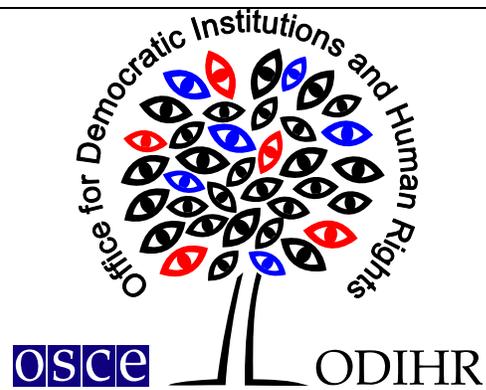


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## **OVERVIEW OF ANTI-DISCRIMINATION LEGISLATION IN THE WESTERN BALKANS**

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**LIST OF ABBREVIATIONS**

BiH – Bosnia and Herzegovina

BPRI - Best Practices for Roma Integration

CERD - UN Convention on the Elimination of All Forms of Racial Discrimination

CRPD - UN Convention on the Rights of Persons with Disabilities

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

ECRI - Council of Europe's European Commission against Racism and Intolerance

EU - European Union

fYRoM - former Yugoslav Republic of Macedonia

ICCPR - International Covenant on Civil and Political Rights

ICJ - International Court of Justice

ILO - International Labour Organization

ODIHR - Office for Democratic Institutions and Human Rights

OSCE - Organization for Security and Co-operation in Europe

UNSCR - United Nations Security Council resolution

## **I. INTRODUCTION**

1. The “Best Practices for Roma Integration (BPRI) Project” (information on the project: <http://bpri-odih.org/>) is a regional OSCE/ODIHR project in the Western Balkans that was initiated in January 2012. Its aim is to contribute to the integration of Roma in the region, namely in Albania, Bosnia and Herzegovina (hereinafter “BiH”), the Republic of Croatia, the former Yugoslav Republic of Macedonia (hereinafter “FYRoM”), Montenegro and Serbia. The project also focuses on the Roma integration in Kosovo\*.
2. As part of the 2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area<sup>1</sup>, the commitment of numerous governments to join the initiative “Decade of Roma Inclusion”<sup>2</sup> and national government strategies for Roma integration, governments, non-governmental organizations and Roma civil society in the Western Balkans are working together to combat discrimination and promote social inclusion of Roma. The BPRI project supports this process by promoting innovative programmes and facilitating co-operation between local and national governments, independent institutions and civil society.
3. One of the components of the project is to raise awareness among the general public on Roma issues and promote participation and visibility of Roma communities in public life (Activity Set 3), namely by conducting legal reviews, accompanied by regional comparisons, of relevant anti-discrimination legislation (Activity 3.1 of the project).
4. This Overview was prepared to implement the above Activity 3.1. It provides for an analysis of selected main components and provisions of the laws in question and indicates key areas of concern in each of these laws. In the interest of concision, it tends to focus more on the most problematic areas of the laws.
5. The scope of the Overview covers specific aspects of anti-discrimination laws of the target region<sup>3</sup>, seen from a comparative point of view. Thus limited, it does not constitute a full and comprehensive review of the individual laws

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\* This designation is without prejudice to positions on Kosovo’s status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.

<sup>1</sup> See Ministerial Council Decision No. 3/03 on the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area and the annexed Action Plan, Permanent Council Decision No. 566 of 27 November 2003, par 8.

<sup>2</sup> The Decade of Roma Inclusion 2005–2015 involves a political commitment by European governments to improve the socio-economic status and social inclusion of Roma. The Decade is an international initiative that brings together governments, intergovernmental and nongovernmental organizations, as well as Romani civil society, to accelerate progress toward improving the welfare of Roma and to review such progress in a transparent and quantifiable way. The Decade focuses on the priority areas of education, employment, health, and housing, and commits governments to take into account the other core issues of poverty, discrimination, and gender mainstreaming. For more information, see <http://www.romadecade.org/home>.

<sup>3</sup> It should be noted that all jurisdictions in question chose to adopt separate anti-discrimination laws. The analysed laws are the following: the 2010 Albanian Law No. 10 221 on Protection from Discrimination; the 2009 BiH Law on Prohibition of Discrimination; the 2009 Anti-discrimination Act of Croatia; the 2010 Law of on Prevention and Protection Against Discrimination the former Yugoslav Republic of Macedonia; the 2010 Law on Prohibition of Discrimination of Montenegro; and the 2010 Law on the Prohibition of Discrimination of Serbia. The 2004 Anti-Discrimination Law of Kosovo was also analysed in this context.

under consideration, nor of all available framework legislation on anti-discrimination in the target region.

6. The Overview was finalized on 30 April 2013, and presented at a regional conference on „Particular Challenges in Dealing with Complaints of Discrimination on Grounds of Ethnicity – A Regional Practitioners’ Exchange“, held in Ohrid, former Yugoslav Republic of Macedonia, on 26-27 September 2013. This conference was attended by ombuds institutions and anti-discrimination bodies from the Western Balkans. In the weeks and months following the conference, input on the overview was received from participants from Albania, Bosnia and Herzegovina, Croatia, former Yugoslav Republic of Macedonia, and Serbia. OSCE/ODIHR has reviewed these comments, and incorporated a number of them into this new version of the Overview.
7. The ensuing recommendations for amendments are based on relevant international standards and OSCE commitments. Additionally, the Overview bears extensive reference to relevant EU legislation; even though most of the jurisdictions in question are not EU Member States at this specific time, all have applied for, and are at different stages of achieving EU membership<sup>4</sup>. While the Republic of Croatia became a full member of the European Union as of 1 July 2013, Montenegro, Serbia and the former Yugoslav Republic of Macedonia are candidate countries. Albania and BiH are potential candidates. According to the EU, Kosovo has a clear European perspective in line with the European perspective of the Western Balkans region.
8. This Overview is based on unofficial translations of the laws. Errors from translation may result.
9. In view of the above, OSCE/ODIHR would like to make mention that this Overview is without prejudice to any written or oral recommendations and comments to the laws or related legislation that OSCE/ODIHR may make in the future.

## **II. ANALYSIS AND RECOMMENDATIONS**

### **1. International Definitions and Standards Related to Anti-Discrimination Legislation**

10. General international anti-discrimination standards can be found in human rights instruments such as the International Covenant on Civil and Political Rights<sup>5</sup> (hereinafter “the ICCPR”) (Article 26) and the European Convention on Human Rights<sup>6</sup> (hereinafter “the ECHR” or “the Convention”) (Article 14,

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<sup>4</sup> For more information, please see: <http://europa.eu/about-eu/countries/>

<sup>5</sup> The United Nations International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966. Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro have all ratified this Covenant. In Kosovo, it is directly applicable following Article 22 of the constitution and Article 3.2 of the Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>6</sup> 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. Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro have all ratified

in combination with other articles of the Convention protecting individual rights and freedoms and Protocol No.12<sup>7</sup>). Other conventions combating more specific aspects of discrimination, such as the UN Convention on the Elimination of All Forms of Racial Discrimination<sup>8</sup> (hereinafter “the CERD”), the UN Convention on the Elimination of All Forms of Discrimination Against Women<sup>9</sup>, the UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”)<sup>10</sup> and Convention No. 111 of the International Labour Organisation (ILO) prohibiting discrimination in the field of employment and occupation,<sup>11</sup> are all relevant in this context.

