

SARAJEVO OPEN CENTRE

THE AGENCY FOR GENDER EQUALITY OF BOSNIA AND HERZEGOVINA

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The Agency for Gender
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TOWARDS MORE EFFICIENT PROTECTION FROM DISCRIMINATION:
**PROPOSED AMENDMENTS TO
THE BIH LAW ON PROHIBITION
OF DISCRIMINATION**

Joint proposal of the
Agency for Gender Equality of BiH and Sarajevo Open Centre

INTRODUCTION¹

During the implementation of the BiH Law on Prohibition of Discrimination (LPD) since its adoption in 2009, certain drawbacks and omissions were noticed that led to scarce and unbalanced implementation of this law in practice. Also, the BiH Law on Prohibition of Discrimination is not aligned with the European Union's (EU) acquis. Alignment of BiH's legal system, i.e. anti-discrimination legislation in this case, with the EU legal system is one of the requirements for BiH's EU membership. Under the Structured dialogue for the judiciary (2014) and at an Interim Committee session (Stabilisation and Accession Agreement, 2013 session), the European Commission explicitly invited BiH to align this law with the EU acquis. In this regard, there was a need for civil society organisations to indicate and propose certain solutions for individual articles of the law. Joint work of the Agency for Gender Equality of BiH, Sarajevo Open Centre and our collaborators resulted in the development of this document².

Of note, the European Commission will evaluate accession negotiations based on alignment of national legislation, including anti-discrimination laws with: anti-discrimination provisions of founding treaties, anti-discrimination directives and relevant decisions of the General Court of the European Union.

Provisions that are directly relevant for anti-discrimination protection can be found in two key Union treaties: Treaty on the Functioning of the European Union (TFEU) and Treaty on the European Union (TEU)³. Thus, Article 9 of TFEU and Article 3 of TEU stipulate that the Union shall pay special attention to combating of social exclusion and prevention of discrimination when defining and implementing its policies and activities. TFEU specified this obligation in Article 10 stipulating that, in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Charter of Fundamental Rights of the European Union also explicitly thematizes the prohibition of discrimination. Thus, Article 21 of the Charter⁴ reads that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited; and Article 23 contains a provision explicitly guaranteeing equality between men and women and clearly indicating that the guarantee of equality includes the possibility of introducing measures providing for specific advantages in favour of the under-represented sex.

¹ This document is based on analysis Alignment of the BiH Law on Prohibition of Discrimination with the EU acquis. Expert analysis on alignment by Tena Šimonović Einwalter (deputy Ombudswoman, Republic of Croatia) and Goran Selanec (deputy Ombudsman for Gender Equality, Republic of Croatia), published by Sarajevo Open Centre in March 2015, edition of Human Rights Papers, Paper 9. The analysis can be found both in English and BCS at: <http://soc.ba/uskladivanje-zakona-o-zabrani-diskriminacije-bih-sa-pravnom-stecevinom-eu/>

² These amendments should be viewed as a proposal only, and by no means as final and adequately drafted legal norms.

³ Official versions of Treaties are available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT> and <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012M/TXT>

⁴ Charter is available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Anti-discrimination directives are of practical importance for the Law on Prohibition of Discrimination itself, as they define explicitly and in details the obligations of member states, and thereby of future member states in the context of alignment of legislation with them. The directives are as follows:

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000),
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000),
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373/37, 21.12.2004),
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204/23, 26.7.2006)

The proposed amendments to the BiH Law on Prohibition of Discrimination include the obligations from the EU legal system and other international acts and also improve other drawbacks that adversely influence or may influence the efficiency of the protection from discrimination.

2009 BiH Law on Prohibition of Discrimination	Proposed amendments to the BiH Law on Prohibition of Discrimination	Explanation of the proposal
<p>CHAPTER I - GENERAL PROVISIONS</p> <p>Article 1</p> <p>(1) This Law shall provide a framework for implementation of equal rights and opportunities to all persons in BiH and shall define a system of protection from discrimination.</p> <p>(2) In compliance with the BiH Constitution and international standards related to human rights and fundamental freedoms, this Law defines responsibilities and obligations of legislative, judicial and executive authorities in BiH and of legal persons and individuals with public authorities in BiH (hereinafter “competent institutions of BiH”) to ensure protection, promotion and creation of conditions for equal treatment.</p>		
	<p>After Article 1, Article 1a shall be added and read as follows:</p> <p>Article 1a (Gender Neutral Language)</p> <p>Terms that are expressed in one grammatical gender for clarity purposes shall, without discrimination, apply to both men and women.</p>	<p>A provision on gender-neutral language shall be introduced in the law. Gender-specific words and terms, be it in masculine or feminine gender, shall apply to both masculine and feminine genders.</p> <p>The obligation to introduce this article into the law arises from Article 44a of the <i>Uniform Rules for Legislative Drafting in the Institutions of BiH</i>.</p>
	<p>After Article 1, Article 1b shall be added and read as follows:</p> <p>Article 1b (Definition of Terms)</p> <p>In this law, term:</p> <p>a) “The Ombudsman Institution” means the Human Rights Ombudsman Institution of Bosnia and Herzegovina,</p> <p>b) “public bodies” means all institutions, bodies, organs and other government institutions in Bosnia and Herzegovina (state, entity, Brčko District of BiH, cantonal, city, municipal, and other legal entities exercising public powers),</p> <p>c) “The Ministry” means BiH Ministry of Human Rights and Refugees.</p>	<p>Rather than in the text of the law, Article 1b introduces at the very beginning abbreviated names for the three key terms that are used throughout the law.</p>

<p>Article 2</p> <p>(1) Discrimination, within the meaning of this Law, shall be any different treatment including any exclusion, limitation or preference based on actual or assumed features towards any person or group of persons on grounds of their race, skin colour, language, religion, ethnic affiliation, national or social origin, connections with a national minority, political or any other belief, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and any other circumstance with a purpose or resulting in disabling or endangering equal recognition, enjoyment or exercising of rights and freedoms in all areas of public life.</p> <p>(2) Prohibition of discrimination shall apply to all public bodies, all natural and legal persons, both in public and private sector, in all spheres, and especially: employment, membership in professional organisations, education, training, housing, health, social protection, goods and services designated for the public and public places and performance of economic activities and public services.</p>	<p>Article 2 shall be amended to read as follows:</p> <p>Article 2 (Definition of Discrimination and Grounds for the Prohibition of Discrimination)</p> <p>(1) Discrimination, within the meaning of this Law, shall be any different treatment, including any exclusion, limitation or preference based on actual or assumed features towards any person or group of persons and those related to them by kin or otherwise, and any other circumstance with a purpose or resulting in disabling or endangering equal recognition, enjoyment or exercising of any person's or group of persons' rights and freedoms in all areas of public life.</p> <p>(2) In accordance with paragraph 1 of this Article, discrimination on the following grounds shall be prohibited: race, skin colour, national or ethnic origin, affiliation with a national minority, religion, language, political or any other belief, membership in trade union or any other association established in accordance with the law, disability, genetic features, health condition, age, sex, gender, intersexuality, marital or family status, pregnancy, sexual orientation, gender identity and expression, social status, social background, property or any other personal feature.</p>	<p>The existing definition in Article 2 (paragraph 1) does not cover all necessary grounds on which discrimination should be prohibited, and it does not prohibit discrimination based on affiliation with a person or a group of persons.</p> <p>The existing paragraph 2 regulates areas in which discrimination is prohibited, which is already much more broadly and more precisely determined by the existing Article 6. In order to eliminate these shortfalls, abolishment of the existing paragraph 2 is proposed.</p> <p>Amendments to paragraph (1) introduce prohibition of discrimination <i>based on kin or other relations</i>⁵, unlike the existing definition, where the prohibition of discrimination based on relations only applies to national minorities by using the term "connections with a national minority."</p> <p>Amendments to paragraph (2) will correct partial inconsistency pertaining to the list of grounds on which discrimination is prohibited. Although Article 2 of the BiH Law on Prohibition of Discrimination defines a broad and open list of grounds, this list and the used terms are not aligned with the EU directives. For this reason, <i>a changed list of grounds is proposed</i>.</p> <p>Directive 2000/43/EC prohibits discrimination based on <i>race or ethnic background</i>, Council Directive 2000/78/EC prohibits discrimination based on <i>sexual orientation, disability, religion or belief and age</i>, and Directive 2006/54/EC and Directive 2004/113/EC prohibit discrimination based on <i>sex</i> (according to caselaw of the European Court, it also includes gender identity and expression).</p> <p>It is evident that two grounds from the directives: <i>age</i> and <i>disability</i> are not included in the existing text of the law. Although it is possible that age and disability are already included in the list of grounds due to its openness, in terms of the alignment, for the sake of visibility and seriousness of discrimination ban on these grounds, it is still necessary to add <i>age and disability</i> in Article 2, paragraph (2) as grounds that are explicitly stated.</p> <p>It is also necessary to add <i>sexual orientation and gender identity and expression</i> as grounds based on which discrimination is prohibited. Term sexual orientation is introduced because the currently used terms "sexual expression or orientation" are not terminologically correct and they neither exist, nor are used as such in comparative legal practice. "Sexual orientation and gender identity" are common terms.</p> <p><i>Other listed grounds</i> arise from other international documents and caselaw of the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg.</p> <p>Article 21 of the <i>European Charter on Fundamental Rights</i> prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.</p>
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⁵ See: European Commission: 2005 Annual Report on Equality and Anti-Discrimination, see: http://ec.europa.eu/justice/discrimination/files/lawrev5_en.pdf

