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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**“The former Yugoslav Republic of Macedonia”**

**DRAFT OPINION**

**ON THE DRAFT LAW  
ON PREVENTION AND PROTECTION  
AGAINST DISCRIMINATION**

**on the basis of comments by**

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## I. Introduction

1. By a letter dated 3 August 2017, the Minister of Labour and Social Policy of “the former Yugoslav Republic of Macedonia”, Ms Mila Carovska, requested an opinion on the Draft Law on Prevention and Protection against Discrimination (CDL-REF(2018)003, hereinafter “the draft law”).
2. Mr Aureescu, Ms Bazy-Malaurie, Mr Eşanu and Mr Ribičič were invited to act as rapporteurs.
3. In order to have a better understanding of the local context, a mission to Skopje was organised. Mr Eşanu and Mr Bedirhanoglu from the Secretariat went to Skopje on 29-30 January 2018.
4. The visit was well organised by the Council of Europe Office in Skopje and the Ministry of Labour and Social Policy (hereinafter “the Ministry”). The delegation held talks with representatives of the Ministry, the President and three other members of the Commission for Protection against Discrimination, parliamentarians, the Ombudsman Office, the EU Delegation and OSCE Offices in Skopje, as well as NGO representatives.
5. The visit proved to be a very useful one and led to a better understanding of the national context and the issues involved in the preparation of the draft law.
6. The present Opinion is based on the English translation of the draft law provided by the Macedonian authorities. The translation may not always accurately reflect the original version on all points; therefore, certain issues or inaccuracies raised may be due to problems of translation.
7. *This Opinion has been prepared on the basis of the rapporteurs’ comments and of the information gathered during the visit. It was .....by the Venice Commission at its 114<sup>th</sup> Plenary Session (Venice, 16-17 March 2018).*

## II. Background information

8. The Law on Prevention and Protection against Discrimination currently in force (hereinafter “the LPPD”) was adopted in April 2010 and has been amended slightly in 2014, 2015 and 2016.
9. Before its adoption, at the request of the Macedonian authorities, the Venice Commission and OSCE/ODIHR commented on two draft laws provided by the concerned Ministry. Although the draft law subject to the present Opinion differs on a number of points from the precedent drafts commented by the Venice Commission<sup>1</sup> and OSCE/ODIHR<sup>2</sup> in 2008 and 2009, some points and concerns raised in that context remain valid.

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<sup>1</sup> CDL-AD(2008)042, Opinion on the draft law on protection against discrimination of “the former Yugoslav Republic of Macedonia” (hereinafter “the Venice Commission 2008 Opinion”).

<sup>2</sup> OSCE/ODIHR Comments on the Draft Anti-Discrimination Law of the former Yugoslav Republic of Macedonia, 19 December 2008; OSCE/ODIHR Comments on the Draft Anti-Discrimination Law in former Yugoslav Republic of Macedonia, 12 March 2008; and OSCE/ODIHR Comments on the Draft Law on Prevention and Protection Against Discrimination of the Former Yugoslav Republic of Macedonia, 13 October 2009 (hereinafter “the OSCE/ODIHR 2009 comments”). These texts can be found on the website: <http://www.legislationline.org/topics/topic/84/country/31>

10. The text of the LPPD as well as its implementation has been subject of criticisms from international organizations, in particular the European Union<sup>3</sup> and the Council of Europe.<sup>4</sup> The main criticisms concern the lack of independence and impartiality of the Commission for Protection against Discrimination (hereinafter “the Commission”), the absence of the secretariat of the Commission, the insufficiency of its financial and human resources,<sup>5</sup> the non-availability of free legal aid for bringing a court case, the non-mention of sexual orientation and gender identity in the list of grounds for discrimination, the fact that the duty of the State to promote equality is not expressly mentioned in the LPPD, the inadequate level of precision and expertise in the legal analysis of the Commission, the large burden placed by the LPPD on the complainant to prove that discrimination has taken place, the impossibility for associations that have a legitimate interest in combatting discrimination to initiate a court case without referring a specific victim, and to file a complaint to the Commission, etc.

11. The 2017 letter of request from the Minister of Labour and Social Policy noted that the aim of the draft law, prepared in coordination with the relevant national and international organisations, was to create a more effective system for the protection and prevention from discrimination.

12. In the course of the visit to Skopje, the delegation was informed that the Ministry would wait for the Venice Commission’s opinion to send the final draft to the government.

### III. Analysis

#### A. Preliminary remarks

13. The present Opinion highlights the key issues raised by the draft law and provides indications of areas of concern. In the interests of concision, the Opinion focuses more on problematic areas rather than on the positive aspects of the draft law.

14. The present assessment of the draft law has been conducted in the light of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocol 12, the case law of the European Court of Human Rights (hereinafter “the ECtHR”), the Paris principles relating to the status of national human rights institutions (hereinafter “the Paris principles”), the EU’s equal treatment directives.<sup>6</sup> Specific

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<sup>3</sup> See European Commission 2016 Report on “the former Yugoslav Republic of Macedonia” ([https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_the\\_former\\_yugoslav\\_republic\\_of\\_macedonia.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf)), p. 61; and European Commission 2015 Report on “the former Yugoslav Republic of Macedonia” ([https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2015/20151110\\_report\\_the\\_former\\_yugoslav\\_republic\\_of\\_macedonia.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf)), p. 59.

