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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON PROTECTION AGAINST DISCRIMINATION

of "the former Yugoslav Republic of Macedonia"

Adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008)

on the basis of comments by

Ms Lydie ERR (Member, Luxembourg)
Mr Fredrik SEJERSTED (Substitute Member, Norway)

I. Introduction

1. By a letter dated 16 June 2008, Mr Meskov, the then Minister of Labour and Social Policy of "the former Yugoslav Republic of Macedonia", requested the expertise of the Venice Commission on the draft law on protection against discrimination (CDL(2008)135).

2. A similar request was sent by the Macedonian authorities to OSCE/ODHIR.

3. The Venice Commission received a first draft which was sent in August but which contained several inconsistencies. In September, the Venice Commission received another, and much revised, draft which constitutes the basis of the comments made by the rapporteurs; this draft will be referred hereafter also as the "September draft".

4. Mr Sejersted, substitute member of the Venice Commission in respect of Norway, and Ms Err, member of the Venice Commission in respect of Luxembourg, were appointed as rapporteurs and presented their comments (CDL(2008) 143 and CDL(2008)136 respectively).

5. The Venice Commission and OSCE-ODHIR decided to have a common fact-finding mission to Skopje. Mr Sejersted and Ms Martin from the Venice Commission and Mrs Nasrin Kahh, Legal adviser at the ODHIR's tolerance and non-discrimination department, went to Skopje on 24-26 November 2008.

6. The mission was organised in an excellent manner by the OSCE mission in Skopje (OSCE SMMMS); the delegation is particularly grateful to Mrs Zaneta Stojkova, National rule of law Officer. Meetings with the Ministry at the political and administrative level, with the Office of the Ombudsman, with key NGO representatives, as well as with the Director of the Council of Europe office in Skopje took place and the representatives from the OSCE SMMS briefed extensively the delegation beforehand and participated in the meetings and discussions.

7. 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 the new anti-discrimination legislation in the "the former Yugoslav Republic of Macedonia".

8. The following opinion was drawn up on the basis of the rapporteurs' comments and of the information gathered during the fact-finding mission ; it was adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008).

II. Background information

A. The draft law

9. In the course of the mission, the delegation was informed by the Ministry that the draft law under consideration (the "September draft") is not longer the final official draft for the new anti-discrimination law. Indeed, a new November version, which is not official yet and is only available in Macedonian, has been prepared as the result, according to the authorities, of six public debates that took place in the country in the last weeks.

10. The authorities are to organise a seventh and last public debate in Skopje in the near future. Once this public process is completed, the Ministry might consider further modifications and the final proposal should then be presented by the Government to the Parliament by the end of 2008 with the ambition that it can be adopted well before the local and presidential elections in March 2009.

11. In agreement with OSCE/ODHIR, it has been decided that the Venice Commission would assess the "September draft " and not wait for the final official proposal from the Government.

12. It is so in the first place because this is the draft which had been sent formally to the Venice Commission; in addition, and more importantly, this will give the authorities the possibility of following the Venice Commission's recommendations before sending the final proposal to the Parliament.

13. OSCE/ODHIR, for its part, will intervene at a later stage, by assessing the final proposal which will be presented to the Parliament and will see whether the Venice Commission opinion has been taken into account.

14. The draft law has been presented by the authorities as part of the national programme for European Union integration.

B. The situation in "the former Yugoslav Republic of Macedonia"

15. "The former Yugoslav Republic of 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.[1]

16. It has also been pointed out recently by the Commissioner for Human Rights of the Council of Europe that the situation in "the former Yugoslav Republic of 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.[2]

III. General remarks

17. The following opinion on the draft law on protection against discrimination has been conducted in the light of the Council of Europe standards, especially Article 14 of the European Convention on Human Rights[3] (ECHR), its Protocol 12,[4] the European Social Charter, EU directives against discrimination[5] and with specific attention to ECRI's documents (Recommendation no. 7 of 2002) regarding the National Legislation on the Fight Against Racism and Racial Discrimination.

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[1] 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 in 2009 for adoption in 2010.

[2] 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).

