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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# OPINION

# ON THE DRAFT LAW ON AMENDMENTS OF THE LAW ON MINORITY RIGHTS AND FREEDOMS

# OF MONTENEGRO

**Adopted by the Venice Commission**
**at its 104th Plenary Session**
**(Venice, 23-24 October 2015)**

**on the basis of comments by:**

**Mr Bogdan AURESCU (Substitute Member, Romania)**
**Mr Sergiy KIVALOV (Member, Ukraine)**
**Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)**

## I. Introduction

1. On 15 June 2015, the Ministry of Human and Minority Rights of Montenegro requested an opinion of the Venice Commission on the draft law introducing amendments (hereinafter, the draft law, see CDL-REF(2015)026) to the Law on Minority Rights and Freedoms of Montenegro (hereinafter, the Law).

2. The Commission invited Mr Aurescu, Mr Kivalov and Mr Scholsem, to act as rapporteurs on this file.

3. The present opinion is based on the English translation of the draft law, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

4. This opinion was adopted by the Venice Commission at its 104th PlenarySession (Venice, 23-24 October 2015).

## II. Preliminary Remarks

5. It is not for the first time that the legislation regulating the protection of national minorities in Montenegro is under consideration by the Venice Commission. In June 2004, the Commission adopted its *Opinion on the revised draft Law on exercise of the rights and freedoms of national and ethnic minorities in Montenegro* (CDL-AD(2004)026, hereinafter, the 2004 Opinion).

6. In its 2004 Opinion, the Commission *inter alia* welcomed the readiness of the Montenegrin authorities to set up councils of national minorities and underlined that *"[i]ndependent advisory bodies comprising representatives of minorities and advising the state authorities in the field of minority policies may have an important role in ensuring better protection of their interests."*[1] The Commission at the same time emphasized that, in view of the importance of the competences of the councils, as provided by the law, "the real *degree of representation* of the Council is of utmost importance".

7. The amendments under consideration in the present Opinion pertain to the modification of a number of articles of the Law (articles 7, 8, 33, 36, 36a) and the addition of new articles (one new article after article 7, another one after article 8, 21 articles after article 36a, 2 new articles after article 42b, 5 new articles after article 44). These provisions are mainly dealing with the establishment of a "public institution" in charge of protecting the rights, cultures and identities of Montenegro's national minorities, and the operation of a "*Fund for protection and exercise of minority rights*" (hereinafter the "Minority Fund") as a key mechanism for the implementation of the state's policy of supporting, through public subvention, the preservation of the specific identities and cultures of its national minorities[2]. Further changes concern the provisions referring to the protection of the Roma in Montenegro and the Transitional and final provisions of the current Law.

8. It is noted in this connection that, in its Second Opinion on the implementation of the Framework Convention for the Protection of National Minorities[3] by Montenegro adopted in June 2013[4], the Advisory Committee of the Framework Convention noted, based on information received from the representatives of national minorities, that public financial support for national minorities was still limited and insufficient to guarantee the preservation and development of their cultures. The Advisory Committee further noted that representatives of national minorities appeared not to be adequately involved in the decision-making processes on

[1] See CDL-AD(2004)026, para. 58.
[2] See article 36 of the Law in force.
[3] Hereinafter the Framework Convention
[4] http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Montenegro_en.pdf, see para. 85

the allocation of funds for cultural projects and that the six representatives of the minority councils sitting in the 17-member governing board of the Minority Fund were not in a position to influence the attribution of available funds (para. 85). The Montenegrin authorities were invited to ensure that national minority representatives are involved at all stages of implementation of minority cultural projects, in particular in the decisions on the allocation of funds for such projects.

9. In its 2015 Resolution on the implementation of the Framework Convention by Montenegro[5], the Committee of Ministers of the Council of Europe further confirmed the above concerns. In particular, the Resolution stressed that "[*t]he Minority Councils are perceived by large segments of Montenegrin society as vehicles for political patronage. There is no mechanism to guarantee a gender balance in their composition. Another challenge facing the councils is their vaguely defined legal status, and they are essentially considered to be non-governmental organisations, without any real decision-making powers. The situation of the councils is aggravated by the fact that each of them acts independently, and there is no institutionalised structure which would allow them to speak to the authorities with one voice on behalf of all the minorities.*" The authorities were invited to amend the relevant legal provisions and administrative practice in order to address the shortcoming noted.