<sup>4</sup> See in particular ECRI, Fifth report on “the former Yugoslav Republic of Macedonia”, adopted on 18 March 2016 ([http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Former\\_Yugoslav\\_Republic\\_Macedonia/MKD-CbC-V-2016-021-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Former_Yugoslav_Republic_Macedonia/MKD-CbC-V-2016-021-ENG.pdf)), pp. 11-12; and Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on “the former Yugoslav Republic of Macedonia”, adopted on 24 February 2016 (<https://rm.coe.int/16806d23e3>), §§ 7, 20 and 31.

<sup>5</sup> The delegation of the Venice Commission was informed during its visit to Skopje that the Commission has at its disposal only two professional staff who are seconded by other authorities and a small office in the building of the State Television of Macedonia.

<sup>6</sup> Especially the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter “the Directive 2000/43”) and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter “the Directive 2000/78”).

attention was paid to ECRI's General Policy Recommendation (GPR) No. 2 on Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, and ECRI's GPR No. 7 on National legislation to combat racism and racial discrimination, adopted on 13 December 2002. Where appropriate, this Opinion also refers to relevant recommendations made in previous Venice Commission 2008 Opinion.

15. Article 9 of the Constitution of "the former Yugoslav Republic of Macedonia" (hereinafter "the Constitution") states the principle of equality only for citizens. It provides a closed list of grounds for discrimination which contains only sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status.

16. As opposed to the Constitution, a number of laws, such as the LPPD (Article 3) and the Law on Equal Opportunities for Women and Men (Article 3 § 6), contain larger and open ended lists of grounds for discrimination.

17. In addition to the LPPD, anti-discrimination provisions may be found in a considerable number of laws, such as the Law on Equal Opportunities for Women and Men, the Law on the Committee for Relations between the Communities, the Law on the Promotion and Protection of the Members of Communities that are less than 20% of the Population, the Criminal Code, the Law on Labour Relations, the Law on Social Protection, the Law on the Protection of the Rights of Patients, the Law on Public Health, the Law on the Use of Languages, the Law on Local Self-Government, the Law on the Legal Status of a Church, Religious Community and Religious Group, etc.

18. The scope of this Opinion covers only the draft law, submitted for review. Thus limited, the Opinion does not aim to provide a full and comprehensive review of the legal framework of "the former Yugoslav Republic of Macedonia" regarding discrimination.

## **B. General comments**

19. The draft law represents a real improvement of the LPPD. It remedies most of the shortcomings mentioned above in paragraph 10. It constitutes undeniably an important step forward for the normative protection against discrimination in "the former Yugoslav Republic of Macedonia". As compared to the LPPD, it is more precise on many subjects and better drafted.<sup>7</sup> It widens the powers and responsibilities of the Commission and strengthens its capacity of fighting against discrimination.

20. Nevertheless, some major shortcomings remain: the draft law proclaims the independence of the Commission without providing enough safeguards to ensure it. It provides for the financial independence of the Commission without however guaranteeing the allocation of sufficient funds for it to perform its duties. Its provisions regarding the election and dismissal of the members of the Commission do not appear to adequately ensure the independence of the Commission.

21. Although the draft is entitled "law on prevention and protection against discrimination", most of its provisions are dedicated to the protection against discrimination. It is true that the Commission has a number of responsibilities regarding the promotion of equality and prevention of discrimination (Article 22 §§ 1, 9, 12, 14, 15 and 16 for instance); however, the mechanisms set up by the draft are mainly focused on the protection. It should also be noted that, contrary to the recommendation of ECRI (GPR No. 7, § 8), the draft does not place other

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<sup>7</sup> Nonetheless, it contains some repetitions and obvious mistakes. There is a formal error in the wording of Article 35 § 1 (it should refer to Article 33 § 1), Article 41 ("Article 34" must be replaced by "Article 33") and Article 42 § 2 (there is no paragraph 7 in Article 25). There is no need to use both words "forms" and "types" in the heading of Part II and in the first Article of the draft.

public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.

### **C. Specific comments**

#### **1. General provisions (Part I: Articles 1-6)**

##### **Subject and purpose of the law (Articles 2 and 3)**

22. The reference in Article 2 to the “ratified international agreements” does not take into consideration that not all international agreements require ratification and in accordance with Article 11 of the Vienna Convention on the Law of Treaties the “consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”. Therefore, the Venice Commission would recommend replacing the word “ratified” by “binding”. For the sake of consistency with this Article, the wording “international agreements to which the Republic of Macedonia has acceded” mentioned in Article 13 § 2 should also be changed accordingly.

23. Bearing in mind that the draft law contains also a number of articles with regard to the Commission, it would be more appropriate to precede the word “prevention” in Article 2 with the wording “legal and institutional framework for”.

##### **Scope of the law (Article 3)**

24. If the intention of the drafters is that the draft law be applied in all areas, as recommended by ECRI (GPR No. 7, § 7) and as the delegation was told by the Ministry, the enumeration of some areas of application of law is not really necessary. However, if the intention is to underline the importance of the prohibition of discrimination for certain specific areas, it is advised to make a clear reference to the general implementation of the Law in all areas before enumerating some areas where the law will be notably applied.