[3] Article 14 ECHR reads:
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[4] Article 1 Protocol 12 ECHR reads:
"Article 1 . General prohibition of discrimination
1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2 No one shall be discriminated against by any public authority."

[5] Especially the Council directive 2000/43/EC from the 29th of June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council directive 2000/78/EC from the 27th of November 2000 establishing a general framework for equal treatment in employment and occupation.

18. The following opinion is *not* to be seen as an attempt to assess whether the 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 would fall outside the scope and work of the Venice Commission.

19. At the constitutional level, a general provision on the principle of equality is laid down in Article 9.[6]

20. The draft presented so far by the authorities for a new and general law "On protection against discrimination" constitute an important step in the fight against discrimination and in improving the normative protection against discrimination in the country.

21. 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.

22. The draft law is well structured and divided into eight parts, with 35 articles altogether.

23. However, a considerable number of issues remain problematic and make this draft a rather complex piece of legislation, quite abstract and general, leaving too much room for discretion and which would not meet, at this stage, international standards. There are also doubts whether the draft as it stands can be effectively implemented and operated in a way that would actually reduce discrimination in the country.

24. In addition to specific comments related to several provisions of the draft, which will be elaborated below under paragraphs 36-114, the very nature of the subject of anti discrimination calls for additional, separate and general consideration with regard to the law-making process and technique, as well as to the implementation of the law .

25. In principle, and in the view of the Venice Commission, in the context of anti-discrimination legislation it might be desirable to involve the civil society.

26. The legislative process of the current draft seems to have suffered from a lack of transparency and involvement of the civil society. Indeed, according to the discussions the delegation had with the NGO representatives in Skopje, "the September draft" is not the product of the working group that was set up in early 2008 and in which a number of NGOs, organised into an informal "coalition" for anti-discrimination, had been invited by the Ministry of Labour and Social Policy to participate.

27. It seems that although the NGOs have been consulted in theory, the "September draft" does not reflect any of their comments and reveals that they have had very little influence on the drafting and content of the law.

28. While the Venice Commission can only but welcome the fact that NGOs have been invited to participate actively in the working process, the transparency and legitimacy of the legislative process remains dubious if it is not conducted in a genuine manner so as to take into account NGOs' inputs and comments.

[6] Article 9 of the Constitution reads: "Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status".

29. With regard to the legal technique, the draft presented by the Ministry is a short and rather abstract text, leaving a lot of room for interpretation and discretion (administrative and judicial). First, there is a very wide prohibition, covering all possible sorts of discrimination. Second, there are equally wide and general exceptions, which leave a very significant margin of discretion to those applying the law.

30. Whether an act on discrimination issues should be abstract or concrete depends on national legal culture and context, on the state of the national legal community, on the administration and the courts.

31. However, the assessment of any draft in the light of international standards includes the evaluation of the legal certainty of the draft and of an adequate frame for a genuine implementation and functioning of the law.

32. Therefore, the Venice Commission is of the opinion that if the legislature is to adopt an act on anti-discrimination as open and general as the "September draft", an explanatory memorandum or some other sort of authoritative text on how the act should be interpreted and applied should be provided. Such a memorandum or explanatory report should also provide references, cross-references and links to the other parts of the national legislation, and to the relevant sources on international and European law and standards.

33. Moreover, the choice of another legal technique that would make a longer and more detailed text, trying to legislatively solve as many questions as possible, leaving as little room as possible for interpretation and discretion, could also be further contemplated[7] by the authorities. All the more so considering the scepticism of the NGOs at the ability of the national courts to effectively apply and develop a general and abstract law on anti-discrimination, a view which 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[8].

34. Additionally, the draft law should, at any rate, be harmonized and cross referenced with other relevant existing laws, such as the criminal code, the civil code, the law on misdemeanours, the law on gender equality, employment law, the law on freedom of religion, general rules on administrative and judicial procedure.

35. Finally, the Venice Commission holds that in the field of anti-discrimination it is not only important to get good legislation in place but also to ensure that such good legislation will be implemented correctly and effectively. While the legal approach is crucial, strengthening the institutions responsible for the application of the law and for taking comprehensive administrative actions are equally essential.