		<p>Article 26 of the <i>International Covenant on Civil and Political Rights</i> prohibits discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</p> <p>Article 14 of the <i>European Convention on Human Rights and Freedoms</i> and Article 1 of Protocol 12 to the European Convention on Human Rights specify the following grounds: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</p> <p>Other grounds such as pregnancy arise from comparative practice of other European states.</p> <p>We can conclude that the proposed list of grounds covers obligations arising from the EU directives, but also a broad list of other grounds that arise from other international documents and caselaw of the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg. In this way, Bosnia and Herzegovina obtains a comprehensive and correctly founded list of grounds for the prohibition of discrimination. Compared to other countries of the Western Balkans, BiH will thus obtain the best defined list of grounds.</p>
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<p>CHAPTER II - FORMS OF DISCRIMINATION</p> <p>Article 3 (Forms of Discrimination)</p> <p>(1) Every different treatment on grounds defined in Article 2, i.e. every action or failure to act when a person or a group of persons is put, has been or could be put into a less favourable position than another person or group of persons in similar situations shall be considered direct discrimination.</p> <p>(2) Every situation in which an apparently neutral provision, criterion or practice has or would have the effect of putting a person or group of persons into an unfavourable or less favourable position comparing to other persons shall be considered indirect discrimination.</p>	<p>Article 3 shall be amended to read as follows:</p> <p>Article 3 (Forms of Discrimination)</p> <p>(1) Every different treatment on grounds defined in Article 2, paragraph 2 i.e. every action or failure to act when a person or a group of persons is put, has been or could be put into a less favourable position than another person or group of persons in similar situations shall be considered direct discrimination.</p> <p>(2) Every situation in which an apparently neutral provision, criterion or practice has or would have the effect of putting a person or group of persons into an unfavourable or less favourable position comparing to other persons on grounds defined in Article 2, paragraph 2 shall be considered indirect discrimination, unless such provision, criterion or practice can be objectively justified with a legitimate aim, and means for their achievement are appropriate and necessary.</p>	<p>The Law on Prohibition of Discrimination “guarantees equality of treatment” (Article 2 of Directive 2000/78/EC). The principle of equal treatment primarily comprises of 1) guarantee on the prohibition of direct discrimination and 2) guarantee on the prohibition of indirect discrimination. Directive 2000/43/EC and Directive 2000/78/EC provide very clear definitions of direct and indirect discrimination.</p> <p>In Article 3, paragraph (1), words “on grounds defined in Article 2, paragraph 2 of this law” shall be added.</p> <p>The proposed provision of Paragraph (2) foresees a change in the definition of <i>indirect discrimination</i>, in order to clearly and explicitly allow a possibility to try and justify an unbalanced effect of seemingly neutral treatment and present it as necessary or proportional, in view of the importance of the legitimate aim of the seemingly neutral treatment for the specific operations. By changing the definition of indirect discrimination, this Article would be aligned with definitions of indirect discrimination that arise from Directive 2000/43/EC and Directive 2000/78/EC.</p>
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<p>Article 4 (Other Forms of Discrimination)</p> <p>(1) Harassment shall be considered discrimination in every situation when behaviour is related to one of the specified grounds from Article 2 that aims for or has an effect of harming one's dignity and creating intimidating, hostile, degrading, humiliating or offensive environment.</p> <p>(2) Any form of unwanted verbal, non- verbal or physical behaviour of sexual nature which aims for or has effect of harming one's dignity, especially when it creates fearful, hostile, degrading, humiliating or offensive environment shall be considered sexual harassment.</p> <p>(3) Any form of non- physical harassment at work place with repetitive actions that have humiliating effect on a victim that aim at or result in degradation of employee's working conditions or professional status shall be considered mobbing.</p> <p>(4) Segregation is an act by which a (natural or legal) person separates other persons on basis of one of the grounds specified in Article 2 of this Law, in compliance with the definition of discrimination from the Article 2 of this Law.</p> <p>(5) Instructing others to discriminate and assisting others in discrimination shall be considered forms of discrimination.</p> <p>(6) Any advocacy for national, racial or religious hatred shall represent an incitement to discriminate and shall be prohibited.</p>	<p>Article 4 shall be amended to read as follows:</p> <p>Article 4 (Other Forms of Discrimination)</p> <p>(1) Harassment is any unwanted behaviour caused by one of the specified grounds from Article 2, paragraph 2 that aims at or actually represents harming of one's dignity and creating of intimidating, hostile, degrading, humiliating or offensive environment.</p> <p>(2) Sexual harassment is any unwanted verbal, nonverbal or physical behaviour of sexual nature that aims at or actually represents harming of one's dignity, especially when it creates intimidating, hostile, degrading, humiliating or offensive environment.</p> <p>(3) Segregation is an act by which a (natural or legal) person consciously or unconsciously separates other persons to groups on the basis of one of the grounds specified in Article 2, paragraph of this Law.</p> <p>(4) Any advocacy for national, racial or religious hatred, causing intolerance based on language, political belief, sex, sexual orientation, gender identity and expression, disability or any ground specified in Article 2, Paragraph 2 of this law hatred shall represent an incitement to discriminate.</p> <p>(5) Hate speech is expressing ideas, information and opinions in the media and in publications, events and publicly accessible places and writing and displaying messages or symbols that incite hatred or violence against an individual or a group of individuals due to their personal feature or on any ground specified in Article 2, Paragraph 2 of this law.</p> <p>(6) Victimization is any form of unfavourable treatment against persons who reported discrimination, attended or witnessed discrimination, refused to follow an order involving discriminatory treatment, participated in any way in the procedure of protection from discrimination, provided information or documents required in the process of protection from discrimination or informed the public in good faith about discriminatory treatment.</p> <p>(7) Instructing others to discriminate and assisting others in discrimination shall be considered forms of discrimination.</p> <p>(8) Any omission to provide disabled persons, based on their specific needs, with the following shall be deemed discrimination:</p> <p>a) use of publicly available resources,</p>	<p>The BiH Law on Prohibition of Discrimination prescribes 6 other discrimination forms: harassment, sexual harassment, mobbing, segregation, instructing others and incitement to discrimination. Unfortunately, definitions of these terms are not in accordance with the EU acquis i.e. the directives and/or comparative legal practice. For this reason, changes to the definitions of other discriminations forms have been proposed.</p> <p>Discrimination forms <i>harassment and sexual harassment</i> (Paragraphs 1 and 2 of this Article) are aligned with definitions arising from the Directive 2006/54/EC. Also, the term <i>harassment</i> had to be amended, so that the behaviour is described as "unwanted" by the person exposed to it. In the definition of sexual harassment, word "<i>spolno</i>" was replaced with "<i>seksualno</i>" (note: both mean "sexual" in English), because this is a more adequate term, which is commonly used, among other, in the BiH Gender Equality Law, Article 5.</p> <p>The definition of special form of discrimination – <i>segregation</i> – in Paragraph (3) is regulated more clearly and in greater details, in order to emphasise that segregation does not have to be intentional, but that actions that constitute discrimination may inflict unintentional consequences.</p> <p>Definition of the special discrimination form – <i>incitement to discrimination</i> – in <i>paragraph</i> (4) is regulated more clearly and in greater details, in order to cover other grounds as well, apart from national, racial and religious hatred, in accordance with the comparative practice when it comes to perpetration of illegal prejudice-based offences. Identical solution can be found in Article 13, Paragraph (1) of the Law on Prohibition of Discrimination of the Republic of Serbia.</p> <p>Incitement to discrimination shall no longer constitute Paragraph (6), but Paragraph (4).</p> <p>Paragraph (5) introduces a new form of discrimination: <i>hate speech</i>, along the lines of the definition specified in Article 11 of the Law on Prohibition of Discrimination of the Republic of Serbia. This provision proved to be very efficient in the prevention of hate speech against minority groups, which is also confirmed by reports and recommendations of the Commissioner for Protection of Equality of the Republic of Serbia.</p> <p>Paragraph (6) defines <i>victimization</i> as a discrimination form. Framework directive (2000/78/EC) commits states to establish more efficient measures for the protection from victimization. We believe that the most efficient way to do this is to define victimization as a discrimination form. According to this paragraph, nobody must be put in less favourable position for having reported discrimination in good faith, because they witnessed discrimination, refused an instruction to discriminate or participated in any way in a procedure conducted due to discrimination. This guarantee protects all, and not only immediate discrimination victims. Similar solution can be found in Article 7 of the Anti-Discrimination Act of the Republic of Croatia. In view of the fact that victimization is regulated in this Article, the existing</p>
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	<p>b) participation in public and social life, and c) access to the workplace and adequate working conditions, by accommodating the infrastructure and space, use of equipment in another way as well, which does not impose a disproportionate burden on the one obliged to provide it.</p>	<p>Article 18 that deals with victimization shall be deleted (see below).</p> <p>The existing Paragraph (5) shall become Paragraph (7), given that these discrimination forms (<i>instruction to discriminate</i>) arise from the Directive 2000/43/EC.</p> <p>Paragraph (8) introduces another separate form of discrimination - <i>failure to provide reasonable accommodation</i>, in accordance with the Directive 2000/78/EC. Reasonable accommodation is a special expression of the equality principles that certainly do not constitute an exception but accompany the guarantee on the prohibition of unequal treatment based on disability. Framework directive (2000/78/EC) explicitly specifies that the guarantee of reasonable accommodation for disabled persons represents guarantee of abidance by the equality principles in treatment of this social group. In other words, reasonable accommodation is not an “exception to the rule” that should be interpreted and applied only to an extent that is strictly necessary for achieving a goal that allows deviations from the existing standard. Reasonable accommodation is a rule. In some EU member states, national legislation defines omission to make reasonable accommodation as a form of discrimination, where the failure or omission to act leads to discrimination. According to Framework Directive (2000/78/EC), reasonable accommodation represents employer’s obligation to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Measures that can obtain support within a national policy on equality of persons with disability shall not be deemed to be a disproportionate burden, if there is an obligation to provide them. Similar solution can be found in Article 4 of the Anti-Discrimination Act of the Republic of Croatia.</p> <p>The former Paragraph (3) <i>Mobbing</i> shall be deleted from this Article. Mobbing is connected with the work process, and not with specific features of a victim (discrimination grounds) or their affiliation with a wider group. Mobbing is reduced to a consequence of systemic treatment of an employee aimed at humiliating, isolating or excluding them from the working environment. Harassment as a form of discrimination is a wider and socially more serious form of unfavourable treatment that must be preconditioned by one’s affiliation with a social group that is traditionally in a less favourable position within the society. Therefore, while discrimination includes all areas of social life and all activities of an individual, mobbing only applies to the work process.</p> <p>The need to separately regulate this matter arises from the above. Regulating this matter by a separate chapter of this law, by a separate state-level law or by entity-level (labour) legislation should be considered in details.</p>
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	<p>After Article 4, Article 4a shall be added and read as follows:</p> <p>Article 4a (Severe Forms of Discrimination)</p> <p>(1) Severe form of discrimination is discrimination against a person or a group of persons on several grounds specified in Article 2, Paragraph (2) of this law (multiple or cross discrimination), discrimination perpetrated several times (repeated discrimination), discrimination over an extended period of time (extended discrimination) or discrimination that especially severely affects the discrimination victim.</p> <p>(2) The Court shall consider the circumstances described in Paragraph (1) of this Article when defining a damage compensation amount and a sanction for offences defined in this law.</p>	<p>The existing Law on Prohibition of Discrimination does not stipulate <i>severe forms of discrimination</i>.</p> <p>Along the lines of the comparative solution from the Anti-Discrimination Act of the Republic of Croatia (Article 6) and the Law on Prohibition of Discrimination of the Republic of Serbia (Article 13), Article 4a introduces severe forms of discrimination that will constitute an aggravating factor when evaluating discrimination and proportion of the pronounced sanction. The aim is to protect individuals extremely susceptible to discrimination such as Roma women who may not only be discriminated for their affiliation with a national minority, but also because they are women (sex/gender based discrimination). What makes such persons especially vulnerable is the fact that they are often in a subordinated position within their social group due to their affiliation with another group at the same time. What is more, due to harmful consequences of such treatment in real life, likelihood that the individual who treats other unfavourably on several grounds is unaware or could not be aware of it is significantly lower than in a situation where unfavourable treatment is only limited to one person. Similar applies to other multiply marginalised social sub-groups.</p>

