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# Country report

## Non-discrimination

Macedonia

2016

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**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Equality  
Unit JUST/D1

*European Commission  
B-1049 Brussels*

# **Country report**

# **Non-discrimination**

# **Macedonia**

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Reporting period 1 January 2015 – 31 December 2015

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Luxembourg: Publications Office of the European Union, 2016

PDF ISBN 978-92-79-47009-7

doi:10.2838/616164

DS-04-16-688-3A-N

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## EXECUTIVE SUMMARY

### 1. Introduction

Macedonia (FYR),<sup>1</sup> a South-East European land-locked multi-ethnic country, declared its independence in 1991, following Yugoslavia's dissolution. It has been a candidate for European Union membership since 2005, and has held a conditional invitation to join the North-Atlantic Treaty Organization since 2008. Although these processes are considered a foreign affairs priority for the country, both are stalled. Until 2014, the name dispute stood as the main reason for not opening negotiations for membership with the EU. However, in both 2014 and 2015, the European Commission country progress reports<sup>2</sup> raised serious concerns about fundamental rule of law issues (for example, partisanship of institutions and society, independence of judiciary and freedom of the media). Official domestic priorities still include the implementation<sup>3</sup> of the Ohrid Framework Agreement,<sup>4</sup> lowering unemployment rates<sup>5</sup> and the fight against poverty.<sup>6</sup>

The end of 2014 and beginning of 2015 saw massive protests by university and high-school students, honoraria workers, independent trade unions, workers fired in the transition and transformation processes, etc. In February 2015, the wire-tapping affair revealed an even more serious domestic situation. The largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20,000 people that are alleged to have been carried out by the state Counterintelligence Agency.<sup>7</sup> The content of the published recordings removed doubts about the already existing claims of a state capture<sup>8</sup> and extreme concentration of power in the ruling party, including the complete exercise of party control, over not only the judiciary, but *all* aspects of society. The Ombudsperson opened two cases in relation to the wire-tapping affair, as gross and large-scale violations of the right to private and family life were observed. The Ombudsperson expressed outrage about the lack of response from the Counterintelligence Agency to its requests for additional information in the context of gathering information pursuant to the aforementioned cases. The Ombudsperson has reported this obstacle to the Parliament, but no assistance or feedback from the Parliament has been noted.<sup>9</sup>

It needs to be highlighted that what seems to be the voice of the President of the equality body, Dushko Minovski, also featured in the publicly broadcasted conversations; he can be heard to be a person working for the ruling party on the ground during the election campaign, and even to be (ab)using his position in the Ministry of Labour and Social Policy by instructing people that have been awarded social assistance how to vote. In addition to

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<sup>1</sup> The constitutional name of the country is 'Republic of Macedonia'. However, pending settlement with Greece on the name dispute, under a UN Resolution A/RES/47/225, the country was admitted as a member of the UN under the temporary reference 'the Former Yugoslav Republic of Macedonia', which is the term used by the European Commission, thus also used for the purposes of this report.

<sup>2</sup> European Commission (2015), *The Former Yugoslav Republic of Macedonia – Progress Report* [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_the\\_former\\_yugoslav\\_republic\\_of\\_macedonia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf). All hyperlinks accessed: 27.05.2016.

<sup>3</sup> Although it is not OFA itself that is being implemented, but constitutional, legal provisions and strategic documents that resulted from its signing, the expression 'implementation of OFA' is used here to avoid long explication pretexts.

<sup>4</sup> Signed in view of ending the 2001 armed conflict, OFA aims to advance the position of minority ethnic communities not in majority, and to preserve and reflect the multi-ethnic character of the country in public life, including through actions to promote non-discrimination and equitable representation.

<sup>5</sup> According to the State Statistical Office, the unemployment rate in the last quarter of 2015 was 24.6 % of the active population, while 42.7 % are employed.

<sup>6</sup> The Laeken indicator of poverty for 2014 (last available statistic) is 22.1 %.

<sup>7</sup> Balkan Insight, (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

<sup>8</sup> The concept of 'state capture' is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'.

<sup>9</sup> Annual Report of the Ombudsperson for 2015, Ombudsperson of the Republic of Macedonia (2016).

this, what seems to be the voice of the then Minister of Interior Gordana Jankulovska<sup>10</sup> was featured in a conversation that clearly shows the pressure the Roma community has been under to go out on election day and vote as instructed.<sup>11</sup> Following the release of this recording, Roma organisations protested against the Government, demanding Jankulovska's resignation,<sup>12</sup> after which she published what was intended to be an apology to the Roma community. However, the letter was a mere rehearsal of all actions undertaken in the country to improve the position of Roma, rather than an apology.<sup>13</sup>

The country's population is a little over two million.<sup>14</sup> Ethnic affiliation is important, as sets of rights and positive action measures are tied to the numerical representation of an ethnic community in the total population. The ethnic composition<sup>15</sup> is 64 % ethnic Macedonians, 25 % ethnic Albanians, 4 % ethnic Turks, 3 % ethnic Roma, 2 % ethnic Serbs, 1 % ethnic Bosniaks, 0.5 % ethnic Vlachs and 1 % 'others' (a term used in the Constitution).

Patchwork legal and institutional reforms created a framework that raises legal certainty issues. Very frequent changes to laws, disregard for the public policy participation principle and underfunding of the two national human rights institutions (with responsibility for equality and non-discrimination), are just some of the most pressing issues. These have an impact on the country's legal and institutional framework, and on the implementation of and practices related to upholding the principle of equality and non-discrimination.

Although the Government often presents the country as one open to differences, because of the actions it has undertaken to advance minority rights,<sup>16</sup> this is not the case. Hate speech seems to be omnipresent and is widely tolerated. Homophobic statements and hate speech directed towards homosexuals are still very present. Moreover, there were several violent attacks on an LGBT support centre founded by a local civil society organisation (CSO). The attacks have still not been thoroughly investigated, and almost no charges were raised, so protests by CSOs, which began in 2014, continued in 2015.

Many Government and donor-supported activities, including those supported by the EU, have been undertaken as part of the efforts to overcome the challenges to the realisation of the basic human rights of Roma. However, as a 2013 study on the implementation of the Decade of Roma Inclusion<sup>17</sup> shows, the results in terms of the achievement of the goals, (then) only two years away from the end of the decade were devastating. The only area where we can speak of inclusion would be in relation to political participation.<sup>18</sup>

In relation to the cooperation between Government and CSOs, as in the previous years, in theory, all NGOs can participate in public consultations and cooperate with and even get financial support from the Government. In practice, however, the NGOs with meaningful participation in public policy processes are those with the least critical approach towards Government actions. This is in line with the overall approach of the Government – to silence

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<sup>10</sup> Gordana Jankulovska resigned 12 May 2015.

<sup>11</sup> A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gipsy by Gipsy, we'll drag them"' (*СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме*) <http://a1on.mk/wordpress/archives/465799>. Please note that in the national context "Gipsy" ("Циган") is a derogatory word for Roma.

<sup>12</sup> 24 Vesti - National TV Broadcaster, 'Roma request resignation from the Minister Jankulovska' [Ромите бараат оставка од министерката Јанкуловска], <http://24vesti.mk/romite-baraat-ostavka-od-minsiterkata-jankulovska>.

<sup>13</sup> This letter is no longer available online.

<sup>14</sup> Although not supported by official numbers, estimates show that 250 000 to 500 000 people have left the country in the past few years, to work abroad.

<sup>15</sup> All numbers presented here are rounded percentages from the 2002 census. A new census was scheduled for 2011, but it was annulled due to lack of clarity in the implementation of the methodology. All statistics by the State Statistical Office can be found at: [www.stat.gov.mk/](http://www.stat.gov.mk/).

<sup>16</sup> There were inter-ethnic violence cases in 2011 and in 2012.

<sup>17</sup> The Decade of Roma Inclusion was a regional Government initiative for improving the situation of Roma in health, housing, education and employment which ended in 2015.

<sup>18</sup> There is a Roma minister in the Government, a Roma municipality (Shuto Orizari), Roma MPs, etc.



all critical voices in the country.<sup>19</sup> Government organised NGOs (or 'GONGOs') still operate to provide public support for Government actions when and as needed. The activities of GONGOs also include 'initiating' and holding counter-protests to the protests organised by NGOs.

## 2. Main legislation

The 'Constitution of the Republic of Macedonia',<sup>20</sup> a written constitution, is the country's highest legal act. It accepts international law as part of domestic law, and as higher than the laws and bylaws. The Constitution provides for protection against discrimination. It upholds the equality of citizens before the Constitution and before law, stating that citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of gender, race, colour, national and social origin, political and religious conviction, property and social status. It provides a protection mechanism for all who find their human rights and freedoms breached, in front of the Constitutional Court. Upholding the monism principle on application of international law (the signed and ratified international documents), the Constitution provides for the domestic use of these documents, thus also for those providing for protection against discrimination and/or upholding the principle of equality.

Until 2010, anti-discrimination provisions were scattered in various laws. In April 2010, the Anti-discrimination Law (ADL)<sup>21</sup> - the first comprehensive equality law - was adopted as part of the EU *acquis* approximation process. The ADL does not comply with the directives regarding minimum protected grounds, definitions and forms of discrimination, effective, proportionate and dissuasive sanctions, use of statistical data, and dialogue with the NGO sector. The equality body established by the act - the Commission for Protection against Discrimination (CPAD) - cannot be said to meet the requirements of Directive 2000/43.

The ADL protects the following grounds: colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, education, political affiliation, personal or social status, family or marital status, property ownership, and health condition. It does not explicitly protect the minimum list of grounds prescribed by the directives, as it includes a limited scope of belief, and excludes sexual orientation; however, there is an open-ended clause ('any other ground established by law or a ratified international treaty', Article 3), and contains grounds not covered by the directives.

The 2013 ex-post evaluation of the implementation of the ADL, conducted by the Ministry of Labour and Social Policy (MLSP) with the support from the OSCE Mission to Skopje, showed that the aims of the law<sup>22</sup> were only partly reached, which, according to the evaluation report, is justified given the amount of state-budget funds allocated for the implementation of the ADL. Although noting numerous points where implementation could be improved, the report explicitly spelled out only three recommendations for legislative changes for improving the implementation: amending the ADL to allow for the establishment of administrative support for the CPAD; explicit prescription of the 'shift of burden of proof' for the CPAD; and enhancing the CPAD accountability mechanisms.

In 2014 and 2015, the OSCE Mission to Skopje supported an all-encompassing analysis of the harmonisation of the national legislation on equality and non-discrimination externally

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<sup>19</sup> The report by the Special Rapporteur on freedom of thought and opinion, Freedom House annual reports, Civil Society Organisation Sustainability Index, and Nations in Transit have all marked the decline in overall freedom and democracy in the country.

<sup>20</sup> The text of the Constitution of the Republic of Macedonia is accessible in English at: Constitution of the Republic of Macedonia (*Устав на Република Македонија*) <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>.

<sup>21</sup> Law on prevention and protection against discrimination (*Закон за спречување и заштита од дискриминација*) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015, Const.Ct. Decision: У.6р.82/2010 (15.09.2010).

<sup>22</sup> As the Anti-discrimination Law does not contain a provision on its aims, by analysing other documents, the ex-post evaluation team identified the aims to be prevention of and protection against discrimination.

(compared to international standards), and internally (inside the domestic laws and bylaws). The result of the analysis identifies points for harmonisation with EU law and CJEU practice, as well as with other international equality and non-discrimination standards.<sup>23</sup>

### 3. Main principles and definitions

The Anti-discrimination Law (ADL) contains definitions of direct and indirect discrimination, harassment, instructions to discriminate and victimisation. Compared to the directives, the definition of direct discrimination is unnecessarily complex, whereas the definition of indirect discrimination is fully replicated. The law contains an article on harassment and on sexual harassment, as well as a separate article on discrimination against people with disability. Multiple discrimination is included as a grave form of discrimination, as are also repeated and extended discrimination. The law also has a provision on inciting and encouraging discrimination. There is no provision on discrimination by association.

The law defines a list of exceptions and exemptions. These are connected with the nature of particular occupational activities and/or special care for some groups of people (the elderly, youth, pregnant women, people with disabilities, and parents). Reasonable accommodation is included primarily in the Law on Employment of People with Disabilities. However, the list of exceptions is not very precise in the personal and material scope. This leaves room for readings of the law that could narrow protection against discrimination.

Before the adoption of the ADL, various laws incorporated definitions of discrimination. As the ADL does not establish a unification of provisions amongst various laws in its transitory and final provisions, one can expect that the institutions that are supposed to implement the law could face doubts about which legislation and/or provision to apply to a certain case, and which provisions should have precedence. *Lex specialis derogat legi generali* and *lex posterior derogat legi priori* are by tradition part of judicial work, but judges tend to rely on existing provisions rather than general legal principles, even in cases where seemingly contradictory provisions exist, as general legal principles are used primarily in case of legal loopholes (as prescribed under the Law on Courts).

The National Strategy on Equality and Non-discrimination on grounds of ethnicity, gender, age and disability (the first comprehensive equality public policy) was implemented in the years 2012-2015, with operational plans for its implementation adopted annually. In December 2015 the Ministry of Labour and Social Policy held the first public consultation on the new strategy, entitled 'Strategy on Equality and Non-discrimination 2016-2020'.<sup>24</sup>

### 4. Material scope

The Anti-discrimination Law (ADL) is applicable to both the private and public sector and applies to all fields. The law notes that specific attention should be paid to the fields of employment and working relations; membership of and involvement in trade unions, political parties, NGOs, foundations, and other membership organisations; social security, including social protection, pensions and disability insurance; health insurance and healthcare; education; access to goods and services; and housing. Thus, it goes beyond the directives. Other laws also include discrimination provisions, defining the material scope. All of them relate to both the public and private sector, apart from the Law on Ombudsperson, which provides protection against discrimination only in the public sphere.

Chapter III - Exceptions from Discrimination (ADL), prescribes the following three exceptions and exemptions:

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<sup>23</sup> Kotevska, Biljana, *Analysis of the harmonization of national equality and non-discrimination legislation* (forthcoming – 2016; OSCE and CPAD).

<sup>24</sup> At the time of writing this report, the strategy had not yet been adopted. In addition, according to publicly available information, no analysis of the implementation of the previous strategy has been published.

- Affirmative measures (Article 13): Actions undertaken by natural or legal persons that will not be considered as discrimination if they are established as justified in the past, in the present, or in the future and may be undertaken until complete factual equality is achieved and factual inequalities are eliminated or reduced.
- Unequal treatment that will not be considered as discrimination (Article 14): different treatment of non-citizens; genuine occupational requirement; different treatment of persons on the basis of religion, belief, sex or other characteristics in relation to education and training for the aims of the occupation related to the relevant religion; actions of members and bodies of churches and religious communities, citizens' organisations, political parties, unions and other organisations conducted in accordance with their doctrine, convictions or beliefs and/or the aims determined in their statutes, programmes and/or regulations; regulation of marriage; exercise of the constitutionally guaranteed principle of freedom of speech, public appearance, opinion and public information; and establishment of a minimum and maximum age in relation to entering a profession/granting privileges/retirement provided that there is a legitimate aim.
- Protective mechanisms for specific categories of persons (Article 15): protection of pregnant women and mothers; children without parents, juveniles, single parents and people with disability; equal participation of women and men; employment encouragement; training and education for persons with disabilities; anticipation of minimum and maximum ages for access to certain levels of training and education, provided that it is objectively justified for the achievement of the legitimate aim, and the extent of this differentiation does not exceed the one necessary in relation to the nature of the training or education, or the conditions in which they are delivered and the extent of this differentiation does not exceed the level necessary for the achievement of the aim; special measures beneficial to persons or groups who are placed in an unfavourable position as a result of any of the discriminatory grounds, for the purpose of equalising their opportunities, as long as those measures are necessary; measures for the protection of the specifics and identity of persons belonging to ethnic, religious or linguistic minorities and their right to cherish and develop their own identity individually or in a community with other group members and measures stimulating conditions for promotion of that identity; and measures in the field of education and training to ensure the participation of ethnic minorities, as those measures are necessary.

In the field of employment, aside from the Anti-discrimination Law, there is also a Law on Labour Relations,<sup>25</sup> which prohibits discrimination in line with the standards of the directives. These laws apply both to the public and private sector.

## 5. Enforcing the law

According to the Constitution, citizens are entitled to bring a case for the protection of fundamental rights and freedoms to the ordinary courts in a prompt procedure. However, in practice, although invocations of the procedures have been made, the Constitutional Court has been very reluctant to act upon cases in relation to discrimination i.e. cases on citizens' rights and freedoms in general.

The laws that are currently in force are not clear when it comes to addressing complaints of discrimination. Various laws provide various types of proceedings in similar cases. Proceedings vary from inspectorial control, misdemeanour procedure, litigation procedure, administrative procedure, to criminal procedure. The Anti-discrimination Law (ADL)

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<sup>25</sup> Law on Labour Relations (*Закон за работните односи*), Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014; Constitutional Court Decisions: U. no. 139/2005, U. no. 161/2005, U. no. 134/2005, U. no. 187/2005, U. no. 111/2006, U. no. 188/2006, U. no. 170/2006, U. no. 200/2008, U. no. 20/2009, U. no. 176/2009, U. no. 263/2009, U. no. 62/2013.

envisages several options for procedural protection. These are: administrative, litigation and misdemeanour procedures.

Administrative procedure before the CPAD is free of charge. This body may give its opinion and recommendation. The procedure can last up to 90 days. If the recommendation is not acted upon, the CPAD can initiate a procedure with a competent body (the law does not specify this further). The CPAD received 70 cases in 2015, which is a third less than in 2014. According to its annual report, the CPAD finds that the drop-in reporting is related to its low technical capacities. However, this cannot explain why fewer people complained to the CPAD in 2015 than in 2014. A more plausible explanation behind the drop in the number of cases could be a decline in trust in this institution, which might have arisen from the wire-tapping affair, due to reasons explained in section 1.

Litigation procedure can also be raised in ordinary courts, based on the provisions of the ADL. The law does not resolve the priority of the procedures, in a case of simultaneous procedures, but it states that if a procedure is raised in a court, no procedure can be raised before the CPAD. However, it does not say what one does if a procedure is raised before the CPAD, and after that (but before the procedure ends in the CPAD) another procedure is started before a court. Furthermore, the relations between procedures in front of the Ombudsperson and the CPAD are not regulated by law, but are governed by a memorandum of understanding between the two institutions.

Under the ADL, the outcome of the procedure depends on the procedure that one chooses to pursue. The administrative procedure provides a recommendation for rectifying the violation (i.e. the discrimination) within 30 days, litigation would lead to an award of regular compensation, and the misdemeanour procedure can lead to fines in the range of EUR 70 to 1 000 (in national currency). Financial and other sanctions for discrimination are provided in the Criminal Code. These provisions have not been applied thus far.

Another procedure for the protection of rights, including the right to equality and protection against discrimination is a procedure that can be initiated in front of the Ombudsperson. This is limited to the public sphere only. The Ombudsperson is vested with the responsibility to provide protection of the principles of non-discrimination and equitable representation. In 2015, the percentage of discrimination cases remained low: 53 cases were directed to the Ombudsperson (representing 1.2 % of the total number of cases received by the Ombudsperson). As in previous years, the majority of discrimination cases are in the field of employment and on the ground of ethnicity. The fact that the number of cases reported to the Ombudsperson did not experience a fall as striking as that of the CPAD further supports the suggestion of a possible loss of trust in the CPAD as a result of the wire-tapping affair (see section 1 above).

Neither under the ADL, nor under previous laws have situation testing and statistical evidence been prescribed as admissible evidence and tools in procedures in discrimination cases. They have not been used in practice. Statistical evidence is not mentioned in domestic legislation. In fact, statistics are only mentioned in the context of the duties of the equality body (i.e. collecting statistics).

The ADL prescribes shifting of the burden of proof, as do several other laws. However, its definition is not in line with the directives, as the law asks that the potential victim of discrimination provides facts and proofs to justify their claim. This places an unreasonably large portion of the burden on the potential victim. Shift of the burden of proof does not apply for criminal offences related to breach of equal treatment. The CPAD has thus far applied the shift of burden of proof in accordance with national legislation.

NGOs support complaints of victims and bring cases of discrimination to public attention. However, the media and public do not show a constructive approach to such cases or to covering discrimination, but tend towards a sensationalist attitude.

## 6. Equality bodies

The Anti-Discrimination Law (ADL) provided for the establishment of the first equality body in the country – the CPAD. Its members were elected in December 2010 and it started functioning in 2011. The CPAD works on cases of discrimination as covered by the ADL. The grounds covered are: sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property ownership, health condition, or any other ground stipulated in law or a ratified international treaty.

The CPAD received 70 cases in 2015 (a striking fall of one third compared to 2014, when it received 106 cases, and the first fall in the number of cases since the body was established). The cases in 2015 were brought on the following discrimination grounds: 9 on ethnicity, 8 on personal or social status, 8 on mental or physical disability, 8 on age, 8 on health status, 5 on political affiliation, 4 on family or marital status, 4 on social origin, 3 on language, 3 on education, 2 on sex, 2 on race, 2 on citizenship, 2 on religion or religious belief, 2 on other beliefs, 2 on property status, 1 on colour of skin, 1 on gender, 1 on belonging to a marginalised group, 17 cases where no ground was claimed, and 14 under 'any other ground'. In filed cases, the alleged discrimination was in the following fields: 30 in employment and labour relations, 4 in access to goods and services, 14 in social security, 4 in judiciary and administration, 3 in public information and media, 3 in education, science and sports, 4 in housing, 13 in which no field was claimed by the applicant, and 3 in other fields as provided for under the law. As in previous years, the body did not produce statistics on how many of these cases were processed and/or were closed in 2015.<sup>26</sup>

The CPAD has the following mandate: giving advice and recommendations on cases of discrimination; providing information and initiating procedures at relevant state bodies; reporting, and providing education and training; initiating changes to legislation; cooperation with local government, NGOs, other equality bodies and international organisations; collecting statistical data, establishing databases and carrying out research.

There was no equality body before ADL's adoption. Some competences concerning discrimination fall within the mandate of the Ombudsperson's office. The relations between the Ombudsperson and the CPAD are not regulated in the ADL (their relationship operates partly under a memorandum of understanding). According to the Ombudsperson's general mandate, it can accept individual claims, investigate, give recommendations and opinions, initiate procedures, and monitor and research specific issues, focusing protection on the grounds mentioned in the Constitution and covering violations made by public bodies.

## 7. Key issues

The key issues of concern in the national context include:

- lack of inclusion of sexual orientation as an explicitly protected ground in the comprehensive anti-discrimination law;
- lack of internal harmonisation of national legislation with the Anti-discrimination Law and with international standards;
- low resources for both national human rights institutions with an equality and non-discrimination mandate, preventing them from fully exercising their competences;
- impunity of hate crime and hate speech, especially with regards to sexual orientation;

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<sup>26</sup> Commission for Protection Against Discrimination (*Комисија за заштита од дискриминација*) (2016), *2015 Annual Report of the Commission for Protection Against Discrimination* <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>.

- grave rule of law issues, including lack of independence of the judiciary and partisanship of the state institutions, resulting in a loss of trust in the institutions;
- lack of independence of the equality body which, under its present positioning and operation, cannot be seen to be in line with the directives.

## RÉSUMÉ

### 1. Introduction

La Macédoine (ARYM),<sup>27</sup> pays multiethnique et enclavé du sud-est de l'Europe, a déclaré son indépendance en 1991 par suite de la dissolution de la Yougoslavie. Elle s'est portée candidate à l'adhésion à l'Union européenne en 2005 et a reçu en 2008 une invitation conditionnelle à rejoindre l'Organisation du traité de l'Atlantique Nord. Bien qu'ils soient considérés comme une priorité nationale en matière d'affaires étrangères, ces deux processus d'adhésion sont au point mort. Le litige sur le nom a constitué jusqu'en 2014 la raison principale de la non-ouverture de négociations en vue de l'adhésion à l'UE. Tant en 2014 qu'en 2015 toutefois, les rapports d'avancement publiés par la Commission européenne<sup>28</sup> concernant les progrès réalisés par le pays sur la voie de cette adhésion font part de vives préoccupations portant sur des questions d'État de droit fondamental (politisation des institutions et de la société, indépendance du judiciaire et liberté des médias, par exemple). Les priorités nationales officielles prévoient toujours la mise en œuvre<sup>29</sup> de l'accord-cadre d'Ohrid,<sup>30</sup> la réduction des taux de chômage<sup>31</sup> et la lutte contre la pauvreté.<sup>32</sup>

La fin de l'année 2014 et le début de l'année 2015 ont été marqués par d'importants mouvements de protestation de la part d'étudiants des universités et hautes écoles, de travailleurs freelance, de syndicats indépendants, de salariés licenciés dans le cadre des processus de transition et de transformation, etc. En février 2015, l'affaire des écoutes téléphoniques a révélé une situation interne plus préoccupante encore. Le principal parti d'opposition a entamé la publication d'enregistrements censés être tirés de l'interception illégale des communications de plus de 20 000 personnes par l'Agence de renseignement macédonienne.<sup>33</sup> Le contenu des enregistrements rendus publics dissipe les doutes entourant les allégations d'ores et déjà formulées quant à une captation de l'État<sup>34</sup> et une concentration extrême du pouvoir dans les mains du parti dirigeant, y compris un contrôle total du parti non seulement sur l'appareil judiciaire mais sur *tous* les aspects de la société. Le Médiateur a ouvert deux procédures en rapport avec l'affaire des écoutes téléphoniques, étant donné que des cas flagrants de violation à grande échelle du droit à la vie privée et la vie familiale avaient été constatés. Il s'est dit indigné de l'absence de réponse de l'Agence de renseignement à ses demandes d'informations complémentaires dans le cadre du rassemblement d'éléments en rapport avec ces deux procédures. Le Médiateur a fait

<sup>27</sup> La dénomination constitutionnelle du pays est «République de Macédoine». Mais en attendant que soit réglé le litige en cours avec la Grèce concernant cette dénomination, la résolution A/RES/47/225 des Nations unies prévoit que l'État est admis comme membre des Nations unies en étant provisoirement désigné sous le nom d'«ancienne République yougoslave de Macédoine», qui est aussi la dénomination retenue par la Commission européenne et utilisée dès lors dans le présent rapport.

<sup>28</sup> Commission européenne (2015) «The Former Yugoslav Republic of Macedonia – Progress Report» [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_the\\_former\\_yugoslav\\_republic\\_of\\_macedonia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf). Tous les hyperliens ont été consultés le 27 mai 2016.

<sup>29</sup> Même si ce n'est pas l'accord-cadre d'Ohrid proprement dit qui est mis en œuvre, mais des dispositions constitutionnelles et légales ainsi que des documents stratégiques découlant de sa signature, l'expression «mise en œuvre de l'accord-cadre d'Ohrid» est utilisée ici pour éviter de longues périphrases explicatives.

<sup>30</sup> Signé en vue de mettre fin au conflit armé de 2001, cet accord vise à améliorer la situation des communautés ethniques minoritaires ainsi qu'à préserver et refléter le caractère multiethnique du pays dans la vie publique, y compris au moyen d'actions pour la promotion de la non-discrimination et en faveur d'une représentation équitable.

<sup>31</sup> Selon l'Office national de statistique, le taux de chômage atteignait 24,6 % de la population active au dernier trimestre de 2015, et le taux d'emploi 42,7 %.

<sup>32</sup> L'indicateur de pauvreté de Laeken était de 22,1 % en 2014 (dernière statistique disponible).

<sup>33</sup> Balkan Insight, (2015), «Macedonia PM Accused of Large-Scale Wire-Tapping» (Le Premier ministre macédonien accusé d'écoute téléphonique à grande échelle) (9 février 2015), site web de Balkan Insight, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

<sup>34</sup> Le concept de «captation de l'État» s'entend ici au sens que lui donne Transparency International, à savoir: «une situation où des personnes physiques, [des institutions,] des entreprises ou des groupes puissants, qui peuvent être ou non des ressortissants du pays, recourent à la corruption pour peser sur les décisions politiques et l'environnement juridique du pays au profit de leurs propres intérêts».

part de cette entrave au Parlement, mais celui-ci ne lui a fourni aucune assistance ni retour d'information.<sup>35</sup>

Il convient de souligner que l'on entendrait également la voix du Président de l'organisme pour la promotion de l'égalité, Dushko Minovski, dans les conversations rendues publiques et qu'il apparaît dans ces enregistrements comme une personne travaillant sur le terrain pour le parti au pouvoir durant la période électorale, et même comme (ab)usant de sa fonction au sein du ministère du Travail et de la politique sociale pour donner instruction aux bénéficiaires d'une aide sociale sur la manière de voter. On entend de surcroît une voix qui serait celle de la ministre de l'Intérieur de l'époque, Gordana Jankulovska,<sup>36</sup> dans une conversation attestant clairement de la pression exercée sur la communauté rom pour qu'elle aille voter le jour des élections conformément aux instructions données.<sup>37</sup> Suite à la publication de cet enregistrement, des organisations roms ont manifesté contre le gouvernement et réclamé la démission de Jankulovska:<sup>38</sup> la ministre a alors publié ce qui se voulait une lettre d'excuse à la communauté rom, mais qui se contentait plutôt de récapituler l'ensemble des mesures prises par le pays pour améliorer la situation des Roms.<sup>39</sup>

La population du pays dépasse légèrement la barre des deux millions.<sup>40</sup> L'appartenance ethnique est importante car une série de droits et d'actions positives sont liés à la proportion numérique qu'une communauté ethnique représente dans l'ensemble de la population. La composition ethnique<sup>41</sup> s'établit comme suit: 64 % de Macédoniens de souche, 25 % d'Albanais de souche, 4 % de Turcs de souche, 3 % de Roms de souche, 2 % de Serbes de souche, 1 % de Bosniaques de souche, 0,5 % de Valaques de souche et 1 % «d'autres» (terme utilisé par la Constitution).