10. It seems that, at least in part, the draft law submitted to the Venice Commission for assessment aims at implementing the recommendations addressed to the country under the monitoring of the Framework Convention. It undoubtedly also intends to address the concerns expressed by the European Commission, as regards the operation of the Minority Fund, in its Progress Reports on Montenegro. The 2011 Report singled out such problems in the functioning of the Minority Fund as allocating funds, and monitoring of their use.[6] The most recent, 2014 Report, continued to stress as shortcomings the allocation of funds, while further emphasizing, as areas of concern, the implementation and the overall management of projects and the repeated failure to report Fund's activities to Parliament. The Report also expressed concern about the fact that most of the minority councils lack work programmes and financial plans, and stressed the underperformance of the Ministry for human rights and minorities in controlling the legality of their work.[7]

11. The aim of the present opinion is not to address in an exhaustive manner all provisions of the draft law, but to address the main issues which, in the view of the Venice Commission, require further consideration and improvement.

12. In the assessment of the draft law, the Venice Commission took into account the principles enshrined in the Framework Convention with regard to the protection, by the State Parties to this Convention, of the specific identities and cultures of persons belonging to national minorities and the effective participation of these persons in public affairs.

13. In particular, as a contracting Party to the Framework Convention[8], Montenegro committed to "*promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage*" (Article 5 of the Framework Convention) and "*to create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them*" (Article 15 of the Framework Convention).

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[5] *Resolution CM/ResCMN(2015)2 on the implementation of the Framework Convention for the Protection of National Minorities by Montenegro*

[6] European Commission's Montenegro 2011 Progress Report, part of Communication from the Commission to the European Parliament and the Council 'Enlargement Strategy and Main Challenges 2011-2012' SEC(2011) 1204 final 12.10.2011., p. .20. (http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/mn_rapport_2011_en.pdf )

[7] European Commission's Montenegro Progress Report 2014, part of Communication *'Enlargement Strategy and Main Challenges 2014-15* COM(2014)700 final of 8.10.2014. p. 46 and 47. (http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-montenegro-progress-report_en.pdf)

[8] Montenegro acceded to the Framework Convention on 11/5/2001 (date of accession by the state union of Serbia and Montenegro). The convention entered into force for Montenegro on 6 June 2006.

14. The Constitution of Montenegro devotes a special section (Section 5, under Part II – Human Rights and Liberties) to the protection of minorities, and article 79 on the protection of identity provides the list of rights and liberties which "*persons belonging to minority nations and other minority national communities shall be guaranteed*". These include in the first place, under article 79.1, "*the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities*".

## III. Analysis

### 1. Article 1 - the protection of the Roma

15. The first amendment - to article 7 paragraph 3 of the Law, defining the main objectives of the governmental policy of minority protection - provides for the deletion of the words "*as well as the better integration of Roma into the social and political life of Montenegro*". Paragraph 3 reads, in its current wording, as follows: "*The Strategy, referred to in paragraph 1 of this Article, shall, in particular, define measures for the implementation of the present Law and the improvement of living conditions of minority nations and other national minority communities and the improvement of measures and activities, as well as the better integration of Roma into the social and political life of Montenegro*."

16. Although, at first sight, a special reference to the situation of Roma might be seen as necessary (also taking into account the findings on the matter of the above-mentioned Resolution of the Committee of Ministers), in the specific context of Montenegro the deletion of this reference may help to avoid seeing the Roma minority as being in an inferior position among the other minorities of the country (see in paragraphs 5-30 of the 2004 Opinion the analysis of the terminology issues regarding minorities and of the problem of the hierarchy of various minority groups in Montenegro[9]). It is noted in this connection that, as part of the efforts made to foster the integration of the Roma and their participation in public affairs, alongside the councils established under Articles 33-35 of the Law on Minority Rights to represent the Albanian, Bosniak, Croat, Muslim, and Serb national minorities, a Council of the Roma minority has been set up. As indicated by the Advisory Committee of the Framework Convention in its 2013 Opinion, the councils are intended to "*play an active role in raising public awareness of national minorities, creating a framework for discussion on national minority issues and making proposals on the outstanding issues affecting them*." In view of the above considerations, the deletion of the specific reference to the Roma appears acceptable.

