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Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe anti-discrimination standards

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The views expressed in this report are those of the authors and do not necessarily reflect those of the Council of Europe or the European Union. This report has been prepared as a result of an independent assessment by the consultants being contracted under the Project "Supporting national efforts for prevention and combating discrimination in Moldova".

Contents

I. Introduction

1. The present Opinion covers Law no. 121 on Ensuring Equality (hereinafter the Law) adopted by the Parliament of Moldova on 25 May 2012. The Law entered into force on 1 January 2013, Law no. 298 on the Activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality, was also consulted for the purpose of this work. This Opinion, however, is to be considered limited insofar as it does not extend to all current pieces of legislation pertaining to anti-discrimination in Moldova and does not explore issues related to their coordination.

2. The Opinion addresses those provisions of the Law which are of concern vis-à-vis Council of Europe standards, represented primarily by the judgements of the European Court of Human Rights (hereinafter ECtHR) and the Recommendations of the European Commission against Racism and Intolerance (hereinafter ECRI). The Opinion is based on an unofficial translation of the Law provided by the Council of Europe Office in Moldova. Errors due to language are therefore possible.

The Preamble and Chapters I, II and IV of the Law have been assessed on an article-by-article approach, whereas Chapter III has been assessed on a thematic basis. Each analysis is followed by relevant recommendations aimed at ensuring full compliance of the provisions with the above mentioned standards. A paragraph including general policy recommendations closes the work. The present report complements the part of the Compatibility Analysis Of Moldovan Legislation with the European Standards on Equality and Non-discrimination (Compatibility Analysis) published by the Legal Resource Centre from Moldova and the Euroregional Centre for Public Initiatives dealing with Law no. 121. The Compatibility Analysis focuses particularly on those provisions of Law no. 121 related to mandate and role of the Council, as well as the complaint mechanism it establishes, contextualising them vis-à-vis the practice and the broader legal framework. The present Report, on the other hand, also extends its detailed examination to substantive provisions.

II. Executive summary

Law no. 121 on ensuring equality is a good tool to prevent and combat discrimination and to foster equality, including by establishing the Council for the Prevention and Elimination of Discrimination and Assurance of Equality (hereinafter the Council).

Overall Law no. 121 seems largely in line with the European standards against which it was checked. One of the most critical issues appear to be the lack of any reference to the principles of the ECHR, as interpreted by the European Court, in the Preamble. Insertion of such reference would ensure that sensitive provisions (i.e. those related to matters to which the principles of the Law do not apply, for instance family and adoption where issues related to sexual orientation might arise), are not interpreted in line with the national or European Union legislation (which is sectorial and not all-encompassing) but rather are interpreted in line with human rights standards.

Laudably, the Law extends protection from non-discrimination to virtually all areas of life (thus going beyond the scope of application of both the Directives mentioned in the Preamble, and the ECHR),

and bases this protection on an open-ended list of discriminatory grounds. However the language used, at times, seems to suggest an approach extending the margin of appreciation recognised to States beyond the boundaries set by the ECtHR. This is particularly evident when it comes to the prohibition of discrimination in relation to sexual orientation and religious opinion, two areas that seem particularly sensitive in the Moldovan context.

Turning to the Council, it can be observed how the complaint mechanism for which it is responsible lacks effectiveness, in that the Council cannot issue binding decisions but only recommendations to the perpetrators. The relationship between the findings of the Council and the (eventual) misdemeanour proceedings should also be better clarified and, in any event, mediation opportunities and restorative tools should be introduced.

III. Analysis of selected articles and recommendations

Preamble

The Preamble clearly indicates that the aim of the Law is to establish the legal framework needed for the application of Council Directive 200/43/EC of 29 June 2000 ("Racial Equality Directive or Race Directive") implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and of Council Directive 2000/78/EC of 27 November 2000 ("Employment Equality Directive") establishing a general framework for equal treatment in employment and occupation into Moldovan domestic legal order. It is laudable that, though inspired by the above mentioned Directives, Law no. 121 goes beyond their scope, which is limited to areas of EU competence, namely rights in the economic and social sphere, and creates a wider framework capable of preventing and combating discrimination in almost all areas of life and in relation to an open-ended list of suspected grounds.[1]

Adoption of this Law provides for a protection that could have been achieved if Moldova had ratified Protocol no. 12 to the European Convention on Human Rights (hereinafter ECHR). The advantage of using the Race and Employment Equality Directives, however, cannot be underestimated. First, whilst the principle of equality under Protocol no. 12 ECHR is mentioned in the Preamble, in the Directives it is stated in the text. This has obvious implications in relation to positive actions aimed at promoting full and effective equality. Under Protocol no. 12 ECHR these are made conditional on the presence of a reasonable and objective justification. The Directives, however, do not recall this condition[2].

Another advantage linked to making reference to the Directives is that the latter, unlike the ECHR,

[1] The Racial Equality Directive requires Member States to prohibit certain forms of discrimination, namely direct and indirect discrimination, harassment and instructions to discriminate, in the fields of employment, self-employment and occupation, vocational training, social protection (including social security and healthcare, social advantages), education and access to and supply of goods and services available to the public (including housing) on the grounds of racial or ethnic origin only. The Employment Equality Directive limits the protection to the areas of employment and occupation, and vocational training, and prohibits direct and indirect discrimination as well as harassment and instructions to discriminate, on the grounds of religion or belief, age, sexual orientation and disability only.

[2] The Race Directive stipulates that "the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."

contain detailed definitions of the various forms of prohibited differential treatments and do not exclude indirect discrimination[3].

It seems, furthermore, that the application of Protocol No. 12 in relation to differential treatments implemented by private parties is more limited than under the Directives. Whilst the Race Directive defines its scope of application *rationae personae* by referring to "all persons, as regards both the public and private sectors," Protocol No. 12 contains a reference to "any public authority" only, somehow suggesting that the protection is granted only in relation to State actions. Whilst it is true that the provision, read in conjunction with Article 1 ECHR, clearly indicates that States have positive obligations to ensure the enjoyment of rights and freedoms for all, thus also in relation to acts taken by private parties, the fact that the Directives dispense with any possible contestations is an undoubted advantage[4].

In light of the limited scope of application of the Directives, the fact that the Law actually departs from them, laudably providing for a far-reaching protection from unjustified differential treatment, and considering the international obligations taken up by the Republic of Moldova when signing the ECHR, it is important that the Preamble clearly indicates that, insofar that the Law contains reference to notions, rights or freedoms that correspond to those covered by the ECHR, their meaning or scope shall be the same as in the latter. Save, of course, the possibility to provide more extensive protection. Interpretation of the Law, in other words, shall not prejudice the fundamental rights and freedoms as guaranteed by the ECHR. It is understood that this is the logical consequence stemming from Article 4 of the Constitution of the Republic of Moldova, according to which the ECHR constitutes an integral part of the national legal system which has priority over conflicting national legislation. It is considered, however, that recalling the supremacy of the ECHR in the preamble, including a reference to the jurisprudence of the ECtHR, would facilitate a better understanding of the scope of application of the Law and favour its human rights-compliant interpretation, particularly in relation to thorny or sensitive issues.
It ought to be noted that should this reference to the ECHR and the case-law of the ECtHR be included in the Preamble, some of the recommendations formulated in the text of this Assessment would be redundant.

Recommendation:
The Preamble should be amended to ensure that the interpretation of the Law does not prejudice the rights and freedoms guaranteed by the ECHR, as provided by the case-law of the ECtHR.

[3] In Abdulaziz, Cabales, and Balkandali v. UK, the ECtHR, found no violation of Article 14 on grounds of race despite the disproportionate racial effect resulting from application of immigration rules to married partners of foreign legal residents. The conclusions were based on three elements. First, the circumstance that the rules at issue contained an instruction to immigration officers not to discriminate on grounds of race; secondly, that there was no purpose to discriminate on grounds of race; thirdly that the fact that the rules applied more often to "coloured" than white people was not directly linked to the content of the national legislation but the fact that, amongst immigrants, some ethnic groups outnumbered others. Some observers find in another decision of the ECtHR the suggestion that indirect discrimination may be encompassed by Article 14. See Belgian Linguistic case, Eur. Ct. H. R.
[4] It should be noted that the Explanatory Report to Protocol no. 12 reads that "The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons."

Chapter I – General Provisions

Chapter I of the Law deals with general provisions. It is composed of six articles detailing the scope of application of the Law and the definitions used within, specifying the identity of right-holders and spelling out the measures to be used to eliminate discrimination.

Article 1 - Aims of the law

It is welcomed that the wording of Article 1 of the Law includes a reference to both non-discrimination and equality, thus mirroring the spirit of Protocol no. 12 ECHR. Reference to "individuals", however, could be misleading as, according to Article 3 of the Law, the protection against discrimination is accorded to both individuals (physical persons) and legal entities. A wording echoing Article 1 ECHR, namely referring to "individuals and legal entities within the jurisdiction of the Republic of Moldova" would have been preferred.

The provision also contains a non-exhaustive list of discriminatory grounds that, departing from the limited scope of application of the inspiring Directives, encompasses "race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, opinion, political view or any other similar criteria". The inclusion of the expression "or any other similar criteria" at the end of para. 1 suggests that the list is non-exhaustive. On the basis of ECRI's General Policy Recommendation no. 7, however, it seems that the use of the expression "grounds such as" (echoing the wording of international instruments, ECHR in the first place,) would have been preferable, unequivocally allowing the list to be interpreted in the light of the jurisprudence of the ECtHR and to evolve with societies. The catch-all clause contained in the end should also be better formulated, by recourse to the expression "other status".

