

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

Background and working methodology:

In light of the large number of illegally intercepted communications, which have been published at regular intervals since 9 February 2015, and in particular of the systemic problems which they have revealed or confirmed, the European Commission (DG Neighbourhood Policy and Enlargement Negotiations) recruited a group of independent¹ senior rule of law experts to carry out a rapid analysis of the situation and provide recommendations to address these issues.

The group's expert members have extensive professional experience in a variety of rule of law related fields (law enforcement, interception of communications, the prosecution service and the judiciary, human rights, transition reform) and were already familiar with the country from previous professional assignments for the European Commission, the Council of Europe and other organisations. The group was led by retired Commission Director, Reinhard Priebe.

Members of the group were provided with relevant background materials and conducted site-visits to the country on 20-22 April, 3-5 May, 17-20 May. All experts were accompanied by European Commission staff during their visits. Meetings were held with government and non-governmental actors including those involved in external oversight. These included:

- Representatives of the Ministry of Interior, including the Director and staff of the intelligence service (UBK)
- State Public Prosecutor and members of the Prosecution Office
- President and judges of the Supreme Court
- President and members of the Judicial Council
- Representatives of the associations of judges and prosecutors
- Director of the Academy for Judges and Prosecutors
- Judges and prosecutors working in the specialized court division and prosecution office dealing with organized crime and corruption
- The Ombudsman and his staff
- Director and staff of the Data Protection Directorate
- President and members of the State Election Commission
- Speaker of the Parliament and members of two of its oversight committees

The group also met with representatives of relevant international organisations, non-governmental organisations, associations of lawyers and journalists.

The recommendations which have been prepared will facilitate work in connection with the Urgent Reform Priorities drawn up by the European Commission as a short term response to the current crisis, the High Level Accession Dialogue between the European Commission and the former Yugoslav Republic of Macedonia, the annual progress reporting on the country, the ongoing cooperation in the framework of the Stabilisation and Association Agreement with the country, and ongoing assistance programming.

¹ 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.

Recommendations of the Senior Experts' Group

General remarks

Organisation

(1) The senior experts' group ("the group") examined the situation in the country and made its findings on the basis of a series of technical meetings conducted in Skopje on 3-4 May and 18-20 May 2015 and numerous reports and materials from various sources. This includes information provided in confidence. Therefore this report does not reveal sources of information for each single finding. However, the group is satisfied, that each of its findings is based on sufficiently reliable information and material, confirming their accuracy.

(2) The members of the group have expertise in different areas of the rule of law and come from different legal systems within the EU. They are thus aware that for most issues at stake, different rules and solutions exist in different countries. With their diverse backgrounds, the group is nonetheless in complete agreement with regard to assessing the specific situation in the former Yugoslav Republic of Macedonia, as well as with regard to its recommendations. The group has worked in entire independence without receiving any instruction from any institution as to the content of the report.

Main areas of concern

(3) The group has focused on what appear to be the areas where action is most needed to follow up on the current crisis situation. Significant shortcomings have been identified mainly in five areas: the interception of communications, judiciary and prosecution services, external oversight by independent bodies, elections and the media.

(4) The group has been keen to depict an objective picture of the situation. Although in the five areas assessed significant shortcomings have occurred and cannot be seriously contested, positive developments have also to be noted. Frequently, the existing legal framework does not raise particular problems and relevant services are generally competent and professional. There is however a lack of proper, objective and unbiased implementation. The considerable gap between legislation and practice has to be urgently addressed and overcome.

(5) Looking at positive developments, the group noted the commitment of several NGOs, engaged in promoting democratic standards in particular in relation to free elections, free media, proper oversight of the intelligence services and an independent judiciary. These organisations as well as state institutions like the Ombudsman, the State Election Commission or the Directorate for Personal Data Protection can and should play a central role in overcoming the current crisis by addressing shortcomings in an open, transparent and constructive manner. There is a lot of professionalism in the administration and in the judiciary, with devoted staff keen to do their jobs properly. None of these public or non-governmental bodies should be put under pressure not to exercise their mandate and their tasks to the full extent of their responsibilities.

The recommendations

(6) On the basis of its findings the group has made recommendations. All recommendations and comments made by the group are designed to overcome a very difficult crisis situation by taking concrete actions. 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.

(7) Only a few recommendations refer to necessary changes in legislation; most of them concern actions and choices within the existing constitutional and legal framework.

(8) The recommendations are not exhaustive. Where they are expressed in general terms more concrete actions should be put in place on their basis.

(9) Recommendations are not intended to substitute for recommendations made by various bodies previously. Many earlier recommendations following on from assessments made by the European Commission in its Progress Reports as well as by other domestic and international organisations and bodies remain entirely valid.

(10) The recommendations in this report address systemic shortcomings and should enable the country to improve the overall situation. They are not intended to cover the handling of individual criminal investigations and court proceedings.

(11) The group does not suggest specific deadlines for its recommendations. Given the need for urgent action in all the areas, where recommendations are made, they should – as a general rule – be implemented without delay.

(12) The mandate of the group has not been to look into political consequences to be drawn from the events in recent months or to assess political accountability and responsibility for what happened.

European values

(13) 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 and enforcing these values is therefore essential for a candidate country.

(14) 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 five areas the group has focused on. It is important to be aware that most of the problems identified in this report are linked to or have their origin in shortcomings of a broader nature and specific difficulties will not be overcome if these shortcomings are not addressed:

- Essential standards of democratic governance have to be met. A constructive political dialogue between the government and the opposition beyond all political differences is indispensable for the proper functioning of a parliamentary democracy. The place of an elected party is in the Parliament. The interests of politicians and of parties should not be confounded with the public interest of the state. Sensitive information should be handled with care and should not become the plaything of political tactics. Where there are allegations of serious malfunctioning of state institutions, there is a legitimate public interest in transparent and comprehensive information.