⁶ Analitika – Centre for Social Research offered an excellent analysis of this issue: <http://www.analitika.ba/bs/publikacije/regulacija-mobinga-u-bosni-i-hercegovini-u-kontekstu-zakona-o-zabrani-diskriminacije>

<p>Article 5 (Exceptions from Principle of Equal Treatment)</p> <p>Legal measures and actions shall not be considered discriminatory when reduced to unfavourable distinction or different treatment if based on objective and reasonable justification. Following measures shall not be considered discriminatory if they are used to realize a legitimate goal and if there is a reasonable proportion between the means used and goals to be achieved, even when:</p> <p>a) They arise from the implementation or adoption of temporary special measures designed to prevent or compensate for damages that individuals suffer, that are defined by grounds given in Article 2 herein, especially members of vulnerable groups, such as persons with disabilities, members of national minorities, women, pregnant women, children, youth, elderly people and other socially excluded persons, civilian victims of war, victims in criminal proceedings, displaced persons, refugees and asylum seekers; i.e. to enable their full participation in all spheres of life;</p> <p>b) They are based on a feature related to any ground specified in Article 2 of this Law when, in limited circumstances, due to nature of concrete professional activities or context in which these are implemented, such feature represents an actual and defining condition in terms of choice of occupation. This exception shall be a subject to occasional reviews;</p> <p>c) They are based on distinction, exclusion or preference in employment with an institution, made in compliance with doctrines, basic presumptions, dogmas, beliefs or teaching of actual confession or religion, given that the distinction, exclusion or preference is made consciously, in order not to hurt religious feelings of members of that confession or religion;</p> <p>d) They define maximum age as the most appropriate for employment termination and determine age requirement for retirement;</p> <p>e) They are based on citizenship in a way prescribed by the Law;</p>	<p>Article 5 shall be amended and divided to separate articles to read as follows:</p> <p>Article 5 (Exceptions from the Prohibition of Discrimination)</p> <p>(1) Different treatment of individuals or a group of individuals caused by any of the grounds specified in Article 2 (2) herein shall be deemed to be justified and allowed provided that, in accordance with the Constitution, it is explicitly stipulated by a legal act and necessary to preserve public security, maintain public order and prevent crimes, protect health and protect rights and freedoms of others, and it does not disproportionately violate basic democratic features of the legal system of Bosnia and Herzegovina.</p> <p>(2) Different treatment specified in Paragraph (1) of this Article must not in any case lead to formal or actual discrimination on grounds of race or ethnicity, national background, colour, religion, sex, sexual orientation and disability.</p> <p>Article 5a (Different Treatment Conditioned by Religion or Belief)</p> <p>(1) Different treatment of an individual based on any feature related to any ground specified in Article 2 (2) of this Law shall not constitute discrimination when, due to nature of certain professional activities or conditions in which they are conducted, such feature is an actual and decisive requirement for performance of a certain occupation, if the purpose is justified and the requirement proportional, but such practice shall be subject to occasional reviews.</p> <p>(2) In accordance with the provisions and values of the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights, different treatment based on one's religion or belief shall be allowed in the framework of this Law, only under the following cumulative conditions:</p> <p>a) when it deals with the possibility to access and participate in professional activities within religious institutions and other organizations that, within the existing legal norms, promote the system of values based on religious or philosophical i.e. non-confessional belief;</p> <p>b) when, due to the nature of the specific professional</p>	<p><i>The existing Law on Prohibition of Discrimination, Article 5 regulates exceptions and possibilities to depart from the guarantee on the prohibition of discrimination too broadly and it requires serious amendments aiming at alignment with the EU directives.</i> Detailed explanation is provided below.</p> <p>Every directive allows <i>certain exceptions</i>, where, unlike Directive 2006/54 or Directive 2000/43, Directive 2000/78 stipulates the broadest possibilities for deviation from the guarantee of equal treatment.</p> <p>Directive 2000/78 thus allows member states to stipulate measures by national laws that are deemed necessary in democratic societies for the purpose of public security, preserving public order and preventing crimes, preserving health and protection of rights and freedoms of others. Such broadly defined exceptions are obviously taken from the European Convention on Human Rights and are specific for the Directive 2000/78, and as such they are not applicable in the field of gender equality and ethnic and racial equality.</p> <p>Directive 2006/54, Directive 2000/43 and Directive 2000/78 allow <i>bona fide</i> qualifications i.e. use of non-allowed distinction criteria when, in view of the nature of the working assignment or a context in which the assignment is performed, this criterion represents the actual and decisive factor for successful fulfilment of the specific assignment, provided that the assignment is legitimate i.e. that the use of the criterion is proportional to the goal planned to be achieved through the assignment.</p> <p>However, Directive 2000/78 allows member states to keep legislation that was in force at the time of enactment of the Directive or that was passed by voting following the entry into force of the Directive, but that legitimize a practice that existed at the time of the entry into force of the Directive, related to work at churches and in public or private organizations whose activities are founded on ethos based on religion or belief, and allow different treatment conditioned by <i>religion or belief</i>, in view of the ethos of the specific organization and the nature of specific activities and context in which they are performed. Such distinction represents an actual, legitimate and justified employment criterion. Directive 2000/78 allows such organizations to request from their employees to treat their belief or religious ethos in good faith and with respect. Also, a specific exception allowed by this Directive is related to treatment based on <i>age</i>. Directive 2000/78 explicitly allows member states to stipulate that different treatment based on age shall not constitute violation of the guarantee of equal treatment, if it is reasonable and objectively justified with a legitimate goal in the circumstances of the national law - including legitimate employment policy, goals for labour market improvement, professional development goals - and if means intended for the achievement of such goal are appropriate and necessary.</p> <p>Directive 2000/43/EC allows differences of treatment based on <i>nationality</i> (Article 3, Paragraph 2), referring to nationality of third countries, given that discrimination based on nationality of EU member states is prohibited by the primary law of the European Union.</p> <p>First of all, the existing Article 5 defines the <i>guarantee of reasonable accommodation</i> as an "exception from the principle of equal treatment", while the</p>
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<p>f) They are based on introduction of reasonable accommodations aiming to ensure the principle of equal treatment of persons with disabilities. Employers shall, based on needs in a concrete case, take appropriate measures, in order to enable a person with disability to access, participate or to be promoted, i.e. to participate in training, if such measures do not impose an unreasonable burden on the employer;</p> <p>g) Putting into a less favourable position while defining rights and obligations from the family relation when defined by the Law, especially in order to protect rights and interests of children, which must be justified with a legitimate purpose, protection of public morality, along with favouring marriage in accordance with provisions of family laws;</p> <p>h) When establishing an employment relation, include in membership and activities that are in compliance with preaching and operations of registered churches and religious communities in BiH, and of other public or private organisation working in accordance with the Constitution and laws, if so demanded by religious doctrines, beliefs or goals.</p>	<p>activity described in subparagraph a) herein or circumstances under which it is performed, the criterion of religious affiliation or religious, philosophical or non-confessional belief constitutes actual, legitimate and justified requirement for performance of this occupation, in view of the institution's system of values;</p> <p>c) if the professional activity described in subparagraph a) does not include economic activities in the framework of market relations.</p> <p>Article 5b (Other Forms of Different Treatment)</p> <p>(1) Different treatment regarding conditions of entry and stay of third country nationals and individuals without a nationality at the territory of Bosnia and Herzegovina i.e. treatment that, pursuant to the existing legislation, arises from the legal status of such third country nationals and individuals without a nationality, shall be allowed;</p> <p>(2) Respecting every individual's right to family life in accordance with the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Fundamental Freedoms, different treatment based on sexual orientation shall be allowed regarding the establishment of marital status, provided that such treatment is not used to limit access of individuals with homosexual orientation to benefits and privileges related to employment and labour relations, education and professional development, and to the system of health care, social and pension insurance and protection.</p> <p>(3) In regulating rights and obligations from family relations unrelated to the marital status specified in Paragraph (2) herein, different treatment based on sexual orientation shall only be allowed if, in accordance with the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Fundamental Freedoms, such treatment is fully in accordance with requirements arising from the protection of every individual's basic right to family life, and if family status is not used in any way to limit access of individuals with homosexual orientation to benefits and privileges related to employment and labour relations, education and professional development, and to the system of health care, social and pension insurance and protection.</p> <p>(4) Different treatment based on age shall be allowed if the difference is objectively and reasonably justified with</p>	<p>Directive 2000/78 explicitly defines it as a guarantee of the application of equal treatment principle. Imbalance at the conceptual level will be an aggravating factor in the application by competent bodies, if nothing else, then because the implementing bodies will insist on "strict" or "narrow" interpretation of exceptions from the basic standard, which will limit the effectiveness of this guarantee for persons with disability. What is more, due to the way in which the second sentence in Article 5 (1) was formulated, it implies that an employer could claim that measures of reasonable accommodation basically constitute discrimination of persons without disability, and that therefore they could only be taken if they are proportional given the specific circumstances and needs of persons without disability who apply for the same position or an employment privilege. <i>From the aspect of Directive 2000/78, such interpretation poses an unacceptable limitation on the guarantee of reasonable accommodation.</i></p> <p>Also, Article 5 defines <i>measures of positive action</i> as an exception to the principle of equal treatment, while the EU anti-discrimination directives define it as a specific form of equal treatment for the purpose of achieving full equality in real life. Apart from this conceptual difference, admissibility requirements for measures of positive action that the existing Article 5 insists on are not in accordance with those developed by the Court of European Union through its decisions.</p> <p>In addition, Article 5 is also very unclear in terms of the scope of exceptions that apply to <i>religious organizations</i> and public or private institutions whose activities are founded on ethos based on religion or belief. It arises from Article 5 that religious institutions are allowed to exercise unfavourable treatment in employment based on religion or belief of candidates, although it does not necessarily represent the "actual, legitimate and justified criterion" of employment. What is more, provision of Article 5 allows religious organizations to exercise unfavourable treatment based on any of the prohibited grounds, and not only based on religion or belief. Regarding the claim that Article 5 limits unfavourable treatment of this kind by defining conditions: "realization of a legitimate goal" and "existence of a reasonable proportion between the means used and goals to be achieved", it is useful to note that Article 5, subparagraph (c) instructs that both requirements have been met "having in mind that every distinction, exclusion or giving advance is done consciously in order not to hurt religious feelings of members of that confession or religion". Given that, when it comes to employment, provision of Article 5, subparagraph (c) practically enables religious organizations to exercise almost uninhibited discrimination based on any of the grounds stipulated by Directive 2000/78, it is irreconcilable with the requirements arising from this Directive. The same applies to the provision of Article 5, subparagraph (h).</p> <p>In addition to the above provisions, Article 5, subparagraph (g) should be mentioned, which allows unfavourable treatment based on any of the basically prohibited grounds, following the role model of the Croatian Anti-Discrimination Act, "while defining rights and obligations from the family relation when defined by the Law, especially in order to protect rights and interests of children, which must be justified with a legitimate purpose, protection of public morality, along with favouring marriage in accordance with provisions of family laws". From the aspect of the EU law, such formulation will not be problematic when it comes to access to any</p>
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	<p>a legitimate goal, including a legitimate employment policy, labour market and vocational education, and if ways for achieving this goal are appropriate and necessary, and especially if it is related to:</p> <p>a) establishment of special conditions for access to employment and professional development, for employment and performance of an occupation, including conditions for dismissal and labour fees, for young individuals, elderly workers and individuals that are obliged to take care of others, in order to encourage their vocational integration or provide their protection;</p> <p>b) defining minimum requirements related to age, working experience or years of service for access to employment or certain employment advantages;</p> <p>c) defining upper age threshold for employment, based on training requirements for a specific position or on the need for existence of a reasonable period of time before retirement.</p> <p>(5) Different treatment stipulated by the law regarding the retirement age for women and men shall be allowed within the framework of this Law, if such difference is objectively and reasonably justified with a legitimate goal, especially in view of the fact that women, along with professional obligations that assume on the labour market, also assume a part of the responsibility for family care, especially for children, elderly persons and the weak, and it shall be subject to occasional reviews and gradual equalizing.</p> <p>Article 5c (Measures for Promotion of Equal Opportunities)</p> <p>(1) Measures for the promotion of equal opportunities represent specific advantages conditioned by some of the grounds specified in Article 2(2) of this Law that enable persons who belong to a social group that has traditionally or for a long time been in unfavourable position in a society to equally participate in public life, that eliminate the existing inequalities or provide such individuals with rights they were deprived of in the past.</p> <p>(2) Measures for the promotion of equal opportunities are introduced temporarily in order to provide complete and actual social equality of a specific social group and they shall not constitute discrimination within the framework of this Law, if they cumulatively meet the following conditions:</p> <p>a) when there is a significant under-representation of</p>	<p>privilege within the EU's regulatory competency (labour rights, pension, social protection, access to market goods and services) only if there are no attempts to justify in any way the unfavourable treatment on some of the grounds that enjoy special anti-discrimination protection in the EU legal system, such as e.g. ethnic background, sex or sexual orientation, under the excuse of protecting family and children. What is more, from the aspect of Directive 2000/78, protection of (heterosexual) marriage can in no way justify unfavourable treatment of persons in stable same-sex emotional partnerships when it comes to access to benefits from a labour relation. Given that this provision was adopted based on the Croatian role model, it is useful to mention developments in Croatia that recently adopted the Same-Sex Registered Partnership Act, thus fully aligning Croatian legislation with requirements arising from Directive 2000/78 and recent decisions of the Court of European Union in Luxembourg.</p> <p>Against this background, the existing Article 5 was thoroughly rephrased, and its provisions were divided to Articles 5, 5a, 5b, 5c and 5d. In this way, Bosnia and Herzegovina would obtain the best regulations in the region when it comes to exceptions, different treatment and measures for the promotion of real equality.</p>
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	<p>persons belonging to a specific social group, whereas the significant under-representation threshold in terms of access or use of a specific benefit, opportunity, privilege or good shall be determined from case to case, in view of the specific group's representation in overall population;</p> <p>b) if it is able to contribute to elimination or mitigation of a cause of the significant under-representation specified in subparagraph a) of this Paragraph;</p> <p>c) if, following an objective and impartial evaluation of candidates applying for a specific benefit, opportunity, privilege or good, it was established that the best candidates from the over-represented and under-represented groups equally meet objective requirements for access or use thereof;</p> <p>d) if in terms of employment and advancement at the workplace, a positive measure was stipulated as an obligation by a law or bylaw, the person obliged to fulfil such obligation may, following an objective and impartial evaluation of candidates, also consider relevant reasons specific for the social situation of the specific individual, in order to give preference to a candidate that belongs to a group that is not under-represented, despite the stipulated obligation, but only provided that such decision does not attempt in any way to bypass the purpose of the measure for the promotion of equal opportunities.</p> <p>(3) Measures for promotion of equal opportunities that apply to employment, keeping of employment, development and life-long learning of persons with disability shall be particularly important for the promotion of equal opportunities of persons with disabilities.</p> <p>(4) Measures for the promotion of equal opportunities may also include establishment of organizations based on the affiliation with one of social groups related to grounds specified in Article2 (2) of this Law, if the main goal of such measures is to promote special needs of such persons, in order to prevent or compensate for a less favourable position that the specific group has been in traditionally or for a long period of time.</p> <p>Article 5d (Measure of Reasonable Accommodation)</p> <p>(1) In order to guarantee abidance by the principle of equal treatment of persons with disability, measures of reasonable accommodation of their specific needs must</p>	
