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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON THE PROTECTION AGAINST DISCRIMINATION

of "the former Yugoslav Republic of Macedonia"

by

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1. Introduction

The Venice Commission has been asked by the Macedonian authorities to assess the draft for a new "Law on protection against discrimination", which is under preparation by the Ministry of Labour and Social Policy.

A similar request was sent by the Macedonian authorities to OSCE-ODIRH. Our preliminary views have been discussed and coordinated with the ODIRH representative, Ms Nasrin Khan, and we had a common fact-finding mission to Skopje on the 24-26 November 2008. Given the timetables, and the need to present a draft opinion to the plenary meeting of the Venice Commission in December, it was decided that we should write separate assessments, with the one by the Venice Commission being followed by a later one from the ODIRH. 0

During the process, it has become increasingly clear that what we are looking at is not a final official draft for the new anti-discrimination law, but a document that is still very much in the process of legislative preparation. A first draft was sent to the Venice Commission in August, which we started assessing. Then in September we received a second and much revised draft. This draft is the one on which Mrs Err has based her written comments of 18 November 2008, and on which we based our preparations for the mission to Skopje on the 24-26 November. Upon arriving in Skopje we were however told by the Ministry that there exists a new November version, which is not yet official and for the time being still only available in Macedonian. And even this version is only a draft, which the Ministry will consider further, and which will be subject to a public discussion, before the Government sends it final proposal to Parliament, which they plan to do some time in December.

This raises the question of which draft the Venice Commission should assess, and whether we should wait for the final official proposal from the Government. Having discussed the issue with the ODIRH representative, and after meeting the interested parties during the fact-finding mission, it is my opinion that the most constructive course of action will be not to wait, but to give an assessment based on the September draft. First, this is the version that has been formally sent by the Government to the Venice Commission. Second, this will give the Macedonian authorities the chance to incorporate the opinion of the Venice Commission before sending their proposal to Parliament. If we wait for the final version, we risk getting into the legislative process too late to make any substantial impact.

The following comments are therefore based on the "September draft", which is the one that will be distributed to the Members of the Commission prior to the plenary meeting in December. Furthermore, it is based on what we learned during the three-day mission to Skopje.

The fact-finding mission was very useful, and provided insight into the complex national context, the legislative process so far, and the key issues and challenges facing the formal adoption and actual implementation of new anti-discrimination legislation in Macedonia. The mission was organized in an excellent manner by the OSCE mission in Skopje (OSCE SMMS), which set up meetings with the Ministry at the political and the administrative level, with the Office of the Ombudsman, and with key NGO representatives, as well as the local office of the Council of Europe. Representatives from the OSCE SMMS briefed us beforehand and participated in the meetings and discussions. Going on a joint mission with the ODIRH representative was also very useful, with the different perspectives of our two institutions in this case supplementing each other in a very constructive manner. There will probably be overlap and consensus between our two reports on all the major issues, but with the ODIRH focusing somewhat more on the issue of actual implementation, in contrast to the more legal normative approach of the Venice Commission. This will also reflect a division of work that we agreed upon during the mission.

2. European standards for evaluating the draft law on anti-discrimination

This is to my knowledge only the second time that the Venice Commission evaluates a national statute on anti-discrimination, the first being the opinion of 22 January 2008 on the Serb legislation.[1] The Venice Commission has not itself drawn up any guidelines or other policy oriented documents on this subject. However the Commission should apply and uphold the standards formulated by the European Commission against Racism and Intolerance (ECRI).

The challenge is to evaluate whether the Macedonian draft law is in conformity with European legal and democratic standards in the field of anti-discrimination. The relevant legal standards are first and foremost Article 14 of the European Convention on Human Rights (ECHR), its Protocol 12, the European Social Charter, and the EU directives against discrimination (2000/43 and 2000/78). In addition there is a number of other treaties and international recommendations covering different aspects of anti-discrimination. Checking the present draft against every detail of all of these standards would require time and resources far beyond the scope of this assessment. In other words, there might be additional requirements under international and European law in addition to the points raised in the following comments. We have however taken as a standard the general policy recommendation (No 7) that was adopted by the ECRI in 2002 "On National Legislation to Combat Racism and Racial Discrimination", which provides the most advanced European soft law in the field.

It should be emphasized that the following comments are *not* to be seen as an attempt to assess whether the Macedonian draft law represents a full and correct implementation of EC directives 2000/43 on racial discrimination and 2000/78 on equal treatment in employment and occupation, according to the criteria of Community law. This is for the EU institutions to evaluate, and falls outside of the scope of the work of the Venice Commission.