Whilst welcoming the inclusion in the list of a number of suspected grounds (such as age or disability) that are not included in the wording of Articles 14 and 1 of Protocol no. 12 ECHR, it seems that the listing could have benefitted both from a clearer approach and also from greater internal consistency.

First, it ought to be noted that the list contains a reference to "nationality, ethnic origin": in line with ECRI's General Policy Recommendation no. 7, however, mention of nationality alone does not seem sufficient, and should have been replaced by a reference to "nationality or national" and followed, as it is currently, by "ethnic origin", thus providing for a clear protection of such characteristic.

The reference to religion and belief could have also benefitted from clearer wording. Indeed, as it currently stands, the letter of the provision could be interpreted as not covering religious non-beliefs, such as atheism or agnosticism which, on the contrary, are fully covered by Article 9 ECHR. Article 1, thus, should be amended to explicitly protect religion and religious and other beliefs and non(-religious) beliefs.

Thirdly, it ought to be noted that Article 7 of the Law contains a clear reference to "sexual orientation", which is conversely missing in the list of protected grounds contained in Article 1. As it is incontestable, also in the light of the jurisprudence of the ECtHR, that sexual orientation is one of the prohibited grounds of discrimination, it would be preferable for a reference to it to be included in the list contained at the beginning of the Law. It this respect, it can be anticipated that Article 7 para. 1 does raise critical issues, which will be further clarified in the text.

Para. 2 of Article 1 states the areas to which the provisions of the Law do not extend. The wording used raises a number of concerns, the first of which is related to the use of the word "family". Since the intention of the legislator was, obviously, to close the door to same-sex marriages[5] (the text contains explicit reference to that), that word and not "family" should have been used. Recourse to the notion of family seems to suggest that other connected areas, related for instance to the exercise of parental authority, child custody and access rights[6] and filiation-related issues[7], would also be exempted from the application of the principle of non-discrimination.

Despite the different standing of the areas mentioned, similar concerns apply. In relation to such sensitive areas it is evident, again, how a reference in the Preamble to the ECHR and the relevant jurisprudence would be helpful in ensuring that, even when defective wordings are present, the Law is not implemented in a way which is not compliant with human rights standards.

In relation to the family-related situations mentioned under letters a) and b) of the Law, the latter cannot be interpreted as accepting that marriage and adoption can be conducted in a discriminatory manner. Whilst it seems that the rationale behind the national legislator's choice to include the above-mentioned exceptions was to not open the door to homosexual marriage and adoption, better formulations could have been adopted. Reference to family, in particular, does not seem appropriate and the exception should have been limited to marriage only. Indeed, as it is, the stipulation does not seem to take into consideration the autonomous meaning that the expression "family life" has under the ECHR. This notion, as clarified by the Court[8], clearly encompasses homosexual relationships which, under this provision, would receive no protection at all.

Similar considerations apply to the area of adoption. Whilst the decision on who is entitled to become adoptive parent falls under the wide margin of appreciation recognised to States, the Court made it quite clear in E.B. v. France that when national legislation, going beyond its obligations under the ECHR, creates new rights (a possibility open to it under Article 53 ECHR), then national authorities

[5] Under the case-law of the ECtHR, the right to marry is guaranteed only to heterosexual couples, the recognition of same-sex marriage being left wholly to the discretion of States. See, in this sense, Schalk and Kopft v. Austria, para. 49.

[6] See Hoffman v. Austria and Palau-Martinez v. France, both concerning withdrawal of parental rights, and Voinity v. Hungary, related the removal of access rights, on the basis of the religious faith of the applicant, Salgueiro da Silva Mouta v. Portugal where parental rights were denied on the grounds of the applicant's sexual orientation.

[7] See for example Marckx v. Belgium in relation to discrimination in the procedure for establishing maternity of a child born out of wedlock on the grounds of marital status of the mother, Mizzi v. Malta in relation to different time-limits applying in relation to actions to contest paternity of the presumed father as opposed to other interested parties, and Zaunegger v. Germany in relation to discrimination in the enjoyment of access right between fathers of children born within and out of wedlock.

[8] In Schalk and Kopf v. Austria, paras 94 and 95, the ECtHR clarified that the cohabitation of two persons of the same sex maintaining a stable relationship could no longer be considered merely an aspect of their private life but also constitutes family life.

cannot in the application of that right, take discriminatory measures within the meaning of Article 14. Furthermore, depending on whether adoption takes place inside or outside marriage, the national margin of appreciation is, respectively, broad or narrow. In this respect, the Court has been instrumental in harmonising the rules on adoption outside marriage at European level on the basis of the principle of non-discrimination guaranteed by Article 14 ECHR. As a corollary, the rules must now be the same for homosexuals and heterosexuals as regards both single-parent and second-parent adoptions. In other words, the Court recognises, in the case of single-parent adoption, the right to equal treatment of single persons wishing to adopt, regardless of their sexual orientation and, likewise in the case of second-parent adoption, the right to equal treatment of unmarried couples wishing to adopt, regardless of their sexual orientation[9].

In the light of the above-mentioned jurisprudence, and regardless of the current legislation of the Republic of Moldova in relation to adoption, it would be important to eliminate any reference to adoption in relation to exceptions to the principle of non-discrimination.

Letter c) of Article 1, para. 2 of the Law, furthermore, seems redundant both in relation to the principle of autonomy of religious community and in the light of the provision stipulated in Article 7 para. 6 of the same Law. The latter, in line with the jurisprudence of the ECtHR, states that "In case of professional activities of religious cults and their component parts does not constitute discrimination, differentiated treatment based on religious and personal beliefs, when the religion or belief constitute an essential professional requirement, legitimate and justified". Again, reference to the ECHR and its case law-in in the Preamble would have insured that the autonomy of religious communities in the area of employment law is regarded as not absolute. Indeed, in application of the "reasonable and objective justification" under the ECHR or "the genuine and determining occupational requirement" under EU legislation, the clause stipulated in Article 7 para. 6 has to be interpreted in the sense that restrictions on employment can apply in relation to religious organisations only in relation to positions involving the performance of religious duties or functions that are closely linked to the nature or image of the religious organisation, and not to administrative or support positions[10].

Recommendations[11]:

Article 1 should be reformulated in line with Article 3 of the Law to ensure that it clearly refers not only to individuals, but to both "individuals" and "legal entities".

[9] In relation to second-parent adoption see X. and Others v. Austria.

[10] See, for example, Obst v. Germany where the dismissal for an act of adultery of the Director of the Public Relations Department of the Mormon Church was not in breach of the ECHR in the light of the seriousness that such act constituted in the eyes of the Mormon Church and the important position of the applicant within the establishment, which imposed heightened duties of loyalty on him. Conversely, the ECtHR came to a different conclusion in the case of Schuth v. Germany, where the applicant was an organist and choirmaster at a Catholic Church who had been dismissed on the grounds of adultery. Similar considerations are contained in the Compatibilty Analysis, page 80. .

[11] The Compatibility Analysis, page 149, recommends that in the list of protected grounds "political affiliation" be replaced with the expression "political opinion" in order to widen the scope of application of the Law and ensure compliance with international treaties. Since the English version of the Law submitted to the authors of the present Report contains different wording, no such recommendation can be put forward. Should the wording highlighted by the Compatibility Analysis be correct, then the relevant recommendation is shared.

The scope *rationae personae* of Law should be clarified by indicating that it provides protection to individuals and legal entities "within the jurisdiction of the Republic of Moldova".

The list of suspected grounds should be reformulated so as to refer to "grounds such as" at the beginning and to "other status" at the end.

In the list of protected grounds, nationality should be complemented by reference to "national origin".

Reference to religion and beliefs should be reworded to clearly encompass non(-religious) beliefs as well as religious and other beliefs.

Sexual orientation should be explicitly included in the list of protected grounds.

Letter a) of Article 1 should refer to marriage only; the reference to family should be deleted.

It should be clear that, with due respect to the margin of appreciation recognised to States in relation to adoption and marriage, family life as interpreted by the ECtHR enjoys protection from discrimination.

Adoption should not be included amongst the areas to which exceptions to the principle of non-discrimination apply.

Reference to the autonomy of religious cults, already covered by Article 7 para. 6 of the Law, should be deleted.

Article 2 – General notions

Article 2 contains a list of definitions of the terms used in the Law. It is laudable that the notions included correspond to the definitions found in the Employment Directive and the Racial Equality Directive and that they are complemented with additional notions, such as discrimination by association, of judicial elaboration[12] and racial segregation. The provision, however, does raise some concerns.

Reference to rights and freedoms included in the general definition of discrimination embodied in Article 2 letter a) might be misleading, as the prohibition of discrimination stipulated by the Law also extends to situations where individuals cannot claim a "(human) right". This applies, for instance, to the "right" to access employment[13] or to have access to certain goods (Articles 7 and 8 of the Law

[12] CJEU, Case C-303/06 Coleman v. Attridge Law and Steve Law.

