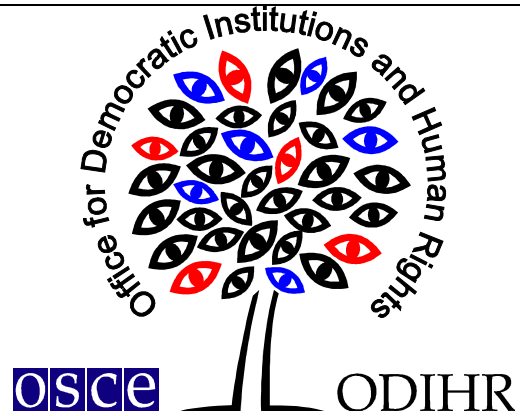


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OPINION ON THE DRAFT LAW ON AMENDMENTS TO THE LAW ON PROHIBITION OF DISCRIMINATION OF MONTENEGRO

based on English translation of the draft law

provided by the Ministry of Human and Minority Rights of Montenegro

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Annex 1: Draft Law on Amendments to the Law on the Prohibition of Discrimination of Montenegro

I. INTRODUCTION

1. *Since early 2013, a working group established by the Minister for Human and Minority Rights has been working on amending the Law on the Prohibition of Discrimination of Montenegro (hereinafter “the Anti-Discrimination Law”).*
2. *On 12 June 2013, the Minister for Human and Minority Rights of Montenegro sent an official letter to the OSCE Mission to Montenegro requesting the legal review of the draft Law on Amendments to the Law on Prohibition of Discrimination.*
3. *On 19 June 2013, the OSCE Mission to Montenegro forwarded the letter to OSCE/ODIHR, along with the English translation of the draft Amendments provided by the Ministry for Human and Minority Rights of Montenegro, asking OSCE/ODIHR to prepare a legal review of the compliance of the draft Amendments with international human rights standards and OSCE commitments.*
4. *Previously, OSCE/ODIHR had already issued an Opinion on the Anti-Discrimination Law in March 2013¹ (hereinafter “the OSCE/ODIHR Opinion on the Law”), to support and inform the discussions of the working group. In 2009 and 2010, both the OSCE/ODIHR,² and the Venice Commission,³ had reviewed draft versions of the Anti-Discrimination Law.*
5. *This Opinion was prepared in response to the Minister for Human and Minority Rights’ letter of 12 June 2013.*

II. SCOPE OF REVIEW

6. The scope of this Opinion mainly covers the draft Law on Amendments of the Law on Prohibition of Discrimination (hereinafter “the Draft Law”) submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and policy anti-discrimination framework in Montenegro.
7. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international anti-discrimination standards, as found in the international agreements and commitments ratified and entered into by Montenegro. Additionally, the Opinion also refers to EU anti-discrimination standards, given Montenegro’s aspirations to join this organization.⁴

¹ OSCE/ODIHR Opinion on the Law on Prohibition of Discrimination in Montenegro, NDISCR - MNG/226/2013 (AT), issued on 27 March 2013, available at http://legislationline.org/download/action/download/id/4355/file/226_NDISCR_MNG_27%20March%202013_en.pdf.

² OSCE/ODIHR Comments on the draft Anti-Discrimination Law in Montenegro, No. NDISCR-MNG/135/2009 (TND), issued on 9 July 2009, available at <http://www.legislationline.org/documents/id/15593>, and OSCE/ODIHR Comments on the draft Law on Prohibition of Discrimination in Montenegro, No. NDISCR-MNG/150/2010 (TND), issued on 27 January 2010, available at <http://www.legislationline.org/documents/id/15776>.

³ Opinion on the draft Law on Prohibition of Discrimination of Montenegro, CDL-AD(2009)045, Opinion no. 541/2009, of 12 October 2009, adopted by the Venice Commission at its 80th Plenary Session (9-10 October 2009) and Opinion on the draft Law on Prohibition of Discrimination of Montenegro, CDL-AD(2010)011, Opinion no. 564/2009 of 18 March 2010, adopted by the Venice Commission at its 82nd Plenary Session (12-13 March 2010).

⁴ Although not a member of the EU, Montenegro was officially granted candidate status for EU membership on 17 December 2010 and has to ensure compliance of its legislation with EU legislation. The 2012 Montenegro Progress Report of the European Commission noted that some progress has been made in the

8. The OSCE/ODIHR also reiterates that the recommendations made in the OSCE/ODIHR Opinion on the Law remain valid with regard to Articles not amended by the Draft Law, and that this Opinion builds upon these recommendations, as appropriate, for the provisions amended by the Draft Law. The Opinion also reflects the contents of previous OSCE/ODIHR opinions and comments, as applicable.
9. This Opinion is based on an unofficial translation of the Draft Law provided by the Minister for Human and Minority Rights of Montenegro, which has been attached to this document as Annex 1. Errors from translation may result.
10. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to legislation and policy combating discrimination in Montenegro, that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

11. At the outset, it should be noted that this Draft Law generally reflects the requirements set by international anti-discrimination standards. The authors of the Draft Law are to be commended for broadening the scope of the competences of the Protector of Human Rights and Freedoms and for elaborating on the provisions relating to sanctions for infringements of the Anti-Discrimination Law.
12. At the same time, certain definitions contained in the Draft Law could be refined and the powers of the courts could be expanded to ensure enforcement of the anti-discriminatory measures. In order to ensure the full compliance of the Law with international standards and to make certain provisions more effective, the OSCE/ODIHR thus recommends as follows:

1. Key Recommendations

- A. to add to Article 2 par 2 of the Draft Law (amending Article 2 par 5 of the Anti-Discrimination Law) that the targeted conducts shall be deemed discrimination “unless [...] objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved”; [par 24]
- B. to re-consider the structure of Chapter II of the Anti-Discrimination Law and added value of reiterating special types of discrimination in separate provisions under Chapter II; [pars 26-27, 34 and 37]
- C. to amend Article 4 of the Draft Law (amending Article 7 of the Anti-Discrimination Law) as follows:
 - 1) refer to harassment as “unwanted conduct”; [par 29]
 - 2) expand the wording of the definition to refer to the “purpose *or effect* of violating personal dignity”; [par 30]
 - 3) add the reference to “degradation” when mentioning “intimidation, feelings of humiliation or offensiveness or creates hostile environment”; [par 31]

area of anti-discrimination policies but that the legislation still presented several shortcomings. It is available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf.

- D. to amend Article 5 of the Draft Law (amending Article 8 of the Anti-Discrimination Law) as follows:
 - 1) expressly mention “verbal, non-verbal or physical conduct” as the types of “unwanted behaviour” falling under the scope of the definition of “sexual harassment”; [par 33]
 - 2) add the reference to “degradation” when mentioning “intimidation, feelings of humiliation or offensiveness or creates hostile environment”; [par 33]
- E. to consider deleting Article 6 of the Draft Law (amending Article 17 of the Anti-Discrimination Law) or, alternatively, to amend it as follows:
 - 1) clarify whether the definition of “discrimination based on religion and belief” is to be deleted and replaced by the definition of “racial discrimination”; [par 34]
 - 2) narrow the list of the grounds stated under the definition of “racial discrimination”; [par 36]
 - 3) delete the reference to “the belief that [the grounds] justify the notion of superiority of a person or group of persons towards those who are not members of that group”; [par 36]

2. Additional Recommendations

- F. to amend Article 16 par 3 of the Anti-Discrimination Law to include the requirement of proportionality; [par 21]
- G. to consider whether to incorporate other justifications of direct discrimination, namely on the basis of age and/or religion or belief, under Article 2 par 1 of the Draft Law (amending Article 2 par 3 of the Anti-Discrimination Law); [par 22]
- H. to amend Article 2 par 1 of the Draft Law (amending Article 2 par 3 of the Anti-Discrimination Law) to expressly state that direct discrimination is prohibited in all cases except in cases involving a “genuine occupational requirement as defined under Article 16 par 3”; [par 22]
- I. if the intention is to delete the definition of “mobbing”, expressly state, under Article 5 of the Draft Law, that the title “Mobbing” shall be deleted and replaced by the title “Sexual Harassment” and that the definition of mobbing shall be deleted and replaced by the definition of “sexual harassment”; [par32]
- J. to expand the scope of competences of the Human Rights Protector under Article 9 of the Draft Law (amending Article 21 of the Anti-Discrimination Law) to include the monitoring of legislation; [par 38]
- K. as appropriate, to revise the wording of Article 13 of the Draft Law (amending Article 30 of the Anti-Discrimination Law) regarding the possibility of third party intervention in court proceedings; [par 40]
- L. to consider amending Article 13 par 1 of the Draft Law (amending Article 30 par 1 of the Anti-Discrimination Law) so that also compensation lawsuits may be filed on behalf of other people; [par 41]

- M. to consider broadening the scope of Article 17 of the Draft Law to include the possibility of fines for all cases of discrimination based on all grounds mentioned in the Anti-Discrimination Law; [par 43]
- N. to clarify under Article 17 of the Draft Law:
 - 1) whether the sanctions apply to the representative of the legal person or authority, or to the direct perpetrators of the discriminatory behaviour; [par 45];
 - 2) the meaning of the term “entrepreneur”. [par 45]

IV. ANALYSIS AND RECOMMENDATIONS

1. International Anti-Discrimination Standards

- 13. This Opinion analyzes the Draft Law from the viewpoint of its compatibility with relevant international human rights standards and OSCE commitments. General international anti-discrimination standards applicable in Montenegro can be found in Article 26 of the International Covenant on Civil and Political Rights⁵ (hereinafter “ICCPR”), and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶ (hereinafter “ECHR”) and its Protocol No. 12. In addition, Montenegro has ratified numerous specific anti-discrimination instruments, among others the UN Convention on the Elimination of All Forms of Racial Discrimination⁷ (hereinafter “CERD”), the UN Convention on All Forms of Discrimination against Women⁸ (hereinafter “CEDAW”), and the UN Convention on the Rights of Persons with Disabilities⁹ (hereinafter “CRPD”).
- 14. As a candidate country to join the European Union,¹⁰ Montenegro has undertaken to make its legislation compliant with the EU *acquis*. Therefore, this analysis of the Draft Law will take into account relevant EU legislation, particularly the key EU directives in the field of anti-discrimination.¹¹

⁵ The United Nations International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and Montenegro succeeded to it on 23 October 2006.

⁶ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953. Montenegro ratified the Convention, as well as Protocol No. 12, on 3 March 2004.

⁷ The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly of the United Nations in resolution 2106 (XX) of 21 December 1965 and signed on 7 March 1966. Montenegro succeeded to this Convention on 23 October 2006.