Des réformes légales et institutionnelles disparates ont créé un cadre qui pose problème en termes de sécurité juridique. D'incessantes modifications législatives, un déni du principe de participation aux politiques publiques et le financement insuffisant des deux institutions nationales pour les droits de l'homme (compétentes en matière d'égalité et de non-discrimination) ne sont que quelques exemples des problématiques les plus urgentes, qui ont une incidence sur le cadre légal et institutionnel du pays ainsi que sur l'application du principe de l'égalité et de la non-discrimination et les pratiques y afférentes.

Bien que le gouvernement présente souvent le pays comme ouvert aux différences, appuyant cette affirmation sur les mesures qu'il a prises pour promouvoir les droits des minorités,<sup>42</sup> tel n'est pas le cas. Le discours haineux semble omniprésent et largement toléré. Les déclarations homophobes et les discours haineux à l'égard des homosexuels restent courants. Un centre de soutien aux personnes LGBT, fondé par une organisation de la société civile (OSC) locale, a fait en outre l'objet de plusieurs attaques violentes. Celles-ci n'ayant toujours donné lieu à aucune enquête approfondie et aucune accusation

<sup>35</sup> Rapport annuel 2015 du Médiateur, Médiateur de la République de Macédoine (2016).

<sup>36</sup> Gordana Jankulovska a démissionné le 12 mai 2015.

<sup>37</sup> Portail média A1On en ligne, «la ministre Jankulovska déclare: en les tirant par les oreilles, nous amèneront tous les Tsiganes, un par un, à venir voter» (*СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме*) <http://a1on.mk/wordpress/archives/465799>. Il faut noter que, dans le contexte national, «Tsiganes» («Циган») est un terme péjoratif pour désigner les Roms.

<sup>38</sup> Chaîne de télévision nationale 24 Vesti, «Les Roms réclament la démission de la ministre Jankulovska» [Ромите бараат оставка од министерката Јанкуловска], <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

<sup>39</sup> Cette lettre n'est plus disponible en ligne.

<sup>40</sup> Sans être confirmées par des chiffres officiels, les estimations font état de 250 000 à 500 000 personnes ayant quitté le pays ces quelques dernières années pour aller travailler à l'étranger.

<sup>41</sup> Tous les chiffres présentés ici sont des pourcentages arrondis tirés du recensement de 2002. Un nouveau recensement était prévu pour 2011, mais il a été annulé en raison d'un manque de clarté au niveau de l'application de la méthodologie. Toutes les statistiques publiées par l'Office national de statistique peuvent être consultées sur son site: [www.stat.gov.mk/](http://www.stat.gov.mk/).

<sup>42</sup> Des actes de violence interethnique ont eu lieu en 2011 et en 2012.



ou presque n'ayant été portée, les manifestations initiées par des OSC en 2014 se sont poursuivies en 2015.

De nombreuses activités soutenues par le gouvernement et des bailleurs de fonds, en ce compris celles soutenues par l'UE, ont été menées au titre des efforts déployés pour relever les défis liés à la concrétisation des droits fondamentaux des Roms. Toutefois, une étude consacrée en 2013 à la mise en œuvre de la Décennie de l'inclusion des Roms<sup>43</sup> fait état d'un bilan catastrophique en termes de réalisation des objectifs à deux ans seulement de l'échéance fixée. Le seul domaine où l'on peut parler d'inclusion est sans doute celui de la participation politique.<sup>44</sup>

Quant à la coopération entre le gouvernement et les OSC, comme les années précédentes, toutes les ONG peuvent – théoriquement – participer aux consultations publiques et coopérer avec le gouvernement, voire même bénéficier d'un soutien financier de la part de celui-ci. En pratique, toutefois, ce sont les ONG ayant l'approche la moins critique à l'égard des actions gouvernementales qui prennent une part significative aux processus d'élaboration des politiques publiques. Cette situation s'inscrit dans l'approche générale du gouvernement, à savoir faire taire toute voix critique dans le pays.<sup>45</sup> Des organisations non gouvernementales organisées par le gouvernement («ONGOG») continuent de fonctionner pour apporter un soutien public aux mesures gouvernementales quand et où cela s'avère nécessaire. Elles ont également pour mission d'«initier» et de procéder à des contre-manifestations en réponse aux protestations organisées par des ONG.

## 2. Législation principale

La Constitution de la République de Macédoine<sup>46</sup> est une constitution écrite qui représente la loi suprême du pays. Elle admet le droit international en tant que partie intégrante du droit interne, et comme prévalant sur les lois et réglementations. La Constitution assure une protection contre la discrimination. Elle consacre l'égalité des citoyens devant la Constitution et devant la loi, affirmant que tous les citoyens de la République de Macédoine sont égaux dans leurs libertés et leurs droits indépendamment de leur genre, race, couleur de peau, origine nationale et sociale, affiliation politique et religieuse, situation sociale et fortune. Elle prévoit, devant la Cour constitutionnelle, un mécanisme de protection à l'intention de tous ceux qui estiment que leurs libertés et droits fondamentaux n'ont pas été respectés. Proclamant le principe du monisme pour l'application du droit international, à savoir les actes internationaux signés et ratifiés, la Constitution prévoit l'usage national de ces documents, y compris donc ceux qui assurent une protection contre la discrimination et/ou consacrent le principe de l'égalité.

Jusqu'en 2010, les dispositions antidiscrimination étaient dispersées entre plusieurs lois. En avril 2010, la loi antidiscrimination<sup>47</sup> – première loi générale en matière d'égalité – a été adoptée dans le cadre du processus d'alignement sur l'acquis de l'UE. Cette loi n'est pas conforme aux directives pour ce qui concerne la liste minimale des motifs protégés; les définitions et les formes de discrimination; les sanctions efficaces, proportionnées et dissuasives; l'utilisation de données statistiques; et le dialogue avec le secteur des ONG. L'organisme pour l'égalité institué par cette loi – à savoir la Commission pour la protection

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<sup>43</sup> La Décennie de l'inclusion des Roms, initiative régionale pour l'amélioration de la situation des Roms en matière de santé, de logement, d'éducation et d'emploi, s'est achevée en 2015.

<sup>44</sup> Le pays compte un ministre rom au sein du gouvernement, une municipalité rom (Shuto Orizari), des députés roms, etc.

<sup>45</sup> Le rapport du Rapporteur spécial sur la liberté de pensée et d'opinion, les rapports annuels de la *Freedom House*, l'Indice de durabilité des organisations de la société civile, et *Nations in Transit* sont unanimes à constater le déclin de la liberté en général et de la démocratie dans le pays.

<sup>46</sup> Le texte de la Constitution de la République de Macédoine (*Устав на Република Македонија*) peut être consulté en français sur: <http://www.sobranie.mk/constitution-de-la-r-publique-de-mac-doine.nspix>

<sup>47</sup> Loi sur la prévention et la protection contre la discrimination (*Закон за спречување и заштита од дискриминација*) Journal officiel de la République de Macédoine, n° 50/10, 44/2014, 150/2015. Arrêt de la Cour constitutionnelle: У.6р.82/2010 (15 septembre 2010).

contre la discrimination — ne saurait par ailleurs être considéré comme répondant aux exigences de la directive 2000/43.

La loi antidiscrimination assure une protection par rapport aux motifs suivants: couleur de la peau, genre, appartenance à un groupe marginalisé, appartenance ethnique, langue, citoyenneté, origine sociale, éducation, affiliation politique, situation personnelle ou sociale, situation familiale ou état matrimonial, fortune et état de santé. Elle ne protège pas explicitement la liste minimale des motifs établie par les directives, étant donné qu'elle limite la portée des convictions et qu'elle exclut l'orientation sexuelle. Elle comporte toutefois une clause ouverte en son article 3 («tout autre motif prévu par la loi ou par un traité international ratifié») ainsi que plusieurs autres motifs non couverts par les directives.

L'évaluation ex post de la mise en œuvre de la loi antidiscrimination, effectuée en 2013 sous la direction du ministère du Travail et de la politique sociale avec le soutien la mission de l'OSCE à Skopje, montre que les objectifs de la loi<sup>48</sup> n'ont été que partiellement atteints – ce qui, selon le rapport d'évaluation, s'explique au vu du montant que le budget national alloue à sa mise en œuvre. Tout en soulignant plusieurs points sur lesquels des améliorations pourraient être apportées, le rapport ne formule explicitement que trois recommandations en vue de changements législatifs destinés à améliorer la mise en œuvre de la loi antidiscrimination: une modification de cette loi de façon à permettre l'instauration d'un soutien administratif à la Commission pour la protection contre la discrimination; l'obligation explicite du «renversement de la charge de la preuve» pour cette Commission; et le renforcement de ses mécanismes de responsabilisation.

En 2014 et 2015, la mission de l'OSCE à Skopje a soutenu une analyse complète de l'harmonisation de la législation nationale relative à l'égalité et la non-discrimination à la fois sur le plan externe (par rapport aux normes internationales) et sur le plan interne (dans le cadre des lois et réglementations nationales). L'analyse recense une série de points à harmoniser avec le droit de l'UE et la pratique de la CJUE, de même qu'avec d'autres normes internationales en matière d'égalité et de non-discrimination.<sup>49</sup>

### **3. Principes généraux et définitions**

La loi antidiscrimination contient des définitions de la discrimination directe et indirecte, du harcèlement, de l'injonction de discriminer et de la rétorsion. La définition de la discrimination directe est inutilement compliquée par rapport à celle figurant dans les directives, tandis que celle de la discrimination indirecte reproduit textuellement la définition des directives. La loi contient un article relatif au harcèlement et au harcèlement sexuel, de même qu'un article distinct concernant la discrimination envers les personnes handicapées. La discrimination multiple est considérée comme une forme grave de discrimination, au même titre que la discrimination répétée et étendue. La loi contient également une disposition visant l'incitation et l'encouragement à pratiquer une discrimination. Elle ne contient aucune disposition relative à la discrimination par association.

La loi définit une série d'exceptions et de dérogations en rapport avec la nature d'activités professionnelles spécifiques et/ou un traitement spécial à l'intention de certains groupes (personnes âgées, jeunes, femmes enceintes, personnes handicapées et parents). L'aménagement raisonnable est principalement inclus dans la loi sur l'emploi des personnes handicapées. Le champ d'application personnel et matériel de la liste des exceptions

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<sup>48</sup> La loi antidiscrimination ne contenant aucune disposition relative à ses objectifs, l'équipe chargée de l'évaluation ex-post a considéré, sur base de l'analyse d'autres documents, qu'il s'agissait de la prévention de la discrimination et de la protection contre la discrimination.

<sup>49</sup> Kotevska, Biljana, *Analysis of the harmonization of national equality and non-discrimination legislation* (à paraître – 2016; OSCE et Commission pour la protection contre la discrimination).

manque toutefois de précision, ce qui ouvre la porte à des interprétations de la loi susceptibles de restreindre la protection contre la discrimination.

Avant l'adoption de la loi antidiscrimination, plusieurs lois contenaient des définitions de la discrimination. Étant donné que la loi antidiscrimination ne prévoit – ni dans ses dispositions transitoires ni dans ses dispositions finales – d'harmonisation entre les dispositions pertinentes figurant dans différentes lois, on peut s'attendre à ce que les institutions censées appliquer la loi ne sachent pas quelle législation et/ou disposition appliquer à un cas d'espèce ni quelles sont les dispositions prévalant sur les autres. Bien que, par tradition, les principes résumés dans les adages *lex specialis derogat legi generali* et *lex posterior derogat legi priori* fassent partie de la pratique judiciaire, les juges tendent à s'appuyer sur des dispositions existantes plutôt que sur des principes juridiques généraux, même lorsqu'ils confrontés à des dispositions apparemment contradictoires, les principes généraux du droit étant surtout utilisés en cas de lacune juridique (comme prévu au titre de la loi relative aux tribunaux).

La Stratégie nationale pour l'égalité et l'interdiction de discrimination fondée sur l'origine ethnique, le genre, l'âge et le handicap (première politique publique globale en matière d'égalité), a été mise en œuvre durant la période 2012-2015 au moyen de plans opérationnels adoptés chaque année. Le ministère du Travail et de la politique sociale a organisé en décembre 2015 la première consultation publique concernant la nouvelle stratégie intitulée «Stratégie pour l'égalité et la non-discrimination 2016-2020».<sup>50</sup>

#### **4. Champ d'application matériel**

La loi antidiscrimination est applicable à fois au secteur public et au secteur privé, de même qu'à tous les domaines. Elle précise qu'une attention particulière doit être accordée aux domaines suivants: l'emploi et les relations de travail; l'affiliation et la participation à des syndicats, des partis politiques, des ONG, des fondations et d'autres organisations associatives; la sécurité sociale, y compris la protection sociale, les pensions et l'assurance-invalidité; l'assurance-santé et les soins de santé; l'éducation; l'accès aux biens et aux services; et le logement. Cette loi va donc au-delà des prescriptions des directives. D'autres lois contiennent également des dispositions en matière de discrimination, ainsi qu'une définition de leur champ d'application matériel. Toutes s'appliquent à la fois au secteur public et au secteur privé, à l'exception de la loi sur le Médiateur qui offre une protection contre la discrimination dans la sphère publique uniquement.

Le chapitre III de la loi antidiscrimination, consacré aux exceptions au principe de la non-discrimination, prévoit les trois exceptions et dérogations suivantes:

- Les mesures positives (article 13): mesures qui, prises par des personnes physiques ou morales, ne sont pas considérées comme discriminatoires lorsqu'elles sont instaurées sur la base d'une justification passée, actuelle ou future, et qui peuvent être adoptées jusqu'à ce qu'une égalité de fait soit intégralement réalisée et jusqu'à ce que les inégalités de fait soient éliminées ou réduites.
- Le traitement différencié non considéré comme discriminatoire (article 14): traitement différencié des non-citoyens; exigence professionnelle essentielle; traitement différencié fondé sur la religion, les convictions, le sexe ou autres caractéristiques personnelles pour ce qui concerne l'éducation et la formation en vue de l'exercice d'une profession liée à une religion déterminée; activités menées par les membres et instances d'églises ou de communautés religieuses, d'organisations citoyennes, de partis politiques, de syndicats ou d'autres organisations conformément à leur doctrine ou leurs convictions et/ou aux objectifs définis par

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<sup>50</sup> À l'heure de rédiger le présent rapport, cette stratégie n'avait pas encore été adoptée. De surcroît, selon des informations accessibles au public, aucune analyse de la mise en œuvre de la stratégie précédente n'a été publiée.

leurs statuts, leurs programmes et/ou leurs réglementations; réglementation du mariage; exercice du principe constitutionnel de la liberté de parole, d'intervention publique, de pensée et d'information publique; et fixation d'un âge minimum et maximum pour ce qui concerne l'accès à une profession/l'octroi de privilèges/la retraite pour autant qu'il existe un but légitime.

- Les mécanismes de protection destinés à des catégories particulières de personnes (article 15): mécanisme de protection des femmes enceintes et des mères; pour les enfants orphelins, les mineurs, les parents célibataires et les personnes handicapées; pour la participation égale des femmes et des hommes; pour l'incitation à l'emploi; pour l'instruction et la formation des personnes handicapées; pour l'avancement de l'âge minimum et de l'âge maximum permettant d'accéder à certains niveaux d'éducation et de formation pour autant que ce traitement différencié soit objectivement justifié par un but légitime et qu'il n'aille pas au-delà de ce qui est nécessaire compte tenu de la nature de l'éducation et de la formation en cause ou des conditions dans lesquelles elles sont dispensées, et qu'il n'aille pas au-delà de ce qui est nécessaire pour atteindre le but recherché; des mesures spéciales en faveur de personnes ou de groupes se trouvant en situation défavorisée en raison d'un quelconque motif de discrimination, afin de leur accorder une égalité de chances, pour autant que les mesures en question soient nécessaires; des mesures destinées à protéger les spécificités et l'identité de personnes appartenant à des minorités ethniques, religieuses ou linguistiques ainsi que leur droit de tenir à leur propre identité et de la développer individuellement ou au sein d'une communauté avec d'autres membres du groupe, et mesures destinées à favoriser l'instauration de conditions propices à la promotion de cette identité; et, le cas échéant, des mesures dans le domaine de l'éducation et de la formation en vue de garantir la participation des minorités ethniques.

Il existe dans le domaine de l'emploi, outre la loi antidiscrimination, une loi sur les relations de travail<sup>51</sup> qui interdit toute discrimination conformément aux normes fixées par les directives. Les deux lois s'appliquent tant au secteur public qu'au secteur privé.

## **5. Mise en application de la loi**

La Constitution confère aux citoyens le droit d'intenter une action devant une juridiction ordinaire dans le cadre d'une procédure rapide pour faire valoir leurs libertés et droits fondamentaux. Dans la pratique toutefois, bien que la procédure ait déjà été invoquée à plusieurs reprises, la Cour constitutionnelle s'est montrée très réticente à se saisir d'affaires de discrimination, autrement dit d'affaires touchant aux droits et libertés des citoyens en général.

Les lois en vigueur manquent de clarté pour ce qui est du traitement des plaintes pour discrimination. Elles prévoient des procédures différentes dans des cas similaires – ces procédures pouvant aller de la simple inspection, procédure contraventionnelle, procédure contentieuse ou procédure administrative à une procédure pénale. La loi antidiscrimination envisage plusieurs possibilités de protection juridique, à savoir la procédure administrative, la procédure contentieuse et la procédure contraventionnelle.

Une procédure administrative engagée auprès de la Commission pour la protection contre la discrimination est gratuite. Cette instance peut formuler des avis et des recommandations. La procédure a une durée maximale de 90 jours. Si la recommandation n'est pas suivie d'effet, la Commission en question peut engager une procédure auprès de l'instance compétente (la loi ne fournissant aucune autre précision). La Commission pour

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<sup>51</sup> Loi sur les relations de travail (*Закон за работните односи*), Journal officiel de la République de Macédoine n° 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014; arrêts de la Cour constitutionnelle : U. n° 139/2005, U. n° 161/2005, U. n° 134/2005, U. n° 187/2005, U. n° 111/2006, U. n° 188/2006, U. n° 170/2006, U. n° 200/2008, U. n° 20/2009, U. n° 176/2009, U. n° 263/2009, U. n° 62/2013.

la protection contre la discrimination a été saisie de 70 dossiers en 2015, soit un tiers de moins qu'en 2014. Elle estime dans son rapport annuel que cette forte diminution du nombre de cas signalés est liée à ses faibles capacités techniques – lesquelles n'expliquent cependant pas pourquoi moins de personnes ont adressé une plainte à la Commission en 2015 qu'en 2014. Une explication davantage plausible de la diminution en question pourrait être une perte de confiance dans l'institution à la suite de l'affaire des écoutes téléphoniques, pour les raisons exposées à la section 1.

En vertu des dispositions de la loi antidiscrimination, une procédure contentieuse peut aussi être intentée devant des juridictions ordinaires. La loi n'établit pas l'ordre de priorité de procédures simultanées éventuelles, mais elle dispose qu'aucune procédure ne peut être engagée auprès de la Commission pour la protection contre la discrimination lorsqu'une action en justice est déjà en cours. Elle ne précise pas en revanche ce qu'il convient de faire lorsqu'une procédure a été engagée auprès de ladite Commission et qu'une autre procédure est engagée par la suite (mais avant la fin de la procédure devant la Commission) devant un tribunal. De même, aucune loi ne régit les relations entre les procédures respectivement engagées auprès du Médiateur et auprès de la Commission pour la protection contre la discrimination: ces relations sont régies par un protocole d'accord entre les deux institutions.

En vertu de la loi antidiscrimination, l'issue de la procédure dépend de la filière choisie. La procédure administrative prévoit une recommandation invitant à mettre fin à l'infraction (autrement dit à la discrimination) dans un délai de 30 jours; la procédure contentieuse peut donner lieu à l'octroi d'une indemnité régulière; et la procédure contraventionnelle prévoit des amendes allant de 70 à 1 000 euros (en monnaie nationale). Le code pénal prévoit des sanctions financières et autres en cas de discrimination, mais ces dispositions n'ont encore jamais été appliquées.

Une autre procédure visant à protéger les droits, y compris les droits à l'égalité et la protection contre la discrimination, peut être engagée auprès du Médiateur, mais elle est limitée à la sphère publique. Le Médiateur est chargé de défendre les principes de la non-discrimination et de la représentation équitable. En 2015, le pourcentage de plaintes adressées au Médiateur pour cause de discrimination est resté faible puisqu'il s'agit de 53 cas, soit 1,2 % du nombre total d'affaires dont il a été saisi. Comme les années précédentes, la majorité des dossiers introduits en 2015 concernaient le domaine de l'emploi et le motif de l'origine ethnique. Le fait que le nombre de cas signalés au Médiateur n'ait pas connu un recul aussi flagrant qu'en ce qui concerne la Commission pour la protection contre la discrimination confirme l'hypothèse d'une perte de confiance à l'égard de cette dernière par suite de l'affaire des écoutes téléphoniques (voir la section 1).

Ni la loi antidiscrimination ni les lois antérieures ne font du test de situation et des preuves statistiques des éléments probants recevables et des instruments utilisables dans le cadre d'affaires de discrimination. La pratique n'y recourt pas. Les preuves statistiques ne sont pas mentionnées dans la législation nationale. En réalité, les statistiques sont uniquement évoquées dans le cadre des obligations de l'organisme pour l'égalité (à savoir la collecte de statistiques).

La loi antidiscrimination prévoit, tout comme plusieurs autres lois, le renversement de la charge de la preuve. Sa définition ne respecte cependant pas les directives, étant donné que la loi fait reposer sur la victime potentielle d'une discrimination l'obligation de fournir des éléments factuels et des preuves à l'appui de sa plainte. Cette exigence fait peser sur la victime potentielle une part déraisonnablement disproportionnée de la charge de la preuve. Le renversement de cette charge ne s'applique pas aux délits pénaux relevant du non-respect de l'égalité de traitement. La Commission pour la protection contre la discrimination a appliqué jusqu'ici le renversement de la charge de la preuve conformément à la législation nationale.

Des ONG soutiennent les plaintes déposées par les victimes et portent certaines affaires de discrimination à l'attention du grand public. Tant les médias que le public n'ont cependant pas pour autant une approche constructive de ces affaires, notamment en termes de couverture, mais tendent davantage à rechercher un certain sensationnalisme.

## **6. Organismes de promotion de l'égalité de traitement**

La loi antidiscrimination a créé le premier organisme de promotion de l'égalité de traitement du pays, en l'occurrence la Commission pour la protection contre la discrimination. Ses membres ont été élus en décembre 2010 et elle a commencé de fonctionner en 2011. La Commission traite de dossiers de discrimination au sens de la loi antidiscrimination, c'est-à-dire toute discrimination fondée sur les motifs suivants: sexe, race, couleur de peau, genre, appartenance à un groupe marginalisé, origine ethnique, langue, citoyenneté, origine sociale, religion ou conviction religieuse, autres types de convictions, éducation, affiliation politique, situation personnelle ou sociale, handicap mental ou physique, âge, situation familiale ou état matrimonial, fortune, état de santé ou tout autre motif stipulé dans la législation ou dans un traité international ratifié.

La Commission pour la protection contre la discrimination a été saisie de 70 dossiers en 2015 (un chiffre qui représente un recul d'un tiers par rapport à 2014 (année au cours de laquelle elle avait traité 106 dossiers) et la première diminution depuis la mise en place de l'institution). Les dossiers introduits en 2015 portaient sur les motifs de discrimination suivants: l'origine ethnique (9), la situation personnelle ou sociale (8), un handicap mental ou physique (8), l'âge (8), l'état de santé (8), l'affiliation politique (5), la situation familiale ou l'état matrimonial (4), l'origine sociale (4), la langue (3), l'éducation (3), le sexe (2), la race (2), la citoyenneté (2), la religion ou la conviction religieuse (2), d'autres convictions (2), la fortune (2), la couleur de la peau (1), le genre (1) et l'appartenance à un groupe marginalisé (1); aucun motif n'était invoqué dans 17 cas et 14 invoquaient une discrimination en se référant à «tout autre motif». La discrimination présumée concernait, dans les plaintes déposées, les domaines suivants: l'emploi et les relations de travail (30), l'accès aux biens et aux services (4), la sécurité sociale (14), le système judiciaire et l'administration (4), l'information publique et les médias (3), l'éducation, les sciences et les sports (3) et le logement (4); aucun domaine n'était invoqué par le plaignant dans 13 cas et 3 concernaient d'autres domaines prévus par la loi. Comme les années précédentes, la Commission n'a communiqué aucune statistique quant au nombre de dossiers traités et/ou clôturés en 2015.<sup>52</sup>

La Commission pour la protection contre la discrimination a pour mandat de formuler des conseils et des recommandations concernant des cas de discrimination; de fournir des informations et d'engager des procédures auprès des organismes officiels compétents; de réaliser des rapports et de prester des services éducatifs et de formation; d'initier des changements législatifs; de coopérer avec les administrations locales, les ONG et d'autres organismes de promotion de l'égalité et organisations internationales pertinentes; de collecter des données statistiques, de créer des bases de données et de procéder à des recherches.

Aucun organisme national de promotion de l'égalité n'était en place avant l'adoption de la loi antidiscrimination. Certaines compétences en matière de discrimination relèvent de la mission du bureau du Médiateur. Les relations entre le Médiateur et la Commission pour la protection contre la discrimination ne sont pas régies par la loi antidiscrimination (elles sont partiellement régies par un protocole d'accord). En vertu de son mandat général, le Médiateur peut être saisi de plaintes individuelles, les instruire, formuler des recommandations et des avis, engager des procédures, et assurer un suivi et effectuer des recherches sur des questions spécifiques, en se focalisant sur la protection par rapport aux

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<sup>52</sup> Commission pour la protection contre la discrimination (Комисија за заштита од дискриминација), Rapport annuel 2015 (2016) <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>.

motifs cités dans la Constitution et sur les infractions commises par des instances publiques.

## **7. Points essentiels**

Les aspects les plus préoccupants dans le contexte national sont :

- la non-inclusion de l'orientation sexuelle en tant que motif expressément protégé dans la loi générale antidiscrimination;
- l'harmonisation interne insuffisante de la législation nationale avec la loi antidiscrimination et les normes internationales;
- le peu de ressources allouées aux deux institutions nationales en matière de droits de l'homme dont le mandat couvre l'égalité et la non-discrimination, ce qui les empêche d'exercer pleinement leurs compétences;
- l'impunité des crimes de haine et des discours haineux, à l'égard de l'orientation sexuelle plus particulièrement;
- de sérieuses problématiques en termes d'État de droit, y compris le manque d'indépendance de l'appareil judiciaire et la politisation des institutions de l'État, qui entraînent une perte de confiance des citoyens dans les institutions;
- le manque d'indépendance de l'organisme pour l'égalité qui, dans son positionnement et son fonctionnement actuels, ne peut être considéré comme conforme aux directives.

## ZUSAMMENFASSUNG

### 1. Einleitung

Mazedonien (ehemalige jugoslawische Republik)<sup>53</sup> ist ein multiethnisches Binnenland im Südosten Europas und erklärte sich 1991, nach der Auflösung Jugoslawiens, für unabhängig. Seit 2005 ist das Land Bewerber um eine Mitgliedschaft in der Europäischen Union und im Jahr 2008 erhielt es eine bedingte Einladung zur Mitgliedschaft im Atlantischen Bündnis. Obwohl diese Prozesse für das Land zu den außenpolitischen Prioritäten zählen, ruhen derzeit beide. Bis 2014 wurde der Namensstreit auch als Hauptgrund dafür genannt, dass keine Verhandlungen über eine Mitgliedschaft in der EU aufgenommen wurden. Sowohl 2014 als 2015 kamen in den Fortschrittsberichten der Europäischen Kommission<sup>54</sup> jedoch erhebliche Bedenken in Bezug auf grundlegende Fragen der Rechtsstaatlichkeit (Parteilichkeit von Institutionen und Gesellschaft, Unabhängigkeit der Justiz, Freiheit der Medien usw.) zum Ausdruck. Zu den innenpolitischen Prioritäten gehören nach wie vor die Umsetzung<sup>55</sup> des Rahmenabkommens von Ohrid,<sup>56</sup> die Verringerung der Arbeitslosenquote<sup>57</sup> und die Bekämpfung der Armut.<sup>58</sup>

Ende 2014 und Anfang 2015 gab es massive Proteste von Studenten und Gymnasiasten, Freiberuflern, unabhängigen Gewerkschaften, Arbeitern und Arbeiterinnen, die während der Transitions- und Transformationsprozesse entlassen worden waren. Im Februar 2015 offenbarte die Abhöraffaire eine noch ernstere innenpolitische Situation. Die größte Oppositionspartei begann, Mitschnitte von Gesprächen von mehr als 20 000 Menschen zu veröffentlichen, die vom staatlichen Geheimdienst offenbar illegal abgehört worden waren.<sup>59</sup> Der Inhalt der veröffentlichten Mitschnitte zerstreute die Zweifel an den bereits erhobenen Vorwürfen einer „Staatsvereinnahmung“<sup>60</sup>, einer extremen Machtkonzentration innerhalb der Regierungspartei und einer vollständigen Parteikontrolle – nicht nur über die Justiz, sondern über *alle* Aspekte der Gesellschaft. Die Ombudsperson leitete im Zusammenhang mit der Abhöraffaire zwei Verfahren ein, da massive Verletzungen des Rechts auf Privat- und Familienleben festgestellt wurden. Die Ombudsperson äußerte sich empört über die mangelnde Reaktion des Geheimdienstes auf ihre Ersuchen um zusätzliche Informationen, die sie im Rahmen ihrer Ermittlungen zu den beiden Verfahren sammelte. Die Ombudsperson hat dieses Problem dem Parlament gemeldet, von diesem jedoch keinerlei Unterstützung oder Rückmeldung erhalten.<sup>61</sup>

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<sup>53</sup> Der amtliche Name des Landes lautet „Republik Mazedonien“. Bis zur Beilegung des Namensstreits mit Griechenland wurde das Land im Rahmen der UN-Resolution A/RES/47/225 jedoch unter der provisorischen Bezeichnung „ehemalige jugoslawische Republik Mazedonien“ als Mitglied der Vereinten Nationen zugelassen. Diese Bezeichnung wird von der Europäischen Kommission und deshalb auch in diesem Bericht verwendet.

