



RE-THINKING DEMOCRATIC OVERSIGHT OF SECURITY AND INTELLIGENCE SERVICES IN NORTH MACEDONIA

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CONTENTS

EXECUTIVE SUMMARY	4
1. BACKGROUND	5
2. WHO CONTROLS AND OVERSEES THE WORK OF THE SECURITY AND INTELLIGENCE SERVICES IN NORTH MACEDONIA?	6
3. PARLIAMENTARY OVERSIGHT	7
3.1. Legal and institutional set-up	7
3.2. The malfunctions of the parliamentary oversight system	10
3.2.1. Legal and institutional labyrinth	10
3.2.2. Legitimacy in free-fall	10
3.2.3. Oversight of everything equals oversight of nothing	11
3.2.4. Politicization of parliamentary oversight	12
3.2.5. Limited results of parliamentary oversight	12
3.2.6. Secret collection of data remains a taboo	14
3.2.7. Lack of capacity to conduct oversight	15
4. COUNCIL FOR CIVILIAN SUPERVISION (CCS)	16
4.1. Sui generis body	17
4.2. Mandate of action	17
4.3. Legal and institutional obstacles preventing the Council to become operational	19
4.4. Selection of members	20
4.5. "Civilian oversight" insulated from citizens	21
5. THE WAY FORWARD	22
5.1. Public debate on the models of intelligence oversight and creating a special law on parliamentary oversight	22
5.2. Re-think and strengthen current parliamentary bodies	23
5.2.1. Committee on Security and Defense should be more proactive in providing general oversight of the security sector and the security policies	23
5.2.2. Committee on overseeing the work of the security-intelligence services	23
5.2.3. The lessons from the attempt to establish a Council for Civilian Supervision should be used for creating a functional specialized oversight body	24
5.2.4. Creation of a non-parliamentary, independent specialized oversight body	25
5.2.5. Strengthen the work of the independent oversight bodies and their relation with the Parliament	26
BIBLIOGRAPHY:	27

EXECUTIVE SUMMARY

Intelligence governance was set to be one of the top priorities for the country from the beginning of Prime Minister Zoran Zaev's Social Democrat-DUI coalition government throughout the previous several years. Following the recommendations of the so-called "Priebe report," North Macedonia adopted a set of legal and institutional changes aimed at reforming the system for interception of communications and transforming the former Administration for Security and Counterintelligence into an independent National Security Agency.

While the need to increase accountability of the security services has become increasingly apparent, to date there has been little discussion on the mechanics of the current oversight model; there have been no substantial changes in the functioning of the established bodies.

This paper takes a critical stance towards the existing model of democratic review and control, which performs parliamentary oversight through three specialized parliamentary committees and a newly created hybrid body for civilian supervision.

The report identifies deficiencies in the legal setup for parliamentary oversight, unclear mandates, insufficient access to expertise, a paucity of actual results, politicization of the oversight, and other issues. These issues are all evidence of – and amplified by – deficient political will to ensure effective parliamentary oversight over intelligence activities.

Moreover, the paper takes into consideration the theoretical and practical limitations of parliamentary oversight that have already been identified within the EU and on a wider level. Furthermore, the poor design of the Council for Civilian Supervision renders it incapable of performing its anemic designated role, let alone any more substantial oversight. The numerous obstacles to provide even the basic conditions for this body to become functional demonstrate a lack of political will to enable effective civilian supervision.

This paper's particular contribution, in addition to documenting the deficiencies of the existing oversight system, is to propose a new model of democratic oversight, involving both parliamentary and external expert oversight. The parliamentary element would require passing a special law to invest a *single committee* with clear competences, powers, and tools to perform this role comprehensively. In addition, we advocate establishing a non-parliamentary, independent specialized oversight body with strong popular legitimacy (bolstered through transparency in its construction and operation), powers, and resources. These new bodies would replace the existing oversight infrastructure.

1. BACKGROUND

EU Member States should establish a robust oversight framework adequate to the powers and capacities that intelligence services have. The independence of oversight bodies should be enshrined in law and applied in practice. EU Member States should grant oversight bodies adequate financial and human resources, including diverse and technically-qualified professionals. Member States should also grant oversight bodies the power to initiate their own investigations as well as permanent, complete and direct access to necessary information and documents for fulfilling their mandate. Member States should ensure that the oversight bodies' decisions are binding.

EU Fundamental Rights Agency¹

Given the popular demands for justice and accountability beginning with civil society and amplified through protests beginning in early 2015, intelligence governance was declared a top priority of the Zaev government upon taking office in mid-2017.² The massive wiretapping scandal from 2015 revealed important rule of law deficiencies, where the then Administration for Security and Counterintelligence (UBK) took a prominent role.

The European Commission delegated a group of experts, led by retired European Commission director, Reinhard Priebe, to assess the situation and “diagnose” the systemic malfunctions which enabled such great and deliberate abuses of power. This report, popularly known as “The Priebe Report,”³ offered concrete recommendations, which further transposed into the “Urgent Reform Priorities” for North Macedonia.⁴

As the Regional Anti-corruption Initiative rightly notes, “The Priebe Report identified the security sector as an important lever of state capture. It pointed to power concentration in one civilian intelligence service in Macedonia, operating without oversight. Responsible authorities hadn’t used their control and oversight powers, because they were politicized or intimidated, or otherwise sabotaged.”⁵ The EC’s follow up assessment in 2017 unfortunately demonstrated that little had been done to remediate these failings up to that point. The European Commission then turned the requested reforms into a precondition for the country’s progress towards EU integration, along with the reforms in public administration, the judiciary, and the fight against corruption.

Therefore, the first stage of reforming the intelligence and security services began in 2018 with reforming the system of signals intercepts. The Law on Interception of Communications⁶

1 European Union Agency for Fundamental Rights FRA: “Surveillance by intelligence services: fundamental rights safeguards and remedies in the European Union – Volume II”, 2018. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-surveillance-intelligence-services-vol-2-summary_en.pdf

2 Please see: Government of the Republic of Macedonia: “Plan for Urgent Reform Priorities “3-6-9”, 04.07. 2017. Available at: <https://vlada.mk/node/14649?ln=en-gb>

3 The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts’ Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, Brussels, 8 June 2015 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

4 Government of the Republic of Macedonia: Plan 3-6-9, 04.07.2017, available at: <https://vlada.mk/node/14649?ln=en-gb>

5 Pejic, J.: “All Western Balkan countries need “Priebe Reports” to measure state capture”, European Western Balkans, 08.02.2019, available at: <https://europeanwesternbalkans.com/2019/02/08/priebe-report-state-capture-western-balkans/>

6 Law on Interception of Communications, Official Gazette of the Republic of North Macedonia No. 71/2018

addressed the monopoly over the UBK's use of the surveillance equipment in the intelligence activities and criminal procedures. It introduced the Operational Technical Agency (OTA)⁷ as a mediator between the operators and the services. The law also distinguished the measures for interception of communications for the purposes of security and defense from those employed in criminal procedures as special investigative measures. The law also introduced specific safeguards, such as control and oversight of the interceptions of communications.

Next, the authorities proceeded towards transformation of the UBK, which had been an integral part of the Ministry of Interior, into an independent National Security Agency (ANB). In September 2019, the ANB became operational. The Law on the National Security Agency also incorporates provisions for control and oversight of its work.

It should be noted that reforming the (foreign) Intelligence Agency and the military intelligence,⁸ also important branches of the intelligence and security community, has yet to even commence.

2. WHO CONTROLS AND OVERSEES THE WORK OF THE SECURITY AND INTELLIGENCE SERVICES IN NORTH MACEDONIA?

There are several layers constituting the Macedonian intelligence oversight system:

- ◆ **Internal Control:** This element of regulation binds officials and establishes internal control and audit mechanisms. It relies on standing orders, recruitment, training, coordination of staff (including mechanisms for protecting the rights of officers and disciplining individuals).⁹ The internal control in ANB is performed by the Organizational Unit for Internal Control whose Head is appointed by the Director of the ANB, after a prior approval by the competent working body in the Macedonian Assembly, performing parliamentary oversight of the Agency. The Head of this unit is drawn from among the Agency's employees and should hold this position for six years.¹⁰

The Law on the Intelligence Agency does not contain any provisions for internal control; however, this outdated piece of legislation¹¹ is likely to be replaced by a new Law which is in the final draft phase. It has not yet seen the light of day because of the dissolution of parliament and the early parliamentary elections.

