Strasbourg, 26 February 2016

CDL(2016)001*
Or. Engl.

Opinion No. 829 / 2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE LAW
ON THE PROTECTION OF PRIVACY

AND

ON THE LAW
ON THE PROTECTION OF WHISTLEBLOWERS

OF "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

on the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Ms Claire BAZY-MALAURIE (Member, France)
Mr Dan MERIDOR (Member, Israel)
Mr Ben VERMEULEN (Member, the Netherlands)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*
This document will not be distributed at the meeting. Please bring this copy.
www.venice.coe.int

I. INTRODUCTION 3

II. BACKGROUND INFORMATION 3

III. ANALYSIS 4

A. The time-frame for the application of the two laws 4

B. The Privacy Law 4

1. Article 1: what materials are covered by the law? 4
2. Article 2: obligation to hand the intercepted materials over to a relevant prosecutor 5
3. Articles 3, 4 and 5: disclosure of the intercepted materials 6
   - a. General principles on the balance between the privacy interests and the freedom of speech 6
   - b. The Privacy Law and the existing legislation: the “public interest” exception 7
   - c. The Privacy Law and the mandate of the Special Prosecutor 8
   - d. The various aspects of “privacy” which the Law may seek to protect 9
   - e. Privacy as secrecy of communications. Is it justified to prohibit publication of intercepted materials simply because they have been obtained in violation of the secrecy of communications? 9
   - f. Privacy as reputation. Should the law prevent publication of intercepted materials simply because they damage somebody’s reputation? 11
   - g. Privacy as non-disclosure of information of intimate character. What sort of intercepted materials should not be made public? 12
   - h. Is it appropriate to combat disclosure of private information by means of criminal law? 14
4. Conclusions on the Privacy Law 14

C. The Law on the Protection of Whistleblowers 15

1. Scope of Whistleblowers Law *ratione personae* 15
2. What are the “protected disclosures” under the Whistleblowers Law? 16
3. Procedure for protected disclosures 18
4. What sort of protection does the Law give to whistleblowers? 20
   - a) Procedural measures of protection 20
   - b) Substantive protection 21
   - c) Procedures under Article 10 of the Whistleblowers Law 22
   - d) Public awareness about the Whistleblowers Law 23

IV. CONCLUSIONS 23

I. INTRODUCTION

1. On 1 December 2015 the Permanent Representative of "the Former Yugoslav Republic of Macedonia" (hereinafter – "the Republic") to the Council of Europe requested an opinion of the Venice Commission on the Law on the Protection of Privacy and the Law on the Protection of Whistleblowers (CDL-REF(2016)002).

2. Mr R. Barrett, Ms C. Bazy-Malaurie, Mr D. Meridor, and Mr B. Vermeulen acted as rapporteurs on behalf of the Venice Commission. On 8 and 9 February 2016 a delegation of the Venice Commission visited Skopje and met with the State officials and politicians concerned, as well as with the members of the civil society, and of the expert community. The delegation is grateful to the Macedonian authorities for the organisation of the visit and for the possibility to discuss the legislation with the relevant stakeholders.

3. This Opinion is based on the English translation of the laws at issue provided by the Macedonian authorities. This translation may not always accurately reflect the original version in Macedonian on all points; therefore, certain issues raised may be due to problems of translation.

4. This Opinion was discussed at the Sub-Commission on Fundamental Rights and Democratic Institution and adopted by the Venice Commission at its … Plenary Session (…).

II. BACKGROUND INFORMATION

5. During the year 2015 in the Republic a large quantity of audio tapes, obtained through wiretapping of telephone conversations, were released to the public through the mass media. It appears that these tapes and related transcripts record the content of conversations involving – among others – the Prime Minister, Government ministers, senior public officials, mayors, members of Parliament, the Speaker, opposition leaders, judges, prosecutors, civil servants, journalists, editors, and media owners. According to the information available to the Venice Commission, these conversations had been recorded without the knowledge of the participants. Although the circumstances surrounding this "mass" wiretapping are still unclear and are being currently investigated, various sources suggest that these conversations have been intercepted by State officials working for the National Security Service of the Republic (the UBK).[1] They also suggest that these interceptions were not legally sanctioned. The reasons for wiretapping or the subsequent leaking of the audiotapes are unknown. It is reported that there are in total 20,000 recorded conversations of which only a small proportion so far has been released into the public domain. The wiretapping material therefore partly has been leaked, and further leaks are possible.

6. In order to restrain and regulate the use and in particular the publication of this material so as to protect privacy – and personal and family rights in particular – and to protect the public interest in the investigation of crime and corrupt misbehaviour on the other hand, in 2015 several laws have been enacted by the Macedonian legislature.

---

[1] The Venice Commission stresses that it does not have information on whether and to what extent any official within the UBK has been involved in those mass wiretappings. Moreover, it stresses that it is not within its mandate (nor it is its aim) to take a stand in these matters. This situation is currently being investigated at the domestic level. Any reference to the "illegal wiretapping" or to the UBK made in the present opinion only serves to designate intercepted materials all coming from the same source, but not to accuse any particular official or institution of any unlawful activity.

7. The first law adopted in September 2015 (hereinafter the Law on the Special Prosecutor)[2] established a Special Prosecutor with a mandate to investigate both the facts revealed by these recordings and the circumstances of their creation and dissemination. That law is not the subject of the current analysis. However, the existence of this mechanism, which recently started to operate, will be taken into account in the analysis below.

8. Secondly, on 10 November 2015 two other acts were enacted (CDL-REF(2016)002): the Law on the Protection of Privacy (hereinafter the "Privacy Law") and the Law on the Protection of Whistleblowers (hereinafter the "Whistleblowers Law"). The Privacy Law focuses on the disclosure of material allegedly intercepted by the UBK between 2008 and 2015; the Whistleblowers Law does not apply to that material, but concerns future disclosures by whistleblowers. This opinion will focus on these two laws.

III. ANALYSIS

A. Time-frame for the application of the two laws

9. The Whistleblowers Law will become effective on 10 March 2016 (Article 30). Its Article 24 provides that "it shall be prohibited to use materials arising from the unlawful interception of communications carried out in the period between 2008 and 2015 as content of the disclosure referred to in Article 3, paragraph (1) of the present Law". In other words, the disclosure of materials unlawfully intercepted between 2008 and 2015 cannot be regarded as "protected disclosure" under the Whistleblowers Law.

10. The time frame of the application of the Privacy Law is less clear. The English translation of Article 7 of the Privacy Law reads as follows: "This Law shall enter into force on the day of its publication […] and shall apply for the duration of six months after the day of its entry into force." At several meetings in Skopje the rapporteurs of the Venice Commission were informed that this translation is not fully accurate and that, according to the Macedonian text, the application of the Privacy Law is to start six months after its adoption. This means that although the law is already in force, it will start to be applied only from 10 May 2016 onwards. In its subsequent analysis the Venice Commission will assume that this is a correct reading of Article 7.

11. That being said, it appears that some of the articles of the Privacy Law will become operational before 10 May 2016. According to Article 2, anyone in possession of material arising from unlawful interception of communications as set forth in Article 1 should hand it over to the "relevant public prosecutor" within 20 days from the "entry into force of this Law". It thus appears that this obligation, contrary to the rest of the Law, is applicable from December 2015 onwards (unless this is a translation problem). At the same time, Article 7 postpones the applicability of the Law in its entirety, without any exception. Hence, Articles 7 and 2 should be harmonised.