3. General Comments

3.1. Introduction

A general provision on the principle of equality is laid down in Article 9 of the Macedonian Constitution, which also has provisions on the rights of the national minorities. However, Macedonia has no general law on anti-discrimination, and this has been criticized by several international institutions, inter alia the European Commission and the ECRI.[2] It has also been pointed out recently by the Commissioner for Human Rights of the Council of Europe that the situation in Macedonia as regards discrimination leaves a lot to be desired, and that there is need both for a better anti-discrimination legislative basis and for concrete and substantial action to be taken in this sector.[3]

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[1] Cf Opinion no. 453/2007, CDL-AD(2008)001 on the draft law on prohibiting discrimination in the Republic of Serbia, endorsed at the 73rd Plenary Session of the Venice Commission (14-15 December 2007).

[2] Cf. inter alia the "2008 Progress Report on the Former Yugoslav Republic of Macedonia" presented by the European Commission on 5 November 2008 (SEC (2008) 2695 final), and the Third Report on "The Former Yugoslav Republic of Macedonia" adopted by the ECRI in June 2004, cf CRI(2005)4. A new report by the ECRI is scheduled to be made in 2009.

[3] Cf the report of 11 September 2008 by the Commissioner for Human Rights for the Council of Europe, Mr Thomas Hammarberg, on his visit to "the former Yugoslav Republic of Macedonia" 25-29 February 2008 (CommDH(2008)21).

The draft presented so far by the Macedonian authorities for a new and general law "On protection against discrimination" is therefore a welcome step forward, and a great normative improvement as compared to the present situation. At the same time, the draft has many weaknesses, both on substance and form, and it is doubtful in my opinion whether in its present version it will function so as to fulfill basic European standards. There are also grave doubts to be raised on whether the act as it stands can be effectively implemented and operated in a way that would actually help reduce discrimination in Macedonia.

3.2. Comments on the present stage of the legislative preparations

Even if the national drafting of the new act is still in progress, it appears that it is in the last stages before being presented to Parliament. From what we were told, the new (and yet undisclosed) "November Draft" is on most points a technical revision of the "September Draft", with the addition of a new "council" as an organ for policy coordination. Furthermore, we were given to understand that the plan is to present the draft proposal to Parliament before the end of the year, with the ambition that it can be adopted well before the local and presidential elections in March 2009. There did seem to be some element of urgency on the part of the authorities, which might perhaps be explained in part by EU pressure.

This raises the question of whether the draft act has reached a stage of completeness where it is ready to be presented to Parliament for final evaluation. To my mind this is questionable, for two reasons.

First, the wording of the draft act still leaves a lot to be desired, and there is much room for further substantive improvement, as will be elaborated in the following.

Second, the legislative process so far suffers from a lack of transparency and involvement by civil society. There are a number of NGOs active in the field of anti-discrimination in Macedonia, representing various groups and interests, and they have organized themselves in an informal "coalition" for anti-discrimination, which has been actively pushing for legislative reform for some time. In principle they appear to have been consulted. The coalition was invited by the Ministry to participate with two members in the ministerial working group that was set up in early 2008 to prepare the law, and they have been contributing actively in the work of this group. The problem is that this is not reflected in the "September Draft", which according to the NGO representatives we talked to is not the product of the working group, but a separate document produced by the Ministry, which came as a surprise to the NGO members of the working group when it was presented. The coalition subsequently made a set of comments, dated 25th September, but it is still unclear to what extent these comments will be taken into account by the Ministry.

At the present stage, the situation is therefore that although the NGOs have been consulted in theory, they have had very little influence on the drafting of the law. This calls into question the transparency and legitimacy of the legislative process.

For these two reasons, the draft act as it presently stands is in my opinion not yet ready for parliamentary adoption. Further improvement is necessary, taking into account the comments of the NGO coalition as well as those of the ODIRH and the Venice Commission. Whether this is feasible within the timeframe envisaged by the Macedonian Government is not for us to decide, but it should be done either before the draft is sent to Parliament or during the parliamentary deliberations, in such a way as to ensure a comprehensive new revision before the act is adopted. The best should not become the enemy of the good, but in this case there is still some way to go to reach the good.

3.3. On the basic legal technique

Drawing up a national general law covering all potential aspects of anti-discrimination is a complex legislative challenge in any country. There are a large number of international and European legal rules and obligations in this field, which are not always fully harmonized, and which must be supplemented by the specific requirements of the national context. Furthermore, the various grounds on which discrimination may occur – covering race, religion, ethnic origin, language, gender, sexual orientation, disability, and etcetera – give rise to different problems, which to some extent require different legal thresholds and solutions.

