Strasbourg, 11 December 2017 **CDL-AD(2017)033**

Opinion No. 905 / 2017 Engl. only.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

"The former Yugoslav Republic of Macedonia"

OPINION

ON THE DRAFT LAW ON THE TERMINATION OF THE VALIDITY OF THE LAW ON THE COUNCIL FOR ESTABLISHMENT OF FACTS AND INITIATION OF PROCEEDINGS FOR DETERMINATION OF ACCOUNTABILITY FOR JUDGES

ON THE DRAFT LAW AMENDING THE LAW ON THE JUDICIAL COUNCIL

AND ON THE DRAFT LAW AMENDING THE LAW ON WITNESS PROTECTION

adopted by the Venice Commission
at its 113th Plenary Session
(Venice, 8-9 December 2017)

on the basis of comments by

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Mr Guido NEPPI MODONA (Substitute Member, Italy)
Mr Ciril RIBIČIČ (Member, Slovenia)
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I. Introduction

1. By letter of 17 October 2017, the Ambassador of "the former Yugoslav Republic of Macedonia" to the Council of Europe requested the Venice Commission to prepare an opinion on three draft laws related to the Macedonian judiciary, namely on the Draft Law "On the termination of the validity of the Law on the Council for Establishment of Facts and Initiation of Proceedings for Determination of Accountability for Judges", on the Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness Protection (CDL-REF(2017)042).

2. Mr Barrett, Mr Neppi Modona, Mr Ribičič, and Mr Varga were invited to act as rapporteurs.

3. The present Opinion was prepared on the basis of contributions by the rapporteurs and on the basis of a translation of the three Draft Laws provided by the Macedonian authorities. Inaccuracies may occur in this opinion as a result of incorrect translations. In addition, this opinion takes into account clarifications submitted by the Macedonian authorities in written on 4 December 2017 (hereinafter – the "Clarifications").

4. This opinion was adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

II. Background

5. In 2015, at the request of the European Commission, the Venice Commission adopted an Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia" (hereinafter – the 2015 Opinion).[1] In the 2015 Opinion the Venice Commission made a number of recommendations, which related *inter alia* to the status and functions of the newly created Council for the Establishment of Facts (the CEF; the functions of this body are described below).[2]

6. The first two Draft Laws, which are at the focus of the present Opinion, are interconnected: they were developed by the Macedonian authorities in response to the 2015 Opinion. The third Draft Law (amending the Law on witness protection) stands apart, since it relates to a question not yet examined by the Venice Commission. However, it is indirectly connected to an opinion prepared by the Commission for the Macedonian authorities in 2016 (the 2016 Opinion).[3] It was thus decided to prepare a common "follow-up" opinion covering all three Draft Laws.

7. This opinion analyses only the amendments proposed by the three Draft Laws. It does not examine the organisation of the Macedonian judiciary or the system of witness protection. The Venice Commission observes that the proposed amendments implement some of recommendations of the Venice Commission made previously. The Venice Commission draws attention of the Macedonian authorities to other recommendations, made in the opinions of 2015 and 2016, which do not appear to be addressed in the three Draft Laws.[4]

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[1] CDL-AD(2015)042

[2] Or, in the previous translation of the Law, the "Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge"

[3] CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the Law on the Protection of Whistleblowers.

[4] See also, in addition to the two above-mentioned opinions, CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the competence of the Constitutional Court and special financial zones.

III. Analysis

A. Draft Law on the abolition of the Council for the Establishment of Facts

8. The CEF was created in February 2015 under the Law of the same name.[5] The main function of the CEF is to investigate disciplinary cases against judges, and to submit them to the Judicial Council. Under the Law currently in force, the Council is composed of nine members,[6] elected by the judges, with a four years' mandate. Disciplinary cases investigated by the CEF are submitted to the Judicial Council which is competent to decide them on the merits. Decisions of the Judicial Council are appealable before the Appeals Council, which is formed within the Supreme Court on an *ad hoc* basis in each case separately, and composed of nine judges.

9. The need for the creation of the CEF was explained by the Macedonian authorities by reference to the risk of the conflict of interests, inherent in the pre-existing system, in which the persons having initiated disciplinary proceedings were also taking part in a panel deciding on the disciplinary liability.

10. The OSCE Kiev Recommendations,[7] in p. 5, state that "Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures." In p. 26 of the Kiev Recommendations the OSCE suggested that "bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them".

