

POLICY BRIEF

A Look Back and a Glance Forward at the Occasion of the First Anniversary of the Special Public Prosecutor Office: The Urgency of the UBK Related Reforms

The Special Public Prosecutor Office (SPP Office) presented its Annual report at a Parliament session held on 26 September 2016 marking the one year anniversary of its establishment. The report is available to the public through the SPP Office's website.¹ We engaged in a close reading of the report and could identify the following main features of its functioning in the past year:

- In spite the relative cooperation of the other institutions with the SPP's Office, there is flagrant lack of it too in the form of either 1) not responding to requests to hand in documentation related to cases that SPP has authority over, 2) not responding as requested by way of flooding the SPPO with materials that are evidently not linked with cases related to its juridical authority, a process that has significantly slowed down the pace of work for the Special Prosecutor. Considering absence of competence to understand the requests must be ruled out, we are compelled to conclude that these instances are in fact intended obstructions of the process. The central case related to the wiretapping revelations, namely "Putsch," opened by the Public Prosecutor in May 2015, after more than a year of delays was handed over to the SPP on 30th June 2016.
- In spite of the short period of time amounting to mere one year since its establishment, the SPP has managed to demonstrate remarkable efficiency by opening

¹The Special Public Prosecutors Office [Јавно обвинителство за гонење на кривични дела поврзани и кои произлегуваат од незаконското следење на комуникациите], Report on the activities of the Special Public Prosecutor for the six months period of 15.09.2015 to 15.03.2016 and Report on the activities of the Special Public Prosecutor for the six months period of 15.03.2016 to 15.09.2016 [Извештај за активностите на Јавното обвинителство за гонење на кривичните дела поврзани и кои произлегуваат од содржината на незаконското следење на комуникациите за период од шест месеци (за периодот од 15.09.2015 до 15.03.2016) и Извештај за активностите на Јавното обвинителство за гонење на кривичните дела поврзани и кои произлегуваат од содржината на незаконското следење на комуникациите за период од шест месеци (за периодот од 15.03.2015 до 15.09.2016)], available at <http://www.jonsk.mk/>, accessed on 15 October 2016.

60 preliminary investigations, out of which 38 preliminary investigations on publicly leaked recordings and 22 preliminary investigations regarding unpublished recordings. The Special Public Prosecutor indicted 40 persons involved in four (4) cases that have been subject to its investigations in the past year. Two subsequent indictment proposals were filed with the Trial Court Skopje 1 on the 15th of September 2016, the date of the release of the second report by the SPP.

We could say that a certain minimum issuing from the *Urgent Reform Priorities*² related to the task of moving away from autocratic tendencies and state capture has been met through the functioning of SPP Office. Nonetheless, the work accomplished by the SPP is about mere implementation of the principle of rule of law related to the wiretapping scandal and cannot be considered part of the reform process in the strict sense, albeit acting as its precondition. The urgent reforms proposed in the *Report of the Senior Experts' Group* (dubbed *The Priebe Report*)³ concern undertaking systemic changes enabling future democratic and non-corruptive functioning of the state.

The first recommended step toward substantial democratization of the system according to the *Senior Experts' Group Report* (SEGR) is related to reforms aimed at limiting the virtually unchecked power of UBK. The recommended reforms, we argue, require certain legislative interventions:

- "Divesting of UBK of its intermediary function" (SEGR, 7) which enables it to act on its own behalf and on behalf of the Police, Customs Administration and Financial Police, granting it "monopoly over the use of surveillance" (SEGR, 5) is something that requires change in legislation and, thus, an initiative of the Parliament involving all major political parties.

² European Commission: Neighborhood and Enlargement Negotiations, *Urgent Reform Priorities for the Former Yugoslav Republic of Macedonia* (June 2015), available at http://ec.europa.eu/enlargement/news_corner/news/news-files/20150619_urgent_reform_priorities.pdf, accessed on 20 October 2016.

