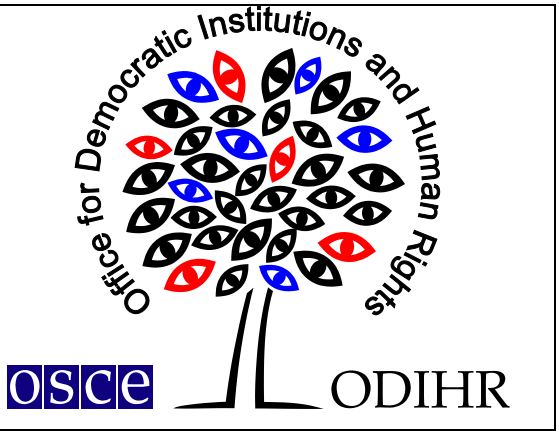
Warsaw, 15 July 2019 Opinion-Nr.: FOI-MKD/345/2019 [TO] www.legislationline.org	

OPINION ON THE DRAFT LAW ON FREE ACCESS TO PUBLIC INFORMATION IN THE REPUBLIC OF NORTH MACEDONIA

This ODIHR Opinion has benefited from contribution made by Ms Alice Thomas (ODIHR Expert)

OSCE Office for Democratic Institutions and Human Rights
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

TABLE OF CONTENTS

I. INTRODUCTION

1. On 6 March 2019, the Head of the OSCE Mission to Skopje forwarded a request to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) from the Ministry of Justice of the Republic of North Macedonia to prepare an opinion on the Draft Law on Free Access to Public Information in the Republic of North Macedonia.
2. On 8 March 2019, ODIHR Director responded to this request, confirming the Office's readiness to prepare a legal opinion on this Draft Law, to assess its compliance with OSCE human dimension commitments and international human rights obligations.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of the key OSCE commitments in the human dimension.

II. SCOPE OF THE OPINION

4. The scope of this Opinion focuses on the Draft Law on Free Access to Public Information in the Republic of North Macedonia (the Draft Law), submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the free access to information.
5. The Opinion raises key issues and indicates areas of possible refinement. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Law. The ensuing recommendations are based on relevant OSCE commitments, Council of Europe and other international obligations and standards, and international good practices.
6. This Opinion is based on an unofficial English translation of the Draft Law. Thus, inaccuracies may occur as a result of incorrect translations.
7. In view of the above, ODIHR would like to note that this Opinion is without prejudice to any written or oral recommendations and comments to the Draft Law regulating freedom of information that ODIHR may make in the future.

III. EXECUTIVE SUMMARY AND CONCLUSIONS

8. The right to access public information is protected by a number of international instruments, including the United Nations International Covenant on Civil and Political Rights and the European Convention on Human Rights. On the national level, the freedom of individuals to access public information derives from Article 16 of the Constitution, which guarantees free access to information and the freedom of reception and transmission of information. This is further supported by the currently enforced Law on Free Access to Public Information (2006).
9. In 2018, the government initiated a number of amendments to this Law, in which it sought to address some of the recommendations made in the 2015 European Union (EU) report. In January 2019, the government submitted a new Draft Law on Free Access to Public Information in the Republic of North Macedonia (the Draft Law) to the parliament, which was subsequently adopted on 24 April 2019.
10. Generally, the Draft Law is to be commended for its visible attempts to entrench key principles relating to access to information, enhance transparency of public bodies and strengthen the mandate of the responsible oversight body. It contains freedom of

information guarantees and detailed procedures on how members of the public may access information. At the same time, a number of shortcomings remain, including on clarifying the exceptions to free access of information, lack of effective harm test, insufficient regulation of the selection process of the director and deputy director of the oversight body, as well as incomplete legal redress provisions.

11. To further improve the compliance of the Draft Law with international obligations and OSCE commitments, ODIHR makes the following key recommendations:

    A. to remove political parties from the definition of information holders [paragraph 36];

    B. to revise Article 6.3, including wording on exceptions, introducing clearly defined criteria for exceptions to disclose. Refusal of access to information should only be possible in cases where the disclosure of such data would substantially harm the protected interests mentioned in this provision [paragraph 43];

    C. to detail the entire appointment and selection process for the oversight body in the legislation and make it more transparent. Consideration could also be given to including certain criteria or processes to help boost the inclusiveness of the process for women and national minority candidates [paragraph 48];

    D. to avoid possible conflicts of interest and inter-dependency with the parliament and individual members of parliament, it is recommended to limit the number of times that the director or deputy director of the oversight body may be re-elected [paragraph 49];

    E. to explicitly provide for an opportunity to appeal decisions on dismissal of director and deputy director, as well as opening these debates to the public, to ensure transparency [paragraph 55]; and

    F. to clarify the scope and meaning of Article 26, including its terminology, in order to ensure that legal remedy is effectively provided [paragraph 64].