11. The position of the Venice Commission on this point is somewhat more nuanced. The Venice Commission agreed that the risk of a conflict of interests under the previously existing Macedonian regulations was real (§ 73 of the 2015 Opinion). However, in its view, the separation of functions of "accuser" and "judge" does not necessarily call for the creation of a completely separate institution: it suffices to provide that members who were involved at the initial stage of the disciplinary proceedings as "accusers" or "investigators" do not participate in the adjudication of disciplinary cases as "judges" (§ 78). The Venice Commission concluded, in its 2015 Opinion, that the creation of the CEF was not necessary (§ 74), made critical comments and suggestions with regard to the composition of this body (§ 77), and noted that proceedings before the CEF were "complicated and tortuous" (§ 82). As a result, it recommended the abolition of this body (§ 113).

12. The Draft Law on the abolition of the CEF is aiming at implementing this recommendation of the Venice Commission. This is a positive move. However, several remarks are called for in this respect.

13. First, under Article 2 of the Draft Law, contracts of employees and the mandate of the members of the CEF are terminated with the adoption of the Law, with all inconveniences it causes for the members and the staff of this body. The Venice Commission was critical about the idea of creation of this body; but, once it was instituted, and once its members were elected and staff hired, these persons may have acquired rights as officials under the Macedonian law.

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[5] Published in the Official Gazette No. 20 from 12 February 2015

[6] It is composed of three retired judges, three retired public prosecutors, two retired professors of the faculties of law, and one retired lawyer.

[7] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2 November 2010, http://www.osce.org/odihr/kyivrec

14. The Venice Commission draws the attention of the Macedonian authorities to the case of *Baka v. Hungary*[8] where the European Court of Human Rights (the ECtHR) found a violation of Article 6 of the European Convention on account of the absence of judicial remedies available to the dismissed chief judge of the Hungarian Supreme Court. The ECtHR accepted that Article 6 may be inapplicable to the "labor disputes" involving civil servants, but stated that such exclusion (1) should be explicitly provided by the law and (2) should be justified.[9] The Venice Commission admits that the liquidation of the CEF may be, as such, a non-justiciable issue; but, if this is the case, it should be expressly provided for in the Draft Law under examination. As a minimum, the courts should be competent to protect the individual rights of the members/staff of the CEF[10] from the abrupt termination of their service relation.

15. What sort of legal consequences the liquidation of the CEF should entail for its members/staff is a different question. Some categories of civil servants (judges, for example) are often better protected than others, and cannot be dismissed but only transferred to a post in another court. The Venice Commission considers that in the process of liquidation of the CEF, the legitimate interests of its members/staff should be taken into account, according to the applicable standards of the Macedonian legislation on civil service, and that this should be reflected in the Draft Law. In their Clarifications the Macedonian authorities explained that the mandates of the members/staff of the CEF would in any event expire in the 2018; in this assumption, the liquidation of the CEF would, normally, be without consequence for them.

16. Second, the Draft Law provides for the automatic transfer of all "initiated proceedings" to the Judicial Council. Since the CEF had no ultimate decision-making power, this transfer does not entail the passage of the jurisdiction over a case by means of a legislative intervention. Nevertheless, the Venice Commission invites the Macedonian authorities to assess whether, in the light of relevant factors such as, for example, the number of pending cases, the CEF should be allowed to finish the investigation of those cases which have been submitted to it before the adoption of the law.

B. Draft Law on the Judicial Council

17. The purpose of adoption of the Draft Law on the Judicial Council (the JC) is three-fold: first, to introduce a new procedure of investigation into disciplinary offences committed by judges (following the abolition of the CEF); second, to increase the transparency of the disciplinary proceedings; and, third, to simplify those proceedings.

18. The new procedure may be summarized as follows. The right to trigger proceedings is given to a number of officials and bodies. Apparently, they can act *proprio motu* or in response to complaints received from private individuals and other State bodies. Having received a formal complaint, the JC will set up an investigative Commission, which will conduct an inquiry and submit a report to the JC with a recommendation (which may be in favor or against imposing a disciplinary liability). The case is then heard by the plenary JC, which renders the decision on the merits. This decision is appealable to the Supreme Court.

19. Under Article 1 of the Draft Law, the JC, once a month, will hold a session to "discuss individually on all petitions and complaints filed by citizens and legal entities on the work of judges and courts", and shall "make a decision on each petition and complaint".

[8] [GC], no. 20261/12, ECHR 2016
[9] See § 103 of the *Baka* judgment, referring to the so-called "*Eskelinen* test"
[10] The Venice Commission does not exclude that status of members and of the staff of the CEF may be governed by different regimes.