### 2. Article 2 - the gender issue

17. Article 2 of the draft law introduces to the Law a new article 7a, reading that "*terms used in this Law for natural persons in the masculine gender include the same terms in feminine gender*." This amendment is to be welcomed.

### 3. Article 3 - a new public institution for the of support minorities' cultures

18. Article 3 of the draft law introduces a new article 8 a, which provides for the establishment, "in a manner and under conditions prescribed by the law governing cultural institutions", of a "public institution" in charge of promoting and protecting minority rights and in particular the development and the expression of their cultures. A second paragraph sets forth that the supervision of the activity of this institution shall be done by "the organ of the state administration responsible with human and minority rights". This new institution should thus be distinguished from the state organ entrusted with the overall government policy of minority protection as well as from the Fund for protection and realization of minorities' rights (the

[9] "*the Commission assumes that it is not the intention of Montenegro to introduce a hierarchy of categories within the "minorities" in Montenegro, and that whatever terminology will be used […], the legal status and the scope of the protection guaranteed to the persons concerned shall be the same*.", CDL-AD(2004)026, § 30

Minority Fund) established by the Parliament of Montenegro under Article 36 of the Law, which plays an essential role in funding policy of the activities of minority communities.

19. The cultural institution referred to in article 8a may be seen as a response to the criticism, by the Committee of Ministers in its 2015 Resolution, of the absence of a common institutional platform promoting issues common to all minority councils. According to the Montenegrin authorities, it will actually not be an entirely new institution; such an institution has already been operating as a Centre for Minority Culture Preservation and Development, under a law which was repealed. The current draft law will thus provide a new legal framework for its organisation and operation. However, increased clarity should be provided, by the future Law, with regard to the specific roles and functions of the three above-mentioned bodies: the organ of state administration, the cultural institution, the Minority Fund. A clear delimitation of their respective mandates and scope of action would help avoid undue overlapping and difficulties in the implementation of the state's policy for the protection of national minorities. In addition to being more specific on the functions of the cultural institution (including in relation to the minority councils), the Law should provide the basic rules of its organisations, of its supervision by the organ of state administration (and, thereby, the degree of autonomy it will enjoy), and, in its *Final and transitional provisions*, should set specific time line for the start of the operation of the new institution. Article 8 should be made more specific in the light of the above comments. Also, its wording should be harmonized with article 42 č of the *Final and transitional provisions,* to make it clear that they both refer to the same - already operating - institution, i.e. the Centre for Minority Culture Preservation and Development

### 4. Article 4 - membership in the minority councils

20. The amendment in article 4 of the draft law proposes the deletion of paragraph 9 of article 33 of the Law (article providing for the manner of establishing of minority councils), followed by other minor terminological modifications. Article 33 paragraph 9 reads that "*Persons referred to in paragraph 5 of this Article* [that is, according to paragraph 5, the members of the council of minority nation and other national minority community, by function: members of Parliament and government, presidents of municipalities, of city municipalities, of municipality assemblies, of city municipality assemblies, of parliamentary parties, belonging to the respective minority nation and other national minority community], *and members of bodies of political parties shall not participate on the electoral assembly*." So, the current amendment opens the possibility for these *ex officio* members of the minority councils and for members of political parties to take part in the election of the other members of the minority councils, a possibility which is currently forbidden by the Law. It would seem that the purpose is to reinforce the "public" nature of these minority councils and to distinguish them very clearly from mere NGOs. Nevertheless, the proposed amendment is problematic for at least two reasons.

21. Basically, this amendment introduces a difference of status between the *ex officio* and the elected members of the minority councils: the members of the first category not only become members by reason of their political status, but they receive also the extra power to decide upon the election of the members of the second category, which places them in a superior position. This might negatively impact upon the activity of the councils.