³ 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 (Brussels, 8 June 2015), available at http://ec.europa.eu/enlargement/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf, accessed on 20.10.2016

- “UBK has the means to interfere in criminal investigation” (SEGR, 5) and thus undermine the “leader of investigation, i.e. the prosecutor” and, through that, the rule of law by way of affecting the independence of the Judiciary; thus, it is imperative that a reform in the legislation is undertaken as the breach of power by UBK is currently legally permitted or not explicitly and unequivocally prohibited.
- Functioning parliamentary oversight over UBK also requires legislating intervention that will address the problem of “conflict of interest” (SEGR,7) present in the current form of oversight as prescribed by the law permitting UBK to issue or not clearances to members of the parliamentary oversight committee.
- In order to divest UBK from access to arbitrary, i.e., not contingent upon a court order, mirroring of the communication signal and to, therefore, move “proprietary switches,” as required by the Senior Experts’ Group, to the “premises of the telecommunication providers” legislative interventions are required too so that UBK has no “practical capability to capture communications directly.” (SEGR, 8)

Apart from policy changes and concrete action in the institutional practice, legislative interventions are required in order to ensure the basic principles of a democratic and European state are observed in the functioning of the UBK. The excessive power of the UBK and its interference in the work of “the leader of investigation” (SEGR, 5) undermines the country’s compliance with the Copenhagen criteria by way of compromising the independence of the judiciary (i.e., the prosecution). For these purposes, a minimum consensus along different party lines in the Parliament is indispensable as the precondition for reform processes in terms of legislation revision.

The legislation contradicts itself among a number of articles in two related laws or, at least, displays vagueness which permits arbitrariness in the actions of UBK. Namely, articles 9 and 10 of the *Law on interception of communication* require a valid court or-

der for a definite period of time for an interception process to be initiated.⁴ However, the *Law on electronic communication*⁵ enables unrestricted access of UBK to constant mirroring and direct capturing of signal intimates practical total absence of oversight which can invite arbitrariness in action on the part of UBK. The articles 175 and 176 of the *Law on electronic communication*, as noted in the *Senior Experts’ Group Report*, allow that “the three national telecommunications providers to equip 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*.” (SEGR, 6) Thus, the Senior Experts’ Group urges Republic of Macedonia to divest UBK from its power to directly intercept communications and requires that “proprietary switches” are “moved to the premises of the telecommunication providers.” Legal interception should be enabled only by way of diverting signal to the competent law enforcement agencies by the telecommunication providers upon the receipt of a valid court order. This implies that intervention in legislation is required, namely addressing issues raised by the Senior Experts’ Group, in particular with regard to the articles 175 and 176 of the *Law on electronic communication*. Or in the words of the Senior Experts’ Group:

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

⁴ “Amendment to the Law on Interception of Communication” [Закон за изменување и дополнување на законот за следење на комуникации], *Official Gazette of the Republic of Macedonia* 116 (2012) [Сл. Весник на Р. Македонија, 116 (2012)].

⁵ “Law on Electronic Communication” [Закон за електронските комуникации] *Official Gazette of the Republic of Macedonia* 39 (2014) [Сл. Весник на Р. Македонија 39 (2014)]

order, and only for the purposes of lawful interceptions. Under no circumstances should the UBK have the practical capability to capture communications directly. (SEGR, 8)

Undertaking action in addressing the UBK related recommendations in the Senior Experts' Group report is the first and necessary step to guarantee commitment by all parties-signatories of the June/July Agreement of 2015 (or the so-called "the Pržino Agreement") to engage in effective reforms aiming at dismantling the system that enables state capture. Adopting changes in legislation to ensure such a commitment will be the material proof of will of the parties to do something more than merely maintain or establish change in power after the early elections in December 2016.

In conclusion, we recommend:

1. Change in legislation in reference to articles 175 and 176 of the *Law on electronic communication* that will enable for the proprietary switches to be moved back to the telecommunications providers and for UBK to be divested of the technical capability to directly capture signal, as proposed in the *Senior Experts' Group Report*.
2. Revision of the legal provisions concerning parliamentary oversight of the UBK that will circumvent the issue of conflict of interest which is permitted by the vagueness and contradicting stipulations of the current legislation (as noted in the *Senior Experts' Group Report*).
3. Legislative interventions to be carried out by the Parliament should be coupled by bylaws to be adopted by the law enforcement agencies endorsing policies of transparency and rule of law.