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	<p>be provided, which means that employers shall take adequate measures in a specific situation and when necessary, in order to provide a person with disability with access to employment, participation or advancement at work or development, provided that such measures do not pose a disproportionate burden on the employer.</p> <p>(2) Within the meaning of measures of reasonable accommodation described in Paragraph (1) of this Article, special but not exclusive attention should be paid to the provision of adequate, effective and practical measure to accommodate workplace for disability, by accommodating premises and equipment, the schedule of working hours, by assignment of tasks or provision of funds for training or introduction to the working assignments.</p> <p>(3) In order to establish whether certain measures impose the disproportionate burden specified in Paragraph (1) of this Article, special attention should be paid to related financial and other costs, the extent and financial sources of the company, and to possibilities for obtaining support from public funds or another assistance, whereas the burden may not be deemed disproportionate if the employer uses assistance of the existing measures provided within a state-level, entity, cantonal or local policy for the protection of persons with disabilities.</p>	
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<p>CHAPTER III: PROTECTED RIGHTS</p> <p>Article 6 (Scope of Application)</p> <p>(1) This Law shall apply to actions of all public bodies at the level of the state, entity, canton and Brcko District of BiH, municipal institutions and bodies, and legal persons with public authorities, as well as to the actions of all legal and natural persons, in all spheres of life, but especially in the following fields:</p> <p>a) Employment, work and working conditions, including access to employment, occupation and self-employment, working conditions, remuneration, promotions and dismissals;</p> <p>b) Education, science and sports. Access to education should not depend on immigration status of children or their parents;</p> <p>c) Social protection, including social insurance, social benefits, social assistance (housing allowances, allowances for youth, etc.) and ways of treating social protection beneficiaries;</p> <p>d) Healthcare, including access to care and treatments, and regarding the ways of providing care and treatment of patients;</p> <p>e) Trainings, including initial trainings and continuous professional development, all sorts and all levels of professional orientation, advanced professional development, additional qualifications and requalification and gaining practical working experience;</p> <p>f) Judiciary and administration, including activities of police and other law enforcement officers, border control officers, military and prison staff. Concretely, all persons shall be equal before courts and tribunals;</p> <p>g) Housing, including access to housing, housing conditions and termination of a lease contract;</p> <p>h) Public information and the media;</p> <p>i) Membership in professional organizations, including membership in organizations of employers or employees or any other organization whose members perform certain occupation; involvement in such organizations and benefits provided by these organizations;</p> <p>j) Goods and services designated for public and public places, including, e.g. when purchasing goods</p>	<p>Article 6 (1) shall be amended to read as follows:</p> <p>(1) This Law shall apply to actions of all public bodies and actions of all legal and natural persons, in all spheres of life, but especially in the following:</p> <p>a) Employment, work and working conditions, including access to employment, occupation and self-employment, working conditions, remuneration, promotions and dismissals;</p> <p>b) Education, science and sports. Access to education should not depend on immigration status of children or their parents;</p> <p>c) Social protection, including social insurance, social benefits, social assistance (housing allowances, allowances for youth, etc.) and ways of treating social protection beneficiaries;</p> <p>d) Healthcare, including access to care and treatments, and regarding the ways of providing care and treatment of patients;</p> <p>e) Trainings, including initial trainings and continuous professional development, all sorts and all levels of professional orientation, advanced professional development, additional qualifications and requalification and gaining practical working experience;</p> <p>f) Judiciary and administration, including activities of police and other law enforcement officers, border control officers, military and prison staff. Concretely, all persons shall be equal before courts and tribunals;</p> <p>g) Housing, including access to housing, housing conditions and termination of a lease contract;</p> <p>h) Public information and the media;</p> <p>i) Membership in professional organizations, including membership in organizations of employers or employees or any other organization whose members perform certain occupation; involvement in such organizations and benefits provided by these organizations;</p> <p>j) Goods and services designated for public and public places, including, e.g. when purchasing goods in a shop, when submitting an application for a loan from a bank and in relation to access to discotheques, coffee shops and restaurants;</p> <p>k) Performing business activity, including law on market competition, relations between companies, and relations between companies and the state;</p> <p>l) Participation in cultural and art creations;</p> <p>m) Equal participation of all citizens in public life;</p>	<p>Definition in Article 6 (1) lacked explicit listing of “city” institutions and bodies. Given that all government levels are listed, it is important to include cities as well. However, as the issue of “public bodies” is mentioned throughout the entire Law and, in order to avoid repetitions stating that the provisions apply to institutions, bodies, organs and other government institutions in Bosnia and Herzegovina (state, entity, Brčko District of BiH, cantonal, city, municipal, and other legal entities exercising public powers), abbreviated term “public bodies” was introduced and defined in new Article 1b. Therefore, the use of the term “public bodies” shall be changed throughout the law, to exclude the unnecessary explicit listing of all government levels. This way, the text seems more legible.</p>
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<p>in a shop, when submitting an application for a loan from a bank and in relation to access to discotheques, coffee shops and restaurants;</p> <p>k) Performing business activity, including law on market competition, relations between companies, and relations between companies and the state;</p> <p>l) Participation in cultural and art creations;</p> <p>m) Equal participation of all citizens in public life;</p> <p>n) Families, where spouses shall enjoy full equality of rights and responsibilities in relation to the marriage, during the marriage and divorce, including rights and responsibilities when it comes to raising children, in accordance with provisions of the Family Law;</p> <p>o) Rights of a child, including measures of protection needed according to their status of minors, by their families, society and the state.</p>	<p>n) Families, where spouses shall enjoy full equality of rights and responsibilities in relation to the marriage, during the marriage and divorce, including rights and responsibilities when it comes to raising children, in accordance with provisions of the Family Law;</p> <p>o) Rights of a child, including measures of protection needed according to their status of minors, by their families, society and the state.</p>	
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<p>CHAPTER IV: INSTITUTIONS IN CHARGE OF PROTECTION FROM DISCRIMINATION</p> <p>Article 7 (Central Institution for Protection from Discrimination)</p> <p>(1) Central institution competent for the protection from discrimination is the Ombudsman for Human Rights of Bosnia and Herzegovina (hereinafter: BiH Ombudsman).</p> <p>(2) Within its competences, the BiH Ombudsman shall:</p> <p>a) Receive individual and group complaints related to discrimination;</p> <p>b) Provide needed information to natural and legal persons who filed a complaint for discrimination about their rights and obligations, and possibilities of judicial and other forms of protection;</p> <p>c) The BiH Ombudsman may decide not to accept a complaint or to initiate an investigative procedure;</p> <p>d) Propose initiation of a mediation process in compliance with provisions of the Law on Mediation;</p> <p>e) Collect and analyze statistical data on discrimination cases;</p> <p>f) Submit annual and, if necessary, extraordinary reports on discrimination phenomena to the Parliamentary Assembly of BiH, FBiH Parliament, RS National Assembly and Brcko District Assembly;</p> <p>g) Inform the public on discrimination phenomena;</p> <p>h) Self-initiatively conduct research in the field of discrimination;</p> <p>i) Give opinions and recommendations aiming to prevent and combat discrimination, and propose appropriate legal and other solutions to the competent Institutions of BiH;</p> <p>j) Have the right to initiate and participate in proceedings for the protection from discrimination for offences prescribed by this Law;</p> <p>k) Monitor legislation and provide advice to legislative and executive authorities;</p> <p>l) Raise awareness on issues related to racism and racial discrimination in society;</p> <p>m) Improve policies and practices that aim at ensuring equal treatment.</p> <p>(3) When developing regular reports, opinions and recommendations on discrimination phenomena, the</p>	<p>Certain paragraphs and subparagraphs of Article 7 shall be amended to read as follows:</p> <p>Article 7 (Central Body for Protection from Discrimination)</p> <p>(1) The Ombudsman for Human Rights of Bosnia and Herzegovina shall be the central body competent for the protection from discrimination.</p> <p>(2) Within its competencies, the Ombudsman Institution shall:</p> <p>a) Receive individual and group complaints from legal and physical persons and conduct examination process related to discrimination by public bodies;</p> <p>c) decide at own discretion whether to accept a complaint. If a complaint is not accepted, the Ombudsman Institution shall inform the complainant in writing about reasons for rejecting the complaint;</p> <p>f) Within its annual report, and through special reports if necessary, submit information on discrimination phenomena to the Parliamentary Assembly of BiH, FBiH Parliament, RS National Assembly and Brcko District Assembly. Recommendations that were not followed shall be emphasized separately and individually;</p> <p>g) inform the public, raise awareness, conduct campaigns and actively promote fight against discrimination in other ways, aimed at its prevention;</p> <p>h) conduct research in the field of discrimination;</p> <p>j) initiate proceedings for protection from discrimination for offences prescribed by this Law or, as a friend of the court (<i>amicus curiae</i>), participate in other minor offence proceedings;</p> <p>(3) When developing the annual report, special reports, decisions and recommendations on discrimination phenomena, the Ombudsman Institution shall cooperate</p>	<p>Article 7 shall be amended to eliminate terminological dilemmas and define substantial provisions more clearly.</p> <p>Instead of “institution”, word “body” shall be used, in view of the fact that this is a common term and that it better matches the term “equality body” that must be established based on Directives 2000/43/EC, 2004/113/EC and 2006/54/EC.</p> <p>In paragraph (1), proper name is used for central institution, and the word “Institution” is added to it, in accordance with the Law on Human Rights Ombudsman in BiH. On this ground, the new abbreviated name is introduced: it is no longer the “Ombudsman of Bosnia and Herzegovina”, but the “Ombudsman Institution”, in line with the definition of the term, as defined by new Article 1b.</p> <p>Paragraph (2) subparagraph a) is regulated in greater details, and it defines that the Ombudsman Institution must only process complaints about discrimination on the side of public bodies. In view of the fact that the Ombudsman Institution primarily deals with human rights violations by public bodies and, in case of discrimination, the Institution only deals with cases that involve a public body that committed discrimination, other cases are resolved in other proceedings.</p> <p>Paragraph (2), subparagraph c) shall be changed. The Ombudsman Institution still has discretion in evaluations, but the Ombudsman Institution is obliged to provide a written explanation to the complainant in case of it decides not to accept the complaint.</p> <p>Paragraph (2), subparagraph f) shall be changed. According to the new proposal, the Ombudsman Institution shall no longer prepare separate annual report on discrimination phenomena, but include its findings in the (existing) annual report of the Ombudsman Institution, which is already regularly developed based on the law on ombudsman. The annual report of the Ombudsman Institution is comprehensive, it covers different issues related to the protection and promotion of human rights, and it shall only be upgraded with a separate chapter and sub-chapters. The annual report of the Ombudsman Institution shall particularly emphasize recommendations that were not followed, so that competent parliamentary bodies on all levels can make adequate conclusions and measures, in order to put pressure on those public institutions to end/prevent discrimination.</p> <p>Paragraph (2) subparagraph g) shall be changed. The existing definition shall be expanded and the function of human rights promotion shall be primarily emphasized, i.e. in this case the promotion of prevention and fight against corruption, in line with the Paris Principles of the UN pertaining to human rights promotion.</p> <p>Paragraph (2), subparagraph h) shall be changed. Words “self-initiatively” shall be deleted, given that this is an independent institution that always acts self-initiatively.</p> <p>Paragraph (2), subparagraph j) shall be changed. By deleting the words “have the right to”, the importance of initiation and participation in the procedure for the protection from discrimination is underlined, in view of the fact that the Ombudsman Institution almost never used this possibility in the past 5 years.</p> <p>Paragraph (3) is only terminologically adjusted and regulated.</p>
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<p>BiH Ombudsman shall cooperate with civil society organizations dealing with protection and promotion of human rights and organizations dealing with protection of groups at high risk of discrimination.</p> <p>(4) The Ombudsman of BiH shall provide assistance to persons or groups of persons who address international bodies for protection from discrimination, providing them with guidelines, advice and consultations during a procedure, as well as proposals and recommendations.</p> <p>(5) In order to exercise its competences, BiH Ombudsman shall establish a special department that would exclusively consider cases of alleged discrimination related to actions of public bodies at the levels of state, entities, cantons and Brcko District of BiH, municipal institutions and bodies, and legal persons with public authorities, as well as actions of all legal and natural persons, in all spheres of life.</p> <p>The budget of the BiH Human Rights Ombudsman Institution shall have a special budget line necessary for functioning of the special department/ special departments for combating discrimination.</p> <p>(6) All state, entity and cantonal institutions, and BiH Brcko District bodies, municipal institutions and legal persons with public authorities, and all other legal and natural persons shall, at the request of the BiH Ombudsman, submit requested data and documents within 30 days as of the day when the request is received.</p> <p>(7) Competent institutions in BiH shall cooperate with the BiH Ombudsman and deliver their written responses and notifications within the deadline defined by the BiH Ombudsman, including reports on effects of recommendations given in order to eliminate discrimination.</p>	<p>with civil society organizations dealing with protection and promotion of human rights and organizations dealing with protection of marginalised groups at high risk of discrimination.</p> <p>(4) The Ombudsman Institution shall provide assistance to persons or groups of persons addressing international bodies for protection from discrimination providing them with guidelines, advice, consultations during a procedure, proposals and recommendations.</p> <p>(5) For the purpose of fulfilling the obligations arising from this Law and in accordance with the law that regulates its work and activities, the Ombudsman Institution shall adopt an internal act defining who and how shall consider complaints about alleged discrimination in actions of public bodies, and how will recommendations be made.</p> <p>The budget of the Ombudsman Institution shall have a separate budget line necessary for performance of competencies of the central body for protection from discrimination. This budget line shall include staff expenses, but also expenses of other activities listed in paragraph (2).</p>	<p>Paragraph (4) is only terminologically adjusted with the use of the new term, i.e. the new abbreviated name “Ombudsman Institution”.</p> <p>Paragraph (5) is only terminologically adjusted with the use of the new term, i.e. the new abbreviated name “Ombudsman Institution”. In addition, the existing provision about establishment of a “special department” is deleted, and the Ombudsman Institution is given the right to make a decision with an internal act about a way of handling complaints and about who will do this work. Paris Principles of the UN, recommendations of the International Coordinating Committee and of the Venice Commission allow the Ombudsman Institution to establish its internal organization at own discretion, in order to strengthen and fulfil the principle of “independence”⁷. Nevertheless, there is still the obligation from the second sentence to introduce a separate line in the Ombudsman Institution’s budget that will specify required funding for the Institution to perform the work of a central body for the prevention of discrimination and protection of equality. This budget line should cover funding for the staff and other activities, such as research, awareness raising campaigns, field work and all other activities listed in paragraph (2) of this Article.</p> <p>Paragraphs (6) and (7) shall be deleted, because they regulate the issue of examination process implementation and making recommendations in a superficial and unclear way. The new Paragraph (5) leaves it to the Ombudsman Institution to regulate the issue of examination and making recommendations, as it is the case with other forms of human rights violations, in accordance with the law that regulates work of the Ombudsman Institution.</p>
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⁷ More information about the recommendations can be found in the analysis: <http://eu-monitoring.ba/prijedlozi-za-unapredenje-institucionalnih-okvira-zastite-i-promocije-ljudskih-prava/> i modelu zakona: <http://eu-monitoring.ba/model-zakona-o-instituciji-ombudsmena-u-bih/>