- Transparency in general should prevail as an indispensable method of how to deal with crisis situations like the current one, as well as a culture of legal accountability and political responsibility.
- Freedom of the media is an essential basis for an open, democratic society. Media should exercise their task to inform the public without any pressure or direct or indirect interference from public authorities. This precludes selective government financing and arbitrary government advertising, according to political preferences.
- Revelations published recently demonstrate serious incidents of political corruption at various levels and in multiple ways. Fighting this form of corruption will definitively need to become a top priority for the country. The problem of corruption would be worthy of a report all to itself; the fact that it is not addressed in detail in this report is not because the issue is not of great importance but because treating it as a side issue in a report the focus of which is elsewhere would not do justice to the problem. Corruption is the most serious problem facing the country apart from the specific issues arising from the current crisis, caused by the communications interception scandal, which is the primary focus of this report.

The way forward

(15) Many of the suspicions previously raised concerning interference in judicial affairs, restrictions of freedom of the media, electoral irregularities, blurring of state and party, as well as lack of oversight over intelligence activities have been confirmed by the findings of the group. Internal and external oversight of intelligence services falls short of what is needed and the cumulative effect of a lack of any activity, on the part of practically all oversight bodies, is a reason for deep concern.

(16) Obviously, implementing the group's recommendations will require political will and determination to address shortcomings and to make changes. To improve democratic governance all bodies, institutions and actors have to assume their responsibility, according to their mandate.

(17) Too often, and almost across the board, the group was confronted with an attitude of abdication of responsibility, minimalist interpretation of institutions' mandates and an inclination to hide behind the competences of other institutions as an excuse not to act, rather than promoting a governing culture of assuming responsibilities proactively to contribute to overcome the current crisis situation and to reverse the backwards trend.

(18) Bodies in charge of oversight and control in particular should not shy away from, and should by no means be prevented from, freely carrying out their mandate without inappropriate "political self-restraint". Bodies which in a properly functioning democracy would be among the more important oversight and control bodies, such as the State Election Commission, the Directorate for Personal Data Protection and the Parliamentary oversight committees, appear unwilling to carry out their mandate. By contrast, the Ombudsman's genuine efforts are hampered by other institutions. All oversight and control bodies should proactively assume, each under their specific responsibilities, their mandate in order to follow up effectively on the interception scandal. Relevant statutes should be applied in such a way as to give full effect to the mission of those oversight bodies. *Ex officio* action has to be considered in the light of the seriousness of what has been revealed.

(19) The interception scandal has revealed a massive invasion of fundamental rights including the right to participate in public affairs and to vote; the right of equal access to public services, the

rights to privacy and the protection of personal data, as well as the right to an independent and impartial judiciary.

(20) Progress on investigating and prosecuting wrongdoing revealed in the content of the interceptions will require to be kept under review, including within the framework of the EU's various institutional contacts with the country.

1. Interception of communications

From 9 February 2015 to the present date, the opposition party SDSM has released a total of 36 packages of audio tapes of recorded telephone conversations of among others the Prime Minister, government Ministers², senior public officials³, Mayors, Members of Parliament, the Speaker of the Parliament, opposition leaders, judges⁴, the State Prosecutor, civil servants, journalists, editors and media owners into the public domain⁵. The amount of material contained in these releases so far has reached around 500 pages of transcribed conversation. SDSM claims that it has access to over 20,000 such recorded conversations in total, and that these recordings have been made by the national intelligence services. The making of these recordings is generally acknowledged to have been illegal, to have taken place over a number of years and not to have been part of any legitimate court-sanctioned operations. The recordings are also of a quality, scale and number to be generally acknowledged to have been made inside the national intelligence service's facilities⁶. The content of many of the recordings provide indications of unlawful activities and abuse of power by senior government officials. The head of the intelligence service and two senior government Ministers have resigned since the start of the interception scandal in January 2015.

Causes of the current situation

The causes of the protracted scandal in the former Yugoslav Republic of Macedonia can be traced back both to a concentration of power within the national security service (UBK) and to a malfunctioning of the oversight mechanism over the UBK.

The UBK appears, to an external onlooker, to have been operating outside its legal mandate on behalf of the government, to control top officials in the public administration, prosecutors, judges and political opponents with a consequent interference in the independence of the judiciary and other relevant national institutions.

From the point of view of technical capability, the UBK holds the monopoly over the use of surveillance in both intelligence and criminal investigations. Surveillance is executed and monitored exclusively by the UBK on its own behalf, and also on behalf of the Police, Customs Administration and Financial Police. Therefore the UBK has the means to interfere in criminal investigations and, indirectly, to undermine the independence of the leader of the investigation (ie. the prosecutor).

Acting on the basis of Articles 175 and 176 of the Law on Electronic Communication, each of the

² Including present or former Ministers of Interior, Finance, Transport and Communication, Justice, Culture, Labour and Social Policy, Agriculture, Defence, Education, Health, Economy and Foreign Affairs.

³ Including the Director of the intelligence service (UBK), Director of the Public Revenue Office, Director of Customs, and a prison director.

⁴ Including the then President of the Supreme Court, President of the Judicial Council, appeal court judges etc.

⁵ See eg. https://www.youtube.com/watch?v=evG_d6Mu1Io or <https://www.youtube.com/watch?v=nNN39oRCjZA>

⁶ This fact has been acknowledged to the group by the former Director of the intelligence service (UBK) and can also be inferred from the plea bargain admissions and subsequent conviction of a former employee of UBK.

three national telecommunications providers equips the UBK with the necessary technical apparatus, enabling it to mirror directly their entire operational centres. As a consequence, from a practical point of view, the UBK can intercept communications directly, autonomously and unimpeded, regardless of whether a court order has or has not been issued in accordance with the Law on Interception of Communications.

The ongoing scandal demonstrates 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. The apparent lack of staff familiarity with, and respect for, basic fundamental rights and data protection rules is also an area of concern. Family ties between high ranking politicians and senior officials in the UBK as well as the Public Prosecution Office create a risk environment for conflicts of interests.

By contrast, stronger safeguards exist with regard to access to metadata, which is retained by telecommunications providers and can only be obtained by either law enforcement or security agencies upon submission of a court order to one of the three telecommunications providers.