11. Both Article 26 of the ICCPR and Article 14 of the ECHR protect individuals from discrimination based on an extensive and non-exhaustive range of grounds.<sup>12</sup> The overall concept behind the anti-discrimination provisions in the ICCPR and the ECHR is to prevent any difference in treatment of persons in a relevantly similar or analogous situation that is not based on “objective and

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the Convention. In Kosovo, it is directly applicable following Article 22 of the constitution and Article 3.2 of the Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>7</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) adopted on November 4, 2000, in Rome and entered into force on April 1, 2005. Unlike Article 14 of the Convention itself, the prohibition of discrimination in Protocol 12 is not limited to enjoying other rights in the Convention. The first judgment of the ECtHR finding a violation of Article 1 of Protocol No. 12 was in the case of *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. [27996/06](#) and [34836/06](#). Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro have all ratified Protocol No. 12. In Kosovo, it is directly applicable following Article 22 of the constitution and Article 3.2 of the Constitutional Framework for Provisional Self-Government in Kosovo, which cover both the Convention and its Protocols.

<sup>8</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly of the United Nations in resolution 2106 (XX) of 21 December 1965 and signed on 7 March 1966. Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro have all ratified the Convention. In Kosovo, it is directly applicable following Article 22 of the constitution and Article 3.2 of the Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted by resolution 34/180 of the General Assembly at its thirty-fourth session, 18 December 1979. Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro have all ratified the Convention. In Kosovo, it is directly applicable following Article 22 of the constitution and Article 3.2 of the Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>10</sup> Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro have ratified the Convention. This Convention is not mentioned as applicable in Kosovo under Article 22 of the constitution and Article 3.2 of the Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>11</sup> 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. Entry into force: 15 June 1960, in accordance with article 8; available at: <http://www.un.org/disabilities/default.asp?id=259>. Albania, Bosnia and Herzegovina, Croatia, Montenegro and Serbia have ratified the Convention.

<sup>12</sup> Article 26 states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status”. Similarly, Article 14 foresees that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

reasonable” grounds.<sup>13</sup> This means that situations will not constitute discrimination where the distinction at issue pursues a “legitimate aim” and where there is a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”.<sup>14</sup>

12. Under European Union law, numerous directives have reflected EU countries’ commitment to protecting equal treatment of all persons, in particular the “Racial Equality Directive”<sup>15</sup> (Council Directive 2000/43/EC) and the “Employment Equality Directive” (Council Directive 2000/78/EC)<sup>16</sup> (hereinafter “the EU Equality Directives”). The EU directives include clear and specific definitions of direct and indirect discrimination, as well as remedy and enforcement provisions and requirements for anti-discrimination/equality bodies. These bodies focus on the promotion of equal treatment and on protection from discrimination.
13. Of the various OSCE Commitments focusing on equal treatment, the Vienna Document is among the most specific. It stresses that all OSCE participating States commit to ensuring human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>17</sup>
14. More specifically, the 2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area calls on States to adopt and implement effective legislation to combat racial and ethnic discrimination on all fields. Such anti-discrimination should, according to the Action Plan, ensure, among others, prohibition of direct and indirect racial discrimination, effective, proportionate and dissuasive sanctions, and equal access to effective remedies.<sup>18</sup>

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<sup>13</sup> See the UN Human Rights Committee’s General Comment No. 18, par. 13, and its admissibility decision in the case of *Balani v. Spain*, Communication No. 1021/2001, of 28 March 2003, par 4.3. See also, among others, the recent ECtHR judgment in the case of *Carson and Others v. the United Kingdom*, no. 42184/05, of 16 March 2010, par 61.

<sup>14</sup> *Andrejeva v. Latvia* [GC], no. 55707/00, judgment of 18 February 2009, par 81.

<sup>15</sup> See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>

<sup>16</sup> See the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, hereinafter “the Employment Equality Directive” or “Council Directive 2000/78/EC”.

<sup>17</sup> The OSCE Concluding Document of Vienna – The Third Follow-Up Meeting, Vienna, 15 January 1989, Questions Relating to Security in Europe, Principles, pars 13.7 - 13.8. The Ministerial Council Decision 4/03 on Tolerance and Non-Discrimination of 2 December 2003 reaffirmed the Ministerial Council’s concern about discrimination in all participating States and the Permanent Council Decision no. 621 of 29 July 2004 on Tolerance and the Fights against Racism, Xenophobia and Discrimination committed participating States to consider enacting, or strengthening, as appropriate, legislation prohibiting discrimination.

<sup>18</sup> *Op. cit.*, footnote 3, par 9.

## **2. Protected Characteristics**

### **2.1 General Characteristics**

15. While one element of discrimination entails a difference in treatment, not all differences in treatment are considered to be discrimination. Rather, this applies only to such actions or omissions which are based on certain grounds, or “protected characteristics”. Habitually, these are grounds that are not so much linked to a person’s character or actions, but instead to his/her background or appearance.
16. Article 26 of the ICCPR prohibits discrimination based on the following grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The same grounds are reflected in relevant OSCE commitments, such as the Vienna Document (see par 13 *supra*). Article 14 and Article 1 of Protocol No. 12 of the ECHR enumerate the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The EU Equality Directives provide a framework for combating discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.
17. All laws examined contain quite extensive lists of prohibited grounds, reflecting, in large parts, the wider lists of the ICCPR and the ECHR.<sup>19</sup> The laws of Albania, Croatia and Montenegro comprise all of the grounds found in the EU Directives, while supplementing them with additional characteristics. The same holds true for the Anti-Discrimination Law of Kosovo (hereinafter the “Law of Kosovo”).
18. It is noted that the Law on Prohibition of Discrimination of Bosnia and Herzegovina (hereinafter “the BiH Law”)<sup>20</sup> does not include age or disability in the list of protected characteristics, while the Law on Prevention and Protection against Discrimination of the Former Yugoslav Republic of Macedonia (hereinafter the “Law of fYRoM”)<sup>21</sup> does not cover sexual orientation. The Law on the Prohibition of Discrimination of Serbia (hereinafter the “Serbian Law”)<sup>22</sup> leaves non-religious belief outside of the protected scope. It is recommended to include the missing grounds in the respective laws in order to bring them in line with international standards, namely the ICCPR and the ECHR (fYRoM and Serbia), and, in the case of Bosnia and Herzegovina, with the CRPD and the EU Equality Directives.
19. Moreover, certain laws in question list grounds which would benefit from further clarification. For example, the Albanian Law on Protection from Discrimination (hereinafter the “Albanian Law”)<sup>23</sup> refers to “genetic predispositions”, the Croatian Anti-Discrimination Law (hereinafter the “Croatian Law”)<sup>24</sup> covers “genetic heritage”<sup>25</sup>, the Law of fYRoM<sup>26</sup> refers to

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<sup>19</sup> See Annex 1.