<sup>54</sup> Europäische Kommission (2015), *The Former Yugoslav Republic of Macedonia – Progress Report* [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_the\\_former\\_yugoslav\\_republi\\_c\\_of\\_macedonia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republi_c_of_macedonia.pdf). Letzter Zugriff auf alle Hyperlinks: 27.05.2016.

<sup>55</sup> Obwohl nicht das Rahmenabkommen von Ohrid selbst umgesetzt wird, sondern verfassungsrechtliche und gesetzliche Bestimmungen und strategische Dokumente, die sich aus der Unterzeichnung des Abkommens ergeben, wird hier der Ausdruck „Umsetzung des Rahmenabkommens“ verwendet, um langwierige Umschreibungen zu vermeiden.

<sup>56</sup> Das Rahmenabkommen von Ohrid wurde Ende 2001 zur Beendigung des bewaffneten Konflikts unterzeichnet und hat das Ziel, die Lage ethnischer Minderheiten zu verbessern und den multiethnischen Charakter des Landes im öffentlichen Leben widerzuspiegeln, insbesondere durch Maßnahmen zur Förderung der Gleichbehandlung und gleichberechtigten Repräsentation von Minderheiten.

<sup>57</sup> Nach Angaben des Staatlichen Amtes für Statistik belief sich die Arbeitslosenquote im letzten Quartal 2015 auf 24,6 % der Erwerbsbevölkerung, wohingegen 42,7 % erwerbstätig sind.

<sup>58</sup> Der Laeken-Indikator für Armut für 2014 (letzte verfügbare Statistik) ist 22,1 %.

<sup>59</sup> Balkan Insight (2015), *"Macedonia PM Accused of Large-Scale Wire-Tapping"* (Telefonüberwachung im großen Maßstab: Anschuldigungen gegen mazedonischen Ministerpräsidenten) (09.02.2015), Webseite von *Balkan Insight*, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

<sup>60</sup> Der Begriff „Staatsvereinnahmung“ (*state capture*) wird hier so verwendet, wie Transparency International ihn versteht: „eine Situation, in der mächtige Individuen, Institutionen, Unternehmen oder Gruppen innerhalb und außerhalb eines Landes Korruption einsetzen, um Politik, rechtliches Umfeld und Wirtschaft des Landes so zu gestalten, dass ihren eigenen Interessen begünstigt werden“.

<sup>61</sup> Jahresbericht der Ombudsperson für 2015, Ombudsperson der Republik Mazedonien (2016).



Hervorzuheben ist, dass das, was die Stimme des Leiters der Gleichstellungsbehörde Dushko Minovski zu sein scheint, in den veröffentlichten Gesprächen ebenfalls auftaucht; er ist zu hören als jemand, der sich im Wahlkampf vor Ort für die Regierungspartei engagiert und sogar seine Position im Ministerium für Arbeit und Sozialpolitik benutzt (bzw. missbraucht), um Menschen, denen soziale Unterstützung gewährt wurde, zu instruieren, wie sie wählen sollen. Darüber hinaus ist eine Stimme – offensichtlich die der damaligen Innenministerin Gordana Jankulovska<sup>62</sup> – in einem Gespräch zu hören, aus dem deutlich der Druck hervorgeht, der auf die Roma-Gemeinde ausgeübt wurde, damit sie am Wahltag entsprechend den Anweisungen wählen ging.<sup>63</sup> Nach Veröffentlichung dieser Mitschnitte protestierten Roma-Organisationen gegen die Regierung und forderten den Rücktritt von Jankulovska.<sup>64</sup> Diese veröffentlichte daraufhin ein Schreiben, das eine Entschuldigung an die Roma-Gemeinschaft sein sollte, in Wirklichkeit aber eine bloße Wiederholung aller Maßnahmen war, die das Land ergriffen hatte, um die Lage der Roma zu verbessern.<sup>65</sup>

Das Land hat eine Bevölkerung von etwas mehr als zwei Millionen.<sup>66</sup> Die ethnische Zugehörigkeit ist wichtig, weil zahlreiche Rechte und Fördermaßnahmen an den zahlenmäßigen Anteil einer ethnischen Gemeinschaft innerhalb der Gesamtbevölkerung geknüpft sind. Die ethnische Zusammensetzung<sup>67</sup> ist wie folgt: 64 % ethnische Mazedonier, 25 % ethnische Albaner, 4 % ethnische Türken, 3 % ethnische Roma, 2 % ethnische Serben, 1 % ethnische Bosnier, 0,5 % ethnische Walachen und 1 % „sonstige“ (in der Verfassung verwendeter Begriff).

Zusammenhangslose gesetzliche und institutionelle Reformen haben einen Rahmen geschaffen, der die Rechtssicherheit in Frage stellt. Ständige Gesetzesänderungen, Missachtung des Grundsatzes der politischen Partizipation und Unterfinanzierung der beiden nationalen Menschenrechtsstellen (die für Gleichbehandlung und Antidiskriminierung zuständig sind) sind nur einige der dringendsten Probleme. Sie haben Auswirkungen auf das rechtliche und institutionelle System des Landes sowie auf die Verwirklichung des Grundsatzes der Gleichheit und Nichtdiskriminierung und die Maßnahmen zu dessen Einhaltung.

Obwohl die Regierung ihre Maßnahmen zum Schutz der Rechte von Minderheiten<sup>68</sup> als Beweis für die kulturelle Offenheit des Landes anführt, kann davon keine Rede sein. Hassreden sind omnipräsent und werden allgemein akzeptiert. Homophobe Äußerungen und Hassreden gegen Homosexuelle sind nach wie vor sehr häufig. Zudem wurde ein von einer örtlichen zivilgesellschaftlichen Organisation (ZGO) gegründetes Zentrum für LGBT-Personen bereits mehrmals angegriffen. Diese Angriffe wurden noch immer nicht gründlich untersucht und es hat so gut wie keine Anklagen gegeben, weshalb die von verschiedenen ZGO 2014 initiierten Proteste auch 2015 anhielten.

Im Rahmen der Bemühungen, die Schwierigkeiten bei der Verwirklichung der grundlegenden Menschenrechte der Roma zu überwinden, wurden zahlreiche staatliche und geberunterstützte Maßnahmen, darunter auch von der EU unterstützte, durchgeführt.

<sup>62</sup> Gordana Jankulovska trat am 12. Mai 2015 zurück.

<sup>63</sup> Online-Medienportal A1On, „SDSM: Jankulovska sagt, 'An den Ohren werden wir die Zigeuner, einen nach dem anderen, hinschleppen'“ (СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме) <http://a1on.mk/wordpress/archives/465799>. Dabei ist zu beachten, dass „Циган“ (Zigeuner) im nationalen Kontext eine abfällige Bezeichnung für Roma ist.

<sup>64</sup> Nationaler Fernsehsender 24 Vesti, „Roma fordern Rücktritt von Ministerin Jankulovska“ (Ромите бараат оставка од министерката Јанкуловска), <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

<sup>65</sup> Der Brief ist online nicht mehr abrufbar.

<sup>66</sup> Obwohl keine offiziellen Zahlen vorliegen, gehen Schätzungen davon aus, dass in den letzten Jahren zwischen 250 000 und 500 000 Menschen das Land verlassen haben, um im Ausland zu arbeiten.

<sup>67</sup> Alle Zahlen sind gerundete Prozentangaben aus der Volkszählung von 2002. Für 2011 war eine neue Volkszählung geplant; aufgrund von Unklarheiten bei der methodischen Umsetzung wurde sie jedoch abgesagt. Alle Statistiken des Staatlichen Amtes für Statistik sind zu finden unter: [www.stat.gov.mk/](http://www.stat.gov.mk/).

<sup>68</sup> 2011 und 2012 kam es zu Gewaltausbrüchen zwischen verschiedenen Ethnien.

Eine Untersuchung von 2013 zur Umsetzung der „Roma-Dekade“<sup>69</sup> zieht, was die Erreichung der gesteckten Ziele betrifft, (damals) nur zwei Jahre vor dem Ende der Dekade jedoch eine verheerende Bilanz. Der einzige Bereich, in dem von Einbeziehung der Roma gesprochen werden kann, ist wohl der der politischen Partizipation.<sup>70</sup>

Was die Zusammenarbeit zwischen Regierung und ZGOs betrifft, so können – theoretisch – alle NROs, wie schon in früheren Jahren, an öffentliche Anhörungen teilnehmen, mit der Regierung zusammenarbeiten und von dieser sogar finanzielle Unterstützung erhalten. In der Praxis sind es jedoch die NROs, die der Politik der Regierung am wenigsten kritisch gegenüberstehen, die an den politischen Entscheidungsprozessen in erheblichem Maße beteiligt sind. Dies entspricht dem generellen Ansatz der Regierung – alle kritischen Stimmen im Land zum Schweigen zu bringen.<sup>71</sup> Nach wie vor sind von der Regierung organisierte NROs aktiv, um staatliche Maßnahmen im Bedarfsfall öffentlich zu unterstützen. Unter anderem „initiierten“ diese von der Regierung organisierten NROs auch Gegenproteste gegen die Demonstrationen echter NROs.

## 2. Wichtigste Gesetze

Die Verfassung der Republik Mazedonien<sup>72</sup> ist eine geschriebene Verfassung und oberstes Gesetz des Landes. Sie akzeptiert das internationale Recht als Bestandteil des nationalen Rechts und räumt ihm Vorrang vor den Gesetzen und Verordnungen ein. Die Verfassung schützt vor Diskriminierung. Mit der Bestimmung, dass die Bürger der Republik Mazedonien die gleichen Freiheiten und Rechte besitzen, ungeachtet von Geschlecht, Rasse, Hautfarbe, nationaler oder sozialer Herkunft, politischer und religiöser Überzeugung, Eigentum und sozialem Status, betont sie die Gleichheit der Bürger vor der Verfassung und den Gesetzen. Jeder, der sich in seinen Menschenrechten und Grundfreiheiten verletzt fühlt, hat durch die Verfassung die Möglichkeit, vor dem Verfassungsgericht zu klagen. In Übereinstimmung mit einem monistischen Rechtsverständnis hat internationales Recht (die unterzeichneten und ratifizierten internationalen Abkommen) direkte Anwendung im nationalen Rechtssystem und bietet damit auch Schutz vor Diskriminierung bzw. Verstößen gegen den Gleichbehandlungsgrundsatz.

Bis 2010 waren die Antidiskriminierungsvorschriften über mehrere Gesetze verteilt. Im Rahmen des Prozesses der Annäherung an den Besitzstand der Union wurde im April 2010 das Antidiskriminierungsgesetz<sup>73</sup> (ADG) – das erste umfassende Gleichstellungsgesetz – beschlossen. Das Gesetz erfüllt in folgenden Punkten nicht die Anordnungen der Richtlinien: mindestens zu schützende Diskriminierungsgründe, Definitionen und Formen von Diskriminierung, wirksame, verhältnismäßige und abschreckende Sanktionen, Verwendung statistischer Daten und Dialog mit NROs. Die durch das Gesetz eingerichtete Gleichbehandlungsstelle – die Kommission zum Schutz vor Diskriminierung (KSchD) – erfüllt ebenfalls nicht die Anforderungen der Richtlinie 2000/43.

Das ADG schützt die folgenden Diskriminierungsgründe: Hautfarbe, Geschlecht, Zugehörigkeit zu einer marginalisierten Gruppe, ethnische Zugehörigkeit, Sprache, Staatsbürgerschaft, soziale Herkunft, Bildung, politische Zugehörigkeit, persönlicher und

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<sup>69</sup> Die „Roma-Dekade“ war eine regionale Initiative der Regierung, mit der die Situation der Roma-Bevölkerung in den Bereichen Gesundheit, Wohnraum, Bildung und Beschäftigung verbessert werden sollte und die 2015 endete.

<sup>70</sup> Es gibt einen Roma-Minister in der Regierung, eine Roma-Gemeinde (Shuto Orizari), Roma-Abgeordnete usw.

<sup>71</sup> Der Bericht des Sonderberichterstatters für Gedanken- und Meinungsfreiheit, die Jahresberichte von *Freedom House*, der Nachhaltigkeitsindex der Organisation der Zivilgesellschaft und *Nations in Transit* haben allesamt den generellen Verfall der Freiheit und Demokratie im Land bescheinigt.

<sup>72</sup> Der Text der Verfassung der Republik Mazedonien (*Устав на Република Македонија*) ist abrufbar (in englischer Sprache) unter: <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>.

<sup>73</sup> Gesetz zur Verhinderung von und zum Schutz vor Diskriminierung (Закон за спречување и заштита од дискриминација), Amtsblatt der Republik Mazedonien Nr. 50/10, 44/2014, 150/2015. Beschluss des Verfassungsgerichts: У.6р.82/2010 (15.09.2010).

sozialer Status, Familienstand, Eigentum und Gesundheitszustand. Da es Glaube nur eingeschränkt und sexuelle Ausrichtung überhaupt nicht erwähnt, schützt das Gesetz nicht ausdrücklich alle in den Richtlinien vorgegebenen Diskriminierungsgründe. Allerdings enthält es eine offene Formulierung („alle sonstigen durch ein Gesetz oder ein ratifiziertes internationales Abkommen geschützten Gründe“, Art. 3 ADG) und enthält Gründe, die von den Richtlinien nicht erfasst werden.

Die 2013 unter Leitung des Ministeriums für Arbeit und Sozialpolitik mit Unterstützung der OSZE-Mission in Skopje durchgeführte Ex-post-Evaluation zeigte, dass die Ziele des Gesetzes<sup>74</sup> nur zum Teil erreicht wurden – was, laut Evaluationsbericht, angesichts der im Regierungshaushalt für die Umsetzung des Gesetzes veranschlagten Mittel nachvollziehbar war. Obwohl der Bericht zahlreiche Punkte aufzählt, in denen die Umsetzung verbessert werden könnte, werden in ihm nur drei Empfehlungen für entsprechende Änderungen des Gesetzes ausdrücklich genannt: Änderung des Gesetzes zur Schaffung der Voraussetzungen für eine administrative Unterstützung der KSchD, ausdrückliche Verlagerung der Beweislast bei Verfahren vor der KSchD und verbesserte Rechenschaftspflicht der KSchD.

2014 und 2015 unterstützte die OSZE-Mission in Skopje eine umfassende Analyse der Harmonisierung der nationalen Rechtsvorschriften über Gleichbehandlung und Nichtdiskriminierung nach außen (in Bezug auf internationale Standards) und nach innen (in Bezug auf die innerstaatlichen Gesetze und Verordnungen). Das Ergebnis der Analyse nennt verschiedene Punkte einer Harmonisierung mit dem EU-Recht und der Praxis des EuGH sowie mit anderen internationalen Gleichstellungs- und Nichtdiskriminierungsnormen.<sup>75</sup>

### **3. Wichtigste Grundsätze und Begriffe**

Das ADG enthält Definitionen von unmittelbarer und mittelbarer Diskriminierung, Belästigung, Anweisung zur Diskriminierung und Viktimisierung. Im Vergleich zu den Richtlinien ist die Definition von unmittelbarer Diskriminierung unnötig kompliziert, die Definition der mittelbaren Diskriminierung entspricht dagegen den Richtlinien. Das Gesetz enthält einen Artikel über Belästigung und sexuelle Belästigung und einen eigenen Artikel über die Diskriminierung von Menschen mit Behinderung. Mehrfachdiskriminierung wird als besonders schwere Form der Diskriminierung genannt, ebenso wiederholte und andauernde Diskriminierung. Das Gesetz enthält auch Bestimmungen über die Aufhetzung und Ermutigung zur Diskriminierung. Diskriminierung durch Assoziierung wird nicht erwähnt.

Das Gesetz enthält eine Reihe von Ausnahmeregeln. Diese beziehen sich auf die Art bestimmter beruflicher Tätigkeiten bzw. auf besondere Schutzmaßnahmen für bestimmte Gruppen (Senioren, junge Menschen, Schwangere, Menschen mit Behinderung und Eltern). Angemessene Vorkehrungen werden vorwiegend im Gesetz über die Beschäftigung von Menschen mit Behinderung behandelt. Allerdings ist der persönliche und sachliche Anwendungsbereich der Ausnahmeregelungen nicht besonders genau abgegrenzt. Dies ermöglicht Auslegungen, die den gesetzlichen Schutz vor Diskriminierung schwächen.

Vor der Verabschiedung des ADG waren die Definitionen von Diskriminierung auf mehrere Gesetze verteilt. Da das ADG keine Vereinheitlichung der Bestimmungen dieser unterschiedlichen Gesetze in ihren Übergangs- und Schlussvorschriften vorsieht, stehen die Institutionen, die das Gesetz umsetzen sollen, vor der Frage, welches Gesetz bzw. welche Bestimmung sie in einem bestimmten Fall anwenden sollen, d. h. welche

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<sup>74</sup> Da das Antidiskriminierungsgesetz selbst keine Bestimmung zu seinen Zielen enthält, kam das mit der Ex-post-Evaluation betraute Team durch Auswertung anderer Dokumente zu dem Ergebnis, dass es sich bei diesen Zielen um die Verhütung von und den Schutz vor Diskriminierung handelte.

<sup>75</sup> Kotevska, Biljana, *Analysis of the harmonization of national equality and non-discrimination legislation* (Veröffentlichung demnächst – 2016; OSZE und KSchD).

Bestimmungen Vorrang haben. *Lex specialis derogat legi generali* und *lex posterior derogat legi priori* sind traditionelle juristische Grundsätze, aber Richter verlassen sich, selbst bei scheinbar widersprüchlichen Bestimmungen, in der Regel eher auf die bestehende Rechtsprechung als auf allgemeine rechtliche Grundsätze. Allgemeine Rechtsgrundsätze werden nur dann angewendet, wenn eine Partei versucht, eine Gesetzeslücke auszunutzen (gemäß dem Gerichtsverfassungsgesetz).

Zwischen 2012 und 2015 wurde die „Nationale Strategie für Gleichstellung und Nichtdiskriminierung aufgrund von ethnischer Zugehörigkeit, Geschlecht, Alter und Behinderung“ (erste umfassende politische Strategie für Gleichstellung) mithilfe jährlich verabschiedeter operativer Pläne umgesetzt. Im Dezember 2015 führte das Ministerium für Arbeit und Sozialpolitik die erste öffentliche Anhörung zur neuen Strategie, der „Strategie für Gleichstellung und Nichtdiskriminierung 2016-2020“, durch.<sup>76</sup>

#### **4. Sachlicher Anwendungsbereich**

Das ADG gilt für den privaten und den öffentlichen Sektor und für alle Bereiche. Gemäß dem Gesetz ist das Diskriminierungsverbot insbesondere zu beachten in den Bereichen Beschäftigung und Arbeitsverhältnisse, Mitgliedschaft und Mitwirkung in Gewerkschaften, politischen Parteien, NROs, Stiftungen und anderen Mitgliederorganisationen, soziale Sicherheit, einschließlich von Sozialschutz, Renten- und Berufsunfähigkeitsversicherung, Krankenversicherung und Gesundheitsversorgung, Bildung, Zugang zu Gütern und Dienstleistungen und Wohnraum. Damit geht das Gesetz über die Richtlinien hinaus. Auch andere Gesetze enthalten ein Verbot von Diskriminierung und erweitern damit den sachlichen Anwendungsbereich. All diese Gesetze gelten für den öffentlichen und den privaten Sektor, mit Ausnahme des Gesetzes über die Ombudsstelle, die nur vor Diskriminierung durch die öffentliche Hand schützt.

Kapitel III des ADG – Ausnahmen vom Grundsatz der Nichtdiskriminierung – sieht folgende drei Ausnahmen und Befreiungen vor:

- Fördermaßnahmen (Art. 13): Maßnahmen natürlicher oder juristischer Personen, die keine Diskriminierung darstellen, wenn ihre Rechtmäßigkeit früher, jetzt oder künftig nachgewiesen wurde. Diese Maßnahmen dürfen aufrecht erhalten werden, bis eine völlige sachliche Gleichstellung erreicht und sachliche Ungleichheiten beseitigt oder gemindert wurden.
- Ungleichbehandlungen, die keine Diskriminierung darstellen (Art. 14): Ungleichbehandlung von Personen, die keine Staatsbürger sind, wesentliche berufliche Anforderungen, Ungleichbehandlung von Personen aufgrund von Religion, Weltanschauung, biologischem Geschlecht oder anderen Merkmalen bei der allgemeinen und beruflichen Bildung für eine Tätigkeit in Bezug auf die jeweilige Religion, Handlungen von Mitgliedern und Organen von Kirchen und religiösen Gemeinschaften, Vereinen, politischen Parteien, Gewerkschaften und anderen Organisationen gemäß einer Doktrin, Überzeugung oder eines Glaubens und/oder der in einer Satzung, einem Programm und/oder Vorschrift festgelegten Ziele, Ehevorschriften, Ausübung der durch die Verfassung garantierten Redefreiheit, Versammlungsfreiheit, Meinungs- und Informationsfreiheit, und Festlegung eines Mindest- und Höchstalters für den Eintritt in einen Beruf, die Gewährung von Vorrechten oder das Ausscheiden aus dem Beruf, sofern damit ein legitimes Ziel verfolgt wird.
- Schutzmechanismen für spezielle Gruppen (Art. 15): Schutz von Schwangeren und Müttern, elternlosen Kindern, Jugendlichen, Alleinerziehenden und Menschen mit Behinderung; Chancengleichheit von Frauen und Männern; Beschäftigungsförderung;

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<sup>76</sup> Zum Zeitpunkt der Abfassung dieses Berichts ist die Strategie noch nicht verabschiedet worden. Öffentlichen Informationen zufolge wurde außerdem keine Analyse der Umsetzung der vorherigen Strategie veröffentlicht.

allgemeine und berufliche Bildung für Menschen mit Behinderung; ein erwartetes Mindest- und Höchstalter für den Zugang zu bestimmten Stufen der allgemeinen und beruflichen Bildung, sofern dieses zur Erreichung eines rechtmäßigen Ziels objektiv gerechtfertigt ist, und das erforderliche Alter das Ausmaß dieser Ungleichbehandlung im Hinblick auf die Natur der Fort- oder Ausbildung oder die Umstände ihrer Ausübung und das Ausmaß dieser Ungleichbehandlung nicht den Rahmen übersteigt, der für die Erreichung des rechtmäßigen Ziels notwendig ist; Fördermaßnahmen für bestimmte Personen oder Gruppen, die wegen eines Diskriminierungsgrundes benachteiligt sind, zum Zweck der Verbesserung der Chancengleichheit, solange diese Maßnahmen notwendig sind; Maßnahmen zum Schutz der Merkmale und der Identität von Personen, die einer ethnischen, religiösen oder sprachlichen Minderheit angehören, und deren Rechte zur Pflege und Entwicklung der eigenen Identität, allein oder gemeinsam mit anderen Mitgliedern der Gruppe, und Maßnahmen zur Schaffung günstiger Bedingungen für die Förderung dieser Identität und Maßnahmen im Bereich der Aus- und Weiterbildung, mit denen die Teilhabe ethnischer Minderheiten gewährleistet wird, sofern diese Maßnahmen notwendig sind.

Im Bereich Beschäftigung wird ein Diskriminierungsverbot neben dem ADG auch vom Gesetz über Arbeitsverhältnisse<sup>77</sup> gewährleistet, das Diskriminierung gemäß den in den Richtlinien genannten Vorgaben verbietet. Diese Gesetze gelten sowohl für den öffentlichen als auch den privaten Sektor.

## **5. Rechtsdurchsetzung**

Gemäß der Verfassung haben Bürger bei einer Verletzung ihrer Grundrechte und Freiheiten das Recht auf ein schnelles Verfahren vor einem ordentlichen Gericht. In der Praxis wurden zwar entsprechende Verfahren eingeleitet, das Verfassungsgericht hat jedoch auf Fälle von Diskriminierung, d. h. bei Verletzungen der Grundrechte und Freiheiten der Bürger nur sehr zögerlich reagiert.

Die derzeit geltenden Gesetze regeln nicht eindeutig, wer für Diskriminierungsklagen zuständig ist. Unterschiedliche Gesetze sehen für ähnliche Fälle verschiedene Verfahrensweisen vor. Möglich sind unter anderem behördliche Kontrollen, Ordnungsverfahren, zivilrechtliche Klagen, Verwaltungsverfahren oder Strafverfahren. Das ADG sieht mehrere Schutzverfahren vor, nämlich Verwaltungsverfahren, Klagen und Ordnungsverfahren.

Verwaltungsverfahren vor der KSchD sind kostenlos. Die Kommission kann Gutachten und Empfehlungen erstellen. Das Verfahren kann bis zu 90 Tage dauern. Wenn die Empfehlungen nicht befolgt werden, kann die KSchD ein Verfahren bei einer zuständigen Stelle anstrengen (das Gesetz führt dies nicht näher aus). 2015 gingen bei der KSchD 70 Beschwerden ein – ein Drittel weniger als im Jahr 2014. In ihrem Jahresbericht stellt die Kommission fest, der Rückgang der gemeldeten Fälle hänge mit ihren geringen technischen Kapazitäten zusammen – was jedoch nicht erklärt, warum sich 2015 weniger Menschen bei der KSchD beschwerten als 2014. Eine überzeugendere Erklärung für den Rückgang der Fallzahlen könnte sein, dass es infolge der Abhöraffaire, aus den in Abschnitt 1 erläuterten Gründen, zu einem Vertrauensverlust in diese Institution gekommen ist.

Außerdem kann vor den ordentlichen Gerichten auf Grundlage des ADG Klage eingereicht werden. Wenn beide Verfahren gleichzeitig eingeleitet werden, legt das Gesetz keine

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<sup>77</sup> Gesetz über Arbeitsverhältnisse (*Закон за работните односи*), Amtsblatt der Republik Mazedonien Nr. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014; Urteile des Verfassungsgerichts: U. Nr. 139/2005, U. Nr. 161/2005, U. Nr. 134/2005, U. Nr. 187/2005, U. Nr. 111/2006, U. Nr. 188/2006, U. Nr. 170/2006, U. Nr. 200/2008, U. Nr. 20/2009, U. Nr. 176/2009, U. Nr. 263/2009, U. Nr. 62/2013.

Rangfolge fest. Wenn die Klage vor Gericht bereits eingeleitet ist, kann jedoch kein Verfahren bei der KSChD mehr eröffnet werden. Für den Fall, dass zuerst Beschwerde bei der KSChD eingelegt und vor der Entscheidung der Kommission auch vor Gericht geklagt wird, enthält das Gesetz keine Bestimmungen. Auch die Rangfolge zwischen Verfahren vor der Ombudsstelle und der KSChD sind nicht gesetzlich geregelt, sondern durch eine Absichtserklärung zwischen den beiden Stellen.

Nach dem ADG hängt das mögliche Ergebnis davon ab, für welches Verfahren das Opfer sich entscheidet. Im Verwaltungsverfahren wird innerhalb von 30 Tagen eine Empfehlung zur Berichtigung des Verstoßes (d. h. der Diskriminierung) ausgesprochen, bei einer Klage erhält das Opfer gegebenenfalls Schadensersatz und Ordnungsverfahren führen zu Geldbußen in Höhe von 70 bis 1000 Euro (in mazedonischen Denar). Das Strafgesetzbuch sieht für Diskriminierung Geldstrafen und andere Sanktionen vor. Diese Strafbestimmungen wurden bisher noch nie angewandt.

Zum Schutz der eigenen Rechte, einschließlich des Rechts auf Gleichbehandlung, können Diskriminierungsopfer auch Beschwerde bei der Ombudsstelle einreichen. Dies ist jedoch auf den öffentlichen Sektor beschränkt. Die Ombudsstelle ist für den Schutz des Gleichbehandlungsgrundsatzes und des Grundsatzes der gleichberechtigten Repräsentation zuständig. Der Anteil der Diskriminierungsbeschwerden war nach wie vor gering: 2015 gingen 53 derartige Beschwerden bei der Ombudsstelle ein, das entsprach 1,2 % aller bei der Ombudsstelle eingereichten Beschwerden. Wie schon in den vergangenen Jahren bezogen sich die meisten Diskriminierungsbeschwerden auf den Bereich der Beschäftigung und das Merkmal der ethnischen Herkunft. Die Tatsache, dass die Zahl der bei der Ombudsperson eingereichten Beschwerden weniger stark zurückgegangen ist wie die Zahl der bei der KSChD eingereichten, stützt die Vermutung eines Vertrauensverlusts in die KSChD infolge der Abhöraffaire (siehe oben Abschnitt 1).