[7] For a rather critical analysis of law drafting in "the former yugoslav Republic of 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.

[8] Cf his report of 11 September 2008 §§ 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.

IV. Specific comments on the "September draft"

A. Part I - General remarks

36. **Article 1** states that the law "regulates and advances the right to equality and provides protection against all forms of discrimination".

37. This is a good a starting point which is to be welcomed. The Venice Commissions notes also with satisfaction that the draft mentions the "right of equality", and, in doing so, goes beyond the wording of Article 14 of the ECHR which does not mention the principle of equality as such.

38. **Articles 1 and 2** are quite similar since the latter refers to the rights guaranteed by the national Constitution and by international treaties. These two articles could be merged into one single article.

39. **Article 3** regulates the so-called "discriminatory basis", that is, 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.

40. 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. The Venice Commission welcomes this in principle.

41. However, the drafters should take into account that such an approach may entail the risk that the concept of discrimination may become diluted in a way which could weaken the protection against more serious discriminatory actions.

42. Moreover, the criterion of citizenship mentioned in the draft seems to contradict the terms of Article 15.3 of the draft, which provides that "different treatment of foreigners shall not be considered as discrimination". The intentions of the drafters in this regard should be clarified.

43. Additionally, with regard to the English version of the draft, the term "political orientation" should be replaced by "political conviction" and the reference to "family or marital condition" by "family or marital status".

44. **Article 4** states that the law "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 welcomed by the Venice Commission.

45. However, the wording of this article suggests that legal persons or entities (like associations, organisations, companies etcetera) are excluded. Even though the protection of private persons is the most important, the Venice Commission would recommend extending the protection to legal persons and entities.

46. The draft laws suggest in several parts that the obligation not to discriminate applies both to public authorities and to private persons (natural and legal), although this is not explicitly stated in the first articles of the law. Article 5 refers exclusively to public authorities.

47. The Commission considers that provision should be made, for example in Article 4, that a prohibition of discrimination exists for "all public and private authorities". While the Commission is cognizant that in respect of racism such obligation extends to all natural and legal persons, it considers that in other areas certain kinds of different treatment by natural persons which might well be perceived as discrimination are not prohibited by current international standards.

48. **Article 6** contains four definitions of "affirmative measures", "marginalized groups", "sexual orientation" and "sexual harassment". Whereas the intention of the drafters to define the concepts used in this draft law should be welcomed in principle, the current wording and position in the draft could be subject of improvement.

49. With regard to the notion of positive action, the Venice Commission would propose devoting Article 6 to the sole definition of the important concept of positive action which is currently only referred to as " affirmative measures and positive discrimination" under Article 6 and as an exception under Article 15.2 of the current draft. The definition could be modeled on ECRI Recommendations and the EC directives[9].

50. Moreover, according to ECRI's policy, the use of the term or notion of "positive discrimination" as it is used in the present draft should be avoided[10].

51. The definition could also recall specifically that "affirmative measures" are not contrary to the principle of equality as long as they are temporary and aim to overcome an existing discrimination.

52. With regard to the other definitions, since the next section, on "Forms of discrimination", also contains a number of definitions, the Venice Commission would suggest to better harmonize these parts.

53. Moreover, the first two 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.

54. The definition of a "marginalized group" is not quite clear, nor is the one on "sexual orientation". On the whole, it seems that many questions regarding discrimination because of "sexual orientation" are not really further regulated by the draft.

55. The Venice Commission would hence recommend a better wording in the definition of "marginalized groups" and "sexual orientation".

56. With regard to "sexual harassment", the requirement that injury must be intentional is unsatisfactory. The phrase "whose goal is to cause injury" should be changed, for example by introducing the concept of "purpose or effect is to…".

57. A better harmonization with the body of the draft would also be welcomed. For instance the section on "sexual harassment" should be moved to Article 8 on "harassment".

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[9] 2000/43/EC: Article 5, Positive action. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. 2000/78/EC: Article 7, Positive action. 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

[10]. ECRI never refers to the term or notion of "positive discrimination" as it is used in the present draft. There are two main reasons for this: first, legally, "positive discrimination" does not make sense. According to the case-law of the European Court of Human Rights, discrimination is unjustified differential treatment. Thus, if differential treatment is justified (as positive action always is) there cannot be discrimination. Secondly, politically, the term "positive discrimination" sends the wrong message: when defined as discrimination, positive action is automatically discredited in the eyes of the public.