⁸ Convention on the Elimination of All Forms of Discrimination against Women, adopted by resolution 34/180 of the General Assembly at its thirty-fourth session, 18 December 1979. Montenegro succeeded to this Convention on 23 October 2006.

⁹ Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. Montenegro ratified this Convention on 21 September 2010.

¹⁰ Following the entry into force of the Stabilisation and Association Agreement with the EU on 1 May 2010, Montenegro was officially granted candidate status for EU membership on 17 December 2010. Accession negotiations between the EU and Montenegro officially started on 29 June 2012.

¹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter the “EU Employment Equality Directive”); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (hereinafter the “EU Racial Equality Directive”); Council Directive 2004/113/EC of 13 December 2004 on equal treatment between men and women in the access to and supply of goods and services; and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal

15. Of the various OSCE commitments focusing on equal treatment, the Vienna Document is among the most specific. It stresses that all OSCE participating States shall “ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹²

2. General Provisions

16. At the outset, OSCE/ODIHR would like to reiterate some of the main recommendations of the OSCE/ODIHR Opinion on the Law, left un-addressed by the Draft Law, particularly as regards: the scope of the Anti-Discrimination Law and its applicability to the private sector;¹³ the absolute prohibition of *racial* segregation (Article 9 of the Law);¹⁴ special sanctions attached to cases of grave forms of discrimination (Article 20 of the Law);¹⁵ ensuring the consistency of the Anti-Discrimination Law with the Law on Human Rights Protector;¹⁶ and expanding the powers of the courts (Article 26 of the Law).¹⁷
17. However, as regards the Draft Law, it is welcome that its Article 1, amending Article 1 par 1 of the Anti-Discrimination Law, broadens the scope of the Law to include not only the prohibition of, and the protection from discrimination, but also the promotion of equality.
18. Article 2 of the Draft Law removes the derogations for justifying direct discrimination under Article 2 par 3 of the Anti-Discrimination Law, thus prohibiting direct discrimination in all cases. It must be noted that such a provision would be stricter than the EU legislation, in that it would not allow for any derogation, while the EU Equality Directives provide that Member States *may* decide to justify differential treatment in a limited set of legitimate circumstances relating to employment.
19. According to the EU Equality Directives, a differential treatment may be justifiably allowed in the following cases: (1) on the basis of a “genuine occupational requirement”, provided that the objective is legitimate and the requirement proportionate;¹⁸ (2) in case of certain employers with an ethos based on religion or belief;¹⁹ and (3) on the basis of age, when this pursues legitimate employment-related objectives, provided that this meets the proportionality test,²⁰ or in relation to occupational social security schemes, provided that this does not constitute

opportunities and equal treatment of men and women in matters of employment and occupation (hereinafter both together referred as the “EU Gender Equality Directives”).

¹² Concluding Document of the Vienna – the Third Follow-up Meeting, Vienna, 15 January 1989, Questions Relating to Security in Europe, Principles, par 13.7.

¹³ See pars 15-16 of the OSCE/ODIHR Opinion on the Law.

¹⁴ See pars 31-32 of the OSCE/ODIHR Opinion on the Law.

¹⁵ See pars 40 and 53 of the OSCE/ODIHR Opinion on the Law.

¹⁶ See pars 44-45 of the OSCE/ODIHR Opinion on the Law.

¹⁷ See pars 47 and 53 of the OSCE/ODIHR Opinion on the Law.

¹⁸ See Article 4 of the EU Racial Equality Directive, Article 4(1) of the Employment Equality Directive and Article 14(2) of the Gender Equality Directive.

¹⁹ Article 4(2) of the Employment Equality Directive.

²⁰ Article 6(1) of the Employment Equality Directive also provides some examples of differences of treatment on the basis of age that would be justified.

- discrimination on the grounds of sex.²¹ It must be noted that such derogations would have to be interpreted strictly.²²
20. Given that the Directives leave the choice of whether or not to adopt such derogations to the Member States themselves, a Member State may choose whether or not to incorporate any or all of such grounds for justification. The practice amongst EU Member States varies greatly.²³ Certain countries have adopted national transposing legislation containing “general” exceptions across the employment field for cases where certain grounds are a determining factor for an occupational activity, or a specific list, identifying particular occupational activities where the said ground constitutes a determining factor.²⁴
21. Article 16 par 3 of the Anti-Discrimination Law relating to discrimination in the field of employment states that “[d]istinction, exclusion or giving preference is not considered to be discrimination if so require the peculiarities of the particular work in which a personal characteristic of a person represents a real and decisive condition of doing the work, if the purpose to be achieved that way is justified, as well as taking measures of protection according to certain criteria of persons referred to in paragraph 2 of this Article.” While such a derogation seems to justify differential treatment on *any* ground on the basis of “genuine occupational requirement”, it is noted that the wording may imply a wider scope of derogation than that provided in the EU Equality Directives, since there is no mention of the proportionality criteria. It would therefore be recommended to also amend Article 16 par 3 to include the requirement of proportionality.
22. It would also be advisable for the Montenegrin authorities to consider whether to incorporate or not certain other justifications of direct discrimination, namely on the basis of age and/or religion or belief (see par 19 *supra*), depending on the particular national context and circumstances. In any case, it is recommended that Article 2 par 1 of the Draft Law (amending Article 2 par 3 of the Anti-Discrimination Law) states that direct discrimination is prohibited in all cases except in cases involving a “genuine occupational requirement as defined under Article 16 par 3” (and possibly to expressly refer to other articles should additional derogations be added on the basis of age and/or for employers with an ethos based on religion or belief).
23. The Draft Law’s proposal to amend Article 2 par 5 (Article 2 par 2) states that “inciting, helping, giving instructions as well as announced intent to discriminate” shall be deemed as discrimination, which covers a broader scope than the current Anti-Discrimination Law by adding the acts of “helping” and “announced intent”. This reflects the wording of the General Policy Recommendation No. 7 of the European

²¹ Article 6(2) of the Employment Equality Directive.