Weder im ADG noch in früheren Gesetzen werden Situationstests und statistische Daten als zulässige Beweise und Hilfsmittel in Diskriminierungsfällen eingeführt. Auch in der Praxis wurden diese Beweisformen noch nie genutzt. Statistische Daten werden im mazedonischen Recht nicht erwähnt. Allerdings gehört die Erhebung statistischer Daten zu den Pflichten der Gleichbehandlungsstelle.

Das ADG, wie auch verschiedene andere Gesetze, sieht eine Verlagerung der Beweislast vor. Deren Definition entspricht jedoch nicht den Vorgaben der Richtlinien, da das Gesetz von dem potenziellen Diskriminierungsopfer verlangt, Fakten und Beweis vorzulegen, um seine Behauptung zu untermauern. Dadurch liegt ein unverhältnismäßig großer Teil der Beweislast beim potenziellen Opfer. Bei Strafdelikten im Zusammenhang mit einem Verstoß gegen das Gleichbehandlungsgebot kommt die Verlagerung der Beweislast nicht zur Anwendung. Bisher hat die KSChD die Verlagerung der Beweislast in Übereinstimmung mit den nationalen Rechtsvorschriften angewandt.

NROs unterstützen die Klage von Opfern und machen Fälle von Diskriminierung öffentlich. Die Medien und die Öffentlichkeit behandeln die Berichterstattung über Diskriminierung jedoch nicht konstruktiv, sondern setzen eher auf reinen Sensationsjournalismus.

## **6. Gleichbehandlungsstellen**

Durch das ADG wurde die erste Gleichbehandlungsstelle des Landes eingeführt – die KSChD. Ihre Mitglieder wurden im Dezember 2010 gewählt und im Jahr 2011 nahm die Kommission ihre Arbeit auf. Die KSChD behandelt Diskriminierungsfälle, die unter das ADG fallen. Sie ist für folgende Diskriminierungsgründe zuständig: biologisches Geschlecht, Rasse, Hautfarbe, soziales Geschlecht, Zugehörigkeit zu einer marginalisierten Gruppe, ethnische Zugehörigkeit, Sprache, Staatsbürgerschaft, soziale Herkunft, Religion oder religiöse oder sonstige Weltanschauung, Bildung, politische Zugehörigkeit, persönlicher und sozialer Status, geistige oder körperliche Behinderung, Alter, Familienstand, Eigentum

und Gesundheitszustand und alle sonstigen durch ein Gesetz oder ein ratifiziertes internationales Abkommen geschützten Gründe.

2015 wurden bei der KSChD 70 Beschwerden eingereicht (ein starker Rückgang um ein Drittel im Vergleich zu 2014, als es 106 Beschwerden waren, und der erste Rückgang der Fallzahlen seit Bestehen der Kommission). Die 2015 eingereichten Beschwerden bezogen sich auf folgende Diskriminierungsgründe: ethnische Herkunft (9), persönliche oder soziale Stellung (8), geistige oder körperliche Behinderung (8), Alter (8), Gesundheitszustand (8), politische Zugehörigkeit (5), Familienstand (4), soziale Herkunft (4), Sprache (3), Bildung (3), biologisches Geschlecht (2), rassische Zugehörigkeit (2), Staatsangehörigkeit (2), Religion oder religiöse Überzeugung (2), andere Überzeugungen (2), Vermögensverhältnisse (2), Hautfarbe (1), soziales Geschlecht (1), Zugehörigkeit zu einer marginalisierten Gruppe (1); in 17 Fällen wurde keinerlei Grund angegeben, 14 Fälle beriefen sich auf „sonstige Gründe“. Die mutmaßlichen Fälle von Diskriminierung, auf die sich die eingereichten Beschwerden bezogen, betrafen folgende Bereiche: Beschäftigung und Arbeitsbedingungen (30), Zugang zu Gütern und Dienstleistungen (4), soziale Sicherheit (14), Justiz und Verwaltung (4), öffentliche Informationen und Medien (3), Bildung, Wissenschaft und Sport (3), Wohnungswesen (4); in 13 Fällen gaben die Beschwerdeführenden keinerlei Bereich, in 3 Fällen andere Bereiche als die im Gesetz vorgesehen an. Wie schon in früheren Jahren legte die Kommission keine Zahlen dazu vor, wie viele Fälle 2015 bearbeitet und/oder abgeschlossen wurden.<sup>78</sup>

Die KSChD hat folgende Aufgaben: Beratung und Empfehlungen in Diskriminierungsfällen, Information und Einleitung von Verfahren bei zuständigen staatlichen Stellen, Erstellung von Berichten und Aus- und Fortbildungsunterlagen, Empfehlung von Gesetzesänderungen, Zusammenarbeit mit örtlichen Behörden, NROs und andere Gleichbehandlungsstellen und internationale Organisationen, Erhebung statistischer Daten, Einrichtung von Datenbanken und Durchführung von Forschungsprojekten.

Vor Verabschiedung des ADG gab es keine nationale Gleichbehandlungsstelle. Einige Aufgaben im Bereich Diskriminierung fallen in den Zuständigkeitsbereich der Ombudsstelle. Die Beziehung zwischen der Ombudsperson und der KSChD ist im ADG nicht geregelt (zum Teil basiert diese Beziehung auf einer gemeinsamen Absichtserklärung). Dem allgemeinen Mandat der Ombudsstelle zufolge kann diese Einzelbeschwerden entgegennehmen und untersuchen, Empfehlungen aussprechen und Gutachten erstellen, Verfahren einleiten sowie spezielle Themen beobachten und untersuchen, mit Schwerpunkt auf den in der Verfassung geschützten Diskriminierungsgründen und auf Verstößen, die von staatlichen Stellen begangen werden.

## 7. Wichtige Punkte

Zu den wichtigsten Problemen in Mazedonien gehören folgende:

- die sexuelle Ausrichtung wird im allgemeinen Antidiskriminierungsgesetz nicht ausdrücklich als geschützter Diskriminierungsgrund genannt;
- die innerstaatlichen Rechtsvorschriften wurde weder auf das Antidiskriminierungsgesetz noch auf internationale Normen abgestimmt;
- beide nationale Menschenrechtsstellen, die für Gleichbehandlung und Nichtdiskriminierung zuständig sind, verfügen über geringe Mittel und können ihre Aufgaben daher nicht in vollem Umfang wahrnehmen;
- Hassverbrechen und Hassreden, vor allem im Zusammenhang mit sexueller Ausrichtung, bleiben straflos;

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<sup>78</sup> Kommission zum Schutz vor Diskriminierung (Комисија за заштита од дискриминација), Jahresbericht 2015 (2016), <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>.

- gravierende Rechtsstaatlichkeitsmängel wie fehlende Unabhängigkeit der Justiz und Parteilichkeit der staatlichen Stellen führen zu einem Vertrauensverlust in die Institutionen;
- der Gleichbehandlungsstelle mangelt es an Unabhängigkeit und sie kann, in ihrer derzeitigen Aufstellung und Arbeitsweise, nicht als richtlinienkonform gelten.



## INTRODUCTION

### The national legal system

The Former Yugoslav Republic of Macedonia<sup>79</sup> is a unitary, semi-parliamentarian, civil law country, which adopts the monism principle regarding the relationship between international and municipal law, the former being considered part of the latter, and superior to domestic laws and bylaws,<sup>80</sup> and where, if it is deemed fit and appropriate, courts can use the final judgments of the European Court for Human Rights (ECtHR), International Criminal Court (ICC), or any other international court with jurisdiction over the country.<sup>81</sup> Although in theory directly applicable, references to international law in the jurisprudence of the domestic courts are still very rare and, in practice, the courts do not seem to treat it as higher in the national legal hierarchy than the national laws.

The Constitution prescribes the principle of the separation of powers. The three branches of power are: legislative, executive and judicial.

Legislative power is vested in the Assembly of the Republic (the Parliament). The members are elected on what the Constitution and the laws set out as general, direct and free elections, and by secret ballot.<sup>82</sup> The Parliament has the power to adopt and amend the Constitution, ratify international treaties as well as to adopt and amend laws. There are special procedures in place that aim to ensure that no law touching upon issues of relevance for the non-majority ethnic communities in the country will be adopted without them. This voting mechanism is called the Badinter principle and it requires that a law gain two-thirds of the votes of the members with an affiliation to one of the non-majority ethnic communities. The Parliament has a Standing Inquiry Committee on Human Rights, which is tasked to follow and alert the Parliament on developments related to human rights. The Parliament also elects and appoints the members of the two national human rights institutions – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson.

The executive branch is represented by the President (who holds a rather ceremonial role) and the Government, which has 15 ministries, four Deputy Prime Ministers and six ministers without portfolio. The President is directly elected, whereas the Government is appointed by the Parliament. Within the Government, several ministries share human rights competences. The Ministry of Foreign Affairs hosts the inter-ministerial body on human rights, established with the aim of improving coordination and communication among the Government departments on key human rights issues. Aside from this body – and of relevance to this report, an important division of the executive Government is the Ministry of Labour and Social Policy (MLSP), which is tasked with coordination and development of non-discrimination activities. The Representative for Equal Opportunities

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<sup>79</sup> The constitutional name of the country is 'Republic of Macedonia'. However, pending settlement with Greece on the (on-going) name dispute, under the UN Resolution A/RES/47/225, the country was admitted as a UN member under the temporary reference 'the Former Yugoslav Republic of Macedonia' Former Yugoslav Republic of Macedonia, which is the term used by the European Commission, thus also used for the purposes of this report.

<sup>80</sup> Article 118 of the Constitution states: 'International agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law'. Source: Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia, [www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp](http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp). All hyperlinks were accessed on 18 March 2015.

<sup>81</sup> Former Yugoslav Republic of Macedonia Law on Courts (*Закон за судовите*), Official Gazette of the Republic of Macedonia No. 58/2006, 62/2006, 35/2008, 150/2010; Constitutional Court Decisions: Y.6p.256/2007 (16.04.2008), Y.6p.74/2008 (10.09.2008), Y.6p.124/2008 (14.01.2009), Y.6p.12/2011 (29.02.2012). Article 18(5).

<sup>82</sup> Please see section 11 below for information on the wire-tapping affair, which cast doubt on the respect for these principles in practice, as well as on the separation of powers and the rule of law in the country in general.

of Women and Men is based in the MLSP; each state administrative body has a legal obligation to appoint a coordinator for equal opportunities.<sup>83</sup>

The judiciary consists of the courts.<sup>84</sup> There are 27 courts of first instance (14 with basic competences, and 13 with expanded competences), four courts of appeal, and one Supreme Court. There is also an Administrative Court (court of first instance), and a Higher Administrative Court (court of second instance) with competence in processing administrative cases. Aside from the ordinary courts, there is the Constitutional Court, the primary duty of which is to decide on the constitutionality of laws and bylaws.<sup>85</sup>

There are two institutions that can be considered as national human rights institutions, both acting as quasi-judicial bodies: the Commission for Protection against Discrimination (CPAD), which is the national equality body, and the Ombudsperson of the Republic of Macedonia, (the Ombudsperson), which has duties pertaining to human rights extending beyond equality and non-discrimination.

Local governance in the country is organised through decentralisation of local self-government units. These units are made up of 80 municipalities<sup>86</sup> and the City of Skopje (which is a separate local self-government unit).

Protection in discrimination cases, depending on the personal and material scope of the case, can be sought under several procedures: criminal procedure,<sup>87</sup> civil procedure,<sup>88</sup> administrative procedure,<sup>89</sup> quasi-judicial procedure,<sup>90</sup> and a procedure before the Constitutional Court.<sup>91</sup>

### **List of main legislation transposing and implementing the directives**

The Law on Prevention and Protection against Discrimination<sup>92</sup> (the Anti-discrimination Law, ADL) was adopted on 8 April 2010, and entered into force on 21 April 2010 (implementation began on 1 January 2011). It was last amended on 2 September 2015. Under Article 3, an open-ended clause, the following discrimination grounds are explicitly protected: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, other forms of belief, education, political affiliation, personal or social status, mental or physical disability, age,

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<sup>83</sup> Former Yugoslav Republic of Macedonia, Law on Equal Opportunities of Women and Men (*Закон за еднакви можности на жените и мажите*), Official Gazette of the Republic of Macedonia No.06/2012, 30/2013, 166/2014, 150/2015.

<sup>84</sup> The Judicial Council is the body established to secure and guard the autonomy and independence of the courts. Under the Law on the Academy of Judges and Public Prosecutors a public institution was established for vocational training of candidates for judges and public prosecutors.

<sup>85</sup> Please see section 11 below on the allegations of the complete control of the ruling party over the judiciary as well as on the way in which the appointment of judges has been operating.

<sup>86</sup> Former Yugoslav Republic of Macedonia, Law on Territorial Organisation of Local Self-government (*Закон за територијална организација на локалната самоуправа*), Official Gazette of the Republic of Macedonia, No.55/2004, 12/2005, 98/2008, 149-2014; Constitutional Court Decision: У.6п.40/2005 (26.10.2005). Article 16.

<sup>87</sup> Criminal procedure is an option for discrimination cases that amount to a criminal offence.

<sup>88</sup> Under various laws, in civil proceedings (more details follow in the report below).

<sup>89</sup> Including for misdemeanours.

<sup>90</sup> Procedures before the Commission for Protection against Discrimination and also the Ombudsperson.

<sup>91</sup> Citizens have the right to lodge 'Requests for protection of human rights and freedoms' to this court when they believe that they have been discriminated against on the grounds stipulated in the Constitution. This is a procedure based on urgency, and is envisaged as a mechanism to safeguard the set of rights laid out in the Constitution from unconstitutional acts (laws and bylaws). However, the effectiveness of this mechanism is still under question (according to the ECtHR, a legal remedy needs to be effective not just in theory but also in practice), given that in over 20 years of existence of the mechanism, the Constitutional Court has only once decided in favour of applicants seeking protection under such a request, and has discarded almost all of the filed cases.

<sup>92</sup> Former Yugoslav Republic of Macedonia, Anti-discrimination Law, 2010. Full title: Law on Prevention and Protection against Discrimination (*Закон за спречување и заштита од дискриминација*) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015, Constitutional Court Decision: U.no.82/2010.

family or marital status, property status, health condition. Article 4 on fields of implementation of the law lists several fields, but states that the law also applies to any other field specified under law. The Anti-discrimination Law applies to both public and private sector and to natural and legal persons.

The Law on Labour Relations (Labour Law)<sup>93</sup> was adopted on 28 July 2005, entered into force on 5 August 2005 and was last amended on 31 July 2015. Under Article 6(1), an open ended clause, the following grounds are covered by the law: racial or ethnic origin, colour, gender, age, health condition, that is, disability, religious, political or other belief, membership of trade unions, national or social origin, family status, property and financial situation, sexual orientation or other personal circumstances. The Labour Law applies to labour relations among employers and employees established by conclusion of employment contracts (Article 1), which is understood as any contractual relationship between the employee and the employer where the employee takes part in the employer's organised working process voluntarily, for salary and other remunerations, personally and continuously carries out the work according to the instructions and under the supervision of the employer (Article 5(1)1).

The Law on Employment of Persons with Disabilities<sup>94</sup> was adopted on 2 June 2000, entered into force on 10 June 2000, and was last amended on 27 August 2015. In October 2014, the Ministry of Labour and Social Policy presented a new draft-law and opened a public discussion process. At the time of writing of this report, the draft-law was not yet adopted. The law refers to the ground of disability in the field of employment, namely with regards to:

'special conditions for employment and work of persons with disability [defined as] activity individually as a sole proprietor, with an employer or in the capacity of an employer in the state administration, the local self-government units, public enterprises, institutions, agencies and funds and other state institutions, as well as the conditions for establishment and advantages for working in a trade company for employment of disabled persons – protection company (hereinafter: protection company)' (Article 1).

The Law on Social Protection<sup>95</sup> was adopted on 24 June 2009, entered into force on 2 July 2009, and was last amended on 5 November 2015. It provides for protection against discrimination in relation to the rights established by this law and, in a closed list, encompasses the following grounds: sex, race, colour, national, ethnic, social, political, religious, cultural, language, property and social belonging, disability, and origin.

Please note that these are only the main pieces of legislation transposing the two directives, and the ones that, at the time of adoption were explicitly referred to as being adopted for the purposes of transposition of EU law. As the Anti-discrimination Law was adopted only in 2010, there are provisions on equality and non-discrimination scattered through many laws, including those on primary, secondary and higher education, adult education, various

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<sup>93</sup> Former Yugoslav Republic of Macedonia, Labour Law, 2005. Full title: Law on Labour Relations (*Закон за работните односи*) Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015; Constitutional Court Decisions: U. no. 139/2005, U. no. 161/2005, U. no. 134/2005, U. no. 187/2005, U. no. 111/2006, U. no. 188/2006, U. no. 170/2006, U. no. 200/2008, U. no. 20/2009, U. no. 176/2009, U. no. 263/2009, U. no. 62/2013.

<sup>94</sup> Former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities (*Закон за вработување на инвалидни лица*), Official Gazette of Republic of Macedonia, No. 44/00, 16/2004, 62/2005, 113/2005, 29/2007, 88/2008, 161/2008, 99/2009, 136/2011, 129/2015, 147/2015.

<sup>95</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection (*Закон за социјалната заштита*), Official Gazette of Republic of Macedonia No. 79/2009, 36/2011, 51/2011, 166/2012, 15/2013, 79/2013, 187/2013, 38/2014, 44/2014, 116/2014, 180/2014, 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015; Constitutional Court Decision: U.no.165/2009.

aspects of social protection (including the pension system and health security), and in the field of employment.

## 1 GENERAL LEGAL FRAMEWORK

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Macedonian Constitution includes the following articles dealing with non-discrimination:

- Article 9, a general equality clause on equality before the law, covers the following grounds: sex, race, colour of skin, national or social origin, political and religious belief, property and social status (closed list of grounds). Its personal scope is limited to citizens and, according to the Constitutional Court's practice, natural persons.
- Article 54 prohibits discriminatory limitations of constitutionally prescribed rights and freedoms on grounds of sex, race, colour, language, religion, national or social origin, property or social status.

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

In theory, the constitutional anti-discrimination provisions are directly applicable. However, in practice, this is not the case.<sup>96</sup> Under the Constitution, every citizen may invoke the protection of freedoms and rights prescribed in the Constitution before the ordinary courts and before the Constitutional Court, through a procedure based upon the principles of priority and urgency. However, the ordinary courts have a practice of rejecting Constitution-based human rights claims. The Constitution also guarantees judicial protection of the legality of individual acts of the state administration and of other public institutions (Article 50). One might conclude from this that the provisions are directly applicable. However, this does not seem to be the case in practice. The mechanisms provided in the laws that enable ordinary courts to directly apply the constitutional anti-discrimination provision have not been used and no verdicts have been delivered under this mechanism. In practice, regardless of the procedure invoked, courts insist that a lawsuit is brought invoking provisions of specific laws, and tend not to implement the Constitution directly. On the other hand, the Constitutional Court's positioning and practice is such that it does not enter into revisions of ordinary courts' verdicts and decisions.<sup>97</sup> As a result, there are no requests for interpretation of constitutional provisions from the ordinary courts to the Constitutional Court. Also, ordinary courts rarely seem to use the Constitutional Court's interpretations in their own practice.

Although judicial interpretation would be required, there is no reason to expect that constitutional equality clauses cannot be enforced against private actors (as opposed to public actors).

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<sup>96</sup> See section 1(b) of the 2013 Report: <http://www.equalitylaw.eu/component/edocman/2013-mk-country-report-ln-final/Download>.

<sup>97</sup> See, for example, Constitutional Court cases: U.No.55/2015 (para.4) [24.06.2015]; U.No.152/2012-0-0 (para.4) [14.11.2012]; U.No.172/2002 (para.4) [25.12.2002]; U.No.37/1997 (para.3) [19.03.1997].

## **2 THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination explicitly covered**

The following grounds of discrimination are explicitly prohibited in national law:

- Law on Prevention and Protection against Discrimination: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, other forms of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health condition (open-ended clause) (Article 3).
- Law on Courts: article on aims and functions of courts states that courts aim to secure equality, equal rights and non-discrimination on any ground (Article 3 (1) to (3)); everybody has equal access to the courts (Article 6(1)); during the election of judges and lay judges, there should be no discrimination on the basis of sex, race, colour of skin, national and social background, political and religious beliefs, or property or social status (Article 43(1)).
- Criminal code: article on breach of equality among citizens covers sex, race, colour, national or social origin, political and religious belief, property and social position, language or any other personal quality or occurrence (Article 137(1)); article on incitement of national, racial or religious hatred, divisions and intolerance covers national belonging, race and religious belief (Article 319(1)); article on spread of racist and xenophobic materials through computer systems covers racial, colour, national or ethnic origin, or religious belief (Article 394-r); article on racial and other discrimination covers race, colour, national or ethnic origin (Article 417(1)).
- Law on Execution of Sanctions: race, colour, sex, language, religion, political or other beliefs, national or social origin, relation, property and social status or other status. Grounds refer to the person whose sanction is being executed. Special mention is made of the religious feelings, personal convictions and moral norms of the persons against whom the sanctions are enforced and which must be respected (Article 4(2) and (3)).
- Law on Labour Relations: race or ethnic origin, colour, sex, age, health condition i.e. disability, religious, political or other belief, membership of a trade union, national or social origin, family status, property status, sexual orientation, or other personal circumstances (Article 6(1)).
- Law on Child Protection: race, colour, sex, language, religious conviction, political and other belief, national, ethnic or social origin, cultural and other affiliation, property status, disability, birth, or other status (Article 12(1)).
- Law on Social Protection: sex, race, colour, national, ethnic social, political, religious, cultural, language, property and social belonging, disability and origin (Article 20(1)).
- Law on Patients' Rights: sex, race, colour, language, religion, political or any other belief, national or social origin, belonging to a national minority, material position, birth origin, sexual orientation or any other status (Article 5(2)).
- Law on Public Health: race, sex, national or social origin, property status, religious belief, sexual orientation, or status of a person with disability (Article 16(5)).
- Law on Volunteering: race, colour, sex, age, health status or disability, religious or other conviction, national or social origin, family status, property status, sexual orientation, and other personal circumstances (Article 9).
- Law on Higher Education: selection criteria for enrolment will guarantee equality of all candidates on grounds of race, colour, sex, language, religion, political or other belief, ethnic, national or social origin, property, birth, social position, disability, sexual orientation and age (Article 108(5)).
- Law on Voluntary Financed Pension Insurance: sex, race, colour, language, faith and religion, political or other position, national or social origin, belonging to a national or ethnic minority, or on grounds of property, family, health condition and age (Article 3).

- Law on Health Protection: race, sex, age, national belonging, social origin, religious conviction, political or other belief, property status, culture, language, type of illness, intellectual<sup>98</sup> and physical disability (Article 9).
- Law on Mental Health: sex, language, religion, political or other belief, national or social origin, relatedness, property and social position or other status (Article 20(4))
- Law on Equal Opportunities of Women and Men: race, colour, gender, belonging to a marginalised group, ethnic belonging, language, citizenship, social origin, religion or a religious belief, education, political belonging, personal or social status, intellectual<sup>99</sup> or physical disability, age, family or marital status, property status, health condition or any other ground (Article 4(3)).
- Law on Institutions: sex, race, colour, national or social origin, political and religious belief, property and social position or other status (Article 13(1)).

### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

Although the Anti-discrimination Law contains an article defining key terms used in the law (Article 5), it does not contain definitions of the directives' grounds. Grounds are only listed in the article on discrimination grounds (Article 3) and in the definition of discrimination (Article 5(3)). The only ground with a definition in the law is 'belonging to a marginalised group'. Article 5(1), line 11, defines marginalised group as:

'a group of individuals unified by a specific position in the society, subjected to prejudices, who have special characteristics that make them suitable for certain types of violence, who have less opportunity for exercising and protecting their own rights, or who are exposed to a greater chance of further victimisation'.

A 2013 research study highlighted the fact that two elements of this definition, 'specific position in the society' and 'certain types of violence', stand out as being unclear. The former refers to an easily identifiable characteristic or group (such as, geographic position or smaller religious community) matched with unequal access to resources or to opportunities (for example infrastructure, education, employment), whereas the latter is to be interpreted in accordance with the criminal law.<sup>100</sup> Also, it can be argued that 'persons that are protected under this ground are persons who are likely to be discriminated against on several grounds'<sup>101</sup> and that:

'For some of these persons, the claim for protection against unjustified unequal treatment on grounds of belonging to a marginalised group would best reflect the status that these persons have and which needs to be protected (for example sex workers), while for other groups this ground should be applied if in the circumstances of the specific case it can be concluded that the determining conditions will be the conditions of specific position in society and susceptibility to violence.'<sup>102</sup>

In addition, although it does not define disability, the ADL refers to 'physical and mental disability', out of which 'mental disability' could be interpreted to include psychosocial disability and intellectual disability. In addition to this, several other laws include various terms to refer to disability and various types of disability. A 2015 analysis of the harmonisation of the national legislation found insensitive disability terminology to be a cross-cutting issue. The analysis was conducted on 139 laws, out of which 40 laws referred to disability; in all of these 40 laws the terminology used could not be considered to be in

<sup>98</sup> Literal translation would be 'psychological invalidity' (психички инвалидитет).

<sup>99</sup> Literal translation would be 'mental disability' (ментална попреченост).

<sup>100</sup> Kotevska B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: [www.osce.org/skopje/116789?download=true](http://www.osce.org/skopje/116789?download=true) pp. 51-52.

<sup>101</sup> Najcevska M. and Kadriu B. (2008), *Terminology glossary for discrimination*, Skopje, OSCE and MCIC. p. 61.

<sup>102</sup> Kotevska B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: [www.osce.org/skopje/116789?download=true](http://www.osce.org/skopje/116789?download=true) pp. 51-52.

line either with the spirit of the directives, or with the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the country is a party.<sup>103</sup>

There are no equivalent terms of the directive grounds defined elsewhere in national law, although references can be found in bylaws. This can be aggravating for the design and implementation of public policies and related actions. For example, in relation to ethnicity, a complex set of measures is activated in relation to ethnicity and the implementation of the Ohrid Framework Agreement. However, the legislative changes and strategic documents do not define what ethnicity, or ethnic origin/belonging/affiliation is.

It is important to note, however, that ratified international treaties stand higher than laws in the national legal hierarchy. As reported in Annex 2, the country has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women, the CRPD and the Convention on the Rights of the Child, so interpretation of the discrimination grounds ensuing from these treaties should be considered as valid at the national level. The same applies to the European Convention on Human Rights and the Framework Convention on National Minorities, to which the country is also a party. The resourcefulness and absolute necessity of turning to international law for the definitions of the discrimination grounds is made clear in the *Guide on Discrimination Grounds*, published by the Commission for Protection against Discrimination (the national equality body) in cooperation with the OSCE. In particular, the guide relies heavily on international law sources (including practice from the human rights bodies and courts) in order to carve out the definitions of the discrimination grounds prescribed under the national law.<sup>104</sup>

In conclusion, national law does not provide definitions for age, ethnicity, race, sexual orientation and disability.<sup>105</sup>

### **2.1.2 Multiple discrimination**

In Macedonia, prohibition of multiple discrimination is included in the law.

Multiple discrimination is specified in the Anti-discrimination Law as a severe form of discrimination, and it is defined as discrimination against a person on several discrimination grounds (Article 12). Given the scope of the Anti-discrimination Law, this means that multiple discrimination is prohibited in all fields covered by any national law. No further legal rules or case law exists that would provide more detailed guidance on how to deal with multiple discrimination cases, including on the consequent sanctions (no separate provisions on sanctions for this form of discrimination exist).

In Macedonia there is no case law dealing with multiple discrimination. In 2015<sup>106</sup> no such cases were reported by the courts. The Ombudsperson has not yet reported a case on multiple discrimination. According to its 2015 annual report, the national equality body CPAD received 12 cases (17 % of its annual case load) where applicants claimed discrimination on several grounds. However, the body either did not accept the applications on procedural grounds, or did not find discrimination.<sup>107</sup> The situation was similar in

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<sup>103</sup> The analysis was conducted on 139 laws. Table 2 includes all provisions that contain disability terminology that needs revising. Source: Kotevska, B. *Analysis of the harmonization of national equality and non-discrimination legislation* (forthcoming – 2016; OSCE and CPAD).

<sup>104</sup> Kotevska B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: [www.osce.org/skopje/116789?download=true](http://www.osce.org/skopje/116789?download=true).

<sup>105</sup> For disability it notes two types – mental disability and physical disability. On this matter, please see 2.1.1 above.

<sup>106</sup> Please note that at the time of writing of this report, the annual report for 2015 of the Constitutional Court has not yet been published.

<sup>107</sup> Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) 2015 Annual Report of the Commission for Protection Against Discrimination (2016) <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>.



previous years, so we still cannot tell how the equality body will process such cases in terms of consideration of all, several or one ground, the levels of sanctions, etc.

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Macedonia the national law (including case law) does not prohibit discrimination based on perception or assumption of what a person is.