12. These and a number of additional recommendations, which are included in this Opinion (highlighted in bold), are aimed at further improving the compliance of the legal framework governing the free access to information with OSCE commitments, Council of Europe and other international human rights standards and obligations.

IV. ANALYSIS AND RECOMMENDATIONS

A. International Obligations and OSCE Commitments

13. This Opinion analyses the Draft Law from the viewpoint of its compatibility with international obligations and standards that the Republic of North Macedonia has undertaken to uphold relating to the freedom of information, as well as key OSCE commitments in this area.

14. It is important to reiterate that any transparent and democratic government is held to provide its population with access to public documents. This is specified in international human rights instruments such as the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR). More specifically, Article 19 focuses on the right to freedom of expression, including the freedom "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one's] choice."[1] The 2011 UN Human Rights Committee

[1] The UN ICCPR, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966. The North Macedonia ratified this Covenant in 1994.

General Comment No. 34 on Freedoms of Opinion and Expression provides further guidance on the shaping of freedom of information laws. This includes a general right of access to information held by public bodies, as embodied in relevant legislation.[2] The right protected by Article 19 of the ICCPR, is, however, not unlimited. It may be restricted by law, but only in cases where this is necessary for the respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals.

15. In 2004, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression have jointly stated that "[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."[3]

16. In addition, in 2010, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression reiterated that governments shall take the necessary legislative and administrative measures to improve access to public information for everyone. Any access to information policy should observe, among others, the maximum disclosure principle, the presumption of the public nature of meetings and key documents, broad definitions of the type of information that is accessible, reasonable fees and time limits, independent review of refusals to disclose information, and sanctions for non-compliance.[4]

17. Lastly, in 2013, the Special Rapporteur issued another report to the UN General Assembly, focusing on the importance of freedom of information, specifically on past human rights violations, as well as noting that the right to freedom of opinion and expression is an enabler of other rights and access to information is often essential for individuals seeking to give effect to other rights.[5]

18. OSCE participating States have committed to respect the right to freedom of expression of everyone, individually or in association with others, including the right to freely disseminate information of all kinds, and to remove any restrictions inconsistent with these obligations and commitments. In paragraph 34 of the 1989 Concluding Document of Vienna, the participating States committed "[i]n this connection and in accordance with the [ICCPR], the [UDHR] and their relevant international commitments concerning seeking, receiving and imparting information of all kinds, they will ensure that individuals can freely choose their sources of information." Similarly, OSCE commitments under the Copenhagen Document include the protection of the freedom of opinion and expression (paragraph 9.1) and the right to seek and receive the information (paragraph 10.1). In addition, in paragraph 26 of the 1999 Istanbul Document, participating States reaffirmed the importance of the free flow of information, as well as the public's access to information, as well as in 2012, the

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2 See the UN Human Rights Committee General Comment No. 34, Freedom of Opinion and Expression (Article 19), CCPR/C/GC/34, July 21, 2011, paragraphs 18 and 19. See also Principle 11 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995.

3 See the Joint Declaration.

4 See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, 20 April 2010, paragraph 32.

5 See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, submitted to the UN General Assembly at its 68th session on 4 September 2013.

OSCE Ministerial Council emphasized the importance of free access to information in preventing and combating corruption, the financing of terrorism, and money-laundering.[6]

19. On a regional level, the Council of Europe Convention on Access to Official Documents recognizes a general right of access to official documents held by public authorities and sets forth the minimum standards to be applied in the processing of requests for access to official documents.[7] The European Court of Human Rights (ECtHR) has also confirmed the existence of a right of access to information in its various judgments finding violations of Article 10 of the European Convention on Human Rights.[8]

20. A number of countries across the globe have adopted legislation ensuring access to information held by public bodies. Certain key principles relating to such legislation are derived from the said obligations as well as from a variety of international law sources, including resolutions of the UN General Assembly and the Human Rights Council, General Comments from the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights, and reports from the Special Rapporteur on Freedom of Opinion and Expression, among others.[9]

B. Background

21. The freedom of individuals to access public information derives from Article 16 of the Constitution, which guarantees, among others, the freedom of speech, public address, public information and the establishment of institutions for public information. More specifically, Article 16 equally guarantees free access to information and the freedom of reception and transmission of information.