1. Appointment/promotion of judges

20. Article 4 of the Draft Law introduces an obligation for each member of the JC to state "publicly"[11] the reasons for his/her voting in the process of election of candidates to the judicial position. This obligation, indeed, may theoretically contribute to the selection of the best candidates. However, it changes the nature of the process of appointment of judges. The selection of the best candidate by secret voting is a discretionary act; the exercise of this discretion is thus not subject to appeal, provided that formal conditions are met. By contrast, *reasoned decisions* are usually subject to some sort of an appeal. It is unclear whether the reasoning given by each member will play any role in further proceedings regarding the possible contestation of the judicial appointments (since the individual reasoning does not necessarily explain the decision reached by the collegial body). Furthermore, a negative opinion about a particular judge expressed by a member of the JC publicly in the context of the promotion proceedings may be seen as demonstrating a personal bias of the latter against the former. This may lead to disqualification of the member from subsequent disciplinary proceedings concerning the same judge. In sum, the obligation of the members of the JC to state their reasons may lead to complications.

21. It is not clear how formal criteria for the selection of candidates (i.e. their ranking obtained in the Academy for Judges and Public Prosecutors, as stipulated in Article 40, and their performance results, in Article 42 § 2 (2)) are accounted for in the process of voting. For example, is it possible, as a result of the voting, to appoint not the best ranking candidate but a candidate having poor performance results? This should be clarified.[12]

22. The Macedonian authorities, in the Clarifications, noted that the duty of each member of the JC to give reasons for his/her voting was supposed to put an end to the abusive practices of the old JC where appointement decisions sometimes "disrespected the established ranking list of candidates". This is a reasonable concern, but it is also important to clarify rules on the ranking of candidates and how this ranking is taken into account in the final decision on the appointment of the candidate. There will always be a subjective element in the assessment of moral and professional qualities of the candidates, after all. That being said, the increased transparency of the proceedings before the JC in the matters of appointment is, generally, a welcome development.

2. Disciplinary proceedings against judges – who may trigger the proceedings

23. Article 6 amends Article 54; it provides that the following actors are entitled to formally trigger disciplinary proceedings against judges: a member of the JC, a president of the court at issue, a president of a higher court, and the plenary session of the Supreme Court.

24. The first question is whether this power should belong to court presidents. Most of the international documents focus on the bodies taking *final decisions* in disciplinary matters, but remain silent as to who may formally initiate such proceedings.[13]

25. The Venice Commission was critical of the idea of giving court presidents the power to trigger disciplinary proceedings against ordinary judges.[14] Thus, in its recent opinion on Bulgaria the Venice Commission stated that "*the powers which put presidents in a hierarchically*

[11] It is unclear whether those reasons should be stated only orally or also in writing.
[12] The Venice Commission draws the attention of the Macedonian authorities to a discussion of a similar problem in its opinion on Armenia - Opinion on the Draft Judicial Code, CDL-AD(2017)019, in particular in §§ 117-118.
[13] See, for example, Recommendation CM/Rec(2010)12; see also the CCJE Opinion no. 19 (https://rm.coe.int/1680748232) which does not comment on the role of the President in disciplinary proceedings
[14] Cf. the two recent opinions on Armenia and Bulgaria: CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, § 133 and, in particular, footnote no. 68; CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, § 84

superior position vis-à-vis their fellow judges should be reconsidered; in particular, powers in the disciplinary field (to impose reprimands and to initiate disciplinary proceeding) […] should be withdrawn from court presidents".[15] In the same vein, the OSCE Kiev Recommendations[16] suggested that a court president "*may file a complaint to the body which is competent to receive complaints and conduct disciplinary investigations*" but "*should not have the power to […] initiate […] disciplinary measure*".

26. The position of the OSCE and the Venice Commission is explained by the common understanding that the president of a court should be seen not as a hierarchically superior to ordinary judges, but rather as *prima inter pares*. According to this position, the best solution would be not to entrust a court president with the power to trigger disciplinary proceedings.

27. That being said, the role played by the president is determined by many factors, the competency of triggering disciplinary proceedings being just one of them. If too many competencies are concentrated in the hands of a court president, it may be detrimental to the internal independence of judges, even if each such competency, taken in isolation, is not dangerous *per se*. Therefore, whether or not a president should have the competency to trigger disciplinary proceedings should be decided in the light of other competencies the president has. The method of appointment of court presidents also plays a role: presidents elected by their fellow judges are less of a danger for judicial independence than presidents appointed by/or with significant participation of the executive or legislative branches.

