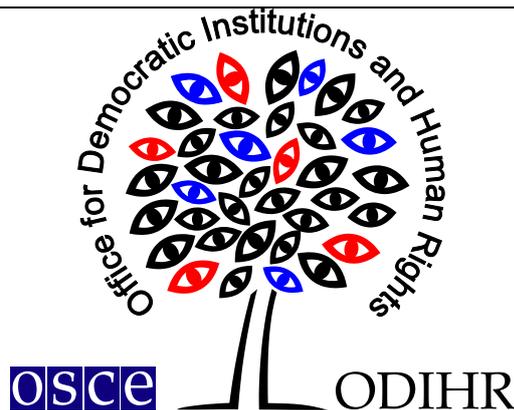


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COMMENTS ON THE DRAFT LAW ON PREVENTION AND PROTECTION AGAINST DISCRIMINATION OF THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

**Based on an unofficial English translation of the draft Law on Prevention and
Protection against Discrimination
Provided by the OSCE Mission to Skopje**

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*These Comments are also available in Macedonian and Albanian
However, the English version remains the only official version of the document.*

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I. INTRODUCTION

1. *On 4 December 2017, the Head of the OSCE Mission to Skopje sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of the Draft Law on Prevention and Protection Against Discrimination in the former Yugoslav Republic of Macedonia (hereinafter “the LPPD”).*
2. *On 8 December 2017, the Director of OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare comments on the compliance of the LPPD with OSCE commitments and international human rights standards.*
3. *The OSCE/ODIHR conducted this assessment within its mandate to “assist participating States, at their request, in developing anti-discrimination legislation, as well as in establishing anti-discrimination bodies”.¹ As part of its mandate, the OSCE/ODIHR has previously produced legal reviews on antidiscrimination legislation in the former Yugoslav Republic of Macedonia in 2008, 2009 and 2014.²*

II. SCOPE OF REVIEW

4. The scope of these Comments covers only the Law on Prevention and Protection Against Discrimination in the former Yugoslav Republic of Macedonia (LLPD), submitted for review. Thus, they do not constitute a full and comprehensive review of the entire legal and institutional framework governing the prevention of and protection against discrimination in the former Yugoslav Republic of Macedonia.
5. The Comments address key issues and indicate areas of concern. In the interests of conciseness, the Comments focus more on those provisions that require improvements rather than on the positive aspects of th LLPD. The ensuing recommendations are based on international anti-discrimination standards and practices as well as relevant OSCE human dimension commitments. The Comments will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women³ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender

¹ See *Annex to Decision No. 3/03 on Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, MC.DEC/3/03 of 2 December 2003, par 20, <<http://www.osce.org/odihr/17554?download=true>>.

² OSCE/ODIHR, *Overview of Anti-Discrimination Legislation in the Western Balkans* (28 March 2014), par 26, <<http://www.legislationline.org/documents/id/18726>>; OSCE/ODIHR, *Comments on the Draft Law on Prevention and Protection Against Discrimination of the Former Yugoslav Republic of Macedonia* (13 October 2009), <<http://www.legislationline.org/documents/id/15682>>; OSCE/ODIHR, *Comments on the Draft Anti-Discrimination Law of the Former Yugoslav Republic of Macedonia* (19 December 2008), <http://legislationline.org/download/action/download/id/6716/file/124_NDISCR_MKD_2008.pdf>; and OSCE/ODIHR, *Comments on Draft Anti-Discrimination Laws in Former Yugoslav Republic of Macedonia* (12 March 2008), <http://legislationline.org/download/action/download/id/3571/file/104_NDISCR_MK_104_2008_TND.pdf>.

³ *UN Convention on the Elimination of All Forms of Discrimination against Women*, adopted by UN General Assembly Resolution 34/180 on 18 December 1979. The former Yugoslav Republic of Macedonia succeeded to the CEDAW on 18 January 1994.

perspective into OSCE activities, the Comments analyze the potentially different impact of the LPPD on women and men.⁴

7. These Comments are based on an unofficial English translation of the LPPD provided by the OSCE Mission to Skopje, which is attached to this document as an Annex. Errors from translation may result. The Comments are also available in the Macedonian and Albanian languages. However, the English version remains the only official version of the document.
8. Given the overall similarity of parts of the LPPD with some provisions of former draft anti-discrimination laws and draft laws, this review also relies on the findings and recommendations made in earlier OSCE/ODIHR legal reviews, where appropriate.
9. When reviewing legal provisions, one key criterion is the extent to which the legislation is effective in securing relevant human rights and freedoms. As noted by the OSCE/ODIHR in the past, “the law must be capable of full and meaningful implementation. Achieving this requires legislation which is concrete, with a clear appreciation of the social context and the financial consequences to the implementing state.”⁵ Therefore, relevant information on implementation of the current Law on Prevention and Protection Against Discrimination from 2010 (hereinafter “the 2010 Law”)⁶ was analyzed and taken into account when assessing the potential effectiveness of provisions of the LPPD.
10. In view of the above, the OSCE/ODIHR would like to make mention that the Comments do not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of the former Yugoslav Republic of Macedonia that the OSCE/ODIHR may wish to make in the future.

III. EXECUTIVE SUMMARY

11. This LPPD is a positive step towards combating discrimination in the former Yugoslav Republic of Macedonia and an improvement compared to the 2010 Law.⁷ It is better aligned with the EU *aquis communautaire* and appears to generally comply with international obligations. However, there are some discrepancies in the use of terminology and certain sections that are not in line with the above obligations; these should be reconsidered based on the recommendations made in these Comments.
12. In spite of the two-fold purpose reflected in the LPPD’s title, it seems to place greater emphasis on protection against discrimination than on prevention of discrimination. The LPPD seeks to establish a two-tier protection system, comprising an administrative mechanism (complaints proceedings before the Commission for Protection against Discrimination) and a judicial mechanism (civil action before ordinary courts or

⁴ See par 32 of the *OSCE Action Plan for the Promotion of Gender Equality* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

⁵ *Op. cit.* footnote 2, par 3 (December 2008 OSCE/ODIHR Comments).

⁶

See

http://legislationline.org/download/action/download/id/3483/file/FYROM_Law%20on%20protection%20against%20discrimination_2010_en.pdf

⁷ *Ibid*

misdemeanor proceedings before misdemeanor courts). At the same time, the draft fails to envisage adequate awareness-raising and other measures to publicize and implement the proclaimed principles of equality and non-discrimination, aside from public dissemination and educational activities of the Commission. This is a different approach than that taken, for example, by the 2012 Law on Equal Opportunities for Women and Men,⁸ which envisages many basic and special measures for the purpose of achieving equal opportunities in any sphere of social life.

13. In general, with respect to protection against discrimination, even though it is commendable to have an ambitious goal to have extensive grounds for possible discrimination, it is noted that the long list of sometimes vague or broadly defined discrimination grounds contained in the LPPD may make it difficult to prove that discrimination occurred. Furthermore, the general exception from discrimination found in Article 13 par 2 (3) of the LPPD is too broad and it is therefore recommended to introduce clarifying language.
14. More specifically, and in addition to what was stated above, the OSCE/ODIHR makes the following recommendations to further enhance the LPPD and its compliance with international standards and good practice:
 - A. Adopt a wider scope of the purpose of the the LPPD and include a reference to other sources of international law than binding agreements in article 2; [par 21]
 - B. To adopt a shorter list of discriminatory grounds in Article 4 to increase effectiveness of the law and clarify “any other grounds” to avoid arbitrary interpretations; [par 28]
 - C. To amend Article 5 to the effect that rules or behavior can also constitute discrimination even if this was not the purpose; [par 32]
 - D. To clarify Article 6 sub-par 7 on legitimate or objectively justifiable purpose or delete it as it seems superfluous; [par 33]
 - E. To include more definitions in the glossary (Article 6), such as “language” and “prejudice”; [par 33]
 - F. To include failure to act against discrimination by officials in the definition of discrimination in Article 7; [par 36]
 - G. Employ a term similar to “measures or actions not deemed to be discrimination” instead of “exception to discrimination” as the measures are not considered to be discrimination according to the LPPD; [par 49]
 - H. To introduce criteria in Article 13 par 2 (3) as the “different treatment” in the Constitution and other laws is very broad. It should be referred to specific provisions in the Constitution and laws; [par 53]; and
 - I. Introduce provisions on the decision-making process within the Commission; [par 71]

Additional Recommendations, highlighted in bold, are also included in the text of the Comments.

⁸ See:

http://legislationline.org/download/action/download/id/5645/file/FYROM_Law%20on%20equal%20opportunities_2012_en.pdf

IV. ANALYSIS AND RECOMMENDATIONS

1. International Anti-Discrimination Standards

15. Internationally, the United Nations system has, next to the Universal Declaration of Human Rights (hereinafter “UDHR”,⁹ Article 7), developed numerous more general human rights treaties that also include reference to the principle of non-discrimination, namely the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”,¹⁰ Article 2 par 2), the International Covenant on Civil and Political Rights (hereinafter “ICCPR”,¹¹ Article 26), and the Convention on the Rights of the Child (hereinafter “CRC”,¹² Article 2), among others.¹³
16. More specialized anti-discrimination treaties include the CEDAW; the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “ICERD”¹⁴); the Discrimination (Employment and Occupation) Convention of the International Labour Organization (hereinafter “ILO Convention”¹⁵); the UNESCO Convention against the Discrimination in Education (hereinafter “CDE”¹⁶); and, more recently, the Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”¹⁷).

⁹ *Universal Declaration of Human Rights*, adopted by UN General Assembly Resolution 217 A (III) on 10 December 1948.

¹⁰ *UN International Covenant on Economic, Social and Cultural Rights*, adopted by UN General Assembly Resolution 2200A (XXI) on 16 December 1966. The former Yugoslav Republic of Macedonia succeeded to the ICESCR on 18 January 1994.