22. Secondly, the involvement of these *ex officio* members, who are politicians by their function and members of political parties in the election process, will lead to the politicizing of the councils, which should be avoided by all means. This is especially problematic in the light of the concerns expressed by both the Advisory Committee of the Framework Convention and the Committee of Ministers over the fact that the minority councils are perceived within the Montenegrin society as *"vehicles for political patronage".*

23. In view of the above comments, it is recommended to maintain paragraph 9 of article 33 as it is in the current text of the Law.

## 5. Chapter II. Articles 5 to 8 - The Minority Fund

24. The amendments proposed in the Chapter II a of the Draft (in particular, 21 new articles after article 36a, 2 new articles after article 42b and 5 new articles after article 44) are quite technical but contain the core of the proposed changes to the current Law. All these provisions look well drafted and they seem generally non-problematic. The aim is clearly to make the distribution of subsidies for cultural activities of minorities, through the Minority Fund, neutral, transparent and objective and to ensure the participation of minorities in this process, so to address the concerns expressed in the context of monitoring the Framework Convention and in the European Commission's reports (see above). In short, it is about fighting against this image of "political patronage".

25. In more concrete terms, the amendments refer to the composition of the Management Board of the Fund and the election of its members, its competences, the election of the Director of the Fund and his/her competences, certain incompatibilities and interdictions, the financing of the Fund, the competition for projects, the establishment of an Evaluation Commission and its competences etc. A complex and sophisticated mechanism of distribution of state subsidies is proposed, which aims to make the policy of state support to the activities of minorities of as transparent as possible.

26. It is for the national authorities to decide which mechanisms correspond best to the necessities of supporting the preservation and development of the identity of persons belonging to national minorities in Montenegro and to assess whether such a sophisticated mechanism is adapted to the national context and to the specific situation of this country's national minorities. The Venice Commission would nevertheless like to point out to a number of issues raised by the proposed amendments.

### *a. Legal basis and status of the Minority Fund*

27. Article 36 of the Law in force is essential. Its paragraph 1 requires the Parliament of Montenegro to establish a Fund to support the policy in favour of national minorities and other communities in the ethnic, linguistic, religious or cultural fields (the Minority Fund). This paragraph 1 remains unchanged.

28. The amendment under article 6 of the draft law pertains to the modification of paragraphs 2 and 3 of article 36 of the current Law. Current paragraph 2, which sets forth that the "*the act on establishing the Fund shall stipulate bodies of the Fund, mandate, competencies and manner of work and decision-making, composition and number of members of the administrative bodies, as well as other issues relevant for the work of the Fund"* is replaced with a text saying that the Fund *"shall have the status of a legal person*", from which it might be inferred that the current Fund lacks this status. This amendment is non-problematic. As a matter of fact, the essence of the current paragraph 2 is retained in the draft paragraph 3: "*The Founding act of the Fund shall in detail regulate competency and manner of decision-making of the Fund organs, as well as other issues prescribed by the Law*".

### *b. Composition of the Management Board of the Minority Fund*

29. According to the new articles 36 b article 36 č, the composition of the Management Board will include: two representatives of the Parliament who are not MPs, proposed by Parliamentary "working body" in charge of human and minority rights, one representative of the Ministry of Human and Minority Rights proposed by that Ministry, one representative of the minority councils proposed by minority councils, one independent expert on human and minority rights nominated by University of Montenegro, one representative proposed by the organ of state administration competent for the media to represent that organ. All members will be elected by the Parliament of Montenegro, on the basis of a public call to be organized by the proposing body, for a term of four years, with maximum of 2 consecutive terms. As stipulated in the draft article 36 b, the Parliament shall also dismiss the members of the Board.

*i. Representation of minorities*

30. One important change introduced by the draft law is the deletion of the current wording of paragraph 3 of article 36 according to which "*[e]ach council of minority nations and other national minority communities shall have its own representative in the administrative body of the Fund*". At the same time, in new article 36 b it is provided that the "Management board" of the Fund shall consist, *inter alia*, of "*one representative of the councils of national minorities and other minority national communities*".