- ◆ **Independent bodies:** In regard to the external oversight of the ANB, it is dispersed among several state institutions and other bodies such as the Ombudsman, the Personal Data Protection Agency, the Directorate for Security of Classified Information, the State Audit Office, and other entities.¹²
- ◆ **The Public Prosecution/Judiciary** is specified in the Law on Interception of Communications as providing control of the implementation of the measures for interception of communications. However, it also serves other functions, such as

⁷ Regulated with the Law on the Operational-Technical Agency, Official Gazette of the Republic of North Macedonia No. 71/2018, 98/2019

⁸ The intelligence community in North Macedonia consists of: National Security Agency responsible for national security and counterintelligence, Intelligence Agency which predominantly collects intelligence from abroad, and a Department for military security intelligence within the Ministry of Defense.

⁹ Please see: Fuior, T., Lembovska, M., Richards, J. and Ridder, W. "Guidelines for intelligence oversight for parliamentary committees in the Assembly of the Republic of Macedonia", 2018, DCAF & Assembly of the Republic of Macedonia, available at: https://www.dcaf.ch/sites/default/files/publications/documents/ENG_INTELLIGENCE%20OVERSIGHT.pdf

¹⁰ Law on the Agency for National Security, Official Gazette of the Republic of North Macedonia no. 108/2019. Art. 52-3

¹¹ Law on Intelligence Agency, Official Gazette of the Republic of North Macedonia, No. 19/1995

¹² Law on the National Security Agency, Art. 59

adjudicating charges of misconduct, criminal activity or access to information in intelligence-related matters, providing access to remedy when individual's rights have been infringed, etc.

- ◆ **Parliamentary Oversight:** The parliamentary oversight of the security and the intelligence services, as a focal point of this work, is performed by the Macedonian Assembly, both directly at the plenary sessions, and through the Assembly's competent working bodies.
- ◆ **Council for Civilian Supervision:** a hybrid body intended to provide democratic oversight of the implementation of the interception of communications.

The parliamentary oversight and the oversight by the Council for Civilian Supervision constitute democratic oversight of the security and intelligence services in North Macedonia. Democratic oversight is fundamental to promoting rule of law, maintaining checks and balances and ensuring citizen's control of one of the most intrusive sectors of governance, through their elected representatives.

Due to the importance of democratic oversight (including parliamentary oversight and oversight by the Council for Civilian Supervision), the paper focuses on these two bodies as focal institutions to ensure accountability of the security and intelligence services. While other types of oversight and control demand scrutiny, they have not been included in this endeavor.

3. PARLIAMENTARY OVERSIGHT

3.1. LEGAL AND INSTITUTIONAL SET-UP

Following the structure and the organization of the current set of working bodies in the Assembly, which are in detail operationalized in the Rulebook,¹³ there are three pivotal committees that play a significant role in regard to parliamentary oversight of intelligence: the Committee on Defense and Security, the Committee for Supervising the Work of the National Security Agency and the Intelligence Agency, and the Committee on Oversight of the Implementation of Measures for Interception of Communications.¹⁴ In addition, the Legislative Committee which hosts all discussions related to draft legislation, as well as the Finance and Budget Committee, which might discuss draft legislation related to intelligence oversight if financial implications are envisaged in the text. Lastly, it is worth noting that the Standing Inquiry Committee for Protection of Civil Freedoms and Rights also has competence to play a significant role in parliamentary oversight, stemming from the Committee's obligation to review communications from citizens and respond.¹⁵ Having in mind that one of the main tenets of parliamentary oversight is to secure protections of citizens' rights and freedoms,¹⁶ a proactive role of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights is expected. In the past, this has not been the case, and this Committee had remained dormant regarding issues concerning the work of intelligence services.

The Committee on Defense and Security (CDS) deals with multiple issues including: performing control in the field of defense and security, cooperation with the collective defense and security

¹³ Rules of Procedure of the Assembly of the Republic of Macedonia (consolidated text), 2013, available at > https://sobranie.mk/rules-procedures-of-the-assembly-ns_article-rules-of-procedure-of-the-assembly-of-the-republic-of-macedonia-precisten-tekst-2013.nspix

¹⁴ Website of the Parliament: Working bodies 2016 – 2020. Available at: <https://sobranie.mk/working-bodies-2016-2020-en.nspix>

¹⁵ Website of the Parliament: Working bodies 2016 – 2020. Available at https://sobranie.mk/working-bodies-2016-2020-en.nspix_article-standing-inquiry-committee-for-protection-of-civil-freedoms-and-rights-16-20-en.nspix

¹⁶ Born, H. and Wills, A. (Eds) "Overseeing intelligence services – A Toolkit", Geneva Centre for the Democratic Control of Armed Forces (DCAF) pg. 60

systems to which the country has acceded, as well as many other security-related issues¹⁷. From a practical point of view, this committee “deals with the draft legislation in the sphere of security and defense, proposed decisions on sending staff on peacekeeping missions and other documents.”¹⁸ The Committee is composed of a chairman and 12 members. Each of the 13 MPs has their respective deputy member.¹⁹ Deputy members should ensure functioning of the Committee in a case where the members are not available to attend.

Committee for Supervising the Work of the National Security Agency and the Intelligence Agency (Committee for Oversight of ANB and IA) undertakes a distinctively more substantial role in performing parliamentary oversight of the intelligence services. The main competences of this committee are the following:

- ◆ considering the respect of the rights and freedoms of citizens and other legal entities, defined by constitution and law, by ANB and the IA;
- ◆ scrutinizing the legal compliance in exercising the authority of the ANB and the IA in terms of encroaching their authority, unauthorized activities, abuse and other adverse trends in its work contrary to their rights stipulated by law;
- ◆ closely following the methods and means used by the ANB and the IA in terms of respecting the law and respect of civil and the rights of other subjects;
- ◆ closely following the financial, personnel and technical facilities of the ANB and the IA;
- ◆ discussing establishment of international cooperation on issues referring to supervision and oversight of intelligence, as well as other issue regarding the two agencies.²⁰

Since the adoption of the new Law on the National Security Agency, “an attempt was made to further specify the work of this Committee, such as: obliging the Director, upon the request of the Committee, to allow access to the premises, enable insight into the documentation, provide data and information, submit an extraordinary report, etc.”²¹ Composed of a chairman and eight members, it is smaller than the Committee on Defense and Security, which has a broader remit. According to the Assembly’s Rules of Procedure, every member of a working body (in this case, a committee) should have her/his respective deputy.²²

Lastly, the **Committee on Oversight of the Implementation of Measures for Interception of Communications (Committee for Oversight of Interceptions of Communications)** is mostly dedicated to controlling the work of the newly established OTA and the bodies with competences to intercept communications. The work of this Committee is mostly related, but not limited, to the following issues:

17 Website of the Parliament: Working bodies 2016 – 2020. Available at https://sobranie.mk/working-bodies-2016-2020-en-ns_article-committee-on-defence-and-security-16-20-en.nspix

18 Lembovska, M. 2020, More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State, EUROTHINK – Center for European Strategies, Skopje, pp. 30-1 <http://www.eurothink.mk/gridfs/data/id/ae0364b4acc4ce34b5d9277c>

19 Website of the Parliament: Working bodies 2016 – 2020. Available at: https://sobranie.mk/working-bodies-2016-2020-en-ns_article-committee-on-defence-and-security-16-20-en.nspix

20 Website of the Parliament: Working bodies 2016 – 2020. Available at: https://sobranie.mk/working-bodies-2016-2020-en-ns_article-committee-for-supervising-the-work-of-the-security-16-20-en.nspix

21 Lembovska, M. 2020, More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State, EUROTHINK – Center for European Strategies, Skopje, p. 32