The Macedonian authorities are attempting to draw up one general statute covering all possible grounds of discrimination. The new act will come in addition to the more specific provisions on anti-discrimination in other parts of the legislation, which we were told exist, but which were not presented to us and which are not cross-referenced in the draft general act.

The ambition of adopting a general act prohibiting all sorts of discrimination is to be supported, and this is in line with the recommendations of the ECRI and the comments of the Commissioner for Human Rights of the Council of Europe in September 2008, as well as the EU Progress Report on Macedonia presented by the European Commission in November 2008.

In principle, there are two different ways of drawing up an act like this. One is to make a short, general and abstract text, leaving a lot of room for interpretation and discretion (administrative and judicial). The other is to make a long and detailed text, trying to legislatively solve as many questions as possible, leaving as little room as possible for interpretation and discretion. Both legislative models are legitimate, and which one is the most appropriate in any given context will depend on a number of factors, including national legal traditions and the state of the national legal community, the administration and the courts.

As regards the new law on anti-discrimination in Macedonia, the choice of legal technique is subject to controversy. The draft presented by the Ministry is a short, general and rather abstract text. First, there is a very wide prohibition, covering all possible sorts of discrimination. Second, there are equally wide and general exceptions, which leave huge room of discretion for those applying the law.

This model is criticized by the coalition of NGOs. What they want is a legal text which is much more precise and specified. One of their arguments is that the draft law will not be able to create the necessary level of legal certainty. Another is that the Macedonian legal community (civil servants, lawyers, judges) is not ready for this kind of abstract legislation, at least not in this sector. In particular, it was emphasized to us by several sources that the national judiciary is not at its present stage of development ready for such a complex piece of legislation as the one presented, which is very much open to interpretation and judicial discretion, and which would require deep knowledge and difficult harmonization of a number of relevant legal sources both from national, European and international law.

The skepticism of the NGOs at the ability of the national courts to effectively apply and develop a general and abstract law on anti-discrimination is supported by the general evaluation of the Macedonian judiciary made by international observers, inter alia the Commissioner for Human Rights of the Council of Europe.[4]

[4] Cf his report of 11 September 2008 paras 29-43, stating inter alia that the country's judiciary has been "frequently described by both national and international stakeholders as weak and inefficient, with widespread perceptions of political influence and corruption" (29). According to the report there is a backlog of over one million cases, which is an astonishing number in a country with a population of two million people.

In my opinion, it is not for the Venice Commission to have any general opinion on whether an act like this should be abstract or concrete. This depends on the national legal culture and context. I do however hold that the draft presented by the Macedonian authorities is not clear and precise enough to function effectively in the Macedonian context at this stage. Further work is needed, in particular on the wording of the exceptions to the general prohibition of discrimination (see below). In this process, the relevant authorities should pay more attention to the many concrete proposals put forward by the coalition of NGOs than what seems to have been the case so far.

The problems of a short and abstract act is aggravated by the fact that there does not seem to be any clear tradition in Macedonia for supplementary authoritative texts that may serve as guidance on the interpretation and application of the law – whether in the form of "preambles", "explanatory memorandums" or different sorts of authoritative "preparatory works" by the legislator.[5]

If the Macedonian legislature is to adopt an act on anti-discrimination as open and general as the present draft, it is in my view necessary in the interest of legal certainty that they produce some sort of detailed explanatory memorandum, which describes the legislative intent and lays down guidance for the interpretation and application of the law – in general, and in the specific sectors most affected by the act, such as for example ethnic affiliation, religion, gender, sexual orientation, physical and mental disability and so on. Such a memorandum should also provide references and links to the other relevant parts of the national legislation, and to the relevant sources of international and European law.

Furthermore, it is necessary for the Macedonian legislature to harmonize the new law with other relevant existing laws. As far as we were given to understand, this has not been attempted so far as part of the legislative process, even though there seems to be a number of other relevant provisions already in force – including for example an existing law on gender equality. To some extent, it seems obvious that other laws will need to be amended. And even if they are not, the effectiveness of the new act would benefit greatly from introducing a system of cross-references with other relevant laws, such as the criminal code, the law on misdemeanors, employment law, the law on gender equality, the law on freedom of religion, general rules on administrative and judicial procedure, and etcetera. Effective use of cross-references in the law seems even more important in the Macedonian context than usual, given that the general availability of legislation is rather low (even for the judges), with for example no general compilation of national statutes.