B. The Privacy Law

1. Article 1: what materials are covered by the law?

12. Article 1 p. 1 of the Privacy Law defines that this law applies "to material arising from the unlawful interception of communication carried out in the period between 2008 and 2015". This provision may be interpreted in different ways. First, it is unclear whether the Privacy Law is

[2] The Law on the Public Prosecution Office for Prosecuting Cases Surrounding and Arising from the Content of the Unauthorized Interception of Communications

supposed to cover *all* intercepted materials obtained unlawfully during this period of time, or only materials of a specific origin – namely those which had been obtained as a result of interceptions allegedly organised within the UBK. Secondly, it is unclear whether the law automatically labels all those materials without exception as "unlawfully obtained". As follows from the exchanges the rapporteurs had in Skopje, the interpretation that the Law only covers materials unlawfully obtained as a result of the mass interception allegedly organised within the UBK is the most commonly shared reading of Article 1 p. 1. However, if the unlawfulness of the interceptions is already established at the legislative level, that might prejudge the conclusions of the on-going investigation into the wiretapping led by the Special Prosecutor. If, in contrast, not all the materials are labelled as "unlawfully obtained", the question arises who would define this unlawfulness – the Special Prosecutor, the courts examining cases under the Privacy Law, or any other instance? The authorities are invited to revise the formula used by the Privacy Law to define the material scope of its application, in order to specify it in more clear terms and harmonise it with the law on the Special Prosecutor.

13. Under Article 6 of the Privacy Law, the law does not apply to material which has already been made public on and before 15 July 2015. This is a reasonable approach, since any prohibition for further dissemination of materials which are already public would be useless and would not help achieving the main goal of the Law – protection of privacy interests.

2. Article 2: obligation to hand the intercepted materials over to a "relevant public prosecutor"

14. Article 2 of the Privacy Law creates an obligation to hand over the intercepted material to a competent authority – the "relevant public prosecutor". Admittedly the law implies that this should be the Special Prosecutor whose mandate is to investigate the wiretapping issues. However, that should be specified more clearly in the law (by cross reference to the law on the Special Prosecutor).

15. Handing such materials to the Special Prosecutor appears valid as a legal obligation to channel the material into a framework where it can be lawfully used. Some of the material covered by the Privacy Law may disclose criminal conduct, or impropriety short of criminality such as political misbehaviour or dishonesty. Some of the material may be relevant to a criminal investigation as it might exonerate a person who is otherwise under investigation or prosecuted for criminal conduct. Further, some of the information may appear innocuous at first glance, but in combination with other information might be relevant in a criminal investigation. Because of the criminal law context, the role of a Special Prosecutor appears well chosen as the repository for this material.

16. That being said, Article 2 does not fix any sanction for the failure to hand the materials to the Special Prosecutor. The continued possession of copies of conversations is declared unlawful pursuant to Article 1 p. 3, but this provision is not supported by any sanction either. Sanctions provided by Article 4 of the Privacy Law only concern *disclosure* of such materials. If, in revising the law, the legislator decides to introduce any such sanction, it should be proportionate to the legitimate aim pursued by the law (to facilitate the task of the Special Prosecutor), and should not interfere with the right of the media to retain, seek, access and publish the information of public interest (for more details on this issue see below).

17. More generally, the Venice Commission considers that the creation of an independent Special Prosecutor may be, in the exceptional circumstances at hand, an appropriate instrument to investigate into the illegal wiretapping itself and into the facts revealed in the intercepted communications. To be effective, the Special Prosecutor should not only enjoy strong

guarantees of independence and be adequately staffed and funded. The Special Prosecutor should also have the necessary investigative powers, in order to be able to access the intercepted materials and conduct further investigations into the information contained therein.

3. Articles 3, 4 and 5: disclosure of the unlawfully intercepted materials

18. The most problematic part of the Privacy Law is the ban on disclosure and, in particular, on the *public* disclosure (disclosure to one person only, in private context, does not seem to be exempted from the ban) of the intercepted materials (see Article 4 p. 1 and, in particular, p. 2). This ban may interfere with the freedom of the press and the right of the public to know important information. It raises, therefore, an important human rights question. The subsequent analysis will focus on this aspect of the law.

19. The Venice Commission stresses that the law does not regulate other situations where the information does not affect privacy but other interests, for example national security or industrial secrets. The analysis proposed below follows the logic of the law; the conclusions of the Venice Commission could be different if the law approached the publication of those audiotapes from a broader perspective and included other considerations which might justify the ban.

a. General principles on the balance between the privacy interests and the freedom of speech

20. In essence, the Law on Privacy touches upon a problem well known in the case-law of the European Court of Human Rights: how to find a proper balance between the freedom of speech, guaranteed by Article 10 of the European Convention, and the right to private and family life, guaranteed by Article 8 of the Convention. The criteria relevant for such balancing exercise can be found in the ECtHR case of *Von Hannover v. Germany* (no. 2),[3] concerning publication of private photos of a celebrity by a tabloid newspaper. These criteria, as far as they are relevant to the cases covered by the Privacy Law, are as follows (see §§ 108 et seq.):

- Contribution of the published information to a debate of general interest;
- How well known is the person concerned and what is the subject of the report?
- Prior conduct of the person concerned;
- Content, form and consequences of the publication;
- Circumstances in which the material was obtained.

21. This test has been supplemented and developed in other cases. Thus, in assessing the existence of a "public interest" the ECtHR made a distinction between "serious" and "tabloid" press (see *Von Hannover v. Germany (1)*).[4] Furthermore, the Court made reference to the possibility of attaining the goal of informing the general public by other, less intrusive means (see *Peck v. the United Kingdom*).[5] The severity of the sanction imposed on the journalist for breaching privacy was also assessed to determine whether the privacy interest had been sufficiently protected (see *Armoniene v. Lithuania*),[6] etc.

22. The test proposed by the Court is not a categorical one: in other words, the various elements should be assessed to come to a correct result. It would be mistaken to always give preference to Article 10 rights simply because the publication touches upon matters "of public interest". It would be equally wrong to base the whole analysis solely on the effects of the

[3] *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012
[4] *Von Hannover v. Germany*, no. 59320/00, § 59, ECHR 2004-VI
[5] *Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I
[6] *Armonienė v. Lithuania*, no. 36919/02, 25 November 2008

publication on the reputation of the main subject of such publication and conclude, on that basis, that Article 8 has been breached.

23. It is difficult, if not impossible, to measure *in abstracto* the relative weight of each element of the test applied by the Court. However, it would be fair to say that when the publication concerns serious matters of public interest, other considerations generally will be of less importance. In *Lingens v. Austria*[7] the Court held that “freedom of the press […] affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”. The Court repeatedly held that it “must apply the most careful scrutiny when […] the sanctions imposed by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern” (see, among other authorities, *Tønsbergs Blad A.S. and Haukom v. Norway*,[8] *Kasabova v. Bulgaria*,[9] and *MGN Limited v. the United Kingdom*[10]). And it should be added that matters of public concern are not limited only to political sphere – see *Thorgeir Thorgeirson v. Iceland*.[11]

24. The Venice Commission also recalls that the concept of “private life” is applied differently to private persons, on the one hand, and politicians on the other hand, who “inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance” (see, for example, *Incal v. Turkey*,[12]; and *Castells v. Spain*;[13] see also *Lingens*, cited above). The limits of acceptable criticism are accordingly wider as regards a politician as such. By contrast, the status of an ordinary person “enlarges the zone of interaction which may fall within the scope of private life”.[14]

b. The Privacy Law and the existing legislation: the “public interest” exception

25. It is difficult for the Venice Commission, in the light of the information made available to the rapporteurs during their visit to Skopje, to fathom what the new law adds to the current regulations, especially to the Criminal Code or any other law which may establish criminal liability for the offences related to the unlawful interception of materials or disclosure of such materials. It seems that the Privacy Law has been adopted without an in-depth analysis of the existing legal regime concerning intercepted communication. Hence, The Venice Commission recommends, when revising the law, to describe its relation to the other laws which may be applicable *in casu*.