<p>Article 8 (Records Keeping and Coordination of Competent Bodies)</p> <p>(1) Competent institutions in BiH shall regularly keep records of all reported cases of discrimination and deliver collected data to the Ministry for Human Rights and Refugees of Bosnia and Herzegovina.</p> <p>(2) In accordance with its competencies defined by the law, the BiH Ministry for Human Rights and Refugees shall, based on collected data on manifestations and scope of discrimination, produce a report for the Council of Ministers of BiH at least once a year, as well as special reports, when needed, containing proposal of measures for prevention and suppression of manifestations of discrimination in Bosnia and Herzegovina.</p> <p>(3) The Ministry for Human Rights and Refugees of BiH shall report once a year, through the Council of Ministers, to the BiH Parliamentary Assembly about manifestations of discrimination and propose concrete legislative or other measures in that regard.</p> <p>(4) In line with provisions of this Article, special records shall be established in legislative, executive and judicial bodies for the purpose of registering cases of discrimination determined in criminal, civil, non-contentious and enforcement proceedings.</p> <p>(5) Central database of perpetrated acts of discrimination shall be established in the Ministry for Human Rights and Refugees of Bosnia and Herzegovina.</p> <p>(6) The BiH Ministry for Human Rights and Refugees shall issue a Rulebook on methods for collection of data on cases of discrimination in Bosnia and Herzegovina within 90 days from the date of entry into force of this Law, which shall define content and form of a questionnaire for data collection on cases of discrimination and other issues related to the procedure of necessary data collection.</p>	<p>Article 8 shall be amended to read as follows:</p> <p>Article 8 (Records Keeping, Reporting and Prevention)</p> <p>(1) All judicial bodies shall keep records and statistical overviews of court cases involving discrimination and of Discrimination grounds on which the proceedings are conducted, and submit them to the Ministry and the Ombudsman Institution not later than 01 February for the previous calendar year.</p> <p>(2) All judicial bodies specified in Paragraph (1) of this Article shall state all records of discrimination cases within their competency by sex, discrimination ground and discrimination status.</p> <p>(3) The Ombudsman Institution shall include data collected from all judicial bodies in its annual report, and in special reports when needed, pursuant to Article 7 of this Law.</p> <p>(4) The Ministry shall conduct research in the field of discrimination at least once a year.</p> <p>(5) Based on data collected from all judicial bodies, the annual report of the Ombudsman Institution and conducted researches from Paragraph (4), the Ministry shall develop proposed measures for the prevention and suppression of discrimination in Bosnia and Herzegovina.</p> <p>(6) The Ministry shall report once a year, through the Council of Ministers, to the BiH Parliamentary Assembly about the taken measures and propose concrete legislative or other measures in that regard.</p>	<p>Since 2009 until today, the Ministry of Human Rights and Refugees of BiH has unfortunately failed to fulfil its obligations stipulated in Article 8. The Rulebook specified in Paragraph (6) has not been adopted, the database from Paragraph (5) has not been established, and the Ministry never developed a report (Paragraph (5)).</p> <p>In order to solve this problem and make the anti-discrimination system more efficient, but in line with realistic circumstances, new Article 8 stipulates direct obligation of all judicial institutions (Paragraph (1)) to submit data on court cases involving discrimination by 01 February for the previous calendar year to the Ministry and the Ombudsman Institution.</p> <p>Data on cases processed through administrative procedures shall not be collected, considering the realistic circumstances, but introduction of this obligation should be considered once conditions for that have been created.</p> <p>The Ombudsman Institution shall incorporate these data in its Annual Report (Paragraph (3)), and in its special reports when needed. In view of the fact that the Ombudsman Institution submits its reports to all legislative bodies at the level of the state, entities and Brčko District, all relevant data shall be available to the parliaments, which is a way to prevent duplicated work of the BiH Ministry of Human Rights and Refugees and the Ombudsman Institution on development of annual reports, which was their obligation defined by the existing law (Paragraph (5)).</p> <p>On the other hand, the Ministry is obliged to act strategically. Pursuant to new provisions of Article 8, the Ministry has an obligation to conduct research at least once a year (Paragraph (4)). Researches of the Ministry shall focus on individual grounds or special forms of discrimination and cover all discrimination phenomena that were not documented through court or administrative procedures, but remained “invisible”.</p> <p>Based on data collected from all judicial bodies, the annual report of the Ombudsman Institution and conducted researches (Paragraph (5), the Ministry shall develop measures (public political document, covering one or several years) and thus act proactively in combating discrimination. Once a year, the Ministry shall report to the Parliamentary Assembly of BiH on measures taken and, if needed, propose specific legislative or other measures. In this way, the Ministry shall be spared from regular reporting and shall dedicate itself to strategic actions in the field of prevention of discrimination, through cooperation with relevant bodies at the entity, cantonal and Brčko District levels.</p>
<p>Article 9 (Monitoring of the Law Implementation)</p> <p>BiH Ministry of Human Rights and Refugees shall monitor the implementation of this Law.</p>		
<p>Article 10</p>		