22. The currently enforced Law on Free Access to Public Information (the Law) dates from 2006. The recent reform process was initiated by recommendations for improvement set out in the 2015 European Union (EU) report, which contained an update on, among others, the political and human rights situation in the country.[10] The report also noted that in the Law, the scope of exemptions to free access to public information was too broad, and that the Commission responsible for reviewing appeals did not have the capacity to monitor compliance with the proactive disclosure of information requirement, nor was it empowered to impose penalties in cases of non-compliance.[11] Ensuing EU reports have reiterated some of the recommendations.[12]

23. In July 2018, the government prepared amendments, in which it sought to address some of the recommendations made by both the EU and domestic civil society organizations. The Office of the OSCE Representative on Freedom of Media (RFoM) issued a legal analyses, in which it praised a number of proposed improvements to the Law, but also noted some problematic issues, including the definition of the scope of the Law, the inclusion of political parties as information holders, the exemptions to free access to information, and the

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6 See the OSCE MC Declaration 2/2012 on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism.

7 The Convention was ratified by the Republic of North Macedonia on 18 June 2009.

8 See *the Youth Initiative for Human Rights* v. *Serbia* (application no. 48135/06), 15 June 2013 and *Magyar Helsinki Bizottság* v. *Hungary* (application no. 18030/11), 8 November 2016, *Sdruženi Jihočeské Matky* v. *Czech Republic* (Application no. 19101/03), of 10 July 2006.

9 See Article 19: Open Development, *Report on Access to Information and the Sustainable Development Goals*, 19 July 2017.

10 See the 2015 EU Report.

11 This was also included in an EU 2015 List of Urgent Reform Priorities.

12 See the 2016 EU Report and the 2018 Report.

scope of the reporting requirements of public bodies.[13]

24. In January 2019, the government submitted a new Draft Law on Free Access to Public Information in the Republic of North Macedonia (the Draft Law) to the parliament, which was subsequently adopted on 24 April 2019.

C. Comments on the Draft Law

1. General Remarks

25. The Draft Law still contains numerous provisions that were discussed in the RFoM Analysis. Generally, the Draft Law is to be commended for its visible attempts to entrench key principles relating to access to information, enhance transparency of public bodies and strengthen the mandate of the responsible oversight body. At the same time, the Draft Law would benefit from some improvement, with more detail and concrete recommendations provided in sections below.

26. Moreover, the financial impact assessment of the Draft Law states that the Draft Law shall have no additional impact on the budget of North Macedonia. Given that the Draft Law proposes to create a whole new Agency with additional competences, notably in the area of misdemeanor procedures, it will likely have financial impact. The drafters should at least plan for awareness-raising and training costs, and should assess whether the current number of staff is sufficient to conduct the work of the Agency.[14] ***In this respect, it is recommended to conduct a new impact assessment with respect to the financial impact, including on awareness-raising and training costs, while bearing in mind possible difficulties and obstacles to the proper implementation of the Law.***

27. Lastly, as the parliament has adopted the Draft Law before publication of this Opinion ODIHR hopes that extensive consultation throughout the entire process has been conducted. As a preliminary remark, it should be noted that successful reform should be built on at least the following three elements: 1) clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) political commitment to fully implement the legislation in good faith.[15] ***ODIHR would like to stress that an open and transparent process of consultation increases the confidence and trust in the adopted legislation and in the state institutions in general.***

2. Scope and Definitions

28. Article 1 of the Draft Law states the subject of the law and includes "legal entities and natural persons performing public authorizations determined by law and performing activities in the public interest" as "information holders." Article 3, which includes a definition of the term "information holders" also refers to entities and natural persons "performing public authorization" and "activities of public interest" as well as political parties with respect to their "revenues and expenditures."