##### **Discriminatory grounds (Article 4)**

25. The addition of “sexual orientation” and “gender identity” to the grounds for discrimination, and the change of denomination from “political belonging” to “political conviction” are to be welcomed. It is also welcomed that the ground which is worded in the current law as “any other grounds established by the law or by ratified international agreements” is changed to “any other grounds”.

26. That said, the observations in the Venice Commission 2008 Opinion (§ 41) and OSCE/ODIHR 2009 comments (§§ 18-20) remain valid. The long list of the so-called “discriminatory grounds” (26 grounds in the Draft Law, 24 grounds in Article 3 of the LPPD) is likely to weaken the effectiveness of the protection against the particularly egregious forms of discrimination. Moreover, providing an extensive list of discriminatory grounds is not necessary from a legal point of view, since the list remains open.

27. It is also to be noted that, as mentioned in the Venice Commission 2008 Opinion (§ 42), the criterion of citizenship<sup>8</sup> mentioned in the draft seems to contradict the terms of Article 13 § 2/1 of the draft, which stipulates that “different treatment of persons who are not citizens of the Republic of Macedonia” shall not constitute discrimination. It is recommended to delete the said criterion or clarify the drafters’ intention.

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<sup>8</sup> The delegation was told by the Ministry that the word in the original Macedonian text of the LPPD is “citizenship”, and that the word “nationality” is only a different translation of the same word.

## **Definition of discrimination (Article 5)**

28. It is recommended to align the definition included in Article 5 with the definition of racial discrimination stipulated in Article 1 of the CERD by adding to it the term “or having the effect of” after “aimed at”.

## **Glossary of terms (Article 6)**

29. The definition adopted by the draft of “person” is very restrictive, since the criteria of location, registration and “carrying on business” are limiting the scope of the law. It seems also to be in contradiction with the first paragraph of Article 3 which provides that “Law shall apply to all natural and legal entities”.

30. This definition excludes the protection of persons who have never been in “the former Yugoslav Republic of Macedonia” but have been, nevertheless, discriminated by the authorities or private persons from that country.<sup>9</sup> The reference to “legal entity registered or carrying on business in the Republic of Macedonia” excludes in turn the legal entities which only intend to start doing business in that country. They would not be protected even though they demonstrate that they have been discriminated in the enjoyment of their fundamental rights enshrined in international conventions. In the opinion of the Venice Commission, the draft law should be applied to any person within the jurisdiction of “the former Yugoslav Republic of Macedonia”, formulation which would be in line with Article 1 of the ECHR.

31. As regards paragraph 11, the term “multiple times” should be replaced by the term “more than once”.

32. The definition of “continued discrimination” (§ 12) should be reformulated. In order to differentiate it from the “repeated discrimination” it is recommended to add the wording “discrimination committed in an uninterrupted manner”.

## **2. Forms of discrimination (Part II: Articles 7-12)**

33. To be in line with ECRI's GPR No. 7 (§ 6), it is recommended to add to the forms of discrimination “announced intention to discriminate” and “aiding another to discriminate”.

34. As discrimination by association<sup>10</sup> and discrimination by perception<sup>11</sup> defined in Article 6 constitutes as well two different forms of discrimination, they should be placed under Part II. Sanctions should, consequently, be provided for these two forms of discrimination by Articles 42 and/or 43.

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<sup>9</sup> This can be for instance the case of Macedonian citizens who were born out of the country and have never been in “the former Yugoslav Republic of Macedonia” or persons who entered into commercial relationship with natural or legal persons from that country without being physically in the country (by ordering for example goods or services via internet).

<sup>10</sup> According to Article 6 § 8 “[d]iscrimination by association shall mean any distinction, exclusion or restriction of a person based on their relationship with another person or group under any discriminatory grounds”.

<sup>11</sup> According to Article 6 § 9 “[d]iscrimination by perception shall mean any distinction, exclusion or restriction of an individual or group based on assumed discriminatory grounds”.

### **Direct and indirect discrimination (Article 7)**

35. According to the case law of the ECtHR, differential treatment constitutes discrimination only if it has no objective and reasonable justification.<sup>12</sup> To align the definition of direct discrimination with the relevant case law, the Venice Commission suggests adding to the first paragraph the terms “without any objective and reasonable justification” after “or comparable situation”.

### **Calling, incitement and instruction to discrimination (Article 8)**

36. The rather vague and broad terms used in this Article such as “any activity through which discrimination is [...] indirectly called for, incited [...] or prompted” risk being used to restrict disproportionately the right to free expression. This Article ought to be reformulated very carefully in the light of the relevant case law of the ECtHR so as not to breach freedom of expression guaranteed by Article 10 of the ECHR.

### **3. Measures and actions not deemed to present discrimination (Part III: Articles 13-14)**

#### **“General exception to discrimination” (Article 13)**

37. The draft law deletes Articles 14 and 15 of the LPPD which enumerate in total 18 specific situations which cannot be deemed discriminatory. Deletion of these Articles which contain quite vague exceptions to the prohibition of discrimination is commendable. However, Article 13 of the draft which is supposed to replace Articles 14 and 15 raise some concerns. First of all, the use of the expression “exception to discrimination” is not appropriate. Although some differential treatments are acceptable under European human rights law<sup>13</sup> they do not constitute exception to discrimination but treatments which are not deemed discrimination since they can be objectively and reasonably justified.