²² EU Court of Justice (ECJ) judgment in the case of *Johnston*, case no. 222/84, of 15 May 1986, par 36.

²³ See the Comparative Analysis of the Anti-Discrimination Legislation in the 27 EU Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey, by the European Network of Legal Experts in the Non-Discrimination Field, financed by and prepared for the use of the European Commission, Directorate-General for Justice, October 2012, available at <http://bookshop.europa.eu/en/developing-anti-discrimination-law-in-europe-pbDSAW13001/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L>.

²⁴ See, for example, the Belgian Anti-Discrimination Act of 10 May 2007 which states that the judge shall appraise, on a case-by-case basis, whether a given characteristic constitutes a genuine and determining occupational requirement; but also that an illustrative list of situations in which a specific characteristic constitutes a genuine and determining occupational requirement may be established by decree. See also e.g. Article 22 of the Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities of Bulgaria, available at <http://legislationline.org/topics/country/25/topic/84>.

Commission against Racism and Intolerance (ECRI) on National Legislation to Combat Racism and Racial Discrimination (2002) (hereinafter “ECRI Recommendation”),²⁵ in relation to racism and racial discrimination, and for that reason represents a welcome amendment.

24. As mentioned in the OSCE/ODIHR Opinion on the Law,²⁶ the blanket prohibition of incitement to discriminate may potentially affect every person’s right to freedom of expression, including the freedom of the media. While this right may be limited as necessary in a democratic society for the protection of, *e.g.* national security, territorial integrity, disorder and crime, or the rights and freedoms of others, such restrictions need to be proportionate to the harm being addressed; it is not clear whether a blanket ban on incitement would fulfill these criteria. The European Court of Human Rights (hereinafter “ECtHR”) has, on several occasions, struck a balance between the freedom of expression and the prohibition of discrimination.²⁷ In line with the ECtHR’s judgments, it is recommended to state that the above conducts shall be deemed to be discrimination, “unless [...] objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved.”
25. Finally, the OSCE/ODIHR would like to reiterate its recommendations regarding the scope of protection in the Anti-Discrimination Law, *i.e.* that it should prohibit discrimination in both the public and private sphere and that the originators of discrimination may be public authorities, but also natural and legal persons.²⁸

3. Special Forms of Discrimination

26. As mentioned in the OSCE/ODIHR Opinion on the Law,²⁹ it is unclear why forms of discrimination based on certain grounds³⁰ need to be reiterated specifically in Chapter II of the Law, given that the protected grounds are already explicitly mentioned in Article 2 par 2 on the prohibition of discrimination (see also comments relating to Article 6 of the Draft Law inserting an article on “racial discrimination” under par 35 *infra*). To avoid the impression that certain types of discrimination are more important, or more serious than others, it is again recommended to rethink this approach.

²⁵ See General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI) on National Legislation to Combat Racism and Racial Discrimination, of 13 December 2002, par 6.

²⁶ See par 29 of the OSCE/ODIHR Opinion on the Law.

²⁷ For ECtHR judgments on right to non-discrimination v. freedom of expression, see *e.g.* the ECtHR judgment in the case of *Willem v. France*, application no. 10883/05, of 16 July 2009; ECtHR judgment in the case of *Jersild v. Denmark*, application no. 15890/89, of 23 September 1994; ECtHR judgment in the case of *Vejdeland and Others v. Sweden*, application no. 1813/07, of 9 February 2012.

²⁸ See par 15 of the OSCE/ODIHR Opinion on the Law. See also Article 3(1) of the Council Directive 2004/113/EC of 13 December 2004 on equal treatment between men and women in the access to and supply of goods and services, states that it applies to “all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.” See also Article 3 of the EU Racial Equality Directive.

²⁹ See par 33 of the OSCE/ODIHR Opinion on the Law.

³⁰ *I.e.* Articles 12 (discrimination based on health conditions), Article 13 (discrimination based on age), Article 14 (political discrimination), Article 17 (racial discrimination under the Draft Law or discrimination based on religion or belief under the current law), Article 18 (discrimination of persons with disability under the current law), and Article 19 par 1 (discrimination based on gender identity and sexual orientation).