28. In the Macedonian system, the courts' presidents are appointed by the JC (see Articles 41 and 47b of the Law on Courts),[17] which is an acceptable model.[18] Furthermore, disciplinary proceedings can be triggered by a number of actors, court presidents having no exclusive role in this process, which is also positive. On the other hand, from the current law it is not entirely clear what other powers court presidents may have.[19] In such circumstances the Venice Commission prefers to leave this question open and to invite the Macedonian authorities to revisit the powers of the court presidents in the disciplinary field in the light of the general approach enunciated above.

29. The second question is whether the Minister of Justice (as an *ex officio* member of the JC) should have the right to trigger disciplinary proceedings against judges. Since the Minister does not have the right of vote in the JC (see Article 6 § 1 of the Law on the Judicial Council), the power to trigger proceedings does not represent a serious danger for the independence of judges. One may even say that, since the Minister is not the only actor capable of triggering disciplinary proceedings, his/her role in this process may even be useful, because it helps to avoid any corporatist disposition within the judiciary in disciplinary matters.[20]

30. The third issue is the possibility of "forum-shopping", inherent to the proposed system of initiating the proceedings. There is no single channel of receiving complaints from private individuals about alleged disciplinary breaches by judges. It appears that the aggrieved person may write in parallel to all actors empowered to trigger proceedings, hoping that at least one of

[15] Op. cit., § 113
[16] Cited above
[17] CDL-REF(2015)046
[18] With reservations concerning the composition of the Judicial Council – on this see CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the competence of the Constitutional Court and special financial zones, §§53 et seq.
[19] This is not described in detail in the Law itself (see Article 88 of the Law on Courts), and much is left to the Rules of Procedure.
[20] In CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, § 68, the Venice Commission expressed a reservation as to whether the Minister of Justice should have this competency; however, the Minister of Justice has those powers in several countries – for example, in Italy.

them will react positively. If, within the time-limits, at least one of the competent actors decides to forward the complaint to the JC, the procedure is formally open. The current system gives good chances to private individuals to see their complaints examined by the JC, but it also means that several members of the Council may bring, in parallel, the same complaint to the attention of the JC. In this case these members should be barred from sitting in the final composition of the JC deciding on the merits. That may perturb the composition of the JC in terms of the balance between the judicial and lay members and in terms of the "double majority" rule based on the ethnic principle (on this see more below).

3. Separation of functions within the Judicial Council

31. After the abolition of the CEF, the investigation and adjudication functions will be performed within the JC, but by differently composed bodies.

32. All complaints (lodged by the specifically designated actors – see above) should go first to the JC, which has to determine their formal admissibility (Article 55 and 56 §§ 1 and 2). If admissible, the complaint is forwarded to an *ad hoc* Commission, composed of three members of the JC selected by lot (Article 56 § 3; apparently, lay members may also be on this Commission, but it should be provided expressly in the law that one of the members of the Commission must be a lay member). The role of this Commission is similar to the role of the abolished CEF: to conduct an investigation, collect evidence, prepare a report and submit it to the JC for the final determination of disciplinary liability (see new Article 56-g).

33. As stressed above, having a separate investigative body is not a *conditio sine qua non* for disciplinary proceedings. It is acceptable that such an investigative body be created *within* the JC itself, provided that its members do not take part in the final determination of the disciplinary liability. According to Article 8, amending new Article 60, Commission members do not vote when the final decision is taken by the Council on the basis of the recommendation prepared by the Commission. This is, in principle, positive. Admittedly, if the case is brought by a member of the JC, she/he (being an "accuser") should sit neither in the Commission nor in the composition of the JC which renders the decision on the merits. This should be stipulated expressly in the law.

34. The Macedonian authorities, in the Clarifications, explained that "the member of the Council that initiated the initiation of a procedure for determining responsibility cannot be in the same time a member of the Commission for determining responsibility in the specific procedure, and that it is not allowed to the members of the Commission to vote for the final decision of the Council." However, it is also important that the member who triggered the proceedings is barred not only from sitting in the Commission, but also in the JC itself when the latter takes the decision on the merits of the disciplinary case.

4. Composition of the Judicial Council when it takes the decision on the merits

35. The rule that members of the JC who triggered the proceedings and sat on the Commission cannot take part in the final decision on the disciplinary liability may have effect on the final composition of the JC.