Content of the interceptions

The scale of the unlawful recording of conversations, the concentration of power within the UBK, the over-wide remit of the UBK's mandate (which, despite its considerable breadth, was nevertheless exceeded) and the dysfunctional external oversight mechanism have resulted in a number of serious violations:

- Violation of the fundamental rights of the individuals concerned;
- Serious infringements of the personal data protection legislation;
- Violation of the 1961 Convention on Diplomatic Relations (Vienna Convention), given that diplomats have also been illegally intercepted;
- Apparent direct involvement of senior government and party officials in illegal activities including electoral fraud⁷, corruption⁸, abuse of power and authority⁹, conflict of interest, blackmail, extortion¹⁰ (pressure on public employees to vote for a certain party with the threat to be fired), criminal damage¹¹, severe procurement procedure infringements aimed at gaining an illicit profit¹², nepotism and cronyism¹³;
- Indications of unacceptable political interference in the nomination/appointment of judges¹⁴ as well as interference with other supposedly independent institutions for either personal or political party advantages¹⁵.

The competent authorities have, as a consequence of the revealed interceptions, initiated several investigations, which can be divided in two groups.

⁷ See eg. revelation number 7 (6 March), revelation number 8 (10 March), revelation number 11 (18 March), revelation number 16 (4 April)

⁸ See eg. revelation number 14 (26 March)

⁹ See eg. revelation number 5 (27 February)

¹⁰ See eg. revelation number 7 (6 March), revelation number 8 (10 March)

¹¹ See eg. revelation number 5 (27 February)

¹² See eg. revelation number 14 (26 March)

¹³ See eg. revelation number 12 (19 March)

¹⁴ See eg. revelation number 2 (15 February), revelation number 12 (19 March)

¹⁵ See eg. revelation number 19 (8 April), revelation number 20 (16 April)

Investigations were initiated in January 2015 by the Basic Public Prosecution Office for Prosecution of Organized Crime and Corruption against 7 individuals, believed to be either directly or indirectly responsible for the illegal interceptions and for the dissemination of those intercepted communications. Some have been charged with illegal interception (Article 151 of the Criminal Code), others with espionage (Article 316 of the Criminal Code) and others for violence against representative of high institution (Article 311 of the Criminal Code). Out of these suspects, one person has already been convicted, on the basis of a plea bargain, of espionage and illegal interception. For five others an indictment has been lodged on 30 April 2015.

The group was informed that further investigations have been initiated, or are planned, in relation to the actual revelations of criminal conduct deriving from the content of the interceptions. It would be a matter of concern to the group if these investigations focused exclusively or primarily on opposition-linked figures and related to the leaking of the documents rather than the substance of the wrong-doing which appears to emerge from many of the transcripts.

Parliamentary oversight

The country in theory has in place a system of parliamentary oversight in the form of a *Committee supervising the work of the Directorate for Security and Counterintelligence and the Intelligence Agency* and a *Committee for oversight of the application of communication interception techniques by the Ministry of Interior, Ministry of Defence and other empowered agencies*. The former Committee has never convened. The latter has convened eight times since it was first constituted in 2006, but has never functioned properly. Members of the Committee have not carried out inspections at the UBK or collected statistics on interceptions. The Committee does not appear to have available the technical skills to retrieve data logs from the UBK apparatus or from the telecommunications providers, if any such exist, in order to be compared with the number of interception orders issued by the Courts, so as to identify any abuses. The Committee is also practically hindered from performing inspections at the UBK, as out of the five members at any given time there are always one or two who lack the required clearance certificate to access classified information such as interception logs - clearance which, in an obvious conflict of interest, is supposed to be issued by the UBK itself (ie. the body to be inspected).

The three members of the opposition party which partly constitute this Committee have, for over one year, prevented the Committee's proper functioning by not participating, due to their party's boycott of the Parliament. Moreover, the Committee is in breach of its statutory requirement to submit an annual report to the Parliament.

Recommendations

In relation to the causes of the current situation

- Interception of communications for the purpose of criminal investigation and interception for security purposes should be considered as separate functions and regulated separately to reflect the concerned agencies' respective competences. In general, competences related to crime prevention and detection should be strictly respected. The mandate of the UBK should be narrowed down accordingly, to focus on these tasks.
- The UBK should be divested of its intermediary function, so as to not interfere with the autonomy of law enforcement agencies (Police, Customs Administration and Financial Police) when intercepting communications;

- The 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. The providers should activate and divert signals to the competent law enforcement agencies (Police, Customs Administration and Financial Police) or the security agencies (the Security and Counterintelligence Service (UBK), the Intelligence Agency, and the Ministry of Defence's military security and intelligence service) only upon receipt of the relevant court order, and only for the purposes of lawful interceptions. Under no circumstances should the UBK have the practical capability to capture communications directly.
- Intelligence services involved in the interception of communications should act only in accordance with a clear mandate set out by law, defining and limiting their tasks to the purpose of national security and overriding public interest. Under no circumstances can they be entitled to collect information for political or other purposes.
- Recruitment and selection of staff should be based on stringent criteria of merit and integrity, take full account of the sensitivity of intelligence work and safeguards against conflicts of interests. Staff should be regularly trained, including on respect for data protection rules, fundamental rights of citizens and professional ethics and integrity.
- Bearing in mind that the scope of intelligence services' activities should be determined by the purpose of their tasks and that any interference (such as interception of communications) should be restricted to what is necessary and proportionate, human resources and equipment should be allocated accordingly. Given the high staff numbers currently available to the UBK, and the relatively low number of court-ordered interceptions carried out annually, this will require a significant reduction of resources and equipment. At the same time sufficiently functioning and well-trained human resources need to be allocated to control and oversee the intelligence services.
- Risk management tools should be put in place to guide and lead all intelligence operations.
- Data security should be reinforced to avoid any risk of uncontrolled and unlawful dissemination of interception of communications, particularly within the Ministry of Interior, which in accordance with Article 34 of the Law on Interception of Communication is supposed to store data "under a special regime".
- Reports on interception made for security purposes should be deleted within a reasonable timeframe (the current 5-year limit is too long) and according to the principles of necessity and proportionality.