#### **b) Discrimination by association**

In Macedonia the national law (including case law) does not prohibit discrimination based on association with persons with particular characteristics.

## **2.2 Direct discrimination (Article 2(2)(a))**

#### **a) Prohibition and definition of direct discrimination**

In Macedonia, direct discrimination is prohibited in national law. It is defined in the Anti-discrimination Law, however the definition is unnecessarily more complicated than the one in the directives. Under the Anti-discrimination Law, direct discrimination is taken to occur when one person is treated less favourably, or when there is a differentiation, exclusion, or limitation that results or could result in deprivation, violation or restriction of the equal recognition or exercise of human rights and basic freedoms as compared to the treatment that another person has or could have in the same or similar conditions (Article 6(1)). As opposed to the simple comprehensive encompassing wording of the definition contained in the directives, this definition includes types of treatment (which are gradations of less favourable treatment), thus adding the risk of excluding gradations not mentioned in the definition if restrictive judicial interpretation is applied. It ties the definition to human rights and basic freedoms, which is the formulation contained in the Constitution. Given the weak practice of using international human rights law in domestic courts, this could also be interpreted restrictively by courts (meaning only to apply to discrimination by deprivation, violation or restriction of the equal recognition or exercise of rights mentioned in the Constitution).

Before the adoption of the Anti-discrimination Law, direct discrimination was defined in several other laws as well; the Law on Labour Relations (Article 7(2)) replicating fully the definition from the directives and the Law on Social Protection (Article 21(1)), which also provides a definition in line with the directives. The Law on Child Protection prohibits (Article 13(1)) and defines (Article 14(1)) direct discrimination. The definition in this law is not in line with the directives as it defines direct discrimination only as a situation where a person has been treated less favourably in a comparable situation, but not if the person would be treated in such a manner. Although the literal meaning of the provision might suggest that a person that is treated less favourably is also not covered under the provision (because of the use of past tense in the provision), such a reading does not seem very likely.

#### **b) Justification of direct discrimination**

Although the Anti-discrimination Law does not allow for direct discrimination (justification strictu sensu) (Article 6(1)), it does contain provisions where differences in treatment will not be considered as discriminatory. These are prescribed in more general terms and are not tied to single grounds (Article 14), although several grounds are much more frequent in the justifications that are listed, notably religion or belief, age, ethnic origin, gender (for more on exceptions, see section 4 below). There are tests that must be satisfied to justify such difference in treatment, which include: objective justification, proportionality,

legitimate aim, appropriateness and necessity, genuine and determining occupational requirement. This also includes the possibility for the justification of ethnicity as a 'genuine and determining occupational requirement' (Article 14(1)). Although the wording of the provision states 'overstepping the level necessary for implementation' instead of 'proportional', it can be expected that its interpretation will largely be in line with the Racial Equality Directive.

Prior to the adoption of the Anti-discrimination Law, legislation only included exceptions from discrimination, without referring to justified direct discrimination as such (thus no related tests existed).

### **2.2.1 Situation testing**

#### **a) Legal framework**

In Macedonia, the law is silent on situation testing. There is no mention of situation testing in the Anti-discrimination Law. It is worth noting that Article 206 of the Law on Civil Procedure states that all facts that are important for reaching a decision can be used as evidence, but that it is up to the courts to decide which facts need to be proven and which do not. The Law on Civil Procedure goes on to mention examples of evidence, but situation testing is not one of those examples.

#### **b) Practice**

In Macedonia, situation testing is used in practice by CSOs. In 2014, it was announced that findings from a situation testing case conducted by the Macedonian Helsinki Committee and the OSCE Mission to Skopje will be used for bringing cases to courts and/or the equality body, however no further information has been published since.

### **2.3 Indirect discrimination (Article 2(2)(b))**

#### **a) Prohibition and definition of indirect discrimination**

In Macedonia, indirect discrimination is prohibited in national law. It is defined. The Anti-discrimination Law fully replicates the definition of indirect discrimination from the directives. Indirect discrimination on any protected ground is taken to occur when an apparently<sup>108</sup> neutral provision, criterion or practice would put a person or a group at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 6(2)).

Definitions of indirect discrimination in accordance with the directives are also included in the Law on Labour Relations (Article 7(3)), the Law on Child Protection (Article 14(2)) and the Law on Social Protection (Article 21(2)).

#### **b) Justification test for indirect discrimination**

Under the Anti-discrimination Law, indirect discrimination is justified if

'the provision, criterion, or practice can be considered to have a justified aim, and the means of achieving that aim are appropriate and necessary' (Article 6(2)).

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<sup>108</sup> Please note that a literal translation of the term used for 'apparently' in the Macedonian language version of the law would be 'obviously'. However, this is a clear language error, as the term in the Albanian version of the law (also an official version of the law) is 'të dukshme' ('apparently'). Thus, the intent of the legislator seems clear.

The lack of judicial practice prevents any further comprehension of the elements of those tests.

Also, the definitions of indirect discrimination included in the Law on Labour Relations (Article 7(3)), the Law on Child Protection (Article 14(2)) and the Law on Social Protection (Article 21(2)) provide that an exception is justified if the differentiation is based on criteria and practices objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

c) Comparison in relation to age discrimination

There are no specific references provided on how to develop a test and how to use comparable data in particular cases, including in age discrimination cases.

### 2.3.1 Statistical evidence

a) Legal framework

In Macedonia there are national rules permitting data collection. The main legislation in this area is the Law on State Statistics. Data are collected covering all five grounds except for sexual orientation. The data are anonymous and therefore the collection of such data does not conflict with the Law on Protection of Personal Data.<sup>109</sup>

In relation to data collection, it is also worth noting that Article 206 of the Law on Civil Procedure states that all facts that are important for reaching a decision can be used as evidence, but that it is up to the courts to decide which facts need to be proven and which do not. Furthermore, the text of the law's subsequent articles focuses on specific forms of evidence, but statistical evidence is not mentioned.

The Ministry of Information Society and Administration<sup>110</sup> collects data on administrative servants in the form of a Register of Public Sector Employees. The data to be collected and the access to the register are specified in a bylaw. The data are not publically available, and only persons specified in the rulebook can have access to the register. The data are not anonymous and include the following grounds covered by the directives: ethnic origin, disability, sex and age.

The (state) Employment Agency also collects data on job seekers. The data are not anonymous and cover the grounds of racial or ethnic origin and age. The grounds of belief, disability and sexual orientation are not covered.

Statistics are not used in litigation. However, they are widely used for designing strategic policy documents, including the design and planning of national action plans (including those on positive action). The ministerial cabinet uses statistics extensively in national strategies and positive action measures. With regard to issues of ethnicity, use of data includes planning employment of under-represented non-majority communities (national

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<sup>109</sup> Former Yugoslav Republic of Macedonia, Law on Protection of Personal Data (2005), Full title: Law on Protection of Personal Data (*Закон за заштита на лични податоци*) Official Gazette of the Republic of Macedonia No. 7/2005, 103/2008, 124/2010, 135/2011, 43/2014, 153/2015.

<sup>110</sup> Former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Full title: Law on Administrative Servants (*Закон за административни службеници*) Official Gazette of the Republic of Macedonia, No. 27/2014, 199/2014, 48/2015, 154/2015. Article 7(1)-(9).

minorities) and the priorities in relation to the now-closed Decade of the Roma<sup>111</sup> and the 'National Strategy on Roma 2014-2020'.<sup>112</sup>

On disability, statistics were used for the 'National Strategy on Equalisation of the Rights of Persons with Disabilities' and on age, they were used for the 'National Strategy on the Elderly'. Statistics were also used during the preparation of the first equality strategy adopted in 2012, the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability', as well as for the 2015-2020 National Action Plan for the Implementation of the Law on Prevention and Protection against Discrimination.

In Macedonia the law is silent on using statistical evidence in order to establish indirect discrimination. It neither permits nor prohibits it, which means it would be possible to use statistical evidence in discrimination cases.

The Anti-discrimination Law does not regulate the use of statistical evidence to establish indirect discrimination. This was not even discussed in the course of the preparation of the draft-law. Statistical evidence is only mentioned in the law as part of the duties of the CPAD (Article 24(10)). Statistical evidence is not mentioned in provisions regulating the procedure before the CPAD or in other procedural laws.

Statistical evidence as such is not mentioned elsewhere in national law. The Law on State Statistics<sup>113</sup> does not discuss the use of statistical data as evidence in general, meaning it also does not mention such a possibility in the context of indirect discrimination. Thus, no procedures or conditions for admissibility of such statistical evidence exist, making a breakthrough and usage of such data a distant possibility.

#### b) Practice

In Macedonia, statistical evidence in order to establish indirect discrimination is not used in practice. It remains an issue of a general disregard for statistics and the collection of statistics overall, rather than an issue of the courts' reluctance to use statistics. Thus, it cannot be said that the practice in other countries influences the national law or developments in this respect.

## 2.4 Harassment (Article 2(3))

#### a) Prohibition and definition of harassment

In Macedonia, harassment is prohibited in national law. It is defined under the Anti-discrimination Law. Harassment is taken to occur when there is an act that violates the dignity of a person or group of persons on any of the discrimination grounds, with an aim to or result in violation of the dignity of a specific person or creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 7). The definition complies with the directives.

Harassment does not constitute a criminal offence. It is part of the provisions of the Law on Labour Relations, which deal with harassment, sexual harassment and mobbing. The definition of harassment is in line with the directives (Article 9, 9-a). This definition states

<sup>111</sup> For more information on the projects implemented within the frame of the Decade of the Roma and MLSP activities on Roma rights and integration, please see: *Проекти произлезени од декадата на Ромите* (Roma Decade Related Projects), Ministry of Labour and Social Policy Website, <http://www.mtsp.gov.mk/proekti-proizlezeni-od-dekadata-na-romite.nspix>.

<sup>112</sup> Strategy on Roma 2014-2020 (*Стратегија за Ромите 2014-2020*), [http://arhiva.vlada.mk/registar/files/Strategija\\_Romite\\_%202014-2020.pdf](http://arhiva.vlada.mk/registar/files/Strategija_Romite_%202014-2020.pdf).

<sup>113</sup> Former Yugoslav Republic of Macedonia, Law on State Statistics (1997), Full title: Law on State Statistics (*Закон за државната статистика*) Official Gazette of the Republic of Macedonia No. 54/1997; 21/2007; 51/2011; 104/2013; 42/2014, 192/2015.

that harassment is an unwanted conduct related to the protected grounds with the purpose or effect of violating the dignity of the applicant for employment or the worker, and of creating an intimidating, hostile, humiliating or offensive environment (Article 9(3)). Sexual harassment is every verbal, non-verbal or physical conduct of a sexual character with the purpose or effect of violating the dignity of the job applicant or worker, or of creating an intimidating, hostile, humiliating or offensive environment (Article 9(4)). The law defines psychological harassment or so-called 'mobbing' as every negative and repetitive (for at least a six-month period) conduct with the purpose or effect of violating the dignity of the job applicant or worker, or of creating an intimidating, hostile, humiliating or offensive environment and which has the final objective of ending the working relationship or forcing victims to leave their working positions (Article 9-a(2)).

In Macedonia harassment does explicitly constitute a form of discrimination in the Anti-discrimination Act (Article 7) and in the Law on Labour Relations (Article 9).

It is important to note that in 2013 a special Law on Protection against Harassment in the Workplace<sup>114</sup> was adopted. In terms of the elements constituting harassment, the definitions of the different types of harassment — psychological and sexual — are in line with the ones in the directives. This legislation also outlaws instruction or incitement to harass. The law is silent as to the grounds it covers for psychological harassment. For sexual harassment, the ground – sex — is contained in the title of the type of harassment, although without any clear guidance as to whether multiple grounds could also be considered. An important note here is that the legislature obviously intended to create a distinction between harassment in the workplace and other activities that would not be considered as such, including 'any unjustified distinction during unequal treatment towards the employee on any ground of discrimination which is prohibited and for which protection is provided for under a law'.<sup>115</sup>

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Macedonia the employer and/or the employee could be held liable. Who will be held liable will depend on the complaint – who the alleged victim of harassment is identifying as the discriminator, as well as the details of the case (most notably whether the person has decided to first seek protection from the employer or whether he/she has decided to go directly to court/quasi-judicial body). It is also worth noting that, under the provision on psychological harassment or mobbing in the Law on Labour Relations (Article 9-a), a group of persons/employees can be held liable for harassment as well. The Anti-discrimination Law does not specify in greater detail how liability is established beyond identification by the potential victim herself/himself.

The Law on Protection against Harassment in the Workplace is in the field of employment. The liability scope is the same as the one under the Law on Labour Relations. An important note here is that the legislator obviously intended to create a distinction between harassment at the workplace and other activities that would not be considered as such, including 'any unjustified distinction during unequal treatment towards the employee on any ground of discrimination which is prohibited and for which protection is provided for under a law'.<sup>116</sup>

The liability for actions of third parties (tenants, clients, customers, etc.), seems to be subject to judicial interpretation.

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<sup>114</sup> Former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Full title: Law on Protection against Harassment in the Workplace (*Закон за заштита од вознемирување на работно место*) Official Gazette of the Republic of Macedonia No.79/2013.

<sup>115</sup> Former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Article 8(3).

<sup>116</sup> Former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Article 8(3).

## 2.5 Instructions to discriminate (Article 2(4))

### a) Prohibition of instructions to discriminate

In Macedonia, instructions to discriminate are prohibited in national law. Instructions are not defined. The Anti-discrimination Law contains an article on invoking and inciting discrimination, which also includes instructions to discriminate. Notably, this article states that it considers as discrimination every activity that directly or indirectly invokes, encourages, instructs or instigates another person to commit discrimination (Article 9).

The Criminal Code also contains a prohibition on instructions to discriminate. Although its articles do not include the specific term 'instruction', they do speak of instigating or stimulating discrimination, notably when fuelling national, racial or religious hatred, discord or intolerance, which will be considered a criminal offence (Article 319), or when spreading racist and xenophobic materials through computer systems (Article 394-d).

The law does not make specific reference to the liability of legal persons for such actions. However, given the general clause that under the law a person is deemed to be any natural or legal person, one could argue that this is a possibility.

It is important to note that a case whose facts point to possible elements of instruction to discriminate was put before the CPAD in 2013. The case involves discrimination against Roma persons hired for the provision of services through a sub-contracted company. In this case, the sub-contracted company, Land Service, was asked by the contracted company, MARCEM, to 'remove' all employees of Roma ethnic origin who worked in the food department at City Mall (one of the largest trade centres in Skopje). In this case, the CPAD found that there was direct discrimination on grounds of ethnic belonging by the contracted company, but it did not find instruction to discriminate. The case was filed by Sumnal, a CSO dealing with Roma rights.<sup>117</sup> Land Service itself later filed a case at the CPAD, however the CPAD did not initiate proceedings, as it has already decided on the matter. Land Service also filed a request to the Constitutional Court for protection of freedoms and rights (protection against discrimination). However, in line with the already established principle of the Constitutional Court, Land Service's case was rejected as it had been filed by a legal and not a natural person.<sup>118</sup> There has still been no follow up on this case.<sup>119</sup>

In Macedonia instructions do explicitly constitute a form of discrimination.<sup>120</sup>

### b) Scope of liability for instructions to discriminate

In Macedonia the instructor and/or the discriminator are liable (Article 9, Anti-discrimination Law). This applies to both natural and legal persons. Who will be held liable depends on the complaint – who the potential victim of discrimination identifies as the potential discriminator.

It is worth noting here that in the 2013 City Mall case (mentioned above, under section 2.5.a), the CPAD found direct discrimination on grounds of ethnic belonging by the contracted company, MARCEM, which requested the sub-contracted company Land Service to 'remove' all employees of Roma ethnic origin who worked in the food department at City

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<sup>117</sup> Commission for Protection against Discrimination (*Комисија за заштита од дискриминација*) No.07-633/4 Association for Development of the Roma Community Sumnal vs Marcem DOO Skopje, 23.05.2013.

<sup>118</sup> Constitutional Court (*Уставен Суд*) Decision U.no.65/2013-0-0, 06.11.2013.

<sup>119</sup> It is important to note, however, that the supermarket, which was part of an international chain of supermarkets and was serviced by Land Service and MARCEM, closed for business in autumn 2015.

<sup>120</sup> Law on Prevention and Protection against Discrimination (*Закон за спречување и заштита од дискриминација*) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015; Constitutional Court Decision: U.no.82/2010. Article 9.

Mall (one of the largest trade centres in Skopje). However, the CPAD found that the case failed to qualify as one of instruction to discriminate.

The Criminal Code contains provisions making it a criminal offence to fuel national, racial or religious hatred, discord or intolerance (Article 319; provides for one to ten years of imprisonment) and to spread racist and xenophobic materials through computer systems (Article 394-r; provides for one to ten years of imprisonment). It provides that the persons committing the crimes will be held liable for the actions (including where the crime is conducted via the media; Article 395-r (2)).

## **2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)**

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Macedonia the duty to provide reasonable accommodation is included in the law. It is defined.

To begin with, it is worth mentioning that the Convention on the Rights of Persons with Disabilities was signed and ratified in 2012. Although no further steps were taken regarding the implementation of this document, according to the Constitution the ratification of the convention means that it has become part of domestic law. The convention defines a failure to make a reasonable accommodation as a form of discrimination.

The Anti-discrimination Law, which also applies in the field of employment, tackles the issue of reasonable accommodation in two ways, by first defining adjustment of infrastructure and services and second by defining discrimination against people with disability – both considered to be forms of discrimination. It defines adjustment of infrastructure and services as an act of undertaking appropriate measures, where needed in a particular case, to enable a person with 'mental'<sup>121</sup> or physical disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer (Article 5(12)). This definition is similar in wording to Article 5 of Directive 2000/78, although it is limited to infrastructure and service. It also does not define what would be a disproportionate burden for employers or whether the availability of financial assistance from the state is to be taken into account in assessing whether there is a disproportionate burden. The second point is the definition of discrimination against people with disability. Notably, the law deems the lack of measures undertaken for the removal of obstacles and limitations, or the absence of measures for the adjustment of infrastructure, space, usage of publicly available resources or participation in public and social life for people with intellectual disability and physical disability to amount to discrimination (Article 8(2)). However, the law does not go into this issue in any more detail.

The Law on Labour Relations does not specifically mention reasonable accommodation for people with disabilities. The Law on Employment of People with Disabilities<sup>122</sup> also does not contain a definition of reasonable accommodation, but it contains references to accommodation-related measures for improving employment conditions and the conditions for the execution of work duties of people with disabilities. The law establishes a duty on the employer to provide for working space, equipment, and other relevant conditions for work and for the adaptation of the working environment (Article 7(2)). Employers' measures undertaken to accommodate people with disability are subject to inspection and

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<sup>121</sup> Mental disability could be understood to include psychosocial disability and intellectual disability.

<sup>122</sup> Law on Employment of Persons with Disabilities (*Закон за вработување на инвалидни лица*), Official Gazette of Republic of Macedonia, No. 44/00, 16/2004, 62/2005, 113/2005, 29/2007, 88/2008, 161/2008, 99/2009, 136/2011, 129/2015, 147/2015.

employers can be fined, however the law makes no special reference as to whether the worker themselves can request that such measures be undertaken.

b) Practice

There are no legally established specific criteria to assess issues in relation to reasonable accommodation such as the extent of the duty, what is a disproportionate burden, etc. It is not possible to know whether state financial assistance will be taken into account when assessing whether there is a disproportionate burden.

c) Definition of disability and non-discrimination protection

In the Anti-discrimination Law, disability is understood as intellectual and physical disability, however this law does not go into more details than this in defining disability. Thus, in the context of reasonable accommodation, disability is to be understood in the same way.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Macedonia, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. The Anti-discrimination Law deems lack of measures undertaken for the removal of obstacles and limitations, or for the adjustment of infrastructure, space, usage of publicly available resources or participation in public and social life, including in education and training (Article 15(3)), for people with intellectual disability or physical disability to amount to discrimination (Article 8(2)). The article uses the same formulation as is used in the field of employment.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Macedonia failure to meet the duty of reasonable accommodation does count as discrimination.

The Anti-discrimination Law classifies the lack of reasonable accommodation for people with intellectual or physical disabilities as discrimination (Article 8(2)). However, the Law on Employment of People with Disabilities and the Law on Construction do not include specific sanctions if proper adaptation is not carried out. This failure is not considered to be discrimination. The misdemeanour provisions in the Anti-discrimination Law do not contain a special provision on fines regarding Article 8(2), which provides for reasonable accommodation, thus the issue would be subject to judicial interpretation.

There is no exception for the shift of burden of proof rule for reasonable accommodation, as lack of it is considered a form of discrimination, thus the same rules for shifting the burden of proof should apply.

f) Duties to provide reasonable accommodation in respect of other grounds

In Macedonia there is a duty to provide reasonable accommodation in respect of other grounds in the public and in the private sector. These include ethnicity, religion and age.

Limited accommodation in respect of ethnicity can be found in the Law on Holidays of the Republic of Macedonia.<sup>123</sup> Under this law, vacation days are to be granted for the specific celebrations of some ethnic communities (Articles 1 and 2).

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<sup>123</sup> Former Yugoslav Republic of Macedonia, Law on Holidays (2007), Full title: Law on Holidays of the Republic of Macedonia (*Закон за празниците во Република Македонија*) Official Gazette of the Republic of Macedonia, No. 21/98, 18/2007.



Limited accommodation in respect of religion is mentioned in the Law on Holidays of the Republic of Macedonia. Under this law, vacation days are to be granted for religious celebrations on the basis of the faith of the employee (Articles 1 and 2).

With respect to age, there are special measures for the protection of older workers in the Law on Labour Relations, regarding the working hours of older (and younger) workers. It provides that these workers cannot be assigned to work overtime or on night shifts (Article 180). This measure is applicable to workers over the age of 57 for women and 59 for men (Article 179).

g) Accessibility of services, buildings and infrastructure

In Macedonia national law indirectly requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. Namely, under the Anti-discrimination Law, discrimination against persons with disabilities, which is deemed a separate form of discrimination, includes inaccessibility of services, buildings and infrastructure (Article 8(2)). This would apply both in the employment field and beyond.

The Law on Construction creates the potential to reduce the standard basic requirements governing re-construction and adaptation of buildings if such reconstruction and adaptation is intended to provide for the free access, movement, stay and work of people with disability (Article 10). According to Article 3(2) of the law, the basic requirements for the construction include:

'mechanical endurance, stability and seismic protection, fire protection, sanitary and health protection, protection of the working and living environment, protection against noise, safety in the use, efficient use of energy and thermal protection, unobstructed access and movement to and in the construction, and technical characteristics of the construction products used in building.'

Reducing the standard means that some of these requirement will not be met, should an approval of the Ministry of Labour and Social Policy be acquired stating that the reduction of the basic standards would go in favour of the above provisions, namely, the free access, movement, stay and work of people with disability.

The Law on Construction requires public buildings to be designed and built in an accessible way. It states that the construction of

'public buildings and structures for commercial use, those with the purpose of residential housing and buildings with housing and business purpose must be designed and constructed to allow unimpeded access, movement, residence and work to persons with disabilities' (Article 11).

The Anti-discrimination Law states that failure to comply with such legislation (referring also to relevant provisions in any other laws, such as the aforementioned Law on Construction) would be treated as discrimination.

The Law on Construction also states that:

'The manner of providing unimpeded access, movement, residence and work for people with disability to buildings ... should be prescribed by the minister who heads the state authority responsible for performing the work in the field of urban planning.'

The same law states that there is no need for approval to build structures that allow and facilitate the movement of people with disability in the building.<sup>124</sup> Furthermore, public and business facilities

'must ensure unimpeded access to persons with a disability as prescribed by this Law within four years of the date of entry into force of this law, and adapt outside staircases for public use within two years of the date of the entry into force of this Law' (the law entered into force on 5 November 2009).<sup>125</sup>

A 2014 Government information report submitted to the UN Committee on the Rights of Persons with Disabilities states that the provisions

'are little or not applied at all, both in adapting existing buildings and in the construction of new buildings. This includes inadequate public areas with high kerbs, inconvenient pedestrian crossings, sidewalks, parking spots, access to bus stations, adapted toilets for persons in wheelchairs, etc.'<sup>126</sup>

In Macedonia national law does not contain a general duty to provide accessibility by anticipation for people with disabilities.

#### h) Accessibility of public documents

No such requirements currently exist. However, it is worth noting that a recent vacancies advertisement by the Government for employment of people with disabilities was published in Braille.<sup>127</sup> This was not a general recruitment advert - only people with disabilities could apply for the positions.

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<sup>124</sup> Former Yugoslav Republic of Macedonia, Law on Construction (2009), Full title: Law on Construction (*Закон за градење*) Official Gazette, No. 130/2009, 124/2010, 18/2011, 36/2011, 54/2011, 13/2012, 144/2012, 25/13, 79/13, 137/13, 163/2013, 27/2014, 28/2014, 42/2014, 115/2014, 149/2014, 187/2014, 44/2015, 129/2015, 217/2015, 226/2015; Constitutional Court Decisions: U.no. 262/2009 (02.02.2011), U.no. 212/2010 (30.03.2011).

<sup>125</sup> Former Yugoslav Republic of Macedonia Law on Construction (2009), Article 170.

<sup>126</sup> Ministry of Labour and Social Policy (2014), *Initial report of the Republic of Macedonia pursuant to article 35, paragraph 1 of the Convention on the Rights of Persons with Disabilities*, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMKD%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMKD%2f1&Lang=en).

<sup>127</sup> Press24 (2014), 'People with visual impairments hailed vacancy ad for employment of 300 persons with disability', (*Слепите лица го поздравиле огласот за вработување 300 лица со инвалидност*), [www.press24.mk/slepite-lica-go-pozdravija-oglasot-za-vrabotuvanje-300-lica-so-invalidnost](http://www.press24.mk/slepite-lica-go-pozdravija-oglasot-za-vrabotuvanje-300-lica-so-invalidnost).

### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

In Macedonia, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. On provisions of relevance for non-discrimination, the Constitution sets a requirement of citizenship in order for a person to enjoy the protection of rights under the Constitution, including protection against discrimination. Stricter conditions also apply to residents without Macedonian citizenship with regards to employment and acquiring social protection.<sup>128</sup> In other areas, including self-employment, access to training and membership in workers' organisations, there is no legal inhibition and there are no reports of less favourable treatment. With regard to the Constitution, the approach implemented in practice gives foreign citizens the opportunity to participate in the social and economic life of the country. No such requirement exists under the Anti-discrimination Law.

The country is a candidate for EU membership. So far, the course of harmonisation of the legislation has not reached the stage where provisions on distinctions between EU and non-EU nationals are incorporated in laws. As yet, no clear plans have been made on how this will be regulated. A sign of planned developments in this direction is that special provisions have been inserted in the Law on Internal Affairs, which regulate special rules for EU citizens, with much eased procedures for short-term and long-term stay and residence.

##### **3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)**

###### **a) Natural and legal persons**

In Macedonia the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination and for the purpose of liability for discrimination. It does not distinguish between natural and legal persons, either for the purposes of protection against discrimination or for liability for discrimination. Article 2 of the Anti-discrimination Law provides that the law is applied to both natural and legal persons, while Article 5(9) defines a person as both a natural and legal person. Article 4 provides for the fields of discrimination covered by the law, adding that the law applies to all natural and legal persons.

As the law uses the term 'person' throughout for both protection against discrimination and liability for discrimination, it is clear that such a distinction is not made. However, there is a distinction when speaking of the sanctions, as fines for misdemeanours are divided between fines for natural and for legal persons and vary in amount (Articles 42 to 45). Furthermore, it should be noted that under the Constitution, only citizens are included in the general equality clause, and also that the Constitutional Court's practice is clear that human rights protection, which also includes protection against discrimination, can be sought by natural persons only.

###### **b) Private and public sector including public bodies**

In Macedonia the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination and for the purpose of

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<sup>128</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection (2009), Full title: Law on Social Protection (*Закон за социјалната заштита*) Official Gazette of Republic of Macedonia No. 79/2009, 36/2011, 51/2011, 166/2012, 15/2013, 79/2013, 187/2013, 38/2014; 44/2014; 116/2014; 180/2014, 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015; Constitutional Court Decision: U.no.165/2009 (07.04. 2010), Article 15.

liability for discrimination. The Anti-discrimination Law states that the law applies to all natural and legal persons (Article 2) and that it covers both the private and the public sector, including public bodies (Article 4).

## **3.2 Material scope**

### **3.2.1 Employment, self-employment and occupation**

In Macedonia, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, and holding statutory office, for the five grounds.

The Anti-discrimination Law applies to all sectors of public and private employment and occupation (Article 4). Articles 6 to 11 of the Law on Labour Relations<sup>129</sup> prohibit various aspects of discrimination in labour relations and, in general, do not distinguish between different types of actors (public or private, secular or religious). It states that it regulates the labour relations of workers employed by the state, local government, public institutions, public enterprises, institutes, foundations, organisations and other legal and individual employers, unless another law determines otherwise.<sup>130</sup>

Having agreed with the general approach, it should be noted that practically all major areas of public employment are covered also by the Law on Administrative Servants<sup>131</sup> (adopted in 2014, and replacing the previous Law on Public Servants and Law on State Servants; implementation started in 2015), the Law on the Police,<sup>132</sup> the Law on Defence and the Law on Foreign Affairs for labour relations of the employees in the respective ministries.

### **3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))**

In Macedonia, national legislation includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.