26. Article 151 § 1 of the Macedonian Criminal Code penalises unlawful wiretapping. The Criminal Code also penalises, in Article 151 § 2, the disclosure of materials obtained through unlawful wiretapping. Although the interpretations given by the domestic interlocutors varied, Article 151 apparently applies to journalists who obtained unlawfully intercepted materials and published them. This provision contains a blanket prohibition to disclose such materials and contains no reference to the public interest whatsoever (cf. with Article 150 of the Criminal Code which concerns disclosure of professional secrets but contains an exception based on the “public interest” considerations). Moreover, since the unlawfully intercepted materials are now

---

[7] 8 July 1986, § 42, Series A no. 103
[8] No. 510/04, § 88, ECHR 2007-III
[9] No. 22385/03, § 55, 19 April 2011
[10] No. 39401/04, § 201, 18 January 2011
[11] 25 June 1992, § 64, Series A no. 239
[12] 9 June 1998, § 54, Reports of Judgments and Decisions 1998-IV
[13] 23 April 1992, § 46, Series A no. 236
[14] *Jokitaipale and Others v. Finland*, no. 43349/05, § 70, 6 April 2010

the subject-matter of the investigation conducted by the Special Prosecutor, their disclosure may admittedly be prohibited by Articles 360 and 369 of the Criminal Code which penalise disclosure of official secrets and violation of the confidentiality of a criminal procedure.

27. Neither of those provisions of the Criminal Code contains a “public interest” exception. Against this background, Article 4 of the Privacy Law is a step forward: Article 4 p. 1 provides that criminal liability is not applied for disclosure, in private context, of “conversations or statements of public interest”. Furthermore, Article 5 of the Privacy Law requires the courts, in applying its provisions, “to adhere to the Convention for the Protection of Human Rights and Fundamental Freedoms and the judgments of the European Court of Human Rights”.

28. Those elements of the law are welcome. However, it appears that, insofar as the *public disclosure* is concerned (Article 4 p. 2), the “public interest” exception is not applicable to it. This provision reads as follows: “Any person *making public* [italics added] intercepted or audio-recorded conversations or parts or transcripts thereof violating the privacy of personal and family life shall be punished with one month to a year of imprisonment.” It appears that Article 4 p. 1 should be read as applying to the private disclosures (from one person to another), whereas Article 4 p. 2 is supposed to apply to the public disclosures. Therefore, the law contains an absolute ban on any publication of the information contained in the intercepted materials which relate to “personal and family life”, whatever the public interest in knowing that information might be. More generally, the law seems to present protection of privacy as an absolute argument, leaving no space for the balancing exercise required under the ECHR (see, in particular, the formula used by Article 3 p. 1).

c. The Privacy Law and the mandate of the Special Prosecutor

29. The Venice Commission observes that the Privacy Law was adopted as part of a broader legislative package implementing a political agreement reached between the opposition parties and the majority coalition in mid-2015. A part of that agreement provided for the creation of the above mentioned Special Prosecutor with a specific mandate. The Venice Commission sees the political logic of the Law: on one hand all publication of unlawfully intercepted conversations is forbidden. On the other hand the Special Prosecutor will see all of it and will be able to press charges (presumably on corruption and other criminal offences committed by powerful political figures).

30. However, a political agreement should not deny to the people the right to learn about important information of public interest. The State cannot create special closed forums or institutions which would have an exclusive right of accessing, examining and using such information. By doing so, the State would prevent the press from playing its vital role of “public watchdog”, which is the core element of the Court’s case-law under Article 10 of the European Convention.[15]

31. From the practical point of view, the very idea of creating the office of the Special Prosecutor must be praised. However, the fact that the office of the Special Prosecutor pursues its investigations should not prevent journalists from reporting on information of public interest. The Venice Commission notes with concern that the efficiency of this newly created mechanism is yet to be shown in practice. From the meetings the rapporteurs had in Skopje it appeared that the office of the Special Prosecutor is constantly under attacks from other State institutions and from political figures. Furthermore, its mandate is relatively short (18 months only); also, it was reported that it lacks necessary resources and already experiences serious impediments in its

[15] See, amongst many authorities, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, Reports 1996-II, § 39, and *Thorgeir Thorgeirson v. Iceland*, cited above, § 63.

daily work. Therefore, from both points of view – theoretical and practical – the existence of the Special Prosecutor cannot be regarded as a justification for the absolute ban on the public disclosure of the information of public interest, which the Article 4 p. 2 of the Law introduces.

d. The various aspects of "privacy" which the Law may seek to protect

32. The Venice Commission will now analyse whether the Privacy Law strikes a fair balance between "privacy" rights and "public interest" considerations.

33. The right to "privacy" is nowadays acknowledged everywhere as a basic principle, that covers various, quite distinct fields; its definition in different jurisdictions varies. "Privacy" is often invoked in respect of the protection against interception of private communications – by phone, post, internet or otherwise. Sometimes it is referred to in order to protect one's dignity or reputation. This concept has been used as a reference for the right not to have certain information of personal character disclosed or, conversely, to have access to certain information[16]. Privacy may also relate to certain intimate practices which the government should not interfere with (like sexual practices[17]). The list of situations where the right to "privacy" may be invoked is large and expanding.

34. At the domestic level "privacy" is a constitutionally protected value: Article 25 of the Macedonian Constitution provides that "each citizen is guaranteed the respect and protection of the privacy of his or her personal and family life and of his or her dignity and repute". In addition, Amendment XIX provides that "the freedom and inviolability of correspondence and other forms of communication is guaranteed. Only a court decision may, under conditions and in procedures prescribed by law, authorize [departure from] the principle of inviolability of correspondence and other forms of communication, in cases where it is indispensible to preventing or revealing criminal acts, to a criminal investigation or where required in the interest of security and defense of the Republic". These provisions are clear, although there appears to be limited case-law as yet within the Macedonian court system on the interpretation and application of these provisions.

35. The absolute ban on public disclosure of intercepted communications, contained in Article 4 p. 2 of the Privacy Law, in theory may be justified by various facets of the "privacy interest". In the following paragraphs the Venice Commission will verify whether there is indeed a plausible reason justifying introduction of such a rule, and whether it is "necessary in a democratic society".

e. Privacy as secrecy of communications. Is it justified to prohibit publication of intercepted materials simply because they have been obtained in violation of the secrecy of communications?

36. Article 4 of the Privacy Law introduces a criminal liability for disclosure of the *unlawfully intercepted* material.[18] One may conclude that an absolute ban, contained in Article 4 p. 2, might be justified on the sole ground that the material has been obtained in blatant violation of the secrecy of private communications. This reading is supported by Article 1 p. 3 of the Privacy Law which stipulates that "the possession, processing, public disclosure and disposal in any way, shape or form of material arising from the unlawful interception of communication […] shall also be banned under this Law".

---

[16] The Charter of Fundamental Rights of the European Union declares in Article 8.1 that everyone has the right to the protection of personal data concerning him or her.

[17] See *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45

[18] The Law and the ban does not apply to any of the material which has already got into the public domain, which is positive, since prohibiting it would be in any event useless.

37. The question is, however, whether this reason – namely the unlawful origin of those recordings - is a relevant and sufficient argument to justify the ban. The ECtHR case-law under Article 10 does take into account the method by which the information has been obtained. In *Fressoz and Roire v. France*,[19] the Court examined sanctions imposed on the journalists for publishing information which they should have known was from a confidential tax file. The Court considered necessary to determine "whether the objective of protecting fiscal confidentiality, which in itself is legitimate, constituted a relevant and sufficient justification for the interference [with the freedom of the journalists to publish certain information obtained from secret fiscal files]". Thus, the method of obtaining the information appears to be a *relevant* argument which needs to be addressed.[20]

38. However, it is not necessarily a *sufficient* argument. The interest of the population to know certain information of public interest may override a legal duty of confidence – the Venice Commission will return to this argument when discussing the Whistleblowers Law.[21] The next question is whether Article 10 interests may also prevail in a more serious situation, where the information is obtained not as a result of the breach of the duty of confidence, but through a violation of the secrecy of private communications – like it was *in casu*.

39. There is no doubt that the practice of illegal wiretapping by law-enforcement services should be combatted. There are many ways how to do that. For instance, in some jurisdictions materials obtained as a result of illegal wiretapping cannot be used in criminal proceedings as evidence.[22] Such rule is supposed to discourage such kind of behaviour of the law-enforcement. However, this logic is not applicable here. The aim of the Privacy Law is purely retroactive: it is not supposed to deter future wrongs but its purpose is to deal with something which has already happened.[23]

40. It is perfectly legitimate to try to identify and punish those persons who ordered or carried out illegal wiretapping. In the present case, the Macedonian legislator has created a special mechanism to investigate into the illegal wiretapping and identify the perpetrators (the Special Prosecutor). As already pointed out, the existence of such a mechanism could be a sufficient deterrent against abuses allegedly committed by the personnel of the security services.

