which should be of a similar nature to a reason which would justify dismissal of a serving judge. Any decision to veto the appointment of a candidate who has successfully completed the course of study and final exam of the Academy should be justified and subject to appeal to a court of law.

45. The Judicial Council also decides on the particular judicial office to be filled by successful candidates. Beyond the first three graduates in the rankings, a certain discretion which lacks transparent criteria can be exercised by the Judicial Council in appointing judges to the vacancies they apply for. Instead graduates of the Academy should be given the choice of where they are appointed based on the order of their graduation ranking.

46. Entry to the judiciary and prosecution and subsequent appointments and promotions must be based on high standards and merit and not on political considerations.

47. The Venice Commission's opinion on the disciplinary liability and evaluation of judges<sup>8</sup> concluded that "the evaluation system, as presented in the Law on Courts, puts too much

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<sup>7</sup> In the case of *Gerovska Popcevska v the former Yugoslav Republic of Macedonia* (Application no 48783/07) and in four other cases in which judgment was given on the same day, the ECtHR held that a system in which some members of the Judicial Council who had carried out preliminary enquiries and brought proceedings against judges subsequently also took part in the decisions to remove them from office prompted objectively justified doubts as to the impartiality of the Judicial Council and amounted to a violation of Article 6(1) of the Convention (Judgement of 7 January 2016; see also *Jakovski and Trifunovski v the former Yugoslav Republic of Macedonia* and *Poposki and Duma v the former Yugoslav Republic of Macedonia*. See also *Mitrinovski v the former Yugoslav Republic of Macedonia*, no. 6899/12).

<sup>8</sup> Opinion of the European Commission for Democracy through Law on the laws on the disciplinary liability and evaluation of judges of the former Yugoslav Republic of Macedonia, CDL-AD(2015)042, 21 December 2015



emphasis on the quantitative criteria and disregards the qualitative aspect of the judicial decision-making".<sup>9</sup> It was damning in its criticism of the system of evaluation in use to assess the judiciary, as well as with the criteria used to evaluate the work of court presidents and candidates for those offices which it described as "very dangerous" and "detrimental to the quality of the judicial decision-making."<sup>10</sup> The Commission's conclusion was that the provisions in question "may have a negative impact on the judicial independence and the quality of their work and should be subjected to a profound revision."<sup>11</sup>

48. No steps have been taken to implement the recommendations of the Venice Commission. The observations of the group during its visit to Skopje support the conclusion that the Venice Commission's fears were prescient and have been fully realised by what has happened since.

49. Promotions in the judiciary are effectively made through a process of the Judicial Council filling more senior vacancies as they arise. There is no procedure for the establishment of merit-based criteria or for objective assessment of the quality of candidates. Effectively, the Judicial Council is free to choose whichever candidate it pleases for any vacancy and does not have to justify its choice which is not open to review. The 2015 recommendation about a performance management system based on quantitative and qualitative performance standards has also not been addressed.

#### *d) Discipline and Dismissal*

50. Judges should not be disciplined because of differences in legal interpretation of the law or judicial mistakes, as to discipline judges in such cases undermines the independence of individual judges. The Venice Commission in its 2015 opinion on the disciplinary system in the country was highly critical. It concluded that disciplinary sanctions should not interfere with the individual judges' independence in decision-making. Only deliberate abuse of judicial power or repeated and gross negligence should give rise to a disciplinary violation. Underperformance and disciplinary violations are two different things and should not be confused.<sup>12</sup> The system should allow for less drastic sanctions for lesser violations, and dismissal should be ordered only in exceptionally serious cases.

51. The Venice Commission was also highly critical of the Council for Determination of Facts whose creation had not addressed the real problems. Its functions should be transferred back to the Judicial Council provided that the Council's procedures were changed to ensure that an accuser could not also act as judge in the case. It also criticised the use of special ad hoc Appeal Councils which are fundamentally objectionable because the appeal body can be established for the individual case. Appeals should lie to a judicial body predetermined by law.

52. Apart from the failure of the Judicial Council to remedy the breach of the ECHR, discussed above, the findings against the country before the European Court of Human

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<sup>9</sup> Ibid, at paragraph 108, the Commission's Opinion continued "Thus, Article 102 is entitled "qualitative criteria"; however, in essence it refers to the number of missed procedural dead-lines and the number of cases overturned on appeal. The general impression that this part of the Law on Courts gives is that the main measure of professionalism of a Macedonian judge is his or her productivity and punctuality." Quoting an earlier Venice Commission opinion on the evaluation system in Kazakhstan the Commission concluded "it is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. [...] Quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation."

<sup>10</sup> Ibid at paragraph 108.

<sup>11</sup> Ibid at paragraph 109.

<sup>12</sup> Ibid at paragraph 113.

Rights<sup>13</sup> in early 2016 should have given urgency to the need for a thorough and general reform of the law in regard to discipline and dismissal.

53. It is recommended that the law relating to discipline and dismissal be amended as a matter of urgency along the lines suggested by the Venice Commission and that the offer of the Venice Commission to assist in this process be accepted. The amendments should include the abolition of the Council for Determination of Facts. The system of discipline and dismissal should exist only as a means to deal with judicial misbehaviour and not as a means to exercise control over the content of judicial decision-making.

54. The importance of the role of the Supreme Court should be emphasised in providing appropriate safeguards for clarity and foreseeability through greater uniformity of practice, including with regard to ethical rules developed by the Association of Judges. There is further no transparent and foreseeable mechanism for settling the panel that decides cases brought by the Special Public Prosecutor.

## **Recommendations**

*Implementation of all recommendations, including the outstanding recommendations from 2015, is necessary to address systemic issues with regard to the judiciary.*

### **Judicial Council**

- The judicial reform should include an in-depth review of the role and accountability of the Judicial Council, including issues relating to its composition, introducing a non-renewable mandate, ensuring procedures to avoid the risks from nepotism and cronyism, ensuring objective, merit-based decisions, how to avoid conflicts of interest, and whether the Council should remain a full time body.
- The Judicial Council should be required to appoint any candidate who is a graduate of the Academy except for reasons which must be specified in legislation and justified in the decision itself. Graduates of the Academy should be given their choice of available vacancies in the order of merit of the qualification examination except where a reason specified in the legislation justifies a departure from this principle.
- Judges should be excluded from appointment to the Judicial Council as part of the quota which is not reserved for judges and consideration should be given to reducing the judicial component as suggested by the Venice Commission. This could be achieved by including some representatives of civil society. There should be greater transparency concerning the election of the judicial component which should be organised and counted by a person or persons outside the Judicial Council.
- The part of the Judicial Council not reserved for judges should be elected in a non-politicised manner, for example, by a direct vote of the lawyers or the law faculties or using a qualified majority of the parliament with an anti-deadlock mechanism if the threshold is not reached. The advice of the Venice Commission in this regard could be sought.