22 Rules and Procedures of the Parliament of the Republic of North Macedonia (consolidated text). Available at: https://sobranie.mk/rules-procedures-of-the-assembly-ns_article-rules-of-procedure-of-the-assembly-of-the-republic-of-macedonia-precisten-tekst-2013.nspix

- ◆ is mostly dedicated to controlling the work of the newly established OTA and the bodies with competences to intercept communications. The work of this Committee is mostly related, but not limited, to the following issues:
- ◆ consideration of the lawfulness of the implementation of measures for interception of communications carried out by the OTA;
- ◆ consideration of the effectiveness of the implementation of the special investigative measures; preparation of annual reports on the oversight;
- ◆ establishing international cooperation on oversight-related issues, and other issues and actions related to the implementation of measures for interception of communication.²³

One peculiarity related to the composition of this Committee is that it is the only parliamentary Committee in which the opposition has the majority.²⁴ Furthermore, this Committee is the smallest among the three committees performing parliamentary oversight of the intelligence services, being composed of five members and five deputy members.²⁵ The chairman and the deputy chairman come from the largest political party in opposition, while two members and their deputies come from the ruling parties, while the other two members and their respective deputies come from the parties in opposition²⁶. This mechanism provides certain checks and balances within the system of parliamentary oversight, giving numerical power to the political opposition in parliament to easily channel their concerns regarding the work of the OTA, with emphasis on the special investigative measures (SIM).

23 Website of the Parliament: Working bodies 2016 – 2020. Available at: https://sobranie.mk/-ns_article-committee-on-oversight-of-the-implementation-of-the-special-investigation-measure-interception-of-th.nspix

24 Lembovska, M. 2020, More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State, EUROTHINK – Center for European Strategies, Skopje, p. 33

25 Website of the Parliament: Working bodies 2016 – 2020. Available at: https://sobranie.mk/-ns_article-committee-on-oversight-of-the-implementation-of-the-special-investigation-measure-interception-of-th.nspix

26 Lembovska, M. 2020, More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State, EUROTHINK – Center for European Strategies, Skopje, p. 33

3.2. THE MALFUNCTIONS OF THE PARLIAMENTARY OVERSIGHT SYSTEM

3.2.1. Legal and institutional labyrinth

Navigating the complex institutional and legal set-up of security sector oversight is possible only for experts in the field. At the moment, provisions on parliamentary oversight are spread among multiple laws: the Law on the National Security Agency, the Law on Intelligence Agency, the Law on Interception of Communications, and the Law on the Parliament. In addition, multiple bylaws, such as the Rules of Procedure of the Assembly, as well as those of the committees, have bearing.

Distributing oversight among three parliamentary committees is both inefficient and ineffective, especially as some MPs are members of two or more of these committees. Moreover, the latest legislation makes a distinction between “oversight” and “control” of the services, where control is reserved for the judicial bodies, while oversight is supposed to be performed by the Parliament and the Council for Civilian Supervision. The law does not clearly define the meaning of “oversight” and “control.” Looking at the provisions referring to oversight and control, one can conclude that both functions refer to reviewing the legality of application of interception measures, where judicial bodies can perform more in-depth review.

Another dilemma further sparks the debate among the professional public: the number of committees in parliament that should/need to be involved in parliamentary oversight of the intelligence services. Various examples can be found in the comparative overview of this issue. For example, the Australian model foresees one Parliamentary Joint Committee on Intelligence and Security (PJCIS). Since 2005, this Committee had overseen the work of all six agencies of the Australian Intelligence Community.²⁷ To the contrary, the United States’ congressional oversight of intelligence services spans across several committees, with additional support from the judiciary and the executive.²⁸ Many countries in the EU follow the first model of having one parliamentary committee that performs the greatest share of work regarding parliamentary oversight: Belgium, Bulgaria, Denmark, Austria, among others.²⁹ Having in mind that there are currently three committees in the Macedonian Assembly sharing responsibility over the oversight of the intelligence services, it might be wiser for lawmakers to decrease this number to either one or two committees, concentrating expertise and powers within them. This may contribute to the increase of efficiency and effectiveness of the parliamentary oversight.

3.2.2. Legitimacy in free-fall

Public trust in parliament in North Macedonia is traditionally low, as it is low for most state institutions and other institutions in the political system. Three very recent polls show trust in parliament in the range between 20% and 25% of the respondents. NDI’s North Macedonia poll from June 2020 tells us that 22% either trust or fully trust the Macedonian Assembly.³⁰ IRI’s poll from March 2020 measuring sentiments in the Western Balkans shows that a paltry cumulative total of 25% of the respondents in North Macedonia trust parliament a great deal or somewhat.³¹ This is reinforced with another NDI poll, depicting an even lower level – 21% – of trust.³² An NDI poll dating from March 2017 demonstrates this is a consistent lack of public faith in their elected representatives, with just over 20% trust nearly four years ago, prior to the current government.³³

Figures show parliament to have deeply compromised popular legitimacy, diminishing its credibility when conducting parliamentary oversight of the intelligence services. In this vein, MPs need to further increase their efforts in order to improve parliament’s image. That being said, citizens’ trust in parliamentary oversight will subsequently increase and strengthen. However, this potential increase in trust needs to be grounded in increased activity by the committees responsible for oversight, as well as substantial improvement of the quality of the oversight that needs to be evidence based, timely and to serve the purpose of securing transparency, accountability and protection of human rights.

In the last decade, the country underwent several protracted political and legal crises. The gravest period, also having serious implications in terms of security, lasted between 2015 and 2017. During these two years, the terrorist attack in Divo Naselje, a suburb of Kumanovo, took place, as well as the violent storming into the parliament building and attack over MPs from the prospective parliamentary majority on April 27, 2017, as an aftermath of the protests of the “Common Macedonia” movement.³⁴ Furthermore, the frequency of holding elections in North Macedonia creates additional discontinuity of the effective work of parliament. In the last decade alone, the country witnessed four early parliamentary elections (2011, 2014, 2016 and 2020), two local elections (2013 and 2017), as well as two presidential elections (2014 and 2019). The pre- and post-electoral periods, election campaigns and frequent politicization and political polarization in the country, often resulted with neglect of many parliamentary competences, including oversight.

Citizens seem to have greater trust in expert independent bodies, though that trust varies. For instance, the State Commission for Prevention of Corruption (SCPC) used to be one of the least trusted institutions in the past, due to the questionable appointment of its members and lack of results. However, after the legal changes, setting clear and appropriate criteria for appointment of members, and selection in a transparent and an inclusive manner,³⁵ this independent body gained the trust of the citizens. However, trust is not static – it must be reinforced and maintained over time. Recent polls show that in spite of the early optimism, the SCPC does not enjoy great trust of citizens. Just a couple of months ago, only 15% of the respondents either trusted or fully trusted the SCPC.³⁶ However, this does not mean that one should disregard the possibility for independent and expert oversight of intelligence services.

3.2.3. Oversight of everything equals oversight of nothing

Looking at the numerous provisions regarding parliamentary oversight in the Law on the National Security Agency, the Law on Interception of Communications, the Law on the Intelligence Agency, as well as several other laws that touch upon aspects of oversight of intelligence services, the lack of clarity in terms of the areas and scope of the oversight becomes evident. For example, looking at Article 60, Paragraph 3 of the Law on the National Security Agency, which regulates what MPs from the competent committee can seek information about,³⁷ a plethora of general issues arise. The Law specifies the measures the ANB may conduct, mandating court orders for enforcing secret data collection and court orders for enforcing interception of communications, pursuant to the Law on Interception of Communications. It also designates how the ANB should implement its budget, as well as the procedures for using special funds, information on the material, technical and personal capacities of the ANB, as well as other issues.³⁸ At first blush, it would appear that the Committee would have deep insight on the ANB’s conduct. Yet the Law does not clearly present the means and methods by which the Committee’s members should perform their duties. Furthermore, current legislation does not envisage the goals that should be achieved by looking at this abundance of documents stipulated in the provision. Future legislative improvements should have a more clear and specified approach to parliamentary oversight and empower the Committee to perform its tasks. Similar examples can be found in the Law on Interception of Communications.