3.4. On the institutional system for applying and monitoring the act

For the law on anti-discrimination to have any effect in Macedonian society, it is of great importance to have institutions with clear responsibility for implementation, application and monitoring of the new rules.

In part this responsibility lies of course with the ordinary public authorities and the courts. It is for the administrative bodies at all levels to respect the law, and to see to it that it is enforced within their specific fields of responsibility. And it is for the courts to apply the law in the cases brought before them. However, as regards most forms of discrimination the victims very rarely have the resources to launch court cases themselves, and even if this problem to some extent can be reduced by the active involvement of NGOs, it is still not realistic to expect more than a tiny fraction of all potential cases of discrimination to ever reach a court of law.

[5] For a rather critical analysis of law drafting in Macedonia in general, see the OSCE ODIRH Legislative Paper – Law Drafting and Regulatory Management in the Former Yugoslav Republic of Macedonia, 099/2007, of 23 November 2007.

In the field of anti-discrimination it is therefore widely held that in addition to the ordinary institutions, there is need for a specialized independent body. On this point Recommendation No 7 of the ECRI says that:

24. The law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level (henceforth: national specialised body). The law should include within the competence of such a body: assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment.

How this should best be organised in Macedonia is subject to dispute. The position of the Ministry is that such a new institution is not necessary. Instead the task should be given to the national Ombudsman, which according to article 17 of the draft is to be the "body in charge for protection against discrimination". Article 17 does leave open the possibility that such responsibility could also "be taken by another body provided by law", but as far as we were given to understand there is no plan to set up a new institution for this.[6]

This is being criticized by the coalition of NGOs, who wants a new specialized body, in line with ECRI recommendations. Their proposal is for a new specialized "Committee for protection from discrimination", and they have drawn up draft provisions on the composition and competences of such a body in their comments of 25 September 2008. One of the arguments of the NGOs against entrusting the task to the Ombudsman was that this institution has too many obligations already, and that it was not wise to centralize all monitoring of the public administration, of human rights, anti-discrimination, and etcetera in one institution. It was also pointed out that the ombudsman only has powers against the administration, not against private persons (natural or legal), which is required in the field of anti-discrimination. Some also implied that the ombudsman institution is too close to the Government, and inter alia not financially independent enough.

In my view it is clear that in principle a specific specialized body for anti-discrimination would be the best solution. It is also clear that the Macedonian ombudsman does not have the powers that the ECRI considers necessary, neither against the administration nor (especially not) against private persons. In principle the Venice Commission should support the creation of specialized anti-discrimination bodies in line with ECRI Recommendation No 7.

In the case at hand this must be weighted against the national context and the present stage of administrative development in Macedonia. In particular one should take note of the opinion of the Commissioner for Human Rights for the Council of Europe, Mr. Hammarberg, who concluded on this issue that he "would suggest minimizing the complexity of structures by focusing on strengthening existing structures in this regard".

My opinion is therefore that although a new specialized body for anti-discrimination would be by far the better solution, it might also be acceptable for the time being to entrust this responsibility to the Ombudsman – provided (i) that the Ombudsman institution is strengthened in terms of resources (manpower and funds) necessary to fulfill its new tasks, (ii) that its legal competences are adapted to the new challenges, and (iii) that it is reorganized in a way which

[6] We were told during meetings with the Ministry that the "November Draft" contains a new provision on the establishment of a "Council" for anti-discrimination. It appears however that this is only to be a council for policy coordination within the administration (and hopefully with the NGOs), and not a new institution with any kind of competence to receive complaints or make inquiries.

ensures that a necessary number of staff has anti-discrimination as their only or main task. If these criteria are not met, then the present institutional structure will in my view not be good enough to ensure that the law is applied and monitored at a level compatible with European standards.

4. Specific Comments on the Text of the "September Draft"

The following comments are based on the "September Draft", which is the one so far formally sent to the Venice Commission. I am aware that there has since been another revision, but we were given to understand that this is for the most part a technical revision, with only a few changes of a more substantial nature. The comments are not meant to be exhaustive, but only to reflect elements of particular importance. They should be read together with the comments supplied by Madame Lydie Err on 18 November 2008, with which I agree.

The draft act has 8 sections, with altogether 35 articles. The structure is clear and logical. At first sight the text may appear relatively easy to access and understand. On closer analysis it is a rather complex piece of legislation, which is quite abstract and general, and leaves a lot of room open for interpretation and discretion.

In some places the wording of the draft is difficult to understand, but this may in part be due to problems of translation.