In relation to the content of the interceptions

- Investigations into criminal conduct disclosed by the interceptions should be seriously addressed without hesitation and fear, in a non-selective manner, prioritising the more serious wrong-doing which appears to be disclosed.
- Effective investigation may require the seizure of data log files and any available log file archives from the UBK and telecommunications providers, and their comparison with issued court orders. Where necessary, investigators may consider seeking international support and expertise, for example in the recovery or authentication of deleted log files.

In relation to parliamentary oversight

- The committees of the Parliament on security and counterintelligence and on the oversight of interceptions measures should convene immediately and meet regularly (with the participation of all parties elected to the Parliament) to ensure parliamentary accountability.
- The parliamentary boycott, if sustained, might require ad-hoc solutions, preferably within the structures of the Parliament, avoiding the situation where parliamentary oversight is *de facto* suspended for a prolonged period. The withdrawal of a minority of the Committees' membership should not be permitted to hamper the performance of its statutory functions, and if necessary the parliamentary rules of procedure should be amended to permit this to take place.
- The necessity for security clearance must not be used as a reason to delay the work of the committees, and the process of granting security clearances should be fast-tracked to permit this.
- Members of the Committee should be allowed to be assisted by technical experts.
- Parliament should insist on institutions strictly respecting their reporting duties, e.g. the obligation on the Committee for supervising the application of communication interception techniques to report once a year.

2. Judiciary and Prosecution

The country possesses a comprehensive set of rules which, if fully observed, should generally ensure a proper functioning of the judicial system to a high standard, although there is a need for some further reform, particularly in relation to the appointment, promotion and removal of judges and prosecutors. Highly qualified and experienced judges, prosecutors and judicial staff are available in sufficient numbers to enable the judicial system to function effectively.

The judiciary and the prosecution services should be able to act in an independent and impartial manner (thus avoiding giving any impression – justified or not – of treating cases in a selective and unbalanced manner) and in many areas, this seems indeed to be the case. On the other hand, there is a perception, that in some areas and in particular with regard to cases considered to have a political dimension or believed to be of interest to politicians, the usual standards are set aside.

It was reported to the group by several sources that there is an atmosphere of pressure and insecurity within the judiciary. This is confirmed by the revelations made by the leaked conversations¹⁶. Many judges believe that promotion within the ranks of the judiciary is reserved for those whose decisions favour the political establishment. There must be no such thing as a “political case” in the judicial process. All cases reaching the judiciary should be handled with the same approach to efficiency, independence and impartiality, simply applying the law, both substantial and procedural, in a clear and predictable way. This is essential if the confidence of the public in the proper functioning of the judiciary and the public prosecution is to be maintained or, to the extent that may be necessary, restored.

The recruitment of judicial personnel (including court staff at all levels) should according to the rules be based on merits only. The Academy for Judges and Prosecutors plays a central role in

¹⁶ See eg. revelation number 2 (15 February)

ensuring that judges and prosecutors are recruited to study in the Academy according to merit only. Despite the merit-based system of admission to the Academy, and the requirement that all judges and prosecutors be recruited from amongst its graduates, there is still a political dimension to the actual appointment of prosecutors as these appointments have to be approved by Parliament. As regards the appointment of judges, there is a lack of transparency in both the appointment standards and the procedure. There is no comparison of the merit of candidates, but rather they must be nominated by a member of the Judicial Council and then pass two rounds of voting, without any apparent recourse to objective criteria and with no obligation on the voting members to justify their reasoning.

The system of performance management for judges and court staff is weak, lacks credibility and is open to abuse. In particular, performance criteria for judges have been established which are formalistic and predominantly quantitative. This is partly because it has long been considered impossible for users and evaluators within the judiciary to apply a system of qualitative merit assessments in an objective and non-selective way due to the pervasive political culture and mentality. Furthermore no clear-cut methodologies or harmonised approach exist to prevent court presidents from taking performance management decisions in their respective courts, apparently at their complete discretion.

The perception is that, particularly in relation to promotions to higher posts, political considerations prevail, and there is evidence in the leaked telephone interceptions which supports the view that this perception is justified¹⁷.

In the area of dismissal of judges and disciplinary responsibility, numerous recommendations made in recent years have still not been addressed.¹⁸ The high numbers of judges who have been dismissed or resigned in recent years, in particular following controversial decisions in high profile cases, is a serious concern and has a chilling effect on morale and independence within the profession.

Strict rules regulating the assignments of cases to judges exist and are implemented by an electronic case management system. However, there is a perception that these rules are not always respected and that ways can be found to circumvent the system. Although the Judicial Council is supposed to audit the functioning of this system, it has not been shown that any such auditing actually takes place in practice.

Only around a tenth of around 100 judgments of the European Court of Human Rights against the country appear to have been properly executed. There may be a number of reasons for this, one of which appears to be a lack of resources and capacity of the Government Agent.

The handling of the numerous pending or upcoming cases and investigations related to the current crisis is a particular challenge and will be a test case for the functioning of the judiciary and the public prosecution of the country in an efficient, independent and impartial manner. The prosecution of various possible criminal activities related to the interception of communications, both to their making and their release, as well as to criminal activities which have become known from the content of the communications themselves, has to be carried out proactively, where necessary on the initiative of the prosecution services themselves, deploying all possible means of

¹⁷ See eg. revelation number 12 (19 March)

¹⁸ Relating to, for example, the lack of clarity and precision of the grounds for disciplinary action; the lack of clear and predictable reasoning in Judicial Council's decisions; the lack of proportionality of the disciplinary measures chosen; the dismissal of judges on grounds relating to the actual content of their decisions; questions over the efficacy of the appeal system against dismissal etc.

efficient investigation. While the authenticity of the intercepted conversations does not appear to be seriously contested, the fact that data might have been obtained illegally is a complicating factor in relation to any investigation or prosecution based on that data.