<sup>20</sup> Article 2 of the BiH Law

<sup>21</sup> Article 3 of the Law of fYRoM

<sup>22</sup> Article 2 of the Serbian Law

<sup>23</sup> Article 1 of the Albanian Law

<sup>24</sup> Article 1(1) of the Croatian Law

“belonging to a marginalized group” and the Serbian Law<sup>27</sup> includes “appearance” in the list. The above grounds would benefit from some clarification, to ensure proper applicability of the above legislation.

## ***2.2. Discrimination Based on Assumed Characteristics or Based on Association***

20. It is worth stressing that it may be helpful to also reflect cases of discrimination based on assumed characteristics, or based on association with a characteristic, in relevant legislation combating discrimination. In the first case, the assumption leads to discrimination, regardless of whether such an assumption is factually correct or not (e.g. a dark-skinned person is discriminated for being a Roma, whereas he/she is in fact not Roma).
21. In the second case, a person is discriminated against because of a relationship with a person or persons from a protected group, e.g., a heterosexual man may suffer discrimination because he is with friends who are homosexual. Another example would be if an individual is discriminated against because of the race of his/her partner.
22. The examined laws have addressed the issues of assumed and associated discrimination in different ways. The Albanian Law<sup>28</sup>, for example, states that discrimination occurs when there is a distinction, limitation or preference because of association with persons who belong to a protected group or because of the supposition of such an association. Therefore, discrimination by association and discrimination based on supposed/assumed association are barred. However, discrimination on the basis of assumed membership of a group is not specifically prohibited. It is, therefore, recommended to clarify this and include the prohibition of discrimination based on presumed characteristics or criteria in the Albanian Law.
23. The BiH Law<sup>29</sup> affords protection from discrimination based on “real or assumed features”, as well as on the ground of “connection to a national minority”. However, discrimination on the basis of association with any other group is not prohibited, and it is thus recommended to expand the protection from discrimination by association accordingly.
24. The Croatian Law<sup>30</sup> affords protection against discrimination on the basis of assumed characteristics. It also stipulates that discrimination of a person related to the discriminated person by “kinship or other relationship” is prohibited. Such “other relationship” is not, however, defined in the Law. The prohibition of discrimination on the basis of association with a group also

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<sup>25</sup> It is noted that discrimination based on a person’s “genetic heritage” is forbidden based on Article 11 of the Council of Europe’s Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164, adopted on 4 April 1997), but that the Convention also does not define this term. The Convention was ratified by the Republic of Croatia on 28 November 2003.

<sup>26</sup> *Op. cit.*, footnote 23

<sup>27</sup> *Op. cit.*, footnote 24

<sup>28</sup> Article 3(4) of the Albanian law

<sup>29</sup> Article 2(1) of the BiH Law

<sup>30</sup> Article 1(1) of the Croatian Law

appears to be lacking, as only individual relationship is regulated. It would be advisable to revise the Law accordingly.

25. In the Law on Prohibition of Discrimination of Montenegro<sup>31</sup> (hereinafter the “Law of Montenegro”), “assumed membership in a group” is protected, which presumably reflects discrimination based on assumption. At the same time, the protection from discrimination on the basis of association with a group other than a national minority likewise seems to be lacking. It would be advisable to amend this provision accordingly.
26. The Law of fYRoM does not address these two forms of discrimination at all. Both forms of discrimination are likewise not mentioned in the Law of Kosovo. It is recommended to include the prohibition of both forms of discrimination in the respective laws.
27. Finally, the Serbian Law<sup>32</sup> protects against discrimination on real or presumed grounds. However, in terms of protecting against association with a specific identifiable group of persons, it only protects “members of families” and persons close to those being discriminated. It is recommended to amend the Law accordingly to include other forms of discrimination based on association.

### **3. Personal Scope**

28. Generally, international anti-discrimination instruments apply the equality principle to all persons (see Article 26 ICCPR). This implies that protection against discrimination should not be conditional on nationality, citizenship or residence status. Furthermore, protection from discrimination should also be provided for legal persons (as provided for in par 16 of the Preamble to the EU Racial Equality Directive). The laws of Albania, BiH, Croatia and Serbia appear to satisfy these requirements.
29. While Article 4 of the Law of Kosovo stipulates that it shall apply to all natural and legal persons, Article 1 sets out that the purpose of the Law is to prevent and combat discrimination, promote effective equality and put into effect “the principle of equal treatment” of persons referred to in the Law as “the citizens of Kosovo”. This formulation seems to be too restrictive as the principle of equal treatment should be applied to all persons. In this context, it is noted that UNMIK Regulation No. 2004/32, which promulgated the Law in 2004, stated that the word “citizens” shall be replaced by the term “persons in Kosovo”. As stated in the UNMIK Regulation, this should be reflected in the text of the Law.
30. Despite the fact that general protection from discrimination should not be conditional on nationality, citizenship or residence status, both EU Equality Directives provide that they do not cover “difference of treatment based on nationality.” The Laws of BiH<sup>33</sup>, Croatia<sup>34</sup>, fYRoM<sup>35</sup> and Serbia<sup>36</sup> all contain

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<sup>31</sup> Article 2 of the Law of Montenegro

<sup>32</sup> Article 2(1) of the Serbian Law

<sup>33</sup> Article 5(e) of the BiH Law

<sup>34</sup> Article 9(9) of the Croatian Law

<sup>35</sup> Article 14(1) of the Law of fYRoM

provisions which specify that such difference of treatment is permitted in accordance with the law.

#### **4. Material Scope**

31. The principle of equality and non-discrimination shall apply in all relevant fields of public and private life. Thus, Article 26 of the ICCPR does not differentiate in this respect but, in a general manner, speaks of equality before the law, and protection from discrimination for all persons.
32. Under the ECHR, when applying Article 14, the ECtHR has made it clear that it may examine claims under Article 14 taken in conjunction with a substantive right, even if there has been no violation of the substantive right itself. Protocol 12 to the ECHR prohibits discrimination in relation to “enjoyment of any right set forth by law” and is thus greater in scope than Article 14, which relates only to discrimination in the exercise of the rights guaranteed by the ECHR. The relevant Commentary provided in the Explanatory Report of the Council of Europe states that Protocol 12 also relates to those relations between private persons, which the State is normally expected to regulate, “for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity”<sup>37</sup>.
33. In this context, it is noted that the Law of fYRoM<sup>38</sup> states that “the prevention and protection against discrimination shall be applicable for all natural and legal persons in the process of exercise of the rights and freedoms guaranteed with the Constitution and the legislation of the Republic of Macedonia”. Linking the application of the Law to the exercise of rights and freedoms may be too limiting given that, as recognized in Protocol 12 to the ECHR, not all cases of discrimination will involve the infringement of rights.<sup>39</sup> For example, a person who will be barred from entering a club due to his/her ethnicity will not have other rights violated, as no separate right to enter night clubs is enshrined in law. It is recommended to revise this definition accordingly.
34. The Law of Kosovo<sup>40</sup> limits the scope to “any action or inaction which violates the right or rights” of any natural or legal person to the enumerated instances. This reference should likewise be removed, as also here, not all instances of discrimination will necessarily involve the violation of rights.
35. The EU Equality Directives list specific areas in which the principle of equal treatment should be maintained. Four sections are common to both Directives and include: conditions of access to employment, self-employment or an occupation, including selection criteria and recruitment; access to all types of

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<sup>36</sup> Article 3 of the Serbian Law

<sup>37</sup> Protocol no. 12 to the Convention for the protection of Human Rights and Fundamental Freedoms (ETS no. 177) Explanatory Report, par 28

<sup>38</sup> Article 2 of the Law of fYRoM

<sup>39</sup> This definition also appears to be more limiting than the principle of non-discrimination outlined in Article 9 of the Constitution, which merely states that all citizens are equal, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status, Article 29 specifies that foreign subjects shall, as a rule, enjoy the same rights and freedom as citizens.