¹¹ *UN International Covenant on Civil and Political Rights*, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966. The former Yugoslav Republic of Macedonia succeeded to the ICCPR on 18 January 1994.

¹² *UN Convention on the Rights of the Child*, adopted by UN General Assembly Resolution 44/25 of 20 November 1989. The former Yugoslav Republic of Macedonia succeeded to the CRC on 2 December 1993.

¹³ See also ICCPR article 2 par 1 as a general non-discrimination clause, Art. 3 of equal enjoyment of rights to men and women; Article 23 par 4 regarding non-discrimination of spouses in marriage and its dissolution and Article 24 regarding the rights of the child. Furthermore, see Human Rights Committee’s General Comments No. 4 (on Art. 3) and 18 (Non-discrimination).

¹⁴ *UN International Convention on the Elimination of All Forms of Racial Discrimination*, adopted by UN General Assembly Resolution 2106 (XX) of 21 December 1965. The former Yugoslav Republic of Macedonia succeeded to this Convention on 18 January 1994; while recognizing that the term “race” is a purely social construct that has no basis as a scientific concept, for the purpose of the opinion, the term “race” or “racial” may be used in reference to international instruments applying such a term to ensure that all discriminatory actions based on a person’s (perceived or actual) alleged “race”, ancestry, ethnicity, colour or nationality are covered - while generally preferring the use of alternative terms such as “ancestry” or “national or ethnic origin”; see OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), pages 41-42, <<http://www.osce.org/odihr/36426?download=true>>; see also the footnote under the first paragraph of Council of Europe’s Commission on Intolerance and Racism (hereinafter “ECRI”), *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, adopted on 13 December 2002, <https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#P127_11468>. Except when part of a citation from a legal instrument or case law, the words “race” or “racial” are thus placed in quotation marks in these Comments to indicate that underlying theories based on the alleged existence of different “races” are not accepted.

¹⁵ *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), adopted on 25 June 1958 by the General Conference of the International Labour Organisation at its forty-second session on 25 June 1958. The former Yugoslav Republic of Macedonia ratified the ILO Convention on 17 November 1991.

¹⁶ *UNESCO Convention against Discrimination in Education*, adopted on 14 December 1960. The former Yugoslav Republic of Macedonia succeeded to the CDE on 30 April 1997

¹⁷ *UN Convention on the Rights of Persons with Disabilities* adopted by General Assembly resolution 61/106 on 13 December 2006. The former Yugoslav Republic of Macedonia ratified the CRPD on 29 December 2011.

At the Council of Europe level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”¹⁸), in its Article 14, and its Protocol 12 codify the non-discrimination principle, as does the Revised European Social Charter (hereinafter “RESC”) ¹⁹ (Part V, Article E), and the Framework Convention for the Protection of National Minorities (hereinafter “Framework Convention”, Article 4)²⁰, as well as the Convention on Preventing and Combating Violence against Women and Domestic Violence (“Istanbul Convention”)²¹

17. At the OSCE level, key commitments relating to non-discrimination, prevention and protection against discrimination date back to the OSCE founding document, the Helsinki Declaration. Specifically, OSCE participating States committed to “respect human rights and fundamental freedoms (...) for all without distinction as to race, sex, language or religion”,²² “color [...], political or other opinion, national or social origin, property, birth or other status”, and agreed “that no individual exercising, expressing the intention to exercise or seeking to exercise these rights and freedoms or any member of his family, will as a consequence be discriminated against in any manner”,²³ while committing to ensure “equal protection of the law” and “equal and effective protection against discrimination on any ground”.²⁴
18. The former Yugoslav Republic of Macedonia is also a candidate for accession to the European Union (EU), which obliges its Government to gradually approximate relevant state legislation to the EU *acquis communautaire*. When drafting new legislation, it is thus important to take into consideration EU primary legislation (the EU treaties and the EU Charter on Fundamental Rights). Moreover, the minimum standards set out in secondary EU legislation will need to be transposed into domestic law, including in particular EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter “Race Equality Directive”); Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;²⁵ and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

¹⁸ 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. The former Yugoslav Republic of Macedonia ratified the ECHR on 10 April 1997

¹⁹ Council of Europe, *European Social Charter*, adopted on 3 May 1996. The former Yugoslav Republic of Macedonia ratified the RESC on 6 January 2012.

²⁰ Council of Europe, *Framework Convention for the Protection of National Minorities*, adopted on 1 February 1995. The former Yugoslav Republic of Macedonia ratified the Framework Convention on 10 April 1997.

²¹ Istanbul Convention (CETS No. 210 entered into force on 1 August 2014). The former Yugoslav Republic of Macedonia signed the Convention on 08/07/2011 but has yet to ratify. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TFY?p_auth=JdVzkd3

²² Questions Relating to Security in Europe: 1. (a) “Declaration on Principles Guiding Relations between Participating States – Principle VII”, Helsinki, 1975.

²³ Questions Relating to Security in Europe: Principles, Vienna, 1989, pars 13.7 and 13.8.

²⁴ 1990 Copenhagen Document, par 5.9; see also 1990 Copenhagen Document, pars 25.3 and 25.4: “measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation” and “will not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority”; and *OSCE Decision no. 10/05 Tolerance and Non-discrimination: Promoting Mutual Respect and Understanding*, MC.DEC/10/05, adopted at the Ministerial Council in Ljubljana, 6 December 2005, pars 4, 5 and 5.1; *OSCE Decision no. 13/06 Combating intolerance and Discrimination and Promoting Mutual Respect and Understanding*, MC.DEC/13/06, adopted at the Ministerial Council in Brussels of 5 December 2006, pars 2, 5, 6 and 10; and *OSCE Decision no. 13/06 Combating intolerance and Discrimination and Promoting Mutual Respect and Understanding*, MC.DEC/10/07, adopted at the Ministerial Council in Madrid of 30 November 2007, pars 7, 9 and 10.

²⁵ The aim of Directive 2000/78/EC is to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation.

2. General Provisions of the LPPD

2.1. Subject and Purpose of the LPPD

19. The LPPD has 50 Articles contained in 8 chapters. Most of them are referred to below. The analysis will address the main themes of the LPPD following the general structure of this draft law.
20. At the outset, Part I of the LPPD deals with general matters, such as purpose, scope and definitions. Within this Chapter, Article 1 states that “[t]his Law regulates prevention and prohibition against discrimination, forms and types of discrimination, procedures for protection against discrimination and the composition and work of the Commission for Protection against Discrimination”. Nevertheless, in comparison to the 2010 Law and the draft version(s) preceding it, Article 1 of the LPPD goes a step further by providing a more elaborate explanation of the scope of the Law.²⁶
21. Article 2 of the LPPD establishes that “[t]he purpose of the Law is ensuring the principle of equality and prevention and protection against discrimination in the exercise of rights and freedoms guaranteed by the Constitution of the Republic of Macedonia, laws and ratified international agreements”.²⁷ A similar provision in a previous draft law was criticized for being too narrow, as it appeared to confine the scope of the draft law to “the exercise of human rights”.²⁸ The same concern would seem to apply here. For instance the discrimination ban in ECHR article 14 can only be invoked together with a human right. However, the ECtHR has held that the application of the ECHR is not restricted to a violation of one the substantive rights guaranteed in the Convention; it is sufficient that the situation in question “falls within the ambit of one or more of the Convention Articles”.²⁹ The prohibition of discrimination in Article 14 thus extends beyond the rights and freedoms stipulated in the Convention and Protocols. It applies also to those additional rights, falling within the general scope of any Convention article.³⁰ **It is recommended to revise the text of the LPPD to reflect this wider scope.** Article 118 of the Constitution requires an international agreement to be ratified in order to be binding for the former Yugoslav Republic of Macedonia. It is

²⁶ Many civil society organizations in the former Yugoslav Republic of Macedonia favored an even more detailed description of subject-matters of a former draft law. For example, in February 2010, the Foundation Institute Open Society Institute in the former Yugoslav Republic of Macedonia (FOSIM) analyzed the Government/MLSP’s draft at the time (which was previously presented to the public in April 2009 and discussed at the September 2009 session of the National Euro-integration Council), including its Article 2 (which sets out the aim of prevention and protection against discrimination in the enjoyment of rights and freedoms guaranteed by the Constitution, laws and the ratified treaties). This provision was afterwards translated into Article 2 of the 2010 law, which reads: “The protection and prohibition of discrimination relates to all natural and legal persons in the enjoyment of rights and freedoms guaranteed by the Constitution and the laws of the Republic of Macedonia”. The FOSIM held that Article 2 of the Draft Law did not match the traditional legislative technique of specific enumeration of areas regulated and covered by the respective law, while the opposite approach of clear definitions of covered areas leaves no “possibility for restrictive interpretation and manipulation by the subjects concerned”. The FOSIM also referred to the extensively descriptive Article 1 of the (“unofficial”) Draft Law of December 2009 prepared by a coalition of NGOs “Macedonia without Discrimination” (MwD) to illustrate what introductory provision of an anti-discrimination law should look like. Source: [FOSIM, *Comments on the Draft Law on Prevention and Protection against Discrimination* (draft of January 2010)], pages 3 and 4, <<http://star.fosm.org.mk/dokumenti/Comments-on-Anti-Discrimination-Law-FOSIM-February-2010.pdf>>.

²⁷ The use of the prefix “international” denotes multilateral “treaties”, such as those mentioned in this review, so the word “international” is occasionally omitted for reason of economy of space. The general term “treaties” is used throughout the text of the present Comments in spite of the fact that the corresponding Macedonian word (“dogovori”) is translated as “agreements” (one of many types of treaties) in the commissioned translation of the 2017 draft LPPD.

²⁸ *Op. cit.* footnote 2, par 56 (October 2009 OSCE/ODIHR Comments); and par 33 (2014 OSCE/ODIHR Overview).