B. Part II - Forms of discrimination

58. 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 at the same time defines different "forms" of discrimination and regulates some specific issues, in particular the provision on disability in Article 9.

59. The definitions of direct and indirect discrimination in **Article 7** seem to be inspired by those used in EC directives 43/2000 and 78/2000 only in part as they are more detailed, which might lead to unnecessary difficulties of interpretation.

60. Therefore, the Venice Commission would advise to follow the definitions used by ECRI on racial discrimination.[11] This would also allow the introduction of the notion of "apparently neutral" in the definition of indirect discrimination, whereas the current wording narrows the disposition to "neutral content'.

61. Additionally, the wording of ECRI's Recommendations would allow the introduction of the concept of "objectively justifiable different treatment" in the definition of both direct and indirect discrimination, subject to strict proportionality review, and would consequently invalidate the need for the "general exception" provided for in Article 14, which in its present form is a far too wide and open-ended exception.

62. **Article 8** dealing with the issue of harassment could be improved. The concept of "purpose or effect" should be introduced in the first paragraph, instead of "goal".

63. The fact that harassment can be considered as a threat of discrimination constitutes a progressive approach with regard to European directives and should be welcomed.

64. 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.

65. The rules in **Article 9** on the disabled go quite far, so as to make a lack of architectonic adaptation of public places to the needs of the disabled a form of "harassment". This is well intentioned, and should probably be welcomed.

66. However, at the same time it is an example that the force of the legislation may be diluted by trying to cover so different situations as for example severe cases of ethnic and racial discrimination and lack of public architectural adaptation for the disabled in one and same set of provisions. The drafters are invited to take this drawback into account.

67. **Articles 10, 11 and 12** extend the concept of discrimination to cover "incitement", "segregation" and "victimization". This is to be welcomed, as it goes beyond EC Directives.

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[11] 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.

68. 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. Moreover, the title "victimization" doesn't reflect properly the content of the provision.

69. The provision on aggravation in **Article 13** is in itself satisfactory, 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

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

71. The "general exception" expressed in **Article 14** is far too wide and open-ended and in its present form should therefore be taken out.

72. If an article of this nature is to be kept, then 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.

73. The list of 12 "special exceptions" in **Article 15** is also problematic, in several respects. The wording is unclear, and the form differs from one exception to the other. In addition, many of the exceptions are formulated very widely, as for example no 3, and also difficult to reconcile with Article 3 (see §§ 39 to 43 above). 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. Further, 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.

74. Finally, many of the "special exceptions" refer to some kind of "affirmative action". As it has been said under § 61 above, 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.

75. The Venice Commission is of the opinion that 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.

76. In addition, as said at paragraph 32 above, there should be an explanatory memorandum or other authoritative text 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

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

78. It is particularly difficult from the wording to understand whether the narrowing of the scope applies both to the public authorities and to private persons and entities, whether it is limited to the 9 sectors mentioned - if so a number of important areas of the public sphere for instance would be excluded from the "area of implementation" and left open to discrimination (for instance trade and commerce, public procurement, energy, agriculture, the armed forces, and all other sectors not mentioned on the list).

79. In view of the Venice Commission, the content and purpose of Article 16, and how such a reduction in the "area of implementation" can be legitimate raise not only serious concern on several aspects but also would be impossible to reconcile with European and legal standards.

80. With regard to international standards, the Venice Commission reminds the national authorities that the list contained in ECRI Recommendation N°7 article 7 designates the sectors that should "notably" be covered by the prohibition of discrimination. 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.

81. Moreover, even though the EC directives against discrimination also contain lists of the sectors they apply to, this 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. 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.

82. Therefore the Venice Commission would strongly recommend that Article 16 be taken out, unless it has another meaning than what it appears to have in the present wording.

83. Moreover, if there is to be a provision on "area of implementation", then this should be in line with the ECRI standards, and emphasises that the law 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.