38. Moreover, the first paragraph of Article 13 deals with affirmative measures and consequently can be merged into Article 14. As for the second paragraph, it concerns scope of the concept of discrimination and thus can be placed under Article 3 of the draft.

39. That said, in order to facilitate the application of the law, the most common differential treatments which are not considered discrimination under international law may be listed and explained in an explanatory memorandum.

40. The wording of the third subparagraph of the second paragraph<sup>14</sup> is too vague and has the potential to weaken considerably the protection against discrimination. During the visit, the delegation was made aware that there were certain discriminatory provisions in other laws of the country. It goes without saying that a person should not be punished under the draft law for having respected a provision of another law. It is, however, to be noted that the State has the obligation under the international law to abolish any laws, regulations and administrative provisions contrary to the principle of non-discrimination.<sup>15</sup> Until such a harmonization with

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<sup>12</sup> See, amongst many others, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010.

<sup>13</sup> See for instance Article 3 § 2 of the Directive 2000/43 and Articles 3 § 2, 4 and 6 of the Directive 2000/78.

<sup>14</sup> The third subparagraph stipulates as follows: “Different treatment of persons on the basis of provisions stipulated in the Constitution and other laws.”

<sup>15</sup> Above all, this obligation derives from Article 14 of the ECHR and its Protocol 12. It is also one of the requirements of the EU, expressly stipulated in Article 14 of the Directive 2000/43.



international and European law is achieved, instead of making a general reference to the Constitution and laws, this Article should refer to the specific provisions of these texts.

#### **Affirmative measures (Article 14)**

41. According to the second paragraph of this Article, affirmative measures can be adopted only by “the competent authorities”, which means that affirmative measures taken by natural and legal persons in private sector may be considered as discrimination. The Venice Commission does not see any reason for depriving private persons of this possibility.

42. Given that the authorities mentioned in the third paragraph can all be covered by the term “competent authorities”, it is recommended to merge the second and third paragraphs in a way that ensures that the new provision will not exclude the possibility for private persons to take affirmative measures.

#### **4. Commission for Protection against Discrimination (Part IV: Articles 15-23)**

43. The current Commission was established in 2011. However, as mentioned before, it has encountered serious budgetary and staff shortage problems which prevented it from playing a significant role in the fight against discrimination.

44. As this body is one of the key actors of the implementation of the LPPD, the provisions of the draft aimed at further strengthening the capacity of the Commission to promote equality and combat discrimination are commendable.

#### **Legal status of the Commission and election of its members (Articles 15, 18 and 19)**

45. Article 15 remains unchanged. It proclaims that the Commission is “an autonomous and independent body”.

46. In the field of the promotion of equality and fight against discrimination, it is widely held that, in addition to the ordinary institutions such as courts, there is a need for a specialized independent body.<sup>16</sup> However, it is not sufficient to proclaim the independence of such bodies; the law should establish the conditions necessary to ensure this independence in practice, which does not seem to be sufficiently guaranteed by the draft law.

47. It is to be noted that in “the former Yugoslav Republic of Macedonia” there is also the institution of Ombudsman which is empowered to “undertake actions and measures for protection of the principle of non-discrimination” (Article 2 of the Ombudsman Law). However, Article 77 of the Constitution limits the Ombudsman’s competences to the public sphere whereas the Commission can act in both public and private spheres. Therefore, it is important that the Commission, as the main equality body, be provided with all guarantees necessary for it to accomplish its duties independently and efficiently.

48. The independence of an equality body is ensured mainly through the rules of election and dismissal of its members.

49. According to the draft law, the Commission will consist of 7 members appointed and dismissed by the Parliament. The Parliament will “publish a public announcement for the appointment of Commission Members” (Article 19 § 1) and the Committee on Elections and Appointments (which is called “Commission to the Assembly” in Article 19 § 3 and “Commission of Election and Appointment” in Article 21 §§ 1 and 3) will “prepare a draft list of applicants after

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<sup>16</sup> See for instance ECRI’s recently revised GPR No. 2, §§ 1 and 2 as well as Article 13 of the Directive 2000/43.

having conducted a previous public hearing, and submit it to Macedonia's Parliament" (Article 19 § 3). It is also the current procedure of election of Commission members.

50. This procedure requires some clarification. According to Article 20 of the Rules of Procedure of the Assembly of "the former Yugoslav Republic of Macedonia", an adequate representation of political parties represented in the Assembly shall be ensured in the composition of the Committee on Elections and Appointments. This provision means that the ruling coalition in the Parliament has also majority in the Committee. This fact was not contested by the authorities during the visit of the delegation. The delegation was told that the Committee takes decision with simple majority. Even though the Parliament has the possibility to reject one or more candidates on the list, bearing in mind that the Committee has the same rate of representation of political parties as the Parliament, there is little chance that it happens. However, in case it happens it is not entirely clear what would be the procedure for electing new candidates instead of those rejected by the Parliament. Would the procedure restart from the very beginning with a new publication of public announcement or would the Committee on Elections propose new candidates among the candidates who were not included in the draft list?

51. The delegation was informed as well that it is the practice of the Committee on Elections to send a list of seven candidates to the Parliament and the latter does not have the possibility to elect a candidate who does not appear on the shortlist provided by the Committee but does meet the objectively stated criteria. The delegation was also told that the Parliament elects members of the Commission with simple majority. All these points should be clarified in the draft law or references to the relevant articles of other applicable laws should be made.