It is a source of concern that so far prosecutions arising from the scandal appear to have been selective and have related exclusively to the acts of making, obtaining, releasing and publishing the interceptions but not to the many potentially criminal or otherwise illegal acts revealed in the content of the interceptions themselves. The group was assured by the authorities that this is because these first-mentioned cases are the easiest to prove and that investigations into the substantive wrongdoing evidenced by the content of the tapes is ongoing and will result in prosecutions.

In one of these cases, Zvonko Kostovski was convicted, on the basis of a plea bargain, of the offences of espionage and illegal interception¹⁹. A source of concern is that, because the case was dealt with as a plea bargain, it is impossible for the group to know to what extent the trial judge made enquiry into the factual basis of the plea bargain so as to satisfy himself that the plea was a proper one and that the accused was not, for example, receiving a deal involving a light sentence as a reward for participating in a cover-up of the involvement of others. The verdict refers to the evidence placed before the court, including the records of the defendant's interrogations. The verdict does not indicate that any issue as to the propriety of the plea was raised before or considered by the court. The verdict does not suggest that the court made any finding that Kostovski acted alone; on the contrary it seems that he was found to have acted as part of a structured group with premeditation incited by two other defendants. We were informed that there is neither a video or audio recording nor a complete transcript of the hearing, which seems surprising for such an important, high-profile case. The group does not know what evidence the court heard to support the plea to espionage since the elements of this offence require the offence to relate to a "state secret" and to be "obtained for the purpose of dissemination to a foreign state". Nor does the group know the content of any admissions which may be alleged to have been made by the defendant during interrogation.

It appears, that where plea bargaining is used, it is subject to a very formalistic oversight of lawfulness and fairness, and that no established test exists in practice for the judicial oversight of 'sufficient evidence of guilt'²⁰. There is furthermore no 'public interest consideration' test to require the authorities to continue with a criminal investigation into further possible wrongdoing despite a plea bargain.

Recommendations

- In order to ensure the independence of, and in particular the absence of political influence over, prosecutorial and judicial decision-making the appointment and promotion of judges and prosecutors should be de-politicised. Appointments and promotions should be made by the Judicial Council and the Council of Public Prosecutors according to transparent, objective and strictly merit-based criteria, and using transparent procedures which should be established by law and not merely by internal rules, in accordance with the recommendations of the Venice Commission's reports on judicial appointments and the independence of the judiciary²¹ as well

¹⁹ Articles 316 and 151 of the Criminal Code

²⁰ Article 334 (1) (2) of the Law on Criminal Procedure

²¹ Venice Commission Report on Judicial Appointments (Opinion No. 403 / 2006 of 22 June 2007, CDL-AD(2007)028); Venice Commission Report on the Independence of the Judicial System, Part I: the Independence of Judges (Study No. 494 / 2008 of 16 March 2010, CDL-AD(2010)004); Venice Commission Report on European

as specific recommendations contained in opinions specific to the former Yugoslav Republic of Macedonia, many of which have not been implemented²². There should be no scope for political or party affiliation or support as criteria for selection.

- The Judicial Council plays a central role in making the judiciary system function efficiently and in ensuring the independence of the judiciary. Members of the Judicial Council have to be selected only from amongst the most skilled judges and the most distinguished and experienced lawyers of the country. A clear and foreseeable test should be developed in practice as to the meaning of the statutory term "a distinguished lawyer".
- The Judicial Council should exercise its duties without any political interference (either direct or, equally importantly, indirect). It needs to be more proactive in defending judges against interference and attack affecting their independence. This could be done, for example, by strengthening the communication capacities of the Judicial Council and the courts.
- The condition that only graduates of the Academy for Judges and Prosecutors can be recruited to the judiciary and the prosecution should be, for the time being, maintained and therefore there should be no stepping back from the current system of recruitment based on qualification only.
- A harmonized performance management system based on quantitative and qualitative performance standards needs to be put in place, as a basis for all career decisions.
- Dismissals or other disciplinary penalties against judges need to rigorously respect procedures and rules laid down by law, meaning not only the letter but also the spirit of the law. The applicable procedures should be regulated in a similar manner to questions of appointment and promotion, without political interference.
- The rules regulating random case assignments should be strictly respected. Any exemption should be clear and foreseeable and should not jeopardize this principle. There should be no *ad hoc* assignments. Compliance with the rules should be assessed regularly by the Judicial Council and the assessments published. The principle of random case assignment should not detract from the need to ensure greater specialization of judges in certain categories of cases.
- Judgments and Decisions of the European Court of Human Rights should be strictly and speedily implemented, in accordance with the country's obligations under the ECHR, and a list of practical and effective measures should be designed in each case or category of cases.
- Investigations and prosecutions should be beyond any doubt as to their impartiality and with regard to an equal treatment of any person under investigation. This includes the duration of investigations and the intensity with which they are carried out.
- Operational independence of criminal investigation services from political pressure or control should be strengthened. There should be no scope for ministerial instructions in operational matters. Judicial Police and Investigative Centres should start operating in order to strengthen the functional independence of investigators and prosecutors.

Standards as regards the Independence of the Judicial System, Part II: the Prosecution Service (Study No 494 / 2008 of 3 January 2011, CDL-AD(2010)040)

²² See, for example, CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)

- There needs to be practical and effective application of the ban on the use of detention on remand, liberty-, property-directed or other intrusive measures merely for the purpose of forcing the suspect to enter a plea bargain. This should be done by means of clear, published practice guidance for prosecutors and judges. The ‘sufficient evidence’ test allowing a plea bargain needs to be clarified with a view to the practical and effective control of lawfulness and fairness of each plea by the courts. Moreover, the public interest should permit continuation of criminal investigations despite a plea bargain.
- Particular attention should be paid to the proper functioning, sufficient staffing and the independence of administrative courts, bearing in mind their specific mandate of controlling the public administration and in particular their important role in reviewing decisions by the State Electoral Commission.

3. Other oversight institutions

The group interviewed two other oversight institutions: The Office of the Ombudsman and the Directorate for Data Protection.