84. On a technical point of view, an article on the area of implementation should be moved at the beginning of the law, for instance after Article 3, following in this way the structure of the relevant European directives. Current Article 4 could be merged into this article, since it deals also with the area of implementation of the draft law.

Part V – Institutional framework

85. According to **Article 17** of the draft, the Ombudsman "in the framework of its competencies" is to be the "body in charge for protection against discrimination".

86. In the field of anti-discrimination, it is widely held that in addition to the ordinary institutions (ordinary public authorities and the courts), there is a need for a specialized independent body.

87. 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."*

88. In principle, the Venice Commission would therefore support the creation of specialized anti-discrimination bodies in line with ECRI Recommendation No 7.

89. This has also been advocated by the coalition of NGOs, which wants a new specialized body, in line with ECRI Recommendations[12].

90. However, the principle of a specialized anti-discrimination must be weighed against the national context and the present stage of administrative development in "the former Yugoslav Republic of 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".

91. Whether the Ombudsman would be the best institution in place to tackle anti-discrimination issues remains, however, questionable for several reasons.

92. Firstly, the Ombudsman does not have the powers that ECRI considers necessary, neither against the administration nor (especially not) against private persons.

93. Secondly, to make the present Ombudsman the "body in charge for protection against discrimination", in addition to the other duties of this institution, 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. At least amendments to the current law on the Ombudsman would be required.[13]

94. Finally, one must consider whether the possibility to adapt and enlarge the competencies of the Ombudsman especially against private persons would not even call for constitutional changes since the wording of Article 77 of the Constitution seems to limit the Ombudsman's competencies to the public sphere [14].

95. This being said, the Venice Commission could, under the prerequisite that this would be constitutionally feasible, consider it acceptable for the time being to entrust the responsibility for protection against discrimination to the Ombudsman – provided (i) that the Ombudsman institution be strengthened in terms of resources (manpower and funds) necessary to fulfil its new tasks, (ii) that its legal competences be adapted to the new challenges, and (iii) that it be reorganized in a way which ensures that the necessary number of staff has anti-discrimination as their only or main task.

96. If these criteria are not met, then the present institutional structure will, in the view of the Venice Commission, not be good enough to ensure that the law is applied and monitored at a level compatible with European standards.

97. Additionally, Article 17.2 leaves open the possibility that the protection against discrimination could also "be taken by another body provided by law". In the opinion of the Venice Commission, if another body is to be in charge of discrimination issues it should be already designated in the current draft[15] .

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[12] 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.

[13] According to §31 of the Information note on the fact-finding visit by the Chair of the Committee, the Ombudsman, Mr Memeti, has also already voiced the need to amend the current law. See AS/Mon(2008)31 rev.

[14] Art. 77 of the Constitution reads: " The Assembly elects the Public Attorney.
The Public Attorney protects the constitutional and legal rights of citizens when violated by bodies of state administration and by other bodies and organizations with public mandates.
The Public Attorney is elected for a term of eight years, with the right to one reelection.
The conditions for election and dismissal, the sphere of competence and the mode of work of the Public Attorney are regulated by law."

[15] It stemms from the 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.

98. The possibility provided in Article 18 for the Ombudsman to decide to take part – at the request of a victim - in court proceedings is welcomed. However, the draft law could further precise the criteria for such a decision.

Part VI - Legal protection

99. Section 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.

100. The provisions of disciplinary responsibility, **Article 19**, and on administrative proceedings are very brief and would in the opinion of the Venice Commission be effective and functional only if there were a more complete reference to general administrative law on this issue. Cross references would here also be needed.

101. With regard to the provision on administrative procedure in **Article 20**, the Venice Commission would recommend adding a provision on the possibility to annul an administrative decision and for the victim to get compensation. Furthermore, in order to make this provision fully operational in practice, additional regulation should be foreseen on the extent to which discrimination can be invoked as the basis for declaring an administrative act invalid, the conditions for this, and whether the effect should be *ex tunc* or *ex nunc*.

102. The Chapter on court proceeding for protection against discrimination (Article 21 to 29) would in general benefit from cross references to the relevant provisions of ordinary procedural law.