The Anti-discrimination Law includes labour and labour relations in public and private sectors (Article 4), thus should be read as including employment, self-employment or occupation. It does not seem to deal differently with the private sector on this matter.

The general non-discrimination article in the Law on Labour Relations<sup>133</sup> encompasses selection criteria, recruitment conditions, treatment at work, promotion, professional training and other benefits, as well as ending employment. A specific ban on discrimination

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<sup>129</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Full title: Law on Labour Relations (*Закон за работните односи*) Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015; Constitutional Court Decisions: U. no. 139/2005, U. no. 161/2005, U. no. 134/2005, U. no. 187/2005, U. no. 111/2006, U. no. 188/2006, U. no. 170/2006, U. no. 200/2008, U. no. 20/2009, U. no. 176/2009, U. no. 263/2009, U. no. 62/2013. Articles 6 to 11.

<sup>130</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 3.

<sup>131</sup> Former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Full title: Law on Administrative Servants (*Закон за административни службеници*) Official Gazette of the Republic of Macedonia No. 27/2014, 199/2014, 48/2015, 154/2015.

<sup>132</sup> Former Yugoslav Republic of Macedonia, Law on the Police (2006), Full title: Law on the Police (*Закон за полицијата*), Official Gazette of the Republic of Macedonia No. 114/2006, 06/2009, 145/2012, 41/2014, 33/2015. Article 96 and Former Yugoslav Republic of Macedonia, Law on Internal Affairs (2014), Full title: Law on Internal Affairs (*Закон за внатрешни работи*) Official Gazette of the Republic of Macedonia No. 42/2014, 116/2014, 33/2015.

<sup>133</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 6.

in vacancy announcements is prescribed in the Law on Labour Relations.<sup>134</sup> However, in relation to access, both in that provision and the law overall, the protection against discrimination for people with disabilities can be considered as being very weak because, although the applicant is not obliged to submit a health certificate when concluding an employment contract, the employer can send her or him for a medical examination.<sup>135</sup> The only legal limitation is that the examination should be strictly and necessarily linked to the specific post.

None of the provisions in the non-discrimination articles should be interpreted as restrictions on the employer's right to refuse to hire a person who does not meet the occupational requirements in that particular field, as long as the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.<sup>136</sup>

Conditions for access to employment and criteria for various professional activities in the public sector are mostly determined by specialised laws. However, no equivalent and consistent approach or scope of protection is contained in these laws. Health status is mentioned as a condition for employment in the Law on the Police and the Law on Army Service, and in the Law on Administrative Servants.<sup>137</sup> The Law on Administrative Servants sets out general conditions for employment as an administrative servant, which aside from general health capability, also include citizenship, active knowledge of the Macedonian language, being at least 18 years of age, and having no criminal conviction in relation to conducting a profession or duty (Article 31(1)).<sup>138</sup>

There is an established system of state inspection that conducts supervision of the implementation of the Law on Labour Relations, and of other laws and regulations for labour relations, collective agreements and job contracts that regulate the rights and obligations of the employee and the employer. Such inspections are carried out by the state body responsible for labour inspection.<sup>139</sup>

### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

In Macedonia, national legislation includes working conditions, which include pay and dismissals, for all five grounds and for both private and public employment.

Article 4 of the Anti-discrimination Law covers the area of employment and labour relations, thus it is to be considered to include pay and dismissals (it applies to both public and private sector).

Aside from this law, the Law on Labour Relations contains a provision stating that for equal work, workers should be equally paid. The only category explicitly mentioned is women,<sup>140</sup> however in the general provisions section, in Article 7(4), it explicitly states that discrimination is prohibited on all grounds mentioned in Article 6 (which include all the directives grounds) in relation to, inter alia, 'working conditions, all rights from a labour relation and in relation to such a relation, including equality of pay'.

The Law on Administrative Servants devotes a chapter – Chapter XIV – to salaries, without mentioning equality of pay. It establishes the following as the main elements on which

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<sup>134</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 24.

<sup>135</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 25.

<sup>136</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 8.

<sup>137</sup> Former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Full title: Law on Administrative Servants (*Закон за административни службеници*), Official Gazette of the Republic of Macedonia No. 27/2014, 199/2014, 48/2015, 154/2015.

<sup>138</sup> Former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Article 31(1).

<sup>139</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 256.

<sup>140</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 108.

salary is based: education level, level of working position, and years of experience.<sup>141</sup> No case law on this new law exists.

### 3.2.3.1 Occupational pensions constituting part of pay

There are three laws dealing with pensions.<sup>142</sup> However, only one of these contains a prohibition of discrimination: the Law on Voluntary Fully Funded Pension Insurance (Article 3).<sup>143</sup> It states that voluntary, fully funded pension insurance schemes are prohibited from discriminating against members on the grounds of sex, race, colour, language, faith and religion, political or other orientation, national or social origin, belonging to a national or ethnic minority, or on the basis of property, family, health and age.

However, in the same law it states that a company cannot refuse membership of the Voluntary Pension Fund to any employee if the person is at least 15 years old and not more than 70 years of age.<sup>144</sup> This means that disability is not a ground for refusal, although if it is treated as a health condition it falls under anti-discrimination protection. The Law on Voluntary Fully Funded Pension Insurance does not include any sanction equivalent to the prohibition of discrimination for voluntary pension schemes. There are no articles on discrimination or equality in the framework Law on Pensions and Disability Insurance<sup>145</sup> and in the Law on Mandatory Fully Funded Pension Insurance.

### **3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

In Macedonia, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

Article 4 of the Anti-discrimination Law covers the area of employment and labour relations, and includes education, thus it can also be interpreted to include access to guidance and training, as per the directives.

Though not expressly using the wording of Article 3(1)(b) of Directive 2000/43, the prohibitions against discrimination in access to vocational guidance, professional training, continuing professional training and practical work experience are stipulated in the general prohibition on discrimination in the Law on Labour Relations<sup>146</sup> and in laws on different stages of education. National legislation gives everyone equal rights to acquire higher education and to be educated throughout their lives, and equal rights to lifelong learning.<sup>147</sup>

<sup>141</sup> Former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Articles 85 to 97.

<sup>142</sup> Former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance (2012), Full title: Law on Pension and Disability Insurance (*Закон за пензиско и инвалидско осигурување*), Official Gazette of the Republic of Macedonia No. 98/2012, 166/2012, 15/2013, 170/2013, 43/2014, 44/2014, 97/2014, 113/2014, 160/2014, 188/2014, 20/2015, 61/2015, 97/2015, 129/2015, 147/2015, 154/2015, 173/2015, 217/2015); Former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance (*Закон за доброволно капитално финансирано пензиско осигурување*), 2008, Official Gazette of the Republic of Macedonia No. 07/2008, 124/2010, 17/2011, 13/2013, Constitutional Court Decision: U.no.117/2008 (17.12.2008); Former Yugoslav Republic of Macedonia, Law on Mandatory Fully Funded Pension Insurance (*Закон за задолжително капитално пензиско осигурување*), 2002, Official Gazette of the Republic of Macedonia No. 29/2002, 85/2003, 40/2004, 113/2005, 29/2007, 88/2008, 48/2009, 50/2010, 171/2011, 36/2011, 98/2012, 13/2013, 164/2013, 44/2014, 192/2015; Constitutional Court Decision: U.no.163/2002 (02.04.2003), U.no.165/2008 (11.03.2009).

<sup>143</sup> Former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008.

<sup>144</sup> Former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008, Article 94.

<sup>145</sup> Former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

<sup>146</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 7.

<sup>147</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education (*Закон за високото образование*), 2008, Article 3. Official Gazette of the Republic of Macedonia No. 35/08, 103/2008, 26/2009, 83/2009, 99/2009, 115/10, 17/2011, 51/2011, 123/2012, 15/2013, 24/2013, 41/2014, 116/2014, 130/2014, 10/2015; 20/2015; 98/2015; 145/2015; 154/2015; Constitutional Court Decision: U.no. 98/2011 (03.04.2011).

According to the Law on Higher Education,<sup>148</sup> citizens of the country are equally entitled to education in higher educational institutions in the country. The approach to nationality is different, and foreign nationals can use the principle of reciprocity (meaning that if Macedonian students are given national treatment in a certain country, nationals of that country may study in Macedonia as if they were Macedonian citizens). The right to education of stateless persons has still to be determined in law and under ratified international agreements.

The selection of candidates by the university cannot be discriminatory on the grounds of race, colour of skin, sex, language, religion, political or other beliefs, ethnic, national or social origin, property, birth, social position, disability, sexual orientation or age.<sup>149</sup>

The Law on Adult Education states that the aim of adult education is to provide an opportunity for everyone in all adult groups to achieve their appropriate educational level and enable them to acquire knowledge, skills and attitudes that will comply with the requirements of society and the labour market (Article 4).<sup>150</sup>

### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

In Macedonia, national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment. Article 4 of the Anti-discrimination Law covers membership and acting in unions, political parties, associations of citizens and foundations, and other organisations based on membership.

The Law on Labour Relations only provides for the freedom of workers and employers to establish and participate or not in the work of such an association.<sup>151</sup> There are no anti-discrimination provisions related to the grounds of the directives. Having said that, it should be also noted that *mutatis mutandi* the general anti-discrimination provision in the Law on Labour Relations should be applicable to these situations as well. Following the same line of reasoning, the provisions in the Anti-discrimination Law would also be applicable.

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

In Macedonia, national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive.

According to the Constitution, the Republic provides for social protection and social security of citizens in accordance with the principle of social justice, and it guarantees the right of assistance to those who are infirm or unfit for work (Article 35).

The Anti-discrimination Law provides for prohibition of discrimination in social security (including social protection, pension insurance and health protection) (Article 4(3)). The provision on the protected grounds is open-ended, and explicitly lists racial and ethnic origin, disability, belief, and age. Sexual orientation is not explicitly mentioned in this provision.

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<sup>148</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 7.

<sup>149</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 108.

<sup>150</sup> Former Yugoslav Republic of Macedonia, Law on Adult Education (*Закон за образование на возрасните*), 2008, Official Gazette of the Republic of Macedonia No.07/2008, 17/2011, 51/2011, 74/2012, 41/2014, 144/2014, 146-2015; Constitutional Court Decision: U.no. 46/2008.

<sup>151</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Articles 183, 184, 185, 198.

The general and specific provisions on prohibition of discrimination in social services are also listed in the Law on Social Protection;<sup>152</sup> racial and ethnic origin and disability are protected as grounds, while belief, age and sexual orientation are not. According to the Law on Social Protection, the ban is related to both public institutions for social care and private institutions.<sup>153</sup> Protection in cases of discrimination in the field of social care is covered by the potential for the 'applicant or user of social protection to seek protection from the competent authority'.<sup>154</sup> In cases of discrimination, there is a shift of the burden of proof<sup>155</sup> and financial sanctions of EUR 3 000-5 000 (in national currency) are envisaged.<sup>156</sup>

The Law on Healthcare defines, as one of the basic principles of the provision of healthcare, the principle of equity, which it defines through the prohibition of discrimination. Notably, in Article 9, the law states that the healthcare is realised through prohibition of discrimination in provision of healthcare protection on grounds of race, sex, age, nationality, social origin, religion, political or other belief, property status, culture, language, type of illness, 'mental'<sup>157</sup> or physical disability.<sup>158</sup> It does not include sexual orientation as one of the protected grounds. Article 2 of the Law on Health Insurance states that health insurance is mandatory for all citizens on the principles of 'comprehensiveness, solidarity, equality and effective use of resources under conditions determined by Law'.<sup>159</sup>

The Child Protection Law has articles on discrimination.<sup>160</sup> In addition to definitions of direct and indirect discrimination, specific measures are included for the protection of children and their parents or guardians when applying for social care. However, the procedure is so complicated that it is very unlikely that these articles will be used in practice (especially because the whole procedure should be carried out by the potential victims without any institutional help).

#### 3.2.6.1 Article 3.3 exception (Directive 2000/78)

Macedonian legislation does not include any exemptions from payments of any kind made by state schemes or similar, including state social security or social protection schemes, relying on the exception allowed in Article 3(3), Directive 2000/78.

#### 3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In Macedonia, national legislation includes social advantages as formulated in the Racial Equality Directive.

The Constitution states that the Republic provides for social protection and social security of citizens in accordance with the principle of social justice. It guarantees the right to

<sup>152</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 21.

<sup>153</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 20.

<sup>154</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 22.

<sup>155</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 23.

<sup>156</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 254.

<sup>157</sup> Includes intellectual and psychosocial disability.

<sup>158</sup> Former Yugoslav Republic of Macedonia, Law on Healthcare (*Закон за здравствената заштита*), 2012. Official Gazette of the Republic of Macedonia No. 43/2012, 145/2012, 87/2013, 164/2013, 39/2014, 43/2014, 132/2014, 188/2014, 10/2015, 61/2015, 154/2015, 192/2015; Constitutional Court Decision: U.no. 59/2012 (24.04.2013), U.no. 69/2012 (11.06.2014).

<sup>159</sup> Former Yugoslav Republic of Macedonia, Law on Health Insurance (*Закон за здравственото осигурување*), 2000. Official Gazette of the Republic of Macedonia No. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008, 98/2008, 6/2009, 67/2009, 50/2010, 156/2010, 53/2011, 26/2012, 16/2013, 91/2013, 187/2013, 43/2014, 44/2014, 97/2014, 112/2014, 113/2014, 188/2014, 20/2015, 61/2015, 98/2015, 129/2015, 150/2015, 154/2015, 192/2015, 217/2015; Constitutional Court Decision: U.no.85/2000, U.no.173/2000, U.no.37/2001, U.no.60/2006, U.no.40/2007, U.no.167/2006, U.no.45/2006, U.no. 199/2008, U.no.109/2009, U.no.185/2009, U.no.112/2011.

<sup>160</sup> Former Yugoslav Republic of Macedonia, Law on Protection of Children (*Закон за заштита на децата*), 2013, Articles 12, 13, 14, 15. Official Gazette of the Republic of Macedonia No. 23/2013, 12/2014, 44/2014, 144/2014, 10/2015, 25/2015, 150/2015, 192/2015.



assistance to those who are infirm or unfit for work. It also provides for particular protection for people with disability and ensures that their involvement in social life is possible.<sup>161</sup>

Social advantages are stipulated by law. For instance, the Law on Social Protection envisages that due to age and disability, beneficiaries of social financial assistance are relieved from the obligation to conduct public service duties in a duration of up to 90 days.<sup>162</sup> This law also contains a general anti-discrimination provision (Article 20) and an article defining direct and indirect discrimination (Article 21). Although not explicitly addressed, discrimination in the area of social advantages is likely to be unlawful also under the Anti-discrimination Law (Article 4(1), line 3). Albeit not containing a special anti-discrimination provision specifically concerning social advantages, it is safe to conclude that the legal framework implicitly upholds the concept of non-discrimination with regard to the social advantages.

In Macedonia, the lack of definition of social advantages does not raise problems.

### **3.2.8 Education (Article 3(1)(g) Directive 2000/43)**

In Macedonia, national legislation includes education as formulated in the Racial Equality Directive.

Under the Anti-discrimination Law, discrimination is prohibited in the educational process, at all levels and in all forms, both private and public. All directive grounds are explicitly listed in the provision on protected grounds, apart from sexual orientation. Aside from the Anti-discrimination Law (Article 4(2)), laws that regulate primary<sup>163</sup> and secondary<sup>164</sup> education also prohibit discrimination. Primary and secondary education is compulsory in the country. The legislation covers the directives' grounds of race or ethnic origin and belief (political and religious), while disability, age, sexual orientation and belief (other aspects) are missing.

#### **a) Pupils with disabilities**

In Macedonia the general approach to education for pupils with disabilities does raise problems.

The laws that regulate primary<sup>165</sup> and secondary<sup>166</sup> education prohibit discrimination, and although they do not cover disability as a ground for discrimination, they include specific articles dealing with the education of children with disabilities. In this sense, a parent of a child with 'special educational needs' has the right to enrol the child at primary school,

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<sup>161</sup> Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Article 35. Official Website of the Assembly of the Republic of Macedonia, <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspix>.

<sup>162</sup> Former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 55.

<sup>163</sup> Former Yugoslav Republic of Macedonia, Law on Primary Education (*Закон за основното образование*), 2008. Article 2 states: 'Every child has the right to primary education. (2) Discrimination on the grounds of sex, race, colour, national, social, political, religious, property and social background in realisation of the rights of education and primary education, as defined by this Law are prohibited.' Source: Official Gazette of the Republic of Macedonia No. 103/2008, 33/2010, 116/2010, 156/2010, 18/2011, 51/2011, 100/2012, 24/2013, 41/2014, 116/2014, 135/2014, 10/2015, 98/2015, 145/2015; Constitutional Court Decisions: U.no. 212/2008 (01.04.2009), U.no. 202/2008 (15.04.2009), U.no.234/2008 (24.06.2009), U.no.226/2008 (01.07.2009).

<sup>164</sup> Former Yugoslav Republic of Macedonia, Law on Secondary Education (*Закон за средното образование*), 1995, Article 3. Official Gazette of the Republic of Macedonia, No. 44/95, 24/96, 34/96, 35/97, 82/99, 29/2002, 40/2003, 42/2003, 67/2004, 55/2005, 113/2005, 35/2006, 30/2007, 49/2007, 81/2008, 92/2008, 33/10, 116/10, 156/10, 18/2011, 42/2011, 51/2011, 100/2012, 24/2013, 41/2014, 116/2014, 135/2014, 10/2015, 98/2015, 145/2015; Constitutional Court Decision: U.no. 355/1995 (20.03.1996), U.no. 210/2000 (16.05.2001), U.no. 83/2003 (19.11.2003), U.no. 31/2005 (15.06.2005), U.no. 102/2005 (21.12.2005), U.no. 226/2008 (01.07.2009).

<sup>165</sup> Former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 2.

<sup>166</sup> Former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 3.

except in cases where the 'special educational needs' of the child are such that the child should be taught in a specialised primary school. Also, students with special educational needs are to be provided with appropriate conditions for acquiring basic education and life skills in regular and special primary schools and are entitled to individual assistance for the acquisition of primary education.<sup>167</sup>

The manner and conditions for the enrolment of students with special educational needs in primary schools is determined by the Minister, on a proposal of the Bureau for Development of Education (an independent body within the ministry).<sup>168</sup> According to Macedonian legislation there is specialised primary education for children with disabilities and specialised schools are considered equivalent to state schools.<sup>169</sup> In general, children are enrolled in these specialised schools instead of being enrolled in mainstream schools. The Law on Higher Education<sup>170</sup> does not explicitly prohibit discrimination on the ground of disability; however, there are articles on the special benefits for students with disabilities (exemption from payment of tuition fees,<sup>171</sup> selection of students,<sup>172</sup> and special benefits provided by the university).<sup>173</sup> It also lists special conditions for enrolment of students with a citizenship other than Macedonian.

Special curricula for students with disabilities are developed by the Department for Development of Education.<sup>174</sup> At present there is much stronger support for the segregated education of children with disabilities than for their inclusion in mainstream schools.<sup>175</sup> According to the Law on Primary Education, children with disabilities are entitled to shorter class time, a lower number of children per class and the engagement of specialists. In practice, just a few of the standards in the law are implemented.

In 2006, the Ombudsperson of the Republic of Macedonia (the Ombudsperson) prepared a special report on the inclusion of children with special needs in education.<sup>176</sup> This report underlines that the practical application of legal provisions entails a lot of problems and obstacles that do not allow for the provision of adequate and equal access to education for children with disabilities, thus practising this right often results in discrimination.<sup>177</sup>

There are separate secondary schools for children with special needs.<sup>178</sup> Secondary school students with 'special educational needs' are educated under adjusted programmes for job

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<sup>167</sup> Former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 6.

<sup>168</sup> Former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 51.

<sup>169</sup> Currently there are: four primary schools for students with moderate intellectual disabilities; one elementary school for children with more severe intellectual disabilities; a primary school for blind and visually impaired children; a primary school for deaf and hearing impaired children; a primary school for students with serious physical disabilities; two secondary schools for students with moderate intellectual disabilities; a school for blind and partially blind students; a school for deaf and hard of hearing students; 80 special classes for pupils in regular primary schools; and two day care centres for young people with moderate or severe combined disabilities. These schools enrol in total about 1 700 students. Please see: Former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 186.

<sup>170</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 7.

<sup>171</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 87.

<sup>172</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 108.

<sup>173</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 150.

<sup>174</sup> Former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 30.

<sup>175</sup> Nova Makedonija Newspaper (11.09.2009), 'Roma Pupils are Ghettoised in Bitola' (*Се гетоизираат ромските ученици во Битола*), [www.novamakedonija.com.mk/NewsDetal.asp?vest=9119922592&id=9&setIzdanie=21785](http://www.novamakedonija.com.mk/NewsDetal.asp?vest=9119922592&id=9&setIzdanie=21785).

<sup>176</sup> Ombudsperson of the Republic of Macedonia (2006), *Посебен извештај на народниот правобранител за вклученоста на децата со посебни потреби во образованието* (Special Report of the Ombudsperson on the Inclusion of Children with Disabilities in Education), available at: <http://ombudsman.mk/upload/documents/Posebni%20potrebi%20na%20decata1%20-mak.pdf>.

<sup>177</sup> There are cases of non-admittance of children with disabilities into regular primary education, or in some other cases these children were admitted at first, but after a certain period they were expelled, thus leaving their parents to cope with the children on their own. Teachers themselves have problems dealing with these children because they are not trained adequately to work with them and to find the most appropriate methods for including children with special needs in school activities.

<sup>178</sup> Former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 43.

training.<sup>179</sup> A programme called 'Open the Windows' has run for several years now and aims to promote assistance technology for children with disabilities from primary school.<sup>180</sup> There are no specific articles that regulate the education of children with disabilities in ordinary secondary schools; these are out of the reach of children with disabilities.

b) Trends and patterns regarding Roma pupils

In Macedonia, there are specific patterns existing in education regarding Roma pupils such as segregation.

According to the data from the State Statistical Office, one in ten Roma children completes primary education (please also note that 95 % of the children on the streets are Roma children),<sup>181</sup> in spite of the fact that primary (as well as secondary) education is compulsory in the country. According to 2008 data from the United Nations Children's Fund (UNICEF), Roma children have the lowest level of educational achievement: 39 % of Roma do not attend primary school and the lowest proportion of children attending primary school is observed in the poorest wealth quintile (86.3 %), and among the Roma (61.1 %).<sup>182</sup>

In 2005, the policy document, 'Strategy for the Roma in the Republic of Macedonia' was adopted.<sup>183</sup> In this strategy, education for Roma was proclaimed a government priority. The strategy highlighted the following concerns with regard to the situation of the Roma population (of relevance for education): the poor economic and social position of a significant number of Roma families; the high percentage of children not attending preschool education; the small number of children attending elementary education; lack of adequate conditions in the homes; economic exploitation of children; lack of sufficient knowledge of Macedonian language; high number of children dropping out of education; and a lack of awareness for the need of education.<sup>184</sup> Some parents of Roma origin intentionally enrol their non-disabled children in special schools for children with moderate intellectual disabilities where they can learn crafts. The reasons for this include the fact that it is much easier for the children to complete these schools and find employment.<sup>185</sup>

According to the strategy document, segregation often occurs in the process of education. However, in spite of numerous inspections and public statements, no sanctions have been imposed in relation to segregation in schools. Eight Roma information centres were established to support the implementation of the strategy and to monitor, inter alia, this situation on the ground.<sup>186</sup> Many Roma NGOs are working on countering the issue of segregation in education. However, segregation continues to take place and is becoming even more visible with the increase in the number of Roma pupils.

A case was filed with the CPAD by the Helsinki Committee of the Republic of Macedonia in 2011 regarding the segregation of Roma children in schools in Bitola. After breaching all possible procedural deadlines, the CPAD finally decided this case in September 2014, and the applicants received the decision in December 2014. CPAD did not find discrimination

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<sup>179</sup> Former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 50.

<sup>180</sup> 'Open the Windows' website: <http://openthewindows.org>.

<sup>181</sup> Institute on Human Rights (2013), *Breaking the Wall of Silence*, [www.ihr.org.mk/images/pub/covekovi-prava-web.pdf](http://www.ihr.org.mk/images/pub/covekovi-prava-web.pdf).

<sup>182</sup> UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, [www.unicef.org/tfymacedonia/MK\\_SITAN\\_ENG.pdf](http://www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf).

<sup>183</sup> There are also several policy documents targeting Roma women. For more, please see MLSP website at: <http://mtsp.gov.mk/?ItemID=6FC822BBA79A61429117F41943673AE4>.

<sup>184</sup> Ministry of Labour and Social Policy (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020) <http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

<sup>185</sup> Ministry of Labour and Social Policy, (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020) <http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

<sup>186</sup> For more information on the Roma Information Centres, please see Ministry of Labour and Social Policy website: <http://mtsp.gov.mk/?ItemID=16963527D912DC41B48380E0B6034274>.

on grounds of ethnicity in the case, nor did it find segregation. The CPAD actually found the situation to be a result of the parents' choice to register their children in a specific primary school, however it failed to state on what it bases its argument, and bluntly added that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.<sup>187</sup> Although having deliberated on this case for over three years, the CPAD adds a surprisingly short elaboration on its opinion, the largest portion of which consists of a bullet point list of 14 letters/requests that it has sent and received while processing this case, one of which is a rather vague explanation of proceedings which states, 'numerous phone calls on the case topic with relevant sides and numerous meetings on the case topic'. There is no further elaboration as to whom the CPAD talked to or with whom and when they met, and what was discussed and possibly decided. It also disregards reports on Roma children in education and on segregation in education, including a statement from the director of the primary school saying that the parents of children from other ethnicities, although living in the school's region, choose to register their children in other primary schools in order to avoid sending them to school with Roma children.<sup>188</sup>

Many reports have been published on the issue of Roma education in the country — including an Open Society Institute (OSI) report,<sup>189</sup> Roma Education Fund reports,<sup>190</sup> a UNICEF situation analysis<sup>191</sup> and a UNICEF analysis of segregation in education<sup>192</sup> — with very similar conclusions on segregation and enrolment barriers. They find that the most significant problems in Roma education are similar to those faced by Roma throughout the Western Balkans. Critical issues include low enrolment, poor performance, and a high drop-out rate for Roma children, combined with in-school segregation and discrimination, referral to special schools, restricted access to preschool, and a lack of support for further education.<sup>193</sup>

The most recent study published in 2013 by the Institute for Human Rights, supported by the Roma Education Fund, looks at Roma children in primary and secondary education, noting that the problems range from general living conditions, to discrimination, up to clear examples of segregation (including making Roma children sit in the last rows in classes, complaints by parents from other ethnicities that they do not want their children to study with Roma children, even reporting getting lower grades with explicit comments by the teacher that the grade is lower because the student is of Roma ethnic origin).<sup>194</sup>

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

In Macedonia, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive. The Anti-discrimination Law includes access to goods and services in the fields of the law's implementation (Article 4), and applies to all

<sup>187</sup> Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, [http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn\\_pripadnost/07-80.%2005.09.2014.pdf](http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf).

<sup>188</sup> Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, [http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn\\_pripadnost/07-80.%2005.09.2014.pdf](http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf).

<sup>189</sup> Open Society Institute (2007), *Equal Access to Quality Education for Roma, Volume 2: Croatia, Macedonia, Montenegro and Slovakia*, [www.opensocietyfoundations.org/sites/default/files/equal\\_20071218.pdf](http://www.opensocietyfoundations.org/sites/default/files/equal_20071218.pdf).

<sup>190</sup> Roma Education Fund (2007), *Advancing Education of Roma in Macedonia*, [www.romaeducationfund.hu/sites/default/files/publications/macedonia\\_report.pdf](http://www.romaeducationfund.hu/sites/default/files/publications/macedonia_report.pdf).

<sup>191</sup> UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, [www.unicef.org/tfymacedonia/MK\\_SITAN\\_ENG.pdf](http://www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf).

<sup>192</sup> UNICEF (2009), *Multiculturalism and interethnic relations in education (Мултикултурализмот и меѓуетничките односи во образованието)*, [www.unicef.org/tfymacedonia/New\\_MKVersionsm2\(3\).pdf](http://www.unicef.org/tfymacedonia/New_MKVersionsm2(3).pdf).

<sup>193</sup> Roma Education Fund (2007), *Advancing Education of Roma in Macedonia*, [www.romaeducationfund.hu/sites/default/files/publications/macedonia\\_report.pdf](http://www.romaeducationfund.hu/sites/default/files/publications/macedonia_report.pdf).

<sup>194</sup> Institute on Human Rights (2013), *Breaking the Wall of Silence*, [www.ihr.org.mk/images/pub/covekovi-prava-web.pdf](http://www.ihr.org.mk/images/pub/covekovi-prava-web.pdf).

the grounds of the directives and more (Articles 3 and 5(3)), except for sexual orientation which is not explicitly included in this article or the law, although, as Article 3 is an open-ended provision and includes ratified international treaties as well as other grounds established under law, there is space to seek protection on this ground as well. It is also important to note that Article 11, which is part of the chapter on forms of discrimination, establishes that 'disabling or limiting the use of goods and services to persons or groups of persons on any of the grounds established in Article 5, point 3 of this law is discrimination'.

#### 3.2.9.1 Distinction between goods and services available publicly or privately

There are no specific articles forbidding discrimination concerning goods and services available to the public that make a distinction between the goods and services available to the public and those available privately.