29. Private persons and entities exercising public functions are commonly part of legislation

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13 See Office of the OSCE Representative on Freedom of Media: Legal Analysis of proposed amendments to the "Law on Free Access to Information of Public Character," December 2018 (Published on 25 March 2019).

14 In recent EU reports, the [Agency] was considered to not have sufficient capacity to monitor the compliance of information holders with proactive disclosure requirements.

15 See paragraph 5.8 of the 1990 OSCE Copenhagen Document, which requires "legislation, adopted at the end of a public procedure."

regulating access to publicly-held information, and it is assumed that this is what is meant by entities and natural persons "performing public authorizations determined by law." The rationale for treating these types of persons and entities the same as public bodies is that the type of information (namely information that is in the public interest) is the same as that held by public bodies, except that this particular public function is being exercised by a private entity or person. It would not be fair to exclude these persons from legislation on access to publicly-held information, as it should not make a difference to the public whether the holder of such information is public or private.

30. However, it is not clear why under Article 1, these same entities or persons also need to perform activities that are in the public interest in order to be considered information holders in addition to performing public authorization. The term "public interest" itself is defined in Article 3 of the Draft Law, but only appears to be related to the exercise of the right of free access to public information. Here, it implies interest for information and situations where such information reveals or provides access in certain cases of wrongdoing of public authorities, threats to individuals or the environment, understanding of issues of public policy debates, or ensuring equal treatment of citizens.[16] Furthermore, reference to the "public interest" in Article 1 appears to be vague and may create confusion in the process of application of this Draft Law.

31. If the wording is not meant to be read cumulatively (private entities and natural persons performing public authorizations determined by law and performing activities in the public interest), but rather separately (private entities and natural persons performing public authorizations determined by law, and private entities and natural persons performing activities in the public interest), then this would over-expand the definition of information holder, and would potentially oblige a wide array of different private entities and natural persons to disclose information that they hold, with unforeseen consequences. The wording of the Draft Law does not point in this direction, but such a wide scope of the Draft Law would raise serious concerns due to the unclear and potentially wide definition of public interest, as well as the impact this would have on the privacy and other rights of the respective entities and individuals.[17]

32. Unless an issue of a translation, ***it is advisable to re-examine the definition of subjects of this Draft Law, avoiding references to "public interests" in Article 1 and 3, introducing definition of the "information holders", as the mere fact of performing public functions should already suffice to add these private entities and persons to the list of information holders.*** In addition, as suggested by the RFoM, the cases set out in the definition of public interest (Article 3) could instead be incorporated into Article 6.3, or added to Article 6 as a separate paragraph.

33. In addition to the above, Articles 1 and 3 also include "political parties concerning their revenues and expenditures" in the definition of information holder. Presumably, this was added in response to recent EU reports, which noted that political parties were excluded from the definition of information holder.

34. The aim of legislation providing access to publicly-held information is to oblige state bodies to disclose information that individuals, based on Article 19.2 of the ICCPR and Article 10 of the ECHR, are entitled to ask for and receive. In this context, it is not clear why political parties should fall under the same obligation, as they are not bodies of the state, and also do not exercise any public functions. Rather, political parties are private associations that

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16 The RFoM noted that "as to activity of public interest, this is something that is defined in the amendment to Article 2, which in fact reads much more like a set of hard public interest overrides to exceptions than a definition of public bodies."

17 See paragraph 24 of the 1991 OSCE Moscow Document.

usually take part in elections with a view to one day becoming part of the government.

35. This is not to say that political parties should not be transparent with respect to their funding. On the contrary, political parties should underlie quite stringent disclosure requirements.[18] This is, however, not due to their capacity as holders of public information, but instead due to the need to level the political playing field before, during and after elections, and the need to avoid undue influencing in the political sphere and potential state capture by certain interest groups.

36. For this reason, transparency and disclosure requirements for political parties do not belong in legislation providing access to publicly-held information, but should rather be detailed in legislation pertaining to political party financing. ***It is thus recommended to remove political parties from the definition of information holders.***

3. Exceptions to Free Access to Public Information

37. Generally, exceptions to the maximum disclosure principle are possible, where they follow one of the legitimate aims set out in Article 19.3 of the ICCPR, and Article 10.2 of the ECHR. These include respect of the rights or reputations of others, as well as the protection of national security or of public order, or of public health or morals. In addition to these, Article 10.2 also includes territorial integrity or public safety, the prevention of disorder or crime, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary as legitimate aims. The respective restrictions need to be proportionate and necessary to achieve said aims: public bodies may only refuse to disclose relevant information where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in disclosure.

38. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also recommended that "[e]xceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information, and should be determined by an independent body, preferably a court, and not the body holding the information."[19]

39. In addition, Article 3 of the Council of Europe Convention on Access to Official Documents also contains a more specific list of protected interests that may justify limiting the right of access to publicly-held information. Paragraph 2 of the Convention states that access to publicly-held information may be refused if its disclosure would harm or would be likely to harm any of the interests mentioned in Article 3.1 unless there is an overriding public interest in disclosure.

40. Article 6 of the Draft Law provides exceptions to the principle of free access to public disclosure in cases where (1) such information underlies a certain degree of classification, (2) for reasons of personal data protection, (3) confidentiality of tax procedures, (4) the investigation of criminal or misdemeanor matters, to avoid harming or interfering with civil or administrative procedures, as well as (5) to protect industrial or intellectual property.

41. Further, Article 6.3 refers to a "mandatory injury test" to protect the "public interest."[20] If read correctly, this procedure seems to be a mean of double-checking the consequences that disclosing the information will have on the interests protected under Article 6.

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18 See paragraphs 201-206 of the Joint ODIHR and Venice Commission Guidelines on Political Party Regulation.

19 See also paragraph 909 of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report on the promotion and protection of the right to freedom of opinion and expression*, A/68/362, 4 September 2013.

20 Article 3 of the Draft Law defines an "injury test" as a mandatory procedure conducted by an information holder before refusing access to information in accordance with Article 6.

42. When looking separately at the grounds for refusal set out in Article 6, the first exception to the disclosure requirement concerns classified information with "a certain degree of classification." It is not clear if and how the exception, as envisaged under Article 6.3, would apply to the classified information and in what circumstances "information holder" would be authorized to apply the exception or release information. In this context, Article 6.1(1) does not specify the degree of classification, raising concerns with regard to the legality and foreseeability of the relevant provision.

43. In addition, it is not enough to simply define the "injury test" in a provision containing definitions of terms. Without a proper test, under the wording of Article 6, the exceptions listed hereto, would potentially allow public authorities wide discretion, without giving proper guidance (in allowing or refusing to disclose publicly-held information), which means that such decisions may happen regardless of whether disclosure would really harm protected interests and rights or not. To ensure compliance with international standards, ***it is recommended to revise Article 6.3, including wording on exceptions, introducing clearly defined criteria for exceptions to disclose. Refusal of access to information should only be possible in cases where the disclosure of such data would substantially harm the protected interests mentioned in this provision***.

44. In general, classification follows its own rules, and such decisions need to be revisited on a regular basis. It is thus possible that information which was highly confidential some years ago no longer falls under this category. In addition, the act of classifying information does not reveal whether or not the contents of a certain document are liable to harm certain protected interests.[21] Legislation on classification of confidential documents is generally different from legislation providing access to information, which determines whether and how to make information accessible in a legal way. As already stated in previous ODIHR opinions, the decision to classify documents made in the past may not be sufficient to justify continued prohibition of the disclosure.[22] To this end, it is important that the relevant legislation ensures the possibility for the regular revision of the reasons for classified information as well as provide the grounds for such decision when necessary. In addition, there should be a judicial review for establishing classification.

45. The other reasons for limiting access to publicly-held information set out in Article 6.1 would appear to reflect some of the exceptions listed in Article 3 of the Council of Europe Convention on Access to Official Documents (notably privacy rights and other legitimate private interests, investigation of criminal matters, as well as the equality of parties in court proceedings and the effective administration of justice). However, Article 3 of the Convention also mentions national security, defence and international relations as reasons to curtail access to publicly-held documents, as well as public safety, disciplinary proceedings, inspection, control and supervision by public authorities, commercial and other economic interests, and economic, monetary and exchange rate policies of the State.[23]

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21 The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also noted that "the protection of national security explicitly appears in international human rights law as an acceptable reason to limit a number of freedoms, including freedom of expression. On the other hand, as detailed above, restrictions to the exercise of basic freedoms, including all possible restrictions to the right to access information, must still be clearly and objectively established by law and must also conform to the strict tests of necessity and proportionality."