<sup>40</sup> Article 4 of the Law of Kosovo

vocational training and guidance, including practical work experience; employment and working conditions, including dismissals and pay; and membership or involvement in workers' organizations, employers' organizations and professional organizations.

36. The Racial Equality Directive extends the scope of protection against discrimination on the grounds of racial or ethnic origin to social protection, including social security and healthcare, social advantages, education, and access to and the supply of goods and services that are available to the public, including housing.
37. The 2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area goes even further by stating that legislation combating racial and ethnic discrimination shall relate to all fields, including, *inter alia*, housing, citizenship and residence, education, employment, and health and social services.<sup>41</sup>
38. While the scope of most of the laws reviewed are quite broad, it is noted that in the case of certain laws, it may be worthwhile to specify explicitly that all of the above areas are included therein, to ensure full compliance with the above instruments and commitments. The Albanian Law<sup>42</sup>, e.g., while including membership in trade unions in its scope, appears not to include membership in employers' organizations and professional organizations. In the area of housing, it refers to "systemization in a place where housing is offered". Such formulation is not clear and would benefit from clarification; also, the scope should be expanded as set out above.
39. At the same time, the Croatian Law<sup>43</sup>, while covering work and working conditions (usually focusing on work premises, health and safety issues), does not specifically include conditions of access to employment, dismissal and pay, and employment conditions in the material scope. To enhance clarity of the Law, it may be beneficial to explicitly reflect the scope set out by the EU Equality Directive in the text. Such formulation could be included directly in the Law, or by reference to other legislation where it may be outlined in greater detail, e.g. in labour laws.
40. It is noted that the Law of fYRoM<sup>44</sup> refers only to "work and labour relations", without referring to the more detailed spheres enumerated in the EU Equality Directives. In order to enhance clarity and foreseeability of the Law, it may be beneficial to be more specific about the spheres covered by the law, which should, in relation to employment, cover areas such as access to employment, self-employment/occupation, including selection criteria and recruitment, and access to vocational training and guidance.
41. The Montenegrin Law<sup>45</sup>, while prohibiting any form of discrimination, on any ground, at the same time specifies the material scope in certain areas, namely the "use of facilities, buildings, areas in public use", "public service delivery", "health", "education and vocational training", and the field of labour which

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<sup>41</sup> *Op cit.* footnote 3, par 8.

<sup>42</sup> Article 20(2)(d) of the Albanian Law

<sup>43</sup> Article 8 of the Croatian Law

<sup>44</sup> Article 4 of the Law of fYRoM

<sup>45</sup> Articles 10-18 of the Montenegrin Law

encompasses “equal pay for work of equal value”. While the added value of specifically listing certain forms of discrimination in separate provisions is doubtful, it is stressed that this should not be interpreted as limiting the scope of the Law. Thus, the Law could be understood as restricting the protection against discrimination in access to employment, work and education to the ground of health condition. Furthermore, the protection against discrimination in access to healthcare, “the right to work and the rights related to employment relations”, “the right to marry, form a family and other rights from the field of marriage and family relations” may be seen as restricting this field to the ground of disability. The scope and wording of the Law should be revisited to reflect a wide scope of applicability, as required by international and EU law.

42. In Serbia, the material scope of the Law<sup>46</sup> appears not to include the following: access to self-employment or an occupation; membership in employers’ organizations and professional organizations, as well as social advantages and housing. These missing spheres should be included in the Law.

## **5. Key Definitions and Concepts**

### ***5.1. Direct Discrimination***

43. Direct discrimination is defined similarly under both the ECHR and EU law. Direct discrimination, as laid down in the Directives, occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of protected characteristics. The ECtHR states that there must be a “difference in the treatment of persons in analogous, or relevantly similar, situations”, which is ‘based on an identifiable characteristic’<sup>47</sup>. The ECtHR further specifies that discrimination will be found to have occurred if this difference in treatment is not based on an objective and reasonable justification. The EU Equality Directives, while not containing such a caveat in their definition of direct discrimination, do permit an exception to both direct and indirect discrimination in cases where, by nature of particular occupational activities, or due to the context in which they are carried out, a genuine occupational requirement justifies a difference in treatment, provided that the objective is legitimate, and the requirement proportionate.<sup>48</sup>
44. All seven laws in question contain definitions of direct discrimination. The laws in Albania<sup>49</sup>, BiH<sup>50</sup>, Croatia<sup>51</sup> approximate their definitions of direct discrimination to the definition found in the EU Equality Directives. The definitions found in legislation from fYRoM, Montenegro and Serbia, however, would benefit from some revision.

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<sup>46</sup> Article 16 of the Serbian Law

<sup>47</sup> Carson and Others v. the United Kingdom [GC], no. [42184/05](#), §§ 61 and 70, D.H. and Others v. the Czech Republic [GC], no. [57325/00](#), § 175, Burden v. the United Kingdom [GC], no. [13378/05](#), § 60

<sup>48</sup> Article 4 in both EU Equality Directives.

<sup>49</sup> Article 3(2) of the Albanian Law

<sup>50</sup> Article 3(1) of the BiH Law

<sup>51</sup> Article 2(1) of the Croatian Law

45. The definition contained in the Law of Kosovo<sup>52</sup> is also in line with the EU Equality Directives.
46. According to the Law of fYRoM<sup>53</sup>, direct discrimination “on the discriminatory basis is any unpleasant acting, differencing, excluding or limitation which has or shall have a consequence of suspension, violation or limitation of the equal recognition or enjoyment in the human rights and basic freedoms”.
47. This definition does not appear congruous with international anti-discrimination standards. The definition links discrimination to a consequence of suspension, violation or limitation of equal recognition or enjoyment of rights and freedoms, which may limit the scope of applicability of the Law (see pars 32-34 *supra*). The wording of this definition should be clarified.
48. In the Law of Montenegro<sup>54</sup>, the definition of direct discrimination provides for an exception where the difference in treatment is based on a reasonable and objective justification. Given Montenegro’s status as an accession State, it may well be considered worthwhile to revise the wording to reflect EU legislation by outlining that direct discrimination is prohibited in all cases except in cases involving a genuine occupational requirement (see also par 85 *infra*).<sup>55</sup>
49. Finally, the Serbian Law<sup>56</sup> stipulates that direct discrimination shall occur on the grounds of “personal characteristics”. Unless the wording in the Serbian language version is clearly referring to the provision on protected grounds, it is recommended that this part of the Law contain a specific reference to protected grounds under the Law.