### **Case assignment**

- There should be a full independent audit of the operation of the system of random allocation of cases to determine when and by whom this system was not respected.

### **Appointment, evaluation, promotion, discipline, dismissal and oversight**

<sup>13</sup> Mitrinovski v. the former Yugoslav Republic of Macedonia, no. 6899/12

- The existing system of evaluation needs to be replaced by a performance management system with a focus on enhancing the quality of justice rather than focusing exclusively on quantitative measurements, many of which are of doubtful value and open to manipulation. Individual sanctions should be proportional and any dismissal on the basis of poor performance should be a measure of last resort.
- While there is no case for a general vetting of judges in the country, where there is evidence of serious misbehaviour, in particular at senior levels, appropriate steps should be taken in accordance with the principles of fair trial.
- The Judicial Council should revise its disciplinary procedures as a matter of particular urgency to take account of all relevant findings of the European Court of Human Rights. The Court's judgments must be given effect forthwith to ensure that all persons affected by the Court's breaches of the law are restored to their position and rights they would have if this had not happened. The Venice Commission's recommendations in regard to discipline should be given effect and the Council for Determination of Facts should be abolished. There should be an appeal to a court of law against disciplinary findings and the current arrangements for an ad hoc Appeal Council should be abolished. The disciplinary system should be confined to cases of judicial misbehaviour and gross negligence and should not be confused with issues relating to performance management. Ethical rules (positive principles of conduct) and disciplinary rules should be clearly delimited in law and practice.
- An internal inspection answerable to the Judicial Council should be set up to focus on prevention and risk management, rather than reprimand.

## **II. Law enforcement and Prosecution**

### ***(a) Reform of interception of communications***

55. 2015 witnessed the release of illegal recordings of communications of inter alia government Ministers, senior officials, members of parliament, the judiciary, opposition, civil service and the media. These recordings were performed illegally, outside of court-sanctioned operations from inside the national intelligence service's facilities – the Bureau for Security and Counterintelligence (UBK). These revelations and the underlying systemic shortcomings which they exposed or confirmed triggered the first report of the Group of Senior Rule of Law Experts in 2015. The assessment was one of a very serious malfunction of the oversight mechanism over the Bureau for Security and Counterintelligence (UBK) and a concentration of power in this institution.

56. Two years after this first assessment, the situation remains largely unchanged. The urgent measures to prevent illegal wiretapping have not been addressed. The UBK still holds the monopoly over interception of communications for both security purposes (intelligence) and criminal investigations, which represents a clear interference with the autonomy of police bodies. The UBK still has direct access to the technical equipment allowing mirroring of the communication signal. There are indications that illegal interception continued after the group's recommendations were issued. The necessary safeguards, oversight mechanisms and internal control measures have not been put in place to prevent any risk of illegal wiretapping. As the 2015 report stated, the scandal "demonstrated a disrespect for professional ethics, basic principles of risk management and a lack of knowledge of the sensitivity of the intelligence task at hand within the UBK." There are indications that concerns expressed then about the lack of respect for basic fundamental rights and data protection rules still stand.

57. The country has taken initial steps towards a longer term reform of the intelligence services. In 2016, following the crisis and the strong criticism of the role of UBK in the

experts' report, the authorities took the political decision to launch the so called "Intelligentia Project", for which they received organisational and methodological support from the Geneva Centre for the Democratic Control of Armed Forces (DCAF), with the aim of proposing a comprehensive approach to reform the intelligence services in the country. This covered the models for interception of and access to interception equipment but also the repositioning of the Bureau for Security and Counterintelligence (UBK). This project looks at different stakeholders dealing with security or intelligence, namely the Bureau for Security and Counterintelligence, the Intelligence Agency, the Military Security and Intelligence Service, the Bureau for Public Safety (police), the Customs Office and the Financial Police Office as well as several oversight bodies including parliamentary committees and the Directorate for Personal Data Protection. Aspects linked to these institutions and the wider reform are not within the scope of this report. This project included the setting up of a Core Project Management Team and four Working Groups on technical and material resources, legislative aspects, working processes and on human and financial resources. They completed a gap-analysis which identified four different models for management, implementation and oversight of interceptions. The team also indicated which legislative instruments may need to be amended (mostly needing a two-thirds majority vote).

58. In 2015, in view of the urgency, the senior experts had recommended that "UBK should have no direct access to the technical equipment allowing mirroring of the communication signal. The proprietary switches should be moved to the premises of the telecommunication providers." Considering the new context in 2017 and the process underway to reform intelligence services, including UBK, the group reiterates its recommendation that the direct access to technical equipment by UBK should be removed.

59. The Intelligentia Project proposed different models for achieving this as part of the wider reform. The launch of this reform process requires the prior decision of the government regarding the model for interceptions. This decision will need to be taken without undue delay to ensure a modern system with strong safeguards can rapidly be put in place to remove any possibility for illegal wiretapping to take place. It appears that only one of the models foresees clearly that proprietary switches are to be moved to the premises of the telecommunication providers. According to latest information, it appears that a proposal might be submitted to the government for the switches to be moved from the UBK to an Operational Technical Centre. This centre is to be established ex-novo as suggested in three of the four models. This would only be a valid alternative if the proposed centre can remain strictly technical and free from external influence and pressure. Whilst this model has proved to be successful in other countries, a key issue is whether such a centre could withstand political influence and pressure in a way that established institutions in the country have been unable to withstand. Reform, therefore, of the intelligence services cannot only be about divesting the UBK of its interception function but must address the need to significantly improve internal and external control standards throughout the administration and across all national bodies handling intelligence data, notably the UBK, to the judiciary and to the police.