31. It is not clear whether the "*management board*" referred to in the new article 36 b is the same as the "administrative body of the Fund" of current paragraph 3 of article 36. The Montenegrin authorities should clarify this terminology issue, which might be the result of a different English translation of the same term. It is noted that, in draft article 36 a, only the Management Board and the Director are mentioned as "the organs of the Fund". If this is the case, this would indeed mean that instead of having each minority council represented in the Management Board of the Fund, one person will represent all 6 councils, therefore all national minorities and other minority communities represented by these councils.

32. The proposed way of representation of Montenegro's minority communities in the Management Board raises several issues.

33. First, it is difficult to understand why six minority councils representing six national minorities along with further unnamed minority communities, would be represented by one single representative. It is unlikely that the six councils representing as many national minorities and other minority communities will be able to easily agree on the appointment of a common representative. However, the authors of the draft appear not even to envisage that minority councils would fail to agree on a name, since there is no alternative solution in the draft to address such a case. Moreover, no specific mechanism or procedure for nominating that representative is provided. While such a nomination should legitimately be left to an internal decision of minorities, a general framework enabling such a decision, in case this mechanism is maintained, could be helpful.

34. More importantly perhaps, irrespective of which of minorities would eventually prevail by installing their representative into the Management Board, the equality of minorities in terms of access to distribution of state funds might be compromised. With one minority only represented in the Management Board (although as one voice for all minority councils), there could be a perception within the society that a single privileged minority's position prevails in planning and ultimate decision-making on the Fund's projects for that 4 years tenure. Moreover, the presence of the representatives of each minority in the Management Board of the Fund is essential in order for the Fund to support those projects which really correspond to the priorities presented by the respective minorities. In addition, this presence would allow a certain type of control, by all national minorities, on the operation of the Fund.

35. In view of the above comments, it is recommended that the proposed representation of national minorities in the Management Board, where minorities are in minority position as opposed to state representation, be re-examined. While there is no easy solution or model for such a mechanism, the most suitable option could be to provide equal representation by one member of each minority council. As for the re-adjustment of the quantitative quotas of the nominating entities, to provide for efficient work of the Board avoiding deadlocks and quorum deficits, the promoters of the Draft are best-positioned to do that as they see best.

36. To avoid situations like those reported by the Montenegrin authorities, where projects funded by/to be implemented by members of the Management Board of the Fund (representatives of the minority councils) enjoyed privileged access to the state subsidies distributed by the Fund, stronger and more effective guarantees should be introduced in relation to the public competition enabling access to state support. Such guarantees should be provided in relation to the eligibility criteria for state subsidies and for the formation of the

Evaluation Commission, as well as to the procedure of selection of the projects, which should be more clear and transparent, should provide for clearly specified deadlines for application and criteria for the projects' assessment etc. (see comments below). The shortcomings noted in the past in the allocation of the state funding should not be seen as a reason for limiting the involvement of the representatives of the minority councils in this process. It is recalled that the selection process is to be conducted by the Evaluation Commission and that an important role in the decision is assigned to the Director of the Fund, the Management Board intervening only as an "appeal" body.

*ii. Election of the members of the Management Board of the Minority Fund*

*Criteria for eligibility/incompatibilities*

37. To be elected to the Management Board, one must not be member of a political party, a minority council other than their commonly designated representative, an NGO which is working for the rights of national minorities, or of an organization seeking subsidies (new articles 36 c, 36 e and 36 m). This prohibition is repeated *mutatis mutandis* in articles 36 dž (on the election of the Director of the Fund) and 36 k (dealing with the eligibility criteria for membership to the Evaluation Commission).

38. Whereas the aim of ensuring neutrality in the composition of the Board is legitimate, the exclusions provided for by the new article 36 c (which may greatly reduce the number of candidates) would deserve to be further specified; otherwise, the proposed mechanism may prove unworkable. In particular, this incompatibility rule raises the question of a resignation made by a potential candidate (who was a member of a minority council, a political party or an NGO active in the field of minority rights) shortly before the elections to the Board. Would it be possible for such a person to be nominated and subsequently elected to the Board? This should be specified by the Law.