## ***5.2. Indirect Discrimination***

50. Another definition of crucial importance is that of indirect discrimination. Both EU Equality Directives state that such discrimination shall occur when an apparently neutral provision, criterion or practice would put persons of a protected characteristic at a particular disadvantage compared with other persons, unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The ECtHR has drawn on this definition of indirect discrimination in its judgments, stating that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group”<sup>57</sup>.
51. Croatia<sup>58</sup> and Montenegro<sup>59</sup> have introduced definitions of indirect discrimination in their legislation, which generally reflect the formulation

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<sup>52</sup> Article 3(a) of the Law of Kosovo

<sup>53</sup> Article 6(1) of the Law of fYRoM

<sup>54</sup> Article 2 of the Montenegrin Law

<sup>55</sup> The 2012 EU Progress Report on Montenegro also specified that in relation to definitions, legislation on discrimination is not in line with the EU acquis (p. 41).

<sup>56</sup> Article 6 of the Serbian Law

<sup>57</sup> D.H. and Others v. the Czech Republic [GC], no. [57325/00](#), § 184 ,

<sup>58</sup> Article 2(1) of the Croatian Law

<sup>59</sup> Article 2 of the Law of Montenegro

found in the EU Equality Directives. The Law of Kosovo<sup>60</sup> also reflects this formulation.

52. However, the definition contained in the Law of BiH<sup>61</sup> does not include the exception of an objective justification.
53. The Serbian Law<sup>62</sup> stipulates that “indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary”. Again, the reference to personal characteristics is insufficiently precise (see par 49 *supra*).
54. Moreover, the stipulation that the act shall be based on the principle of equality and prohibition of discrimination should be removed. For indirect discrimination to occur, a provision, criterion or practice does not have to be based on the principle of equality and prohibition of discrimination – it is sufficient if it is “apparently neutral”. For example, a store may require customers to produce photographic identification in the form of a driver’s license before collecting an order. This may disadvantage a person with vision impairment who is not eligible to hold a driver’s license. Such a provision may, *prima facie*, appear to be neutral but have a discriminatory impact. It would, therefore, be advisable to revise this provision accordingly.

### ***5.3. Harassment***

55. The EU Equality Directives deem harassment to be discrimination, which is when an unwanted conduct related to prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The ICCPR and the ECHR do not specifically mention harassment, but in the CRPD, it is mentioned in relation to employment rights of disabled persons (Article 27 par 1 b) of the CRPD).
56. The Law of BiH<sup>63</sup> contains a definition of harassment which is in line with the wording in the EU Equality Directives. The Law of Kosovo<sup>64</sup> also contains a definition aligned with the EU Equality Directives.
57. At the same time, the definition contained in the Albanian Law<sup>65</sup> adds that harassment shall “in the case of a less favourable treatment [be] performed as a result of an objection or failure to submit by the person affected by such a behavior”. This could potentially be too narrow, as harassment could also occur without any reason.

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<sup>60</sup> Article 3 (b) of the Law of Kosovo

<sup>61</sup> Article 3(2) of the BiH Law

<sup>62</sup> Article 7 of the Serbian Law

<sup>63</sup> Article 4(1) of the BiH Law

<sup>64</sup> Article 3(c) of the Law of Kosovo

<sup>65</sup> Article 3(5) of the Albanian Law

58. In the Law of Montenegro<sup>66</sup>, the possible results of harassment generally reflect the EU standards, except that “inconvenience” is also cited as a possible result of harassment. This would appear to set the threshold for harassment quite low, as numerous less serious adverse effects could fall under this term. The definition of harassment should thus be amended to reflect EU terminology.

#### ***5.4. Instruction to Discriminate***

59. The EU Equality Directives stipulate that an instruction to discriminate shall be deemed discrimination. All of the examined laws, with the exception of Serbia, contain a provision regulating such instruction. However, the Albanian Law<sup>67</sup> states that the instruction to discriminate is “based on hierarchical relations”. First, this definition does not state that such instruction shall be deemed discrimination. Secondly, the reference to hierarchical relations seems to be unnecessary, as it is limiting in scope, excluding any instruction based on relations of other nature.
60. The Law of Montenegro<sup>68</sup>, on the other hand, mentions both incitement and instruction to discriminate as examples of discrimination. As sanctioning the incitement to discriminate could raise issues with regard to the freedom of expression, it is advised to limit the respective provision to instruction to discriminate.

#### ***5.5. Victimization***

61. Article 9 of the Racial Equality Directive and Article 11 of the Employment Equality Directive refer to victimization. Even though it is not considered a form of discrimination, the EU Equality Directives stipulate that individuals should be protected from any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.
62. Generally all laws in question attempt to provide for such protection. The Law of Albania properly reflects the wording of the EU Equality Directives.
63. The Law of Kosovo also contains wording that is compliant with the EU Directives.
64. Definitions contained in the other laws in question, however, are unnecessarily restrictive. For example, the Law of Montenegro<sup>69</sup> appears to be unnecessarily narrow in scope, by only protecting people from victimization in very specific circumstances, namely when they report discrimination, give depositions or offer evidence in proceedings. The scope of the respective provision should be widened, to ensure that all forms of victimization are covered.

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<sup>66</sup> Article 7 of the Law of Montenegro

<sup>67</sup> Article 3(6) of the Albanian Law

<sup>68</sup> Article 2 of the Law of Montenegro

<sup>69</sup> Article 4 of the Law of Montenegro

65. Likewise, the BiH Law<sup>70</sup> protects “persons who reported discrimination or participated in legal proceedings for protection from discrimination”. This type of protection appears to be similarly restrictive, and should be expanded to cover all types of adverse treatment or consequences emanating from such procedures, as stated in the EU Equality Directives.
66. While the Croatian Law<sup>71</sup> enumerates a greater number of cases in which a person will be protected (reporting or witnessing discrimination, refusing to participate, or participating in proceedings), there may still be other instances of adverse treatment or consequences. Furthermore, the respective provision of the Law protects from being placed in a “less favourable position”, which appears to relate more to discrimination, than to the negative or adverse consequences of victimization. It is thus recommended to amend these parts of the Law so that they more aptly reflect the principle of victimization under EU law.
67. In the Serbian Law<sup>72</sup>, treating a person or group of persons “worse than others” shall constitute discrimination if this is based on a request or intention to request “protection from discrimination”, or due to having offered or intending to offer evidence of discriminatory treatment. This provision clearly mixes the concept of discrimination with the concept of victimization, which is protection against adverse treatment or consequences due to anti-discrimination procedures. It would be advisable to amend this provision to make it more consistent with the victimization principle stipulated in the EU Equality Directives.
68. The Law of fYRoM<sup>73</sup> also states that victimization shall be “included in discrimination”, and that persons are protected from unfavourable behavior bearing negative consequences as a result of undertaking activities for protection against discrimination (reporting discrimination, initiating pertinent procedures, or acting as witness during the procedure). Also in this Law, it is recommended to differentiate between discrimination, and victimization, and to protect individuals in all cases where anti-discrimination proceedings may lead to adverse treatment or consequences.