27. Also, the OSCE/ODIHR would like to reiterate its recommendation to reorganize Chapter II of the Anti-Discrimination Law where articles on selected special forms of discrimination are mixed with articles on the material scope or areas covered by the law, such as the use of public buildings and facilities (Article 10), public services delivery (Article 11), education and vocational training (Article 15) and labour (Article 16). It would be preferable to add a separate Chapter specifically setting out the material scope or areas of application of the Anti-Discrimination Law.
28. Article 4 of the Draft Law proposes to amend Article 7 of the Anti-Discrimination Law on harassment. The amended provision prohibits harassment on one or more grounds when “such behavior has the purpose of violation of personal dignity, or causes intimidation, feelings of humiliation or offensiveness or creates hostile environment.”
29. First, it is noted that Article 4 of the Draft Law does not appear to mention any act, conduct or behaviour. The EU Directives refer to harassment as an “unwanted conduct” that “occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” Unless this is merely a result of faulty translation, Article 4 of the Draft Law should also refer to harassment as “unwanted conduct”.
30. It is welcome that the reference to “inconvenience” has now been deleted from the definition as per previous OSCE/ODIHR recommendations.³¹ However, it is worth mentioning that the proposed amended definition refers only to the “purpose of violation of personal dignity” which implies that the behaviour is capable of and intended (or known) to violate personal dignity by the perpetrator, whereas the EU Directives refer to the “purpose *or effect* of violating personal dignity” which is broader. Unless this issue is merely a result of faulty translation, in order to fully align with the definition of the EU Directives, it is recommended to adapt the terminology in Article 4 of the Draft Law accordingly.
31. Moreover, the EU Directives speak of the creation of an “intimidating, hostile, degrading, humiliating or offensive environment”. Article 4 of the Draft Law refers to “intimidation, feelings of humiliation or offensiveness or creates hostile environment” but does not mention “degradation”. While the EU Directives do not provide specific definition of what is meant by “intimidating, hostile, degrading, humiliating or offensive environment”, it may be inferred from the case-law of the ECtHR that this implies a certain difference of degree in terms of the nature of the behaviour, its motive, intention, purpose and effect.³² Consequently, in order to fully align with the

³¹ See par 30 of the OSCE/ODIHR Opinion on the Law.

³² See e.g. ECtHR judgment in the case of *Vona v. Hungary*, application no. 35943/10, of 9 July 2013, par 66 read together with par 31 defining “intimidation” as a type of true threat directed to a person or group of persons with the intent of placing the victim in fear of bodily harm or death; ECtHR judgment in the case of *Campbell and Cosans v. United Kingdom*, application no. 7511/76; 7743/76, of 25 February 1982, par 28-30 which state that a “treatment itself will not be “degrading” unless the person concerned has undergone - either in the eyes of others or in his own eyes [...] - humiliation or debasement attaining a minimum level of severity” also noting that “a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and usual meaning of the word”; ECtHR judgment in the case of *M.S.S. v. Belgium and Greece*, application no. 30696/09, of 21 January 2011, par 263 which takes into account the vulnerability of the victim and confirms the existence of humiliation given the “lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation”; ECtHR judgment in the case of *Peers v. Greece*, application no. 28524/95, of 19 April 2001,

- wording of the EU Directives, it would be recommended to add “degradation” in the definition of “harassment”.
32. Article 5 of the Draft Law introduces the definition of “sexual harassment” under Article 8 of the Anti-Discrimination Law. It is not clear whether the definition of “mobbing” which is stated under the current version of Article 8 of the Anti-Discrimination Law will be consequently deleted/removed. In order to avoid any confusion, this should be clarified by expressly stating, under Article 5 of the Draft Law, that the title “Mobbing” shall be deleted and replaced by the title “Sexual Harassment” and that the definition of mobbing shall be deleted and replaced by the definition of sexual harassment.
 33. Article 5 of the Draft Law defines “sexual harassment” as “[a]ny unwanted behaviour of sexual nature which has the purpose or represents violation of dignity of a person or group of persons, or which achieves this effect, causes intimidation, creates hostile environment, feelings of humiliation or offensiveness”. While this largely reflects the definition of “sexual harassment” found in the EU Gender Equality Directives, it is noted that the Directives also specify that such conduct involves verbal, non-verbal or physical conduct. In order to be fully in line with the EU legislation it would be advisable to expressly include these types of conduct in the definition of “sexual harassment”. Again, “degradation” should also be added to the definition of “sexual harassment” in Article 8 of the Draft Law (see by analogy the comments under par 31 *supra*).
 34. Article 6 of the Draft Law introduces a definition of “racial discrimination” under Article 17 of the Anti-Discrimination Law. It is not clear whether the definition of “discrimination based on religion and belief” which is stated under the current version of Article 8 of the Anti-Discrimination Law, will be consequently deleted/removed. Should this not be the case, then it would once more raise the question of why certain types of discrimination, but not others, are described in specific provisions of the Draft Law (see par 26 *supra*). Article 6 of the Draft Law should clarify whether the definition of “discrimination based on religion and belief” is deleted (see by analogy the comments under par 32 *supra*).
 35. Article 6 of the Draft Law defines “racial discrimination” as “any differentiation, unequal treatment or bringing in unequal position persons with the belief that race, colour, language, religion, nationality or national or ethnic origin, justify depreciation of person or group of persons, or justify the notion on superiority of a person or group of persons towards those who are not members of that group”. As already mentioned under par 26 *supra*, it is unclear why such a specific definition should be included in Chapter II of the Law, given that all protected grounds, *i.e.* race, colour, language, religion, nationality or national or ethnic origin are already explicitly mentioned in Article 2 par 2 of the Anti-Discrimination Law on the prohibition of discrimination.
 36. Moreover, it is debatable whether “religion” and “language” should be part of the scope of “race”/“racial discrimination” since, though sometimes interwoven, they constitute two distinct concepts. Moreover, the need for including a subjective element to the definition of racial discrimination, namely the belief that the above-mentioned

par 74-75 (degrading conditions where they are diminishing the applicant’s human dignity which aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance, noting that the purpose to humiliate or debase the victim is a factor to be taken into account but not necessarily conclusive).

grounds justify depreciation or superiority, is not apparent, as racial discrimination may also occur in cases where there is no clear and demonstrated belief of the right to depreciate, and of superiority. This could also result in difficulties in applying this specific provision. Therefore, it is recommended to consider deleting Article 6 of the Draft Law, or alternatively to narrow the list of the grounds and delete the reference to “the belief that [the grounds] justify the notion of superiority of a person or group of persons towards those who are not members of that group”.