60. The 2015 report highlighted the poor conduct of UBK staff, noting disrespect for professional ethics, risk management, fundamental rights and data protection rules. Reform of this body will require enforcement of effective internal controls. It will also require a strong drive from a professional and unbiased management team to change the mind-set and culture of the institution for it to become a fully professional body performing its function of collecting information without exceeding its mandate.

### ***(b) Oversight of interception***

61. The 2015 report highlighted crucial deficiencies in the parliamentary oversight over the intelligence system and over the application of interception measures. The political turmoil resulted in changes in the composition of the two parliamentary oversight Committees<sup>14</sup>. This oversight system remains practically ineffective. The only recommendation from 2015 which has been implemented concerns the provision of security clearance which has been granted to all members of the Committees except one.

62. Aside from this step, the Committees still have no permanent technical experts to assist them and have not yet started collection of statistical data to crosscheck the number of court orders issued against the number of intercepts based on system logs. No annual report has been published. No inspections of telecommunication providers have been carried out. The Committees' two inspections/visits to the Bureau for Security and Counterintelligence (UBK) did not produce tangible results. Since the last assessment in 2015, the director of UBK changed four times. The new director was more open than his predecessors to allow inspections/visits and to cooperate with oversight bodies, including to the Directorate for Personal Data Protection, which is the only independent body that has taken tangible actions to correct the abuse of UBK in terms of data protection. These actions can be credited to the new director of the Directorate for Personal Data Protection appointed in 2016 following expiry of the previous Director's term.

63. As per the Pržino agreement, a parliamentary inquiry committee was created in 2015 to establish the political accountability of the wiretaps. However, it failed to complete its mandate because members of parliament either did not participate in the hearings or would not answer questions. Both this and the two other committees responsible for oversight of the security services failed to submit the required reports.

64. The new government appears committed to removing the weaknesses in the security and intelligence services highlighted by the group. However, the entire reform, including aspects related to oversight, is still at an embryonic stage. Cross-party consensus is required since the amendment of certain laws would require a qualified majority voting at the parliament.

65. Following obstruction from the previous director of UBK which impeded inspections/visits to be carried out in June and July 2016, the Directorate for Personal Data Protection succeeded in performing four inspections in August, September, October and November 2016, under the new UBK director. The outcome of these inspections led the Directorate to instruct the UBK to implement a series of measures by 10 July 2017. These included: developing technical and organisational measures to assure protection of personal data; tracking deadlines for erasing expired data; defining a mechanism to keep and store personal data; recording logs on activities of the UBK; conducting and documenting internal control at least once a year, etc..

66. The Directorate for Personal Data Protection launched a control inspection at the UBK on 24 July 2017 to check implementation of these measures. The recent actions undertaken by the Directorate for Personal Data Protection seem to be of substance and represent a significant improvement. The inspection is expected to be concluded in September.

### ***(c) Work of the Special Prosecutor's Office***

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<sup>14</sup> "Committee for supervising the work of the Directorate for Security and Counterintelligence and the Intelligence Agency" and "Committee on oversight of the implementation of the special investigation measure interception of the communication by the Ministry of Interior, the Financial Police management, customs management and the Ministry of Defence, ".

67. Criminal responsibility for the illegal wiretaps is essential and must continue to be pursued. As recommended in the 2015 report and included in the Pržino political agreement, the Special Prosecutor's Office (SPO) was established in September 2015 to pursue legal accountability for criminal offences surrounding and arising from the content of the wiretaps.

68. Despite criticisms, obstruction and non-cooperative attitude of a wide range of key institutions, including an attempt by the President to pardon everyone even potentially under investigation, the Special Prosecutor's Office is showing commitment and competence. However, limitations and obstructions to the SPO's mandate raise the question of continuity which is essential for ensuring criminal responsibility. There are different options to ensure this continuity. A strong legal basis for this is indispensable.

69. Out of 20 indictments against 133 individuals filed by the SPO, the competent court confirmed only 3 indictments against 41 persons. The lack of action by the competent court is not in line with the reasonable time requirement of Article 6 of the ECHR, notwithstanding Article 330 of the Law on Criminal Procedure (LPC) which does not set a deadline for the competent court to decide on indictment requests. For some indictments related to very sensitive political individuals (filed at the beginning of 2016) the court seems to be delaying the process for either approving or rejecting the SPO's motions for indictments.

70. The competent courts have shown reluctance to confirm requests for detention or for precautionary measures foreseen by Article 146 of the LPC requested by the SPO.

71. It is worth noting that, at this stage, nearly 2 years have passed since the SPO started its work and no one has actually been successfully convicted, creating a perception of impunity. It is essential that criminal responsibility of all alleged perpetrators is ensured, regardless of political affiliation.

72. Other than the deficiencies of the Law on Criminal Procedure in relation to the absence of deadline within which the court should decide on the indictment requested by the Prosecutor, the Law establishing the SPO presents serious legal and procedural problems which impede the continuation of the investigations entrusted to the SPO. The provision stipulated in Article 22 of the Law on SPO sets a very short time for the investigations of 18 months (including pre-investigation) from the moment the wiretapping material was handed over to the SPO until the filing of an indictment or termination of the investigative procedure. As the SPO received that interception material (package of over 20,000 illegal interceptions) in December 2015, the deadline to conclude those investigations expired in June 2017. This is a serious concern as regards continuity and justice.

73. There are different issues which have not been addressed in the "Final and Transitional Provisions" of the Law on the SPO which put continuity of legal accountability at risk. Firstly, the expired 18 month deadline to file indictments which has left more than 50% of the materials unprocessed by the SPO. Addressing this issue would require either amending Article 22 of the SPO law to align it with provisions of the Law on Criminal Procedure (extending the 18-month deadline) or under article 6, paragraph 515, allowing transfer of responsibility to the State Public Prosecutor (possibly establishing the SPO as a specialised unit within the Public Prosecutor's Office (PPO)), or to another public prosecutor, providing them with legal competence over such cases and materials. The second issue concerns the continued responsibility for the open files after the expiry of the 4 year mandate of the SPO which could be addressed through the extension of the mandate, as envisaged by the SPO law.