The lack of harmonized provisions across various laws dealing with the control and oversight of the intelligence services often creates collision of norms and competences, which sometimes drives different committees not to perform their duties. For example, although the Law on the National Security Agency clearly gives a mandate to the Committee for Oversight of ANB and IA to

³⁴ <https://www.theguardian.com/world/2017/apr/27/macedonia-protesters-storm-parliament-and-attack-mps>

³⁵ The current composition of the SCPC underwent public scrutiny in parliament and before the wider public. The future members underwent “grilling” in front of a panel composed from MPs and civil society representatives alike. The expert public agreed that this was one of the most transparent process of electing public officials in the country’s recent history.

³⁶ National Democratic Institute – North Macedonia and Team Institute: Socio-political opinion research report, February – March 2020, p. 24

³⁷ Law on the Agency for National Security, Art. 60, Par. 3

³⁸ Ibid

discuss issues related to interception of communications – an integral part of the work of the ANB and the IA – the Committee has never undertaken such a role. This vital work has been left exclusively to the Committee for Oversight of Interceptions of Communications to undertake.

3.2.4. Politicization of parliamentary oversight

The fact that Macedonian society is highly polarized, with numerous political, ethnic, and confessional cleavages, is hardly news. This current state of affairs is also recognized by the citizens. In the latest IRI poll conducted in the Western Balkans in March 2020, hefty 45% of the respondents believe that politics in North Macedonia is moving towards greater polarization rather than consensus.³⁹ These opinions presumably stem from a sense of missed opportunity to produce substantial societal change, paired with a sense of betrayal as well. In this highly politicized and polarized atmosphere, MPs transpose these sentiments in the parliamentary benches. Subsequently, the interests of political parties and politicians prevail over those of the citizens. The situation is no different when parliamentary oversight of intelligence services is at stake.

Even after the reform of the intelligence services, and the alleged regulation and streamlining of the interception of communications, a wide array of illegally wiretapped telephone conversations and video clips began appearing in the public sphere, mostly on social media. Just as an example, in the latest campaign for the early parliamentary elections, illegal wiretaps allegedly incriminating both the leader of the ruling party Zoran Zaev⁴⁰ and the leader of the opposition Hristijan Mickovski⁴¹ appeared. If one engages into deeper analysis of the time and political context in which these materials were placed, it is inevitable to attach a politically motivated label to them. This is another indicator that the level of political culture and the democratic maturity of Macedonian society can still be considered as low.

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3.2.5. Limited results of parliamentary oversight

One can draw several conclusions from the number of sessions held in each of the three committees during the last composition of parliament. As expected, given its remit and scope of competencies, the Committee on Defense and Security held the most sessions – 57. The Committee on Oversight of the Implementation of Measures for Interception of Communications only held 15 sessions during the same period. The Committee for Supervising the Work of the ANB and the IA held even fewer – 10 – sessions.⁴⁴ Comparing the latter two committees, which are almost exclusively devoted to parliamentary oversight of the intelligence services, it is evident that the Committee on Oversight of the Implementation of Measures for Interception of Communications was 50% more active in the simple metric of meetings. Also, this Committee has noted an increased activity compared to the work of its predecessors in previous mandates, which is a positive trend.

39 International Republican Institute IRI: Western Balkans Regional Poll, 02.02.2020 p.22

40 <https://360stepeni.mk/sega-izlegoa-i-chetiri-novi-bombi-za-zaev/>

41 <https://360stepeni.mk/novi-bombi-mitskoski-i-kicheets-dogovarale-sorabotka-za-izbori/>

42 <https://360stepeni.mk/sega-izlegoa-i-chetiri-novi-bombi-za-zaev/>

43 <https://360stepeni.mk/novi-bombi-mitskoski-i-kicheets-dogovarale-sorabotka-za-izbori/>

44 Website of the Parliament: committee sessions. Available at: <https://sobranie.mk/sednici-na-rabotni-tela.nsp?structuredId=020DDFF7-9CF1-4C1E-8476-4944986FC6A8>

Exploration of the main topics that these two committees discussed can give an additional perspective of the work of the committees. The Committee for Oversight of Interceptions of Communications' most discussed issues were the following: the need to form an Inter-Sectorial Working Group for preparation and implementation of the Plan for implementation of Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to communications interception;⁴⁵ the Report on performed controls regarding the special investigative measures "Monitoring and Recording of Phone and other Electronic Communications in Procedure Defined by a Specific Law;" the Annual Report of the Operational – Technical Agency for 2018, as well as several other documents. The public inaccessibility of materials ought to generate concern. Only three documents in total had been published on the committee's website, all of them annual reports that must be published according to law. On the positive side of the balance sheet, the Committee increased its number of field visits – in keeping with the legal obligation introduced with the Law on Interceptions of Communications that these be undertaken at least once every three months.⁴⁶ However, the Committee rotated among different institutions, rather than gathering the same data from all institutions subject to its oversight, negating its ability to assess performance over time. In fact, this constitutes the only tool that is available to the Committee – and it was effectively squandered through this perfunctory approach.

The Committee for Oversight of the ANB and IA put emphasis on the following issues: annual reports of the two agencies subject to supervision, technical obligations stemming from the Law on the National Security Agency and the Law on the Intelligence Agency, as well as the formation of the same inter-sectorial working group mentioned previously during the analysis of the work of the Committee for Oversight of Interceptions of Communications. The Committee for Oversight of ANB and IA did an even worse job in terms of transparency. No materials of any kind had been published by this Committee during its mandate.

We call for a systematic and more frequent pace of field visits to both agencies by the parliamentary oversight bodies, and the Committee for Oversight of ANB and IA in particular. Several preparatory and implementation activities need to be taken into consideration. Regarding the preparation of the field visit, concrete priorities and goals need to be defined in advance. Prior discussions with key intelligence service executive officials are therefore necessary in order to breach the wall of mistrust, but this is also a possibility for MPs to better familiarize themselves with some of the issues that will be discussed during the visits. Selection of locations, objects, and other sites subject to oversight – and the rationale for these decisions – demands advance preparation. During the field visit, it is advisable for MPs to follow a specific Code of Conduct that needs to regulate all steps of the visit, including personal identification, orientation sets of questions that needed to be asked, personal attitudes during the visit, as well as debriefing procedures.⁴⁷ All these aspects should be established by a separate Law on parliamentary oversight and further regulated with appropriate bylaws in order to facilitate the work of the MPs, as well as the work of the institutions subject to oversight.

Furthermore, the recent established practice by the Committee for Oversight of Interceptions of Communications regarding field visits at the OTA, largely differs from that of the Committee for Oversight of ANB and IA in relation to the ANB. In order to better illustrate this difference, one should firstly look at the oversight performed by the Committee for Oversight of Interceptions of Communications. On July 19th 2019, a delegation of Committee members led by the chairman Emil Dimitriev visited the OTA and noted that a total number of 258 communications had been activated in 2019.⁴⁸ At the time of the field visit, active surveillance over 159 communications established both

45 The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, Brussels, 8 June 2015. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

46 Law on interception of communications, Article 44

47 Fuior, T., Lembovska, M., Richards, J. and Ridder, W. "Guidelines for intelligence oversight for parliamentary committees in the Assembly of the Republic of Macedonia", DCAF & Assembly of the Republic of North Macedonia, May 2018. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/MKD_INTELLIGENCE%20OVERSIGHT.pdf pp. 42-45

48 By the time when the field visit was conducted.

in 2018 and 2019 was conducted, all based on court decisions⁴⁹. Similar activities by the Committee for Oversight of ANB and IA pertinent to the work of the ANB had not been reported.