37. It is welcome that Article 8 of the Draft Law amending Article 19 par 3 of the Anti-Discrimination Law introduces definitions for “gender identity” and “sexual orientation”. However, as mentioned under par 26 *supra*, the need for a specific definition of discrimination based on gender identity and sexual orientation under Article 19 par 1 of the Anti-Discrimination Law should be re-evaluated.

4. Remedies and Sanctions

38. It is particularly welcome that Article 9 of the Draft Law amends Article 21 of the Anti-Discrimination Law to broaden the scope of the competences of the Protector of Human Rights and Freedoms (hereinafter “the Human Rights Protector”) to include the competence to “act on complaints relating to discrimination” (par 1) and to “initiate a procedure for protection against discrimination in court or appear in that proceeding” (par 4). As stated in the OSCE/ODIHR Opinion on the Law,³³ it is recommended to expressly state that the Human Rights Protector also “monitors legislation”.³⁴ Further comments made in the OSCE/ODIHR Opinion on the Law in relation to the role of the Human Rights Protector as an anti-discrimination body remain valid and are again recommended for consideration, in particular the need to make both pieces of legislation consistent.
39. With regard to Article 11 of the Draft Law amending Article 26 of the Anti-Discrimination Law, it is appreciated that references to the media are deleted. At the same time, recommendations made in the OSCE/ODHIR Opinion on the Law concerning the extension of the powers of courts still remain valid.³⁵
40. Article 13 of the Draft Law amends Article 30 of the Anti-Discrimination Law, in relation to persons who may file complaints on behalf of alleged victims of discrimination. The Article is somewhat unclear, possibly as a result of faulty translation; however, it is presumed that this addition aims to address a recommendation made in the OSCE/ODIHR Opinion on the Law,³⁶ regarding the possibility of third party intervention in court proceedings. This would mean that third parties with a legitimate interest would be able to engage, either on behalf or in support of a complainant, with his/her approval, in judicial or administrative procedures.³⁷ If this is not what is meant by the revised wording of Article 30, Article 13 of the Draft Law should be amended to reflect such a recommendation.

³³ See par 43 of the OSCE/ODIHR Opinion on the Law.

³⁴ ECRI General Policy Recommendation No. 7, Recommendation 24, as well as pars 51 and 52 of the Explanatory Memorandum.

³⁵ See par 47 of the OSCE/ODIHR Opinion on the Law.

³⁶ See par 50 of the OSCE/ODIHR Opinion on the Law.

³⁷ Article 7 par 2 of the Racial Equality Directive and Article 9 par 2 of the Employment Equality Directive.

41. Further, it is reiterated that, as mentioned in the OSCE/ODIHR Opinion on the Law,³⁸ Article 30 par 1 of the Anti-Discrimination Law should be amended so that compensation lawsuits (covered by Article 26 par 1 item 3 of the Anti-Discrimination Law) could also be filed on behalf of another person. It is recommended to add such a possibility under Article 13 par 1 of the Draft Law.
42. Articles 17 and 18 of the Draft Law introduce substantive changes in relation to sanctions for different types of discriminatory behaviour under Article 34 of the Anti-Discrimination Law. However, the recommendations made in the OSCE/ODIHR Opinion on the Law continue to be partially relevant, in particular with regard to the fact that sanctions are imposed for very specific cases, but not for all possible discrimination cases.³⁹
43. In this context, it is unclear why fines would only be imposed in cases of discrimination on the basis of health conditions and on the basis of age, and not also for other grounds of discrimination. It would therefore be recommended to consider broadening the scope of Article 17 of the Draft Law to include the possibility of fines for all cases of discrimination on all grounds mentioned in the Anti-Discrimination Law.
44. The OSCE/ODIHR would also like to reiterate its recommendations relating to the possibility of imposing fines for the failure to implement a court decision as well as imposing enhanced fines for grave cases of discrimination listed under Article 20 of Anti-Discrimination Law, as suggested in the OSCE/ODIHR Opinion on the Law.⁴⁰
45. Article 17 of the Draft Law states that “[f]or misdeameanour referred to in paragraph 1 of [this] Article [34], the responsible person in the legal person, state authority, authority of local self-government and authority of local government shall be also fined in the amount of 100 EUR to 2,000 EUR” (new Article 34 par 2). It is understood that this would be in addition to the sanctions imposed on the legal person. However, it is unclear from the translation whether such sanctions apply to the representative of the legal person or authority, or to the direct perpetrators of the discriminatory behaviour.⁴¹ Unless this confusion is merely a result of faulty translation, it would be recommended to clarify this provision. In this context, it would be important to clarify the term “entrepreneur” and how it differs from “representative of a legal person”.