Part I – General Remarks

In Article 1 it is stated that the act "regulates and advances the right to equality and provides protection against all forms of discrimination". This is a good starting point, and it is proper that the principle of equality is highlighted in this way, as the legal basis for more elaborate rules on anti-discrimination. The principle of equality is also mentioned in Article 2, which refers to the rights guaranteed by the national Constitution and by international treaties.

Article 3 regulates the so-called "discriminatory basis" – the criteria for establishing discrimination. The list is very long, with 17 criteria, covering not only traditional basic aspects like race, colour, language, religion, nationality and ethnic origin, but also such factors as social origin, education, political orientation, social status, sexual orientation, disability, age, and etcetera. In this way the draft goes beyond the requirements of specific international hard and soft law documents, and probably covers all areas of potential discrimination. This is probably to be welcomed. But the danger in such an approach is that the concept of discrimination may become diluted, in a way which weakens the protection against more serious discriminatory actions.

Article 4 states that the act "provides protection against discrimination to all natural persons in the Republic of Macedonia". This must mean that protection is not reserved for citizens, which is good. It does however seem to leave out legal persons (organizations, companies, and etcetera). Even if the protection of private persons is the most important, it should also be extended to legal persons.

It is clear from various parts of the draft act that the obligation not to discriminate applies both to public authorities and to private persons (natural and legal). This is however not explicitly stated in the first articles, which may give rise to unnecessary confusion, especially since Article 5 on the particular active duty to take measures against discrimination only applies to the public authorities.

I would therefore recommend that a new sentence is added, for example in Article 4, stating explicitly that the prohibition applies to all public authorities and to all natural and legal persons, both in the public and private sector.

Article 6 contains four definitions – on “affirmative measures”, “marginalized groups”, “sexual orientation” and “sexual harassment”. From a legal technical point of view this is a bit strange, since the next section, on “Forms of discrimination”, also contains a number of definitions. These parts could be better harmonized. Furthermore, the two first definitions seem only relevant with regard to the special exemption in Article 15 paragraph 12, and if so should be linked more clearly to this provision. The definition of a “marginalized group” is not quite clear to me, nor is the one on “sexual orientation”. On the whole, it seems that many questions regarding discrimination because of “sexual orientation” are not really regulated.

The fourth definition in Article 6, on “sexual harassment” should be moved to Article 8 on “harassment” in general. Furthermore, the requirement that injury must be intentional is not good, and the phrase “whose goal is to cause injury” should be changed, for example by introducing the concept of “purpose or effect is to…”.

Part II – Forms of Discrimination

Part II of the draft consists of articles 7 to 13, which cover direct and indirect discrimination, “harassment”, “incitement”, “segregation”, “victimization” and “aggravation”. There is also a provision (9) on disability. The section is a mixture of defining different “forms” of discrimination and regulating some specific issues, in particular the provision on disability in Article 9. The article on “aggravation” (13) is not directly linked to the regulation of sanctions, which would be natural, and it is difficult to see its purpose as it stands.

The definitions of direct and indirect discrimination in Article 7 seem in part to be inspired by those used in EC directives 43/2000 and 78/2000. There are differences, but to some extent they may be caused by translation.

A question when trying to define “discrimination” is to what extent the concept of objective and reasonably justified differences should be included in the definition itself, or instead first introduced as the basis for exemptions. The draft act follows the model of the EC directives, which only includes a reference to objectively justified different treatment in the definition of indirect discrimination, not in that on direct discrimination. On the other hand, the concept of “objectively justifiable” causes returns in Article 14 as the basis for a very wide and open general exception.

This is a problematic way of regulating the issue. In my opinion it would be better to apply the definitions used by the ECRI (on racial discrimination), which include “objective and reasonable justification” even for “direct” discrimination, subject to strict proportionality review, and therefore has no need for a general exception clause. The ECRI definitions are:

“direct racial discrimination” shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

“indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

If the draft law uses this approach, mutatis mutandis, there will be no need for the “general exception” in Article 14, which in its present form is far too wide and open-ended.

The wording and clarity of Article 8 could be improved, and the concept of "purpose or effect" introduced in the first paragraph, instead of "goal". In the last part of the second paragraph there is a provision on the disabled, which should be moved to Article 9 on discrimination of "persons with intellectual or physical disability", thus collecting all specific rules on the disabled in one provision.

The rules on the disabled go quite far, so as to make a lack of architectonic adaption in public places to the needs of the disabled a form of "harassment". This is well intentioned, and should probably be welcomed. At the same time it an example that the force of the legislation might be diluted if it is made too broad, and that trying to cover so different situations as for example severe cases of ethnic or racial discrimination and lack of public architectural adaptation for the disabled in one and the same set of provisions is a problematic exercise.