Regarding the number of committee sessions held, and the individual endeavors undertaken by the chairmen of the committees, we have already mentioned in one of our previous studies that the supervisory role of the oversight committees should not depend on the individual characteristics and preferences of its chairmen and members. Concurrently, parliamentary oversight should not depend on the willingness of individual MPs to get involved. More and better mechanisms of control are necessary.⁵⁰ Practices from the EU show that in order to have an effective oversight, it is necessary to have overseers who “a) have the necessary knowledge of and interest in intelligence matters; b) have the will to engage in oversight in an impartial manner; and c) can command the respect and trust of the intelligence agencies.”⁵¹ In regard to transparency, it is one of the principles of utmost importance upon which parliamentary oversight of intelligence agency needs to be pillared. Transparency can help building citizens’ confidence in the intelligence services. One of the ways in which parliamentary committees can achieve it is through publicizing detailed reports on their websites. Another important tool would be processing citizens’ complaints.⁵²

3.2.6. Secret collection of data remains a taboo

Parliamentary oversight of interception of communications is not following contemporary and modern communication system trends. The Law on Interception of Communications is extensive in terms of the goals and the procedure for effectuation of the oversight, the data that is obtained by the communication operators, the OTA, and other relevant competent bodies, the manner in which oversight is performed by the competent Committee and the preparation of its annual reports that are further discussed and adopted with absolute majority at a plenary session.⁵³ Too much emphasis is put on the interception of landline and mobile phone communications in the focus of the Committee for Oversight of Interceptions of Communications, while other modes of communication are neglected. The legal provisions of the Law on Interception of Communications account for much of this under-inclusivity. For example, when reaching out to the operator providing communication services, the Committee for Oversight of Interceptions of Communications, through the accredited technical experts⁵⁴ that are supposed to facilitate its work, asks for logs showing the time and date when a concrete measure for interception of communications has started and ended, logs showing the confirmation of the activation, as well as logs showing the total number of positive confirmations executed in a specific time-frame.⁵⁵ Similar technical logs can be requested from the OTA, accompanied by anonymized court decisions and temporary written orders.⁵⁶ This underlines the very technical and legal phone communications-oriented oversight – a 20th Century-level scope.

No legal and technical mechanisms exist to perform oversight of communications undertaken through mobile phone applications which have proliferated. These new challenges of the emerging digital society need to be mirrored in the legislation. Mechanisms to oversee use of physical

49 OTA website: News. Available at: <https://ota.mk/mk/190719-pretstavnici-sobranie-poseta-ota>

50 Lembovska, M. 2020, *More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State*, EUROTHINK – Center for European Strategies, Skopje, p. 31

51 Wills, A., Vermeulen, M., Born, H., Scheinin, M. and Wiebusch, M. “Parliamentary oversight of security and intelligence agencies in the European Union – Study”, Directorate General for Internal Policies, European Parliament, Brussels, 2011. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/study_en.pdf, p. 98

52 Ibid, p. 201

53 Law on Interception of Communications, Arts. 40-45

54 The accredited technical experts had still not been appointed.

55 Law on Interception of Communications, Art. 41

56 Ibid, Art. 42

surveillance, video monitoring, and similar activities undertaken daily by intelligence agencies are sorely lacking as well. Although the parliamentary committees performing parliamentary oversight, *inter alia*, have implicit competencies to follow these activities, there are no explicit and operationalized mechanisms in place, let alone technical expertise in-house, for these competences to be effectuated in practice.

3.2.7. Lack of capacity to conduct oversight

Glancing through the biographies of the committee members in the previous mandates, one can rarely find an MP with a professional and educational background in defense and security. Although it cannot be expected that MPs would be professionals, but rather representatives of the people exercising control over other branches of government and other institutions, taking into consideration the sensitivity and the peculiarity of the job of “watching the watchers,” the Assembly should provide them with sufficient technical assistance primarily in the form of human capacities, *i.e.* professional, apolitical and permanent staff.

The legislative provisions in the Law on Interception of Communications foresee two technical experts that should facilitate the work of the Committee for Oversight of Interceptions of Communications. This is a step forward in terms of increasing the professional capacity of parliament to deal with the technical aspects of intelligence oversight. Article 39, Paragraph 1 of the Law stipulates that the Committee for Oversight of Interceptions of Communications should hire two technical accredited experts in order to effectively conduct oversight. The experts can be either national or international and can actively participate in the work of the Committee.

Yet, in practice, two years after the adoption of the law, such technical experts have not been appointed. The Committee for Oversight of Interceptions of Communications published a call seeking technical experts and received seven applications. However, the selected candidate has not signed a contract yet. The Committee does not have its own budget and the funds for engaging the expert should be secured from the Parliament’s budget. Hence, the contract should be signed between the expert and the Parliament. However, the whole procedure has been stuck within the parliamentary legal and institutional labyrinth. It is especially worrying that the Committee decided to select only one candidate instead of two, as the MPs in the midst of the selection process decided that they prefer an ethnic Albanian candidate for the purposes of equal participation. Focusing on the ethnic instead of the professional background for such specific expert positions does not only discriminate against the candidates, but also undermines the credibility and the legitimacy of the expected tasks from the expert. As for the selected candidate, while his professional biography perfectly fits the desired profile, there is an evident conflict of interest as the person is employed at the Ministry of Interior on a permanent basis, an institution that he is supposed to oversee.⁵⁷

Following the wire-tapping scandal and the Zaev government’s declarative commitment for reforming the intelligence services, one would expect the oversight committees to be proactive – publicly so. While the previous parliament had a better track record compared to any previous compositions, most of their activities can be attributed to the personalities and will of the chairpersons of the oversight committees. Glancing at the data of the three parliamentary committees that are most involved in the parliamentary oversight, one can see wide discrepancies in their activity. Putting aside the aforementioned field visits, the Committee for Oversight of Interceptions of Communications has been much more active than the Committee for Oversight of ANB and IA. Regarding the last parliamentary composition, the first has held fourteen sessions, out of which a great portion had been dedicated to substantial issues such as field visits, oversights and attempts to hire external experts.⁵⁸ On the other hand, within the same timeframe, the latter

⁵⁷ Lembovska, M. 2020, *More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State*, EUROTHINK – Center for European Strategies, Skopje

⁵⁸ The researchers created their own data set based on information from the Assembly website https://sobranie.mk/-ns_article-committee-on-oversight-of-the-implementation-of-the-special-investigation-measure-interception-of-th.nspix

has held ten committee sessions, vast majority of which were dedicated to technical discussions such as annual reports of the ANB and its predecessor, or fulfillment of technical prerequisites stemming from the new legislation.⁵⁹ Finally, the Committee on Defense and Security held fifty seven sessions of which ten were dealing with formal adoption of the new legislation deriving from the new intelligence service reform, including the discussions on the new models for intelligence services.⁶⁰

That being said, putting aside the work of the CDS that has a wide scope of competences where parliamentary oversight of intelligence agencies constitutes only a small parcel of its work, the main comparison needs to be drawn between the Committee for Oversight of Interceptions of Communications and the Committee for Oversight of ANB and IA. Our research has shown that the efficiency and effectiveness of parliamentary committees regarding intelligence oversight has depended far too heavily on the personal will of the chairpersons of the committees. This is demonstrated by the track record of the two committees, general parliamentary rules for announcing committee sessions and agenda setting, as well as practices shared by committee presidents in in-depth face-to-face interviews with EUROTHINK researcher from previous research endeavors.⁶¹ Institutional and legal mechanisms need to be put in place in order to enable smooth functioning of the parliamentary body, not completely dependent on the individual motivation and (lack of) willingness of prospective MPs to be engaged in oversight activities.

For the above reasons and retention of institutional memory, civil servant staff supporting the three committees need to be selected with an eye to knowledge and expertise. They should be planning, advising and reporting on oversight activities to the Chair and members. It is especially important the committees to be supported by enough and qualified staff.

4. COUNCIL FOR CIVILIAN SUPERVISION (CCS)

The Council for Civilian Supervision was introduced with the Law on Interception of Communications, with the objective of conducting civil oversight over the lawfulness of the implementation of the measures for the interception of communications.⁶² The Council for Civilian Supervision is covered in Articles 47 – 53 of the Law. This newly created body, inspired by the Croatian model of civil oversight of the security services, consists of representatives of CSOs and experts appointed by the Parliament. The CCS was promoted at its inception as an advanced mechanism to ensure accountability of the services, as well as a step towards regaining public trust.