[END OF TEXT]

³⁸ See par 51 of the OSCE/ODIHR Opinion on the Law.

³⁹ See par 53 of the OSCE/ODIHR Opinion on the Law.

⁴⁰ See par 53 of the OSCE/ODIHR Opinion on the Law.

⁴¹ It should be noted that as a general matter, the EU Racial Equality Directive and the EU Employment Equality Directive do not specify under which conditions the EU Member States should divide the liabilities between the direct perpetrators of a discriminatory conduct and the legal persons/employers (and their representative), thus leaving discretion to the EU Member States in that respect. See article “The Liability of Legal Persons in Anti-Discrimination Law” of Mr. Olivier De Schutter in the European Anti-Discrimination Law Review No. 6/7 (2008) (legal review prepared by the European Network of Legal Experts in the Non-discrimination Field, financed by and prepared for the use of the European Commission, Directorate-General for Justice), available at http://ec.europa.eu/justice/discrimination/files/lawrev6_7_en.pdf.

**LAW ON AMENDMENTS TO THE LAW ON PROHIBITION OF
DISCRIMINATION**

Article 1

In the Law on Prohibition of Discrimination (Official Gazette of Montenegro, No. 46/10), in Article 1, paragraph 1 shall be amended to read as follows:

“The prohibition of and protection from discrimination shall be achieved, and the promotion of equality shall be carried out in accordance with this Law”.

In paragraph 2 after the words "the prohibition of and protection from discrimination" shall be added the words "as well as the promotion of equality", and after the words "particular rights" shall be added the words "as well as the promotion of equality".

Article 2

In Article 2, paragraph 3, the comma after the words "in paragraph 2 of this Article", shall be replaced with the full-stop, and the words ",,unless the act, action or failure to act are objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved" shall be deleted.

Paragraph 5 shall be amended to read as follows: “Inciting, helping, giving instructions as well as announced intent to discriminate specific person or group of persons on any ground referred to in paragraph 2 of this Article, shall be as well considered to be discrimination.”

Article 3

The header of Article 5 shall be amended to read as follows: “Regulations and Special Measures”, and in paragraph 1, the words: "Special measures" shall be replaced by the words: "Regulations and special measures" and the word "imposed" shall be replaced by the words: "adopted and implemented".

Article 4

Article 7 shall be amended to read as follows:

“Harassment

Harassment of a person or group of persons on one or more grounds referred to in Article 2, paragraph 2 of this Law, when such behaviour has the purpose of violation of personal dignity, or causes intimidation, feelings of humiliation or offensiveness or creates hostile environment, shall be prohibited.”

Article 5

Article 8 shall be amended to read as follows:

„Sexual Harassment

Article 8

Any unwanted behaviour of sexual nature which has the purpose or represents violation of dignity of a person or group of persons, or which achieves this effect, causes intimidation, creates hostile environment, feelings of humiliation or offensiveness, shall be prohibited.”

Article 6

Article 17 shall be amended to read as follows:

„Racial Discrimination

Article 17

Racial discrimination is any differentiation, unequal treatment or bringing in unequal position of persons with the belief that race, colour, language, religion, nationality or national or ethnic origin, justify depreciation of person or group of persons, or justify the notion on superiority of a person or group of persons towards those who are not members of that group.”

Article 7

Article 18 shall be deleted.

Article 8

In Article 19 paragraph 3 shall be amended to read as follows:

“No one may be called upon to publicly declare its gender identity and sexual orientation.”

After the paragraph 3 two new paragraphs shall be added and shall read as follows:

“Gender identity refers to our own gender experience that does not have to depend on a sex given by birth. Gender identity is relevant to every person and does not imply only a binary concept of male or female.

Sexual orientation refers to emotional and / or physical attraction or sympathy towards persons of the same and / or different sex.”

Article 9

Article 21 shall be amended to read as follows:

“Article 21

The Protector of Human Rights and Freedoms of Montenegro (hereinafter referred to as: the Protector) is competent to:

- 1) act on complaints relating to discrimination and undertake measures and actions to eliminate discrimination and protect the rights of discriminated person, if the court proceeding is not initiated;
- 2) provide required information to the complainant who believes to be discriminated by the natural or legal person, about his/her rights and duties, as well as about possibilities of court and other protection;
- 3) conduct the conciliation proceeding between the person who believes to be discriminated, with its consent, and authority, other legal and natural person referred to in the complaint on discrimination;
- 4) initiate a procedure for protection against discrimination in court or appear in that proceeding as an intervener if the party makes probable, and the Protector assess that the respondent performed discrimination by the treatment on the same ground of a group of persons with the same personal characteristics;
- 5) warn the public on appearance of severe forms of discrimination;
- 6) keep separate records of submitted complaints with regard to discrimination;
- 7) collect and analyze data on cases of discrimination;
- 8) undertake activities for promotion of equality;
- 9) submit to the Parliament of Montenegro, in a separate section within the annual report, the report on the activities conducted regarding protection from discrimination and promotion of equality;
- 10) perform other tasks related to protection from discrimination prescribed by the separate law governing the competences, powers, manner of operation and acting of the Protector.“

Article 10

Article 23 shall be deleted.

Article 11

In Article 26 paragraph 1 after item 2 a new item shall be added and shall read as follows:

"2a) elimination of the consequences of discriminatory treatment;“

In Item 4 the words “in case discrimination is performed through the media,” shall be deleted.