[13] Such right is not guaranteed by the ECHR either. Conversely, dismissal from an occupation can be examined under Article 8 ECHR as an interference with private life. See, for example, I.B. v. Greece, concerning the dismissal of an employee on the ground that he was HIV-positive.

respectively). It is evident that the scope of the law is laudably intended to also offer protection from discrimination in areas of life where "(human) rights" cannot be claimed. As the reference can be misleading, however, it is suggested that the words "rights and freedoms" contained at the end of Article 2 letter a) should be deleted. Similar considerations apply also to the wording of letter j), where the reference to fundamental rights and freedoms suggests a restricted application which is not in line with the purpose of the Law as stated in Article 1.

Article 2 letter a) rightly contains a reference not only to the actual, but also to the (wrongly) perceived, link between an individual and a suspect clause (that is when an individual is wrongly considered to belong to a particular group)[14]. The definitions of the various forms of discrimination that follow, however, only contain reference to the actual link between an individual and a suspected ground. Although it could be argued that the specific forms of discrimination should be read in light of the general definition contained in letter a), it would seem opportune to include a reference to the "perceived" link between a person and a suspected ground also under letters b –g).
In addition, it is to be noted that only the definition of indirect discrimination under letter c) contains a reference to the "reasonable and objective justification" clause which, on the contrary, is also applicable to direct discrimination (letter b). In line with ECRI General Policy Recommendation no. 7 on Combating Racism and Racial Discrimination, it is suggested not only that the clause is replicated under letter b), but also that the clause is listed amongst the definitions, with the clarification that the notion of objective and reasonable justification implies the notions of legitimate aim and reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Either definition of discrimination contains reference to the intention of the agents. In line with the ECtHR's jurisprudence of D.H. v. Czech Republic and Oršuš v. Croatia, it should be clearly indicated that lack of an intention to discriminate cannot be used as a defence in cases of indirect discrimination or racial segregation.

Article 2 letter i) defines "affirmative measures" as "special temporary actions taken by public authorities in favour of one person, group of persons or a community, ensuring their natural development and effective realisation of equal chances in regard to other persons, groups of persons or a community". Whilst laudable, this definition, to be read in conjunction with Article 5 letter a) in relation to its aim and temporary feature, raises issues of concern. Firstly, the use of the expression "in favour of", suggests some forms of favouritism and seems disjoined from the principle of equality that it pursues. Secondly, cross-reference to the data collection and analysis tasks entrusted to the Council for Prevention and Combating Discrimination and Ensuring Equality under Article 12 letter e) should also be introduced in order to ensure the adequate and temporary nature of the measure.

Letter g) of Article 2 only refers to g) instigation to discriminate, thus leaving aside, contrary to ECRI General Policy Recommendation no. 7, announced intention to discriminate; instructing another to discriminate, aiding another to discriminate. These should therefore be included.

[14] See, amongst others, Timishev v. Russia para. 56.

Recommendations:
Reference to rights and freedoms contained at the end of Article 2 letter a) and letter j) should be deleted and should be replaced by "rights and freedoms" only.

Article 2 letter e) in fine should be reformulated so as to read "for assuring to each person, in cases established by law, on equal conditions" or "equal rights and freedoms".

Letters b-g) should be amended to include a reference to the perceived (as opposed to actual) link between a subject and a suspected clause.

Letters c-e) of the Law should be amended so as to clarify that such forms of discrimination are not conditional on the intention to discriminate.

The clause of reasonable and objective justification should be included in the definition provided under letter b).

Reasonable and objective justification should be the subject of a new entry in the list of definitions.

Letter g) should be amended to also include announced intention to discriminate, instructing another to discriminate, and aiding another to discriminate.

Mention to "in favour of" within letter j) should be deleted and reference to equality introduced.

Determination of the temporary measures elicited under letter j) should be linked to the data collection and analysis tasks entrusted by Article 12 letter e) to the Council for Prevention and Combating Discrimination and Ensuring Equality.

Consider the possibility to include the definition of "restorative measure" (see Article 5).

Article 3 - Subjects in the area of discrimination

As already mentioned earlier in the text, the text of this provision should be better coordinated with Article 1 of the Law, and consistency throughout the text should be ensured. Laudably, the Law, departing from the ECHR[15], also affords protection from discrimination to legal entities belonging to the public sphere, thus including bodies exercising State powers.

[15] According to Article 34 ECHR only non-State subjects (persons, non-governmental organisations and groups of persons) can introduce an application to the ECtHR and, thus, are beneficiaries of the rights and freedoms enshrined in the ECHR. Thus, for example, before the ECtHR, a State-owned company must enjoy sufficient institutional and operational independence from the State for the latter to be absolved of responsibility under the Convention for its acts and omissions (Mykhaylenky and Others v. Ukraine, paras 43-45; Cooperativa Agricola Slobozia-Hanesei v. Moldova, para. 19).

Article 4 – Severe forms of discrimination

Article 4 lists a number of discriminatory practices that, because of the identity of the agents or victims, their nature or the means used, are considered to be particularly serious. The rationale of the provision is unclear, particularly considering that Chapter IV, dealing with "Liability for the discrimination acts" does not contain any reference to the above-mentioned severe forms of discrimination. On the other hand, if the instances listed were to be considered not *ex se* but aggravating circumstances, cross-reference to the Criminal Code should have been included. As it is currently formulated, therefore, the provision appears to be confusing.

As already mentioned, the inclusion of hermeneutic reference to the ECHR in the Preamble, furthermore, could prove particularly important when dealing with circumstances listed under letters b) (discriminatory messages through mass media) and c) (display of discriminatory messages in public) of the current provision. Indeed, whilst it is of vital importance to combat discrimination in all its forms and manifestation, it is important that the freedom of expression guaranteed by Article 10 ECHR is not unduly and generically compressed. Restrictions of this right have to be narrowly interpreted and must comply with the requirements of legality, necessity in a democratic society and proportionality typical of qualified rights.

In relation to the first point, the ECtHR, in Jersild v. Denmark, drew a distinction between the authors of openly discriminatory remarks and the applicant, a journalist who had sought to expose, analyse and explain the particular group of youth which was the subject of a documentary film dealing with specific aspect of an issue that was already of public concern. The Court considered that the film as a whole had not been aimed at propagating racist views or ideas but informing the public about a social issue. Consequently, it found that the conviction of the journalist by the national courts for aiding and abetting the dissemination of racists' remarks was in violation of Article 10 ECHR.
Conversely, in Delfi AS v. Estonia, the conviction of an internet provider, running a news portal on a commercial basis, for the offensive comments posted by its readers below one of its online news articles about a ferry company (the comments were removed upon request about six weeks later) was not considered in breach of Article 10 ECHR.

Recommendations:
As currently formulated, the purpose of Article 4 is unclear. If those practices listed under its heading are to be considered aggravated circumstances of criminal offences, this should be clearly elucidated and cross-referencing to the relevant provisions should be included.

Coordination between the present provisions and Chapter IV of the Law, dealing with "Liability for the discrimination acts" should also be established.

Article 5 – Modalities to eliminate discrimination

The catalogue of possibilities to redress discrimination contained in Article 5 of the Law is rather articulated, moving from affirmative measures to reparation. It would have been advisable to include restorative practises in addition to the mediation and reparation listed under letters b) and d).[16] Though it is true that mediation can sometimes lead to a restorative outcome (i.e. in cases when one of the parties recognises the wrongdoing, apologises and offers to make amends), this would be a by-product of the process and not the intended outcome. Considering that the Council for Prevention and Combating Discrimination and Ensuring Equality is an active actor in this context (Article 12 letter m) stipulates that the Council "contributes to the amiable solution of conflicts arising after the commission of discriminatory acts by reconciling the parties and looking for a mutually acceptable solution") and has awareness-raising tasks (Article 12 letter g)), restorative justice should be included amongst the list of mechanisms and actions aimed at redressing discriminatory actions.

Letter c) of the provision under examination generically refers to "punishment" of a discriminatory behaviour: cross-reference to (the relevant provisions) of the Criminal Code or of special legislation should be included so as to ensure compliance of the text with the requirements of Article 7, para. 1 ECHR, according to which criminal laws have to be sufficiently clear and precise as to enable individuals to ascertain which conducts constitutes a criminal offence and to foresee what would be the consequences in case of transgression.

Recommendations:
It might be opportune to consider inserting restorative justice measures amongst the possible remedies to discrimination.

Cross-reference to the relevant provisions of the Criminal Code or of special legislation should be included under letter c) in order to comply with the requirements of legal certainty of criminal sanctions.

Article 6 – Prohibition of discrimination

Though necessary, it seems that this provision would be better placed at the beginning of the text, when dealing with the aims of the law, as well as in the Preamble, and not in a separate provision.

Recommendation:
Consider deleting the provision and including its content in the Preamble and in Article 1 of the Law.

Chapter II – Special Provisions

[16] Restorative justice focuses on repairing the harm caused by criminal behavior rather than on the saction to be imposed on the perpetrator. The result is achieved by ensuring victims and community members are activly involved in the justice process and by holding offenders directly accountable to both. This implies not only the restoration of moral and material damages to the victims, but also the provision of opportunities for dialogue and negotiation. The ultimate goal is to develop a greater sense of safety and peace, transforming people and relationships.

Chapter II examines the application of the principle of non-discrimination in the areas of employment, access to goods and services available to the public, and education.

Article 7 –Prohibition of discrimination in the field of work

Though very detailed and quite comprehensive, the provisions at stake would benefit from the clarification that, similarly to that stated in Article 8, discrimination is prohibited in both the public and private spheres. Reference to occupation, self-employment and membership of professional associations and trade unions[17] is currently missing and should be included. Sexual orientation, mentioned here for the first time, should be deleted in favour of its explicit inclusion in the grounds listed in Article 1 of the Law.