(Cooperation with Civil Society Organizations)

While developing reports, preparing laws, strategies and other plans related to situation in human rights and discrimination issues, all competent institutions shall be obliged to cooperate with civil society organizations dealing with protection and promotion of human rights, and organizations dealing with protection of rights of persons and groups of persons exposed to high risk of discrimination.

<p>CHAPTER V - PROCEEDINGS FOR PROTECTION FROM DISCRIMINATION</p> <p>Article 11 (Protection in Existing Proceedings)</p> <p>(1) Every person or group of persons who believe that they are discriminated may seek protection of their rights through the existing judicial and administrative proceedings.</p> <p>(2) In cases when a violation of the right to equal treatment arises from an administrative act, an appeal in an administrative procedure and potential initiation of an administrative dispute based on protection from discrimination, requesting annulment of such administrative act, shall not prevent the person from paragraph 1 of this Article to initiate a judicial proceeding for the protection from discrimination.</p> <p>(3) All concrete claims specified in Article 12 of this Law, both individual and joint, may be applied for the purpose of filing a lawsuit in civil proceeding.</p>	<p>In Article 11, a new paragraph 4 shall be added and read as follows:</p> <p>(4) The Court and other bodies shall apply the urgency principle in all procedures examining allegations about perpetrated discrimination.</p>	<p>Paragraph (4) should be introduced in order to determine more precisely that the urgency principle shall be applied in all procedures examining allegations about perpetrated discrimination. Similar solution can be found in Article 16 of the Anti-Discrimination Act of the Republic of Croatia.</p> <p>So far, this issue was regulated in Article 12 (2), although this paragraph only applies to special lawsuits for protection from discrimination. In order to stipulate that urgency applies to all procedures, including administrative ones, this issue is regulated by Article 11.</p>
	<p>A new Article 11a shall be added and read as follows:</p> <p>Article 11a (Internal Protection Procedures)</p> <p>All public bodies and other legal entities with more than 20 employees shall regulate, by their general administrative acts or special legal acts, their actions in case of discrimination, and thereby ensure efficient internal protection procedures.</p>	<p>In order to introduce efficient protection from discrimination, resolve discrimination cases internally and reduce the number of complaints submitted to the Ombudsman Institution and courts, all public bodies and other legal entities shall adopt internal procedures for the protection from discrimination, hoping that cases will be resolved in this way.</p>

<p>Article 12 (Special Lawsuits for Protection from Discrimination)</p> <p>(1) A person or group of persons exposed to any form of discrimination, in accordance with provisions of this Law, shall be authorized to submit a lawsuit and claim the following:</p> <p>a) Establishment that a respondent violated the claimant's right to equal treatment i.e. that the action s/he undertook or failed to undertake can directly lead to violation of the right to equal treatment (lawsuit for establishment of discrimination);</p> <p>b) Prohibition of taking actions that violate or may violate claimant's right to equal treatment, i.e. performance of actions to remove discrimination or its consequences (lawsuit for prohibiting or ending discrimination);</p> <p>c) Compensating for material and non-material damage caused by violation of rights protected by this Law (lawsuit for damage compensation);</p> <p>d) Publication of a verdict establishing violation of the right to equal treatment in the media at the expense of the respondent, in case when discrimination was committed through media (printed and electronic), or any kind thereof.</p> <p>(2) Court and other bodies conducting the proceeding shall take urgent actions in proceedings, ensuring that all allegations about discrimination are investigated as soon as possible.</p> <p>(3) When all claims are based on the same factual and legal ground, claims can be submitted cumulatively in a single lawsuit which shall be decided on in a civil proceeding, if these claims are mutually connected and if the same court has subject matter jurisdiction for each of those claims.</p> <p>(4) Claims referred to in paragraph 1 of this Article shall be decided on by a competent court, applying provisions of laws on civil proceedings that are applied in BiH, unless stipulated otherwise by this Law.</p>	<p>Article 12, Paragraph 1, Subparagraph d), and Paragraph 3 shall be amended, and Paragraph 2 shall be deleted. The existing paragraph 3 shall become paragraph 2, whereas paragraph 4 shall become paragraph 3. In addition, new paragraphs 4, 5 and 6 shall be added:</p> <p>d) Publication of a verdict establishing violation of the right to equal treatment in the media at the expense of the respondent.</p> <p>(2) Claims specified in Paragraph 1 of this Article may be submitted together with requests for the protection of other rights that are decided on in a civil proceeding, if all the requests are mutually related, irrespective whether regular or special civil proceeding is applicable to such requests, except for trespassing disputes. In this case, rules applicable to the specific kind of dispute shall be applied, unless specified otherwise by this Law, which particularly applies to the principle of distribution of the burden of proof and the principle of damage compensation with deterrent effect.</p> <p>(3) Claims referred to in paragraph 1 of this Article shall be decided on by a competent court, applying provisions of laws on civil proceedings that are applied in BiH, unless stipulated otherwise by this Law.</p> <p>(4) The court shall adopt the request for publication of verdict specified in paragraph (1) subparagraph d) herein if it finds:</p> <p>(a) that the violation of the right to equal treatment</p>	<p>Article 12, Paragraph 1, Subparagraph d), and Paragraph 3 shall be amended, and Paragraph 2 shall be deleted. Thus the existing paragraph 3 shall become paragraph 2, whereas paragraph 4 shall become paragraph 3. In addition, new paragraphs 4, 5 and 6 shall be added.</p> <p>Paragraph (2) of the aforementioned Article specifies cumulative decision making in a procedure based on discrimination even in cases involving special proceedings (labour disputes, small claims, arbitration and the trespassing exception). Similar solution can be found in Article 17 of the Anti-Discrimination Act of the Republic of Croatia.</p> <p>Paragraph (1), subparagraph d) shall be shortened, and obligations specified in this subparagraph, along the lines of Article 17 of the Anti-Discrimination Act of the Republic of Croatia, shall be specified in three detailed paragraphs: 4, 5 and 6. Paragraphs 4, 5 and 6 stipulate explicitly and in details respondent's obligations and the method of verdict publication in the media, if the discrimination occurred through the media. The existing definition of Paragraph (1), subparagraph d) was not sufficiently explicit and clear, and it was necessary to clarify it in new paragraphs 4, 5 and 6.</p> <p>The existing paragraph 2 shall be deleted, because the issue of urgency is regulated by Article 11 (new paragraph (4)).</p>
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	<p>occurred through the media, or</p> <p>(b) that the information on actions violating the right to equal treatment was published in the media, and publication of the verdict is necessary in order to fully compensate for the inflicted damage or to ensure protection from unequal treatment in future cases.</p> <p>(5) If the court accepts the request for publication of the verdict, it will instruct the verdict to be published in entirety. Exceptionally, the court may decide that only parts of the verdict shall be published, or that certain personal data shall be removed from the verdict, if this is necessary to protect privacy of parties and other persons, without prejudice to the purpose of provided legal protection.</p> <p>(6) Court decision on publication in the media shall be binding on the publisher of the media that should publish the verdict, irrespective whether they were a party in the proceeding or not.</p>	
	<p>A new Article 12a shall be added and read as follows:</p> <p>Article 12a (Relationship between the Ombudsman Institution and Court)</p> <p>(1) When a court considers a case in which the Ombudsman Institution already gave a recommendation, the court shall develop a separate, clear and detailed explanation in case of derogations from the recommendation.</p> <p>(2) The person that filed a claim to the court, in accordance with articles 11 and 12, who also submitted a complaint to the Ombudsman Institution, shall inform the Ombudsman Institution in writing about initiation of a court proceeding.</p>	<p>New Article 12a stipulates the obligation of the court to provide a separate, clear and detailed explanation in case of derogations from a recommendation given by the Human Rights Ombudsman Institution of BiH in the same discrimination case. Such solution, which is also known in comparative practice (e.g. in Austria and The Netherlands), would ensure better harmonization of procedures before the Ombudsman Institution and the court and additionally enhance the authority of the Human Rights Ombudsman Institution of BiH as the central body for protection from discrimination and protection of equality.</p> <p>Paragraph (2) regulates the obligation to inform the Ombudsman Institution, if the person who was discriminated during the period of complaint consideration by the Ombudsman Institution simultaneously initiates a court proceeding. This information can be important for further actions of the Ombudsman Institution.</p>