Almost two years after the law was adopted, one can discuss whether this body has indeed made a positive contribution towards accountability of the security and intelligence sector. Both the Annual Report⁶³ of the CCS (herein “the Report”) and the articles of the Law, which regulate the citizen oversight over the intelligence apparatus in relation to the interception of communication, were published during the preparation of this policy brief. Several aspects of the CCS’ operation and functioning are problematic, as the following sections detail.

59 The researchers created their own data set based on information from the Assembly website https://sobranie.mk/working-bodies-2016-2020-en-ns_article-committee-for-supervising-the-work-of-the-security-16-20-en.nspix

60 The researchers created their own data set based on information from the Assembly website https://sobranie.mk/working-bodies-2016-2020-en-ns_article-committee-on-defence-and-security-16-20-en.nspix

61 Lembovska, M. 2020, More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State, EUROTHINK – Center for European Strategies, Skopje, pp. 32-4

62 Law on Interception of Communications, Article 47

63 N.B. The annual report of the Council of citizen oversight for 2019, which has been submitted to Parliament has not yet been reviewed or adopted by Parliament.

4.1. SUI GENERIS BODY

While the Council was inspired by and supposed to resemble the Croatian body for civil oversight, the parallel ends with the title. The competence of the Macedonian Council is far narrower than that in Croatia. In Croatia, the Council is empowered to assess the lawfulness of operation of the security services, to monitor and supervise the application of the measures for secret interception of data which constrain the constitutionally prescribed human rights and fundamental freedoms. The CCS' Croatian counterpart also reviews reports and other documents produced by security and intelligence agencies and conducts interviews with the directors and officials from the security and intelligence agencies. In North Macedonia, the Council can merely compare anonymized samples of orders for interception of communications in OTA for the last three months, or request that the Committee for Oversight over the Interception of Communications review them.

In the comparative literature and practice, we were not able to identify any body similar to the Macedonian CCS. Of course, each country should find its own oversight model that best suits its needs and specifics. However, in developing a new intelligence service and oversight constellation, navigating from identified best practices in existing oversight models is in the public interest.

4.2. MANDATE OF ACTION

The Council for Civilian Supervision is empowered to 1) act on its own, meaning it can conduct a control visit to one of the premises of the intelligence entity in its own; or 2) act on received grievances (petition, i.e. request or inquiry) from the general public.

The true mandate of action:

- ◆ 1) The control visits of the premises of the intelligence entities which are conducted by the Council, have to be pre-announced and are limited to comparing anonymized data the Council has previously received with the data stored in the premises, and finally they are limited to a period of the last 3 months, Art 51 (5).
- ◆ 2) As the Law stipulates in Art 51 (2), the manner in which these petitions or citizen reports/inquiries are processed by the Council, is by forwarding the specific inquiry for oversight by the Council in the form of a "request" to the parliamentary Committee for oversight. The parliamentary Committee then has to immediately act by conducting a form of a verification "if the specific telephone number of the inquiring party has been a subject of illicit interception in the past 3 months."⁶⁴ After this delegated form of control pertaining to: 1) only telephone communication being intercepted and 2) focusing only on the last 3 month period, the Commission informs the Council of civilian oversight on the outcome of the check, after no more than 15 days after the receipt of the "request", Art 51 (3).

The true role of the mandate of the Council: A ceremonial messenger

Art 51 (4) lays out that the Council can later respond to a citizen complaint for oversight by either 1) stating that there has been abuse of the interception of the communication; or 2) stating that there was no abuse of the interception of the communication.

In case of verified abuse of the interception of the communication by the Council, Art 51 (6) stipulates that the Council immediately proceeds to inform the Public Prosecutor.

However, the Council does not have any mechanism to review concrete and individual cases of interception of communications. They can only receive anonymized statistical data, with no reference to the identity of those whose communications are being intercepted. Therefore, they cannot provide an answer whether there has been a misuse in a particular case, which makes

⁶⁴ Article 51 (2) of the Law

the possibility for submitting individual complaints pointless. This approach might even further undermine public trust in oversight mechanisms, because the specialized oversight body is not in a position to assess an individual's case and circumstances.

Overlapping with the work of the Committee for Oversight of interceptions of communications

When analyzing the competencies of the parliamentary Committee for Oversight of interceptions of Communications and the Council for Civilian Supervision within the structure of the Law, it is evident that the primary burden for oversight with meaningful control powers is delegated to the parliamentary Commission for Oversight. In contrast, the CCS can only play a more marginal role. The few competences given to the Council in fact overlap with some of the competences given to the Committee for Oversight of Interceptions of Communications, as demonstrated in Table 1. Moreover, the law prescribes that citizens' complaints received by the Council are being referred to the Committee, and the Committee reports on the findings to the Council. This is contrary to the spirit of parliamentary democracy, when a parliamentary committee is being made to report to an external body, which is in fact, created by the Parliament itself.

The Council for Civilian Supervision has limited power to truly regulate the intelligence body it is mandated to oversee and control. Namely, when it comes to ad hoc visits to the OTA and other intelligence entities with the ability to intercept communications, the Council has to pre-announce its delegation's visit to the entity they intend to control. It can only review telephone signals intercepts from the three months prior. Furthermore, the Council is only limited to merely verifying what it knows or suspects from external sources through review of officially relayed anonymized information.

The magnitude and depth of damage exhibited in past communication interception scandals demonstrate far more sophisticated systemic abuses when it comes to the interception of communication. It is therefore conspicuous that the methods of control available to the CCS are so circumscribed and inadequate.

WHAT IS (NOT) MADE AVAILABLE TO THE PARLIAMENTARY COMMITTEE FOR INTERCEPTION OF COMMUNICATIONS AND TO THE COUNCIL FOR CIVILIAN SUPERVISION		
AVAILABLE DATA ON THE PURPOSE OF THE OVERSIGHT	PARLIAMENTARY COMMITTEE	COUNCIL FOR CIVILIAN SUPERVISION
FROM THE OPERATOR		
Logs on the time and date of the commencement of the measure for interception of communications	X	
Logs on the time and date for the completion of the measure for interception of communications	X	
Logs on the confirmation of the activation	X	
Logs on the total number of positive confirmations given at a particular period of time	X	
Identification data on the number, the user, or other identification data		

FROM OTA		
An anonymized court order and an anonymized temporary written order	X	X
Logs on the number of the anonymized court order	X	
Logs on the time of the commencement and the completion of the implementation of the measure for interception of communications	X	
Logs on the total number of implemented measures for interception of communications for a particular period of time	X	
Identification data on the number, the user, or other identification data		
FROM THE AUTHORIZED BODIES		
An anonymized court order and an anonymized temporary written order	X	X
Documents pertaining to the commencement and the completion of the implementation of the measure for interception of communications	X	
Identification data on the number, the user, or other identification data		

Table 1: Data available to the Parliamentary committee for interception of communications and the Council for Civilian Supervision on the purpose of the oversight over the interception of communications.⁶⁵

4.3. LEGAL AND INSTITUTIONAL OBSTACLES PREVENTING THE COUNCIL TO BECOME OPERATIONAL

Even though the budget for the Council for Civilian Supervision was appropriated, in reality, the administration of Parliament made these funds inaccessible to the Council, due to the unclear legal status of the body (explanation cited: “the Council has no status of legal entity”) and the administrative inability to operate their own bank account. Requests of the Council to the president of Parliament to receive their own archive sub-number for easier and more secure administrative flow of documents and writs, in both internal and external correspondence, was denied. This demonstrates that not only was the CCS poorly designed, but there was and remains no political will to enable the Council to become fully operational, even in its own narrow scope of activity.

In its annual report the CCS states that security clearances were not provided to Council members, as stipulated in the Law, to enable them to conduct site visits and review any classified information. In Article 37, the Law stipulates that security clearances will be issued in no more than 30 days following submission of the request. The fact that not all members of the Council have been granted the security certificates necessary to access the intelligence services and data originating from them obstructs the operation of the Council even within the ambit of its own anemic remit.