36. First, it is important to preserve the balance of judicial and lay members in the JC (see Article 104 of the Constitution, which provides for a 15-members' JC, 8 of which are judges elected by their peers). For example, if the disciplinary proceedings are triggered by a judicial member of the JC, and if all three members of the Commission selected by lot happen to be judges (which should be avoided, because otherwise the Commission may be seen as a corporatist body protecting judges; this is one of the reasons why the law must provide that one

of the members of the Commission should be a lay member),[21] there is a risk that in the final composition of the JC judges elected by their peers will be in a minority, since the four judicial members who have participated in the proceedings at the previous stages in the capacity of "accusers" or "investigators" will not be voting.

37. It would be equally wrong to take a final decision by a body composed by 8 judicial members, 1 *ex officio* judge and 2 lay members, one of whom (the Minister of Justice) has no right to vote.[22]

38. Second, in the specific Macedonian context, the JC when deciding on the disciplinary liability of judges should respect the ethnic quotas imposed by the Constitution. From new Article 60 it follows that the decision-making process before the JC involves the "double majority rule" enshrined in Article 43 of the current Law (i.e. a decision taken in respect of a judge belonging to a "non-majority" ethnic community should receive support of a certain number of "non-majority" members of the JC). This rule of "double majority" needs to be coordinated with the rule according to which the members of the Commission (selected by lot) do not vote in the final composition of the JC. For example, if four members of the JC (one who triggered the proceedings and three who sat on the Commission) happen to belong to a non-majority community, in the panel adjudicating the case "non-majority members" risks to be under- or un-represented (under the current rule, the JC should have at least 4 members representing the non-majority communities). On the other hand, strict application of the "double majority rule" may lead to a deadlock in certain (rare) cases, so, admittedly, this rule should be applied with some flexibility.

39. The legislator has to reflect on how to tackle this complex and potentially sensitive issue. It is normal that members of the Council who acted as "accusers" and "investigators" do not sit in the final composition of the Council rendering the final decision. However, this composition should include at least half of the judicial members, and also include sufficient number of lay members, to avoid accusations of corporatism. Ethnic composition should be respected to the extent possible in the circumstances. These issues should be addressed in the Draft Law. One of the possible solutions would be to entrust the investigation not to a 3-member Commission but to one commissioner who would be a sort of an internal rapporteur without the right to vote. However, other solutions are also possible.

40. The Venice Commission would like to stress that entrusting the examination of the disciplinary matters to *the JC itself* is not the only possible model. A simpler solution would be to set up special disciplinary benches within the existing judicial instances (like the disciplinary courts currently existing in Poland). However, the proposed solution is imposed by the Macedonian Constitution (see Amendment XXIX which stipulates that the JC is competent to examine disciplinary cases against judges), and is certainly in line with the European best practices.

5. Review of decisions of the Judicial Council following a successful complaint of a judge to the ECtHR

41. Article 97 describes the process of reopening of a disciplinary case if the ECtHR has established that the judge's rights have been violated in the disciplinary proceedings. In principle, the domestic law should provide for a possibility of reopening in such situations.

[21] The Macedonian authorities, in their Clarifications, explained that this observation will be taken into account in the amended version of the Draft Law.

[22] See Article 105 of the Constitution, Article 6 of the Law on the Judicial Council, and the Venice Commission Opinion CDL-AD(2014)026, § 73, where it expressed concern about a Judicial Council where judges "wield decisive influence".

However, while procedural breaches may be easily remedied by the reopening, in some other cases the reopening is not necessarily the best response to a finding of a violation of the Convention by the ECtHR. For example, if a judge was held liable on the basis on a substantive provision of the Macedonian law which was later found to be contrary to the European Convention, the reopening will not be effective, at least until the provision of the substantive law at issue is invalidated by the Constitutional Court or abrogated by Parliament. In such cases, the proceedings before the JC might be suspended until the matter is duly resolved. The reopening of the proceedings should be possible where it is dictated by the findings of the ECtHR, but not mandatory in all cases where a violation of the European Convention has been found.

C. Draft Law amending the Law on Witness Protection

42. The need to adopt amendments to the Law on Witness Protection is related to the "wiretapping scandal".[23] The discovery in 2015 of a system of unlawful covert wiretapping of public figures led to the creation of an office of a Special Prosecutor, who was entrusted with the investigation into both the wiretapping itself and into the crimes which became apparent from the content of the tapes made secretly.