The Ombudsman

The Ombudsman (or People’s Defender in Macedonian) was established in 1991 on the legal basis of Article 77 of the 1991 Constitution. The first Law on the Ombudsman was enacted in 1997 and the first ombudsman was elected in 1998. The Law on the Ombudsman has been amended since.

The present Ombudsman, Ixhet Memeti, is serving his second, and last, term (each term is 8 years). He was re-elected in 2012. The Ombudsman not only has the classical ombudsman’s mandate of dealing with maladministration but also a broader human rights mandate empowering him to protect the constitutional rights of the citizens in case of violation by public authorities. The mandate does not include the private sector or the Judiciary. However, the Ombudsman may investigate complaints about delays in judicial proceedings or the performance of the court services. Complaints against the judiciary, according to the Ombudsman, are frequently received.

The Ombudsman is accredited with a B-status by the International Coordinating Committee (equivalent to an observer-status). The reasons for not being accredited with a A-status have been e.g. the fact the Ombudsman’s mandate formally does not include promotion of human rights (although it is recognised that he does in fact promote human rights in practice), the lack of sufficient funding to implement its OPCAT²³ mandate and certain concerns about the appointment, composition and pluralism, including insufficient transparency in appointment processes of the Ombudsman. However, the Ombudsman is considered by many as being generally an independent institution in a difficult environment that carries out his functions delicately.

The Ombudsman is empowered to react to complaints from individuals as well as to act on his own initiative. The Ombudsman’s decisions are not legally binding, which is not uncommon for this category of institution. The power of the Ombudsman relies, through his institutional standing as an independent authority, on willingness of the public authorities to comply with his recommendations, inform him, if they do not comply, and in general not to obstruct his work. If the public authorities are not complying with or are obstructing the Ombudsman then the head of the

²³ Optional Protocol to the UN Convention Against Torture

executive, his ministers or Parliament should criticise them, require an explanation or simply express dissatisfaction with the attitude.

The Ombudsman has informed the group that he experiences that the system is not always complying with his decisions, that his communication is at times ignored and that the public authorities are not cooperating. In other countries, failure to comply with instructions or obstruction of the work of the Ombudsman or a National Human Rights Commission may result in a sanction²⁴. The Ombudsman also informed that his Office is, at present, investigating one case related to the interception scandal, but that the investigations are progressing slowly.

Although the Ombudsman cannot issue legally binding decisions, the Ombudsman does have some investigating powers such as to ask for explanations, information and evidence; enter official premises, and to call elected or appointed persons or any other official or public officer for interviews. If a case shows a violation of constitutional or legal rights or that other irregularities have occurred, he may raise an initiative for commencing disciplinary proceedings against an official or submit a request to the competent Public Prosecutor for initiation of a procedure *in order to determine* criminal responsibility (Article 32 of the Ombudsman Law).

Article 32 of the Law does not require that the Ombudsman can prove the criminal responsibility and the wording “irregularities” likewise indicates that the result of the investigations of the Ombudsman is not required to be undisputed.

Nevertheless, the Ombudsman appears reluctant to use his mandate fully, probably as he is balancing between not upsetting the establishment too much in relation to concrete cases and his ability to carry out investigations into less politicised cases. Furthermore, the tense political environment seems to contribute to a lack of respect for his work and powers leading to obstruction. Yet it is precisely during such times of crisis that a strong oversight by the Ombudsman is essential to the rule of law, good governance, the protection of human rights and the restoring of public trust in the state institutions.

Consequently, the Ombudsman is not systematically addressing the revealed potential violations of human rights although apart from obvious political pressure (direct or indirect) nothing, in theory, seems to prevent him from acting strongly on the revelations, like a real watchdog.

The Directorate for Personal Data Protection

Data protection should be seen in light of the right to privacy protected by Article 25 of the Constitution and the European Convention on Human Rights, Article 8. Furthermore, the European Union has adopted Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.²⁵ The Directive is expected to be substituted by a new data protection regime.²⁶

The Directorate for Personal Data Protection reflects the standards in the current EU Directive and the national data protection legislation has been assessed some years ago to be largely in line with

²⁴ e.g. the Irish Human Rights Commission Act 2014, the Law on the Human Rights Ombudsman of Bosnia and Herzegovina, Chapter VII-IX or the Law on the Public Defender of Georgia, Article 25

²⁵ The country has ratified the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows. The convention requires that the supervisory authorities shall exercise their functions in complete independence (article 5)

²⁶ The European Commission has in January 2012 proposed a draft legislative package to establish a unified European data protection law. The data protection reform will contain three main innovations: One continent, one law; One-stop-shop and not 28 entry points for companies, and the same rules for all companies.

it. The directive requires complete independence of the supervisory authority. The authority must have:

- investigative powers
- effective powers of intervention
- power to engage in legal proceedings
- power to receive complaint

The Directorate for Personal Data Protection is established in the Law on Personal Data Protection section IX as an independent state body. The director is appointed by Parliament and he has full control over the budget, technical, human and financial resources. The Directorate may conduct investigations, receives complaints, makes analysis of proposed legislation, and promotes data protection including training of government as well as private institutions and companies. The Directorate has received continuous support from the EU. The mission of the Directorate is to perform inspections over lawfulness of actions taken during the processing of personal data and their protection in the country. Prior to taking office, the director must declare “I hereby state that I shall perform the function of a director diligently, impartially and responsibly, I shall protect the right to personal data protection and I shall respect the Constitution and the Laws of the Republic of Macedonia.”

The Directorate appears generally to function well and with a high level of professionalism. It has received substantial international support.

However, it is worrying that a directorate for data protection has not been more actively engaged in investigating the apparent lack of data protection, the potential improper and uncontrolled registration of telephone-numbers as well as invasion of the right to privacy through potential unauthorised surveillance.

The group was informed that the Directorate believed that it could not react as long as criminal investigations are being conducted, and that it preferred to stay idle in order not to be criticised for choosing a side in the current situation. The Directorate also referred to the fact that it has not received any complaints.