The Council for Civilian Supervision over the intelligence services had a number of meetings with relevant stakeholders from all levels and branches of government. The members of the Council also met with relevant parliamentary or government representatives linked to the subject matter

⁶⁵ The table was originally developed in: Lembovska, M. 2020, *More than (De)Politicization: The Role of Security-Intelligence Services in (De)Capturing the State*, EUROTHINK – Center for European Strategies, Skopje

of civilian oversight (sometimes, the meetings were linked to the open legal and administrative issues the CCS had). The Council also convened with representatives of international institutions and organizations. Moreover, DCAF facilitated and supported capacity building activities for its members, while its members also attended and spoke at events where invited.

However, despite all efforts to remove the obstacles which prevented the functioning of the body, its Chairwoman and the informal Deputy Chairman resigned in June 2020, before the parliamentary elections.

4.4. SELECTION OF MEMBERS

The Council is composed of a chairperson and six members, of whom three are experts and three are representatives of the non-governmental organizations in the area of human rights and freedoms, security and defense.⁶⁶ The ambiguity in the Law relating to the required expertise of the members of the Council is a foundational flaw. Article 48 of the Law stipulates that members should have at least seven years of work experience in the field of law, telecommunications and information technologies, or five years of work experience with non-governmental organizations in the field of protection of human rights, security and defense. There is no clear designation as to what level of expertise is required for the normal operation of the Council. For instance, a suitable member according to the law would be a legal practitioner in any industry within the private sector.

Furthermore, the lack of a specific kind of expertise could, in hypothetical situations, reduce the ability of the Council to perform its control function. No prescribed minimum presence of experts from diverse subject matter areas can lead to oversaturation of expertise in some areas, and complete lack of expertise in others. Another paradox is that the Council has so few competences, that even the best experts in the field would be prevented from conducting any kind of substantial oversight.

The selection process of the members of the Council faced challenges from the very beginning. The procedure was not fully transparent, as the public call was never published online,⁶⁷ resulting in a small number of candidates, (only 8 for 7 positions) where only four fulfilled the minimum criteria. With the will of the majority, and contrary to the will of the opposition, the Assembly selected the candidates that met the requirements as members pursuant to the Law, as well as a chairwoman of the Council. Unfortunately, the second announcement was once again published without requisite publicity for a public oversight body. Three more members were selected in May 2019. There was no press conference or a press release announcing this development and media announced no information whatsoever regarding this decision.

The first annual report of the Council also notes that there has been an additional vacuum in appointing new members to the CCS. The chronology of the first such instance is described in the Report. In November 2019, the resignation of one of the members of the Council was acknowledged by Parliament. The following month, parliament made a decision to announce the call of applications for a new member of the Council. While this call for applications is closed, there remains no decision taken on the new member to the Council – one year later.

⁶⁶ Article 48 paragraphs 2 and 3 of the Law on Interception of Communications

⁶⁷ The call was published only in the Official Gazette, and access to current issues of the Official Gazette is granted only upon a certain fee

Moreover, in June 2020, the Chairperson of the Council and her Deputy resigned from the Council, as despite their efforts to make the Council functional, they faced numerous obstacles and lack of political will to provide even the basic conditions for this body.

4.5. "CIVILIAN OVERSIGHT" INSULATED FROM CITIZENS

Even though the law stipulates that the Council will be headquartered in the parliament building, the initial and inaugural meeting of the Council took place in the offices of the Metamorphosis Foundation.⁶⁸ It later got its premises in the Parliament building. The lack of visibility to the public, both physically and in the media space, remains a major problem. The Council never conducted a press conference to mark the start of its work. Nor does it have its own webpage. It is invisible on social media. So the general public – in whose name the Council was created and whom it is mandated to serve – is unaware of its very existence. The paucity of applications to the join Council is almost certainly due to the lack of public awareness of the opportunity. This certainly appears to be both a situation ripe for self-dealing and opacity regarding a sensitive public matter of great interest and concern.

⁶⁸ As one of its former members was a representative of the Metamorphosis Foundation

5. THE WAY FORWARD

As the analysis of the current institutional and legal setup has shown, there are numerous systemic deficiencies and obstacles that prevent proper oversight of the security services. This section proposes a democratic oversight model in line with the international and European standards⁶⁹ for the national security services, adjusted to the Macedonian context.

In general, there are three main categories of parliamentary oversight bodies in democratic countries:

- A) General parliamentary committees - in our case, the Committee on Security and Defense.
- B) Specialized parliamentary committees – in our case, the Committee on Oversight of the ANB and the IA. Less frequently, there are parliamentary committees tasked with specific aspects of the oversight, such as our Committee for Oversight of the Interception of Communications.
- C) Specialized non-parliamentary bodies – usually committees or individual commissioners who perform oversight professionally, usually on a full-time basis. The efforts to introduce a Council for Civilian Supervision in North Macedonia do not fulfil the criteria of a specialized non-parliamentary body.

In order to address the deficiencies detected within the current model, as analyzed in this paper, the following steps need to be taken

5.1. PUBLIC DEBATE ON THE MODELS OF INTELLIGENCE OVERSIGHT AND CREATING A SPECIAL LAW ON PARLIAMENTARY OVERSIGHT

The “reform of the intelligence services” did not allow for a more substantial discussion on the models of oversight. During the debates on the Law on Interception of Communications, there was more engagement on topics related to the oversight. However, this resulted in an unduly complex and dysfunctional oversight system. Experts observed the deficiencies of the proposed oversight model during the public debate, but these informed arguments were disregarded by political parties on both sides of the aisle. Moreover, the discussions around the new Law on the National Security Agency mostly considered the independence of the agency and selection of its personnel. The oversight package ended up being a collection of semi-functional provisions in various laws – a weak patchwork not fit for purpose.

A special law on parliamentary oversight is urgently required to remediate these deficiencies. The law would define the mandate of the oversight bodies, composition, methods of work, and their relations with the services and relations with the public.

⁶⁹ European Court of Human Rights’ jurisprudence on Articles 3, 5, 8 and 13 of the European Convention on Human Rights; recommendations, resolutions, declarations and reports from the United Nations institutions, Council of Europe institutions (including the Venice Commission, the Parliamentary Assembly PACE and the Commissioner for Human Rights) and the European Union.

Most relevant: UN compilation of good practices on intelligence agencies and their oversight (UN 2010a), the landmark report of the Venice Commission on the democratic oversight of security services; The report of the Fundamental Rights Agency on fundamental rights safeguards ad remedies in the EU

5.2. RE-THINK AND STRENGTHEN CURRENT PARLIAMENTARY BODIES

It is important to strengthen parliamentary oversight as the highest and most democratic form of oversight, as MPs are directly elected by the citizens to serve them. Political parties of all stripes are supposed to ensure that the intelligence services serve the society as a whole, and not only specific majority groups. The involvement of the opposition is a valuable counterweight to the government's position, as illustrated by the involvement of opposition MPs in the selection process of the ANB staff. Also, MPs are empowered to amend legislation, discharge powers, and appropriate budgets.⁷⁰

5.2.1. Committee on Security and Defense should be more proactive in providing general oversight of the security sector and the security policies

The Committee on Security and Defense falls within the taxonomy of general parliamentary oversight committees which handle numerous security issues beyond intelligence. Such committees can "provide only perfunctory oversight of intelligence agencies."⁷¹ Therefore, it should not be expected that the CDS perform more substantial oversight; this is a task for the specialized committees. But this Committee should conduct comprehensive oversight of the security sector as a whole, including the intelligence services. The Committee should continue discussing draft legislation, but also strategic documents related to the security sector (such as National Security Strategy, National Strategy for Defense, National Strategy for fight against Terrorism, Preventing/Countering Violent Extremism Resolution on Migration Policy etc.). Endorsing Government documents and decisions should not be only a formality, but an opportunity to review, amend and improve the policies. Given the variety of topics that the Committee deals with, it should be supported by knowledgeable and permanent staff who can perform beyond administrative work.