39. Also, the rules for the formation of the Management Board suggests a problem of translation or of coordination in the original text between the provisions of the new article 36 b and the new article 36 č listing the nominating bodies (item 5 or 6, paragraph 2, Article 36 b is missing, therefore item 1, paragraph 1, of article 36 č needs rectification). It is recommended that the concerned provisions be re-examined and harmonized.

*Election procedure*

40. The draft law does not contain any indication on the election procedure to follow for the election of the Management Board members by the Parliament. It only makes reference, for clarification on "*the content and manner of the public call [..] as well as the manner of implementation of the process determining the list of candidates* ", to the "*act referred to in article 36 paragraph 3 of this Law*". as to the majority rules for the election of the Management Board members by the Parliament, the authorities of Montenegro may wish to consider introducing a qualified majority requirement of the type stipulated by Article 91(2) of the Constitution (majority vote of the total number of Members the Parliament) as a way to limit the influence of one specific political majority - by having a decisive role in the formation of its Management Board - on operation of the Fund, unless there is a clear risk of stalemate in the parliamentary voting procedure.

41. It is recommended however to set in the draft law a minimum time-limit between the "public calls" for nominations, and the election of the Board members by the Parliament. A minimum of 60 days, which would fit into the timeline (90 days) stipulated in the proposed Articles 44 a and 44 b for the establishment of the Fund and its Management Board, could be suggested.

*iii. Dismissal of the Management Board*

42. As far as the dismissal is concerned, the grounds in article 36 d paragraph 1 item 1: "*if permanently incapacitated for performing the function*", and item 2: "*if convicted to unconditional imprisonment or convicted for a criminal offense* ***or other act which makes him unworthy for performing the function"***[10] are formulated in rather vague terms. It is therefore important that the relevant provision of the subsequent legislation (the Founding Act) referred to in article 36 d § 4 for "*the manner of determining the reasons for dismissal […] and informing the Parliament of Montenegro on those reasons* will be more specific and precise in this regard.

*c. Operating mode of the Minority Fund*

*i. The election/appointment of the Director of the Fund*

43. New article 36 dž deals with the election of the Director of the Fund by the members of the Management Board. As previously mentioned, the Director will be subject to the same (drastic) already mentioned eligibility criteria. While this is meant to enhance the neutrality and objectivity of the operation of the Fund, it involves also the risk of significantly reducing the number of potential candidates and that of excluding experienced and committed people having been involved in the protection of national minorities, who could otherwise add value to the Fund's activities.

44. The Draft law contains no indications as to the modalities envisaged by the drafters for the election of the Director (public/secret voting, majority required), nor does it provide any anti-deadlock mechanism. In view of the important functions of the Director, as listed in new article 36 đ[11], it is of particular importance to provide in the Law (or any related secondary legislation) clear rules for the election of the holder of the function. The introduction of a qualified majority requirement for his/her election would contribute to ensuring impartiality in the operation of the Fund.

*ii. Financial resources of the Fund and remunerations*

45. According to new article 36 g, the Fund will be financed from the state budget and other resources in accordance with the law. This provision establishes the amount allocated to the Fund at least 0,15% "*of the total Budget means reduced by the State Funds and Capital Budget*". This does not seem problematic as long as the proportion is respected. It is at the same time recommended to specify which other funding sources will be authorized or to make more specific reference to the legislative provisions, if any, regulating the use of such sources ("in accordance to the law").

46. In this connection, it would also be important, for the efficient, objective and transparent operation of the Fund, to provide information on the (level of) remuneration of the members of the Fund bodies - the management Board, the Evaluation Commission - and its Director. Since this is not specifically mentioned in the draft law, one may wonder whether the persons concerned will fulfil their respective functions on a full-time basis. This should be specified in the law. Their remunerations should be sufficiently attractive, especially in view of various incompatibilities introduced. It is noted, in this context, that the Draft law rightly provides that "*[o]n the employees of the Fund's professional service shall apply the provisions on civil servants and employees*" (article 36 nj paragraph 2).

[10] Emphasis added

[11] According to the Draft law, the Director of the Fund will, *inter alia*, represent the Fund and organize the Fund's work and operations, propose the statute, program and work plan of the Fund, the Act on Internal Organization and Systematization and other acts of the Fund, be responsible for operations and legality of work of the Fund.