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<sup>15</sup> The article 6, paragraph 5 of the Law on SPO, states: "*The Public Prosecutor of the Republic of Macedonia or any other public prosecutor may not undertake investigations or prosecutions of cases within the mandate of the Public Prosecutor without latter's written consent*".

74. The time needed to analyse over 20,000 illegal interceptions was underestimated. Consequently, the set deadline of 18 months defined in Article 22 of the Law on the SPO was insufficient. Furthermore, it is in conflict with Article 301, paragraphs 2 and 316 of the Law on Criminal Procedure.

75. Given the context at the time of the establishment of the SPO, it can be questioned whether omitting the reference to the deadlines in the Law on Criminal Procedure by the legislator was entirely unintentional. It does seem that the legislator should have predicted that the SPO could not have analysed all the material received and initiated multiple investigations within such a short timeframe.

76. In terms of cooperation, there are indications that the Special Prosecutor's Office is very reluctant to request support from or to order certain investigative measures by either the Organised Crime Department or the Special Investigative Measures Department of the Police. This could be explained by uncertainty that the police is entirely free from political influence. Along the same line, the SPO is reportedly not applying the witness protection programme<sup>17</sup> to ensure protection to potential cooperative/collaborative individuals due to a lack of trust in the integrity of the process. This fear of political interference and obstruction is a reason why the SPO submitted amendments to the Law on Witness Protection. This situation prevents the SPO from proving destruction of evidence and from protecting witnesses. This seems to be one of the main reasons why the investigations conducted by the SPO are mostly concentrating on the collection of material evidence. The SPO, pursuant to Article 13, paragraph 1 of the Law on SPO and the provisions stipulated in the Law on Criminal Procedure, can count on 25 police officers, out of which 4 are from the Financial Police. They are located in the SPO premises and are banned from reporting to their police hierarchy. All 25 officers are reportedly very committed and supportive.

***(d) Capacity and independence of law enforcement and prosecution service***

77. The Basic Public Prosecutor's Office for Organised Crime and Corruption appears to have qualitative capacity to conduct investigations and prosecutions. Nevertheless, it was perceived that the latter still suffers from direct and indirect external influences when investigating high-level corruption cases. It was also implied that an indirect interference is felt when special investigative measures are implemented. The Basic Public Prosecutor's Office for Organised Crime and Corruption, is conducting several investigations to uncover corruption, against politicians, judges and prosecutors, mainly with the support of the Department for the Fight against Serious and Organised Crime of the Police. Cooperation between these specialised departments was said to be just satisfactory.

78. Following the attack of 27 April 2017 in the parliament, all individuals who entered and facilitated entry to the parliament have been identified by the police and the Public Prosecutor's Office has initiated an investigation which is at a preliminary stage.

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<sup>16</sup> As per article 301, paragraph 2 and 3, of the Law on Criminal Procedure:

- the overall duration of the investigation may last 15 months in total (*6 months extendable to another 6 and to another 3*) and it starts to count "*from the day of enactment of the order to initiate an investigation*";
- the investigation targeting organized crime provides the possibility to prolong the duration of the investigation for another 6 months. Thus, for a total of 21 months;

<sup>17</sup> The current Witness Protection Law, foresees that the decision to admit a person at the Witness Program is taken by the "*Council for Witness Protection*", which is composed by four members representing the Supreme Court, the Public Prosecutor's office, the Director of the Directorate for executing sanctions at the Ministry of Justice and the Head of Department for Witness Protection at the Ministry of Interior.

79. Upon the request of the Special Prosecutor (SPO), approximately 10 cases were transferred from the Basic Public Prosecutor’s Office for Organised Crime and Corruption to the SPO, some of them after the prescribed deadline. Transfer of some other cases was rejected by the Council of Public Prosecutor which decides upon conflicts of jurisdiction.

80. The position of head of the Basic Public Prosecutor’s Office for Organised Crime and Corruption has been vacant since February 2017. The Council of Public Prosecutors did not publish the vacancy and failed to observe the 30 day deadline for his replacement despite a written reminder addressed by the Office. The absence of objective reasons for this delay could indicate political influence in the Council of Public Prosecutors.

81. The Department for the Fight against Serious and Organised Crime of the Police is supposed to support serious investigations handled by any Prosecutor’s Office and mainly by the Basic Public Prosecutor’s Office for Organised Crime and Corruption and the Special Prosecutor's Office (SPO). The SPO lacks trust in the Department. Consequently, the Department has never been involved in any of the investigations carried out in relation to the wiretapping scandal and has itself acted quite passively in this regard.

82. Even when working with the Basic Public Prosecutor’s Office for Organised Crime and Corruption, the Department appears to work mainly in a reactive manner, awaiting instructions and it does not demonstrate interest in following the results of cases in which it implemented investigative measures. This attitude does not help the Department to understand good or bad practices nor avoid future inaccuracies.

83. A new Police Director has recently been appointed and many officers occupying key position have been replaced (17 managerial positions). It should be noted that the recruitment and promotion process for officers is not yet transparent and it appears to be strongly influenced by political party belonging. This is facilitated by a lack of strong promotion/appointment criteria and lack of binding link between positions and ranks.

**Recommendations**

*Implementation of all recommendations, including the outstanding recommendations from 2015, is necessary to address systemic issues with regard to law enforcement and prosecution.*

<p><u>Reform of interception of communications</u></p> <ul style="list-style-type: none"><li>• Robust safeguards to prevent illegal wiretapping must be put in place as a matter of urgency and technical capabilities to intercept communications need to be brought under strict independent, including judicial, control.</li><li>• In implementing the reform of the intelligence services, including the interception of communications, measures need to be included that will lead to a change in the organisational culture of intelligence services, notably UBK, to ensure respect for professional ethics, data protection rules and fundamental rights in the exercise of their duties and the mandate of these services.</li></ul> <p><u>Work of the Special Prosecutor's Office</u></p> <ul style="list-style-type: none"><li>• To ensure criminal responsibility the authorities must ensure that all criminal offences surrounding or arising from the illegal wiretaps are pursued until a final conclusion.</li></ul>
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- The authorities should guarantee continuity either by extending the timeframe for the Special Prosecutor's Office to carry out investigations and filing indictments or by ensuring that the Public Prosecutor's Office can pursue these cases. This may require legislative changes, in particular amending Article 22 of the Law on the Special Prosecutor's Office to extend the duration of the investigations and chapter "XX Transitional and Final Provisions" of the Law on the SPO, to define actions after the 4 years' mandate and on the other cases that may need to be opened after the completion of the analysis of the remaining wiretapping materials and which fall outside the 18 month deadline.
- The authorities, in order to observe the reasonable time requirement of Article 6 of the ECHR, should consider amending the Article 330, paragraph 3 of the Law on Criminal Procedure so as to set a deadline within which courts must take decisions on motions for indictment.
- The court competent for reviewing the indictments should speed up the procedure in order to either confirm or reject the indictment motions filed by the SPO. The same procedure should promptly apply to requests for detention and precautionary measures.