43. The Venice Commission was not asked to review the Law on Witness Protection as a whole, but only the draft amendments to it (the Draft Law). As regards the Draft Law, it is understood that its purpose is to facilitate the task of the Special Prosecutor and make him/her more autonomous in matters related to witness protection.

44. Henceforth, the Special Prosecutor will have the power to take decisions related to the inclusion in the witness protection program – see new Article 15-a (added by Article 3 of the Draft Law). This is positive, since it will enable the Special Prosecutor to perform his/her tasks more efficiently.

45. It appears that the decision of the Special Prosecutor to include a person in a witness protection program is discretionary and not subject to appeal. This is permissible, since the person concerned should consent in writing to being included in the program of witness protection (see Article 21-a). That being said, the Venice Commission draws attention of the authorities to the abundant case-law of the ECtHR on the question of use of anonymous witnesses at the trial.[24] While it is permissible to grant anonymity to witnesses, this should remain an exceptional measure and should be accompanied by appropriate procedural guarantees; the core right of the defence to test key witnesses for the prosecution should be ensured.

46. Article 13 of the Draft Law, supplementing Article 39 of the existing Law, regulates the process of termination of the program of protection of witnesses, which is possible upon the request "from the Head of Department [which refers, apparently, to an official of the Ministry of Interior, external to the Special Prosecutor's office] or the protected person". It is worrying that the program (duration of which, as transpires from the previous text, may be set in the agreement concluded between the Special Prosecutor and the witness) may be discontinued before term at the request of the Department (which is seemingly responsible for the implementation of the program). The law should outline considerations which may justify (exceptionally) the discontinuation of the program contrary to the wish of the individual concerned. Leaving this question at the discretion of the Head of the Department puts the

[23] Which is described in CDL-AD(2016)008, 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", §§ 5 – 8

[24] See *Van Mechelen and others v. the Netherlands*, 23 April 1997, §§ 59-65, *Reports of Judgments and Decisions* 1997-III; *Birutis and Other v. Lithuania*, no. 47698/99, ECHR 350, 28 March 2002

individual covered by the program in a vulnerable position, at the mercy of the Department. The Macedonian authorities explained that, under the current Law on Witness Protection (Article 39 § 2), the final decision to exclude a witness from the program against his or her will is made by a special Council, composed of a judge, a prosecutor, one official from the Ministry of Justice and two officials from the Ministry of Interior (Article 6). However, it is unclear whether the Council is involved in the situations where the inclusion in the program was ordered by the Special Prosecutor. The Special Prosecutor should have a say in this process, and the individual concerned may be given a right to challenge the decision to discontinue the program. The Venice Commission recommends amending the Draft Law to this effect.

IV. Conclusion

47. Overall, the three Draft Laws under the examination deserve positive assessment. They clearly demonstrate the willingness of the Macedonian authorities to follow the recommendations formulated by the Venice Commission in its earlier opinions.

48. In particular, the Venice Commission welcomes the abolition of the Council for the Establishment of Facts, and the transferal of its powers to the Judicial Council. Furthermore, it is justified to give the Special Prosecutor appropriate powers in the area of witness protection.

49. The proposed system, where most functions related to the discipline of judges are concentrated within the Judicial Council, is in line with the European practices, provided that the persons who triggered the disciplinary proceedings in a case do not decide this case on the merits. From the second Draft Law (amending the Law on the Judicial Council) it is clear that the legislator is aware of the need to separate those two functions. However, in such a system new problems may arise, which need to be addressed. The Venice Commission recommends in particular:

- to reconsider whether presidents of courts should be given the power to trigger disciplinary proceedings against judges;
- to specify in the law that one of the three members of the *ad hoc* Commission which conducts investigations within the disciplinary proceedings must be a lay member;
- to clearly state in the law that the person who triggered disciplinary proceedings against a judge should not sit on the panel deciding this disciplinary case on the merits;
- to assess how the proposed system of disciplinary proceedings affects the ratio of judicial and non-judicial members in the decision-making body and the requirements related to the representation of non-majority communities; to identify the solution most likely to accommodate these requirements. Judges elected by their peers should represent at least half of the composition of such body, but lay members should be sufficiently represented as well;
- as regards the process of appointment of candidates to the judicial positions, to clarify in the law to what extent exam grades, results of the performance assessment, etc. influence the selection of candidates by voting in the Judicial Council;
- to ensure that the discontinuation of the witness protection program against the wishes of the person concerned does not depend solely on the discretionary decision of the Head of the Department.

50. The Venice Commission remains at the disposal of the Macedonian authorities for further assistance in this matter.