22 See ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts, 25 May 2015 and ODIHR Opinion on the Draft Law of the Republic of Kazakhstan on Access to Public Information, 16 November 2010.

23 Article 6.1(6) of the current Law does foresee possible non-disclosure regarding "information concerning commercial and other economic interests, including the interests of the monetary and fiscal policy the release of which shall have harmful consequences for their operation", but that this was deleted from the Draft Law.

4. The Agency for the Protection of the Right to Free Access of Public Information: appointment and dismissal

46. The Draft Law establishes a new Agency for the Protection of the Right to Free Access to Public Information (the Agency). The Agency replaces the existing Commission for the Protection of the Right to Free Access to Information of Public Character (the Commission) and is defined to be an autonomous and independent body of the state administration (Article 29).

47. The Agency consists of the director and deputy director, appointed (and dismissed) by the National Assembly for a six-year term, based on a proposal made by the Committee on Election and Appointment Issues (Article 32), and is supported by staff (Article 35). It is welcomed that public announcement for the posts of the director and deputy director is made in national newspapers, including in a language other than Macedonian, which is spoken by at least 20 per cent of the citizens.[24] The Draft Law, however does not detail what are the criteria on which this proposal is made, nor is there any information as to the grounds that the Committee bases its decisions on. The civil society and the EU have voiced concerns as to the transparency of the Committee's work in selecting candidates not only for these positions, but for the heads of independent bodies in general.[25]

48. Given the existing concerns, it may be advisable for the drafters to discuss ways to enhance the transparency of this body. ***In general, it would be recommended that the entire appointment and selection process is detailed in the legislation and is transparent. The drafters may also consider including certain criteria or processes to help boost the inclusiveness of the process for women and national minority candidates.***

49. Article 32.1 of the Draft Law allows for re-election of both director and deputy director by the National Assembly for unlimited time. Ideally, the heads of such independent institutions should only be elected for one term, maximum two.[26] ***To avoid possible conflicts of interest and inter-dependency with the parliament and individual members of parliament, it is recommended to limit the number of times that the director or deputy director may be re-elected.***

50. In addition, the Draft Law does not specify by which majority the director and deputy director shall be appointed. As it is not mentioned specifically, it is assumed that it is a simple majority. Given how important it is for the Agency to be neutral and independent from other public bodies (including the Assembly), ***it is recommended to consider appointing the director/deputy director by qualified majority, so as to achieve the broadest possible consensus.***

51. On the same note, it may also be helpful to specify in the Draft Law when the recruitment procedures for a new director/deputy director shall begin, to avoid gaps in appointment. Ideally, the terms of director and deputy director should not overlap entirely, to ensure that even where the mandate of one runs out, the other will still be able to operate as necessary. Similarly, Article 33. 4 states that in case of termination of office of the director, the deputy shall perform the functions of director of the Agency until a new director is appointed. ***It is recommended to consider interim solutions for cases where both the director and deputy director have to be dismissed.***

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24 This is also in line with paragraph 32.5 of the 1990 OSCE Copenhagen Document, which provides for the right to "disseminate, have access to and exchange information in their mother tongue."

25 See the Assessment and Recommendations of the on Systemic Rule of Law issues, 14 September 2017.

26 This is generally considered good practice with respect to heads of national human rights institutions. See, for example, ODIHR Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017.

52. The eligibility criteria set out in Article 32.2 are at times more specific, and have detailed qualification requirements. In particular, it is positive that certain sanctions imposed for wrongdoing by enforceable decision are now exclusion criteria.

53. Article 33 of the Draft Law provides for the reasons for early termination of office and dismissal of the director and deputy director. It lists objective criteria that would lead to termination, which would then be confirmed by the Assembly. These include cases where "the ability to hold the office is permanently lost," as ascertained by the National Assembly. It is unclear which scenario is envisaged by this provision; if this refers to the office-holder's psychological or medical abilities, then these should be determined via a psychological or medical certificate. Similarly, terms of office may be terminated if the incumbent resigns or makes a personal request for termination; the difference between the two is not clear. ***It is recommended to clarify these points.***