#### ***5.6. Reasonable Accommodation***

69. Article 5 of the CRPD states that States shall take all necessary steps to ensure that “reasonable accommodation” is provided. Under Article 2 of the same Convention, this is defined as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.
70. The EU Employment Equality Directive imposes the same obligation on employers in relation to disabled employees, to enable them, where needed, “to have access to, participate in, or advance in employment, or to undergo

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<sup>70</sup> Article 18 of the BiH Law

<sup>71</sup> Article 7 of the Croatian Law

<sup>72</sup> Article 9 of the Serbian Law

<sup>73</sup> Article 10 of the Law of fYRoM

training, unless such measures would impose a disproportionate burden on the employer”. The above measures include modifications or adjustments to the job application process, the physical environment, and policies and practices at work to facilitate qualified disabled candidates.

71. A number of laws in question reflect the main parameters of the CRPD, aside from the Law of Serbia, which does not include the reasonable accommodation requirement. It is recommended to include it in this Law as well, to ensure consistency with the CRPD and the EU Employment Directive. The Law of Kosovo would benefit from the inclusion of such provision in relation to the employment sector as well, to ensure compliance with EU standards.
72. The Croatian Law<sup>74</sup> deems the failure to “adapt the infrastructure and premises” thus removing obstacles that restrict disabled access to publicly available resources, participation in public and social life and access to work and adequate working conditions, to be discrimination. The Law also includes an exception in cases where this poses a disproportionate burden on the responsible person. However, as noted above, adjustments to the job application process and policies and practices at work are also required; the Croatian Law should be adjusted accordingly.
73. The Albanian Law refers to reasonable accommodation in three provisions<sup>75</sup>, and largely reflects what is set out in the CRPD. However, it is noted that while the reasonable accommodation requirement is included under the provision of goods and services, it is not included in parts of the Law describing non-discrimination in employment. It would be beneficial to include it explicitly in relevant provisions, to ensure compliance with the EU Employment Equality Directive.
74. The definition contained in the Law of BiH<sup>76</sup> closely mirrors the reasonable accommodation duty found in the EU Directive. It also states that employers shall take “appropriate measures in order to enable a person with disability to access, participate or to be promoted”. Perhaps this provision could clarify whether it relates to all spheres of life, or only to employment cases.
75. The adjustment of infrastructure for disabled persons is also defined in the Law of fYRoM<sup>77</sup>. It is not clear, however, whether only the failure to adopt measures which would facilitate access to public spaces shall be considered discrimination or whether this also pertains to privately owned work spaces. Furthermore, to adequately reflect the wide scope of the CRPD, it is recommended to include a general reasonable accommodation requirement in the law, relating not only to infrastructure, but to all possible aspects of life covered by the CRPD.
76. The Law of Montenegro<sup>78</sup> describes that the denial of the right to work, making the use of public facilities impossible, restrictive or difficult, and the failure to take special measures to “remedy limitations or unequal position” of

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<sup>74</sup> Article 4(2) of the Croatian Law

<sup>75</sup> Articles 3(7), 5(2) and 20(3) of the Albanian Law

<sup>76</sup> Article 5(f) of the Law of BiH

<sup>77</sup> Article 5(12) of the Law of fYRoM

<sup>78</sup> Article 18 of the Law of Montenegro

the disabled, constitute discrimination. As stated above, such provisions may go too far in that they do not provide for reasonable exceptions, namely where such measures would impose a disproportionate burden on public administration, employers or other stakeholders.

77. Furthermore, other aspects of this definition also fall short in bringing the Law in line with the EU *acquis*. To further enhance protection for disabled persons, it is recommended to extend the Law so that it also includes other aspects of reasonable accommodation, including access to, participation in, or advancement in employment, or training activities, but also other areas of relevance to disabled persons.
78. As it stands, all of the laws examined would benefit from varying degrees of revision to ensure that provisions regulating the reasonable accommodation requirement are in line with relevant parts of the CRPD and the EU Employment Equality Directive. This particularly applies to the Law of Serbia, where it is recommended to include the duty of reasonable accommodation. The Law of Kosovo should also include such a provision.

### ***5.7. Segregation***

79. Another important aspect of discrimination with potential implications for the Roma community is that of segregation. Article 3 of the CERD specifically condemns racial segregation, and obliges States to prevent, prohibit and eradicate all forms of racial segregation. This means that racial segregation may never, under no conditions be justified.
80. The issue of segregation is regulated by the laws of BiH<sup>79</sup>, Croatia<sup>80</sup> and Montenegro<sup>81</sup>. The Law of Kosovo<sup>82</sup> likewise regulates this matter.
81. It is noted that none of the above laws specify which type of segregation they are addressing. Moreover, under the definition contained in the law of Montenegro, segregation is permitted where it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary. The same holds true for the Law of Kosovo. While in certain circumstances, it may indeed be justifiable to separate persons based on their gender, health condition, or age, any kind of racial segregation can never be justified. It is noted that the Albanian Law, the Serbian Law, and the Law of fYRoM do not regulate segregation at all.
82. The respective laws should be amended accordingly, and all laws should specify the absolute ban on racial segregation.<sup>83</sup>

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<sup>79</sup> Article 4(4) of the BiH Law

<sup>80</sup> Article 5 of the Croatian Law

<sup>81</sup> Article 9 of the Law of Montenegro

<sup>82</sup> Article 3(f) of the Law of Kosovo

<sup>83</sup> As the issue only arose in the case of these two laws, segregation is not included in the comparative table under Annex 1.

## **6. Exceptions to the Prohibition of Discrimination**

### ***6.1. Genuine and Determining Occupational Requirement***

83. According to Article 4 of the EU Racial Equality Directive and Article 4 par 1 of the EU Employment Equality Directive, a difference in treatment which is based on a protected characteristic shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
84. All seven laws under consideration have chosen to include such an exception. Albania<sup>84</sup>, BiH<sup>85</sup>, Croatia<sup>86</sup> and fYRoM<sup>87</sup> appear to have approximated their definitions with the definition of the genuine and determining occupational requirement found in the EU Directives. The definition contained in the Law of Kosovo<sup>88</sup> is also approximated.
85. In the Laws of Montenegro<sup>89</sup> and Serbia<sup>90</sup>, on the other hand, the definitions do not explicitly state that such a requirement should adhere to the proportionality principle. It is advised to revise the relevant provisions accordingly.

### ***6.2. Religious Organizations***

86. Under the EU Employment Equality Directive, national legislation or practices may allow churches and other public or private organizations, whose ethos is based on religion or belief, to treat persons differently on the basis of their religion or belief. Such different treatment shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. This exception only allows for different treatment on the grounds of religion or belief, and cannot be used to justify discrimination on any other ground.
87. BiH<sup>91</sup>, Croatia<sup>92</sup> and fYRoM<sup>93</sup> included such an exception in their respective laws. However, the definition in the legislation of BiH may be too wide in scope, as it speaks of "doctrines, basic presumptions, dogmas, beliefs or learning of actual confession or religion", which does not necessarily specify that such difference in treatment will be based on persons' religion or belief, as a genuine occupational requirement. The definition in fYRoM's Law applies

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<sup>84</sup> Article 6(2) of the Albanian Law

<sup>85</sup> Article 5(b) of the BiH Law

<sup>86</sup> Article 9(2), item 4 of the Croatian Law

<sup>87</sup> Article 14(2) of the Law of fYRoM

<sup>88</sup> Article 5 of the Law of Kosovo

<sup>89</sup> Article 16 of the Law of Montenegro

<sup>90</sup> Article 16 of the Law of Serbia

<sup>91</sup> Article 5 (c) of the BiH Law

<sup>92</sup> Article 9(2), item 5 of the Croatian Law

<sup>93</sup> Article 14(3) of the Law of fYRoM

to the grounds of “religion, belief, sex or other characteristics”. Such exceptions may well go beyond the parameters of the EU Employment Directive, and should be revisited.