52. Given the important responsibilities and powers assigned to the Commission, the authorities are invited to consider the election of its members by a higher majority in the Parliament (for instance by a two-thirds majority), coupled with a mechanism against possible deadlocks. This should help to bring about a need for consensus in the Parliament and provide, consequently, more favourable conditions for the choice of independent candidates. However, keeping in mind that Article 69 of the Constitution is interpreted by the Macedonian authorities in the sense that it does not allow an increased majority and would require an amendment of the Constitution,<sup>17</sup> the authorities should at least consider requiring a two-thirds majority for the decision of the Committee on Elections with regard to the choice of candidates to be proposed to the Parliament. As regards the dismissal of the members of the Commission, the majority required within the Committee on Elections and the Parliament should be at least equal to (and preferably higher than) the majority required for election.

53. The text should mention in a more detailed way the criteria on the basis of which the shortlist would be prepared after the hearing. The draft law should ensure in some way or other that the selection of candidates will be based on objective criteria and merit and not on political considerations.

54. The condition "work experience [...] in the area of human rights" mentioned in Article 18 § 3 should be better specified in an explanatory memorandum and the term "effective court judgement" in the fourth paragraph of the same Article should be changed to "final court judgment".

#### **Commission's budget (Article 16)**

55. Compared to the LPPD, the provisions regarding the budget of the Commission are much more detailed. The Commission is entitled to submit a proposal for the funds that it

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<sup>17</sup> This was explained in a Note sent by the Ministry of Labour and Social Policy in the context of the preparation of the present Opinion.

needs, and to use them independently. This Article constitutes undeniably a valuable step forward since it aims at providing the Commission with a financial independence. This independence, nevertheless, is not sufficient to ensure the success of the future Commission. Keeping in mind the financial difficulties encountered by the current Commission so far, the Venice Commission would recommend that this Article be redrafted so as to contain guarantees that the Commission will be provided with sufficient funds to carry out effectively the functions and responsibilities assigned to it by the draft law.

56. An explanatory memorandum could contain concrete and objective indicators to be used to determine the budget of the Commission.<sup>18</sup>

57. It would be recommended that the draft law provide as well sufficient safeguards against arbitrary and disproportionate reduction in the budget of the Commission.<sup>19</sup> One way to do so would be to add a clause to the draft law stating that the public authorities should not use the budgetary process for allocating/reducing funds from the budget in a manner that interferes with the independence of the Commission. Another way would be to lay down the principle that any reductions in the Commission's budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government in the previous year.

58. The Commission is also entitled to raise additional funds, which will certainly constitute further means for its activities. However, without necessary safeguards such as the obligation of disclosure of all funding above a certain amount, that may compromise its independence. The funds received from other sources should not negatively affect the amount of financial means available from the State budget.<sup>20</sup>

59. Lastly, it is important to clearly provide for transparency as regards the use by the Commission of its funds, through the financial accountability and expenditure rules that apply to public authorities.<sup>21</sup>

#### **Composition of the Commission (Article 17)**

60. The last paragraph of Article 17 lays down the rule that "Commission Members should reflect the composition of society as a whole and in the election of Commission Members, the principle of adequate and equitable representation of community members and gender-balanced participation shall apply". The inclusion of a "gender-balanced participation" is particularly welcomed.

61. The delegation was informed that "the principle of adequate and equitable representation", which is rooted in Article 8 of the Constitution, means an equitable representation of ethnic communities. In this case, it is obvious that this Article does not ensure *per se* "the pluralist representation of the social forces involved in the protection and promotion of human rights" such as NGOs active in the fight against discrimination, professional organizations, universities, etc. This is a key criterion set out by the Paris principles. In the view of the Venice Commission, the drafters should try to find a way to reconcile this criterion with other conditions established by Article 17.

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<sup>18</sup> Paragraph 101 of the explanatory memorandum of ECRI's revised GPR No. 2 provides some concrete basis of such objective indicators.

<sup>19</sup> See ECRI's GPR No. 2, § 28.

<sup>20</sup> See CDL-AD(2009)043, Opinion on draft amendments to the law on the protector of human rights and freedoms of Montenegro, § 10.

<sup>21</sup> See ECRI's GPR No. 2, § 32.

62. Keeping in mind the composition of the Committee on Elections and the simple majority required both for drawing the list of candidates and election by the Parliament, the possibility of re-election of members of the Commission (Article 17 § 2) raise likewise serious concerns regarding the independence of the Commission. The Venice Commission would suggest a unique but longer mandate.

63. As the rules of election mentioned in the third paragraph of this Article will be applied only once, from the point of view of legislative technique, it would be more appropriate to place it under the chapter "Transitional and final provisions".

#### **Status of Commission members (Article 20)**

64. Professionalisation of the Commission with full time employed members (as opposed to the part-time membership under the LPPD) is an important step in strengthening the efficiency of the work of the Commission. The fact that the appointed members will not be able to hold any other public office or political function is also an additional guarantee for the independence of the Commission.

65. The fact that the former employments of the members will be put on stand as of the day of their appointment is also welcomed as it will encourage the submission of candidacy from more qualified people.

66. At the same time, the second paragraph, which lays down the rule that the member of the Commission whose mandate expired "shall serve until the appointment of a new member, but no longer than three months" may compromise the well-functioning of the Commission in case the Parliament does not manage, for some reason or other, to elect new members. The drafters should consider deleting the time limit of 3 months in order to enable the functioning of the Commission until the appointment of new members. The same observation is valid also for Article 46, which has a similar provision.