Articles 10, 11 and 12 extend the concept of discrimination to cover "incitement", "segregation" and "victimization". This is to be welcomed. The text of the provisions could however be further worked on. There is for example a question of whether "segregation" should have to be "forced". The wording of the definition of "victimization" in Article 12 is not easily understandable, and might be improved by inspiration from the definition of this concept in the EC directives.

The provision on aggravation in Article 13 is in itself good, but it is not connected to anything, and its function is unclear. It should be linked to the level of sanctions.

Part III – Exceptions from Discrimination

The section on "Exceptions" consists of one article (14) on "General exceptions", and one (15) with a fairly long lost of 12 "Special exceptions".

The "general exception" expressed in Article 14 is far to wide and open-ended, and to my mind highly problematic. It is also unnecessary, if a reference to differential treatment that is "objectively justified" and proportional is instead inserted in the definition of "discrimination" itself.

Article 14 in its present form should therefore be taken out. If it is kept, it should be made more narrow and precise – (i) by defining what might be an "objectively justifiable" cause, and (ii) by introducing a general and strict proportionality requirement, subject to judicial review. As it is, there are proportionality tests in some of the "special exceptions" on Article 15 but not in all.

The list of 12 "special exceptions" in Article 15 is also problematic, on several levels. First, many of the exceptions seem rather unfinished from a legal-technical point of view. The wording is unclear, and the form differs from one exception to the other. Second, many of the exceptions are formulated very widely, as for example no 3, which seems to say that all different treatment of foreigners "provided by law" is exempted. This is far too broad, and also difficult to reconcile with Article 3, that all natural persons are protected against discriminations, whether they are citizens or not. Another example is no 9, which states that all different treatment of the disabled "according to the law" is exempted, and which is difficult to reconcile with Article 9. Third, it seems that several of the "special exceptions" are unnecessary if there is a reference to objectively justified (and proportional) differential treatment included in the definition of "discrimination" as such. Finally, many of the "special exceptions" refer to some kind of "affirmative action". A better way of regulating this would be through a general provision on affirmative action as such, modeled on the ECRI recommendations and the EC directives, with a strict and precise definition. Then several of the special exceptions in Article 15 can be taken out.

In other words, the whole section on “exceptions” (articles 14 and 15) should be thoroughly revised, narrowed down, and made more precise, and subject to a general principle of proportionality. In addition, there should be an explanatory memorandum explaining what the exceptions mean, and how and when they might be applied by the public authorities and by natural and legal persons.

Part IV – Area of Implementation

Part IV of the draft, on “area of implementation”, consists of Article 16, the purpose of which seems to be to narrow the scope of the act down to 9 areas specifically listed, with the tenth option of also applying it to “other areas provided by law”.

It is to me difficult to understand what is the content and purpose of Article 16, and how such a reduction in the “area of implementation” can be legitimate.

First, there is a question of whether the narrowing of the scope applies both to the public authorities and to private persons and entities. This is open to interpretation, depending on whether there should be a comma in the first sentence or not (at present there is not). One interpretation is that the act applies to all public authorities and bodies with public competence – comma (or better: full stop) – and then also to private persons and entities but only in the sectors mentioned. The other is that the limitations also apply to the public authorities – which would mean that a number of important areas of the public sphere would be excluded from the “area of implementation” and left open to legitimate discrimination. This would for example apply to trade and commerce, public procurement, energy, agriculture, the armed forces, and all other sectors not mentioned on the list.

If Article 16 is to be interpreted to narrow the scope of the act with regard to the public authorities, then this is impossible to reconcile with international and European legal standards. It would also be difficult to reconcile with the first five provisions of the act itself, which imply that all kind of discrimination in all areas of society should be prohibited.

But even if Article 16 is interpreted only to narrow down the scope of the act with regard to discrimination exercised by private (natural and legal) persons, it is difficult to understand why this should be confined to the nine sectors listed.

It might be that Article 16 is due to a misunderstanding of European legal standards. One source of misunderstanding could be that ECRI Recommendation no 7 article 7 contains a list that resembles (but which is not identical to) the one in the draft act. The ECRI text however stresses that anti-discrimination should apply “to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas” – then adding that it should “notably” apply to the sectors then mentioned. In other words, these are sectors that are seen as particularly important from an anti-discrimination perspective, but the general prohibition should of course not be limited to these sectors.