41. The Venice Commission notes that Article 4 p. 2 may be applied to law-abiding journalists who have received information allegedly obtained in breach of the law but who themselves had not been responsible for the unlawful interceptions.[24] Indeed, a journalist should not become an instrument in the hands of unscrupulous actors – including members of the security services – who, by abusing their powers, have obtained information likely to discredit certain prominent figures within society and use journalists to publish it. And if there is a proof that the journalist

---

[19] *Fressoz and Roire v. France* [GC], no. 29183/95, § 53, ECHR 1999-I

[20] It appears that for the US Supreme Court the unlawful origin of published documents, where they are of great public importance, is an argument of very minor significance – see *New York Times Co. v. United States*, 403 U.S. 713 (1971),

[21] An important reservation: the duty of confindence may be a much stronger argument in favour of banning publication of certain materials if those materials, as well as the duty, relates to the security-sensitive material; see *Stoll v. Switzerland* ([GC], no. 69698/01, ECHR 2007-V.

[22] That would be the case, for example, in Ireland, in the Netherlands, and in Russia,

[23] The Venice Commission reiterates that it remains unclear to what extent the information contained in the audiotape which should be gathered by the Special Prosecutor may have the force of evidence in criminal proceedings

[24] When speaking of journalists the Venice Commission recalls definition in the General Comment no. 34 to Article 19 of the ICCPR (UN Human Rights Committee), p. 44: "Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere […]."

acted as a criminal associate of those “unscrupulous actors”, such behaviour may be considered as not being “in accordance with the tenets of responsible journalism”.[25]

42. However, in the very specific situation which the Privacy Law is supposed to address, it would be reasonable to assume good faith of the journalists. There is nothing to suggest that the journalists acted as proxies of those “unscrupulous actors” who organised the wiretapping. Moreover, sanctioning journalists would not deter future illegal wiretappings, since, as noted above, the Privacy Law only concerns those wiretappings which had already taken place. The Venice Commission is not called upon to formulate a general rule on whether or not it is legitimate to prevent journalists from publishing unlawfully obtained materials.[26] However, in the circumstances in which the Privacy Law has been adopted, the Venice Commission does not support the idea of sanctioning journalists for publication of materials solely because those materials have dubious origin. The task of a journalist should be limited to assessing whether the material contains matters of public interest and therefore deserves to be published, and whether its publication may cause serious damage to some other legitimate interests, like, for example, privacy.[27]

43. The Venice Commission concludes that the general ban introduced by the Privacy Law, to the extent it is addressed to journalists, cannot be justified solely by the *origin* of the disclosed material (i.e. the fact that the information has been obtained in breach of secrecy of private communications). Whether the ban is acceptable depends to a large extent on the *content* of this information.

f. Privacy as reputation. Should the law prevent publication of intercepted materials simply because they damage somebody’s reputation?

44. The next question is whether the Privacy Law is supposed to protect privacy as *reputation*. It is likely that the journalists will select for publication such conversations which reveal imprudent, morally reprehensible or even unlawful behaviour of public figures – speakers or protagonists. Therefore, virtually every bit of such information may be regarded as harming public image of those figures.

45. Indeed, there may be situations where a journalist deliberately distorts the intercepted conversation, or maliciously misrepresents its content. Such abuses should be punishable; the freedom of the press should not cover false factual assertions made maliciously or with reckless disregard to the truth. After all, the Venice Commission reiterates that the journalists are bound to act “in accordance with the ethics of journalism”.[28] Furthermore, a tape or a transcript might have been edited or fabricated by anyone along the chain, and it should be the professional duty of a journalist to verify, by taking reasonable steps, the authenticity of the any material s/he intends to publish. Such verification may include, for example, contacting the persons concerned by the conversation and asking their comments.

46. That being said, the veracity of the published material does not appear to be the main concern of the Privacy Law. From its text it is clear that it was not supposed to combat malicious or reckless behaviour of journalists. The Law rather deals with publication of true materials which may be, despite their truthfulness, detrimental to somebody’s privacy. Publication of such

[25] See an outline of the ECtHR case-law on this matter *in Pentikäinen v. Finland* [GC], no. 11882/10, §§ 90 and 91, ECHR 2015

[26] It appears that the case-law of the US Supreme Court in this respect is journalist-friendly: see the case of *Bartnicki v. Vopper*, 532 U.S. 514

[27] The Venice Commission stresses again that where the information contained in the leaked materials concern State secrets or alike, the logic may be different and the responsibility of the journalist may be higher.

[28] *Axel Springer AG v. Germany* [GC], no. 39954/08, § 93, 7 February 2012

audiotapes is akin to a publication of a true photograph.[29] Such audiotapes, if published, may destroy reputation, cause moral suffering, perturb family relations etc. but not because they are untrue.

47. The Venice Commission subscribes to the opinion expressed by the US Supreme Court that "state action to punish the publication of truthful information seldom can satisfy constitutional standards".[30] If the purposes of the law is to deal with the honest public disclosure of authentic materials – or materials which are on the face authentic[31] – which are of public interest, their publication cannot be banned *solely* because it may harm somebody's reputation. Damage to reputation is a relevant argument, but it is not sufficient - the law must also take into account *other elements* related to the content of the information, which will be analysed in more detail below.

48. This is *a fortiori* true in the Macedonian context, where most of the victims of the illegal wiretapping were public figures – politicians, state officials, journalists, etc. The Parliamentary Assembly of the Council of Europe in its Resolution 1165 (1998) on the right to privacy defined public figures as "persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain". In p. 6 of this Resolution the PACE noted that "public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy". This is fully in line with the approach of the ECtHR, recalled in the Venice Commission Opinion on the Legislation on Defamation in Italy[32]. The Venice Commission concludes that the damage to the reputation of speakers and protagonists who are public figures cannot, alone, justify banning of publication provided by Article 4 p. 1; even more so, in any balancing exercise this argument should play a minor role compared to other competing interests, and in particular the right of the public to know facts related to the behaviour, character, connections etc. of public figures.

g. Privacy as non-disclosure of information of intimate character. What sort of intercepted materials should not be made public?

49. Article 3 p. 2 of the Privacy Law defines in an exhaustive manner "privacy" as information relating to "family or personal relations, affiliation to various religious or ethnic groups and political parties, as well as personal health status". It thus appears that the Law is mostly concerned with the disclosure of information about some very intimate aspects of private and family life. This is a reasonable reading; protection of such information from disclosure is a legitimate aim for the State to pursue. The question, however, remains, what are the limits of "privacy" so understood.

50. As noted above, Article 4 p. 2 prohibits *any* public disclosure of such private information. This approach is incorrect. In virtually any private conversation one may find some information at least distantly related to "family or personal relations, affiliation to various religious or ethnic groups and political parties, as well as personal health status". Indeed, some of the intercepted material may include some *very sensitive personal information* for which a higher level of protection is justified. However even that is not an absolute argument to prohibit publication of

---

[29] See the cases of *Hachette Filipacchi Associés v. France*, no. 71111/01, 14 June 2007, or *MGN Limited v. the United Kingdom*, no. 39401/04, 18 January 2011

[30] *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)

[31] Not necessarily "true"; the journalist may not be required to prove the thruthfulness of his assertion beyond reasonable doubt in each case; a more relaxed test is usually applied to verify whether the journalist acted professionally and did all that could be reasonably expected from him in the circumstances to check the accuracy of the information.

[32] CDL-AD(2013)038, § 20

such information. Some materials will contain private information which is nevertheless important for public discussion and therefore as a rule it should be permissible to publish this information.[33]

51. From the discussions the rapporteurs had in Skopje with various authorities it became clear that the prevailing understanding of the concept of "public interest" – justifying publications that relate to private information – in the Macedonian law and in practice seems to be quite narrow. Most of the interlocutors agreed that information containing evidence of criminal activities by public figures is of public interest; however, they were reluctant to extend this concept to other situations where the information does not disclose criminal behaviour.