#### **Dismissal of Commission members (Article 21)**

67. According to this Article, if the Committee on Elections and Appointments determines "by a majority vote of its members", amongst other reasons expressly mentioned in this Article, that one of the members "lost his/her psychophysical capability to perform his/her office" or "has performed his/her office in an unprofessional, biased manner and unconscientiously", it shall submit a proposal for dismissal to the Parliament.<sup>22</sup> As it is the case for election, it seems that according to Article 69 of the Constitution the Parliament will take its decision with simple majority, which raises concerns as regards the independence of the Commission.

68. This is all the more so as the terms "unprofessional, biased manner and unconscientiously" are quite vague and leave therefore the possibility for the majority in place to dismiss the members of the Commission on political grounds. This paragraph should be redrafted in a way that protects the members of the Commission against arbitrary dismissals. Dismissal procedure needs to be more detailed in the law and should ensure the respect for basic guarantees of fair trial. For instance, it is not clear if the member concerned will have the right to be heard by the Committee on Elections and Appointments and/or the Parliament, and to challenge the decision of the Committee and/or the Parliament before a court, if the decision of dismissal should be reasoned, etc.

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<sup>22</sup> During the visit to Skopje, the delegation was told that this Article was mistranslated; the term "permanently lost his/her capacity" should be read as "lost his/her psychophysical capability" and that "unethical manner" as "unconscientiously".

69. In order to be in conformity with the ECtHR case law, the draft law should spell out that the loss of capacity should be established before a competent authority on the basis of objective medical expertise.<sup>23</sup> If such conditions are stipulated in another law, a reference to its relevant provisions should be made.

### **Responsibilities of the Commission (Article 22)**

70. Article 22 of the draft law assigns new responsibilities to the Commission (see paragraphs 3, 5, 7, 9 and 13 of Article 22), which is welcomed. Some existing responsibilities of the Commission are also amended in a good direction. For instance, the Commission will have the possibility of establishing cooperation not only with legal entities but also with natural persons (§ 12), which goes beyond the requirement of the Directive 2000/43.<sup>24</sup> Furthermore, with the deletion of the words “to the state bodies”, the competence of the Commission to make recommendations for the implementation of measures aimed at achieving equality would cover also private persons (§ 14).

71. Some responsibilities of the Commission would benefit from clarification. For instance, given that according to paragraph 7, the Commission shall “Initiate and appear as an intervener in court proceedings for protection against discrimination”, it is not clear which proceedings the Commission should initiate under paragraphs 3 and 6. These paragraphs should be redrafted.

72. During the visit, the delegation was told by the Ministry that paragraph 15 empowers the Commission to give opinions on draft laws and paragraph 11 on existing laws. If it is the case, these paragraphs, which are vaguely phrased, should also be redrafted in order to avoid confusions.

73. Overall, the Commission has the most important competences recommended by the relevant international organisations,<sup>25</sup> to fulfil its task to promote equality and combat discrimination, such as assistance to victims, investigative powers, right to initiate and participate in courts proceedings, etc. Nonetheless, as recommended by ECRI,<sup>26</sup> the drafters should consider empowering the Commission to seek an amicable settlement through conciliation, which can be effectively used for the prevention of discrimination, particularly in areas such as employment.

### **Commission’s administrative office (Article 23)**

74. This Article provides for the establishment of an administrative office for the Commission. This is one of the most important progresses brought by the draft law to provide conditions for an increased efficiency of the Commission. However, this Article should be more detailed with a view to ensuring that the Commission will respect, when appointing its own staff, the criteria stated in paragraphs 38 and 39 of ECRI’s GPR No. 2.

75. As mentioned by ECRI (GPR No. 2, § 27), for the independence and effectiveness of the Commission, it is also important that the Commission have its own premises, which should be adequate for its needs.

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<sup>23</sup> See, amongst many others, *Shtukurov v. Russia*, 44009/05, 27 March 2008, § 114; and *Winterwerp v. the Netherlands*, 6301/73, 24 October 1979, § 39.

<sup>24</sup> Article 12 of the Directive 2000/43 stipulates that “Member States shall encourage dialogue with appropriate non-governmental organisations [...]”.

<sup>25</sup> See for instance the Directive 2000/43, Article 13 § 2; ECRI’s GPR No. 2, §§ 10-21; and the Paris principles.

<sup>26</sup> See ECRI’s GPR No. 2, § 14 b) and ECRI’s GPR No. 7, § 10.

## **5. Procedure before the Commission for Protection against Discrimination (Part V: Articles 24-32)**

### **Commission's actions (Article 24)**

76. Article 24 empowers the Commission to "initiate proceedings *ex officio*" under certain conditions which should be better clarified.

77. According to the third paragraph "[a]ssociations, foundations, and other civil society organizations" can also file a complaint to the Commission. This is commendable. However, the term "a higher number of people" needs to be clarified either in an explanatory memorandum or in the Rules of Procedure mentioned in the last paragraph of this Article. This comment is also valid for the similar terms employed in other Articles, such as "a larger group of people" (Article 25 § 5), "a larger number of persons" (Article 29), "a larger number of people" (Article 36 § 1).