Another source of misunderstanding might be that the EC directives against discrimination also contain lists of the sectors they apply to. But this is probably due to the fact that the EU legislator does not have general legislative competence, but only in those fields covered by the EU, or, to be more specific, the EC treaty. This is as far as the EU legal requirements can go. But it does not mean that national rules on anti-discrimination should be limited in the same way, nor can they be, if they are to comply with other European legal standards.

Article 16 should therefore be taken out, unless it has another meaning than what it appears to have. If so, this should be clarified. If there is to be a provision on "area of implementation", then this should emphasize, in line with the ECRI standards, that the act applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas.

Part V – Institutional Framework

The challenges of establishing a good institutional framework for the effective application and monitoring of the act are commented upon above. The best solution would be the establishment of a new independent and specialized body, as prescribed by the ECRI and advocated by the Macedonian coalition of NGOs.

The alternative envisaged by the Macedonian authorities as laid down in Article 17 of the draft act is to make the present Ombudsman the "body in charge for protection against discrimination", in addition to the other duties of this institution. If this is done, then a minimum requirement must be that the Ombudsman institution is given the legal competences and actual resources necessary to effectively fulfill this task. This would imply legal changes beyond what has been envisaged so far, either in Article 17 of the draft or in the Law on the Ombudsman.

A particular challenge if the Ombudsman is to be the institution responsible for anti-discrimination in Macedonia is that his present powers, as far as I understand, only cover the public administration, not acts of discrimination conducted by private natural or legal persons. Discrimination by private employers, organizations, unions, companies, parties, etcetera would therefore not be covered by the control mechanisms of the Ombudsman. There might be other Macedonian public authorities with competence and responsibility each within their field to tackle private discriminatory behavior, and if so this should be made clear.

Part VI – Legal protection

Part VI of the draft, on "legal protection" contains one provision on disciplinary responsibility (19), one on protection in administrative procedure (20), and a number of provisions (21-29) on judicial review of discrimination.

The provisions on disciplinary responsibility and administrative procedure are very brief, and in themselves say very little. I assume that they in effect refer to general Macedonian administrative law, on complaint procedures, disciplinary reactions and etcetera. If so, a minimum requirement should be to put in cross-references to the relevant acts and provisions. One might also consider regulating what kind of disciplinary reactions would be appropriate in cases of public servants committing different acts of discrimination.

The provision on administrative procedure in Article 20 could potentially be quite important in practice, perhaps more so than other forms of judicial proceedings. If there is reason to believe that the decisions of the administration are influenced by discrimination, the most important think for the persons affected will often be to get the decisions annulled, and if possible to get compensation. This is not regulated in Article 20. In the first paragraph it says that an appeal is allowed for "protection against discrimination", which is good as far as it goes. But more important from a practical point of view would probably be to regulate the extent to which discrimination can be invoked as the basis for declaring an administrative decision invalid, and on which conditions, and whether the effect should be ex tunc or ex nunc. If there are to be no particular rules on this as regards discrimination as compared to other forms of administrative misuse of powers, then at least Article 20 should give a reference to the relevant general provisions of administrative law.

I do not have many comments on the provisions on "court proceedings for protection against discrimination" in Articles 21-29. Here again the text would benefit from cross-references to the relevant provisions of ordinary procedural law. The provision on "burden of proof" in Article 25 is in line with the standards of the EC directives and ECRI Rec no 7.

Even though the provisions on judicial procedure in articles 21-29 appear as a substantial part of the act, their practical importance is probably rather marginal. Few victims of discrimination will have the resources necessary to bring a case before the courts, and even if some pilot cases are helped forward by NGOs the number of cases will probably be low. Much more important from a practical point of view are rules on special administrative complaint procedures, and actions taken by the responsible authorities in order to proactively reduce discrimination.

Part VII – Misdemeanor Sanctions

Part VII on "Misdemeanor sanctions" contains five articles (30-34) laying down very detailed rules on fines for various forms of discrimination. The level of the fines is regulated in the text, in Euros, with different categories for different sorts of perpetrators (private persons, professionals, legal entities).

From a legal-technical point of view, there seems to be room for improvement of these articles. On the one hand they are very lengthy as regards the many categories. On the other hand they say nothing about how the fines are decided, by whom, according to which procedures, etcetera. We were told there is a general law on misdemeanors that regulates this. If so there should be a cross-reference. From a legal-technical perspective, it is also problematic to set the exact level of the fine in the statute itself, since this might be subject to inflation. It is burdensome to have to go through a full legislative amendment process in order to adjust the level of the fine with the economy, and other methods are available for this.