<p>Article 13 (Competency, Deadlines and Execution)</p> <p>(1) Unless prescribed differently by this Law, in accordance with the laws on courts in both Entities and BiH Brcko District, courts having general territorial jurisdiction shall be competent for disputes based on the lawsuit specified in Article 12 of this Law in first and second instances.</p> <p>(2) Revision shall be always allowed in proceedings prescribed by Article 12 of this Law.</p> <p>(3) Competent court may decide, on grounds of claims specified in Article 12, paragraphs b) and d), that an appeal shall not stay the enforcement or determine shorter deadline for taking the action ordered to a respondent.</p> <p>(4) Deadline for submitting the lawsuit based on Article 12 of this Law shall be three months from the date of finding out about violation of a right, and not later than one year from the date when the violation was committed. Deadline for submitting a request for revision shall be three months from the date of delivery of a second-instance judgment.</p>	<p>Article 13, Paragraph 1 and Paragraph 4 shall be amended and read as follows:</p> <p>(1) Unless prescribed differently by this Law, in accordance with the laws on courts in both Entities and BiH Brcko District, apart from the court of general territorial jurisdiction, a court that covers the territory of claimant's place of residence and a court covering the territory where the discrimination was committed shall be competent for disputes based on the lawsuit specified in Article 12 of this Law in first and second instances.</p> <p>(4) Deadline for submitting the lawsuit based on Article 12 of this Law shall be twelve (12) months from the date of finding out about violation of a right, and not later than five (5) years from the date when the violation was committed. In cases of continuous discrimination, the deadline starts running from the date of the last perpetrated action. Deadlines shall not apply to cases of systemic discrimination. Deadline for submitting a request for revision shall be three months from the date of delivery of a second-instance judgment.</p>	<p>Due to complexity of the procedure itself and legislator's intention to provide protection to a discriminated person, amendments to Article 13, Paragraph (1) allow competency of choice. Such broader regulation of competency of choice helps the claimant and facilitates their access to court protection, and allows selection of the most favourable forum for them. Similar solution can be found in Article 18 of the Anti-Discrimination Act of the Republic of Croatia.</p> <p>Amendments to Article 13, Paragraph (4) improve one of the poorest solutions in the existing law. As it was found in the existing practice of courts and persons who sought protection by filing a lawsuit that the deadline for lawsuit submission was not sufficiently long, a longer timeframe for lawsuit submission should be provided, but it should not be too broad, for the sake of legal certainty.</p> <p>The Court of the European Union in Luxembourg in its caselaw requested from national courts to exempt procedural provisions from application, as they prevented efficient application of EU provisions of the substantive law. In a large number of cases, such provisions stipulated short deadlines for lawsuit submission.</p> <p>For this reason, new deadlines are proposed (twelve months from the date of finding out and five years from the date of violation.)</p>
<p>Article 14 (Temporary Protection Measures)</p> <p>A court may determine a temporary measure in proceedings defined in Articles 11 and 12 herein, in line with provisions of the laws on civil proceedings that are applied in Bosnia and Herzegovina.</p>	<p>Article 14 shall be amended to read as follows:</p> <p>Article 14 (Security Measure)</p> <p>(1) Before the initiation of a proceeding and during a proceeding based on the claims specified in Article 12 (1), a court may, upon petitioner's proposal, determine a court security measure or temporary security measure, in line with provisions of the laws on civil proceedings that are applied in Bosnia and Herzegovina.</p> <p>(2) Security measure may be imposed if:</p> <p>a) the petitioner satisfies the court that the right to equal treatment was violated,</p> <p>b) the security measure is necessary in order to eliminate danger from severe violation of the right to equal treatment or irreparable damage or to prevent violence.</p>	<p>Article 14 is amended in order to align the name and contents of the article with the adopted terminology of civil and procedural law and provisions of laws on civil proceedings in BiH that define a "court measure or temporary security measure", as the aforementioned Article 14 norm specifies.</p> <p>The title of the Article is therefore changed to "Security Measures".</p> <p>The provision is introduced stipulating that the petitioner must satisfy the court that the right to equal treatment was violated and that the security measure is necessary in order to eliminate danger from severe violation of the right to equal treatment or irreparable damage or to prevent violence.</p> <p>Similar solution can be found in Article 19 of the Anti-Discrimination Act of the Republic of Croatia.</p>

<p>Article 15 (Burden of Proof)</p> <p>(1) In cases when a person or group of persons provide facts in proceedings specified in Article 12 of this Law, corroborating allegations about violation of the prohibition of discrimination, the alleged offender is to prove that he/she did not violate the principle of equal treatment or prohibition of discrimination in the subject case.</p> <p>(2) In cases when a person believes that s/he suffered consequences of discrimination, statistical data or databases may be used as evidence in exercising the right specified in paragraph 1 of this Article.</p> <p>(3) In cases when a person believes that s/he suffered consequences of discrimination due to failure to make reasonable accommodation, burden of proof lies with the respondent.</p>	<p>Article 15 shall be amended to read as follows:</p> <p>Article 15 (Shift of Burden of Proof)</p> <p>(1) In all procedures stipulated by this Law, when a person or group of persons present facts that lead to the assumption that discrimination was committed, the alleged offender is to prove that s/he did not violate the principle of equal treatment or prohibition of discrimination.</p> <p>(2) In cases when a person believes that s/he suffered consequences of discrimination, statistical data or databases may be used as evidence in exercising the right specified in paragraph 1 of this Article.</p> <p>(3) Person who intentionally exposed him/herself to discrimination in order to directly check compliance with the rules on prohibition of discrimination may appear as witness in procedures for protection from discrimination.</p> <p>(4) In cases when a person believes that s/he suffered consequences of discrimination due to failure to make reasonable accommodation, burden of proof lies with the respondent.</p> <p>(5) Provision of Paragraph 1 of this Article shall not apply to minor offence and criminal proceedings.</p>	<p>The institution of the <i>shift of burden of proof</i> was established by Directive 90/80/EC. The reason behind changes to Article 15 lies in the fact that this Article did not define any threshold regarding the assumption of <i>prima facie</i> discrimination, after which the burden of proof would be transferred to the respondent, and it would leave broad discretion to courts in determining this threshold. It is therefore necessary that Article 15 stipulate a clear threshold for <i>prima facie</i> discrimination, based on the claimant's obligation, in light of their actual possibility to access evidentiary materials, to present and prove facts in the specific case that enable the court to assume that discrimination may have occurred. Similar solution can be found in Article 20 of the Anti-Discrimination Act of the Republic of Croatia.</p> <p>Anti-discrimination directives equally define the principle of burden of proof shift and stipulate that, once the party who believes that their right to equality was violated has presented and proved facts that may lead to an assumption that discrimination actually took place, the respondent is to prove that he/she did not violate the guarantee of equality by their actions.⁸ The Court of European Union in Luxembourg dealt with the issue of practical application of this principle in several cases, such as 109/88 Danfoss, C-127/92 Enderby, C-381/99 Brunnhofer, C-54/07 Feryn, C-81/12 Steaua.⁹</p> <p>However, the Court also clearly emphasized that the Court understood that discrimination was often difficult to prove, due to a range of obstacles victims face when it comes to access to information and materials that are of key importance for success in the evidentiary part of the procedure. In this regard, the Court stressed that claimants must not be punished because they objectively did not have quality access to required evidence. Therefore, any form of non-transparency in decision making or actions that may constitute discrimination is basically sufficient to entirely shift the burden of proof to the respondent. What will the respondent have to prove in the specific dispute depends on concrete facts in the case, and primarily on what the claimant could have proved and managed to prove in the first stage of the evidentiary procedure. However, case law of the Court of European Union clearly shows that claimant cannot be requested to prove discrimination with certain (high) degree of probability if s/he is not able to do it for objective reasons.</p> <p>Directives 2000/78/EC and 2000/43/EC apply to procedures before civil courts or any competent body, and the existing provision should be changed in this regard, in order to define that the shift of burden of proof shall be done in all procedures stipulated by this Law. Paragraph 2 was taken over from the existing Article as a possibility for a discriminated person to use statistical data and databases for the purpose of proving discrimination. Paragraph 3 of this Article introduces the possibility that a person who intentionally exposed him/herself to discrimination in order to directly check compliance with the rules on prohibition of discrimination may appear as witness in procedures for protection from discrimination.</p> <p>With regard to amendment to Paragraph 1, Paragraph 5 was introduced to specify</p>
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⁸ See Fiona Palmer „Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof“ European anti-discrimination law review - issue 4 (2006)

⁹ C-109/88 Danfoss [1989]; C-127/92 Enderby [1993]; C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV; C-381/99 Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG. 2001 ECR I-04961; C-81/12 Asociația Accept v Consiliul Național pentru Combaterea Discriminării 2013 –ECR 00000