²⁹ ECtHR, *Ribac v Slovenia* (Application 57101/10), judgment of 5 December 2017, par 38

³⁰ ECtHR, *Andrejeva v. Latvia* [GC], (Application 55707/00), of 18 February 2009, par 74

normal procedure for international agreements to be binding, that domestic ratification must be completed. **However, there are other relevant sources in international law than international agreements, such as recognized practice and principles, which are not necessarily codified in written agreements.**³¹ Thus, it is recommended to also include a reference to other sources of international law than just binding agreements.

22. The LPPD uses the word “equality”, unlike the relevant EU Directives and the Law on Equal Treatment of Women and Men, which refer to “equal treatment”.³² Compliance with both directives and the said law is recommended for consistency. Furthermore, equal treatment is also a clearer term than “equality”, and more accurate, as the LPPD is about ensuring that individuals are treated equally and combatting different forms of discrimination. **Article 2 should be redrafted accordingly.**
23. The inclusion of the term “rights *and freedoms*” in the LPDD (which is not featured in the 2010 LPPD) is a welcome addition, because enjoyment of freedoms is inherently and inseparably linked with non-discrimination and equal treatment. Moreover, the OSCE/ODIHR particularly welcomes the inclusion of the “principle of equality” in Article 2 of the LPPD. This echoes Protocol 12 of the ECHR (preamble) to which the former Yugoslav Republic of Macedonia is also a party.³³
24. **There is also considerable overlap between the text in Article 1 and 2 as the concept of protecting and preventing discrimination is mentioned in both. They can be merged without losing relevant content.**

2.2. Scope of the LPPD

25. Article 3 deals with the application of the LPPD. The two paragraphs of Article 3 of the LPPD state whom the draft law “shall apply to” (par 1) and whom it “shall be applied by” (par 2) and include different list of subjects (“all natural and legal entities”³⁴ in par 1, and “all government bodies, local government units’ bodies, legal persons with public authorities and all other legal entities and individuals” in par 2). The English translation was unclear as it contained the word “entities”, but the Macedonian texts uses “natural and legal persons”, which is clear.
26. Article 3 par 2 lists nine specific areas of application: (1) Employment and labor relations; (2) Education, science and sports; (3) Social security, including the area of

³¹ Statutes of the International Court of Justice (ICJ), article 38 par 1 b (international custom, as evidence of a general practice accepted as law and c the general principles of law recognized by civilized nations), ICJ has defined International Customary law as: “Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it”. (*North Sea Continental Shelf* cases, ICJ Reps, 1969, p. 3 at 44); “General principles of law” are harder to define, but are widely recognized principles. For further information see: http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf

³² Article 1 of Directives 2000/43/EC (Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Race directive”), 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation) and 2004/113/EC (Implementing the principle of equal treatment between men and women in the access to and supply of goods and services).

³³ See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=iBxocnur>.

³⁴ The draft LPPD’s translation to English, commissioned for the purpose of this review, translated the Macedonian word /“lica” (persons) to “entities” in a way creating contradiction in terms in the phrase “natural and legal entities”, because “natural persons” cannot be “entities”, therefore: 1) the word “persons” should be added after the word “natural” and before the word “and” (“natural persons and legal entities”) or 2) the word “entities” should be replaced by the word “persons”, as enterprises etc. can also be referred to as “legal persons” (“natural and legal persons”).

social protection, pension and disability insurance, health insurance and health care; (4) Justice and administration; (5) Housing; (6) Public information and media; (7) Access to goods and services; (8) Membership and activity in unions, political parties, associations, foundations or other membership-based organizations; (9) Culture; and (10) Other areas.” Such areas of application prescribed by the LPPD remain virtually the same as those stipulated by Article 4 of the 2010 Law.

27. **While the final sub-paragraph of Article 3 of the LPPD states that the law shall also apply in “other areas”, and as recommended in the past,³⁵ the LPPD would benefit from explicitly including some areas listed in the Race Equality Directive (notably in a labor and employment context),³⁶ or in ECRI Recommendation No. 7 (such as training or economic activities³⁷). Additionally, it is worth mentioning the EU Victims’ Rights Directive in PP (9) states that victims of crime should be treated without discrimination, but this may be considered covered by “justice” in Article 3 par 2 (4).**

2.3 The LPPD’s Definition of Discrimination

28. Article 4 of the LPPD prohibits any discrimination based on race, skin color, national or ethnic origin, sex, gender, sexual orientation, gender identity, belonging to a marginalized group, language, nationality, social background, education, religion or religious belief, political conviction, other beliefs, disability, age, family or marital status, property status, health status, personal capacity and social status, or any other ground. The comprehensiveness of this provision³⁸ (which contains a wider list of discrimination grounds than the lists set out in human rights treaties,³⁹ and a much wider list than the EU directives⁴⁰) might provoke concerns, as similar wording of previous draft laws did in the past. Notably, such a long list of discrimination grounds may be “potentially self-destructive of the effectiveness of the [Law]”⁴¹ and could inundate the existing judicial and/or administrative systems with apparently unmeritorious cases and

³⁵ *Op. cit.* footnote 2, par 40 (2014 OSCE/ODIHR Overview).

³⁶ *Op. cit.* footnote 32 (2000/43/EC) applies in relation to: “(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; (e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing”.

³⁷ *Op. cit.* footnote 1, Article 7 (ECRI Recommendation No. 7), which states: “The law should provide that the prohibition of discrimination applies [...] in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services”.

³⁸ The discrimination grounds were defined by the ECtHR as “a personal characteristic (‘status’) by which persons or groups of persons are distinguishable from each other” (*Kjeldsen, Busk Madsen and Pedersen v. Denmark* (Application nos. 5095/71, 5920/712 and 5929/72, judgment of 7 December 1976), par 56, <<http://hudoc.echr.coe.int/eng/?i=001-57509>>).

³⁹ The list of discrimination grounds is understandably shorter in the specific anti-discrimination treaties ICERD, CEDAW and ICRPD in comparison with general human rights treaties. The grounds of “race”, “colour”, “sex”, “language”, “religion”, “national or social origin”, “property” and “birth” feature in Article 2 par 1 of UDHR, Articles. 2 and 26 of ICCPR, Article 2 par 2 of ICESCR, Article 2 par 1 of CRD, Article 12 of ECHR and Protocol no. 12 to the ECHR; while CRC replaces “birth” with “origin” and CRPD and ESC (rev.) lack “property”. All of the aforementioned treaties or treaties’ provisions have an open-ended clause.

⁴⁰ *Op. cit.* footnote 32 (Directive 2000/78/EC lays down a framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation; the discrimination grounds in Directive 2000/43/EC are “racial or ethnic origin”; and the discrimination ground in Directive 2004/113/EC is sex).

⁴¹ *Op. cit.* footnote 2, par 13 (December 2008 OSCE/ODIHR Comments).

complaints; this in turn could dilute the otherwise positive intentions of the drafters and/or the proponents of the draft law.⁴² Thus, the OSCE/ODIHR, in its 2009 Opinion, concluded that “the long list contained in Article 3 goes well beyond the requirements of the EU Directives” and recommended “that the law adopts a shorter list of discrimination grounds more closely aligned to the EU Equality Directives and define the discrimination grounds in Article 5 of the draft law”.⁴³ **It is particularly recommended to remove “belonging to a marginalized group” as this is very hard to define. The definition in Article 6 leaves much to interpretation and socially marginalized groups or discriminated ethnic groups are covered by other grounds.** A similar recommendation was made in previous on Comments Bias-Motivated Crimes.⁴⁴

29. While it is true that the directives set out minimum standards and that national legislatures are thus not precluded from adopting a longer list of discrimination grounds, **such additional grounds should be limited to adjustments required in light of national specificities and to ensure coherence with the existing national framework.**
30. At the same time, the phrase “any other ground” keeps the list of discrimination grounds open for the process of interpretation and application of the law, similar to the extension of the respective lists by the case law of bodies or courts established under relevant international treaties.⁴⁵ **Fears of potentially restrictive or arbitrary interpretation of Article 4 of LPPD could decrease if legal practitioners are trained on how to apply the existing discrimination grounds and further instructed on how to identify new ones.** In any case, and even if the ECtHR has noted on many occasions that it is not always possible to draft laws in the most precise terms, **it is recommended to clarify the term “any other grounds” to avoid the risk of potential restrictive or arbitrary interpretation.**
31. Furthermore, the list of discriminatory ground should be checked for consistency with the hate crime provisions in the current Criminal Code of the former Yugoslav Republic of Macedonia and the amendments that are waiting to be passed by parliaments in order to avoid the situation that a criminal act cannot be a discriminatory ground.

2.4 Definitions and Explanations in the LPPD

32. The definition of discrimination in Article 5 of the LPPD seems to be generally in line with international standards. However, it does not make reference to the potential

⁴² Venice Commission, *Opinion on the Draft Law on Protection against Discrimination of the former Yugoslav Republic of Macedonia* (19 December 2008), par 41, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)042-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)042-e)>.

⁴³ *Op. cit.* footnote 2, pars 19-20. (2009 OSCE/ODIHR Comments).