52. The Venice Commission emphasises that the ECtHR applies a much broader concept of "public interest". Certain information may be both "personal" and, at the same time, important for public discussion.[34] Such was the situation in the case of *Fressoz and Roire v. France*, where the journalist published information about the salary of a top-manager of Peugeot.[35] It was not a crime to have a high salary; furthermore, in many situations information about the salary of a person may be considered as his/her private business. However, that information was judged by the Court to be clearly "of public interest", given the context of the case - the on-going discussion on the amounts of salaries of workers in the automobile industry. The information on the state of health of a person is in principle private, but if it is about the long-concealed health problems of the head of the State it becomes information of public interest.[36]

53. From this perspective, instead of presuming that when the intercepted materials contain private information this should prevent their publication, it would be more appropriate – given the specific circumstances of the wiretapping scandal – to rely on the opposite presumption, namely that conversations involving public figures do contain elements representing public interest. Journalists should therefore be allowed to publish such information. Exceptions from this rule may exist, but they should always be formulated as exceptions, not as a general rule.

54. To mitigate the effects which the publication of the material may have on the private life of the protagonists and speakers, the Privacy Law might be amended to require the journalists to take certain practical steps in order to set apart the information which may be made public from the information that should be kept undisclosed. Indeed, there should be a different balance and a different conclusion in respect of "ordinary" people (as opposed to public figures) and their private issues which were "caught" on these tapes, which bear no public interest and may infringe upon their rights and cause unnecessary damage to them. It should be a duty of the journalist to avoid such "collateral damage" and thus to exclude those elements of personal information which do not concern public figures and do not touch on the matters of public interest. But it should belong in the first place to the journalists to differentiate between various types of information, to find the most appropriate form of publication and to take the measures necessary for protecting private life of ordinary people from excessive exposure while, at the same time, revealing information of public interest about public figures. Subsequently it will be for the courts to decide whether the journalist, in doing so, acted reasonably and within the limits set by the case-law of the ECtHR under Articles 10 and 8 of the European Convention.

55. Indeed, Article 10 of the Convention would not protect publications made in breach of the rules of responsible journalism - for example, malicious publication of fake or manipulated recordings, or misrepresentation of their content, or publishing false materials without first taking

[33] *Flinkkilä and Others v. Finland*, no. 25576/04, § 83, 6 April 2010
[34] *Ibid.*
[35] *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I
[36] *Editions Plon v. France*, no. 58148/00, ECHR 2004-IV

reasonable steps to verify their authenticity. However, to the extent that the intercepted materials are *prima facie* authentic, involve public figures and touch upon matters of "public interest", publication – even of the unlawfully intercepted materials (see in particular the reasoning in §§40 et seq. above describing the specific Macedonian context) – should be allowed, unless it reveals very intimate aspects of the private and family life of the speakers and protagonists.

h. Is it appropriate to combat disclosure of private information by means of criminal law?

56. Even the most elaborate legal test which requires balancing of competing interests leaves room for interpretation. Errors are inevitable: journalists may exceed the boundaries of their freedom by publishing information which does not contribute to the public discussion in any meaningful way and which, at the same time, reveals very sensitive personal information.

57. Article 4 of the Privacy Law provides for a sentence of imprisonment for up to one year for disclosure of private information. In the context of defamation, the UN Human Rights Committee has expressed the view that "the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".[37] The PACE also encourages decriminalisation of the defamation laws.[38] The European Court has warned against criminal sanctions in defamation cases.[39] The context of the Privacy Law is somewhat different: it is mostly concerned with the disclosure of sensitive personal information, not of false statements with a defamatory character. However, in the opinion of the Venice Commission, the same logic must apply *in casu*. "Privacy" is primarily a private interest, which may be effectively protected by private-law means. Although there is no common European standard on this issue, the Venice Commission considers that criminal sanctions for breaches of privacy by journalists should be avoided to the maximum extent possible. It is particularly worrying that the same criminal sanction may be applied for the "private disclosure" under Article 4 p. 1, i.e. in the situations where the damage to privacy is admittedly minimal and the use of such serious means is clearly disproportionate. Criminal sanctions, and especially such serious sanction as imprisonment, should be applied only in extreme cases - for example, for *malicious public disclosure* of very sensitive personal data having no public interest whatsoever, leading to very grave and clearly perceptible consequences for the latter. And even the civil-law sanctions should be commensurate to the wrong done to the "victim" or "protagonist" of the publication and take into account the "public interest" defence which may be forwarded by the journalist.[40]

4. Conclusions on the Privacy Law

58. The Venice Commission concludes that the Privacy Law requires an in-depth revision. First, the scope of application of the Privacy Law and its relation to other laws should be clarified. The principal aim it pursues – to protect the privacy of speakers and protagonists – is legitimate. However, it establishes a very rigid rule, prohibiting all publications of all intercepted materials. Given the context in which the interceptions were made and in which this law will operate, Article 4 – both in cases of private disclosure and public disclosure (pp. 1 and 2 correspondingly) – should allow for publication of materials touching upon matters of public interest, with some narrowly defined exceptions, related to the disclosure of information concerning intimate aspects of private and family life. And even in the latter case the "public interest" considerations may override the "privacy" interest, depending on the context. The law

[37] General Comment no. 34 to Article 19 of the ICCPR, § 47
[38] Resolution 1577 (2007), "Towards decriminalisation of defamation"
[39] See the outline of the ECtHR case-law in CDL-AD(2013)038, Opinion on the Legislation on Defamation in Italy, §§ 28 - 32
[40] CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, § 113

should leave space to a balancing exercise, to be conducted first by the journalist and then by the courts. And even where the journalist erred in his/her assessment of appropriateness of the publication, that should not normally entail criminal sanctions, except in the most extreme cases defined by the law.

C. The Law on the Protection of Whistleblowers

59. The Whistleblowers Law provides protection to persons who – in good faith – want to disclose a wrongdoing "that violates or threatens public interest" which they discover in their workplace. In essence the Whistleblowers Law creates an exception from the legal duty of confidentiality, which in normal circumstances is binding on every employee. The law assumes that whistleblowers will make their disclosure either internally within their own institution about which they are making the disclosure, or – if that fails, or if it concerns the management of the institution – to make their disclosure externally, to other competent public agencies. Under certain conditions, which will be analysed in more detail further below, the whistleblowers are entitled to make public disclosures.

60. A legal framework for the protection of whistleblowers is nowadays is in operation in many countries.[41] Disclosures that for a long time have been considered as unlawful or morally suspicious have found legal protection. The Macedonian Whistleblowers Law follows this trend and is largely inspired by the Council of Europe *acquis*. This *acquis* includes the Parliamentary Assembly's 2010 report on the protection of Whistleblowers, followed by Recommendation CM/Rec(2014) of the Committee of Ministers. Recommendation CM/Rec(2014) to a large extent reflects the Parliamentary Assembly's position already expressed in Resolution 1729 (2010) and Recommendation 1916 (2010). The concept of the Whistleblowers Law is in line with Article 24 of the Constitution of Macedonia, which gives some protection to citizens who make petitions to state and public bodies.

61. As a preliminary remark, the Venice Commission welcomes the adoption of the Whistle-Blowers Law as a solid legal text which introduces an important new legal concept, useful for improving private and public governance and human rights protection.

62. As follows from its Article 24, the Whistleblowers Law does not apply to the disclosure of materials obtained through "unlawful interception" which are at the heart of the Privacy Law. Hence, the Privacy Law represents a sort of a *lex specialis*. The Venice Commission also observes that the notion of "public interest" is much better developed in the Whistleblowers Law, and the level of protection given to the whistleblowers is much higher.

1. Scope of Whistleblowers Law *ratione personae*

63. Article 2 p. 3 of the Whistleblowers Law describes categories of people who may claim protection under that Law. These are essentially employees or contractors of private and public institutions. It is understood that the word "institution" mentioned in this provision and in Article 4 p. 2 refers not only to private companies but also to State and municipal authorities (see Article 4 p. 5). To remove any ambiguity, this should be made explicit in the law.