The Law on Consumer Protection<sup>195</sup> notes that a merchant providing public services through a distribution network must allow users to join and use the network and e-services under non-discriminatory, previously known and agreed conditions.<sup>196</sup> There are no specific grounds for discrimination mentioned.

There has been a rise in the number of cases reported to the equality body in this field; in 2013, there were nine cases in relation to access to goods and services, whereas in 2014 the number rose to 22.<sup>197</sup>

#### 3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In Macedonia, national legislation includes housing as formulated in the Racial Equality Directive. The Anti-discrimination Law clearly states that housing is an area to which the law applies (Article 4(5)). The ADL includes all the grounds of the directives except for sexual orientation, which is not explicitly included in the article or the law, although, as Article 3 is an open-ended provision that includes ratified international treaties as well as other grounds established under law, there is space to seek protection on this ground as well. However, a prohibition on discrimination (with regard to any of the protected grounds) is not included in the Law on Housing, which deals specifically with selling or renting a piece of land or a building for housing purposes, or illegal forced evictions.

Under Article 104 of the Law on Housing,<sup>198</sup> a regulatory commission was established with a mandate, *inter alia*, to prevent discrimination in the field of housing,<sup>199</sup> however the provision does not contain any further explanations as to protective mechanisms, nor does it mention grounds of discrimination. Disability is only mentioned insofar as the manager of the building should know the standards and norms for accessibility for persons with disabilities in a residential facility (Article 19(12)) (under the same article, this can also be

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<sup>195</sup> Former Yugoslav Republic of Macedonia, Law on Consumer Protection (*Закон за заштита на потрошувачите*), 2004. Official Gazette of the Republic of Macedonia No. 38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015, 152/2015.

<sup>196</sup> Former Yugoslav Republic of Macedonia, Law on Consumer Protection, 2004, Article 119.

<sup>197</sup> One of the cases initially processed by the equality body, and later (March 2015), taken to court, concerned accessibility of pavements for persons with disability in the town of Delcevo. Both the equality body and the Delcevo court of first instance found discrimination. Commission for Protection Against Discrimination (*Комисија за заштита од дискриминација*) (2015), *2014 Annual Report of the Commission for Protection Against Discrimination*, p.14, [www.sobranie.mk/materialdetails.nsp?materialId=d93111d8-975d-471e-be2c-e07a2df372f3](http://www.sobranie.mk/materialdetails.nsp?materialId=d93111d8-975d-471e-be2c-e07a2df372f3); Primary Court Delcevo (*Основен суд Делчево*), Judgment P-4. no.14/2014 (20.03.2015).

<sup>198</sup> Former Yugoslav Republic of Macedonia, Law on Housing (*Закон за домување*), 2009. Official Gazette of the Republic of Macedonia No. 99/2009, 57/2010, 36/2011, 54/2011, 13/2012, 55/2013, 163/2013, 42/2014, 199/2014, 146/2015; Constitutional Court Decisions: U.no. 246/2009 (14.07.2010), U.no.14/2010 (15.09.2010).

<sup>199</sup> Former Yugoslav Republic of Macedonia, Law on Housing, 2009, Article 104.



taken as imposing an obligation on her/him to initiate court procedures against the constructors for improper and incomplete execution of the appropriate actions).

The Law on Housing neither requires nor promotes the availability of housing that is accessible to the elderly. The article on types of apartments contains a special provision defining housing units for elderly and incapacitated people as units where such tenants get 24-hour assistance from an institution under the condition that these are architecturally adjusted as apartments for elderly (Article 7(3)), however it does not go beyond providing for the possibility of establishing such a unit and the issue has no further clarification. No assessment on the implementation of or compliance with this provision has been conducted yet.

### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Macedonia there are patterns of housing segregation and discrimination against the Roma. Roma are primarily concentrated in 10 municipalities, and the Roma population is usually concentrated in one part of the town,<sup>200</sup> with 95 % of Roma living in towns, while only 5 % live in villages.<sup>201</sup> About 70 % of Roma do not have any proof of ownership over their property.

There are no official statistics on racist incidents and discrimination in housing against Roma. However, the media and NGOs report cases of institutional violence and assault against Roma,<sup>202</sup> particularly police raids and evictions (after the Roma are accused of residing in unlawfully built buildings), that deprive the Roma of their housing, and do not provide them with alternative accommodation.<sup>203</sup>

An older (2008) report on the conditions of housing and health in the Roma community, which is to date the one with most robust and primary data, states that Roma families often live in badly built, sub-standard houses, without in-house water supply and sanitation. Data show that 7.25 % of the families live in improvised houses built from non-construction materials (cardboard, nylon, tin, plastic, etc.), 29.5 % in dilapidated and montage houses, and only 63 % in solid-construction houses.<sup>204</sup> More than 10 % of the families don't have access to any kind of water supply. The sewerage conditions are extremely bad, with an estimate of 50 % of families having no access to proper solution for the discharge of the sewage and communal water.<sup>205</sup>

The UNICEF study, *Children in FYR Macedonia – a situation analysis*,<sup>206</sup> claims that Roma generally live in informal settlements on the outskirts of urban centres and that this further obstructs their access to basic social services. In general, while many Macedonians live in

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<sup>200</sup> CRPRC Studiorum and Mesecina (ЦРИС Студиорум и Месечина), *Report on the condition of housing and health among the Roma Community in Macedonia*, [www.studiorum.org.mk/?p=41](http://www.studiorum.org.mk/?p=41).

<sup>201</sup> Samet Skenderi (2014) *Домување на ромите и социјална интеграција во Република Македонија* (Housing of Roma and Social Intergration in the Republic of Macedonia). p.7.

<sup>202</sup> National Roma Centrum (Национален ромски центар) *Report to the Committee on Economic, Social and Cultural Rights of the United Nations* (Извештај до комитетот за економски, социјални и културни права на Обединетите нации), [www.nationalromacentrum.org.mk/publikacii/istrazuvanja/izvestaj-do-komiteto-za-ekonomski/](http://www.nationalromacentrum.org.mk/publikacii/istrazuvanja/izvestaj-do-komiteto-za-ekonomski/); Kanal 5, 'Discoteque Kalipso Prohibits Entrance to Roma' (Во дискотеката Калипсо во Берово е забранет влезот за Ромите) [Cache]; A1, 'Entrance Banned for Roma at the New Aqua Park' (Забранет влез за Роми во новиот Аква парк) [31.07.2013].

<sup>203</sup> Helsinki Committee for Human Rights of the Republic of Macedonia (2014), *Assessment of the Progress of the Roma Decade* (Проценка на напредокот на декадата на ромите), [www.mhc.org.mk/?ItemID=3DE4E8C7F50F194281021DB76FAD9E1E](http://www.mhc.org.mk/?ItemID=3DE4E8C7F50F194281021DB76FAD9E1E).

<sup>204</sup> Roma houses are small, planned to serve only elementary needs, with housing space of less than 5 m<sup>2</sup> per member for more than 50 % of the families. About 40 % of the families live in shared houses. Only 16 % of the houses have a toilet and bathroom in the house; 77 % of the families use a toilet in the yard and 58 % use a tap in the yard.

<sup>205</sup> CRPRC Studiorum and Mesecina (ЦРИС Студиорум и Месечина), *Report on the condition of housing and health among the Roma Community in Macedonia*, [www.studiorum.org.mk/?p=41](http://www.studiorum.org.mk/?p=41).

<sup>206</sup> UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, [www.unicef.org/tfymacedonia/MK\\_SITAN\\_ENG.pdf](http://www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf).

privately owned apartments (former state-owned public housing that was made available for sale), some 15 to 25 % of the population live in about 100 informal urban settlements. According to the same study,

'there has been no research to date on how housing conditions in Macedonia impact on children, but official government statistics suggest that 95 % (or 47,408) of Roma live in informal settlements located on the peripheries of Macedonia's cities. These settlements are typified by higher levels of unemployment, crime, illiteracy, juvenile delinquency, drug abuse and other social problems, all of which can negatively affect children's social development.'

## 4 EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

In Macedonia national legislation provides for an exception for genuine and determining occupational requirements.

The Anti-discrimination Law contains a general clause stating that difference of treatment that is based on a characteristic related to any of the discriminatory grounds will not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement does not overstep the level necessary for implementation (Article 14(2)).

Article 8 of the Law on Labour Relations<sup>207</sup> uses wording on exemptions from occupational requirements in the context of access to labour, which corresponds to the language of Article 4 of Directive 2000/43/EC. Notably, the law states that

'it will not be considered discrimination making a difference, exclusion or giving priority in terms of a certain thing, when the nature of the work is such or the work is performed in such conditions that the characteristics associated with some of the cases Article 6 of this law are essential and decisive conditions for performing the work, providing that the objective to be achieved is justified and the requirement has been carefully considered.'<sup>208</sup>

Although a careful consideration of the requirement (*одмерен*) is not the same as being proportionate (*пропорционален*), there is room to interpret it as such.

The grounds covered by the Law on Labour Relations are broader than the protected grounds of the two directives, and the differences in treatment in cases of determining occupational requirements need not only be based on the five grounds mentioned in the directives, but can cover all protected grounds.<sup>209</sup>

### 4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In Macedonia national law provides for an exception for employers with an ethos based on religion or belief. The Anti-discrimination Law includes such an exception fully in compliance with Article 4(2) of Directive 2000/78 (Article 14(3-4)). However, under this same law it does not constitute discrimination if members of duly registered churches and religious communities (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)), which goes beyond religion and into the realm of any belief which they might have in their founding and internal acts, programmes or statutes.

The Law on the Legal Position of Churches, Religious Communities and Religious Groups<sup>210</sup> contains no specific articles on employment and labour relations. Other laws also do not include specific provisions on exemptions for employers with an ethos based on religion or

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<sup>207</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

<sup>208</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 8.

<sup>209</sup> The directives' grounds of race, belief, disability, age and sexual orientation are all covered, and the Law on Labour Relations goes beyond them in an open-ended list: sex, health condition, membership of a trade union, social origin, position of the family, property, or other personal circumstances.

<sup>210</sup> Former Yugoslav Republic of Macedonia, Law on the Legal Position of the Church, Communities of Faith and Religious Groups (*Закон за правна положба на црква, верска задница и религиозна група*), 2007. Official Gazette of the Republic of Macedonia No. 113/07.



belief. However, in the exemptions from prohibition of discrimination in the Law on Labour Relations there is sufficient space for churches, religious communities and groups to be exempt in accordance with Article 4(2) of Directive 2000/78 (Article 8).

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Macedonia there are specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination.

Laws that regulate the founding and eligible activities of associations (civil society organisations, foundations,<sup>211</sup> as well as religious communities and religious groups) regulate this issue, stating that an association will cease to exist if they engage in such actions contrary to the Constitution and laws, and violating other people's rights, which includes the right to non-discrimination.

In the Anti-discrimination Law there is no such anti-conflict provision. However, it should be noted that it would not constitute discrimination if members of duly registered religions (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)). This would mean that it excuses these members even if, in doing so, they are discriminating on the grounds mentioned in Article 3, however there is no case law on this provision yet. It also declares that it will not constitute discrimination when a marriage, out-of-wedlock union and family are regulated exclusively as unions of opposite sexes i.e. of one man and one woman (Article 14(6) of the Anti-discrimination Law).

In the Law on the Legal Position of Churches, Religious Communities and Religious Groups, there are no specific articles related to such conflicts. So far there is no case law on the issue. However, the Macedonian Orthodox Church and the Islamic Religious Community have very clearly expressed their opinions that sexual orientation should not be mentioned in the anti-discrimination legislation.<sup>212</sup> Also, the end of 2010 saw an initiative on their behalf to open a cycle of constitutional changes that should, in their words, strengthen the traditional form of the family, but which are clearly intended to target homosexuals. Notably, these changes state that a marriage is a union of one woman and one man, as well as to insert provisions that will limit the possibility for homosexuals to adopt children. The draft amendments to the Constitution, which entered parliamentary procedure and proposed a definition of marriage as a union of one man and one woman, as well as mandatory registration of unmarried couples ('out-of-wedlock communities') defined in the same manner, were not adopted by the Parliament. Thus, this issue is, for now, closed.

- Religious institutions affecting employment in state funded entities

In Macedonia religious institutions are not permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the state. However, there was an attempt in that direction with the introduction of religious education into state elementary schools. Without any legal basis, the two main religious groups – the Macedonian Orthodox Church and Islamic Religious Community – selected the teachers. However, the Constitutional Court, acting upon a petition by NGOs, declared the introduction of religious education null and void.<sup>213</sup>

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<sup>211</sup> Former Yugoslav Republic of Macedonia, Law on Associations and Foundations (*Закон за здруженија и фондации*), 2010, Article 4. Official Gazette of the Republic of Macedonia No.52/2010, 135/2011.

<sup>212</sup> Dnevnik Newspaper, 'Oriented Towards Sexual Discrimination' (*Ориентирани кон сексуална дискриминација*) [www.dnevnik.com.mk/default.asp?ItemID=2747A65351BB6544AC31869A1784FEDC](http://www.dnevnik.com.mk/default.asp?ItemID=2747A65351BB6544AC31869A1784FEDC).

<sup>213</sup> Constitutional Court, Decision U.No. 202/2008, (15.04.2009).

#### 4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Macedonia national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

The Law on Army Service establishes different age limitations, and disability is a ground for losing military status. Professional soldiers must not be older than 26 years of age<sup>214</sup> at the day of the closing of the recruitment advert. The contract is renewable every three years up to a maximum age of 45.<sup>215</sup> Junior officers must not be older than 25 years of age (or 33 years of age, depending on experience, qualifications, as well as previous status in the armed forces, if any),<sup>216</sup> or senior officers older than 30 years of age when entering the Army (or 35 years of age if coming to the senior officer position from a junior officer position).<sup>217</sup> The upper limit for civilian personnel is 40 years of age. The retirement age for active military and civilian personnel is 25 years of pension insurance, out of which 15 have been spent in army service (if this has not been fulfilled, and army service has ended, the Ministry of Defence must provide for further employment or education to allow the person to accumulate the years necessary to reach retirement age).<sup>218</sup>

According to the 2014 amendments to this law, after 45 years of age, professional soldiers will be transferred to an appropriate position in the central state or municipal administration, under a contract with an unlimited duration. There is a retroactive application for this provision, according to which it also applies to professional soldiers whose army service ceased under the law previously due to reaching the maximum age limit of 35 or 38 years of age, if they have an unemployed person status up to 31 December 2013.<sup>219</sup>

People with disability are prevented from entering the Army since general and specific health and good physical condition are unavoidable prerequisites.<sup>220</sup> This is not a specific disability exception, but rather a general exception that refers to health and physical condition. As noted in the 2015 analysis on the harmonisation of the national equality legislation, the medical check up that is mandatory for issuing a certificate for fulfilling these criteria includes checking the nervous system and 'mental condition', 'mental disorders' in the family (including epilepsy), sight and hearing senses, personal habits and physical injuries – one of the rulebooks even includes notes on tattoos as part of this assessment. This is documented in detail in the above-mentioned 2015 analysis, which identifies a number of provisions that include a general health condition as a discriminatory criterion, meaning that this criterion is a cross-cutting discriminatory issue, preventing access to public service.<sup>221</sup>

Even if the disability is a result of army service it would still lead to loss of military status. The best scenario is that the person could remain as civilian personnel retaining the salary received and rank held prior to the health degradation (or would drop one rank down, if the same rank could not be awarded).<sup>222</sup> An extra three days of vacation are provided for personnel with a disability or a person taking care of a disabled child.<sup>223</sup>

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<sup>214</sup> Former Yugoslav Republic of Macedonia, Law on Army Service (*Закон за служба во армијата*), 2010, Article 36. Official Gazette of the Republic of Macedonia No. 36/2010, 23/2011, 47/2011, 148/2011, 55/2012, 29/2014, 33/2015, 193/2015; Constitutional Court, Decision: U.no.60/2010, (22.09.2010).

<sup>215</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 40, 42, 43.

<sup>216</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 34 and 35.

<sup>217</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 32.

<sup>218</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 220 (paragraph 2).

<sup>219</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 40-a, 40-6.

<sup>220</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 31 and 202-210.

<sup>221</sup> See Table 3 in: Kotevska, B. *Analysis of the harmonization of national equality and non-discrimination legislation* (forthcoming – 2016; OSCE and CPAD).

<sup>222</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 78.

<sup>223</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 98 (para.2).

Ethnicity is dealt with in law in several respects. Persons belonging to minorities should be adequately and fairly represented in the Army providing that they are duly trained and competent.<sup>224</sup> Public vacancy ads need to be published in, *inter alia*, at least one newspaper printed in a language used by at least 20 % of the population in the country.<sup>225</sup> With regard to the oath, the document to be signed is both in Macedonian and in the language of that person.<sup>226</sup>

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Macedonia national law includes exceptions relating to difference of treatment based on nationality. The Constitution does not clearly distinguish between nationality (in the meaning of state citizenship) and ethnic affiliation. The Constitution states that

'citizens of the Republic of Macedonia have citizenship of the Republic of Macedonia [and it declares] the free expression of national identity [as] a fundamental value'.<sup>227</sup>

However, in later articles, nationality, rather than ethnicity, is mentioned as a ground of discrimination (Articles 9, 20, 54 and 110). The words ethnic and ethnicity are not mentioned in the Constitution at all. The Constitution makes it clear that the rights and freedoms enshrined in it are reserved for citizens, and that a foreigner enjoys freedoms and rights guaranteed by the Constitution only under conditions regulated by law and international agreements. In this context, the term discrimination on grounds of nationality in Macedonian law actually refers to ethnic discrimination.

In Macedonia, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law. Nationality understood as origin from another country is not covered by the Anti-discrimination Law. However, citizenship, understood as the legal link of a person with a certain country, is part of the grounds covered by the Anti-discrimination Law (Article 3).<sup>228</sup> Although not explicitly referred to, the same would be true for stateless persons.

##### **b) Relationship between nationality and 'race or ethnic origin'**

Nationality understood as origin from another country is not covered by the Anti-discrimination Law. However, citizenship, understood as the legal link of a person with a certain country, is part of the grounds covered by the Anti-discrimination Law (Article 3).<sup>229</sup> Although not explicitly referred to, the same would be true for stateless persons.

The lack of clarity deepens in some laws that refer to nationality and ethnicity as different grounds for discrimination.<sup>230</sup> No definition is provided, which also adds to the confusion of the terms, since in some laws the term 'national belonging' is used.<sup>231</sup> The courts consistently use the terms 'foreigner' and 'foreign' when referring to nationals of another country.

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<sup>224</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 30 (para.5).

<sup>225</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 39 (para.2).

<sup>226</sup> Former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 7 (para.2).

<sup>227</sup> Constitution of the Republic of Macedonia (Устав на Република Македонија). Official Website of the Assembly of the Republic of Macedonia. [www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx](http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx). Articles 4 and 6.

<sup>228</sup> However, please see the exceptions in relation to nationality mentioned in section 4.4.b.

<sup>229</sup> However, please see the exceptions in relation to nationality mentioned below.

<sup>230</sup> For example, Article 3 of the Law on Voluntary Fully Funded Pension Insurance and Article 20 of the Law on Social Protection.

<sup>231</sup> Article 6 of the Law on Primary Education and Article 6 of the Law on Labour Relations.

#### **4.5 Work-related family benefits (Recital 22 Directive 2000/78)**

##### **a) Benefits for married employees**

In Macedonia it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

Macedonian legislation does not mention the right of employers to provide benefits solely to a certain category of employees (such as those married or with children). However, the constitutional provision under which the Republic provides particular care and protection for the family<sup>232</sup> could be interpreted as opening space for, *inter alia*, such privileges.<sup>233</sup> An addition to this argumentation is the provision that is part of an article on unequal treatment that will not be considered as discrimination, in the Anti-discrimination Law, which includes the regulation of the family, marriage, and out of wedlock partnerships as limited to opposite sex partners (Article 15(6)).

##### **b) Benefits for employees with opposite-sex partners**

In Macedonia it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. Same-sex partnership is not recognised under Macedonian legislation, while the Law on Family and Marriage clearly states that marriage is a union between a man and a woman, and the same applies for unmarried couples recognised under this law. There has not been a case on these issues. Moreover, the Anti-discrimination Law provides as part of the article on unequal treatment that will not be considered as discrimination, the regulation of the family, marriage, and out of wedlock partnerships as limited to opposite sex partners (Article 15(6)). A 2015 analysis of the harmonisation of the national equality and non-discrimination legislation against international standards and of the harmonisation at the national level with the comprehensive Anti-discrimination Law raises the issue of inequalities in relation to out-of-wedlock partnerships as well as to partnerships and marriages of same sex couples. It notes that limiting partnerships solely to opposite-sex couples is discriminatory and not in line with the ECHR and the practice of the ECtHR.<sup>234</sup>

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

##### **a) Exceptions in relation to disability and health/safety**

In Macedonia there are no exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78). The anti-discrimination legislation does not provide for specific exceptions in relation to disability in the context of health and safety regulations similar to the provisions of Article 7(2) of Directive 2000/78. However, the general exception of objective and justified limitation, allowed for by Article 8 of the Law on Labour Relations, could be applicable.

This article states that

'it will not be considered discrimination making a difference, exclusion or giving priority in terms of a certain thing, when the nature of the work is such or work is performed in such conditions that the characteristics associated with some of the

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<sup>232</sup> Constitution of the Republic of Macedonia (Устав на Република Македонија). Official Website of the Assembly of the Republic of Macedonia. [www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx](http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx). Article 40.

<sup>233</sup> One needs to bear in mind here that although family is not defined in the Constitution, it is defined in the Law on Family as a community of parents and children and/or other relatives, provided that they live in the same household (Article 2(1); Law on Family).

<sup>234</sup> Kotevska, B. *Analysis of the harmonization of national equality and non-discrimination legislation* (forthcoming – 2016; OSCE and CPAD).

cases in Article 6 of this law are an essential and decisive condition for performing the work, providing that the objective to be achieved is justified and the requirement is carefully considered.<sup>235</sup>

However, aside from this, issues of dress or personal appearance (turbans, hair, beards, jewellery, etc.) are not subject to special regulation in relation to health and safety, meaning that general provisions and principles in deciding a discrimination case will apply.

The Law on Labour Relations does not specify exceptions in relation to health and safety on any other ground, thus the legitimacy and proportionality test indicated in the Law on Labour Relations would be applicable for exceptions based on dress codes or religious tenets (Article 8). However, the law does provide for other health and safety related special protective measures in relation to employees under 18 years of age, as well as for older employees<sup>236</sup> (over 57 years of age for women and 59 years of age for men). The protection encompasses hours of work, night work, work in special conditions and supplementary vacation (for workers under 18) and prohibition of overtime work and night shifts (for older workers), as well as other special measures provided in this and other laws.<sup>237</sup> There are also exceptions for protective measures related to pregnancy and parenting.<sup>238</sup>

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Macedonia national law provides an exception for direct discrimination on age. The Anti-discrimination Law contains a provision that is in line with the test required in Article 6 of Directive 2000/78 (Article 14(9)). The Law on Labour Relations does not mention specific exceptions concerning discrimination on the ground of age that relate to the wording of Article 6 of Directive 2000/78. However, the general exception laid out in Article 8 of the Law on Labour Relations could be used to justify such discrimination. The Law on Labour Relations could be interpreted more widely to give the employer the option of setting specific conditions connected with the age of the employee. It states that at the time of signing of the contract the applicant is obliged to submit evidence to the employer of capability to fulfil the terms of the contract (Article 26).

##### **a) Justification of direct discrimination on the ground of age**

In Macedonia it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age (Article 14(8 and 9), Article 15(4)).

##### **b) Permitted differences of treatment based on age**

In Macedonia national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78. The Anti-discrimination Law contains a clause that is in line with the test required in Article 6 of Directive 2000/78 (Article 14(9)). The Law on Labour Relations provides for specific protective measures in relation to employees younger than 18, as well as for older employees (over 57 years of age for women and 59 years of age for men). The protection encompasses hours of work, night work, work in special conditions and supplementary vacation (for workers under 18) and

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<sup>235</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 8.

<sup>236</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XV.

<sup>237</sup> See Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII: Protection of Workers under 18 Years, and Chapter XV: Special protection of older workers.

<sup>238</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 161.

prohibition of overtime work and night shifts (for older workers), as well as other special measures provided by this and other laws.<sup>239</sup>

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Macedonia national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2). The Anti-discrimination Law contains a clause that allows for occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits (Article 14(9)).

The pension system is composed of three pillars established by three laws: the Law on Voluntary Fully Funded Pension Insurance, the Law on Pension and Disability Insurance, and the Law on Mandatory Fully Funded Pension Insurance. The Law on Pension and Disability Insurance<sup>240</sup> establishes the general age of retirement, which is 64 years of age for men and 62 years of age for women. At least 15 years of pension contributions (i.e. working years covered by pension insurance) is also required (Article 18).

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

In Macedonia there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

In the Anti-discrimination Law there is a general clause making an exception in relation to special protection of parentless children and of single parents (Article 15(7)). Although the term 'parentless children' should mean persons up to 18 years of age, it is also used in the context of protective measures once those people have reached adulthood (such as priority housing and employment).

The Law on Labour Relations provides for specific protective measures in relation to employees younger than 18 years of age.<sup>241</sup> The protection encompasses hours of work, night work, work in special conditions and supplementary vacation. It allows for providing special protection for older workers (Article 179). The same law restricts overtime and night work for older workers (Article 180). The same restrictions apply to persons with caring responsibilities for children not older than seven years of age.<sup>242</sup>

#### **4.7.3 Minimum and maximum age requirements**

In Macedonia there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training.

The Anti-discrimination Law makes two provisions exempting discrimination with regard to minimum age in relation to professional requirements and career advancement as well maximum age for recruitment for, as stated in law, the need for rational time limitations connected to retirement and stipulated by law (Article 14 (8 and 9)).

Law on Labour Relations establishes 15 years of age as the minimum age for employment (Article 250). There is a general prohibition on the employment of children under 15 years of age, except for recording films, preparing and performing arts, stage and other similar works (cultural, artistic, sports and advertising activities). A special procedure and approval

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<sup>239</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII: Protection of Workers under 18 Years, and Chapter XV: Special protection of older workers.

<sup>240</sup> Former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

<sup>241</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII.

<sup>242</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 164.

is required for this. There are also special provisions for the work of students (as practical work experience) and for apprentices.<sup>243</sup>

#### **4.7.4 Retirement**

##### **a) State pension age**

In Macedonia there is state pension age at which, in principle, individuals must begin to collect their state pensions. If an individual wishes to work longer, the pension can be deferred. An individual cannot collect a pension and still work.

The Law on Pension and Disability Insurance<sup>244</sup> establishes the general pension age as 64 years of age (for men) or 62 years of age (for women) with at least 15 years of pension contributions accrued.<sup>245</sup> If someone chooses to continue working, they are not entitled to receive a pension; pension payments can only start after a person ceases working. The Law on Pension and Disability Insurance provides for different criteria for the calculation of pensions in special cases.<sup>246</sup> According to this law, pension and disability insurance rights depend on wages earned and the total length of contributions. The amount of the awarded age pension depends on the monthly average wage, which determines the pension base, while the percentage of the pension is determined according to the length of pension contributions.

##### **b) Occupational pension schemes**

In Macedonia there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wishes to work longer, payments from such occupational pension schemes can be deferred, and the individual can continue to work if their employer agrees, but not after the age of 65 (women) and 67 (men).<sup>247</sup> An individual cannot collect a pension and still work.

##### **c) State imposed mandatory retirement ages**

In Macedonia there is a state-imposed mandatory retirement age. The state-imposed retirement age is mandatory. Under the Law on Labour Relations, Article 104, when an employee reaches the age of 64, but wants to work longer, s/he can continue to do so, but only until the age of 65 and 67 for women and men respectively.<sup>248</sup> There are no sanctions in the Law on Labour Relations tied to a breach of this provision. Under the Law on Pension and Disability Insurance, the age set for acquiring the right to a pension by age remains as 62 for women and 64 for men.<sup>249</sup>

##### **d) Retirement ages imposed by employers**

In Macedonia national law does not permit employers to set retirement ages by contract, collective bargaining or unilaterally. The retirement ages are as set in the national legislation (the Law on Labour Relations and the Law on Pension and Disability Insurance). However, according to the Law on Labour Relations, individual employment contracts or collective agreements may determine rights for workers that are more favourable than those determined by law (Article 12).<sup>250</sup> The same article stipulates that employers cannot

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<sup>243</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 251.

<sup>244</sup> Former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

<sup>245</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

<sup>246</sup> The standard calculation system is given in Articles 18 and 18-a of the Law on Pension and Disability Insurance; Former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

<sup>247</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

<sup>248</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

<sup>249</sup> Former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012, Article 18.

<sup>250</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

include clauses introducing fewer rights than those established in the Constitution and law. National collective agreements for the public sector and the economy do not mention reductions or expansions of the pensionable age in any sector.

e) Employment rights applicable to all workers irrespective of age

General anti-discrimination articles do not include any provisions on different treatment in relation to protection against dismissal on grounds of age. The Law on Labour Relations' protection against dismissal applies to all workers irrespective of age. If the employee has reached the standard pensionable age and has contributed the required number of years of contributions to state pension schemes, the employer can ask for termination of employment even if the employee has not filed a request for retirement or does not want to retire.

f) Compliance of national law with CJEU case law

In Macedonia national legislation is in line with the CJEU case law on age regarding compulsory retirement. However, the issue of mandatory retirement ages has not been a subject of wider discussions as yet (nor have EU Directives and CJEU case-law been discussed in this context).