Article 7, para. 3 contains a closed list of instances that lead to "ungrounded refusal" of employment, admission to professional training or promotion. The different wording used in the paragraph leads to confusion as to whether such behaviours should be regarded as discriminatory or not and, if so, what the consequences would be. In order to enable wide protection against discriminatory conducts of the type elucidated, it should be preferable for the instances mentioned to be considered merely representative. Cross-reference to sanctions foreseen in other pieces of legislation (i.e. labour law, criminal code) for the above-mentioned conducts should be introduced, as should a reference to termination of employment based on the same circumstances.

Article 7, para. 6, though in line with the ECHR, seems redundant, as the previous paragraph already stipulates the justification for differential treatment in the area of employment on the basis of essential and legitimate professional requirements.

Recommendations:
The provision should be extended to also cover occupation, self-employment and membership of professional associations and trade unions.

Consider deleting reference to sexual orientation included in para. 1 in favour of the explicit inclusion of such suspected ground in Article 1 of the Law.

Consider deleting para. 6 as, in the light of the previously stated principle of reasonable and legitimate occupational requirement, it seems redundant.

Article 8 – Prohibition of discrimination in accessing goods and services available to the public

[17] As suggested in ECRI General Policy Recommendation no. 7 and no. 14.

Despite the fact that the list of goods and services for which access is to be provided without discrimination is considered merely representative, the provision would benefit from a few clarifications.

Under letter a) reference to public authorities should be interpreted as including courts[18] and should also apply when services are provided by private entities on behalf of the State.
Under letter e) the right to social services, in compliance with the provision of the Race Equality Directive, should also encompass housing[19]. The provision ought to be interpreted not only in the sense that right of access to housing requires equality of treatment on the part of public or private landlords and estate agents in deciding whether to let or sell properties to particular individuals, but also that allocation, maintenance and rental of housing to particular groups is carried out in an equal manner[20]. Moreover, where state-provided housing is in particularly bad condition, causing hardship to the residents over a significant period of time, the ECtHR has also held that this may constitute inhuman treatment[21].

Recommendations:
Letter a) should clarify that the obligation to not discriminate also applies when public services are rendered by private entities on behalf of the State.[22]

Letter e) should clarify that references to social services encompass access to allocation, maintenance and rental of housing.

Article 9 – Prohibition of discrimination in the area of education

The first paragraph of this Article stipulates the areas or activities in relation to which educational institutions have an obligation not to discriminate. These encompass access to educational institutions, evaluation of knowledge, scientific and educational activity, elaboration of curricula and didactic material, and adequate training of educators and teachers.

By stipulating that one of the obligations of educational institutions is to ensure protection from discrimination by, amongst others, "providing access to the educational institutions of any type and

[18] Access to justice of victims of domestic violence has often been looked under the angle of procedural obligations under Articles 2 and/or 3 ECHR such as in Opuz v. Turkey and Eremia v. Moldova. In Anakomba Yula v. Belgium, the ECtHR examined the complaint of a foreigner who could not obtain public assistance for lodging a paternity claim on the basis that she was not a Belgian national and concluded for a violation of Article 6 in conjunction with Article 14. This judgment should not be interpreted as indicating that non-nationals have an absolute right to public funding. In deciding the case, the ECtHR was influenced by several factors including that the applicant was barred because she did not have a current valid residence permit, even though at the time she was in the process of having her permit renewed. Furthermore, the ECtHR was also motivated by the fact that a one-year time bar existed in relation to paternity cases, which meant that it was not reasonable to expect the applicant to wait until she had renewed her permit to apply for assistance.
[19] The Race Equality Directive does not define housing. The term should be interpreted in line with the jurisprudence developed by the ECtHR under Article 8 ECHR, which was found to cover, amongst others, less conventional fixed abodes such as mobile homes, caravans or trailers, even in situations where they are located illegally (Buckley v. UK).
[20] See also ECRI General Policy Recommendation no. 7.
[21] Moldovan and Others v. Romania (no. 2).
[22] A similar recommendation is included in the Compatibility Analysis, page 24.

level", with no exception, the national authorities of the Republic of Moldova have laudably set the bar very high, particularly in relation to the disabled. Indeed, the term "access" cannot only be interpreted as the administrative possibility to enrol in a school, but also there not being any physical obstacles ("architectural barriers") hindering disabled students from entering school premises and making full use of them.[23] In this respect, the provision seems compliant with the Committee of Ministers' Recommendation.

Paragraph 2 of the provision introduces an exception to the rule that admission principles should not be restricted. The exception is, however, rather generic as it refers to "cases stipulated by the legislation in force" without any additional indication. Recalling the leading case on Article 2 of Protocol no. 1 ECHR, that is the Belgian Linguistic Case, where the Court stated that the provision encompass the right to access to educational institutions existing at a given time, it seems possible to affirm that any limitation of such right must be narrowly construed. This means that conditions grounding restrictions must be clearly identified, respond to the requirements of necessity and proportionality, and clearly define the discretion that educational authorities enjoy in setting them. Similar considerations apply in relation to the clause contained in no. 3 of the same paragraph. For both provisions, it should be clear that, in the light of the jurisprudence of the ECtHR, limitations or restrictions leading to indirect discrimination are not acceptable.[24]

Recommendation:
Limitations to the principle of unrestricted admission to educational institutions should be clearly identified, narrowly construed and interpreted. Such exceptions should be clearly indicated in the Law or, at least, be the object of cross-reference to legislation which is identified without any room for ambiguity.

Chapter III – Institutional frame for preventing and combating discrimination and ensuring equality

This part presents the legal analysis of Articles 10-16 of the Law and the assessment of their conformity with antidiscrimination standards of the Council of Europe. In the analysis, references have also been made to the provisions of Law 298 of the Republic of Moldova on the activity of the

[23] In Gherghina v. Romania [GC], the applicant complained that he was not able to continue his university studies owing to a lack of suitable facilities on the premises of the universities where he attended courses. The applicant complained in particular that he had been discriminated against on the basis of his disability. He also alleged that, because of the lack of access to the university and other public buildings, he had been confined to his home and unable to build relationships with the outside world. He relied in particular on Article 2 (right to education) of Protocol No. 1 to the Convention. The ECtHR, noting that the applicant had not exhausted domestic remedies (he could have applied to the civil courts for an order requiring the universities concerned to install an access ramp and other facilities to accommodate his needs; or brought an action in tort to make good the damage he had sustained; and/or challenge before the administrative courts the decisions to exclude him from university as he had not accumulated sufficient credits to continue with his studies), declared the application inadmissible.

[24] In D.H. v. Czech Republic the ECtHR considered the allocation of Roma children to 'special' schools, which was based on the use of tests designed to test pupils' intellectual capacity. Despite this apparently 'neutral' practice, the nature of the tests made it inherently more difficult for Roma children to achieve a satisfactory result and enter the mainstream education system, thus leading to a finding of indirect discrimination.

Council for Prevention and Elimination of Discrimination and Ensuring Equality (hereinafter Law 298). In addition, the document also contains recommendations for improvements of the provisions.

Before this report goes on to make concrete, substance-related comments, there now follows a few general remarks that should be taken into account:

First of all, the consultant has not received any empirical or statistical data on the functioning of the Council for Prevention and Elimination of Discrimination and Ensuring Equality or on judicial practice in the field of antidiscrimination in Moldova. Therefore this *de jure* analysis relies on some comparisons with other countries and is based on comparative research on the legal profile and activities of Equality Bodies of the member states of the Council of Europe, as well as on the experience the consultant acquired while acting in the capacity of Equality Protection Commissioner in the Republic of Serbia.

Secondly, in Moldova, apart from the Council and the courts, the institution of Ombudsperson has an important role in preventing and combating discrimination, as regulated by Law no. 52 on the People's Advocate (Ombudsperson) from 3 April 2014, in force since 9 May 2014. In that regard, it is necessary to consider whether the delineation of responsibilities between the Ombudsperson and the Council is adequate to ensure there are no positive or negative conflicts of responsibilities and so that citizens know which institution to turn to in case of discrimination. In this document, this important issue has not been considered because it goes beyond the task the consultant was given. However, it is recommended that such an analysis should be performed.

Thirdly, before any legislative changes, it is essential to make a corresponding assessment of the impact of the Law after its adoption. This is necessary as experience shows that in many countries in transition, most of the difficulties related to the full implementation of antidiscrimination standards are not the result of bad legislative solutions, but the result of the bad implementation of the existing legal framework.

Introductory Notes

As a party to several human rights treaties prohibiting discrimination, Moldova should set up an independent national anti-discrimination body to monitor and make recommendations regarding respect of the non-discrimination legislation. The body should have effective investigative powers, a mandate to examine individual complaints of discrimination in both the private and the public sector and should deliver binding and enforceable decisions. It should also have adequate staff and funds, and the ability to provide access to effective judicial remedies for victims of discrimination including measures such as the provision of legal advice and legal aid, acting on behalf of a victim of discrimination or supporting her/him in proceedings taken by a non-governmental organisation, trade union etc. and ensuring effective monitoring of the impact of legislation and policies on different groups and the collection of accurate disaggregated data to use in identifying and addressing discrimination.

Subjects with responsibilities in the area of prevention and combating discrimination and ensuring equality

Law 121 establishes an institutional system of preventing and combating discrimination and ensuring equality, which includes three key entities: the Council for Prevention and Combating Discrimination and Ensuring Equality, public authorities and the Courts.