		that the provision of Paragraph 1 of this Article shall not apply to minor offence and criminal proceedings, for the sake of preserving the presumption of innocence principle as the basic element of a fair trial.
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<p>Article 16 (Participation of Third Parties)</p> <p>(1) During proceedings initiated in accordance with the claims referred to in Article 12 of this Law, a third party may join a person or group of persons claiming to be victims of discrimination in the capacity of a body, organization, institution, association or other party whose scope of activities includes protection from discrimination of persons or group of persons whose rights are being decided upon within the proceeding.</p> <p>(2) The court shall allow participation of a third party only with consent of a person at whose side the third party wants to intervene.</p> <p>(3) Regardless of the outcome of the proceedings, the third party shall cover its expenses for participation in the proceedings.</p>	<p>Article 16 shall be amended to read as follows:</p> <p>Article 16 (Participation of Third Parties)</p> <p>(1) During proceedings initiated in accordance with the claims referred to in Article 12 of this Law, a third party may join a person or group of persons claiming to be victims of discrimination as intervenor in the capacity of a body, organization, institution, association or other party whose scope of formal statutory or actual activities includes protection from discrimination of persons or group of persons whose rights are being decided upon within the proceeding.</p> <p>(2) The court shall allow participation of a third party only with consent of a person at whose side the third party wants to intervene. The Court shall decide on the participation of a third party, adequately applying provisions of this Law and the existing laws on civil proceedings in BiH.</p> <p>(3) Intervenor shall participate and take actions in the procedure until the time of explicit revocation of the consent.</p> <p>(4) Regardless of the outcome of the proceedings, the third party shall cover its expenses for participation in the proceedings, pursuant to adequate provisions of laws on civil proceedings.</p>	<p>When it comes to the existing provisions of Article 16, the existing solution should be amended in order to align terminology with provisions of the existing laws on civil proceedings in BiH that know the institution of an <i>intervenor</i>.</p> <p>Paragraph 1 defines the possibility of intervenor's participation only if its formal statutory or actual activity includes protection from discrimination.</p> <p>Paragraph 2 regulates intervenor's participation only with consent of the party whose side the intervenor wants to take in the proceeding.</p> <p>Paragraph 3 defines that the intervenor shall participate and take actions in the procedure until the time of explicit revocation of the consent.</p>
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<p>Article 17 (Collective Lawsuit for Protection from Discrimination)</p> <p>Associations, bodies, institutions or other organizations registered in compliance with appropriate regulations in BiH that have a justified interest in the protection of interests of a certain group, or they deal with protection from discrimination of a certain group of persons within the scope of their activities, may file a lawsuit against a person who violated the right to equal treatment, if they establish likelihood that actions of respondent violated the right to equal treatment of a large number of persons mostly belonging to a group whose rights are protected by the claimant.</p>	<p>Article 17 shall be amended to read as follows:</p> <p>Article 17 (Collective Lawsuit for Protection from Discrimination)</p> <p>1) Associations, bodies, institutions or other organizations registered in compliance with appropriate regulations in BiH that have a justified interest in the protection of interests of a certain group, or they deal with protection from discrimination of a certain group of persons within the scope of their formal statutory or actual activities, can file a lawsuit against a person who violated the right to equal treatment, if they establish likelihood of the fact that actions of respondent violated the right to equal treatment of a large number of persons mostly belonging to a group whose rights are protected by the claimant.</p> <p>2) The lawsuit specified in paragraph 1 herein may include the following claims:</p> <p>(a) to establish that the respondent violated the right to equal treatment of members of a group whose rights the claimant protects,</p> <p>(b) to prohibit actions that violate or may violate the right to equal treatment, and to perform actions to eliminate discrimination or its consequences on the group members,</p> <p>(c) Publish a verdict establishing violation of the right to equal treatment in the media at the expense of the respondent.</p> <p>(3) Procedural provisions of this Law shall be adequately applied to the lawsuit specified in Paragraph 1 of this Article.</p>	<p>The existing provisions of Article 17 should be precisely defined by amending Paragraph (1) and introducing Paragraph (2).</p> <p>Paragraph (2) clearly defines that a <i>collective lawsuit for protection from discrimination</i> may be filed for the purpose of establishing that the respondent violated the right to equal treatment of members of a group whose rights the claimant protects, and defines prohibition of actions that violate or may violate the right to equal treatment, and stipulates performance of actions to eliminate discrimination or its consequences on the group members and publication of a verdict establishing violation of the right to equal treatment in the media at the expense of the respondent.</p> <p>When Article 17 is precisely defined, it becomes clear that it is not possible to file a collective lawsuit with a damage compensation claim.</p> <p>Similar solution of this issue can be found in Article 24 of the Anti-Discrimination Act of the Republic of Croatia.</p>
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<p>Article 18 (Protection of Persons who Report Discrimination or Participate in Proceedings) No person who reported discrimination or participated in legal proceedings for the protection from discrimination shall suffer any consequences of such reporting or participation.</p>	<p><i>Article 18 shall be deleted.</i></p>	<p>In view of the fact that this Article defines <i>victimization</i>, it shall be abolished, and victimization shall be regulated as one of the other forms of discrimination in Article 4.</p>
<p>CHAPTER VI - PENAL (MINOR OFFENCE) PROVISIONS)</p> <p>Article 19 (Violation of Article 2, paragraph 2 of the Law) (1) A legal person that puts a person or a group of persons into unfavourable position on grounds specified in Article 2 (Discrimination), paragraph (1), in a way described in Article 3 (Forms of Discrimination) and Article 4 (Other Forms of Discrimination) of this Law, shall be fined for minor offence with BAM 1,500 to 5,000. (2) A responsible person in state, entity or cantonal institution, BiH Brcko District body, municipal institution, legal entity with public powers and other legal person shall also be fined for minor offence specified in paragraph (1) of this Article with KM 700 to 1,500. (3) A natural person shall also be fined for the minor offence specified in paragraph (1) of this Article with KM 550 to 1,500. (4) If the minor offence specified in paragraph (1) of this Article is perpetrated by failure to act upon BiH Ombudsman's recommendation, a legal person shall be fined with KM 2,500 to 6,500, and a responsible person in the legal person or a natural person shall be fined with KM 1,000 to 3,000. (5) If the minor offence specified in paragraph (1) of this Article is perpetrated by failure to act upon a court order, a legal person shall be fined with KM 3,500 to 10,000, and a responsible person in the legal person or a natural person shall be fined with KM 2,000 to 5,000.</p>		<p>Note:</p> <p>Level of harmonization between minor offence laws of BiH, RS and FBiH and minor offence provisions from the Law on Prohibition of Discrimination should be analyzed. If discrepancies are found, the need for amendments to minor offence laws of BiH, RS and FBiH should be considered, in order to harmonize them with the Law on Prohibition of Discrimination.</p>
<p>Article 20 (Violations of Article 7, paragraphs 6 and 7 of the Law) (1) A legal person shall be fined with KM 1,000 to 5,000 for a minor offence, if:</p>		

<p>a) it fails to deliver data or documents upon the BiH Ombudsman's request, i.e. if it fails to deliver them within prescribed deadline, and denies access to them, contrary to Article 7 (Central Institution for Protection from Discrimination), paragraph (6) of this Law;</p> <p>b) It does not cooperate with the BiH Ombudsman and does not provide written responses or notifications, i.e. fails to inform about effect of recommendations given in order to end discrimination, contrary to Article 7, paragraph (7) of this Law.</p> <p>(2) For minor offences specified in paragraph (1) of this Article, a responsible person in a state, entity or cantonal institution, BiH Brčko District institution, municipal institution, legal person with public authorities and in another legal person, shall be fined with KM 500 to 1,500.</p> <p>For minor offence specified in paragraph (1) of this Article, a natural person shall also be fined with KM 450 to 1,000.</p>		
<p>Article 21 (Violation of Article 18 of this Law)</p> <p>(1) A legal person that puts into unfavourable position a person who has reported discrimination in good faith or a person who participated in any way in a proceeding for the protection from discrimination on the grounds of their reporting of discrimination or participation in the proceeding, contrary to Article 18 (Protection of persons who report discrimination or participate in proceedings) of this Law, shall be fined for minor offence with KM 1,000 to 10,000.</p> <p>(2) A responsible person in state, entity or cantonal institution, BiH Brčko District institution, municipal institution, in a legal person with public authority and in other legal person, shall be fined for minor offences specified in paragraph (1) of this Article with KM 1,000 to 3,500.</p> <p>(3) A natural person shall also be fined for the minor offence specified in paragraph (1) of this Article with KM 700 to 2,000.</p> <p>(4) If a responsible person in a legal person intentionally commits the minor offence specified in paragraph (1) of this Article, he/she shall be fined with KM 2,000 to 7,000, and if a natural person intentionally commits the minor offence, the natural</p>		

<p>person shall be fined with KM 1,500 to 4,000.</p>		
<p>Article 22 (Measures of Protection) (1) For minor offences prescribed by this Law, protective measures of seizure of objects and prohibition of a certain professional activity, business activity or duty may be imposed. (2) Protective measures of seizure of objects shall be imposed every time when a minor offence is committed through use of those objects, i.e. when the objects were designated to commit the minor offence or were created for the purpose of minor offence perpetration.</p>		
<p>Article 23 (Publishing Minor Offence Decision) Decision on a minor offence prescribed by this Law shall be published in public media available at the entire territory of Bosnia and Herzegovina.</p>	<p>Article 23 shall be amended to read as follows: Article 23 (Publishing Minor Offence Decision) Decision on a minor offence prescribed by this Law shall be published in at least one print media available at the entire territory of Bosnia and Herzegovina.</p>	<p>By amending Article 23, the obligation specified in it becomes clearer and more realistic. Publication no longer applies to the public media, but print media that are by their nature the right place for publication of written texts.</p>

<p>CHAPTER VII - TRANSITIONAL AND FINAL PROVISIONS</p> <p>Article 24 Harmonization of other Regulations with this Law (1) In cases of incompliance of other laws with this Law in the proceedings based on this Law, this Law shall be applied. (2) All laws and general regulations shall be harmonized with provisions of this Law within one year after the entry into force of this law. (3) This Law does not prejudice provisions and conditions determined in international treaties and agreements with religious communities, which do not interfere with their working, normative and organizational autonomy and the principle of full enjoyment of the right to religious freedoms and expression.</p>		
	<p>Article 24a shall be introduced and read as follows:</p> <p>Article 24a (Strategy for Prevention and Suppression of Discrimination) (1) The Council of Ministers of BiH shall adopt a comprehensive, multiannual strategy for the prevention and suppression of discrimination and relevant action plan for its implementation within 18 months following the enactment of amendments to the Law. (2) The strategy and action plan should define the way of Law implementation and measures for the prevention of discrimination. (3) The Council of Ministers of BiH shall inform the Parliamentary Assembly of BiH about the strategy implementation at least once a year.</p>	<p>In this way, the Law implementation would be ensured and the BiH Council of Ministers would be bound to systemically work on the prevention and suppression of discrimination.</p> <p>This obligation arises from the <i>Progress Report</i> for 2014, which was adopted by the European Commission. Also, through several recommendations in the <i>Universal Periodic Review</i>, BiH was invited to develop, adopt and implement a multiannual anti-discrimination strategy.</p>
<p>Article 25 (Entry into Force) This Law shall enter into force on the eight day from the day of its publication in the “Official Gazette of Bosnia and Herzegovina”.</p>		<p>Note: Development of a consolidated text of the Law should be considered.</p>

This publication is issued within the **HUMAN RIGHTS PAPERS** edition, published by the Sarajevo Open Centre. The Human Rights Papers edition also includes general and topical reports, analyses and studies, and other relevant publications about the situation with human rights in Bosnia and Herzegovina. These reports and publications constitute the basis for further advocacy activities with the state and international bodies.

The Human Rights Papers is edited by Saša Gavrić.

So far, we published 15 publications in this edition.

The following publications deal with the prevention and protection from discrimination:

- Tena Šimonović Einwalter/Goran Selanec (March 2015): Alignment of the BiH Law on Prohibition of Discrimination with the EU acquis. Expert analysis on alignment Sarajevo: Sarajevo Open Centre. Available at:
<http://soc.ba/uskladivanje-zakona-o-zabrani-diskriminacije-bih-sa-pravnom-stecevinom-eu/> (BCS version)
<http://soc.ba/en/alignment-of-the-law-on-prohibition-of-discrimination-with-the-eu-acquis-expert-analysis-on-alignment/> (English version)
- Sarajevo Open Centre (March 2015): (Strategy for Preventing and Combating Discrimination) Challenges and possibilities for progress in Bosnia and Herzegovina. Sarajevo: Sarajevo Open Centre. Available at:
<http://soc.ba/strategija-za-prevenciju-i-borbu-protiv-diskriminacije/> (BCS version)
<http://soc.ba/en/strategy-for-preventing-and-combating-discrimination/> (English version)