### **Elements, language and terms of complaint (Article 25)**

78. Compared to the corresponding provision of the LPPD, second paragraph of Article 25 of the draft law is more respectful of minority rights. Fourth paragraph of this Article extends the time limit for filing a complaint to the Commission from three to six months. Both of these changes are welcomed.

79. However, this Article needs to be more detailed. First of all, in case a petition is incomprehensible and does not consist of the necessary facts for determining the act or the action of discrimination, the Commission must have the possibility of requesting it to be clarified by the applicant within a deadline. Secondly, while applications to the Commission should not be anonymous, the applicants should be given the possibility of requesting that their identity be kept confidential.

80. The time limits (5 days for the Commission to submit the complaint to the person against whom it was filed and 8 days for the said person to plead on complaint allegations) mentioned in the last paragraph seem to be very short. In the current law (Articles 25 § 7 and 27 § 2) the time limit for both cases is 15 days and should remain unchanged.

### **Prevention of conflict of interest (Article 26)**

81. Contrary to the LPPD, the draft law provides for reasons for recusal of members of the Commission, which is welcomed. It is recommended to state expressly that members of the Commission can recuse themselves and their recusal can be requested by parties.

### **Burden of proof (Articles 27 and 38)**

82. These Articles, which set out the rules on the shared burden of proof to be applied in discrimination cases before the Commission and courts, ensure stronger protection against discrimination as it facilitates considerably the chance of proving discrimination. These new provisions comply with the EU Directives.<sup>27</sup>

### **Commission's decisions (Article 28)**

83. The time limit within which the Commission shall give its opinion is shortened from 90 days to 45 days. The new time limit does not seem to be realistic. It is suggested that the current one remain.

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<sup>27</sup> See Article 8 § 1 of the Directive 2000/43 and Article 10 of the Directive 2000/78.

84. If the Commission fails to act within this time limit, the complainant can file a complaint to the State Administrative Inspectorate (§ 5). During the visit, the delegation was informed that the “State Administrative Inspectorate” is an administrative organ within the Ministry of Justice which can take a legal action before a misdemeanour court if the Commission fails to act within the abovementioned time limit.

85. In the opinion of the Venice Commission, the possibility of filing a complaint to a State administrative body for the failure of the Commission to act is detrimental to the image of the independence of the Commission. Given that the complainants can themselves take legal actions to the courts, it is recommended that paragraph 5 be deleted.

86. It can be deduced from paragraph 6 that the same issue can be submitted either to a court or to the Commission. If a case has already been introduced before a court, it cannot be referred to the Commission. Nonetheless, after the Commission gave its opinion on a case, it can be submitted to a court. It is recommended to specify that the Commission should refuse to accept a case for consideration if a complaint concerning an identical legal issue has already been introduced by another person before a court. For example, if a decision of a school administration to set up separate classes for Roma students has been contested by some parents before a court of law, the Commission should not accept complaints from other parents, even though they are not party to the court proceeding.

87. As recommended by ECRI (GPR No. 2, § 20), this Article should state expressly that proceedings before the Commission suspend the time limits for the initiation of subsequent court proceedings.

88. It would be useful to spell out that opinions of the Commission should be reasoned and members who vote against an opinion of the Commission have the right to write a dissenting opinion.

89. The opinions and recommendations of the Commission should be made public, with guarantees for keeping the complainant and witnesses confidential if requested and justified.

90. The second paragraph states that “the Commission shall propose measures to eliminate such violations of the right.” Even though it would not be possible to provide an exclusive list, it would be useful for the implementation of the law to mention at least the main measures that the Commission can propose as remedial actions.

91. The draft law should specify, not only with regard to the complaints but for all activities, with which majority opinions, recommendations or decisions will be adopted by the Commission.

92. This Article which is entitled “Commission’s Decisions” refers to “opinion” and “recommendations” of the Commission. However, since the failure to implement the latter is subject to acting by the Commission in court and sanctioned, it may be understood that the respective “opinion” or “recommendation” amounts actually to a compulsory decision which has to be implemented. The terminologies used by this Article create confusion and should be reconsidered.

93. As regards the fourth paragraph, it is not clear, in English translation, if the misdemeanour court, when asked by the Commission to examine the failure to implement its recommendations, is bound by these recommendations. In other words, does the misdemeanour court decide on the existence of the discrimination or only on the fact that the person to whom the recommendation is addressed failed to act upon the recommendation of the Commission? Neither is it clear whether a person can take an action to misdemeanour court for violation of Articles 7-12 of the draft law. These points should be clarified.

### **Inspection of documents and premises and cooperation with individuals and legal entities (Articles 30 and 31)**

94. These Articles confer on the Commission considerable powers for obtaining evidence and information with a view to performing its duties. The fact that the Commission will have the right to inspect directly “the documents and premises of all legal entities” without a previous judicial authorisation (Article 30) may, nevertheless, infringe other fundamental rights, in particular the right to privacy. The drafters are invited to redraft this provision in a way that respects other fundamental rights.

95. As recommended by ECRI (GPR No. 2, § 21 c), it may be useful for the Commission to have the right to question persons, in particular when conducting inquiries and deciding on complaints, as it is the case of the Ombudsman (Article 24 of the Law of Ombudsman).

96. It should also be expressly stated in the draft law whether the Commission shall or may submit a request to initiate infringement proceedings before the competent misdemeanor court in case of violation of Article 30 § 1 and Article 31.