It seems that there is no provision to delineate the responsibilities of the Council and state authorities for proceeding in cases of discrimination. Namely, from Article 13, para.3, Law 121 it is clear that in case of discrimination, a person may choose to address either the Council or the Court and that the procedure before the Council is not a precondition for initiating the Court proceedings. However, since the state authorities also have the authority, based on their functional competency, to review the complaints of individuals who consider themselves victims of discrimination, we would like to give the following recommendation.

Recommendation:
To amend Law 121, by adding a provision which would stipulate that in case of discrimination made by public authorities, filing a complaint to the state authority is not a precondition for submitting the complaint to the Council, or for initiating the Court proceedings.

The legal profile and the legal status of the Council for Prevention and Combating Discrimination and Ensuring Equality

The concept of the Council implies a central national institution for preventing and combating discrimination and ensuring equality. The Council has an anti-discrimination and equality mandate, which is a good solution.

The Legislator has chosen to form a collegial body with the status of a legal person of public law, established in order to ensure protection against discrimination and assure the equality of all persons who consider themselves to be victims of discrimination. It should be noted that in some countries there is a trend to establish a hybrid equality/human rights institution - integrated national institution for human rights protection (Ombudsperson and Equality body).[25] However, such a solution is considered to be inadequate for states which are at the very beginning of antidiscriminatory practice development, like Moldova. Establishing a separate equality body should be received positively, since it is important to have a specialised body which deals exclusively with the implementation of the new antidiscrimination law and the development of antidiscrimination legal practice. According to its key characteristics, this body is a specialised institution, dealing with the promotion and protection of one human right only – the right to non-discrimination.

[25] See: Equality Bodies and National Human Rights Institutions: Making the Link to Maximise Impact An Equinet Perspective, 2011, p. 7; Crowther N. O'Cinneide C. (2013) Bridging the Divide: Integrating the functions of national equality bodies and national human rights institutions in the European Union, London, UCL Faculty of Laws.

Moldova has established an equality body with a horizontal mandate to deal with all different grounds of discrimination (multi-ground equality bodies). This should also be received positively as experience shows that equality bodies with a horizontal mandate are to be preferred: One body is easier for possible victims to approach, has greater legitimacy and will more easily educate people on the multi-faceted aspects of equality and discrimination. On the other hand, the existence of a bigger number of equality bodies opens a series of problems related to delineation of responsibilities, etc. That is why, in countries with several equality bodies, there has been a tendency to integrate these into one national equality body in recent years.[26] In that sense, Moldova's choice of the model of the equality body follows this European trend.

Viewed from a European perspective, and bearing its mandate in mind, the Council belongs to a combined type of equality bodies, as a combination of tribunal-type and promotion-type bodies. They hear, investigate and decide on cases of discrimination, but also implement a range of activities to raise awareness, support good practice and conduct research.[27]

The composition of the Council, criteria, election and the status of Council members

Provisions regarding the Council's composition are satisfactory as they ensure the professionalism and independence of the Council. There are particularly important provisions which require that the members of the Council have no political affiliation, that three members are representatives of civil society, that at least 3 members have to be specialists licentiate in law (Article 11, para.2, Law 121), and also that on the occasion of their election, the principle of diversity is applied by ensuring gender equality and balance of representation of ethnic and minority groups from society (Article 11, para.6 c), Law 121).

The criteria for election of the Council's members are high and ensure that they do not only have a satisfactory level of knowledge, but also an adequate orientation in terms of values.

The members of the Council are elected based on competition, in a transparent procedure, which is one of the most significant guarantees, both for the personal autonomy of the members and for the Council, as a body. The reasons and methods for their dissolution are clearly identified.

However, Law 121 does not contain a provision which would limit the possibility of the same person being elected more than twice as a member of the Council.

Recommendation:

[26] See: Carver, R. (2011) One NHRI or Many? How many institutions does it take to Protect Human Rights? – Lessons from the European Experience, *Journal of Human Rights Practice*, Vol. 3, N. 1.

[27] See more: Equinet *The Bigger Picture: Equality Bodies as part of the National Institutional Architecture for Equality- An Equinet Perspective* is published by Equinet, the European Network of Equality Bodies, Brussels, 2011, Equinet Secretariat, available at:http://www.equineteurope.org/The-Bigger-Picture-Equality-Bodies.

To amend the Article 11, by adding the provision that the same person may not be elected as the member of the Council more than twice.

Article 11, para.11, of Law 121 defines the position of the Chairperson of the Council as a permanent function, while other members of the Council are the non-permanent members. It would be important to provide in the Law that the members of the Council have part-time status and should spend at least 50% of time working in the Council together with the staff. In this way, they would be able to devote themselves to fulfilling their very responsible duties. At the same time, the permanent function of all the members of the Council would ensure the efficiency of the Council.

According to Article 11, of Law 121, non-permanent members of the Council "are called in meetings by the President" and receive an allowance amounting to 10 percent of the average salary for a meeting (paras. 11 and 12).

It should be kept in mind that the amount of compensation is one of the major motivation factors and that it may impact on the decision of highly qualified professional and competent individual persons to hold the position of member of the Council. Financial autonomy is one of the most significant guarantees for the independence of public office holders, as it indirectly enables them to exercise their function professionally, in a way which protects their personality and status.
Also, Law 121 does not contain a regulation about the amount of the Chairperson's salary.

Recommendations:
To amend Article 11 by adding the provision that the Council's members should spend at least 50% of their working hours in the Council and should receive a salary which corresponds to the half of the amount received by the Chairperson.

To provide that the salary of the Chairperson of the Council is not less than the basic monthly remuneration amount of the Ombudsperson.

Independence and Impartiality Principles

Independence and impartiality have been identified as the core indicators of an equality body's capacity to fulfil its potential. These two principles are proclaimed in Article 11, para.1, of Law 121: *"The Council acts in conditions of impartiality and independence in regard to public authorities"*. In para.20, of Law 298, the list of the subjects, in respect of which the Council should be impartial and independent, is defined. Apart from public authorities, individuals and legal entities are also indicated. These are two important principles, ensuring the professionalism and impartiality of the equality body, and it is very important that they have found their place in Law 121 and Law 289. However, the wording should be unified.

Recommendation:

Article 11, para.2, of Law 121 should be formulated in the manner defined in the point 20, of Law 298:*"The Council shall act impartially and independently from other public authorities, individuals, or legal entities".*

Regarding the impartiality principle, this principle has been partially operationalised and made more concrete in Article 17, point e, of Law 289 which defines the duty of a Council member *"to declare any conflict of interest and to abstain, if needed, from examining the complaint"*. The provision of Article 49, of Law 298 also has a similar goal.

Although the scope of this assessment covers only Law 121, it should be noted that further operationalisation of the impartiality principle could be achieved by amending Law 298.

The principle of independence is guaranteed by a series of legal regulations, such as rules on the election of the Council members and the dissolution of the Council, rules on awarding the work of the Council members, etc. The Council is accountable to the Parliament, and not the Government, which is a good solution, because accountability to Parliament is considered as being more appropriate from the point of view of independence.

Law 121 provides the independence principle, but not the autonomy principle. Namely, it is stipulated in the Law that the Council is an equality body, characterised by autonomy, which has organisational and functional detachment from other branches of state power: legislative, executive and judicial. The autonomy of the Council rests, in the first place, on the fact that it is established and organised by Law. One of the major expressions of autonomy is the Council's ability to regulate its work in a more specific way. In that sense, there are no clear reasons why Article 11, para.14, of Law 121, provides that *"The Regulation on procedure of the Council is approved by the Parliament"*. Apart from interfering in the autonomy principle, such a legal solution is not considered rational, because it implies conducting a complicating legal procedure for adoption of any amendments or additions to the Regulation on the procedure of the Council.

Article 11, para.13, provides that the Council is assisted in its work by an administrative body, while Article 1, point b), of Law 298 defines the limited number of the personnel in the administrative apparatus of the Council as being up to 20 staff members. It is not clear whether the Council has any influence at all on the number of employees in the administrative apparatus or who, and on what basis, decides the optimum number of employees. It seems that the Council should be independent regarding the size of its administrative apparatus as it is most familiar with the scope of its own work and needs. This is in accordance with the Paris principles[28] which anticipate that "*The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence".*

[28] Paris Principles relating to the status of national institutions adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.

Recommendations:
To explicitly define the autonomy principle of the Council;

To delete the provision contained in Article 11, para.14, Law 121, which states that the Regulation on procedure of the Council is approved by the Parliament and to provide, instead, that the Council is authorised to autonomously regulate its work; and

To amend Law 121, by adding the provision that the Council is authorised to autonomously define the number of its employees in the administrative apparatus and arrange its organisation.

The Council's role and mandate

The Council's responsibilities are listed in Art. 12 of Law 121. The responsibilities of the Council are not listed exhaustively in the law, which is a positive aspect because it gives the possibility to adjust them to meet possible challenges.

The analysis of rules regulating Attributions of the Council indicates that, viewed from the comparative perspective, the Council is a body of mixed character, which, at the same time, has quasi-judicial and promotional functions. Law 121 grants the Council an important mandate – competencies in three areas: legislation and policies; prevention of discrimination; and examination of individual complaints.