5.2.2. Committee on overseeing the work of the security-intelligence services

Having one specialized committee for intelligence oversight is a common, though not universal, practice among EU member states. Studies have shown that "one single committee responsible for the oversight of all intelligence agencies and functions as this helps to ensure 'seamless' oversight, avoiding the risk that certain issues fall between the purviews of two or more committees."⁷² As our analysis demonstrates, having two specialized committees in North Macedonia has been sub-optimal, leaving both gaps and overlaps of responsibilities – as well as in staffing.

The current Committee for Oversight of the work of the National Security Agency and the Intelligence Agency should broaden to also supervise military intelligence. At the moment, military intelligence is subject of oversight only in the segment of interception of communications by the specialized Committee Overseeing Interception of Communications.

A new Law on Parliamentary Oversight should determine the mandate, powers and other aspects of parliamentary oversight. Based on the research and analysis of the current model of parliamentary oversight, and the best comparative practices, we propose establishment of a parliamentary committee along the following parameters:

⁷⁰ Wills, A., Vermeulen, M., Born, H., Scheinin, M. and Wiebusch, M. "Parliamentary oversight of security and intelligence agencies in the European Union", European Parliament, Brussels, 2011. Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453207/IPOL-LIBE_ET\(2011\)453207_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453207/IPOL-LIBE_ET(2011)453207_EN.pdf)

⁷¹ Ibid.

⁷² Ibid.

Composition:

- ◆ 9 Members and 9 deputies;
- ◆ The Chairperson comes from the Opposition (as is currently the case), the opposition should also hold the majority;⁷³
- ◆ Appointed by the political parties, taking into consideration the background and affiliation of the individual MPs;
- ◆ Top secret security clearance

Mandate:

- ◆ Conducts oversight of the policies, administration, management, budget and legitimacy of the activities of the National Security Agency, Intelligence Agency and military intelligence unit within the Ministry of Defense;
- ◆ Advises on draft legislation;
- ◆ Provides recommendations to the services.

Tools/Powers:

- ◆ Reviews annual programmes, annual plans, draft budgets, reallocations;
- ◆ Discusses reports on completed operations;
- ◆ Performs field visits;
- ◆ Creates working groups – clear rules and procedures on the work of the working group;
- ◆ Requests the directors to answer questions;
- ◆ Cooperates with independent oversight bodies, discusses their reports;
- ◆ Minimum number of meetings within a specified period;
- ◆ Publicly available (redacted) reports on oversight performed

Institutional infrastructure:

- ◆ Secure room for handling and discussing classified materials;
- ◆ Support staff – permanently employed, at least 5 persons, with various backgrounds; Not only administrative work. The staff should receive additional salary incentives, compared to other parliamentary staff.

Transparency:

- ◆ Publishes a publicly available and detailed annual report on its activities, including information on the provided recommendations to the services;
- ◆ Conducts press conferences after completed oversight activities.

5.2.3. The lessons from the attempt to establish a Council for Civilian Supervision should be used for creating a functional specialized oversight body

The Council on Civilian Supervision should be seen only as a lesson learnt. It showed that functioning independent oversight takes a lot more than rhetorical commitment and willingness to

⁷³ At the moment, the Chairperson comes from the opposition, but the majority belongs to the ruling parties. At the same, the opposition holds the majority and is heading the Committee on Interception of Communications

engage otherwise critical NGOs. On the contrary, it demands substantial institutional infrastructure, strong mandate and clear legislation. It demands a rethink and relaunch.

5.2.4. Creation of a non-parliamentary, independent specialized oversight body

The analysis of the work of the parliamentary committees has shown that our committees are not immune to the deficiencies recognized by leading experts and international bodies assessing intelligence oversight:

- ◆ Pursuing partisan political interests incompatible with the demands of conducting effective, independent oversight. Most importantly, this is assessed to be particularly problematic in countries where security services are still used and viewed as instruments of the political party/figures in government. Assessing compliance with the law is not an area of oversight suited to party politics. Even the pursuit of political compromise on such committees can undermine effective human rights protection.⁷⁴
- ◆ Instability of parliamentary politics and risks of leaking information for political or other gain;
- ◆ Due to the understandably competing demands on MPs time, the lack of continuity can have a detrimental impact upon the quality and consistency of democratic oversight.
- ◆ An increased risk that agencies may exploit overseers' lack of knowledge of the agencies to conceal particular issues.⁷⁵

For those reasons, non-parliamentary oversight bodies are increasingly gaining popularity. They have been even assessed to be "fundamental to enhancing the efficacy of oversight and improving human rights protection"⁷⁶ and "best placed to conduct detailed day-to-day oversight of the legality of security service activity."⁷⁷ Moreover, it is considered that "this type of scrutiny is extremely time-consuming, highly specialized and resource intensive," so "some Council of Europe states have chosen to supplement parliamentary oversight with more detailed, full-time scrutiny of operational activities and particularly the use and management of personal data."⁷⁸ They are permanent and independent bodies that can be created in addition to parliamentary oversight committees. They might be appointed by the parliament or the executive, but have their own statutory budgets and operational and decision-making independence. These are some of the advantages:

- ◆ They are professional bodies whose members are highly knowledgeable in intelligence and security matters. Usually, there is a requirement to include prominent and senior members of the legal profession, such as former judges, former prosecutors, lawyers specializing in related fields, etc.;
- ◆ Full-time engagement enables more thorough oversight,
- ◆ Longer mandates enable the members to further develop their expertise over time;
- ◆ Stability and continuity – their mandate is not dependent on changes in government and parliamentary composition. Unlike parliamentary bodies, they do not dissolve between elections,⁷⁹

⁷⁴ Democratic and effective oversight of national security services, Council of Europe, May 2015. Available at: <https://rm.coe.int/1680487770>

⁷⁵ Wills, A., Vermeulen, M., Born, H., Scheinin, M. and Wiebusch, M. "Parliamentary oversight of security and intelligence agencies in the European Union – Study", Directorate General for Internal Policies, European Parliament, Brussels, 2011

⁷⁶ Democratic and effective oversight of national security services, Council of Europe, May 2015

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

The independent, expert oversight body in North Macedonia should be designed in the following manner:

Composition: 3-5 members, including a chairperson appointed by the Parliament upon a public competition. Strict criteria established by law: at least 15 years of experience in issues related to national security, senior legal professionals, senior human rights professionals, 6 years mandate, top security clearance.

Supported by a Permanent Secretariat (15-20 people) with professional staff (employees) covering various aspects (finances, secret data collection, etc.). The staff is headed by a Permanent Secretary who maintains the institutional memory + organizes the work of the staff. Can hire experts on ad hoc basis, for specific tasks and previously vetted. The Permanent Secretariat must be provided with a statutory budget, not rely on discretionary infusions by Parliament.

Mandate: An analysis by the Council of Europe has shown that most parliamentary oversight committees focus on a range of issues including the policy, finance and administration of services, as well as some aspects of completed operations.

Reviews the activities and the functioning of the National Security Agency, Intelligence Agency, Military Intelligence and (maybe) Center for Coordination of the Intelligence Services. Review of:

- ◆ legality - observance of the applicable laws and regulations;
- ◆ *a posteriori* control of the secret methods of data collection including interception of communications (including control of authorizations, the collection process and usage of data);
- ◆ effectiveness – analysis of completed operations;
- ◆ coordination - the mutual harmonization of the work of the services concerned;
- ◆ Handles individual complaints by citizens.

Should give/publish its opinions and conduct its own analysis.

Acts on its own initiative, on the request from the Parliament, or upon a complaint.

Tools: Access to all documents and premises, can summon the Director or the employees to answer questions. The Director and the employees are legally liable if they do not comply.

5.2.5. Strengthen the work of the independent oversight bodies and their relation with the Parliament

The law already establishes that the independent oversight bodies have specific tasks to oversee the intelligence, particularly the National Security Agency. They include: State Audit Office, Personal Data Protection Agency, Directorate for Security of Classified Information and Ombudsman. They all have a potential to make a significant contribution in ensuring accountability of the security and intelligence services. Also, they all have a strong link with the Parliament as their Directors or other top figures are all appointed by the Parliament. Moreover, they report to the Parliament, at least on an annual basis. These relations should be further strengthened, and at the same time, the Parliament should ensure that these bodies have the appropriate human, technical and financial resources.

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