⁴⁴ OSCE/ODIHR Comments on Draft Amendments to Certain Provisions of the Criminal Code of the former Yugoslav Republic of Macedonia regarding Bias-Motivated Crimes (14 April 2016) par. 46. http://www.legislationline.org/download/action/download/id/6342/file/283_HCRIM_MKD_14Apr2016_en.pdf

⁴⁵ By means of its dynamic and purposive interpretation, the ECtHR has found that the prohibition of discrimination set out in Article 14 of the ECHR extends to grounds not enumerated therein, such as sexual orientation, age, nationality, birth and property (see Lila Farkas, Simeon Petrovski, *Handbook for Training Judges on Anti-discrimination Law*, OSCE Mission to Skopje, 2012, page 13, <<http://www.osce.org/skopje/116787>>). In *Wagner and J.M.W.L. v. Luxembourg* (Application no. 76240/01, ECtHR judgement of 28 June 2007), <<http://hudoc.echr.coe.int/eng?i=001-81328>>, the ECtHR made plain that discrimination can emerge even if the adverse treatment cannot be subsumed under any of the explicitly stipulated discrimination grounds.

discriminatory effect of certain behavior,⁴⁶ which features in other similar definitions of discrimination found in relevant international and European norms and standards.⁴⁷

This omission should be remedied by adding in Article 5 that even rules or behavior not “aimed at preventing or restricting the recognition, enjoyment or exercise of the rights and freedoms of any person or group on an equal basis with others” can constitute discrimination when they do, in effect, result in such prevention or restriction.

2.5 Glossary of Terms

33. The selection of terms set out in the glossary in Article 6 of the draft law is generally relevant and the definitions are basically adequate, though some of them would benefit from more precision. It is welcome that this provision includes a definition of “discrimination by association” and “discrimination by perception” since as noted by the OSCE/ODIHR in the past; these forms of discrimination were not address at all in the 2010 LPPD.⁴⁸ The LPPD focuses on a few general concepts, terms of relevance for persons with disabilities and some specific types of discrimination, especially newly introduced concepts, such as “adequate accommodation” and “discrimination by association”. In addition to maintaining the definitions of “multiple discrimination” and “repeated discrimination”,⁴⁹ Article 6 modifies the definitions of “equality”,⁵⁰ “person”,⁵¹ “continued discrimination”,⁵² “marginalized group”⁵³ and “legitimate or objectively justified aim”.⁵⁴ **The introductory negative definition of the latter notion as an “aim which is not contrary to the Constitution, laws and ratified treaties” (Article 6 par 7 *in initio*) is quite unusual and should be clarified or deleted** (it would appear to go without saying that any illegal action would not be legitimate or objectively justified).
34. At the same time, the drafters may consider **including additional definitions in the glossary, such as “language”,⁵⁵ “prejudice”, etc. Moreover, defining some of the numerous discrimination grounds would be beneficial, to achieve a more precise**

⁴⁶ The effect is particularly relevant in case of indirect discrimination (Article 7 par 2 of LPPD), because even apparently neutral provision or practice based on a discrimination ground can lead to a treatment violating the material equality of persons.

⁴⁷ The importance of the “effect” element of the definition can be illustrated by Article 1 of the CERD, which states that treatments amounting to racial discrimination have the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise ..., while Article 1 par. 1(a) of the ILO Discrimination (Occupation and Employment) Convention refers only to the *effect* (not mentioning the “purpose”) of nullifying or impairing equality of opportunity or treatment in employment or occupation.

⁴⁸ *Op. cit.* footnote 2, par 26 (2014 OSCE/ODIHR Overview).

⁴⁹ See also Article 6 pars 10–11 of the LPPD and Article 12 of the 2010 LPPD.

⁵⁰ Article 6 par 1 of the LPPD lacks the second sentence of the definition stated in Article 5 par 6 of the 2010 law.

⁵¹ Article 6 par 2 of the LPPD modifies the definition given in Article 5 par 9 of the 2010 Law by including natural and legal persons who *resided* or *carried* a business in the former Yugoslav Republic of Macedonia, respectively.

⁵² Article 6 par 12 of the LPPD modifies the definition given in the final part of Article 12 of the 2010 Law by removing the words “or which by its consequences particularly seriously affects the discriminated person”.

⁵³ Article 6 par 6 of the LPPD modifies the definition from Article 5 par 11 of the 2010 Law by removing the words “or are exposed to an increased risk of a further victimisation”.

⁵⁴ Article 6 par 7 of the LPPD modifies the definition given in Article 5 par 11 of the 2010 Law by including a “law” in the list of legal sources and “necessity” among the applicable criteria (in addition to the criterion of proportionality featuring in the 2010 law).

⁵⁵ Article 2 par 2 of the CRPD clarifies that “[l]anguage includes spoken and signed languages and other forms of non-spoken languages”. If “language” does not cover a language possibly spoken by a person with disability, the administrative body or the court might infer an unreasonable conclusion that a complaint of such person of discrimination on ground of language does not merit protection under the LPPD.

delimitation of the scope of exceptions from discrimination and affirmative measures.⁵⁶

3. Forms of Discrimination

35. Part II of the LPPD lists the following forms and types of discrimination: “direct and indirect discrimination” (Article 7), “calling, incitement and instruction to discrimination” (Article 8), “harassment” (Article 9), “victimization” (Article 10), “segregation” (Article 11) and “more severe forms of discrimination” (Article 12). Unlike the 2010 law, the second part of the LPPD includes a provision on “segregation”, but does not contain provisions on “discrimination of persons with disabilities” or “discrimination in providing access to goods and services”. However, this is covered by the general provisions in the law in article 4.

3.1. Direct and Indirect Discrimination

36. Article 7 of the LPPD states that “[d]irect discrimination occurs when a person or group of persons is treated, was treated or would be treated less favorably compared to another person or group in a similar or comparable situation, on a discriminatory ground”.ⁱ This definition is generally in line with international law, which is welcome.⁵⁷ **At the same time, the provision would be further enhanced if it would also include the failure of an official person to take action to prevent discrimination or to protect someone from discrimination, as was debated before adopting the 2010 law.**⁵⁸ It could also include that the right not to be discriminated against is also infringed when there is failure to treat differently situations that are significantly different.⁵⁹
37. Article 7 par 2 states that “[i]ndirect discrimination occurs when a person or group is put at a disadvantage compared to other persons or groups of persons through seemingly neutral provisions, criteria or practices, except when they arise from a legitimate aim and the means of achieving such goal are proportionate, i.e. they are appropriate and necessary”. The definition of indirect discrimination in the LPPD is generally in line with international law (including the EU *acquis*⁶⁰) and case law,⁶¹ and appears to be more comprehensive than the current definition in the 2010 law.

3.2. Calling for, Incitement and Instruction to Discrimination

⁵⁶ See OSCE, *Guide on Discrimination Grounds*, 2014, page 11, <<http://www.osce.org/skopje/116789>>.

⁵⁷ *Op. cit.* footnote 32 Article 2 par 2(a) e (Directive 2000/43/EC); Article 2 par 2(a) (Directive 2000/78/EC) and Article 2 sub-par (a) (2004/113/EC) (the EU directives refer only to a “person”, mention only a “comparable” situation and lack a comparator) and ECtHR, *Carson and Other v. the United Kingdom* [GC] (Application no. 42184/05, judgment of 16 March 2010), par 61, <<http://hudoc.echr.coe.int/eng?i=001-97704>>. The ECtHR’s wording includes “difference in the treatment of persons in analogous, or relevantly similar situations”, which is “based on an identifiable characteristic”.

⁵⁸ *Op. cit.* footnote 26, page 7 (2010 FOSIM Comments on the Draft Law on Prevention and Protection against Discrimination).

⁵⁹ ECtHR, *Cassar v. Malta* (Applicatio 50570/13), judgment of 30 January 2018, par 77

⁶⁰ *Op. cit.* footnote 32 Article 2 par 2(b) (Directive 2000/43/EC) and Article 2 par 2(b) (Directive 2000/78/EC).

⁶¹ ECtHR *D.H. and Others v. the Czech Republic* [GC] (Application no. 52375/00, judgment of 07 November 2007), pars 193 - 194

38. Article 8 of the LPPD defines calling for, incitement and instruction to discrimination as “any activity through which discrimination is directly or indirectly called for, incited, instructed or prompted on any discrimination grounds”. The latter type of discrimination reflects the wording of the Article 2 par 1 of the EU Race Equality Directive, which reads as follows: “An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1”. It would be helpful to clarify and distinguish between the actions listed in Article 8, in particular whether and in which cases they have to lead to actual acts of discrimination. Conceivably, calling for the commission of discriminatory acts may imply a degree of publicity, and the instruction to discriminate may require some form of hierarchical relationship between the instructor and the instructed party. The term “prompted”, on the other hand, is quite general, and would greatly benefit from further definition, to avoid potentially arbitrary interpretation of the law. Article 8 also seems to go further than article 20 of the ICCPR that states “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. This requires elements to constitute discrimination: advocacy and a call to discriminate. Article 8 of the LPPD is less specific. **For the above reasons, all of the actions listed in Article 8 need to be clarified, either in the same article or in the glossary under Article 6.**
39. Overall, Article 8 illustrates a decisive approach to combatting discrimination. At the same time, the activities listed therein by implication include the right to express thoughts and ideas. **Article 8 should thus also include criteria for solving the conflict between the right to freedom of expression and the right not to be discriminated.** The extensive case law of the ECtHR pertaining to Article 10 of the ECHR on the freedom of expression and standards laid down therein regarding potentially discriminatory speech should be taken into account. In particular, the law and its interpretation should be clear that offensive and shocking speech is not illegal,⁶² while, clear incitement to discriminate is not permissible.⁶³ **Oftentimes, there is a fine line between the definitions of the two concepts; however, it should be addressed either in the law or an explanatory note.**

3.3. *Harassment*

40. Article 9 defines harassment as an unwanted treatment of a person or a group of persons on any discrimination grounds, whose purpose or effect is to violate the dignity of a person or to create a threatening, hostile, humiliating or offensive environment, approach or practice (Article 9, par 1). It is commendable that the LPPD advances the standard of protection by including the two consequences (intended purpose or consequential) of the unwanted treatment. The above provision is thus mainly in line with relevant international standards,⁶⁴ aside from the imprecise translation of the

⁶² ECtHR, *Handyside v. the United Kingdom* Application no. 5493/72, judgment of 7 December 1976), par 49, <<http://hudoc.echr.coe.int/eng?i=001-57499>>, which states: Freedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.