#### Capacity, independence and accountability of law enforcement and prosecution service

- The prosecutorial system in the country needs to act and be allowed to act in an independent and non-politicised manner. This includes a complete review of the institutional and regulatory framework and capacities.
- The Ministry of Interior should apply clear and transparent criteria for recruitment, promotion and reassignments and establish coherence between positions and ranks.
- The process of de-politicisation and building autonomy of the police should be strengthened in order to ensure that the Department for the Fight against Serious and Organised Crime, just like all other police departments, acts in accordance with international standards and free from undue political interference.
- The Department for the Fight against Serious and Organised Crime of the Police should switch from a reactive to a proactive approach and should follow the outcome of processes they have initiated. A focus on managing risks and threats and learning from mistakes would contribute to improving their performance and avoiding errors at both the policy-setting and operational levels.
- The application of the witness protection legislation should be subject to clear and foreseeable practice by the executive bodies, supported by the judiciary. Detailed rules and practice guides should be developed to itemise the statute.

### **III. Independent bodies (regulatory, supervisory, oversight bodies)**

84. A number of independent oversight bodies have been established by law such as the Office of the Ombudsman, the Directorate for Personal Data Protection, the State Commission for the Prevention of Corruption, the Commission for Prevention of and Protection from Discrimination, the Commission for Access to Public Information and the Council of the Media Agency. In 2015, a number of the recommendations focused on the Ombudsman and the Directorate for Personal Data Protection, and consequently the group has assessed the progress in relation to these recommendations. However, some of the experiences of the Ombudsman and the Directorate for Personal Data Protection may also illustrate the challenges that impact the work of these bodies, in general.

The independent bodies face different challenges that affect their functioning and the

fulfilment of their respective roles.

***(a) The role of Parliamentary Committee for Appointments and Elections***

85. In 2016, a Transparency International Integrity System report pointed out the non-transparent election of members of the State Commission for the Prevention of Corruption. The report highlighted that according to the Rules of the Procedure of the Assembly, "the Committee on Elections and Appointments should review and discuss the list of candidates and their biographies. However, this rarely happens." The group has further observed that, according to reports and interviews, almost all independent bodies have in recent years been associated with politicised appointments, non-transparent processes or failure to elect relevant members based on merits and qualifications. The perception is that the appointments are based on a wish to control the independent bodies politically or to reward loyalty to the government.

86. This perception – justifiable or not – must be addressed as it undermines the credibility of the independent bodies. It is the duty of the Committee on Elections and Appointments to prevent public distrust in the appointments, but the Committee appears to have failed and its general approach has instead so far just contributed to the general perception. The group was, however, informed that the Committee wishes to be more proactive in providing information to the public about appointment procedures in order to become more accountable. The Committee also informed that it wants to assess the appointment procedures in the various laws.

***(b) Appointment or dismissal of members of independent bodies***

87. The general mistrust between the political fractions and society at large leads to questioning over decisions to appoint or initiate dismissal procedures of members of the independent bodies.

88. Legal grounds for dismissal of members of independent bodies are often vague. For instance, according to the wording of article 22 of the Law on Prevention and Protection against Discrimination, a member of the Commission could be dismissed if the member is found to have performed his/her functions unprofessionally, tendentiously and sloppily.

89. With the amendments to the Law on the Office of the Ombudsman, the dismissal of the Ombudsman and his deputies is restricted to only two occasions and they cannot be dismissed even if their acts or omissions seriously undermine the confidence placed in them.

90. Dismissal procedures, just as appointments should be transparent and open, in full compliance with substantive and procedural requirements. The grounds for dismissal must be foreseeable and confined solely to actions adversely impacting on the member's capacity to fulfil his/her mandate. Dismissals should not be discretionary. The procedural rights of the member in question must be safeguarded.

***(c) Cooperation of state agencies with independent bodies***

91. The Ombudsman and other independent bodies report that the public authorities still do not always cooperate with them.

92. The Law on the Ombudsman was amended in September 2016 with the objective to align it with the Paris Principles. This introduced sanctions (Article 34b) against non-compliant authorities and inter alia empowered the Ombudsman to raise an initiative for commencing disciplinary or misdemeanour proceedings against the responsible person.

93. The Law on Prevention and Protection against Discrimination also includes sanctions for non-cooperation with the Commission on Anti-Discrimination. However, the relevant law does not seem to grant the Commission the power to initiate misdemeanour proceedings.

94. Relevant legislation needs to be reviewed to ensure that obstruction to the work of the independent bodies leads to sanctions. The government should, without any hesitation, instruct all its agencies to cooperate with the independent bodies. Any unjustifiable failure to cooperate should be regarded as obstruction. The new government has already emphasised that cooperation with independent bodies is a priority.

***(d) Compliance with recommendations of the independent bodies***

95. The group's recommendation to strengthen the Ombudsman's powers was addressed. The Law now empowers the Ombudsman to submit a request to the Standing Committee of Inquiry for Protection of Freedoms and Rights of Citizens and act as *amicus curiae* of the court. However, if the Standing Committee of Inquiry for Protection of Freedoms and Rights of Citizens is intended to play its role effectively, it needs to have expertise on human rights allowing it to understand the role of the Ombudsman. In case of non-compliance with its recommendations, the Ombudsman can raise the issue with the government and parliament.