The group understands the sensitivity of the matter, however, an independent institution cannot be accused of being used politically as long as it pursues matters falling within its mandate (and mission statement) and does so without being selective. The attitude of staying idle is, as such, a statement of fear and subject to criticism as the Directorate then shows that risks of intimidation from third parties govern the decision-making process within an independent institution.

The group further noted that in fact, the Directorate is not excluded from investigating violations of the right to privacy and data protection if criminal investigations are conducted. The Public Prosecutor confirmed this during the meetings with the group.

The governing law on the directorate concerns failures to protect data and to comply with data processing standards as well as inspection supervision over the implementation of the law and the regulations adopted on the basis of the law.

Failure to comply with the data protection legislation may result in payment of damages as the subject of the personal data could exercise the right to damage compensation caused by the processing of personal data or other activity carried out contrary to the provisions of the law, by submitting a claim for damage compensation to the competent court, cf. article 21.

Chapter IX-a on inspection supervision also provides the Directorate with powers of sanctions if a State Body does not comply with the governing legislation. It is further noted that the Directorate can request to be given aid by the state administration body competent for internal affairs during the implementation of the executive decision, provided that there is physical resistance or such resistance is expected to happen, cf. article 4-d.

The national legislation does not seem to prevent the Directorate from carrying out investigations in relation to the revealed intercepted recordings. Furthermore, the legislation does not appear to exclude, in general, certain ministries, departments or units, in general, from being subject to the mandate of the Directorate.

Recommendations

In relation to the Office of the Ombudsman

- Although the Ombudsman is perceived to be acting independently within a relatively strong mandate, the Ombudsman should be granted sufficient financial means, guaranteed by law, to operate independently and effectively, and the Law on the Ombudsman should be amended in order to comply fully with the Paris Principles²⁷.
- Public authorities must without any exception cooperate with the Ombudsman. Any unjustifiable failure should be regarded as obstruction of the Ombudsman and sanctionable by law.
- Consideration should be given to strengthening the Ombudsman's powers, e.g. to request Parliament to establish specialised temporary commissions of inquiry into gross violations of human rights or to initiate case before the courts against authorities that do not comply with his recommendations.

In relation to the Directorate for Personal Data Protection

- Although the Law on Personal Data Protection is, in general, in compliance with relevant European standards, the Directorate's lack of action undermines the confidence in the independence of the institution. The approach of the Directorate appears also to be inconsistent with the law and the mission of the Directorate, as well as the declaration made by the Director. The Directorate should immediately conduct investigations into the matter and report transparently about its conclusions, regardless its findings.
- Any attempt to influence the Directorate in its work should be disclosed and reported to relevant authorities as it would be attempt to influence the Directorate from carrying its mandate.

4. Elections

The OSCE/ODIHR Election Observation Mission Final Report on the 2014 presidential and parliamentary elections found that they were efficiently administered, including on election day. However, the report also found several shortcomings compared to the principles contained in the 1990 OSCE Copenhagen Document and other international obligations for democratic elections. Some of the observations concerned an inadequate separation between state and party activities;

²⁷ Principles relating to the Status of National Institutions (The Paris Principles), adopted by UN General Assembly resolution 48/134 of 20 December 1993

allegations of voter intimidation; the inadequacy of the voter list; indirect control of the governing party over the media because of the state's dominance in the advertising market; the failure of the media to distinguish between the coverage of state officials in their capacity as ministers and as candidates which contributed to the blurring of the line between state and party; and that the majority of monitored media was largely biased in favour of one ruling party and its presidential candidate and mainly negative against the main opposition party and its candidate.

The recent revelations have confirmed previous presumptions on some election irregularities. The seventh and eighth revelations on 6 March and 10 March 2015 included what appears to be discussion of manipulation of the voter list; voter buying; voter intimidation, including threats against civil servants, and prevention of voters from casting their votes.

1,779,572 voters were registered for the presidential election and 1,780,128 for the early parliamentary elections. According to the *State Statistical Office of Macedonia*²⁸ estimates are that the total population is 2,065,769 people (end 2013). OSCE has previously expressed concerns about what appears to be an inflated voter list compared to the total population²⁹.

The Electoral Code has been comprehensively amended in recent years in line with successive ODIHR recommendations.

The State Election Commission's composition, mandate and functions are regulated in the Electoral Code. The members are elected for 4 years and a professional service must be established for the State Election Commission, in order to execute the professional-administrative and organizational-technical responsibilities of the Commission. The Commission is obliged to safeguard the legality of the preparation and the administration of the elections in accordance with the Electoral Code and consequently is expected by the electorate to be a guarantee for free and fair elections.

Regardless of its powers and mandate, the Commission has not initiated any procedures to determine whether the recent revelations could imply violations of the Code and the principle of legality. The Commission is apparently divided internally on the issue and coincidentally the division is aligned with the political affiliation as a reflection of the Parliament, regardless of the fact that each individual member is required to execute the duties of their office independently, in good faith and responsibly in accordance with their competences determined in the Electoral Code. An electoral commission must work in the interest of the electorate and not political parties.

A member of the Commission informed the group that the reason for not being able to initiate any investigations of violations of the Code was that the Commission has not been asked by the judiciary to do so. The group finds it difficult to understand that an independent body with an explicit mandate to safeguard the legality of elections, and consequently the Constitution, and with powers to initiate proceedings, when there are bases of suspicion that there has been a violation of the provisions of the Electoral Code, simply concludes that it cannot undertake any action in relation to the revelations. The Electoral Code does not appear to prevent the Commission from taking such action. On the other hand, the Commission should interpret its enabling legislation with the objective of protecting the electorate. The group also observes that the Public Prosecutor has informed the group that its investigation does not prevent the State Election Commission from making its own investigation.

The group finally notes that the Commission is regarded by many interlocutors as politicized and incapable of acting independently due to undue political influence from all parties. This is

²⁸ See http://www.stat.gov.mk/OblastOpsto_en.aspx?id=2

²⁹ See OSCE/ODIHR Election Observation Mission Final Report, Early Parliamentary Elections, 5 June 2011, page 8

damaging to the Commission and will result in a decline in public trust and at the end of the day making it impossible to conduct credible electoral processes.