54. Article 33.2 sets out the situations in which the National Assembly may decide to dismiss the director or deputy director, based on a requisite proposal by the Committee on Election and Appointment Issues. These involve cases where one of the eligibility criteria under Article 32 is not met, where the incumbents refuse to submit asset declarations, or submit incorrect ones, where there are obvious conflicts of interest, and where deadlines for taking certain activities have been missed without proper justification. It is at least doubtful whether the unjustified failure to respect deadlines should constitute a basis for the dismissal of the head of an independent institution.[27] ***It is recommended to amend Article 32 so that dismissal is only possible if the behavior of the director or deputy director reflects a regular and large-scale pattern of misconduct, where information is purposefully withheld or provided with significant delays.***

55. In addition, it is concerning that Article 33.2 does not provide the incumbent director or deputy director with a right to reply or to appeal such decision, which would allow him/her to respond to the accusations made by the Committee.[28] ***Thus, consideration should be given to explicitly providing for an opportunity to appeal decisions on their dismissal as well as opening these debates to the public, to ensure transparency***.

56. It should also be noted that the requisite majority for dismissals is not mentioned in Article 33. Generally, the majority for dismissal should be at least as high as the majority for appointment, but may even be higher, to avoid dismissals based solely on political considerations of the majority in the Assembly. ***It is recommended to consider imposing a two-thirds majority requirement for dismissals.***

5. Enhanced Competences of the Agency

57. According to Article 30, the Agency is responsible for the preparation of an annual report on its work that it shall submit to the National Assembly. This report is based on annual reports received from information holders under Article 36 of the Draft Law, and includes, among others, number of received requests, accepted and refused requests, as well as

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27 As provided by the Guiding Principles of the Anti-Corruption Authority Standards of the European Partners against Corruption, "[t]ransparent and objective […] dismissal procedures/mechanisms for the head of the institution and all other personnel shall be based on the principles of efficiency and transparency and objective criteria, and which focus on a proven record of the individual's integrity, skills, education and training, experience and professionalism only.

28 Paragraph 5.10 of the 1990 OSCE Copenhagen Document states, "Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity". Under Article 2.3(a) of the ICCPR States obligated themselves "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

number of appeals. While the transparency of these reports is welcomed, they could be more detailed, especially on the timeframe to respond to requests. ***Such timeframe could be introduced in Article 36 by also providing for more detailed annual reporting requirements.***

58. The EU has previously criticized that the Commission is not able to impose penalties in cases of non-compliance with the rules set out by the existing Law. It is thus welcomed that Article 30 of the Draft Law now provides the Agency with a new competence to conduct misdemeanor proceedings through a Misdemeanor Commission that shall also have decision-making competences. Subsequently, and also given the fact that the Agency supervises implementation of the Draft Law, it may conduct misdemeanour proceedings in the special situations as set out in Section VIII. However, while this may be covered by a different legislation, the Draft Law does not provide for an appeal mechanisms against such decisions, at odds with international obligations and OSCE Commitments.[29] ***It is recommended to include the legal redress provisions in Section VIII of the Draft Law. Alternatively, a reference to other legislation could be made in the Draft Law.***

59. Article 40 specifies that all misdemeanour proceedings undertaken under the Draft Law shall be conducted by a special Misdemeanour Commission. According to Article 40.2, the Misdemeanor Commission shall be composed of staff of the Agency with adequate education degrees and the required professional experience as specified in law.

6. Sanctions

60. Articles 38 and 39 enumerate various sanctions for violations of the legal provisions of the Draft Law. While Article 38 speaks specifically about misconduct of managers, Article 39 does not. It may be good to clarify here whether Article 39 seeks to hold accountable only the official in question, or whether liability should extend also to supervisors who have ordered officials to not disclose information, or to delay proceedings.

61. On a technical note, Article 39 provides that officials shall be fined if they take action that is contrary to Article 6.6 of the Draft Law. It is unclear which part of Article 6 this provision refers to, as Article 6 only has four paragraphs. In addition, Article 39 sanctions violations of cost-free access to information, and refers to Article 10.3. The correct reference is Article 10.2. ***These discrepancies should be eliminated.***

7. Legal Protection and the Appeals Procedure

62. Any refusal to provide information shall be reasoned, and the respective individual shall have the right to appeal against such decisions; also in cases where no response was received from the competent information holder.[30] The States should create an independent body to hear and decide on appeals, which should also monitor public bodies' implementation of the law and provide assistance to the public.[31]

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29 Article 53.3 of the Law on Misdemeanours provides that court protection shall be guaranteed against all decisions taken by the above bodies in misdemeanour proceedings.