In paragraph 2 the words: „paragraph 1 items 1 and 2“ shall be replaced by the words: „paragraph 1 items 1, 2 and 2a“, and the words: „shall be exert“ shall be replaced by the words: „may be exert“.

Paragraph 3 shall be deleted.

Article 12

In Article 27 the words: „90 days“ shall be replaced by the words: “one year “.

Article 13

In Article 30 paragraph 1 after the word „persons“ the words: „or group of persons“ shall be added

After paragraph 2 a new paragraph shall be added and shall read as follows:

„Complaint under Article 26 of this Law may be filed by a person who, with intent to directly verify the application of the rule on prohibition of discrimination, in any way present, or put himself in a position of the person who may be discriminated on any ground referred to in Article 2 of this Law “

Article 14

In Article 32 the words: “over the implementation of this Law“ shall be deleted.

Article 15

After Article 32 a new Article shall be added and shall read as follows:

"Special Powers

Article 32a

When during an inspection control is found that the law or other regulation is violated inspector, in addition to the powers prescribed by the law, and on the request of a person who believes to be discriminated and who initiated the proceeding for protection from discrimination in the competent court, has the power to temporarily postpone by its decision the enforcement of the decision, other act or action of the controlled entity, until the final court decision.

The request referred to in paragraph 1 of this Article may be filed within eight days as of the initiation of the proceeding for the protection from discrimination before the competent court.

The inspector is obliged to decide on the request referred to in paragraph 1 of this Article within eight days as of the date of filing the request, if the requirements from paragraphs 1 and 2 of this Article are met.

Against the final decision referred to in paragraph 3 of this Article the administrative proceeding may not be initiated."

Article 16

In Article 33, paragraph 1 shall be deleted.

Paragraph 2 shall become paragraph 1 and shall be amended to read as follows:

„The courts, the state prosecutor's offices, misdemeanour authorities, the authority responsible for police affairs and inspection authorities are obliged to keep separate records on filed complaints, initiated proceedings and decisions taken within their own jurisdiction in relation to discrimination (hereinafter referred to as: separate records).“

After paragraph 1 a new paragraph 2 shall be added and shall read as follows:

„The authorities referred to in paragraph 1 of this Article shall deliver data from the separate records to the Protector not later than 31st January of the current year for the previous year, and at the request of the Protector they shall deliver the data from these records as well for a certain period during the year.“

In the paragraph 3 the words: „in paragraph 2“ shall be replaced by the words: „in paragraph 1“.

Article 17

„Article 34 shall be amended to read as follows:

A fine of 500 EUR to 20.000 EUR shall be imposed for misdemeanour on a legal person, if:

1) based on health conditions unreasonably differentiates or treats unequally, prevents, restricts or hinders employment, work, education or unreasonably denies other rights to a person or a group of persons (Article 12);

2) prevents or restricts the exercise of the rights, unreasonably differentiates or treats unequally the person or group of persons, based on age (Article 13);

3) files a lawsuit without the written consent of discriminated person or group of persons (Article 30 paragraph 2);

For misdemeanour referred to in paragraph 1 of this Article the responsible person in the legal person, state authority, authority of local self-government and authority of local government shall be also fined in the amount of 100 EUR to 2.000 EUR.

For misdemeanour referred to in paragraph 1 of this Article the entrepreneur shall be fined in the amount of 300 EUR to 6.000 EUR.

Article 18

After Article 34 new Articles 34a and 34b shall be added and shall read as follows:

„Article 34a

A fine of 100 EUR to 2.000 EUR shall be imposed on the responsible person in the state authority, authority of state administration and authority of the local self-government if:

1) it does not keep separate records on filed complaints, initiated proceedings and decisions taken within its own jurisdiction in relation to discrimination (Article 33 paragraph 1);

2) it fails to deliver the data from the separate records to the Protector within the deadlines referred to in Article 33, paragraph 2 of this Law.

Article 34b

Protective Measures

For misdemeanours referred to in Article 34, paragraph 1 and 34a of this Law, individually or with a fine or a warning measure, one or more protective measures may be imposed:

- 1) seizure of objects;
- 2) prohibition to carry out the occupation, activity or duty;
- 3) public announcement of decision.

Protective measure of a seizure of objects shall be obligatory imposed whenever a misdemeanour is committed using the object that is under seizure, or when the object was designed for commitment of the misdemeanour or when the object that is under seizure was made because of committing the misdemeanour

Protective measure of prohibition to carry out the occupation, activity or duty may be applied for a period which may not be shorter than 30 days nor longer than six months.

Protective measure of public announcement of decision shall be enforced by publishing such a decision in the media available in the entire territory of Montenegro.”

Article 19

Secondary legislation referred to in Article 33, paragraph 3 of this Law shall be delivered within six months from the day of entry into force of this Law

Secondary legislation that regulates in more details the content and manner of keeping the records referred to in Article 33 paragraph 1 of this Law shall be delivered within six months from the day of entry into force of this Law.

Article 20

As of the day of the entry into force of this Law, Article 108 of the Law on amendments to the Law prescribing fines for misdemeanours shall cease to be valid.
(Official Gazette of Montenegro, No. 40/2011).

Article 21

This Law shall enter into force on the eighth day as of the day of publication in the Official Gazette of Montenegro.