64. Under Article 8 p. 4 the measures of protection which are normally applicable to whistleblowers may also be applied to persons "who are able to create the probability that the person subject of the disclosure could suspect that such persons have made disclosures against him/her". This proposal, although welcome, may be difficult to put in place due to the certain vagueness of this formula.

[41] Ireland, the United Kingdom, France, Slovak Republic, Serbia, etc.

2. What are the "protected disclosures" under the Whistleblowers Law?

65. Disclosure of confidential information would be "protected" (i.e. it will not attract liability for the employee who breached the duty of confidentiality) if it pursues a "public interest". The CM 2014 Recommendation notes in this respect that "whilst it is for member States to determine what lies in the public interest […], member States should explicitly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment." It is positive that the Law, in its article 2 p.4, provides such a definition of the concept of public interest, which is sufficiently broad.

66. Article 2 p. 1 of the Whistleblowers Law establishes that protected disclosure should concern information about "punishable activity" which is "already performed", "being performed", or "for which there is a probability… that [it] will be performed", or about any other "unlawful or unallowed" activity. In principle, it is legitimate to define protected disclosure as information about "unlawful activities".[42] However, the legislature might consider extending the scope covered by protected disclosure by referring to information about actions which are not necessarily illegal but nevertheless warrants to be reported on - such as gross waste of funds, abuse of authority as well as other types of mismanagement. Similarly, information about possible conflict of interests will not necessarily reveal "punishable activity", but the disclosure of such information evidently deserves to be protected as well. Certain secret political deals may be not unlawful but nevertheless seriously reprehensible. One may say that the scope of the Law may not only include unlawful activities, but also ethically reprehensible actions ("unallowed activities"). That being said, the instruments of the Council of Europe concerning whistleblowers' protection primarily focus on the reporting of unlawful activities, and it belongs to the legislature to decide whether the law should extend the protection beyond this line.

67. It is noteworthy that the Whistleblowers Law only protects disclosures "made in good faith and presenting reasonable suspicions about the veracity of information contained in the disclosure at the time the disclosure has been made" (Article 3 p. 1). The reference to "good faith" and "reasonable suspicions" amounts to a combined test of subjective and objective elements. The "good faith" element under the Law appears to relate to the inner – subjective – motives of the whistleblower. The "reasonable suspicion" element in Article 3 p. 1, most likely, relates to the objective assessment of the veracity – or rather objective credibility (falling short of truthfulness) – of the information which the whistleblower disclosed.

68. Article 2 p. 1 also mentions "reasonable suspicion" about a punishable activity as a ground for disclosure. However, the meaning of "reasonable suspicion" in Article 2 p.1 should be different from the meaning of this term in Article 3 p. 1. Article 2 p. 1 of the Law stipulates that information may be disclosed if it creates a reasonable suspicion of some reprehensible activity. Article 3 p. 1 requires that the person disclosing information should have a reasonable ground to believe that the information s/he is about to publish is accurate. The Law should reflect this difference.

69. For the Parliamentary Assembly, any whistleblower should be considered as acting in good faith, as long as s/he had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and s/he had no unlawful or unethical ulterior

[42] See PACE Resolution 1729 (2010), p. 6.1.1

motive.[43] Thus, for the Parliamentary Assembly the notion of "good faith" encompasses both elements – subjective and objective.

70. The PACE Resolution does not stipulate who should prove the "subjective" element (the non-existence of an "unlawful or unethical ulterior motive"). By contrast, Article 3 p. 2 of the Law stipulates that "whistleblowers shall not be obliged to prove their good faith and the veracity of the information contained in the disclosure". In this respect the Macedonian legislator goes further than the Parliamentary Assembly in protecting whistleblowers, which is commendable.

71. The Venice Commission agrees that it is legitimate to presume the *good motives* of the whistleblower, as the Macedonian law does. Malice is very difficult to prove, so Article 3 p. 2 contains an important safeguard for the whistleblower, insofar as the subjective element is concerned. However, the burden of proof may be distributed differently when it comes to the objective element. In the case of *Guja v. Moldova* the European Court noted that "any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable".[44] The Venice Commission stresses that the whistleblower should not be required to *prove* (beyond reasonable doubt or pursuant to any other standard of proof) that the information disclosed is perfectly accurate; however s/he may be required to show that the information s/he disclosed was at least *prima facie* credible. To a certain extent this idea is already contained in Article 14 (which deals with abusive disclosure defined as "deliberate disclosure of false information" or "not checking the accuracy and veracity of information with due diligence and conscientiously, to a degree permitted by the circumstances").

72. The next question is to what extent the "good motives" of the whistleblower should be decisive for giving him/her protection under the Law. In this respect the Venice Commission discerns a certain tension between the position of the Parliamentary Assembly, for which an "unethical ulterior motive" appears to be the key element in deciding whether the whistleblower should be given protection, and a somehow less categorical approach of the ECtHR in *Guja v. Moldova*, where the Court noted as follows:[45]

> *"[…] [A]n act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection [further reference omitted]."*

73. This quote implies that, although the motive of the whistleblower is an element to assess, the fact that the disclosure was driven by wrong motives does not (completely) remove the protection which the "public interest" may grant to such disclosure. The Whistleblowers Law (see Articles 2 p. 2 and 3 p. 1) appears to consider "good faith" (understood as the "motives") as a decisive element. Probably, this approach should be revised in the direction of the more cautious position expressed by the European Court of Human Rights in the *Guja* case. The Venice Commission, on its side, agrees that the intention or motive may shed light on the character of the person who made the disclosure. However, in the opinion of the Venice Commission, the protection the law offers to the whistleblowers should be primarily based on *the service to society*, and not on the question whether the person who rendered this service was self-interested or not. *Mala fides* disclosures may still serve a good and important cause while *bona fides* does not guarantee a positive contribution to the public interest.

---

[43] See PACE Resolution 1729 (2010), p. 6.2.4
[44] *Guja v. Moldova* [GC], no. 14277/04, § 75, ECHR 2008
[45] *Ibid.*, § 77

3. Procedure for protected disclosures

74. Articles 4, 5 and 6 of the Law describe a 3-step procedure that the whistleblower has to go through in order to enjoy protection. The public interest which justifies the disclosure varies depending on the type of the disclosure; thus, *internal* and *external* disclosures (described in Articles 4 and 5 correspondingly) are protected if they reveal unlawful (punishable) activities that violate or threaten the public interest (Article 4 p. 1).[46] However, *public* disclosure is only protected where the disclosed unlawful activity "violates or threatens the life of whistleblowers or of persons close to them, the health of people, the security, the environment, or which involve large scale damages, and in case of imminent danger that evidence thereof shall be destroyed", and only after having previously made internal and externals disclosures under the procedures (see Article 6 pp.1 and 2).

75. The general approach of the law largely corresponds to the principle formulated in the leading judgment in *Guja v. Moldova* where the Court held as follows (§ 73): "In the light of the duty of discretion [of the civil servant vis-à-vis the State institution where s/he works], disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public". The Venice Commission also recalls the recommendation of the Committee of Ministers of the Council of Europe[47] which provides as follows:

> *"The channels for reporting and disclosures comprise:*
> *- reports within an organisation or enterprise (including to persons designated to receive reports in confidence);*
> *- reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;*
> *- disclosures to the public, for example to a journalist or a member of parliament.*
> *The individual circumstances of each case will determine the most appropriate channel."*

76. As can be derived from the above, the appropriate channel for disclosure, according to the Committee of Ministers, depends on the specific circumstances. The Parliamentary Assembly of the Council of Europe is of the same opinion:[48]

> *"Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistleblower, external whistleblowing, including through the media, should likewise be protected."*

77. In sum, it is reasonable to make public disclosures permissible only under certain specific conditions. However, Article 6 p. 1 of the Law puts the bar too high. It guarantees protection only if (i) the activity being disclosed threatens the life of the whistleblower (or their family), or public health, or security, or the environment, or would involve large scale damages, and (ii) there is a case of imminent danger that the evidence thereof shall be destroyed. This constitutes a significant restriction on the breadth of protection of public disclosures.