103. **Article 21** deals with the right to protection and specifies that cases shall be dealt with "without delay". The adding of a reference to the possibility of urgent proceedings would be welcomed.

104. **Article 25** deals with the burden of proof and seems to provide for a partition of the burden of proof. If so, this would in line with the standards of the EC Directives and ECRI's Recommendation N°7, and the Venice Commission welcomes this.

105. However, the notion of partition of proof could be could be further clarified by taking further direct inspiration in the wording from EC Directives or ECRI's GPR 7, §11[16].

106. **Article 29** provides for the possibility for legal entities (like associations) to join lawsuits for the protection against discrimination. This is welcomed.

107. The Venice Commission however draws the attention of the drafters to the fact that legal entities are not foreseen in the provision defining possible victims (Article 4). In this regard, the Venice Commission reiterates its recommendation to extend the protection to legal entities (see comments under Article 4).

Part VII – Misdemeanour Sanctions

108. 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 and too many categories for different sorts of perpetrators (private persons, professionals, legal entities).

[16] "11. The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination."

109. From a legal-technical point of view, the Venice Commission would recommend improving these articles and particularly with regard to the proceedings (how the fines are decided, by whom, according to which procedures, etcetera).

110. Moreover, setting in a law the exact level of the fine might be problematic since it would need to go through a full legislative process of amendment in order to adjust the level of the fine with the economy, in case of inflation for instance. The Venice Commission invites the drafters to choose other methods of regulation.

111. With regard to the level, the Venice Commission notes that within each category the range is very narrow and does not allow a proper distinction between serious and fairly innocent occurrences. Furthermore, it does not take into account the question of aggravation which is regulated in Article 13. The Venice Commission would recommend reconsidering this issue.

112. Finally, apart from the five provisions on fines for misdemeanours, there is no mention in the draft law of penal sanctions against more severe forms of discrimination.

113. There is, in the opinion of the Venice Commission, clearly a need to criminalize particularly serious acts of discrimination far beyond the relatively modest fines in the draft law, and this is for example laid down in some detail in ECRI Rec no 7 articles 18 to 23[17]. If the general criminal code of the Former Yugoslav Republic of Macedonia contains such provisions, there should be cross references to the Code. If such provisions do not exist, the Venice Commission reminds the national authorities that they would have to be introduced in order to fulfil ECRI standards.

114. **Article 35** deals with the entry into force of the draft, and sets a distinction between the entry into force of the law and the implementation of the law which should take place 3 months after the entry into force. This is an unusual provision and could be replaced by an entry into force on a specific date independently from the publication of the Law in the Official Gazette.

[17] Articles 18 to 23 of ECRI'S Rec.7 reads:
IV. Criminal law
18. The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination, b) public insults and defamation or c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes; f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e); g) the creation or the leadership of a group which promotes racism ; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f); h) racial discrimination in the exercise of one's public office or occupation.
19. The law should penalise genocide.
20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.
21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.
22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.
23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.

Conclusions

115. The intention to provide for a general law on protection against discrimination constitutes an important step in the fight against discrimination and in improving the normative protection against discrimination in the country. This should be particularly welcomed and encouraged.

116. However, the Venice Commission considers that in several respects the draft under consideration would neither meet international standards nor national requirements for a genuine and efficient implementation of the prohibition of discrimination.

117. The Venice Commission would therefore strongly recommend that the drafters

- substantially revise the present draft before adopting the new law by taking into account the comments of the Venice Commission and the ODHIR. The coalition of NGOs and the civil society should be genuinely involved in the re-drafting process;

- strive to make the draft more clear and precise in general;

- state explicitly that the prohibition of discrimination applies to all public and private authorities;

- improve the definitions used in the draft, notably with regard to direct and indirect discrimination, positive action and burden of proof;

- revise the terms of the scope of application of the law;

- narrow down the exceptions and introduce a general principle of proportionality;

- strengthen the institutional system for implementing and monitoring the law, 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 current draft;

- produce 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.

118. The Venice Commission remains at the disposal of the authorities of “the former Yugoslav Republic of Macedonia” for any further assistance.