Generally speaking, the regulations conform to the Anti-Discrimination Directives- Article 13 (2) of **Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.** A similar provision is contained in Article 20(2) Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) *"Member States shall ensure that the competences of these bodies include: (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination; (c) publishing independent reports and making recommendations on any issue relating to such discrimination; (d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality."*

In order for the Council to fulfil its mission even more effectively, in the sphere of prevention and protection from discrimination, it is recommended that the Council receives six additional major powers:

1. the power to impose sanctions for acts of discrimination;
2. the power to file requests before the Constitutional Court for constitutional review of legislative provisions which are considered to be discriminatory;

3. to amend the Law 121, adding a legal provision that obliges the state authorities to send all the draft amendments to the national legislation related to human rights to the Council for coordination, and to grant the Council the ability to give its opinion on whether the draft corresponds to non-discrimination standards or not;
4. authority to initiate a strategic litigation before the Court in discrimination cases for which it estimates this to be strategically important and that should be brought before the Court;
5. specific power to intervene in the litigation initiated by other authorised entities;
6. specific power to provide opinions or advisory opinions in cases of non-discrimination examined by the courts, upon its own initiative, or as summoned by the plaintiff or the Court.

Ad 1) By giving the Council authority to deliver effective, proportionate and dissuasive sanctions, the position of the Council would be strengthened and the discriminated individuals and groups would have more efficient access to justice.

In that regard, we underline that the access to an effective remedy as part of access to justice is referred to in most sources of international law.

The European Convention on Human Rights, in Article 1, commits Member States in general terms to safeguard ECHR rights. Article 14 of the ECHR contains the basic regulation on the prohibition of discrimination to protect individuals from discrimination in the enjoyment of rights guaranteed by this international instrument. In Article 14 it is stated: *"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"*. The term "shall be secured" indicates that the state has not only a negative but also a positive obligation, that is, an obligation to ensure the effective enjoyment of protection against discrimination. So Article 14 is also interpreted by the European Court for Human Rights.

Article 1 of Protocol 12 is the result of a need to introduce greater protection from discrimination in relation to Art. 14 of the European Convention by means of one independent right and to enable applications which will not only include violations of rights guaranteed by ECHR. As the linguistic formulation of Art. 1 is entirely the same as that used in Art. 14, the purpose of this article is not to abolish Art. 14, but to supplement it.

The obligation of a state to ensure the effective enjoyment of protection against discrimination derives from Article 13 of EHCR, which requires that everyone whose rights and freedoms, as set forth in that Convention, are violated shall have an effective remedy before a national authority.

A provision on effective protection and remedies is included in the International instruments of human rights. This provision is, for example, included in the International Convention on the

Elimination of All Forms of Racial Discrimination (Article 6 - To assure to everyone within their jurisdiction effective (...) remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination adequate reparation or satisfaction for any damage suffered as a result of such discrimination) and the Convention on the Elimination of Discrimination Against Women (Article 2(c) - ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination).

The EU Anti-Discrimination Directives have left the decision on how and where to address discrimination cases in terms of sanctions to the Member States, as long as the sanctions imposed are effective, proportionate and dissuasive and as long as all necessary measures are taken to ensure that they are applied. An acknowledgement of the need to use sanctions as a tool for fostering the factual implementation of the principles of equal treatment and non-discrimination is rooted in the EU Anti-Discrimination Directives. They oblige Member States to lay down rules on sanctions for cases of infringement of the said principles as defined in the respective Directives and to take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive (Article 15 of Directive 2000/43/EC, see also Article 17 of Directive 2000/78/EC). Different wording is used in Article 14 of Directive 2004/113/EC (penalties), Article 18 (compensation or reparation) and 25 (penalties) of Directive 2006/54/EC, Art. 10 of Directive 2010/41/EU (compensation or reparation). The preamble of Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, in order to provide more clarification on what these sanctions should be, refers to case law of the European Court of Justice in stating that, in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

Equality bodies are key stakeholders in bringing principles into practice in discrimination cases. Their roles are very diverse, depending on their legal status in discrimination procedures and their financial and staff resources etc. Some equality bodies are competent to levy fines when respondents do not provide them with information and documents requested and/or do not comply with the recommendations or decisions issued. Very few promotion-type bodies are mandated to impose fines. Hardly any equality bodies have the power to award compensation payments. Overall the issue of fines and compensation seems not to rank high on the agenda of equality bodies, which primarily aim at “soft solutions” resulting in settlements between the parties.[29]In many countries, for example,

[29]Ammer, M. Crowley, N. Liegl, B. Holzleithner, W. Wladasch, K. Yesilkagit, K. (2010) Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Human European Consultancy, Ludwig Boltzmann InstitutfürMenschenrechte, p. 10.

in Belgium, Bulgaria, Denmark, Finland, France, Hungary, Latvia, Lithuania, Malta, Norway, Portugal, Romania and Serbia, equality bodies are competent to issue recommendations and sanctions.[30]

Generally speaking, sanctions in discrimination cases can have different aims, such as providing remedy for single victims of discrimination (compensative character) constituting a punishment for the perpetrator (punitive character) being a tool for preventing further discrimination (preventive character) being a tool for fighting discrimination and fostering equality on a societal level (social-preventive character).[31]

In order for the Council to fulfil its mission more effectively, the possibility of granting the Council a power to prescribe coercive administrative measures (such as obligatory prescriptions to the discriminator to remove violations of the antidiscrimination provision, to stop the execution of illegal decisions or orders which lead or may lead to discrimination, publication of the Council's decision etc.) should be considered. Also, the possibility of providing the Council with a power to impose the administrative fines against a person who commits discrimination and against anyone who does not implement an obligation deriving from the antidiscrimination provisions or the provisions of a Council's decision, should be considered. It is important to take the perpetrator's financial capacity into account when determining whether the fine should be close to the maximum or to the minimum amount which should be provided for by the Law.

Ad 2) Experience shows that many laws and general enactments contain discriminatory regulations which should be eliminated from the legal system. It may be done exclusively by the Constitutional Court, and for that reason, it is necessary to give the Council the authority to initiate procedures before the Constitutional Court for assessing the constitutionality or legality of any general act which the Council considers to contain discriminatory regulations. That would contribute to its proactive role in ensuring the standards regarding non-discrimination in the national legislation.

Ad 3) According to Article 12, of Law 121, the Council initiates proposals for the modification of the current legislation in the area of prevention and combating discrimination and adopts advisory opinions concerning the compliance of draft legislation with the legislation on preventing and combating discrimination. This is considered as insufficient for the Council to fulfil its function in the sphere of ensuring the standards regarding non-discrimination in national legislation. Therefore, Law 121 should be amended by adding a legal provision that will oblige the state authorities to send all the draft amendments to the national legislation related to human rights to the Council for coordination and to grant the Council the ability to give its opinion on whether the amendments correspond to non-discrimination standards or not.

Ad 4) Viewed comparatively, one of the most significant roles of the equality body is its ability to participate in a strategic litigation. Article 7(2) of Directive 2000/43 and Article 9(2) of Directive 2000/78 provide that "Member States shall ensure that associations, organisations or *other legal*

[30] Wladasch K. op. cit.
[31] See: Wladasch K. (2015), The Sanctions Regime in Discrimination Cases and its Effects, Equinet.

entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of [*these Directives*] are complied with, may engage, *either on behalf or in support of the complainant,* with his or her approval, *in any judicial and/or administrative procedure provided for the enforcement of obligations under* [*these Directives*]."

Giving the Council the authority to initiate strategic litigations would enable the Council to pro-actively ensure compliance with legislation and develop equality standards. This authority, as part of the Council's advocacy strategy, would ensure that the Council presents to the Court the cases which have a significant impact on a particular sector, challenging a policy or practice that has caused significant disadvantage, also including cases of multiple/ intersectional discrimination. The strategic litigations to be initiated by the Council would contribute to establishing a valid judicial anti-discriminatory practice, to extending and strengthening the protection from discrimination and would draw attention to a priority issue and, finally, as a result would lead to change in this field. By instigating the strategic litigations, the Council would, in a more efficient way, promote the non-discrimination principle, contribute to revealing structural and institutional forms of discrimination, contribute to the implementation of the rule of law principle, contribute to the improvement of the access to justice for the vulnerable social groups and realisation of social justice, etc. However, before initiating a strategic litigation which affects a particular person exclusively, the Council should obtain the previous consent of this person.

Ad 5) Law 121 does not contain a provision which would authorise the Council to be an intervenient in the proceedings before the Court. It would be useful to have such a provision.

Ad 6) Experience shows that providing opinions or advisory opinions which are not binding for the court are important tools of equality bodies in the process of creating judicial antidiscrimination practice which should be in line with International standards. For that reason, it would be useful to provide such a possibility in the Law.

Article 12, para.2, Law 121, provides that "*At the beginning of each year, until 15 March, the Council shall submit to Parliament a general report on the situation in preventing and combating discrimination. The report is published on the website of the Council"*. Submission of annual reports is a usual activity of an equality body. Point 27 of Law 298 provides that the Council may submit the thematic reports *"with any discrimination criterion related to any area of life: political, economic, social, cultural"*. Point 29, Law 298 provides *"Within a deadline of at most 3 months since the date the general report is submitted, it is heard in the plenary session of the Parliament. After hearing the report, the Parliament shall adopt a decision"*. In that regard, it is observed that the Parliament only considers the General Report, not the thematic reports. This is not considered as an adequate legal solution. It should be ensured that the Parliament and the general public are aware of the Council's thematic reports, especially when the later emphasise the challenges which occur in relation to the rights of certain groups (e.g. children, persons with disabilities, LGBT, etc.) or problems related to discrimination in certain fields (education, health, employment, etc.).