96. Although the group still believes that consideration should be given to strengthening the Ombudsman's powers, notably to initiate a case before the courts against authorities that do not comply with his recommendations, it acknowledges that the amendments to the law on the Office of the Ombudsman have strengthened its powers.

97. Other independent bodies, such as the Directorate for Personal Data Protection, have indicated that the ministries or other agencies do not react to their recommendations. The Commission on Free Access to Public Information has indicated that sanctions for non-compliance are envisaged in the law but it has no clear competence to initiate judicial proceedings in case of non-compliance.

98. The relationship between parliament and independent bodies is fundamental for their ability to perform and to ensure that their recommendations and opinions are addressed. The 2012 Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments may work as guiding principles for such a relationship.

***(e) Adequate and timely resources for the independent bodies***

99. The lack of adequate human and financial resources is a challenge for all independent regulatory bodies in view of their broad mandates. An illustration of this is the Ombudsman's inability to operate as a National Prevention Mechanism under the Optional Protocol to the Convention against Torture, due to lack of adequate resources. Without adequate resources reflecting their mandate, including control of their own staff (e.g. having their own secretariat), their ability to perform is undermined.

100. Another factor which hinders the efficient staffing and contributes to a poor public perception of the bodies is the bureaucratic processes to fill in vacancies or promote staff. Independent bodies lack control over recruitment procedures since they require the Ministry for Finance's approval before being able to advertise posts and the Agency for Administration manages the recruitment process. This is not *per se* inappropriate, provided that the independent bodies are subject to uniform rules or regulations ensuring accountability for use of public funds. It is however essential that such procedures do not compromise their ability to perform independently and effectively. Some sources confirm that the procedures are inefficient and there is a need to review them and address potential shortcomings, having in

mind that staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism and the recruitment of staff with the required skills.

***(f) The Directorate for Personal Data Protection***

101. The Directorate for Personal Data Protection's 2016 annual report lists a number of activities carried out to implement the 2015 recommendations. These included inspections/visits at telecommunication operators and at the Bureau for Security and Counterintelligence (UBK) in autumn 2016 resulting in a list of measures requiring implementation by UBK (*see section II*). These steps were made possible by a decrease in the external and internal political pressure exerted upon the Directorate and its staff.

102. The Directorate is receiving an increasing number of complaints, which may also indicate a growing trust.

103. The Directorate still believes however, that there are inexplicable attempts to ignore its recommendations on compliance with the data protection legislation. During the general elections in 2016, the Directorate observed an inconsistency between the Electoral Code and the Data Protection legislation with regard to the disclosure of personal data on the voter lists. This observation was ignored and the problem still persists.

104. The Directorate presented the Ministry of Justice with a set of proposed amendments to the Law on Data Protection with the aim of improving its independence and performance in March 2016 but these have not yet been followed up.

***(g) State Commission for the Prevention of Corruption and related institutions***

105. While the country's anti-corruption efforts were not at the core of the Group's analysis in 2015, ineffectiveness in combatting and prevention of corruption was an underlying theme of the earlier recommendations.

106. The State Commission for the Prevention of Corruption (SCPC) is vested with the authority to undertake activities in preventing corruption as well as with administrative investigation powers and the ability to refer suspicious cases to law enforcement agencies.

107. To date, the measures to fight corruption have had no pronounced impact, as attested by the country's persistently low standing in the Transparency International Corruption Perception and other relevant indices. The track record of investigations, prosecutions and convictions is strong on offences committed by low-level officials but remains weak on high-level corruption. Referrals by the State Commission for the Prevention of Corruption to the prosecution to initiate criminal proceedings usually result in protracted proceedings or minor penalties. Bribery offences still account for a minor number of overall convictions. Penalties intended to prevent corruption are not used to their full, deterrent effect. It is also not uncommon for the courts to downgrade corruption offences to misdemeanours.

108. The role of State Commission for the Prevention of Corruption is particularly relevant both in the anti-corruption policy development and implementation. The current State Programme for Repression of Corruption and Prevention and reduction of Conflict of Interest 2016-2019, which the State Commission developed together with NGOs, is in place. However, this and previous programmes fail to address the proper use of criminal justice when combating corruption. A meaningful, results-oriented monitoring framework of these policies is missing and implementation costs and resources are not properly specified. The SCPC appears to justify this ineffectiveness by a lack of "operational powers" and limited

resources. However, the fact remains that the SCPC has the mandate to conduct "administrative investigations" into asset and income declarations, referring suspicious cases to law enforcement. The 4,500 asset and income declarations filed by public officials every year, cannot be said to put an exorbitant strain on the State Commission for the Prevention of Corruption's resources. The Commission also shows no willingness to be more proactive in employing risk management tools, arguing that establishing financial discrepancies is part of the Ministry of Finance's mandate. As the SCPC does not follow the conclusions of even their own investigations, it cannot draw lessons on what measures have worked or not in practice in the anti-corruption policies designed by the Commission.

109. This report does not intend to provide an exhaustive assessment of the situation with regard to corruption. However, beyond shortcomings identified in the work of the State Commission for the Prevention of Corruption, there are concerns that weaknesses in the fight against corruption also affect other areas examined by this report, notably the judiciary and law enforcement.

110. With regard to inter-agency cooperation regarding serious offences, difficulties have been noted in applying special investigative measures against the allegedly corrupt officials, especially when these are members of the judiciary and law enforcement. Furthermore, while the country has made notable steps in transposing certain European rules on dealing with proceeds of crime, the regulatory and institutional tools and capacities to recover proceeds of crime are insufficient.

111. Tackling corruption in the judiciary and law enforcement is affected by a number of factors, including deficiencies in codes of ethics the lack of stringent obligation for judges or prosecutors to report undue influence (coupled with the lack of responsibility for failure to report) and insufficient provisions against suspected illicit enrichment.

112. In sum, beyond the weaknesses in the work of the State Commission for the Prevention of Corruption, the anti-corruption system in general is marked by weak regulatory, institutional and capacity at all levels, which needs to be addressed.