⁶³ ECtHR, *Pavel Ivanov v. Russia* (Application no 35222/04, judgement of 20 February 2007), par 1, <<http://hudoc.echr.coe.int/eng?i=001-79619>>, which states that “such vehement attack on one ethnic group is directed against the Convention’s underlying values, notably tolerance, social peace and non-discrimination. Consequently, by reason of Article 17 (prohibition of abuse of rights) of the Convention, the applicant could not benefit from the protection afforded by Article 10 (freedom of expression) of the Convention”.

⁶⁴ *Op. cit* footnote 32 Article 2.3 (Directive 2000/43/EC).

English word “harassment” to a Macedonian word whose meaning is more associated with some of the effects of such illicit treatment rather than with its nature.⁶⁵

41. Sexual harassment shall mean any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating the dignity or creating a threatening, hostile, humiliating or offensive environment, approach or practice (Article 9 par 2). This is in line with relevant EU law⁶⁶ and the definition of sexual harassment enshrined in Article 40 of the Istanbul Convention against on preventing and combating violence against women and domestic violence, which is signed but not ratified by the former Yugoslav Republic of Macedonia.⁶⁷
42. It may be difficult to define “sexual nature”, as perceptions may change with time. **However, as several international sources define “sexual nature” as the LPPD, it should be kept as is.**

3.4. Victimization

43. Victimization is defined in Article 10 as “bearing the adverse consequences on the part of a person who has taken action to be protected against discrimination, or who has reported discrimination, initiated proceedings for protection from discrimination, testified during such proceedings or otherwise participated in the procedure for protection against discrimination”. This provision is not fully consistent with the eponymous provisions in the EU Directives, obliging Member States to “introduce into their national legal systems such necessary measures to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to [any legal] proceedings aimed at enforcing compliance with the principle of equal treatment”.⁶⁸
44. While the inclusion of the wording “or otherwise” seeks to protect the broadest scope of persons against victimization, which is welcome, Article 10 does not refer to “adverse treatment”, as done in Article 10 of the 2010 Law. **This distinction is important as people should not only be protected from adverse consequences, but also from adverse treatment, which is an intentional act that has an equally negative, if not worse, effect on such persons. It is recommended to add language to reflect this in Article 10 of the LPPD.**
45. **It is also recommended to consider the recommendations made by the Committee on Economic, Social and Cultural Rights (CESCR), noting that there ‘that there are some gaps in the Law, particularly as regards the definition of discrimination, grounds**

⁶⁵ Both the 2010 Law and the LPPD translate “harassment” as (voznemiruvanje), which also has a meaning of “disturbing” someone (Zoze Murgoski, *English Macedonian Dictionary: The Unabridged Edition*, fourth revised and extended edition, 2008, page 361); instead of using the word (maltretiranje), which better reflects the definition of “harassment” as an “aggressive pressure and intimidation” (see “Harassment” at <https://en.oxforddictionaries.com/definition/harassment>). Prof. Murgoski (*op. cit. supra*, page 591) makes distinction between two meanings of “harass(ment)”: 1) maltreatment (e.g. harassed by police or other public authority or other perpetrator of crime or misdemeanour) – this meaning is more closely associated with the relevant international anti-discrimination law) and 2) disturbance (e.g. “harassed by doubts”, or by forced loss of tranquillity).

⁶⁶ Directive 2002/73/EC (Implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 2 par 2.

⁶⁷ *Op. cit.* footnote 21

⁶⁸ *Op. cit.* footnote 32 Article 9 (Directive 2000/43/EC) Article 11 (Directive 2000/78/EC) and Article 10 (Directive 2004/113/EC).

of discrimination, **burden of proof and the use of statistics to prove the existence of indirect discrimination**⁶⁹.

3.5. *More Severe Forms of Discrimination*

46. According to Article 12 of the LPPD, discrimination is regarded as more severe if it is multiple (committed against a person or group on more than one discriminatory ground), repeated (committed multiple times against a person or a group on any discrimination grounds), or continued (committed for a longer period of time against a person or a group on any discrimination grounds, one or more).
47. Such aggravated forms of discrimination are addressed in separate penalty measures in Article 43 of the LPPD, which stipulates higher amounts of fines for breaches of Article 12 (see also pars 92-94 *infra*). **Nevertheless, it is recommended to provide more guidance regarding the penalty policies by explicitly stating in the LPPD the general principle featured in the EU standard that “the penalties [...] shall be effective, proportionate and dissuasive”** (see also par 93 *infra*).⁷⁰

4. Measures not Deemed to Constitute Discrimination

48. Part III of the LPPD consists of Articles 13 and 14, which occasionally use similar terminology when outlining exceptions from discrimination, encompassing: (1) “measures and activities taken [...] until equality of persons or a group of persons is reached in order to eliminate or reduce actual inequalities” (Article 13 par 1); and (2) “affirmative measures”, defined, *inter alia*, as activities aimed at [...] decreasing or eliminating the actual inequality occurring as a result of previous discrimination” (Article 14). **As these provisions are closely linked and possibly even describe the same kind of measures, it would perhaps make sense to merge them into one article on measures and activities, which could also include affirmative measures. Moreover, it may be advisable to call it “measures or actions not deemed to be discrimination” as they are not considered to be discrimination according to the LPPD.** For clarity the term used in the LPPD is used in these Comments.

4.1. *Exceptions to Discrimination*

49. Article 13 of the LPPD focuses on “general exceptions to discrimination”. Three possible exceptions are envisaged: (1) cases where only citizens of the former Yugoslav Republic of Macedonia enjoy certain rights, (2) reasonable requirements that are needed to exercise certain professions and (3) reference to exceptions in other laws, including the Constitution of the country. It is noted that while the title of Article 13 is quite broad, the provision does mention quite concrete exceptions. **It may thus be more accurate to simply call the provisions “Measures not deemed to be discrimination” or similar.** Moreover, it is not stated clearly whether the three exceptions from

⁶⁹ Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the Combined Second to Fourth Periodic Reports of the former Yugoslav Republic of Macedonia* (2016), E/C.12/MKD/CO/2-4, pars 19-20, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/MKD/CO/2-4&Lang=En

⁷⁰ *Op. cit.* footnote 32 Article 15; (Directive 2000/43/EC), Article 17(Directive 2000/78/EC); and Article 14 (Directive 2004/113/EC).

discrimination listed in par 2 of Article 13 must be subjected to the “necessity test” set out in the first paragraph (which states that the means used need to be appropriate and necessary). ; **an affirmative answer to this dilemma may, however, be inferred via a systematic interpretation of the two provisions (by analogy and *mutatis mutandis*⁷¹). For the sake of clarity, such requirement should be added in par 2 as well (with the exception of Article 13 par 2 (2)) (see *infra* par 53).**

50. Article 13 par 1 states that “[a]ny measures and actions taken by any state bodies, local government bodies, other bodies and organizations exercising public authority, public institutions or any natural or legal persons shall not be deemed discrimination until equality of persons or a group of persons is reached in order to eliminate or reduce actual inequalities, if such differentiation is justified and the means used to achieve such goal are proportionate, i.e. appropriate and necessary.” **This provision is largely the same as the definitions set out in the EU Directives, ICERD and CEDAW,⁷² which, however, use the phrase “to prevent and compensate for disadvantages linked to [discrimination] grounds”, but the semantic difference is minor and need not be changed to comply.**
51. The first specific exception from discrimination set out in Article 13 par 2 is different treatment of persons who are not citizens of the former Yugoslav Republic of Macedonia” regarding rights directly arising from the citizenship (sub-par 1). This is essentially in line with the EU *aquis* and international obligations.⁷³
52. The second exception to discrimination (Article 13 par 2 (2)) is that “different treatment of individuals based on certain protected feature[s] resulting from the nature of their occupation or activity, or from the conditions in which such occupation is performed, which constitutes a genuine and determining occupational requirement, and where the goal is legitimate and the requirement does not exceed the level required for its realization”. **This is in principle a necessity test and does not need to be repeated here if the recommendation above in par 50 is taken into account.** This is considered to be in compliance with the EU *acquis*.⁷⁴
53. The referral to exceptions “on the basis of provisions stipulated in the Constitution and other laws” in the third paragraph of Article 13 par 2 is rather general and no further criteria (e.g. to follow the three-part test) are envisaged to prevent arbitrary interpretation. This also leaves the door open to introduce discrimination in other laws undermining the LPPD. **To remedy this, it would be advisable to make this provision more specific, so that it is clear which types of constitutional and other legal provisions it is referring to, and providing that such provisions are themselves in compliance with international anti-discrimination standards.**

⁷¹ *Op. cit.* footnote 62 par 48. The necessity test has been defined by the ECtHR, and every exception to a rule must be proportionate for the legitimate aim pursued;

⁷² *Op. cit.* footnote 32 article 5 (Directive 2000/78/EC); article 7 (Directive 2000/43/EC); article 6 (Directive 2004/113/EC), (all Articles are titled “Positive action”), ICERD article 1 par 4, CEDAW article 4 par 1, and General Recommendation 32 of the Committee on CERD (The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination).

⁷³ ECHR, Article 16, which refers to Article 14 (non-discrimination). Also of relevance: ICCPR article 25, and *Op. cit.* footnote 30 recital 13 (Directive 2000/78/EC),; and recital 12 (Directive 2000/43/EC),.

⁷⁴ *Op. cit.* footnote 32 article 4.1 (Directive 2000/78/EC) and article 4 (Directive 2000/43/EC) refer to “occupation activities” and the “context” (while Article 13.3(2) of the LPPD uses the phrases “occupation and activity” and “conditions”) and refers to “legitimate object and proportionate requirement”).