30 See paragraph 19 of the UN Human Rights Committee: General Comment No. 34 on Article 19.

31 The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report on the promotion and protection of the right to freedom of opinion and expression*, 4 September 2013, provides that "National laws should contain a clearly and narrowly defined list of exceptions or an explanation of the grounds for refusing the disclosure of information. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information, and should be determined by an independent body, preferably a court, and not the body holding the information" (paragraph 99). It further notes that "[n]ational laws should establish the right to lodge complaints or appeals to independent bodies

63. Article 26 provides for the right of legal protection to persons who file a verbal or written request for access to information under Article 12.1 of the Draft Law. If the legal protection implies to having a legal remedy, then it's not clear why such "protection" is listed for only Article 12.1 and not for others. A number of Articles provide for an opportunity to appeal decisions to the Agency if: (1) an information holder negatively responds to the verbal request (Article 13.4); an information holder does not respond to the supplemented written request (Article 17.6); an information holder grants no access or provides no such decision (Article 20.3); an information holder fails to provide access after extending deadline (Article 22.3); and an information holder fails to respond to repeated request when the applicant considers that the received information does not correspond to the request (Article 24.5).

64. Apart from said provisions, Article 27 separately provides that an applicant can appeal a decision of an information holder for refusing or rejecting the request with the Agency within 15 days. If the Agency fails to decide on such claim within 15 days, or within 7 days in case of repeated request, the administrative dispute can be initiated. The possibility of administrative appeal is welcomed and in line with OSCE commitments and international obligations, however, scattered appeal provisions combined with the lack of clarity with respect to the terminology applied in Article 26 may lead to inconsistent application. To this end, ***in order to ensure consistent and effective application of the Draft Law, it is recommended to clarify the scope and meaning of Article 26, including its terminology, in order to ensure that legal remedy is effectively provided.***

65. In addition, while the timelines and other procedural details are set out in Article 27, this provision does not provide much information on the manner in which the Agency reaches its decision. In particular, the Draft Law does not outline how the Agency investigates cases, and which steps it takes in this process. It is also not clear what are the deadlines for appealing and adjudicating appeals in the court. ***For more transparency and effectiveness, consideration could be given to providing these details in the Draft Law.***

66. Most importantly, neither Article 27 nor any other Article in the Draft Law outlines the competences and mandate of the Agency to obtain the information necessary to take a decision in the matter. First and foremost, this would include a provision specifying an obligation of the respondent information holders to provide the Agency with all relevant information that it requires to take a decision on the matter, within the requested time. Secondly, in cases involving classified documents, the draft law should regulate the grounds and procedures for the Agency to obtain access to such documents or information from the relevant authorities that would enable it to assess whether the refusal to disclose is justified or not. The courts will also need to have full access to all relevant information to assess the decision taken by the Agency. ***The Draft Law should be amended to provide for these details.***

67. Finally, while the timeframe of 15 days for the Agency's decision follows the general good practice, there may be situations where more time is needed to come to a proper conclusion of a case, due to its complexity or due to the amount of information involved. ***It would be recommended that Article 27 includes the possibility to exceptionally extend the 15-day deadline for such reasons, without undermining the due process, as the failure to meet the deadline could lead to an administrative dispute, as set out in Article 27.3.***

8. Other Remarks

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in cases in which requests for information have not been dealt with properly or have been refused" (paragraph 101).

68. It is welcomed that the Draft Law allows for the possibility to apply both verbally (Article 13) and in writing (Article 14) to obtain information. An applicant also has possibility to supplement the request if the latter is incomplete (Article 17). All this would facilitate an unimpeded access to information.

69. However, in certain provisions of the Draft Law, information is only provided online, or by electronic notification. These include provisions relating to the publication of the list of office-holders (Article 5), information about treasury operations (Article 7), duties of information holders (Article 10), information about extending the official deadline for providing information (Article 22), annual reports of information holders (Article 36).

70. While it is presumed that the majority of the population in North Macedonia is connected to the Internet, a number of persons (primarily the elderly and/or persons in rural areas) may not be. ***For this reason, it would be beneficial to review the Draft Law to ensure that non-electronic alternatives are found to inform these groups of people of the Draft Law, once passed, and of the competent information holders and the information that they publish.***

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