## **Recommendations**

*Implementation of all recommendations, including the outstanding recommendations from 2015, is necessary to address systemic issues with regard to independent bodies.*

- The Committee on Elections and Appointments must guarantee that procedures for appointment to independent bodies are followed and that appointments are based on professional competence, experience relevant to the field and comparative merit and qualifications.
- Appointment to independent bodies must be based on transparent procedures at all stages that also promote pluralism and the involvement of civil society. General information on the procedures and other relevant information must be published at least on the website of the Committee on Elections and Appointments.

- Dismissals of members of the independent bodies must be in accordance with established and published procedures, transparent and made in strict conformity with all the substantive and procedural requirements as prescribed by law. The statutory criteria for dismissal must be clearly defined in advance and appropriately confined to only those actions which impact adversely on the capacity of the members to fulfil their mandate.
- All ministries, agencies etc. should cooperate with and follow recommendations of the independent bodies without any exception.
- Cooperation between the Standing Committee of Inquiry for Protection of Freedoms and Rights of Citizens, other parliamentary committees, and independent bodies must be strengthened, including by having access to the necessary expertise on human rights as well as on the role of independent bodies.
- All relevant decisions of the independent bodies should be made public on their websites, including the reasoning for the decision, and the media and civil society should be enabled to comment.
- The independent bodies must be granted the resources and adequate facilities that are required to implement their mandate independently and efficiently.
- Recruitment procedures for vacant positions which benefit from prior approval or the promotion of staff must be optimised and principles governing recruitment to independent bodies respected.

#### Directorate for Personal Data Protection

- All state bodies must respond and defer to the recommendations, opinions and suggestions of the Directorate for Personal Data Protection without unreasonable delay having in mind that the Directorate is specialised in data protection unlike these ministries etc.
- The Directorate for Personal Data Protection must ensure that the general public and other stakeholders are kept informed about its work, including investigations, and that any attempt to influence its work must be disclosed and reported to the relevant authorities.

#### State Commission for the Prevention of Corruption

The SCPC should be empowered to fulfil its mandate to fight corruption on the basis of, for instance:

- A results (outputs, outcomes, impact) oriented monitoring framework, with indicators of degree of achievement, should be developed for the Anti-Corruption Programme 2016-2019. Feeding from this monitoring exercise and a proper corruption risk assessment, a follow-up programme should be developed by way of wide consultative process.
- A stringent, practical, effective and deterrent sanctions regime needs to be put in place in case of failure of public officials to submit income and asset declarations, established discrepancies in real and declared income and assets, and conflict of interest. Historical data on all changes made to income and asset declarations submitted by public officials should be published.

- The SCPC should be mandated for unrestricted access to all relevant registers for the purpose of checking income and assets declarations. The interoperability of the SCPC and law enforcement agencies should be established both in term of the process (automated exchange of data, access to relevant institutional databases etc.) and the content (cross-referencing of data, exchange of risk assessment reports etc.) with regard to any information provided in income and asset declarations, with appropriate legal safeguards and due regard for data protection rules.

The SCPC should use risk management to guide its activities in checking income and asset declarations.

## **IV. Media and Civil Society**

### ***(a) Media***

113. Recommendations of the 2015 in the area of media have only to a limited extent been implemented. The media still faces many of the same challenges that have influenced the media landscape for several years now and the perception is still that the media outlets are politically affiliated or instruments of influential persons.

114. The country has been rated for the second consecutive year as "not free" in the Freedom House Freedom of the Press index 2017. The report which accompanies the index also highlights political influence from both the ruling parties and the opposition as characteristics of the media landscape. In other indices, scoring on professional journalism has also worsened.

115. The media landscape is characterised by the large number of actors with 130 radio and television channels (December 2016). Media outlets predominantly divide along political and ethnic lines. The media market is small and predominantly owned by nationals.

116. The print media is generally under economic pressure as illustrated by the closure of the Media Print Company. The reduction of print media could be seen as a sign of a market that is regulating itself as the market is not sustainable without the significant state/government support. However, the situation of the print media should be addressed as the number of national newspapers is very low (only five daily newspapers) and a potential threat to a free and pluralistic media, which is essential for any democracy.

117. The media profession is also still suffering from numerous challenges. The perception is that investigative journalism is not carried out generally, due to fear, lack of resources as well as journalistic skills. Investigative journalism is often not prioritised and also obstructed by authorities, which hampers citizens' access to reliable pluralist and objective information. It is reported to be difficult to access information and decision-makers. Both journalists and stakeholders report that journalists often are failing to perform in accordance with ethical standards, which undermines the credibility of the profession. This is further reinforced by allegations of corrupt practices of some journalists resulting from self-censorship or the lack of necessary professional skills. Furthermore, the two largest associations for journalists – the Association of Journalists of Macedonia and Macedonian Association of Journalists are not cooperating. The labour conditions for journalists are still very poor with low salaries and short term employment contracts with no job security. The OSCE/ODIHR did note in its Election observation mission final report concerns about the independence of the public broadcaster MRT, the Media Agency, intimidation and threats against journalists and failure to provide balanced and impartial coverage.

118. Although intimidations, threats and violence against journalists are reported, the authorities are claimed to not investigate, charge or convict the perpetrators, leaving an

impression of impunity. Protection of journalists against impunity should be a priority as an attack against journalists performing their work is essentially an attack against the core values of a democratic state.

119. The stated intention of the government is to create an enabling environment while leaving the media sector to manage itself without interference. This self-regulation approach is supported by media stakeholders as well. However, self-regulation does not mean an absence of regulation. There are various codes of ethics in place, including the recent 'Ethical and Professional Principles of MRT for Media Coverage of the Election Process'. The Council of Media Ethics formulated a 'Charter on Ethical Reporting during Elections, which was signed by most media outlets, but ignored in practice by many.

120. Discussions about the media landscape all too often focus on NGOs and journalists, while the private media and their owners are absent from the debates. The perception is that they have little interest in finding sustainable solutions. However, there should be room for exploring the role of the Council of Media Ethics, the Macedonian Media Association, the Economic Chamber of Macedonia, the Macedonian Chambers of Commerce and the Business Confederation of Macedonia.

121. The public broadcaster, MRT, is still in crisis and immediate action is required, in particular to address the financial deficit. The lack of financial resources jeopardises its independence as it must rely on the willingness of the government to provide ad hoc funding. MRT also faces management challenges, a lack of public trust on account of its untransparency, lack of accountability and poor public engagement.