4.2. Affirmative Measures

54. Pursuant to Article 14 par 4 of the LPPD, affirmative measures are “any activities of competent public authorities aimed at preventing and protecting against discrimination, or at decreasing or eliminating actual inequality occurring as a result of previous discrimination”, to be applied only until achievement of the *de facto* equality of persons or groups in a particular area (Article 14 par 4). **Article 13 par 1 also includes affirmative measures and it should be considered merging this into Article 14 for contextual reasons.**
55. Similar measures are stipulated in international documents, e.g. CEDAW and the EC Directives.⁷⁵ Particular attention to measures aimed at addressing inequality between women (who are members of traditionally disfavored groups, including in the employment/labor context) and men is illustrated by the European Court of Justice’s approval of measures of preferential employment of women over men with the same qualification and abilities.⁷⁶

5. Commission for Protection against Discrimination

56. It is worth noting that various UN human rights monitoring bodies have raised some concerns regarding the lack independence and effectiveness of the existing Commission for Prevention of and Protection against Discrimination set-up under the 2010 Law.⁷⁷
57. Part IV of the LPPD outlines the mandate and appointment procedures of the Commission for Protection, prevention is not mentioned, against Discrimination. While the ICCPR and the ECHR do not specifically mention the establishment of equality or anti-discrimination bodies, such bodies are required under the EU Racial Equality Directive. The minimum requirement regarding such bodies, as stipulated in Article 13 of the Directive, is to have one or more bodies, which should provide *independent* assistance to victims of discrimination in pursuing their complaints about discrimination, conduct independent surveys concerning discrimination and publish independent reports and recommendations on any issue relating to such discrimination. The necessity for the independence of such a body is also set out in General Policy Recommendation No. 7 of the Council of Europe’s European Commission against Racism and Intolerance (hereinafter “ECRI”), as are some of its tasks, which should include the right to initiate and participate in court proceedings, and monitoring

⁷⁵ Article 4.1 CEDAW (special measures to achieve equality between men and women), *op. cit.* footnote 32 Recital 26 (Directive 2000/78/EC and recital 17 (Directive 2000/43/EC) refer to preventing or compensating for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation. Article 7 (“Positive action”) of (Directive 2000/78/EC) and Article 5 (“Positive action”, Directive 2000/43/EC) state that “[w]ith 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 these grounds”.

⁷⁶ European Court of Justice, *Helmut Marschall v. Land Nordrhein-Westfalen*, No. C-409/95, 11 November 1997, <<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=C-409/95&td=ALL>>.

⁷⁷ See e.g., Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the Combined Second to Fourth Periodic Reports of the former Yugoslav Republic of Macedonia* (2016), E/C.12/MKD/CO/2-4, pars 19-20, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/MKD/CO/2-4&Lang=En>. See also CERD, *Concluding Observations on the Combined Eighth to Tenth Periodic Reports of the former Yugoslav Republic of Macedonia* (2015), CERD/C/MKD/CO/8-10, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/MKD/CO/8-10&Lang=En>, par 11.

legislation.⁷⁸ In that respect, the UN Paris Principles in relation to national human rights institutions (hereinafter “Paris Principles”),⁷⁹ and the General Observations of the Global Alliance of National Human Rights Institution (hereinafter “GANHRI General Observations”), which serve as interpretive tools of the Paris Principles,⁸⁰ while not addressing anti-discrimination bodies *per se*, may serve as useful guidance to ensure the independence and effectiveness of the Commission for Protection against Discrimination.

58. **In order The OSCE/ODIHR recommends that “Prevention” be included in the title of the Commission to be consistent with the name of the LPPD itself.**

5.1. Status, Funding, Election and Dismissal of Members of the Commission

59. In the LPPD, the Commission for Protection against Discrimination is set out in Part IV, where it is defined as an autonomous and independent body (Article 15). Its members are to be elected and dismissed by the Parliament (Articles 17 par 1 and 21 par 1). This is not problematic, as long as the appointment criteria are open and allow for pluralism within the body (as also required by Article 17 par 5). The LPPD provides for this via an open application process, with a parliamentary selection commission submitting a first pre-selection of candidates to the Parliament following a public hearing. **While the general approach taken by the LPPD is welcome, it would be helpful to add in the relevant provision how the members of the selection commission mentioned in Article 19 par 3 are selected and appointed. Such a selection commission should ideally reflect all parties in Parliament, and ensure proper gender and minority representation.** As recommended in the GANHRI General Observations, the parliamentary **application, screening, selection and appointment process should also involve open and fair consultation with NGOs and civil society**, in order to promote transparency, pluralism and public confidence in the successful candidates and ultimately the Commission.⁸¹ **The legal drafters should consider supplementing the LPPD accordingly.**
60. Also, the appointment procedures are not clear in terms of whether members of the Commission are to be elected by simple or qualified majority. The latter would probably ensure greater independence, as it would not be that easy for majority parties to influence the composition of the Commission. However, this could also conflict with article 69 of the Constitution of the former Yugoslav Republic of Macedonia. **It is recommended to include more information on the respective procedures within the text of Article 19, bearing in mind that procedures shall be such as to ensure independence and impartiality of the body and its members, as well as diverse and pluralist representation.**

⁷⁸ *Op. cit.* footnote 14.

⁷⁹ UN Commission on Human Rights, *Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights*, Resolution 1992/54 (March 1992), General Assembly Resolution A.RES/48/134 of 20 December 1993

⁸⁰ The latest revised General Observations of the Sub-Committee on Accreditation, as adopted by the GANHRI Bureau (hereinafter “GANHRI General Observations”) at its meeting in Geneva on 6 March 2017, are available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/Forms/Default%20View.aspx>.

⁸¹ *Op. cit.* footnote 80, Justification to GANHRI General Observation 1.8.

61. The eligibility requirements are set out in Article 18 and include, next to citizenship and relevant work experience, the requirement of “[h]av[ing] acquired 240 credits according to ECTS or VII/1 degree of education“ (4 years of university level studies). This focus on a particular educational/academic level may exclude people with lower formal education, but highly relevant professional experience. As discrimination can occur in several areas it is commendable that the education is not restricted to specific fields. **However, it is recommended to include relevant professional experience in anti-discrimination work as a criterion for appointment, combined with longer experience, than for members with formal education. This is important in order not to exclude persons with highly relevant experience, but who lack formal education.**
62. The professionalization of the Commission (as opposed to the part-time membership that currently exists under the 2010 Law) is a genuine prerequisite to ensure the steady and efficient work of the Commission. Together with the guarantee that its full-time members must not hold any other public office, political function or work post (Article 20 par 1), it is also a good way to guarantee the Commission’s independence. Although funded by the State Budget (Article 16 par 1), the Commission is entitled to submit a proposal for the funds that it needs, and to independently use, allocate and assign such funds (Art. 16, pars 2 and 3), which allows it a certain financial independence. **It should be ensured that the funding is allocated in a transparent manner and allocated in a separate budget line not under any other posts**⁸²
63. In previous opinions on legislation regulating NHRIs, OSCE/ODIHR has stated that “[f]unding for an NHRI should also be secure, meaning it should not be arbitrarily altered for the period for which it was approved. Additionally, if budget cuts are inevitable, the cuts should not target NHRIs disproportionately.”⁸³ A Toolkit prepared by UNDP and the OHCHR includes a checklist, which may be consulted **to ensure that an adequate budget and sufficient financial autonomy is in place to allow such bodies to properly fulfill their mandates.**⁸⁴ **In addition, legal provisions against unwarranted budgetary cutbacks could be introduced, including, but not limited to, the principle that any reductions in the Commission’s budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government in the previous year.**⁸⁵
64. The provision allowing alternative funding “from other sources” (Article 16 par 5) is an important tool to secure financial independence for an independent body such as this Commission. For further guidance please Guidelines on Freedom of Association⁸⁶
65. The five-year mandate of the Commission members (Article 17 par 2) is longer than the usual four-year term of various offices, including that of Members of Parliament. Such a term of office, might be beneficial for the Commission after a shift of power following a national election, to prevent, at least partially, politically motivated dismissals. **The**

⁸² *Op. Cit.* footnote 80 (Justification to GANHRI General Observation 1.10) and OSCE/ODIHR, *Opinion on the Draft Law Amending and Supplementing the Ombudsman Act of Bulgaria* (29 March 2017), par 31 <http://legislationline.org/topics/topic/82>

⁸³ See e.g., OSCE/ODIHR, *Opinion on the Draft Law Amending and Supplementing the Ombudsman Act of Bulgaria* (29 March 2017), par 33, <<http://legislationline.org/topics/topic/82>>.

⁸⁴ UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions* (December 2010), page 254, <<http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>>.

⁸⁵ *ibid.* See also e.g., OSCE/ODIHR *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland* (31 October 2017), par 88, <<http://legislationline.org/topics/topic/82>>.

⁸⁶ Suggested reading for guidance is: OSCE/ODIHR and Council of Europe Guidelines on Freedom of Association pars 200-202, available at: <http://www.osce.org/odihr/132371?download=true>

reason for the shorter appointment of some members (article 17 par 3) is unclear to the OSCE/ODIHR and should be substantiated. The role of the President referred to in article 17 par 4 should also be specified.