Within each category the range for the fine is very narrow. Under Article 30 for example the fine prescribed for various forms of discrimination ranges from 400 to 600 Euros for a private person, 600 to 800 Euros for a professional, and 800 to 1000 Euros for a legal entity. Given the wide range of different grounds for possible discrimination, and the wide range from very serious to fairly innocent occurrences, this seems rather too narrow. Furthermore, it does not take into account the question of aggravation, which is regulated in Article 13, but which might more properly be put on the section on sanctions.

Apart from the five provisions on fines for misdemeanors, there is no mention in the draft act of penal sanctions against more severe forms of discrimination. There is clearly a need to criminalize particularly serious acts of discrimination far beyond the relatively modest fines in the draft act, and this is for example laid down in some detail in ECRI Rec no 7 articles 18 to 23. It is not clear to me whether the general criminal code of Macedonia contains provisions that will sanction acts of discrimination at the appropriate level. If it does, there should be a cross-reference to the relevant criminal law provisions. If it does not, such provisions would have to be introduced in order to fulfill ECRI standards.

5. On the Implementation of the Act

In the field of anti-discrimination it is even more evident than in many other sectors that getting good legislation in place is only a first step. The real challenge is to implement and effectively apply the law, in a way that will actually help reduce discrimination in its many different forms. In this context the legal approach is only one of many necessary elements. And prohibiting discrimination is only a small gesture unless this is followed up be proactive campaigns and efforts at actually changing entrenched traditions and opinions.

In this context it should be noted that the situation as regards various forms of discrimination in Macedonian society appears to give rise to grave concerns. This was, inter alia, pointed out in the country report by the ECRI in 2004 (a new one is expected in 2009). More recently, the situation has been described in detail by the Commissioner for Human Rights of the Council of Europe in his report from September 2008, which in paragraphs 80-96 explains the situation as regards national minorities, and in paragraphs 97-129 problems of discrimination against other groups, based in particular on gender, disability and sexual orientation. A general observation in paragraph 97 sums up the main points:

98. The country is rife with low-scale but tangible inter-ethnic tensions which fuels societal discrimination and intolerance at many levels. Minorities, Roma and persons with disabilities suffer most explicitly from this. The LGBT community is afforded less protection than others, and a certain stigma is still being attached to being openly LGBT within certain parts of society, particularly within rural communities.

Similar observations have recently been made by the European Commission in its 2008 Progress report on Macedonia, where it is stated inter alia that:

Little progress has been made in the area of **anti-discrimination**. As the draft framework law on anti-discrimination has not yet been enacted, the existing legislation is still not fully in line with the *acquis*. Moreover, the country has not signed the UN Convention on the rights of people with disabilities. Administrative capacity in this area remains weak. Vulnerable groups, including some ethnic minorities, are discriminated against in various spheres of economic and social life. The situation of people with disabilities has not improved. The limited statistics available do not allow different types of discrimination to be monitored as required by the *acquis*. Preparations in this area have been launched.
[…]
Conclusion
Limited progress can be reported in social policy and employment. A moderate level of legal alignment has been reached. While administrative capacity is slowly being strengthened, it remains insufficient to implement properly the legislation and policies adopted.

Against this background, the Venice Commission should strongly emphasize the need for the Macedonian authorities to follow up on the new general law on anti-discrimination, once it is adopted, by strengthening the institutions responsible for application of the law, and by taking comprehensive administrative action at all levels in order to realize the good intentions behind the act. Furthermore, it is incumbent that the authorities enter into a close and constructive relationship with the relevant NGOs and other parts of civil society interested in fighting discrimination in all its many forms.

6. Conclusions

Based on these considerations, the Macedonian authorities should in my opinion:

- Substantially revise the present draft before adopting the new law, taking into account the comments of the coalition of NGOs as well as those of the Venice Commission and the ODIRH.

- In particular strive to make the draft act more clear and precise, and to reduce the room for interpretation and discretion, by narrowing down the exceptions and by introducing a general principle of proportionality.

- Present an explanatory memorandum or some other sort of authoritative text on how the act should be interpreted and applied.

- Harmonize the draft with other relevant parts of the legislation by making the necessary amendments, and introduce cross-references to other relevant laws in the draft.

- Strengthen the institutional system for implementing and monitoring the act, preferably by setting up a specialized body for anti-discrimination along the lines recommended by the ECRI. In the alternative, the competences and resources of the office of the Ombudsman should be strengthened substantially, beyond what is so far envisaged in the draft act.

- Take all necessary measures to ensure that the intentions of the act are actually carried out by the public authorities at all levels of government.

- Work closely and constructively with civil society and in particular with the many NGOs already active in the field of anti-discrimination in Macedonia.