*iii. Organization of project-based public competition for state support*

47. According to new Article 36 h, the public competition for projects to be funded will be announced via the Internet and printed media, and the projects submitted by national minorities will be referred (within eight days) to the Evaluation Commission for review. It is essential for the Fund's neutral operation and for its credibility that the time period provided to applicants between the announcement of competition and the deadline for submission of project proposals be stipulate by the law and be reasonably sufficient for putting together an application by a competent participant. Advertising competition shortly before deadline is one of the most common ways of abusing such mechanisms, especially when associated with insider-informed-projects already lined up for submission.

48. It is positively noted that Article 36 l dealing with the election (by the Parliament) of the members of the Evaluation Commission provides in its paragraph 3 of for a 15 days time-period between public call for nominations and deadline for the submission of applications.

*iv. Fund's expenditure*

49. New Article 36 i sets out two directions for the Fund's expenditure: financing of the Fund's own operation (based on the programme and working plans of the Fund), and financing the projects through the competition-based procedure, leaving the determination of the *ratio* to the Management Board of the Fund, with prior consultation of minority councils.

50. The choice to allow the Fund to independently manage the budget made available to it is to be welcomed as it certainly translates an effort to emancipate this body from any influence or oversight by the executive or by any political circles. That being said, leaving the Board the power to decide, in the absence of clearly specified criteria, the distribution of resources between those for the own operation of the Fund and those to support the activities of minorities, can legitimately raise questions. The absence of any restriction or *ratio* of expenditure between operational expenses and functional expenses could lead, at best, to complications in such determination in practice. A specification capping operational expenses of the Fund at, for example, maximum 25% of its balance could be helpful.

*v. Criteria for the distribution of subsidies. Right to apply*

51. New Article 36 i also sets out new criteria for the allocation of subsidies by public competition procedure. In particular, two new criteria have been added to those listed in article 36 a of the Law in force: "*the contribution that the project gives to intercultural cooperation and reduction of ethnic distance*" and the "*promotion of the spirit of tolerance, intercultural dialogue and mutual respect and understanding*". In addition, one criteria ("*credibility of project applicant*") has been further specified ("*professional and technical capacity of the project applicant*"). These new criteria are in line with the commitments taken by states under article 6 of the Framework Convention, which requires states, while taking measures to ensure the protection of the rights of persons belonging to national minorities, to implement policies aiming at fostering the climate of tolerance, dialogue and mutual understanding between all persons living on their territory. It is understood that these criteria should not be applied in an isolated manner but as a complement to those referring to the project's contribution to the preservation and development of the national, cultural, linguistic and religious identity of Montenegro's minorities.

52. As regards eligibility criteria for application, it is unfortunate that the circle of eligible applicants is limited to NGOs and other legal or natural persons whose activities are aimed "*at the preservation and development of human and minority rights, national or ethnic particularities of minority nations and other minority national communities and their members in the area of national, ethnic, cultural, linguistic and religious identity*." Top-market professional language schools, publishing houses, PR firms, music groups or renowned artists or linguistic scholars may not have immediate work record at *"preservation and development of human and minority rights, national or ethnic particularities of minority nations [...]"*, but may appear much

more efficient in furtherance of those very objectives as a project contractor. The exclusion of such potential applicants is less problematic if the "minority protection" or "intercultural" dimension is considered as a source of added value in other competition-based mechanisms enabling access to state support.

53. It is noted also that, in spite of the efforts made to provide the Fund with operational autonomy, the draft law gives to the Ministry of Human and Minority Rights the power to "prescribe" the manner to evaluate projects (according to the criteria set out in article 36 i) and to decide on the form and content of the application forms and any other documentation required from applicants (see new article 36 i). This power is problematic as it enables the executive to have an influence on the access to subsidies and should therefore be construed strictly. The Management Board of the Fund (whose composition includes representatives of both the Ministry and the Parliament), jointly with the Evaluation Commission (with its highly qualified members), seem to be better positioned to handle that function. It is recommended to re-examine the draft law with a view to eliminating any undue interference of the executive in the process of allocation of subsidies by the Fund.

vi. *The Evaluation Commission*

54. New article 36 j sets up an Evaluation Commission which, although not part of the Fund, plays a very important role in the allocation of subsidies, since its proposals on the matter in principle bind the Director (see articles 36 lj and 36n). The Parliament is entrusted with the election of the Commission's members following a public call procedure and based on criteria which are detailed in the proposed articles 36 k and 36 l. In addition to the usual requirements, candidates must have, as also the Director of the Fund, a certain level of academic qualification (Art. 36 § 1 k). This is a welcome provision, likely to enhance the public trust in this body and the quality of its work.