78. First of all, the list of public interest considerations which may justify public disclosure under Article 6 p. 1 is much shorter than the general list contained in Article 2 p. 4. Thus, the list in

---

[46] The legislator may revise the use of the words "punishable" and "unlawful" activity. Some statues – even the Law under consideration – may outlaw certain activity without defining a punishment for it. Hence, not every unlawful activity is punishable.
[47] CM/Rec(2014)7, p. 15
[48] Resolution 1729 (2010), p. 6.2.3

Article 6 p. 1 does not include violations of human rights, the protection of ownership, free market and entrepreneurship, the rule of law and the prevention of crime and corruption. For the Venice Commission, it is difficult to accept that gross human right violation (other than threatening the life of the whistleblower himself and members of his family) cannot be a sufficient justification for public disclosure. The same concerns serious allegations of corruption, electoral fraud, etc.

79. Furthermore, to be able to proceed with the public disclosure, under the Law, the whistleblower is required to demonstrate that "the evidence of [the unlawful] activity may be imminently destroyed" (Article 6 p.1). But not in every serious case there is a risk of destruction of evidence. Besides, it may be very difficult for a whistleblower to show convincingly that there is a tangible risk of destruction of evidence. Hence, this condition is very difficult to satisfy and should be removed as a *sine qua non*.

80. Finally, Article 6 p. 3 defines three additional obligations for the whistleblower making protected public disclosures: to respect the presumption of innocence, to respect the right to protection of personal data, and not to threaten the course of ensuing court proceedings. These three additional obligations may have a chilling effect on those wishing to make public disclosure.

81. First, it should be specified more clearly what sort of "personal data" may not be published (for more details on this aspect see the analysis of the Privacy Law above). The Venice Commission once again stresses that the public interest may override privacy considerations.

82. Secondly, as to the protection of the presumption of innocence, every public disclosure will necessarily cast doubt on the innocence of those people who are targeted by the disclosure, but that should not prevent it – otherwise all public disclosures should be prohibited. Indeed, the whistleblowers should not publish false accusations – but this problem is sufficiently addressed by Article 14 of the Law dealing with the abuse of disclosure.

83. Thirdly, the condition that public disclosures should not "threaten ensuing court proceedings" is too vague. It is legitimate to prevent public disclosure in situations where the publication of certain sensitive information runs counter clearly identifiable interests of justice in a specific pending court case - for example, where the public disclosure may reveal the name of an anonymous witness. However, the fact that a disclosure relates a story which may later become an object of "ensuing" court proceedings is not a sufficient argument to prevent its publication. The damage to the normal course of justice should be immediate, easily identifiable and serious enough to justify a ban on public disclosure. The Venice Commission considers that the formula used by the Law should be revised in order to avoid overbroad interpretation of this exception.

84. In the opinion of the Venice Commission, Article 6 is the most problematic provision of the Whistleblowers Law and should be fundamentally redrafted. It is recommended that conditions for the protected public disclosure should include any of the three situations: (i) a previous unsuccessful internal/external disclosure, (ii) the non-existence of an internal/external disclosure mechanism or its inefficiency, (iii) the risk of concealment of the wrongdoing or escaping of liability by the culprits in case of an internal/external disclosure or the fear that the materials might be destroyed. The list of "public interest" considerations justifying public disclosure should be as close as possible to the general definition of "public interest" contained in Article 2 p. 4 of the Law.

4. What sort of protection does the Law give to whistleblowers?

85. Retaliation against whistleblowers may take many forms; it can be subtle and difficult to establish. Protecting whistleblowers from retaliation not only encourages more individuals to come forward with information on serious human rights violations and other misconduct, but also protects their right to an effective remedy as provided by Article 13 of the ECHR, especially where public disclosures covered by Article 10 thereof are concerned.

a) Procedural measures of protection

86. The protection provided for by the Whistleblower Law is two-fold: procedural and substantive. First, Article 7 provides for the protection of identity of the whistleblowers, which is an important procedural guarantee. Articles 16, 18 and 19 introduce sanctions for revealing the identity of the whistleblower to the person or institution which might be affected by the disclosure. The Venice Commission notes, however, that those are financial sanctions. The question is whether a fine amounting to 6000 euros maximum would be a sufficient deterrent for malicious leaking of information about the whistleblower to whoever may be interested in knowing his/her identity.

87. Article 7 provides that revealing the identity of the whistleblower (apparently against his/her will) may be possible only under a court order. Article 3 p. 4 contains a similar guarantee.[49] This is an important procedural safeguard, which the Venice Commission fully supports. In addition, the law must specify that revealing of the identity of the whistleblower, even by a court decision, should be possible only in exceptional circumstances – for example, where the disclosure concerns a serious crime which cannot be investigated and prosecuted unless the whistleblower himself is called to testify. In this scenario the court may be required to take additional measures to protect the whistleblower against possible retaliations (for example, by using the status of an anonymous witness or otherwise). To a certain extent, this model is proposed by Article 9 p. 6,[50] but this latter provision is formulated for a very specific case, whereas the Venice Commission recommends formulating a general rule which would permit the courts to decide under which conditions the identity of the whistleblower may be revealed.

88. Article 7 pp. 4 and 5 may be interpreted as allowing disclosure of the identity of the whistleblower without a court order. These provisions should be reformulated in order to reflect the correct general rule formulated in p. 1 of this Article. Moreover, it would be useful to indicate in the law which authority may seek the court's permission to disclose the identity of the whistleblower and under which procedure. Evidently, the question of disclosure of the identity of the whistleblower should be decided by the court with the participation of the former, so as to enable him/her to present his/her considerations on this matter.

---

[49] It is recommended to clearly distinguish between the rights to "anonymity" and "confidentiality" in Article 3. Otherwise, there is a risk that confusion may arise between both concepts. The principle of confidentiality (i.e. where the name of the individual who reported or disclosed information is known by the recipient but will not be disclosed without the individual's consent, unless required by law) is distinct from anonymous reporting or disclosures (i.e. where a report or information is received but no one knows the source).

[50] "(6) If the whistleblower has disclosed a crime against the state, a crime against humanity or international law or organized crime punishable under the Criminal Code by a prison sentence of at least four years the substantiation of which involves disproportionate difficulties or cannot be done without a statement of the whistleblower, who does not agree to give a statement as a witness due to the potential danger of being subjected to intimidation, threat of reprisal or danger to his or her life, health, freedom, physical integrity or property to a larger extent, the institutions shall, upon obtaining written consent from the whistleblower, submit:
- an initiative for submitting a written request for putting forward a proposal for inclusion in the Protection Programme in compliance with the Law on Witness Protection to the Ministry of the Interior or a competent public prosecutor or
- an initiative for putting forward a proposal for inclusion in the Protection Programme in compliance with the Law on Witness Protection to the Public Prosecutor of the Republic of Macedonia.

89. There is a certain tension between Article 7 and Article 9 p. 1 of the Law, which provides that “upon receiving the [limited external disclosure], the institutions [empowered to receive such disclosures] shall, without delay, request notification from the institution or legal entity against which the disclosure was made concerning the existence of any kind of violation of a right of the whistleblower or members of his or her family stemming from the disclosure”. The Venice Commission understands that the whistleblower may wish to identify him/herself; in this case the notification sent to the “institution or legal entity against which the disclosure was made” would serve as a sort of a warning which would give him some security. However, the whistleblower must be free to choose whether s/he wants to have such notification sent – in all other circumstances the rule contained in Article 7 p. 1 should apply (no disclosure of identity of the whistleblower without a court authorisation).