66. The provision stipulating that “Commission members should reflect the composition of the society as a whole” (Article 17 par 5) is reminiscent of the UN Paris Principles, which require that the composition and appointment of members of the national human rights institution be “made in a procedure affording the necessary guarantees to ensure pluralist representation of social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of: (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination [...]”.⁸⁷ The legislative effort to ensure ethnic, gender and overall diversity of the society within the membership of the Commission is further strengthened by the constitutional provision: “Equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life.”⁸⁸
67. In order to ensure that such goals are also achieved in practice, the LPPD could develop mechanisms in its text to ensure “a gender balance and the adequate representation of ethnic and minority groups in the country” similar to the representation prescribed for National Preventive Mechanisms in the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “OPCAT”).⁸⁹
68. The procedure for selecting Members of the Commission is somewhat unclear in Article 19 (1) and (3). **It is recommended to clarify this provision as the election of members by the parliament should have clear rules. Furthermore, it may be advisable to make reference to Amendment V regarding the language requirement, as the 20 percent requirement is consistent with the rules for official languages on the local government level in areas with a large minority language.** Furthermore, a draft Law on Languages, introducing a similar rule on the national level, is currently being processed by the Parliament of the former Yugoslav Republic of Macedonia. **As it is a law regarding anti-discrimination, the announcement of appointments in article 19 par 1 could also be considered published in smaller minority languages spoken in the country to ensure that minorities all communities are informed from the beginning of the Commission’s existence.**
69. The provisions for dismissing a member of the Commission in Article 21 are generally clear. However, language on a qualified parliamentary majority for dismissal could be introduced, in order to avoid abuse. As stated in par 59 *supra*, the composition of the Commission of Election and Appointment (Article 21 par 1) should be clarified. Further clarification may also be beneficial regarding dismissals in cases where “[t]he Commission Member has permanently lost his/her capacity to perform his/her office” or where “[t]he Commission Member has performed his/her office in an unprofessional,

⁸⁷ *Op. cit.* footnote 79, point 1 (a) in the Section on “Guarantees of Independence and Pluralism” (1993 Paris Principles).

⁸⁸ Constitution of the former Yugoslav Republic of Macedonia, Amendment V1 par 1.

⁸⁹ Article 18 par 2 OPCAT; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “UN CAT”) was adopted by the UN General Assembly by Resolution 39/46 of 10 December 1984. The former Yugoslav Republic of Macedonia succeeded to the UNCAT on 12 December 1994; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by UN General Assembly Resolution A/RES/57/199 on 18 December 2002; the former Yugoslav Republic of Macedonia ratified the Optional Protocol on 13 February 2009, and *Op. cit.* footnote 83, par 29 (2017 OSCE/ODIHR Opinion on the Draft Amendments to the Ombudsman Act of Bulgaria).

biased and unethical manner.” **This could be introduced in a separate document. It should also be possible to appeal decisions dismissing members.**

5.2. Mandate of the Commission

70. The various responsibilities of the Commission include (Article 22), *inter alia*: promotional and educational activities regarding equality, human rights and non-discrimination); acting upon applications, and rendering opinions, recommendations and conclusions on specific cases of discrimination. Further duties are providing information on rights and opportunities of initiating judicial or other proceedings for protection against discrimination. Other important tasks involve monitoring the implementation of opinions and giving recommendations regarding particular cases of discrimination; initiating proceedings for violations of the law before competent authorities or appearing as an intervener in court proceedings for protection against discrimination; giving opinions on draft laws important for the protection against discrimination; gathering statistical and other data, and setting up databases. The Commission shall also conduct studies, research and training on discrimination, cooperate with relevant national bodies of other countries, and with international organizations in the field of protection against discrimination etc. This is a vast mandate, which requires the Commission to take a variety of decisions on different matters.
71. **Bearing this in mind, it is noted that the LPPD does not provide much, if any information on the decision-making process within the Commission, nor the role of its President and Members. This should be clarified. It is also recommended to state the working languages of the Commission in line with the rules described in par 68 supra.** While large parts of this should be regulated in rules of procedure adopted by the Commission, certain aspects e.g. the necessary quorum in order to make decisions, need to be addressed in the LPPD, in order to prevent abuse, or a dysfunctional body.
72. **Regarding collection of statistical data, it is recommended that the relevant subparagraph or at least by-laws should oblige the Commission to prepare this data segregated by discrimination grounds and to publish it. This would help to assess the effectiveness of the LPPD in relation to prevention of certain categories of treatment or relief provided to certain categories of persons.**
73. An administrative office of the Commission performs professional, administrative and technical matters of the Commission. Staff at the Commission’s Administrative Office shall have the status of administrative officers, and provisions under the Law on Administrative Officers shall apply to them. The OSCE/ODIHR considers this provision in the LPPD to constitute a progress, as the current 2010 Law has the Commission members performing administrative and technical tasks themselves, which would appear to constitute a considerable burden for its members. This is also in line with recommendations provided by UN human rights monitoring bodies.⁹⁰

6. Procedure before the Commission for Protection against Discrimination

⁹⁰ See e.g., *op. cit.* footnote 77, par 20 (c) (2016 CESCR Concluding Observations).

74. Article 24 entitles persons to file complaints, which appears consistent with the relevant EU Directives.⁹¹
75. Article 25 regulates the complaint's content (par 1), language and alphabet of the proceedings (pars 2 and 3), closing date for filing the complaint (par 4) and the extension of this deadline for cases with larger groups of people, which would have a bigger public effect (par 5). **Deadlines could be further extended for situations involving serious (multiple, repeated or prolonged) discrimination mentioned in Article 12.**
76. Article 26 of the LPPD stipulates several reasons for recusing members of the Commission from working on a particular case, particularly if the respective member has a personal interest or involvement in the case in some other capacity, he or she is in a relationship with a party in proceedings or with his or her representative, or if he or she is somehow related to the party, legal representative or attorney of the party. The above sub-paragraphs describe situations where a member of the Commission would certainly fail the "objective test of impartiality" because of obvious conflict of interests. **Ideally, Article 26 should clarify whether this entails that the member of the Commission shall recuse him-/herself, or whether this determination is reached by a majority of the other members of the Commission (ideally, both should be possible). Moreover, a fourth, relative ground for exemption should be introduced allowing for recusal where the member's prior involvement in a particular case could raise doubts as to whether he/she is impartial in the case at hand. Furthermore, consideration should be given to allowing third parties to request the replacement of members of the Commission under the above three absolute grounds of exemption and also the suggested fourth ground.**

6.1. Burden of proof

77. According to Article 27 of the LPPD, the complainant shall state all the facts that render a claim of discrimination likely. If the Commission determines the claim to be likely, then the burden of proof shall shift to the person or public body against whom/which the complaint was filed. This provision complies with the EU *acquis*.⁹²

6.2. Opinion of the Commission

78. Article 28 par 1 stipulates that the Commission shall issue an opinion within 45 days from the day when the complaint was submitted; it shall likewise propose measures to eliminate the rights violation. **The 2010 law stipulates 90 days; there is a risk of delays if the deadline is too short. It is recommended to keep the 90-day deadline.**
79. Article 29 states that the Commission shall, on its own initiative, indicate a general recommendation in cases of discrimination committed against a larger number of persons. **As it is not very clear to whom and how the recommendation will be addressed and what kind of effect the recommendation is expected to produce.**

⁹¹ *Op. cit.* footnote 32 recital 29 and article 9.2 (Directive 2000/78/EC), and recital 19 and article 7.2 (Directive 2000/43/EC).

⁹² *Op. cit.* footnote 32 recital 31 and article 10 (Directive 2000/78/EC), and; recital 21 and Article 8 (Directive 2000/43/EC).

80. It is welcome that under Article 30, the Commission may directly inspect the documents and premises. This is as broad as the authority provided to the Ombudsman⁹³ and seems more effective. As the liability of the requested body in an event of failing to comply with the request is stated in Article 42 pars 2-5, this right is secured.

6.3 External Cooperation

81. Article 31 (titled “Cooperation with natural persons and legal entities) obliges all persons and entities referred to elsewhere in the LPPD⁹⁴ (also public institutions and services) to provide information on particular instances or general practices of discrimination, within eight days after receiving a respective request by the Commission for Protection against Discrimination. This provision is strengthened by penalty provisions (Article 42 pars 2 to 5).
82. Article 32 stipulates that the Commission shall cooperate with institutions acting on discrimination complaints and human rights protection on specific cases of discrimination (par 1), on the basis of memoranda of understanding concluded with them for this purpose (par 2).⁹⁵ **It may be advisable to establish some procedures/guidelines for such cooperation as the LPPD is rather vague and the mandate of the Ombudsman is overlapping.**
83. The LPPD would benefit from amendment in order to better reflect EU *acquis* relating to involvement of non-governmental actors in the process of implementation of this law. In particular, the draft does not transpose the provisions of the EU Directives 2000/43/EC, 2000/78/EC and 2004/113/EC relating to social dialogue to combat discrimination, dialogue with NGOs⁹⁶ or dialogue with the relevant stakeholders.⁹⁷ Relevant measures include dissemination of adequate information to people in the labor market and on unequal treatment on the basis of racial origin, which is not addressed in the LPPD. The lack of such provisions in the LPPD cannot be substituted by the provision requiring natural or legal persons to provide information to the Commission (Article 31, referred to in the last paragraph of the previous sub-section) or the provisions allowing certain NGOs to be involved in litigation (Article 36, referred to in the next section), because these provisions deal with different matters. **Ideally, article 31 should be amended, so that it also includes non-state actors such as NGOs in a two-way mechanism of cooperation, including them to have a proactive role, similar to that of article 36 allowing NGOs and trade unions to be involved in the effective implementation of the LPPD.**

7. Court Protection

84. Alternatively, or in addition to filing a complaint with the Commission, a person who feels that he/she has suffered discrimination may initiate a procedure before the competent civil courts, which shall treat these cases as urgent cases (Article 33). **The**

⁹³ Law on Ombudsman, article 24.

⁹⁴ For example, in Article 3 par 2.

⁹⁵ For comparison, article 33 of the 2010 LPPD specifically mentioned only the Ombudsman.

⁹⁶ *Op cit.* footnote 32, article 12 (Directive 2000/43/EC) and article 14 (Directive 2000/78/EC).