Recommendation:
To amend Law 121, by adding a rule which gives the Council the authority to file a thematic report, on its own initiative or upon the request of the Parliament, on preventing and combating discrimination in certain fields of social relations or related to some social groups.

Article 12, point m), of Law 121, provides that the Council "*contributes to the amiable solution of conflicts arising after the commission of discriminatory acts by reconciling the parties and looking for a mutual acceptable solution"*. This represents a good legislative solution. The practice of equality bodies shows that mediation, conciliation and other *Alternative dispute resolution* techniques are effective methods in discrimination cases.[32] However, neither Law 121 nor Law 298 contain provisions that would further elaborate how the Council "contributes" to amiable conflict solving.

Having in mind the experiences of equality bodies in comparative systems,[33] mediation is considered to be the most appropriate method for the amiable solution of conflict caused by an act of discrimination.
Recommendation:
To consider the possibility of establishing a system of rendering mediation services within the administrative apparatus of the Council. This would imply creating a special mediation model for cases of discrimination, a Training Programme for Specialised Mediators and training for the employees in the office of the Council and Mediation Promotion. A mediation model within the administrative apparatus of Council should have the elements of restorative justice, and should be integrated into the complaints procedure. It should also define the criteria and the procedure for selecting the mediators.

Although the two basic tasks of the Council are to contribute to the change of practice in the discrimination area, Law 121 does not give the Council the ability to issue opinions to the public about widespread, typical and/or difficult discrimination cases. These are important tools for suppressing discrimination and they contribute to the increased visibility of Equality bodies as well as to an increased level of public awareness regarding the discrimination phenomenon.

Recommendation:

[32] See: Salinger: Mediation as Tool for Specialized Equality Bodies, http://www.equineteurope.org/IMG/pdf/Mediation_Salinger1.pdf; Raymond, T., Ball. J., *Alternative Dispute Resolution in the context of Anti-Discrimination and Human Rights Law: some comparisons and considerations*; Human Rights &Equal Opportunity Commission, Australia, 2000; Ammer, M., Crowley, N., Liegl, B., Holzleithner, E., Wladasch, K, Yesilkagit, K., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Synthesis report, ec.europa.eu/social/BlobServlet?docId=6454&langId=en.

[33] For example, the Belgian Centre for Equal Opportunities and Opposition to Racism, addresses discrimination complaints by Alternative dispute resolution. In Austria, the National Body for Equality suggests mediation during the process: parties can accept it and, for example, an apology offered., Greek Ombudsperson as a Specialized Body for Equal Treatment mediates utilising all "suitable means" in order to resolve a case. The Dutch Equal Treatment Commission has introduced the option of referring cases to an external mediator if both parties agree and are ready to accept mediation criteria such as mutual secrecy regarding the content of the procedure. The Serbian Commissioner for Protection of Equality is obliged to propose mediation, in accordance with the law regulating the mediation procedure, before taking other steps in the proceedings. See more: Ammer, M., Crowley, N., Liegl, B., Holzleithner, E., Wladasch, K, Yesilkagit, K., op. cit., p. 154.

To amend Law 121 by adding a provision which would give the Council the authority to inform the public about the most frequent, typical and serious cases of discrimination by press release, TV, radio etc.

Complaints Consideration Procedure

The Complaints Consideration Procedure is regulated in detail. The circle of entities authorised to submit complaints is quite extensive and enables the unions and NGOs to be active in the sphere of suppressing discrimination by submitting complaints. Verbal principle, on which the procedure is based, should also be looked on favourably because experience confirms that the verbal principle, when compared to the written principle, offers better opportunities to establish the facts in their entirety. Also, it should be noted that the complaints procedure is in line with the fair treatment standards.

Article 13, para.2 of Law 121 provides *"The complaint can be submitted to the Council within one year from the moment when the individual could find that it was committed".* Generally speaking, prescribing the deadline for submission of complaints is a good legislative solution. In cases of discrimination which were committed a number of times (repeated discrimination) or committed over an extended period of time (extended discrimination) the indicated moment from which the deadline is counted is not suitable because these forms of discrimination are characteristic of life situations with a permanent and predefined relationship between the perpetrator and the victim of discrimination, as in education, employment or public authorities conduct. On the other hand, the Law does not prescribe an objective deadline for submission of complaints to the Council.

Recommendation:
To amend Law 121, by adding a provision which would determine how the deadline for the submission of complaints in cases of repeated and extended discrimination is calculated, as well as prescribing an objective deadline for submission of complaints.

Article 15, para.1 of Law 121 provides "The complaint shall be examined within 30 days from its submission, with the possibility of the term extension, but no more than 90 days".
However, some cases are very complex and good investigation needs more than 90 days.

Recommendation:
To amend Law 121, by adding a provision which would allow the Council to extend the deadline for examination of the complaint and a provision which would stipulate the duty of the Council to justify such extension in its decision.

The outcome of the Complaints Procedure is a justified decision of the Council which establishes if discrimination has been committed or not in any specific case. If the Council finds that discrimination was committed, the Council's decision includes *"recommendations for assuring the rehabilitation of victims' rights and preventing future similar cases"* (Article 15, para.4, Law 121).Every

recommendation should be specific and clearly defined in order for the discriminator to have clear directions on how to assure the rehabilitation of victims' rights. It seems, however, that the recommendations of the Council do not have to include these specificities and to some extent the discriminator can choose the measures to be implemented as part of the rehabilitation and prevention processes. This conclusion is derived from Article 15, para.6, Law 121, which provides the following: *"If the Council disagrees with the measures taken, it is entitled to seek a superior body for appropriate actions and/or inform the public".* The Council should not evaluate the measures taken *post festum* and disagree/agree with them. It would be better if the Council provided concrete recommendations and follow up actions in cases where the discriminator did not proceed according to the recommendations of the Council.

Recommendation:
To amend Law 121, by adding a provision which would define guidelines in terms of the content of the Council's recommendations.

In view of the Council recommendations implementation, the Article 15, para.5, of Law 121, prescribes that "*The Council has to* inform *in 10 days about the undertaken measures*". This strict deadline seems to be too short, because in some cases implementation of recommended measures requires more time. For example, if it has been recommended that the headmaster should organise training for the personnel in the field of gender equality, the deadline of 10 days is not realistic because it is not possible to organise and conduct training within such a short period of time.

Recommendation:
To amend the above mentioned provision of Law 121, and to extend the deadline to 30 days or to keep the deadline of 10 days, but amend it by allowing the Council to specify a longer term if needed in any specific case.

Evidence

Part of the Law dealing with Evidence is very detailed and regulated in a satisfactory way. It is particularly important that Article 60, of Law 298 allows any evidence, including audio, video records, statistical data, to be submitted, and also allows witnesses, specialists or experts to be called to the oral hearing. In regard to the presentation of evidence, we state that the law does not anticipate the possibility of "situation testing" and use of test results as the evidence. "Situation testing" is a special experimental method and a specific technique applied in order to check directly and *in situ* if the person accused of discriminating actually does so. In the comparative practice this method is used to reveal the practice of unequal treatment of persons, having a specific personal characteristic (Roma, persons living with HIV, LGBT persons, etc.) and secure valid proof of discrimination.[34] It should be borne in mind that in comparative antidiscrimination practice "situation testing" has been verified as an adequate method of proving discrimination.

[34] See: European Network of Legal Experts on the Non-Discrimination Field, 8 (July 2009)'European Anti-Discrimination Law Review', p. 68

Recommendation:
To comprehensively regulate, in Law 121, for "situation testing" and use of test results in the judicial proceeding and in the procedure of examining the complaints before the Council.

Chapter IV – Liability for the discrimination acts

Chapter IV of the Law disciplines liability for acts of discrimination, covers victims' rights and contains procedural provisions such as those governing the burden of proof, time-limits and court fees. It also covers the financing of the bodies entrusted with the implementation of the law and activities preventing and fighting discrimination.

Article 17 – Liability for discriminatory acts

This provision contains a generic reference to disciplinary, civil, contravention and criminal liability governed by "the legislation in force". Cross-reference to specific actions, procedures and judicial remedies should be included in order to reflect the ECHR requirements of legal certainty under Article 7 ECHR.

Recommendation:
Cross-reference to the relevant provisions of the Criminal Code or of special legislation that can be considered "criminal" for the purpose of the ECHR should be included in order to comply with the requirements of legal certainty of criminal sanctions.

Article 18 – The right of the victim to protection

Article 18 is an articulated provision, raising a number of different concerns. The analysis in para. 1, elucidates the right to judicial protection from discrimination and identifies the different requests that the lawsuit might contain. The outcome of a discrimination action is inherently restrictive and prohibitory, that is it aims to eliminate the effects of discrimination and to prevent it. The ability to request multiple outcomes enables the victim to receive a comprehensive response to the actions put in place by the perpetrator. The system, however, could be improved.

In relation to para. 1, lett. b) it can be observed that the provision lacks precision and that it is not clear whether the ban imposed on the perpetrator only applies to the type of discrimination already made (for example, it bans the respondent from refusing to render dental services in the future to persons living with HIV) or also extends to continuous discriminatory practices that the perpetrator *has already started to commit* (for example, to ban further protests related to a Roma family moving into a building). It would be useful to have both forms of ban explicitly provided for. In addition, the Law could also foresee the possibility to prevent discriminatory practices from being committed

should there be a negative prognosis (i.e. practices have not yet started but there is a risk that they will be implemented – a suitable example would be if the Court bans the launching of a recruitment campaign containing discriminatory conditions).