90. In order to ensure that the protection afforded to whistleblowers is robust and comprehensive, it is recommended to make provision for interim relief pending the outcome of proceedings. This should be available to those persons who have been the subject of retaliation for having made a public interest report or disclosure, particularly in cases of loss of employment. Interim relief could be in the form of a provisional measure ordered by a court to stop threats or continuing acts of retaliation, such as workplace bullying or physical intimidation, or to prevent forms of retaliation that might be difficult to reverse after the lapse of lengthy periods, such as dismissal.

b) Substantive protection

91. Article 8 p. 1 stipulates that “whistleblowers […] shall be provided with protection against any type of violations of their rights, against any detrimental activity or against any threat of detrimental activity in retaliation for protected internal, external, and public disclosures made”. The intention behind this provision is praiseworthy, but the law does not specify what sort of “protection” a whistleblower may count upon: should it be a legal protection against disciplinary sanctions, criminal prosecution or civil law suits related to disclosure, or it also includes physical protection (akin in certain countries where programs of protection of witnesses operate which involve a whole range of very costly and complex measures)? That should be clarified. In addition, the institutions which are supposed to give protection should receive specific mandate in their respective laws and regulations, describing how they should enforce the protection of whistleblowers.

92. More generally, protection provided by the Whistleblowers Law appears to be focused on the possible disciplinary sanctions against the whistleblower.[51] This is in line with the approach of the Committee of Ministers, which recommended that “whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer”.[52] The retaliation against whistleblowers in the employment sphere includes, but may not be limited to, such forms of treatment as dismissal, suspension or demotion, other disciplinary action, performance evaluation, decision concerning pay or benefits, a significant change in duties, responsibilities, or working conditions; hence, the protection shall encompass all forms of retaliation and discrimination that may arise following the disclosure. It is recommended to include in the law an open list of possible forms of

[51] See, for example, Article 12 which declares void provisions of labour contracts and acts which establish the duty of confidentiality without taking into account protected disclosures under the Whistleblowers Law; see also Article 11 which speaks of the “institution or legal entity which violated the rights of the whistleblower”

[52] Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, p. 21

retaliation, in order to allow a sufficiently large interpretation to this term and provide guidance to the courts.

93. The next question is whether this protection should go beyond the disciplinary sphere and cover possible criminal sanctions arising from the disclosure, or any civil liability based on tort or a breach of contract. Thus, for example, would the Whistleblowers Law prevent prosecution of a person who, acting in good faith and with a view of reporting on unlawful activities, revealed information about an on-going criminal investigation – a behaviour which is described as a crime punishable under Article 369 of the Criminal Code? Similarly, what effect would the Whistleblowers Law have on a civil suit for damages, which may arise from the disclosure of an industrial know-how which, on one hand, causes financial loss to the enterprise concerned but, at the same time, reveals unlawful practices?[53]

94. That does not imply that the Whistleblower Law should necessarily become a comprehensive code for all types of disclosures and provide defence against all types of legal sanctions. Probably, in respect of some specific types of disclosures (for example those related to State or military secrets) special rules must apply.[54] However, the Law should be more specific about the "protection" it gives to whistleblowers. The Law must specify whether it only defends them against disciplinary sanctions, or also against other forms of legal actions which may be taken against them on the basis of statutes or contracts. Furthermore, the adoption of the Whistleblowers Law should be accompanied by the revision of the laws (criminal, civil and other) which deal with the duty of confidentiality.[55]

c) Procedures under Article 10 of the Whistleblowers Law

95. Under Article 10, entitled "Court Protection", the whistleblower may actively seek, through a court, to obtain an injunction ordering termination of the unlawful activities, or a declaratory judgment acknowledging the unlawfulness of those activities, or payment of damages, etc.[56] From the text of Article 10 it appears that "court protection" relates not only to a retaliatory act which may be taken against the whistleblower, but also to the unlawful activity as such which was at the heart of the disclosure. This is quite unusual – by virtue of this provision the whistleblower somehow becomes a "prosecutor" in relation to the situation he brought to the attention of the authorities or the public, even if s/he is not personally affected by that situation.

96. Furthermore, it is unclear how the procedure, described in Article 10, relates to the procedures described in Articles 4, 5 and 6 of the Law. Any court proceedings initiated under Article 10, by definition, will be public; at the same time, the whistleblower is supposed to try solving the problem through protected internal disclosure (Article 4) and protected external

---

[53] See Recommendation CM/Rec(2014)7, which provides in p. 23 that "a whistleblower should be entitled to raise, in appropriate civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework." The CM recommendation does not imply that the "public interest disclosure" should be a universal defence applicable in civil, criminal or administrative proceedings; however, it points at the necessity to have a national framework which would regulate such situations in various contexts.

[54] See Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, p. 5: "A special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order or international relations of the State."

[55] The PACE Resolution 1729 (2010) recommends member-states that whistleblowing legislation should be comprehensive and codify all sectors of law, including criminal law, employement law, media law etc. – see p. 6.1.

[56] "(2) The whistleblower may [submit a lawsuit] before a competent court request[ing]:
- a finding that a harmful activity has been undertaken or a right has been violated due to whistleblowing;
- ban on doing a harmful activity or violating a right and repeating a harmful activity or violation of a right;
- annulling an act under which the harmful activity has been done or a right has been violated;
- eliminating the consequences from a harmful activity or violation of a right;
- compensation for material and non-material damage.

disclosure (Article 5), which are not public procedures. At what moment of time does the right established by Article 10 arise – before or after the whistleblower exhausted procedures of internal and external disclosure? The Whistleblower Law should be clearer on this point.

d) Public awareness about the Whistleblowers Law

97. It is recommended that the law identify a lead State agency with responsibility to review the legislation and to lead on training and public awareness about the whistleblowers legislation (for example, it could be the State Commission for Prevention of Corruption or the Ministry of Justice which already have certain functions of general supervision under Article 15). Also, it is current best practice that there be state support for some independent advisory body or structure to which potential whistleblowers can turn for advice. The same above-mentioned lead State agency or ministry should be the link to that advice body. In this respect, it is recommended that the special annual reports of the State Commission for Prevention of Corruption or the Ministry of Justice, mentioned in Article 15 pp. 2 and 3, be made public (without prejudice to the confidentiality of the whistleblowers guaranteed by the Law).

IV. CONCLUSIONS

98. The Venice Commission understands that the adoption of the two laws examined in the present Opinion was a result of a large political agreement, which sought to achieve, in specific circumstances, a normalisation of political life in the country. The Venice Commission praises the authorities and the political parties for their willingness to work together and prepare ground for stable development of Macedonian democracy, including by regulating the collection and disclosure of sensitive information. That being said, the legislation adopted in November 2015 will be applied for the years to come, and should therefore be clear, internally coherent and compatible with the applicable European standards.

99. As to the Privacy Law, the Venice Commission recommends its in-depth revision. This Law pursues a legitimate aim, but does not achieve a proper balance between privacy interests and the interest of the public to be informed. By contrast, the Whistleblowers Law is much more elaborate and clear and represents a positive development of the national legal framework. In particular, in revising these two laws, the Venice Commission invites the Macedonian authorities to take account of the following main recommendations:

- the material scope of the Privacy Law should be re-defined in order to remove any ambiguity as to which materials are covered by it;
- the Privacy Law should allow for publication of materials touching upon matters of public interest with some narrowly defined exceptions, related to the public disclosure of information about intimate aspects of private and family life;
- the obligation, in the Privacy Law, to hand the materials over to the newly established Special Prosecutor should be spelled out more clearly; that obligation should not exclude the publication of such materials which touch on matters of public interest, and the effectiveness of the Special Prosecutor should be ensured by appropriate mandate, powers, funding and staffing;
- Article 6 p. 1 of the Whistleblowers Law should be revised: public disclosure should be possible where internal/external disclosure mechanisms are non-existent, clearly not efficient, or where there is a discernable risk of concealment of the wrongdoing or escaping of liability by the culprits; this Article should refer to the general definition of "public interest" contained in Article 2 p. 4;
- the Whistleblowers Law must specify whether the "public interest" behind the disclosure grants the whistleblower protection against possible disciplinary sanctions

(and similar measures related to the work-place), or also against any criminal sanctions or civil liability.

100. The Venice Commission remains at the disposal of the Macedonian authorities in relation to any future revision of the two laws which have been analysed in the present opinion.