55. The draft law regrettably does not provide for resignation or dismissal of the Commission's members, which nevertheless could be useful. The recommendations made in relation to the dismissal of the Management Board members are applicable here too.

i. *The evaluation procedure*

56. The procedure established by the new Article 36 n is the key to the mechanism of subsidies' allocation. In principle, the Director must follow the proposal for subsidies' allocation as elaborated by the Evaluation Commission. However, he/she may object to it in some cases (article 36 n paragraph 2,) some of which leave him/her a wide scope for discretion (for example, when concluding, as allowed by the Draft law, that the project "does not meet" the very general criteria for accessing subsidies listed in Article 36 i paragraph 3). The Evaluation Commission must then make a new proposal taking into account the objections raised by the Director (Art. 36 n paragraph 4). The Draft law seems to regard this as a kind of automatic/mechanical response, which in practice is rarely the case.

57. The Director's decision, whether it is made from the outset (Art. 36 n paragraph1) or after a new intervention of the Evaluation Commission (Art. 36 n paragraph 5) is subject to appeal by candidates to subsidies to the Management Board (Art. 36 n paragraph 6).

58. The Management Board shall take a final decision within 15 days (art. 36 n paragraph 7). No further appeal (e.g. in Parliament) is available. The Draft law offers no solution in the event that the Management Board does not pronounce or would be in a deadlock situation. This provision should be amended in order to provide a solution in case of deadlock and an appeal mechanism.

## IV. Conclusion

59. The draft Law on Amendments of the Law on Minority Rights and Freedoms of Montenegro is a welcome legislative initiative, likely to contribute to bringing the legislation pertaining to the protection of national minorities in Montenegro, and its implementation, more in line with the applicable European standards and the best practices in the field.

60. The proposed amendments reflect the clear will of the Montenegrin authorities to address the shortcomings found, notably by the monitoring bodies of the Framework Convention on the Protection of National Minorities, in the operation of the mechanism for support fund granting for the activities of national minorities. This involves in particular making this mechanism more effective, more transparent and more objective, free from any undue influence or pressure.

61. The proposed system for public funding of the activities of national minorities is well conceived but complex and sometimes even too sophisticated. However, it belongs to the authorities of Montenegro to assess whether such a system is adequately suited to local conditions and needs. It would be important, however, to make sure that the mechanisms envisaged in order to meet the legitimate goals of transparency and neutrality will not lead to a system which will be very difficult to manage in practice.

62. This being so, a number of provisions need to be re-examined, to be clarified and made more consistent with existing standards and best practice in this area. The authorities are invited in particular to implement the following recommendations:

- to specify the functions, organization and institutional position of the ”public institution” for promotion and protection of minority rights established by the draft law (proposed article 8a), its relations with the minority councils and the Minority Fund and its supervision by the ”organ of the state administration responsible with human and minority rights” ;

- to review the rules for the establishment of the minority councils with a view to ensuring that *ex officio* members are not involved in the process of electing the other members of the councils;

- to provide for representation in the Management Board of the Minority Fund of each of the minority councils representing national minorities and national minority communities;

- to reconsider the eligibility criteria/incompatibilities for the Management Board and the Director of the Minority Fund with a view to avoiding undue exclusion of potential candidates with useful experience in the protection of national minorities;

- to set a reasonable percentage cap on the part of the Minority Fund’s budget to be spent for its own operational expenses; to entrust the Management Board of the Fund with the power to prescribe the modalities to evaluate projects and the content of the forms and any required documentation.

63. The Venice Commission remains at the disposal of the Montenegrin authorities should they need further assistance.