88. The Serbian Law<sup>94</sup> provides for a somewhat different exception by stipulating that “the conduct of priests, that is to say, religious officials, which is in keeping with a religious doctrine, beliefs or the objectives of churches and religious communities” shall not be considered to constitute discrimination. This provision is unclear as it is not entirely certain what type of conduct this would pertain to; therefore, it would benefit from some clarification.

### ***6.3. Other Exceptions***

89. There exist a number of other exceptions in the laws in question. For example, the Albanian Law<sup>95</sup> states that “distinctions in compensation and benefits” established on the basis of protected grounds do not constitute discrimination when “the distinctions are reasonable and in proportion to a risk that is assessed on the basis of current and statistical data that can be verified and are closely linked to the risk”. The meaning and scope of this provision are not clear and it should thus be revised.

## **7. Equality Bodies**

90. While the ICCPR and the ECHR do not specifically mention the establishment of equality bodies, such bodies are required under the EU Racial Equality Directive. The minimum requirement regarding equality bodies, as stipulated therein, is to have one or more bodies for the promotion of racial and ethnic origin equality 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.
91. 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 legislation.<sup>96</sup>
92. Such bodies exist in all target jurisdictions, but in different forms. Next to general human rights institutions, Albania, fYRoM and Serbia also have separate specialized bodies dedicated solely to the protection against discrimination. In BiH, Croatia and Montenegro, the competences with respect to protection from discrimination are vested with the general human rights Ombudsperson. The Ombudsperson is also the responsible anti-discrimination body in Kosovo.

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<sup>94</sup> Article 18 of the Serbian Law

<sup>95</sup> Article 20(5) of the Albanian law

<sup>96</sup> ECRI General Policy Recommendation No. 7, Recommendation 24, as well as pars 51 and 52 of the Explanatory Memorandum.

93. The specialized bodies set up by the laws of Albania, fYRoM, and Serbia are independent; they are appointed by the respective parliaments for five years, and are only accountable to parliament.
94. The more general ombuds offices set up in BiH, Croatia and Montenegro are likewise considered to be independent, as set out in relevant legislation establishing these bodies (though in Croatia the Ombudsman is a Parliamentary Ombudsman).<sup>97</sup> They are all appointed by parliament, for a set tenure, and are only accountable to the parliament. The same holds true for Kosovo where the Ombudsperson is accountable to the Assembly of Kosovo.
95. It should be noted, however, that the Human Rights Protector of Montenegro is appointed by parliament based on the proposal of the President. This procedure has raised some concerns with regard to the independence of the Human Rights Protector in the past.<sup>98</sup>
96. The competences of these bodies in protecting from discrimination found in the reviewed anti-discrimination laws all include assisting victims of discrimination and dealing with their complaints, as well as the publication of reports. While almost all laws foresee the conduct of surveys by these bodies, the Serbian Law does not; it may be advisable to include this task specifically, to make this law fully compliant with the EU Racial Equality Directive.
97. Likewise, most laws foresee the monitoring of the situation and of legislation. While the Law of Kosovo does not specifically mention this, this could perhaps be implied from the general mandate of the Ombudsperson to raise awareness on human rights issues, propose new legislation, and prepare annual reports on the human rights situation. Monitoring is also not explicitly mentioned in the Law of Montenegro, but may be also implied by the Human Rights Protector's mandate to inform the public about discrimination/raise awareness, and collect and analyze statistical data.
98. Certain institutions have even wider mandates that would allow for the participation in proceedings (BiH), the right to file criminal cases with prosecutors (Croatia), the right to initiate proceedings before competent bodies (fYRoM), and the right to submit misdemeanor notices (Serbia). In Kosovo the Ombudsperson can initiate cases before the constitutional court.
99. The Albanian Commissioner for Protection from Discrimination also has quite extensive powers. Next to imposing administrative sanctions, including fines for violating the law, he/she may order regulations or measures, and fine natural or legal persons if they do not inform the Commissioner or implement the decision. Should the person still not implement the decision or pay the fine, then the Commissioner may ask competent authorities to remove or suspend the license or authorization of a person/legal entity required to conduct his/her/its activity.

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<sup>97</sup> Article 13 of the Croatian Law also foresees that certain ombuds tasks may be undertaken by special ombuds bodies, if this is laid down in a special law.

<sup>98</sup> See the OSCE/ODIHR-Venice Commission Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro, CDL-AD(2011)034, of 19 October 2011, adopted by the Venice Commission at its 88th Plenary Session (14-15 October 2011), pars 17-18. The matter of the Human Rights Protector's independence was also raised in the 2012 EU Progress Report on Montenegro, p. 9: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2012/package/mn\\_rapport\\_2012\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf)

100. At the same time, in certain jurisdictions, there appear to be discrepancies between the general scope of the work of ombuds institutions, and the mandate required for adequate and comprehensive protection against discrimination. More specifically, ombuds institutions habitually deal with complaints against public authorities and institutions, and not with complaints against private persons. At the same time, the protection against discrimination should extend to the private sector as well, in particular in the area of employment. Thus, if ombuds institutions should be effective anti-discrimination bodies within the meaning of the EU Racial Equality Directive, their competences need to be expanded in this field.
101. While this is usually reflected in anti-discrimination legislation, the respective basic legislation for establishing ombuds institutions still refers only to complaints against public bodies and institutions, thereby creating a situation where, in terms of scope, the two laws conflict. It looks like this may be the case in Bosnia and Herzegovina and Montenegro. In Croatia, this issue was resolved by a specific reference to competences imposed by other legislation contained in the 2012 Ombudsman's Act.
102. In the Law of Kosovo, there also appears to be a conflict with the relevant legislation on the Ombudsperson.
103. The above discrepancies in legislation should be removed, to ensure that ombuds institutions may be effective anti-discrimination mechanisms in all fields where discrimination may potentially appear.

## **8. Remedies and Sanctions**

104. The right to legal remedy is contained in both Article 2 par 3 of the ICCPR, and Article 13 of the ECHR. Likewise, Article 6 of the CERD, and Article 5 of the CRPD require effective protection and remedies in cases of discrimination on racial/ethnic or disability grounds.
105. According to the EU Equality Directives, infringements of anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim.
106. The European Court of Justice has held that any sanction provided by the national legal system must be such as to "guarantee real and effective judicial protection" and must "have a real deterrent effect" on the discriminating entity.<sup>99</sup>
107. The meaning of that concept must be determined in each concrete case in the light of the individual circumstances. A wide range of possible remedies and sanctions exist in the laws in question<sup>100</sup>.