Recommendations

- Any irregularity revealed should be followed up in such a way that all shortcomings, including those identified in the OSCE/ODIHR Election Observation Mission 2014 Report, are addressed before the next elections take place, to make sure that such irregularities will not occur again.
- Direct political involvement in election manipulations, as appears from the published interceptions, is a serious violation of basic democratic principles and must be properly addressed both at judicial and at political level.
- The State Election Commission plays a central role in the supervision of elections. Any interference in its work is unacceptable. The Commission, as an independent body, should develop a culture of a bipartisan approach to its work based on its broad experience and should resist taking majority decisions according to political camps. Serious consideration should be given to appointing a substantial number of members of the Commission who are of proven independence and free of any political party connection.
- The timing of irregularities, or the timing of their discovery, should not present any obstacle to their effective investigation by the State Electoral Commission.
- The Commission should pro-actively exercise its broad powers and take initiatives on its own, according to its mandate. It cannot ban itself from assessing the irregularities of past elections, as recently revealed, with the simple argument, that the election process has been closed.
- Funding of parties should respect existing rules, e.g. with regard to advertisement or use of public funds and public administration for party activities. The introduction of deadlines for the State Commission for the Prevention of Corruption to investigate complaints on misuse of state resources during the campaign could be considered and the necessary resources to resolve them in a timely manner should be provided, in accordance with outstanding GRECO and ODIHR Recommendations³⁰.

5. Media

The group recalls that Article 16 of the Constitution guarantees the freedom of conviction, conscience, thought and public expression of thought, speech, public address and public information. The country has ratified the relevant European and international legal instruments guaranteeing and regulating the protection of freedom of expression such as the European Convention on Human Rights and the UN Covenant on Civil and Political Rights.

The country is perceived to have suffered from a media crisis that has become gradually worse over the last couple of years, although some positive steps have been taken, e.g. the de-criminalisation of

³⁰ See 2014 OSCE/ODIHR Election Observation Mission Final Report <http://www.osce.org/odihr/elections/fyrom/121306?download=true> and GRECO Compliance Report on "Transparency of Party Funding" adopted by GRECO at its 63rd Plenary Meeting 24-28 March 2014 [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2014\)2_Second_The%20former%20Yugoslav%20Republic%20of%20Macedonia_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2014)2_Second_The%20former%20Yugoslav%20Republic%20of%20Macedonia_EN.pdf)

defamation, alignment with the Audiovisual Media Services Directive and establishment of a self-regulatory body (Council of Ethics).

In the recent index of press freedoms of Reporters without Borders 2014, the country has dropped to its lowest ranking ever and is now ranked as number 123 in the world. Freedom House ranks it as "partly free" in terms of freedom of press but with a declining score over the recent years³¹. In the IREX's 2014 Media Sustainability Index (MSI) it is rated with an overall score of 1.40.³² MSI observed the country's "prospects for media sustainability further deteriorated... The low scores reflect the media community's pessimism about the prospects of escaping the trends toward greater state control, politicization, and economic degradation of the media."

Against this backdrop it is important to emphasise that the media is a key player in a democracy, not only as public watchdog but also as a contributor to pluralism, democratic development and dialogue.

The media crisis deprives journalists of their ability to perform professionally and without fear. Media owners and private advertisers may risk retaliation from political forces for not showing support to their agenda. Several interlocutors have informed that a *chilling effect* is dominating the media in the sense that intimidation, the absence of good labour conditions for journalists and financial instability for media companies is making them reliant on government advertisement and producing an environment of fear which encourages self-censorship. The crisis has also highlighted serious concerns over selective reporting and lack of editorial independence on the part of the Public Service Broadcaster.

The recent interception revelations confirm the existence of an unhealthy relationship between the mainstream media and top government officials, with the former seemingly taking direct orders from the latter on both basic and fundamental issues of editorial policy³³. This practice harms the public's right to receive information from a variety of sources and expressing a variety of views, and reduces the scope for objective and balanced reporting of facts.

The group took note that numerous expert recommendations have already been made in the area of the media, both in the framework of other reports and the European Commission's ongoing monitoring of the country, which have still not been addressed³⁴.

Recommendations

- All media have to be free from any political pressure without any interference or intimidation.
- Media should distance themselves from party politics and should not be at the service of politicians and political parties.
- The Public Service Broadcaster should strive to be completely impartial and independent from political, commercial and other influences and ideologies and contribute to an informed citizenship.

³¹ See https://freedomhouse.org/report/freedom-press/freedom-press-2015#.VWK7obkw_IU

³² This was the lowest rating ever and 1 point lower than the highest score achieved in 2005. The rating is 1 to 4, with 4 as the highest, see <https://www.irex.org/resource/macedonia-media-sustainability-index-msi>

³³ See eg. revelation number 3 (20 February), revelation number 4 (25 February), revelation number 7 (6 March), revelation number 20 (16 April), revelation number 23 (22 April).

³⁴ Including in the areas of defamation, government advertising, the lack of independence of the public service broadcaster, journalists' professionalism and ethics, etc.

- Media play a particularly important role in situations of political crisis. In the public interest it is their task to reveal possible shortcomings in the functioning of a state or a society. Therefore, public bodies should refrain from discouraging media to carry out their mandate.
- Defamation actions should not be used as a means to stifle debate or prevent public figures from being held to account. It is of particular concern when politicians sue journalists for defamation, but also when they sue other political figures, instead of resolving their differences through other means such as public debate.
- Courts should handle defamation claims in a balanced way, independently of possible political implications of a particular case. Courts should develop clear and foreseeable practice on the protection of freedom of expression in view of defamation claims. Both mediation and self-regulation should play an important role in reducing the high number of cases reaching the courts. Consideration should be given to extending the scope of the current statutory ceilings on media liability for defamation to all types of defendants.
- “Buying” political support from the media through financially supporting media outlets is unacceptable. Stringent rules on government advertising should be enforced.
- Media ownership and media financing should be transparent.
- Journalists' labour conditions should be improved in order to reduce self-censorship.