⁹⁷ *Op cit.* footnote 32 article 11 (Directive 2004/113/EC); and *Op. cit.* footnote 15, article 3 sub-par. (a) (ILO Employment and Occupation Convention).

word “urgently” seems illustrative, but is susceptible to various interpretations. Thus, it is preferable to include an approximate time frame in the text.

85. According to Article 35 par 1 of the LPPD, the lawsuit (action) set out in Article 33 of the LPPD⁹⁸ sets out various forms of claims. The possibility of publishing the operative part of the judgment establishing discrimination at the expense of the defendant (Article 25 par 1(4) is strengthened by the provision which prescribes that the publication is mandatory for the publisher of the media, “regardless of whether such publisher was a party in the proceedings” (Article 35 par 3).
86. According to the EU *acquis*, “[a]ssociations, organizations or other legal entities which [...] have a legitimate interest in ensuring [compliance with the EU Directives’ provisions]” are entitled to “engage, either on behalf or in support of the complainant, with his or her consent, in any judicial and/or administrative procedure provided for the enforcement of [the] Directive”.⁹⁹ Article 36 of the LPPD thus states that “[a]ssociations, foundations or other civil society organizations which have justified interest in protecting the interests of a particular group or that deal with protection against discrimination may file a complaint if it is likely that the defendant’s actions have discriminated against a larger number of people” (*actio popularis*).
87. This is commendable as in some large-scale cases of discrimination, public interest might warrant such a lawsuit, which is not brought by single, identifiable alleged victims but by organizations which are not themselves directly affected.¹⁰⁰

8. Other Provisions in the LPPD

88. Article 37 par 1 deals with security measures determined by courts in the context of court proceedings, namely either before or during proceedings. Paragraph 2 of the same provision deals with interim measures to prevent threats of damages, prevent violence or eliminate irreparable damage. **The difference between the two types of security measures is not specified in the LPPD. Article 37 pars 1 and 2 could be merged into one, by referring to the possibility of ordering interim measures for the stated reasons.**
89. Article 38 stipulates a shift of the burden of proof to the respondent where a plaintiff has stated facts that render the claim likely (par 1) (see par 77 *supra* for the discussion on a similar provision relating to proceedings before the Commission). The provision on reversed burden of proof shall not apply in misdemeanor and criminal proceedings (par 2). This provision is partially in line with the EU *acquis*, which, however, excludes only

⁹⁸ Both the Macedonian and English text of the LPPD wrongly refer to Article 32.

⁹⁹ *Op. cit.* footnote 32, recital 19 and article 7 par. 2 (Directive 2000/43/EC); recital 29 and Article 9 par. 2 (Directive 2000/78/EC), and; recital 21 and Article 8 par. 3; (Directive 2004/113/EC); The quote above originates from the three articles.

¹⁰⁰ In the ECJ case of *Firma Feryn HB* (Case C-54/07, 10 July 2008), instigated before the domestic authorities by the Belgian Centre for Equal Opportunities and Combating Racism against a company whose director stated that the company would not recruit “immigrants”, the ECJ decided that direct discrimination existed regardless of identification of a person formally requesting to be protected against discrimination, but noted that associations with a legitimate interest to instigate legal or administrative proceedings to enforce the obligations resulting from the Directive 2000/43/EC should have a legal basis for filing *actio popularis* in the domestic law and that the national court is entitled to assess whether the national legislation allows such a possibility.

criminal proceedings from the scope of this rule.¹⁰¹ It is worth noting that Article 38 of the 2010 Law, which has a similar wording, has been criticized by UN human rights monitoring bodies.¹⁰² **In order to ensure closer adherence to EU law, it would be preferable if Article 38 par 2 would likewise exclude the shift of the burden of proof only for criminal proceedings, meaning that in misdemeanor proceedings it would still apply.**

90. Article 39 of the draft LPPD stipulates the possibility to use statistical data and/or data obtained through situation testing, in addition to evidence described in the Law on the Litigation Procedure. **The cumulative or alternative use of statistical data should be facilitated by a provision obliging the competent institutions to collect data by registering the relevant discrimination ground(s) and other relevant details (there is such a provision in a related law¹⁰³) and there should be adequate registration and processing of data regarding discrimination cases.**¹⁰⁴
91. A welcome development is the provision exempting persons initiating court proceedings for protection against discrimination from the payment of court fees, which shall be borne by the State Budget (Article 40). This provision facilitates access to court for persons alleging to be victims of discrimination, **but its effectiveness could be further strengthened by stating, here or elsewhere, that alleged victims of discrimination shall be eligible to apply for free legal aid, and that the decision regarding such an application must be rendered swiftly.**

9. Penalty Provisions

92. Fines imposed on legal entities for the failure to act in accordance with Articles of the Law (Article 42, par 1 and 2), can amount up to a fine of 5,000 Euros for discrimination under Article 12 (Article 43, par 1). State officials or representatives of public authorities may be fined for various breaches of the Law (Article 42 pars 3 and 4, Article 43 pars 2 and 3). A natural person can be fined for certain activities that are in breach of the Law (Article 42 par 5) and for violations of Article 12 (Article 43 par 4). **The LPPD could include a provision to adjust the amounts regularly according to inflation. There is a reference to Article 25 (7) in Article 42, which does not exist in the draft law, therefore this reference should be corrected or deleted.**

¹⁰¹ See *Op. cit.* footnote 32, Recital 22 and Article 8 par. 3 (Directive 2000/43/EC); recital 31 and Article 10 par 3 (Directive 2000/78/EC); and recital 22 and Article 9 par 3 (Directive 2004/113/EC),.

¹⁰² See e.g., *op. cit.* footnote 77, par 19 (2016 CESCR Concluding Observations); and par 9 (c) (2015 CERD Concluding Observations).

¹⁰³ A possible way of addressing the lack of comprehensive and accurate data is to follow the good example of the Law on Equal Opportunities Between Women and Men, whose Article 18 states: “The Parliament, the Government, organs of the state administration, judiciary, local self-government and legal entities to whom a law entrusts to perform public interest activities [...] and other subjects who are obliged by a law to collect, register and process statistical data, are obliged to also show these *data by belonging to sex* and to submit them to the State Statistical Bureau.” (emphasis added)

¹⁰⁴ Aleksandar Krzhalovski *et al.*, *Discrimination on the Ground of Ethnic Belonging [Diskriminacija po osnov na etnichka pripadnost]*, OSCE Mission to Skopje], December 2010, <http://www.osce.org/mk/skopje/116792?download=true>, p. 130 refer to registration of incomplete data by the Ombudsman from 2007 to 2010: out of 47 complaints of discrimination on ground of ethnic belonging, only in nine cases the ethnicity of the complainants was registered in the Ombudsman records (in seven case discrimination was found to exist).

93. Following some critical remarks regarding the former misdemeanor provisions (including those contained in the 2008 Draft Law¹⁰⁵) there has been a positive legal development: the misdemeanor provision of the LPPD stipulated the competent court – Misdemeanor Court competent *ratione loci* for conducting the procedure and imposing the sanctions (Article 45) and the misdemeanor procedure for determining the amount of fines for legal persons (Article 44). The latitude for the determining authority to choose from a range of sanctions allows for an appropriate individualization of the fines. As opposed to the 2010 law, the LPPD is thus more likely to achieve the characteristics of sanctions required by the EU standards: effective, proportionate and dissuasive sanctions.¹⁰⁶ **Analogously to the criminal law penal institute of a “day-fine”, introducing a similar mechanism of determining the amount of a fine depending on the discriminating person or entity’s income would further individualize the sanction and may have a stronger deterrent effect.**
94. The Venice Commission, in its 2008 Opinion, paid attention to the need of criminalizing the behaviors listed in Articles 18–23 of the ECRE’s General recommendation no. 7 when committed internationally, as it would be easy to relocate to another country to circumvent national law.¹⁰⁷ Discrimination or public incitement to violence, hatred or discrimination and racial discrimination in the exercise of one’s public office or occupation are already punishable under article 319 the Criminal Code of the former Yugoslav republic of Macedonia. **This list from the Venice Commission (so far largely implemented in the criminal code) should be carefully considered by the drafter and/or the legislative body in the context of drafting/passing the LPPD and related laws.**

10. Final and Transitory Provisions

95. The provision setting out the day of publication of the LPPD as a day of its entry into effect reflects the substantial importance of this Law. However, this jeopardizes the principle of legal certainty; according to which any law should be sufficiently accessible and predictable (these standards are developed and maintained in the case law of the ECtHR and other international judicial bodies such as the ECJ). Nonetheless, the publication of such an important Law must be completed as soon as possible after its promulgation.
96. Finally, OSCE commitments require States to adopt legislation as “as the result of an open process reflecting the will of the people, either directly or through their elected

¹⁰⁵ *Op. cit.* footnote 42 (2008 Venice Commission, Opinion) par 109.

¹⁰⁶ *Op. cit.* footnote 32 article 15 (Directive 2000/43/EC), article (Directive 2000/78/EC), article 14 of the (Directive 2004/113/EC), and *op. cit.* footnote 34, article 23 (ECRI Recommendation No 7).

¹⁰⁷ *Op. cit.* footnote 37 (ECRI, General Recommendation No. 7): “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; 8 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”.

representatives”.¹⁰⁸ This is particularly true for legislation that can impact and affect human rights. As a consequence, **it is recommended that the Draft Amendments undergo additional extensive consultation processes throughout the further drafting and adoption process, to ensure that human rights organizations and the general public, including marginalized groups, are fully informed in a timely manner and able to submit their views prior to adoption.**¹⁰⁹

[END OF TEXT]

¹⁰⁸ See par 18.1 of the Moscow Document on the Human Dimension of the CSCE (1991), available at <http://www.osce.org/fr/odihr/elections/14310>.

¹⁰⁹ See supra par 86,

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Draft

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ⁱ The translated text has an error here it must be either “a discriminatory ground” or “discriminatory grounds”