122. Beyond these challenges, notably with regard to the media market, some positive developments can be noted. The number of defamation cases has dropped and is not considered a major concern at this time. It is likewise positive that the judiciary has reportedly an increasing understanding of the application of the standards of the European Court of Human Rights in defamation cases, even if regular exposure is still required.

123. In the Pržino agreement, the political parties decided on a number of media initiatives for the early parliamentary elections. The four political parties also committed themselves to amend the media legislation in line with the European Commission's Urgent Reform Priorities and the group's 2015 report within 6 months after the elections and that legal changes should be made to allow 24/7 Albanian language channel on MRT.

124. The new government "3-6-9" plan foresees to finally stop all "government advertisements" and instead to provide public information based on strict public interest criteria. Consequently, the government will no longer use private agencies for marketing or public campaigns. The measure also covers state-owned enterprises but not local authorities as, according to the government, it cannot instruct them.

125. The "3-6-9" plan also envisages reform of the media laws. The government's priority is to revise the law on Audio and Audio Visual Media Services. This process envisages engagements with civil society and a first consultation meeting has already been held. However, some NGOs expressed scepticism as to the genuine nature of this engagement and to some the process appeared unclear and rushed.

126. Although the intentions of the government are appreciated, it is too soon to assess if they will translate into action. However, there is a risk that the government rushes its programme through parliament, failing to respect a transparent, participatory and non-discriminatory consultation process. To be credible and sustainable, such reforms need to ensure a consultative approach is applied also beyond 3, 6 or 9 months.



127. Since the 2015 recommendations, MRT has tried to improve certain areas, notably by adopting a code of ethics and establishing a corresponding committee; carrying out an internal reorganisation; strengthening editorial freedom and training.

128. The government intends to reform the financing system of MRT by substituting the collection of the license fee by funds amounting to 0.7% of the state budget. The provision of funds through monthly instalments is not the ideal approach, as the MRT will not control the income entirely but depend on the release of the funds and the support from parliament. The government envisages a reform of the system of financing of MRT. This reform would substitute the collection of the license fee by providing funds from the state budget (indications are that these would amount to 0.7%). The reform of the financing system needs be designed in such a way as to ensure that a stable provision of funds is guaranteed in order to safeguard the independence of MRT and that it is not subject to direct or indirect undue political influence.

129. The law governing the Agency for Audio and Audio-visual Media Services is expected to be amended in 2017. The group cannot assess yet its potential impact on the future of the Agency, notably with regard to substituting the current funding through the license fee, or on the Council of the Media Agency. The group recalls that the Law on Audio and Audio-visual Media Services has in general been regarded as in accordance with international standards. Any amendments to the law must be absolutely relevant and compliant with such standards.

130. The group appreciates stated efforts by the Council of the Agency to be more pro-active and transparent about its sessions and decisions, including a YouTube transmission of its sessions. However, some interlocutors stressed the irrelevance of the present Council for the improvement of the media landscape.

## **Recommendations**

*Implementation of all recommendations, including the outstanding recommendations from 2015, is necessary to address systemic issues with regard to media.*

- The government should ensure that media reforms fit into an overall strategy, are well-planned, based on research as well as on credible, timely and transparent consultations with all stakeholders, both public and private, without discrimination and facilitate that their inputs are taken seriously.
- Given the particular challenges faced by print media, measures, such as VAT or other tax exemptions, could be adopted in order to ensure a pluralistic media landscape.
- Every media outlet should adopt a code of conduct and publish it on its website. There should be a complaint mechanism in case of an allegation of violation of the code of conduct.
- Investigations of attacks against any journalist should be prioritised and concluded speedily.
- To improve the role of media in holding the state accountable, investigative journalism should be encouraged and enabled by public institutions and media outlets.

To improve the performance of the public broadcaster MRT:

- Adequate resources immediately to strengthen its independence further and ensure effective operations and management. Legislative amendments or policies must ensure that MRT is fully transparent and accountable to all its stakeholders; engages with all relevant stakeholders actively and ensures that all citizens despite political opinion, sex, age, disability, etc... believe that MRT is their public broadcaster and not an instrument

for political parties or others. MRT management must actively engage with its stakeholders. A communication and engagement strategy that has been developed together with relevant stakeholders could facilitate a change in the public perception of MRT.

- The funding situation of the Agency for Audio and Audio-visual Media Services must be clarified and the independence of the agency, including its Council must be fully guaranteed.

### ***(b) Civil Society***

131. Civil society has for the last couple of years experienced growing pressure culminating, in December 2016, in the leader of VMRO-DPMNE calling for a process of "de-Sorosisation" of the society, presumably in an attempt to question the legitimacy of civil society organisations which receive support from the Open Society Institute. At the same time, civil society became increasingly polarised in support of different parties.

132. Civil society organisations have also reported harassment and inspections from authorities such as the Public Revenue Office and the Public Prosecutor's Office from December 2016 to May 2017. While civil society organisations must comply with relevant legislation, the group finds this development alarming. The group expects the relevant authorities to conclude their investigations speedily in order to avoid that cases without actual merit stay pending for months, contributing to chilling effects upon other civil society organisations.

133. The group appreciates that the government in its "Plan 3-6-9" emphasises the important role of civil society organisations. However, it is essential that these words are translated into real impacts. Interaction with civil society organisations must be based on the values and principles of a democratic society, including ensuring that all relevant organisations are consulted without any discrimination e.g. due to previous criticism of the government. The government must also be ready to actually accept proposals from civil society organisations, if the consultations are to be meaningful.

134. Making use of the various gap analyses which already exist and impact assessment exercises already been carried out by CSOs would also make strategic development and implementation more efficient, while avoiding repetition and overlap. The authorities should involve CSO, representatives in working groups on policy and regulatory development and support the Strategic Planning Units in relevant ministries and other state bodies.

### **Recommendations**

- Interference with and harassment of civil society organisations cannot be tolerated and procedures against them must be fairly and speedily concluded.
- Consultations with civil society organisations must be credible, inclusive and non-discriminatory.
- Strategic work already done by CSOs in the past (e.g. gap analyses, impact assessments) should be built upon.
- Full transparency in the public financing of CSOs should be ensured.