The request of *restitution in integrum* (re-establishment of the situation prior to the violation of the rights), letter c), is formulated having in mind the ultimate goal to be realised. This requires that the victim asks the Court to *order* the perpetrator to *make one or more concrete actions in order to remove (eliminate) the situation created as the result of discriminatory conduct*. It should be spelled out more clearly that the judicial decision of *restitutio in integrum* is based on a specific request by the victim.

Letter d) includes the possibility that the victim requests the recovery of court costs. It should be clear that the outcome of such request depends on the success achieved in litigation.

Having in mind the contents of litigation, the Law should foresee the possibility of publishing the judgment. This option should be linked to a request by the victim. The benefits from such a request are multiple. For a discriminated person, the dissemination of the judgment may represent a kind of satisfaction. On the other hand, the publication contributes to public awareness-raising and has also a preventive role.

Whilst welcoming the possibility that public associations working in the area of antidiscrimination bring a law suit on behalf of the victims, paragraph 2 of the present Article should be clearer and better articulated.

It is not clear either if, in case of discrimination exclusively referring to one individual person, "unions and public associations working for the prevention and combating of discrimination" may file a complaint without his/her consent, or whether it is necessary to obtain such consent. It should specify precisely if, in a case where discriminatory treatment solely affects a particular person, "the unions and public associations" may initiate a lawsuit only with his/her consent given in writing.

When the complaint is filed by unions or public associations and relates to a group of persons, the provision does not provide limitations in view of the possibility of requesting the recovery of the material and moral damage caused (Article 18, para.1, letter d). It seems that asking for remuneration for material and moral damage is appropriate for individual persons and group members, but not for "the unions and public associations". In order to ensure the right to compensation for damages, according to the model of the *opt in* procedure of the collective complaints, members of a discriminated group should be given the opportunity to join the group complaint and ask for compensation of material and moral damage due to the discrimination to which they were exposed.

Law 121 does not contain the rules on "Situation testing", used in order to reveal the practice of unequal treatment of persons with some specific personal characteristic (Roma, persons living with HIV, LGBT persons, etc.) and provide valid proof of discrimination. Having in mind that in the

comparative antidiscrimination practice "situation testing" has been verified as an adequate method of proving discrimination, it is recommended that Law 121 should comprehensively regulate "situation testing" and the use of test results in the judicial procedure and the procedure of examining the complaints before the Council. If this recommendation is accepted, people who participate in testing ("testers") should also be given *locus standi*. It should be provided that a person who has deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case may initiate a lawsuit and submit all requests, save the request for the recovery of the caused material and moral damage.

Law 121 does not contain rules on intervention by "the unions and public associations working for the prevention and combating of discrimination" in a lawsuit initiated by the victim of a discriminatory act and with his/her consent. It does not allow them to intervene *asamicus curiae*, either. In comparative practice the associations, organisations and bodies are given the ability to intervene in antidiscrimination lawsuits and have a status of *amicus curiae*.[35] It is thus suggested that the Law is amended accordingly.

Paragraph 3 of the present Article prohibits the disclosure of information regarding victims of discrimination. Special confidentiality rules are to be observed in relation to registration, storage and use of such information. In line with Articles 1 and 4 of the Law, it can be assumed that the obligation is incumbent on both private and public authorities. Cross-reference to relevant legislation (i.e related to processing of personal data by public administration), however, should be included.

The fact that the provision makes the obligations conditional on the victim's request is rather worrisome. Indeed, the formulation indicates that disclosure of information is actually the rule rather than the exception. This appears to be in contrast with the obligations arising from Article 8 ECHR.[36] Considering the position of particular vulnerability experienced by victims of discrimination and the State's obligations to protect them from victimisation (as stated in Article 2, letter h) – a provision which seems to receive no follow-up in the text), stringent confidentiality rules should apply from the outset in all instances related to discrimination and exceptions should be linked to the presence of an explicit request by the victim.

[35] Similarly to that foreseen by Article 36 ECHR and by para. 29, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Official Journal L 303 , 02/12/2000), which provides that "Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts*".

[36] As clarified by the ECtHR in S. and Marper v. UK, the storing of data related to the private life of an individual amounts to interference within the meaning of Article 8 ECHR (para. 67). Its protection is thus instrumental to the enjoyment of such a right. In order to ensure compatibility with the ECHR, "domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article… The need to such safeguards is all the greater when the protection of personal data undergoing automatic processing is concerned…. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored…. [It] must also afford adequate guarantees that retained personal data were efficiently protected from misuse and abuse." (para. 103)

Recommendations:
Letter b) of the provision should be amended so as to clarify that the ban that can be imposed on the perpetrator not only applies to the discrimination but also to continuous practices that the perpetrator has already started to commit.

Letter c) should be reformulated to clarify that the *restitution in integrum* can be ordered only upon a specific request of the victim.

Letter d) should be amended to link the recovery of court costs to the outcome of litigation.

The ability to publish the judgment upon request of the victim should be included.

The ability of an association to bring a lawsuit should be dependent on the victim's consent.

It should be made clear that public associations cannot claim a right to moral and material damage.

Collective complaint procedures should foresee "an opt in" clause.

The ability for a public association to intervene as *amicus curiae* should be introduced.

Confidentiality of information and data related to victims of discrimination should be the rule, not the exception.

Cross-reference to relevant legislation concerning storage, use and accessibility of data should also be included.

Article 19 – The burden of proof

In relation to the burden of proof applicable to discrimination cases, the wording of Article 19 is in line with ECHR principles, on the basis of which defendants enjoy a shift of the onus of proof in civil cases. They are also in line with EU Directives.[37] It would be important to recall that the notion of "facts" is used to establish *prima facie* evidence of discrimination. According to the ECtHR facts are those assertions that are "supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions… Proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the

[37] Namely Article 4 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Article 8 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Article 10 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

facts, the nature of the allegation made and the right at stake."[38] Facts also include statistics[39], evidence provided by International and reliable non-governmental organisations[40] and, depending on whether this is foreseen at national level, situation testing.

Recommendations:
Reference to the ECHR in the Preamble would ensure that Article 19 is interpreted in compliance with the jurisprudence elaborated on the issue by the ECtHR.

The notion of facts, included in the first paragraph, should specify that it also encompasses statistics.[41]

Article 20 – Terms of prescription

Whilst welcoming the setting of a sufficiently long time-limit for bringing an action under the Law (1 year), the provision might be problematic in cases of repeated or extended discrimination that often take place between persons sharing relations with each other in fields such as education or labour. This provision should thus be coordinated with the relevant civil legislation to ensure that, in the instances mentioned above, time starts running from the last incident and not from the first.

Recommendation:
Cross-reference to the criteria set in civil legislation for calculating the time limit should be included. If the relevant civil legislation does not foresee that, in cases of repeated or extended discrimination, the calculation starts from the last incident, this should be made clear in the Law.

Article 21 – State fees

This provision, exempting judicial actions from fees, is commendable and it contributes to guaranteeing access to justice of victims. However it is not only Financial provisions which safeguard this right and other actions (i.e. adequate training of police officers receiving discrimination complaints, awareness raising activities…), that exceed the scope of the present Law should be implemented.

[38] Nachova and Others v. Bulgaria [GC], para.147 and Timishev v. Russia para. 39.
[39] Statistical data are particularly important in relation to allegations of indirect discrimination, as in these instances the rules or practices in question are neutral on the surface. Statistics can show that the effects of the rules or practices are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation. Production of statistical data works together with the reversal of the burden of proof: where data shows, for example, that a particular group is particularly disadvantaged, it will be for the State to give a convincing alternative explanation of the figures. In this sense see, for example Hoogendijk v. the Netherlands and D.H. v. Czech Republic.
[40] In Opuz v. Turkey, where no statistical data on domestic violence against women was available, the ECtHR was prepared to accept the assessment of Amnesty International, a reputable national NGO and the UN's Committee on the Elimination of Discrimination Against Women that violence against women was a significant problem in Turkey.
[41] Similar conclusions are reached in page 27 of the Compatibility Analysis.

General recommendations

Although the consultants are not familiar with the rules of general litigation process law, experience indicates that the efficient judicial civil law protection from discrimination implies prescribing several special rules. Having in mind some solutions in the comparative law, it would be useful to ensure, if necessary by amending the relevant provisions, that:

- The competence of the Court is set in relation to the residence of the victim or the place where the discrimination took place. This would reinforce the right of access to justice of the victim;
- Discrimination proceedings are given priority.

Also, the following should be included:

- A rule prescribing that the plaintiff may demand (when initiating a lawsuit, in the course of the proceedings and after the termination of the proceedings, until the court decision is enforced) that the court issues a temporary measure in order to prevent discriminatory treatment, with a view to eliminating the danger of violence or some major irreparable damage; the court may order an temporary measure ex officio;
- A rule to ensure that the Court may shorten legally prescribed deadlines for voluntary fulfilment;
- A rule which ensures that the Court may decide that the claim against the temporary measure shall not postpone the execution of the temporary measure;
- Rules on situation testing, including the possibility of the person who voluntarily participated in the testing to lodge a lawsuit for the discrimination suffered.