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<sup>99</sup>Marshall (1993), Case C-271/91, par 24; Dekker (1990), Case C-177/88; Von Colson (1984), Case 14/83.

<sup>100</sup> For a detailed description of the remedies and sanctions see Annex 1.

### ***8.1 Judicial Procedures***

108. According to the above principles, and the EU Equality Directives, states shall ensure that judicial and/or administrative procedures, including, where they deem it appropriate, conciliation procedures, are available to all persons who consider themselves wronged by the failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
109. Judicial remedies are envisaged in all laws under examination<sup>101</sup>. Special civil proceedings requiring urgent action of courts are envisaged in BiH, Croatia, FYRoM, Montenegro and the Serbia, while the Albanian Law refers to civil procedure legislation for compensation, and to criminal procedure legislation for “criminal denunciations”. The only types of legal remedies specifically mentioned in the Albanian Law are compensation, and, depending on the case, criminal sanctions (though criminal liability for acts of discrimination should be avoided). This complements the extensive competences of the Albanian Commissioner for Protection from Discrimination, who may impose sanctions for violations and for the failure to comply with his/her decisions (par 99 *supra*).
110. The specific types of lawsuits mentioned in the Laws of BiH, Croatia, FYRoM, Montenegro and Serbia focus on four main remedial actions, determination of the violation, prohibition of the discriminatory act, compensation or publication in the media. All of the above laws also foresee the imposition of fines for different forms of discriminatory behavior, in a more or less specific manner. It would be important to assess, for each individual law, how effective this system of remedies and sanctions is, and whether the requirements of the laws are sufficiently clear and foreseeable.
111. In relation to the Law of Montenegro, it is noted that the imposition of fines is only possible in very specific cases, but not for general acts of anti-discrimination; this should be amended.
112. The deadline for filing anti-discrimination lawsuits is 90 days according to the Law of Montenegro<sup>102</sup>. It is noted that the Law of Croatia, does not specify a time limit and does not, as do other laws, e.g. those of FYRoM or Serbia, specifically refer to other procedural law in relation to the submission of the claim; it is recommended to remedy this, either directly in the Law or by reference to other relevant legislation where this may be outlined in greater detail. Generally, it should be noted that a time limit for bringing a case should not be too short as this may constitute a potential barrier to litigation.
113. In Kosovo, the legal mechanisms for enforcing rights are generally unclear and insufficiently detailed. The legal mechanisms as set out in Article 7 of the Law would perhaps benefit from some clarifications, as it is not apparent which courts have jurisdiction. It would be helpful to include in the Law an indication of the role of courts and types of proceedings related to discrimination complaints before courts, along with references to the

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<sup>101</sup> For judicial procedures see the following: Articles 34-38 of the Albanian Law; Articles 11-19 of the BiH Law; Articles 16-24 of the Croatian Law; Articles 24-31 of the Law of Montenegro; Articles 34-41 of the Law of FYRoM; Article 7 of the Law of Kosovo; Articles 41-46 of the Serbian Law;

<sup>102</sup> Article 27 of the Law of Montenegro

appropriate courts and procedures. This information could be included directly in the Law or by reference to relevant procedural legislation.

114. In particular with regard to liability, it would be beneficial to include in the Law a list of possible claims that could be taken to court aimed at e.g. the cessation of a discriminatory act, the declaration that such an act has taken place, and compensation/damages for such acts. The Law should also specify which types of courts would be competent to hear such cases.

### ***8.2 Third-Party Intervention***

115. Article 7 par 2 of the EU Racial Equality Directive and Article 9 par 2 of the EU Employment Equality Directive provide that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the principle of equal treatment is complied with, should be able to engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure. A similar principle is outlined in ECRI General Policy Recommendation No. 7, Recommendation 25.
116. All laws in question contain similar provisions that satisfy part of this requirement, but it is noted that the laws of Albania<sup>103</sup>, Montenegro<sup>104</sup> and Serbia<sup>105</sup> appear to only allow third-party intervention on behalf of complainants, but not in support of them. Furthermore, the Montenegrin<sup>106</sup> and Serbian<sup>107</sup> Laws do not permit third-party intervention in the case of compensation lawsuits.
117. As for the Law of Kosovo, it permits third-party intervention, but apparently also only on behalf of complainants, not in support of them.<sup>108</sup>
118. It is recommended to revise the wording in the above laws to reflect more adequately the principle of third-party intervention outlined in the above international instruments.

### ***8.3 Burden of Proof***

119. According to international anti-discrimination standards, and the EU Equality Directives, persons alleging discrimination against them must establish, before a court<sup>109</sup> or other competent authority, facts from which it may be presumed that there has been discrimination. The burden of proving the violation will then shift to the respondent, who must prove that there has been no breach of the principle of equal treatment. This does not, however, apply to criminal procedures, or other procedures where courts have an investigative role.

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<sup>103</sup> Article 34 of the Albanian Law

<sup>104</sup> Article 22 of the Law of Montenegro

<sup>105</sup> Article 35 of the Serbian Law

<sup>106</sup> Article 30 of the Law of Montenegro

<sup>107</sup> Article 46 of the Serbian Law

<sup>108</sup> Article 7.6 of the Law of Kosovo

<sup>109</sup> See *Nachova and Others v. Bulgaria* [GC], nos. [43577/98](#) and [43579/98](#), § 147, as well as *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994). See also *Bleir v. Uruguay*, Doc. A/37/40, p. 130 (1982)

120. All laws under examination have included provisions which shift the burden of proof to the respondent. However, not all have transposed the requirement in line with international standards, and the EU Equality Directives. It would appear that the relevant provisions contained in the Laws of BiH<sup>110</sup> and Croatia<sup>111</sup> are compatible with the above instruments. The provision contained in the Law of Kosovo<sup>112</sup> also appears to be compatible with international standards<sup>113</sup>.
121. The Albanian Law<sup>114</sup> shifts the burden of proof to the respondent, however, “the plaintiff has the obligation to bring evidence in support of the lawsuit, using every kind of lawful evidence that may show discriminating behaviour”. Such obligation may go beyond that of simply establishing the facts.
122. The Law of fYRoM<sup>115</sup> states that “if the party in a court proceeding shall claim that in accordance with the provisions of this Law his/her right to equal treatment has been violated, he/she is obliged to state all the facts and evidence justifying his/her claim.” Here, as in the case of Albania, the reference to evidence appears problematic.

*[END OF TEXT]*

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<sup>110</sup> Article 15 of the BiH Law

<sup>111</sup> Article 20 of the Croatian Law

<sup>112</sup> Article 8 of the Law of Kosovo

<sup>113</sup> However, it is noted that in UNMIK Regulation No. 2004/32 promulgating the Law, the Special Representative of the UN Secretary-General had stated that Article 8 par 3 should be deleted; this article had initially stipulated that the shift of the burden of proof should not apply to criminal and minor offences proceedings. According to Article 8 of the EU Racial Equality Directive, and Article 10 of the EU Employment Equality Directive, the shift of the burden of proof shall not apply in criminal procedures – in the course of attempting to make the Law compliant with EU Law, this should be borne in mind.

<sup>114</sup> Article 36(6) of the Albanian Law

<sup>115</sup> Article 38(1) of the Law of fYRoM