### **6. Court protection (Part VI: Articles 33-41)**

97. Under the EU law - the Directives and Article 47 of the Charter of Fundamental Rights of the EU - and the ECHR (Article 13), the State has the duty to offer judicial protection and remedies to victims of violation of human rights, including those of discrimination. Part VI of the draft seems to respect this international obligation.

#### **Jurisdiction and procedure (Article 33)**

98. This Article recognises only the right to “file a complaint before the competent civil court”. As for the criminal dimension of the protection due by State’s authorities, it is regulated in the Criminal Code (in particular, in Articles 137, 144, 173, 319 and 417) and the Code of Criminal Procedure.

#### **Lawsuit (Article 35)**

99. The wording “can directly lead to discrimination” mentioned in the first subparagraph of the first paragraph excludes indirect discrimination and should thus be redrafted. This comment is valid also for Article 36 § 2, which contains the wording “may directly lead to discrimination”.

#### **Action for protection against discrimination of public interest (*action popularis*) (Article 36)**

100. Contrary to the LPPD (Article 41 § 4), this Article does not require the consent of the persons who can claim to be victim of discrimination for a complaint from the civil society organizations. This is a valuable step forward.

101. Given the wording of Articles 36 and 41, an association that has justified interest in protecting the interests of a particular group can initiate a proceeding under Article 33 of the draft law in order to protect its members but cannot intervene in a proceeding initiated under Article 33 by one of its members for the same issue if it does not deal with the protection of rights to equality and non-discrimination. This inconsistency between the wordings of two Articles should be clarified and, if needed, addressed.



### **Evidence (Article 39)**

102. In the opinion of the Venice Commission, there is no reason to restrict the use of statistical data and information obtained through situation testing as evidence to the court proceedings. They could be used for proceedings before the Commission as well. This Article can be added as a separate paragraph to Articles 27 and 38.

### **Court fees (Article 40)**

103. This provision exempts from court fees those initiating court proceedings in discrimination cases. This exemption, which does not exist in the LPPD, is welcomed.

### **7. Penalty provisions (Party VII: Articles 42-45)**

104. Compared to the current law, the draft law provides for much higher amounts of fines. As regards the last two paragraphs of Articles 42 and 43, the range between the minimum and maximum amounts to be imposed is also larger. The Venice Commission was informed by the Ministry that the wording “A fine of” in the first paragraphs of Articles 42 and 43 is a mistranslation and should be read as “A minimum fine of”. Consequently, as required by the EU standards,<sup>28</sup> the draft allows courts more latitude to impose effective, proportionate and dissuasive sanctions, which is very welcomed.

### **8. Transitional and final provisions (Party VIII: Articles 46-50)**

105. Article 46 states that the mandate of the members of the Commission shall cease as of the day of entry into force of the draft law, which means two or three years earlier for the current members. The early termination of mandate of members of an independent body such as the Commission is highly problematic as regards its independence. Such provisions make illusory the concept of independence of human rights bodies, as any new majority may follow this precedent and interrupt the mandate of an independent body by adopting a new law. It is, therefore, recommended to consider transitional solutions enabling current members to bring their mandate to its term and to ensure their replacement under appropriate conditions.

## **IV. Conclusion**

106. Compared to the LPPD, the draft law has a number of positive aspects. It provides for a shared burden of proof in discrimination cases, professionalisation of the Commission with full time employed members, financial independence of the Commission, and addition of new responsibilities and competences for the Commission. Furthermore, it deletes the considerable number of treatments enumerated in Articles 14 and 15 which are not deemed to involve discrimination, lays down the condition of a “gender-balanced participation” for the selection of the members of the Commission, establishes an administrative office for the Commission, allows courts more latitude to impose effective, proportionate and dissuasive sanctions, mentions expressly sexual orientation and gender identity as grounds for discrimination, empowers the relevant associations and other organisations to initiate proceedings on behalf or in support of victims of discrimination even if a specific victim is not referred to, exempts court proceedings in discrimination cases from court fees, etc.

107. The Venice Commission would however recommend that the drafters reconsider as a priority the following issues in order to improve the quality of the draft law and to ensure that it fully conforms to international and European standards:

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<sup>28</sup> See Article 17 of the Directive 2000/78 and Article 15 of the Directive 2000/43.

- Reviewing the list of discriminatory grounds and improving the definitions used in the draft;
- Providing additional safeguards so as to ensure a real independence for the Commission, in particular by amending provisions concerning the election and dismissal of its members, providing for a unique mandate for its members, and removing the possibility of filing a complaint to the State Administrative Inspectorate in case the Commission fails to act in the legal deadline;
- Revising Article 17 with a view to ensuring, in the composition of the Commission, a pluralist representation of the social forces involved in the protection and promotion of equality;
- Reconsidering the early termination of mandate of members of the Commission as result of the entry into force of the draft law, which is highly problematic in terms of independence of the Commission.

108. The drafters are recommended to revise the draft law by taking into account the relevant previous recommendations of the Venice Commission as well.

109. Although a number of relevant civil society organisations and international organisations took part in the working group which prepared the draft law, the Venice Commission recommends that the authorities organise additional extensive consultation processes not only with the NGOs and international community but also with the general public, in particular the marginalized groups.

110. The Venice Commission remains at the disposal of the authorities for any further assistance.