#### **4.7.5 Redundancy**

a) Age and seniority taken into account for redundancy selection

In Macedonia national law is silent on permitting age or seniority to be taken into account in selecting workers for redundancy.

b) Age taken into account for redundancy compensation

In Macedonia national law does provide compensation for redundancy. Article 97 of the Law on Labour Relations provides the criteria applied to calculate the compensation. Although the number of years an employee has spent working for an employer is one of the criteria for establishing the amount of compensation, this is not tied to the age of the worker.

#### **4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)**

In Macedonia national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. In the Anti-discrimination Law there is one exception of this type, which concerns freedom of speech, public appearance, thought and public information. The provision states that 'the exercise of the constitutionally guaranteed principle of freedom of speech, public appearance, opinion and public information' will not be deemed to be discrimination (Article 14(7)). No related case law exists thus far.

#### **4.9 Any other exceptions**

In Macedonia, other exceptions to the prohibition of discrimination (on any ground) provided in national law include those that are considered as protective mechanisms of groups, and are established in Article 15 of the Anti-discrimination Law. Article 15 states that

'the following shall not be deemed to be discrimination: the measures provided for in the Law on Employment Promotion (Article 15(2)), the measures for protection of the specifics and identity of the persons belonging to ethnic, religious or linguistic



minorities and their right to maintain and develop their own identity individually or in a community with other members of their group as well as to stimulate conditions for promotion of that identity (Article 15(8)); and the special measures to benefit the persons or groups placed in a less favourable position as a result of any of the discriminatory grounds, for the purpose of equalising their opportunities, as long as those measures are necessary (Article 15(6)).<sup>251</sup>

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<sup>251</sup> Former Yugoslav Republic of Macedonia, Anti-discrimination Law, 2010.

## **5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)**

### **a) Scope for positive action measures**

In Macedonia, the law allows for positive action to be undertaken in relation to racial or ethnic origin, religion or belief, disability, age or sexual orientation. Also, the national legal and policy frameworks envisage specific positive actions. Among these, the main emphasis is placed on positive action with respect to ethnic origin, disability and age. The frameworks do not provide for positive action with regard to religion or belief, or sexual orientation. Although beyond the scope of this report, it is also worth noting that there are public policies on positive actions pertaining to gender equality.

In the Anti-discrimination Law there is a special provision in Article 13 named 'affirmative measures' that corresponds to the directive term 'positive action'. This article encompasses measures to eliminate or reduce factual inequality in favour of: (1) a person, group of persons or community; and (2) marginalised groups. People with disabilities are not specifically mentioned in this article as in Directive 2000/78, however, there is no basis for preventing them from being covered by the provision.

Ethnic origin seems to be the dominant ground for undertaking positive action, and has its basis in the 2001 amendments to the Constitution, which were tailored according to the Ohrid Framework Agreement (a political agreement ending the 2001 conflict). Several institutions are tasked to ensure the proper implementation of these measures, the main ones being the Secretariat for Implementation of the Ohrid Framework Agreement, the Committee for Inter-Community Relations and the Agency for Realisation of the Rights of the Communities. The Committee for Inter-Community Relations considers issues of inter-community relations in the Republic and makes appraisals and proposals for their solution, and can propose positive action measures to Parliament, which decides in plenary on such issues. The Parliament is obliged to take into consideration the appraisals and proposals of the committee and to make decisions regarding them. In the event of a dispute among members of the Parliament regarding the application of the voting procedure specified in Article 69(2), the committee will decide by majority vote whether the procedure applies. The Committee for Inter-Community Relations consists of seven members from each of the ranks of the ethnic Macedonians and ethnic Albanians within the Parliament, and five members from among the ethnic Turks, Serbs, Vlachs, Roma and Bosniaks. The members of the Committee are elected by the Parliament.

Political participation of Roma has changed a lot in the past 10 years, partly as a result of the Ohrid Framework Agreement and partly because of the Decade of Roma Inclusion. There is a Roma minister in the Government, a Roma municipality (the direct result of the arrangements within the Ohrid agreement) and the Roma language is legally a language in official use in the Shuto Orizari municipality.

On disability, the main instrument for positive action measures related to persons with disabilities is the Law on Employment of People with Disabilities.<sup>252</sup> Its main goals are the integration of people with disability in the working environment and their safety in the workplace. In 2013 the Government published a recruitment announcement open solely to people with disabilities, which resulted in the employment of 300 people in the public sector. There is also a new draft law that was initiated by the Ministry of Labour and Social Policy, which has still not entered parliamentary procedure.

On age, in relation to young people, actions are undertaken based on Cabinet decrees. In relation to older people, there is a 'National Strategy for Elderly People 2010-2020'. However results from its implementation are not expected soon, as the coordinating body tasked to follow its implementation was only recently established.

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<sup>252</sup> Former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities, 2000, Article 2.

The 2012-2015 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender'<sup>253</sup> and its accompanying action plan,<sup>254</sup> were the first documents of their kind in the country, establishing the general goals of the strategy, and specific goals for each targeted discrimination ground. The general strategic goals are: advancing the legal framework for equality and non-discrimination; strengthening the capacities of the institutional mechanisms for the prevention and protection against discrimination and promotion of equal treatment; and awareness raising towards recognising forms of discrimination and promoting the concepts of non-discrimination and equal opportunities. This document does not provide for positive action measures. A public debate on the new 'Strategy on Equality and Non-discrimination 2016-2020' was organised towards the end of 2015. However, the new strategy had not yet been adopted by the end of the reporting period.<sup>255</sup>

b) Main positive action measures in place on national level

Quotas (ethnicity, including Roma)

There is a special secretariat within the Government charged with the implementation of the Ohrid Framework Agreement.<sup>256</sup> Although no quotas exist on paper, they do exist in practice due to the implementation of the principle of equitable representation, which is used when implementing positive actions. This principle operates on the basis of self-identification and aims to bring about representation of the communities in the institutions to reflect the representation and composition of the ethnic communities in society according to the latest census results (for example, a target percentage for the Albanian population would be a representation of 25 %, as this is the percentage of the Albanian community from the total population of the country, according to the 2002 census).

As equitable representation of members of ethnic communities in state institutions is an important role of the Secretariat for Implementation of the Ohrid Framework Agreement, one of its main tasks has been to ensure the employment of people belonging to these communities in the state and public administration. To that end, various training initiatives have been carried out with great support from the international community.

Additional social and other measures (Roma)

There is a Minister without Portfolio in charge of coordination of the Government activities in relation to the Decade of Roma Inclusion. He is tasked with the inter-ministerial coordination on all Roma issues. National strategic documents on Roma rights and integration, which take the EU Framework for National Roma Integration Strategies up to 2020 into account, are regularly adopted and updated, however, systematic monitoring of any progress is mainly done by NGOs.

Preferential treatment (disability)

Preferential treatment of people with disabilities is provided for in the 'National Strategy for Equalisation of the Rights of People with Disabilities 2010-2018' (and its predecessor). The strategy acts as an operational framework for the UN Convention on the Rights of

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<sup>253</sup> Ministry of Labour and Social Policy (2012), *Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол 2012-2015* (National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender 2012-2015), [www.mtsp.gov.mk/WBStorage/Files/strategija\\_ednakvost.doc](http://www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc).

<sup>254</sup> Ministry of Labour and Social Policy (2013), *Action Plan - 2013 for implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender for 2012-2015*, [www.mtsp.gov.mk/WBStorage/Files/akciski\\_1\\_eng.doc](http://www.mtsp.gov.mk/WBStorage/Files/akciski_1_eng.doc).

<sup>255</sup> Please note that this was also the case at the time of writing of this report.

<sup>256</sup> Although it is not OFA itself that is being implemented, but constitutional, legal and policy documents resulting from its signing, the expression 'implementation of OFA' is used here to avoid long explication pretexts for the wave of reforms after 2001 resulting from it being signed.

Persons with Disabilities.<sup>257</sup> This convention was ratified in November 2011. The country submitted the initial report to the UN Committee on the Rights of Persons with Disabilities in 2014. However, as can be seen from this report, save for training activities with interpreters and pharmacists reported as undertaken pursuant to Article 21 (Freedom of Expression and Opinion, and Access to Information),<sup>258</sup> no other information on the implementation or the progress of this strategy exists.

#### Broad social policy (age)

Young people are covered in two policies. The Ministry of Labour and Social Policy supported a programme entitled 'Intermediation for Employment of Unemployed Young Graduates'. This programme provides free training for young graduates, as well as taxes from which employers can benefit in hiring a first-time employee. The Ministry of Transport and Communications had a programme called 'Flats for Young Married Couples'. The programme enables young couples in civil marriage to engage in buying a flat under more favourable conditions than in the regular market.

There is a 'National Strategy for Elderly People 2010-2020'.<sup>259</sup> However results from its implementation are not yet expected, as the coordinating body tasked to follow its implementation was only recently established. However, special programmes for recreation (free ski trips and use of thermal baths facilities) and transport (free use of public transport in the capital on selected week days, and use of train transportation in the whole territory of the country on selected week days) have been implemented. There are also housing facilities and newly built housing for elderly persons.

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<sup>257</sup> Ministry of Labour and Social Policy (2010), National Strategy for Equalisation of the Rights of Persons with Disabilities, <http://mtsp.gov.mk/WBStorage/Files/FINALNA%20Revidirana%20Nacionalna%20Strategija.pdf>.

<sup>258</sup> The initial report can be accessed at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/275/23/PDF/G1527523.pdf?OpenElement>.

<sup>259</sup> Ministry of Labour and Social Policy (2010), *Национална стратегија за стари лица 2010-2020* (National Strategy for Elderly People 2010-2020), <http://mtsp.gov.mk/WBStorage/Files/Strategija%20za%20stari%20lica%20juni.pdf>.

## **6 REMEDIES AND ENFORCEMENT**

### **6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)**

- a) Available procedures for enforcing the principle of equal treatment

In Macedonia the following procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation):

The Anti-discrimination Law provides several options for procedural protection. These are: administrative, litigation and misdemeanour procedures.

Administrative procedures can be raised before the Commission for Protection against Discrimination (Chapter V, Anti-discrimination Law), and the Labour and Education inspectorates. The procedure before the CPAD is free of charge. The entire duration of the procedure is set to last no more than 90 days (including 15 days for the CPAD to forward the complaint to the respondent, and 15 days for the respondent to reply). This may result in the CPAD giving an opinion and recommendation. If the recommendation is not acted upon, the CPAD can initiate a procedure with a competent body (without further specifications). The location of the CPAD is problematic, as it is situated in a building where there are offices of other ministries (including the Ministry of the Interior).

Litigation proceedings can also be initiated before ordinary courts, based on the provisions of the Anti-discrimination Law (Chapter VI, Articles 34-41). The law does not resolve the priority of the procedures, in case of simultaneous procedures. It states that if a procedure is raised before a court, no procedure can be raised before the CPAD. However, it does not say what one does if a procedure is raised before the CPAD, and after that another procedure is started in front of a court before the procedure before the CPAD has ended. Also, the law does not regulate the relations between the procedures in front of the Ombudsperson and the CPAD, in cases of overlap. This issue has been resolved by a memorandum of understanding between the two institutions.<sup>260</sup>

Under the Anti-discrimination Law, the outcome of a claim depends on the procedure that one chooses to pursue. The CPAD registered 70 cases in 2015. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation could lead to an award of regular compensation; while the misdemeanour procedure envisages fines in the range of EUR 400 to 1 000 (in national currency).

Financial sanctions and other sanctions for discrimination are provided under the Criminal Code. These provisions have not been applied thus far.

The procedures for employment in the private and public sectors are different. In the public sector, the Law on State Administration elaborates a detailed procedure, which must be conducted in accordance with the law and under very strict criteria, while in the private sector, according to Law on Labour Relations, employers are free to choose their own methods to find adequate candidates for employment. A worker who believes that they have been discriminated against, can inform the employer within eight days, giving the employer a chance to resolve the issue (Article 181). If this is not done within the next eight days, the worker can lodge a lawsuit against the employer (within the next 15 days). This last deadline is directly applicable in cases of dismissal and rejection in the recruitment process due to discrimination. This is rather costly procedure, as hiring a lawyer is an

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<sup>260</sup> A memorandum for cooperation between these two institutions and the Commission for Equal Opportunities of Women and Men of the Assembly of Republic of Macedonia and the Macedonian Women Lobby was signed in December 2011.

obligation and the claimant must pay the court costs in advance. Moreover, if a claimant loses a lawsuit against a state employer, he or she has to pay the costs of the State Defender.<sup>261</sup> As it is a judicial litigation, there are strict time limits for all procedural actions.

Mediation is an optional instrument at the disposal of the judge in any litigation. There is no record that it has been used in a discrimination case.

There are no statistical data on discrimination cases brought to the courts. Discrimination claims can be found in other cases (notably, mostly cases from the field of employment).

Although non-binding, if the CPAD finds discrimination, it issues an opinion accompanied by recommendations. The person to whom the recommendation is directed needs to act upon it, and notify the CPAD within a deadline of 30 days (Article 28(2) and (3)). If the person does not act upon the recommendation, the CPAD can open a procedure to a competent body (the law does not specify further which body would be considered as a competent body) to establish the person's responsibility (Article 29).

b) Barriers and other deterrents faced by litigants seeking redress

The procedure before the Commission for Protection against Discrimination (CPAD) is free of charge. No legal representative is needed for this procedure. However, it should be noted that there are some obstacles in filing a case at the commission. The offices of the commission are in the building where the Ministry of Interior has some of its offices. Taken alongside the politicised procedure of the appointment of the first members of the commission, one can say that there is a psychological barrier to accessing the commission. There is also a physical barrier as the offices are on the 20<sup>th</sup> floor and the elevator only goes up to the 19<sup>th</sup> floor.

Watchdog CSOs have reported a substantial backlog in the CPAD's handling of cases.<sup>262</sup> The Network against Discrimination (a network of CSOs working on equality and non-discrimination issues) reported that in 2014 it submitted seven cases to the CPAD, four cases to the Ombudsperson, as well as other cases, responses, requests and so on to other institutions. Of these, the CPAD resolved four out of the seven cases, not finding discrimination in any of them, and the Ombudsperson resolved all four cases submitted to it. Three of the four cases were discrimination cases, and the Ombudsperson found discrimination in all three. The fourth case is a case that the Network against Discrimination brought against the CPAD.

Following silence from the CPAD on 10 cases submitted to it in the period 2011- 2013, which is in clear violation of its obligation to respond within 90 days, the Network against Discrimination filed a case to the Ombudsperson against the CPAD. Once instructed by the Ombudsperson (with a notice in which it points out to the CPAD that it is not acting in accordance with the law), the CPAD sent the opinions on all these cases to the Network against Discrimination. The annual report of the Network against Discrimination containing this information highlights that it is evident from the dates stated on the opinions that some of them were delivered quite some time before being sent to the network, which it interprets as a sign of weak administrative capacity and negligence on part of the CPAD. The report also notes that due to the CPAD's tendency not to respect the legal deadline of 90 days to respond to a filed case, the network has decided to address its cases to other institutions, rather than to the CPAD, should it be in a position to choose. The network also notes that, up to the present day, the Ombudsperson, although having a more limited mandate, seems to be a more efficient institution in resolving cases when compared to the CPAD.

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<sup>261</sup> The State Defender is a state budget financed institution. However, it has a practice of requesting litigation costs as private solicitors. When combined with court costs, this is a serious burden on the claimant.

<sup>262</sup> See: <http://www.equalitylaw.eu/downloads/2864-fyr-macedonia-cso-network-annual-report-pdf-72-kb>.

In relation to the courts, the obstacles can be even bigger. These proceedings are subject to administrative taxes and they can take much longer. The time limits are strict. Also, they raise the issue of the obligation to engage a lawyer.

c) Number of discrimination cases brought to justice

In Macedonia there are partially available statistics on the number of cases related to discrimination brought to justice. There are statistics on the work of the CPAD, the Ombudsperson and the Constitutional Court, however statistics from ordinary courts are lacking. The CPAD received 70 cases in 2015 (a striking fall of one third compared to 2014, when it received 106 cases, and the first fall in the number of cases since this body was established). The cases in 2015 were brought on the following discrimination grounds: 9 on ethnicity, 8 on personal or social status, 8 on mental or physical disability, 8 on age, 8 on health status, 5 on political affiliation, 4 on family or marital status, 4 on social origin, 3 on language, 3 on education, 2 on sex, 2 on race, 2 on citizenship, 2 on religion or religious belief, 2 on other beliefs, 2 on property status, 1 on colour of skin, 1 on gender, 1 on belonging to a marginalised group, 17 cases where no ground was claimed, and 14 under 'any other ground'. In filed cases, the alleged discrimination was in the following fields: 30 in employment and labour relations, 4 in access to goods and services, 14 in social security, 4 in judiciary and administration, 3 in public information and media, 3 in education, science and sports, 4 in housing, 13 in which no field was claimed by the applicant, and 3 in other fields as provided for under the law. As in previous years, the body did not produce accurate statistics on how many of these cases were processed and/or were closed in 2015.<sup>263</sup>

In 2015, the percentage of discrimination cases remained low: 53 cases were directed to the Ombudsperson (representing 1.2 % of the total number of cases received by the Ombudsperson). This is small drop compared to 2014, when it registered 66 cases (representing 1.55 % of the total number of cases it received). As in the previous years, the Ombudsperson did not publish detailed statistics as to grounds and fields in relation to the cases, but did mention that the trend of cases relating to employment and on grounds of ethnicity forming the largest number of cases has continued.

In 2014, the Constitutional Court<sup>264</sup> received 13 cases in relation to the protection of human rights and fundamental freedoms (protection against discrimination falls within this category and seven of the cases were cases for protection against discrimination). This is a substantial drop in the number of such cases filed to the Constitutional Court compared to previous years (there were 22 cases in 2013, 25 cases in 2012 and 23 cases in 2011). In 2014 the Constitutional Court did not report in how many of these cases it found a violation of human rights, but simply mentions that it did not consider two of the cases because there was no breach of rights.<sup>265</sup>

d) Registration of discrimination cases by national courts

In Macedonia discrimination cases are not registered as such by national courts.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

a) Engaging on behalf of victims of discrimination (representing them)

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<sup>263</sup> Commission for Protection Against Discrimination (*Комисија за заштита од дискриминација*) (2016), 2015 Annual Report of the Commission for Protection Against Discrimination <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>.

<sup>264</sup> At the time of writing of this report, the 2015 report has still not been published.

<sup>265</sup> *Overview of the Work of the Constitutional Court in 2014* [Преглед на работата на Уставниот Суд за 2014 година] (February 2015).

In Macedonia associations/organisations/trade unions are entitled to act on behalf of victims of discrimination. Under the Anti-discrimination Law, associations of citizens (as well as institutions, foundations, and other civil organisations) with a legitimate interest as well as any other person working on the right to equal treatment are explicitly allowed to join a potential victim's case (Article 39), and in practice they are also allowed to act on behalf of victims of discrimination (legitimate interest is defined in Article 5(10)). In labour cases, the Law on Labour Relations provides the option only for trade unions to act on behalf of the victim, as long as they have the approval of the complainant (Article 93).

b) Engaging in support of victims of discrimination

In Macedonia associations/organisations/trade unions can act in support of victims of discrimination. There does not seem to be a procedural obstacle for such support, and for joining in existing proceedings. However, it needs to be underlined that it is up to the court to allow for this or not. The court will be looking into whether the associations/organisations/trade unions have an equality mandate (most likely judging by their founding articles) and then decide whether it will allow for this or not (as specified by Article 39 of the Anti-discrimination Law).

c) Actio popularis

In Macedonia national law allows associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**). Although this is not expressly provided for under the Anti-discrimination Law, this is the well-established practice of the equality body. It does exist expressly as an option under other laws, and in other procedures. The Constitutional Court has the ability to look into *actio popularis* cases in relation to human rights cases, including cases on discrimination.

d) Class action

In Macedonia national law allows associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event. Class action ('joint lawsuit' under the Anti-discrimination Law) can be brought by associations of citizens, foundations, or other civil society institutions and organisations that have a justified interest in pursuing the case. The main condition for undertaking a class action is to have the authorisation of the person that finds him/herself discriminated against (Article 41(4)), i.e. an actual person concerned with the class action. Persons will be considered as co-litigants against the person that has violated the right to equal treatment (Article 41(1)). This specific article refers to court proceedings, however such an approach is also permitted in cases before the equality body.

### 6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Macedonia national law requires a shift of the burden of proof from the complainant to the respondent (save for criminal and misdemeanour proceedings).

The Anti-discrimination Law declaratively states that it is up to the respondent to prove that no violation of the right to equal treatment has occurred. However, in order for a procedure to be initiated, the law asks for facts and proof from the complainant (Article 38). As according to the directives, people who consider themselves wronged because the principle of equal treatment has not been applied to them establish only facts from which it may be presumed that there has been discrimination, the Anti-discrimination Law seems to place a huge part of the burden in proving discrimination on the complainant, asking for the submission of '*facts and proofs* from which the act or action of discrimination can be *established*', unlike the directives, which set a requirement for *facts* from which the discrimination may be *presumed* (emphasis added).



This means that although the law claims that it is not the complainant who has to prove the facts but the respondent, we cannot say that it provides for a reversed burden of proof, as per the directives, as a step towards proving the facts is a burden placed on the complainant by asking for proofs aside from laying out of all known facts in relation to the case and leaving the respondent to show these facts to be non-existent (i.e. it makes a step from *onus proferendi* to *onus probandi*).

The Law on Labour Relations and the Law on Social Protection also include provisions on the shift of burden of proof (Articles 11(1) and (2) and Article 23 respectively). The newly adopted Law on Psychological and Sexual Harassment also provides for a shift of the burden of proof (Article 33). Since these provisions differ from the provision in the Anti-discrimination Law, it remains subject to judicial interpretation which provision will be applied to a labour case. The Law on Child Protection prescribes that the procedure for protection against discrimination shall be conducted as prescribed by the Anti-discrimination Law, thus one can conclude that the same rules for shifting the burden of proof will apply.

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

In Macedonia there are legal measures of protection against victimisation. The Anti-discrimination Law declares victimisation to be a form of discrimination. Victimisation is extended beyond the person who reports discrimination, to the person who files the complaint and to any witnesses (Article 10). The Constitution also provides for protection against victimisation, as it states that a citizen cannot be called to account or suffer adverse consequences for attitudes expressed in petitions, unless they entail the committing of a criminal offence (Article 24). The Law on Labour Relations provides for protection against victimisation<sup>266</sup> in a procedure related to psychological harassment (referred to in the law as mobbing). This protection also extends to cover witnesses. Protection against victimisation is also granted under the new Law on Psychological and Sexual Harassment (Article 30).

#### **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

##### **a) Applicable sanctions in cases of discrimination – in law and in practice**

Under the Anti-discrimination Law, sanctions vary according to the procedure. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation could lead to regular compensation awards; and the misdemeanour procedure envisages fines in the range of EUR 70<sup>267</sup> to 1 000, in national currency (Articles 42 to 45(6)). Alignment with the new Law on Misdemeanours (adopted 23 July 2015), resulted in amendments to Chapter VII-Misdemeanours, of the Anti-discrimination Law. Following the amendments, paragraphs one in Articles 42-45 are now on legal persons, paragraphs two on responsible persons from the legal person, and paragraphs three for responsible persons at the public bodies, while new fourth paragraphs are added for natural persons. The charges for legal persons are raised, the fines for responsible persons with public duties and natural persons are lowered, whereas the fines for the responsible person in the legal person are set on a strict scale, which is the mid-value from the amount that was prescribed thus far. Before the amendments, paragraphs one prescribed fines for 'anyone' that conducts the above noted actions, paragraphs two were on fines for the responsible person from the legal person (be it private or public) and paragraphs three were fines for the legal person itself.

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<sup>266</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 11(3).

<sup>267</sup> Lowest fine dropped from EUR 100 to EUR 70 with the 2015 amendments of the ADL.

In labour cases as well as other civil court litigation, only compensation for pecuniary and non-pecuniary damages can be claimed.<sup>268</sup> In cases of child and social protection, sanctions are fines imposed in a misdemeanour procedure. These can amount to EUR 500 to 1 000 (in national currency) in child protection cases and EUR 3 000 to 5 000 (in national currency) in cases concerning social protection.<sup>269</sup>

b) Ceiling and amount of compensation

There are no limits stipulated by law, and the amount of compensation fully depends on the court verdict. In other areas of compensation (such as traffic accidents), court practice is to relate the sum of compensation to the living standard in the country.

c) Assessment of the sanctions

At present no conclusions can be drawn as to whether the available sanctions are likely to be effective, proportionate and dissuasive, as required by the directives. When compared to the available sanctions provided for other misdemeanours<sup>270</sup> and so on, the anti-discrimination sanctions cannot be seen as dissuasive, effective or proportionate. Further consideration of the issue through legal practice is not possible yet, due to lack of case law.

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<sup>268</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Articles 264-266.

<sup>269</sup> Please bear in mind that the average gross monthly salary in the country is approximately EUR 380.

<sup>270</sup> For example, the value of the fine in some discrimination cases is equal to the value of a fine for throwing a cigarette butt on the street.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Anti-discrimination Law, adopted in the course of harmonising the national legislation with the *acquis*, provided for the establishment of an equality body – the Commission for Protection against Discrimination (CPAD).<sup>271</sup> This commission is tasked to deal with both the public and the private sector. It is the first specialised body for equal treatment. According to the preparation materials of the Anti-discrimination Law, the CPAD is the body established and tasked with equality according to the transposition process.

Before this, the Ombudsperson was the only institution that had duties for the protection of the principles of non-discrimination and equality as part of its broader mandate for the protection of human rights in the public sector.<sup>272</sup> It has a special unit focused on non-discrimination and equitable and just representation.

- b) Status of the designated body/bodies – general independence

According to the Anti-discrimination Law,<sup>273</sup> the CPAD is established as an autonomous and independent body. The CPAD is composed of seven members appointed by the Parliament with five-year mandates. Macedonian citizens with regular residence in the country, university degrees and experience in human rights are eligible for membership. Applications are collected through a public call for applications.

The commission is financed through the state budget, but its activities can also be funded through other sources. The members of the commission receive honorarium of two average monthly salaries<sup>274</sup> (around EUR 700 gross per month). However, its annually allocated budget in the state budget remains very small, creating a barrier to the CPAD fully exercising its duties. It should also be noted that the CPAD has been a beneficiary of several projects conducted by CSOs, and has been one of the main institutions in the focus of the OSCE Mission in Skopje anti-discrimination project for the past four years.

The other body of relevance here, the Ombudsperson, is tasked to protect the constitutional and legal rights of citizens when violated by state bodies and other authorities and organisations with public powers. This quasi-judicial institution has a mandate to safeguard *inter alia* principles of non-discrimination, and adequate and equitable representation of communities in the organs of state power, bodies of local government and public institutions and services (Article 77).<sup>275</sup>

The Ombudsperson is elected by the Parliament under the Badinter principle (i.e. majority vote of the total number of parliamentarians, which must include a majority of the total number of MPs who belong to ethnic communities that are not the ethnic majority). The Ombudsperson is elected for a term of eight years, with the possibility for one re-election. The Ombudsperson has deputies who are elected under the same procedure as the Ombudsperson, one of whom is tasked to focus on non-discrimination and equitable representation.

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<sup>271</sup> Former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2014, Articles 16 to 33.

<sup>272</sup> Former Yugoslav Republic of Macedonia, Law on the Ombudsperson, 2003, Articles 6, 11.

<sup>273</sup> Former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010.

<sup>274</sup> Former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010, Article 21.

<sup>275</sup> Constitution of the Republic of Macedonia (Устав на Република Македонија). Official Website of the Assembly of the Republic of Macedonia, [www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp?x](http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp?x), Article 77.

Any Macedonian citizen can be appointed Ombudsperson if they meet the general conditions specified in law for employment in a state body, and if they are a graduate lawyer with over nine years' experience in legal affairs, whose activity is proven in the field of protection of citizens' rights and who enjoys a suitable reputation for performing the function of Ombudsperson.<sup>276</sup> The Ombudsperson and the Deputy Ombudsperson cannot be held responsible for actions, measures and activities undertaken in exercising their function. The independence and autonomy of the office is guaranteed by the Constitution and by law.

In practice, the election of the Ombudsperson very much depends on the votes of the governing political parties. Also, given that its funding comes from the state budget, the Ombudsperson could also be seen as financially dependent (as no law prescribed percentages of its budget). The institution has a working unit for protection against discrimination.

A study on national human rights institutions in Macedonia (conducted in 2012) looked at both these institutions, aiming to assess them against the international framework of standards, including the EU *acquis*. For the CPAD, on the part of the legal framework, related to issues raised in this question of the report, it recommended that: a guarantee for pluralism of the CPAD beyond ethnicity should be entered in the law in order to enable the composition of CPAD to mirror the society as a whole; the law should include an obligation for the Parliament to debate the CPAD annual report, accompanied with an obligation for representatives from the Government to be present at the session where this report will be discussed; and that social sciences should not be included in the provision, so as to allow only people with specific equality and non-discrimination or human rights education and experience to be able to stand as candidates for members of the CPAD.<sup>277</sup> Also, it reiterated previous findings that 'the discussions at the parliamentary session devoted to the appointment on members, prove the whole process of the establishment of the first composition of the first equality body in the country as a highly politicised one.'<sup>278</sup> On the resources of the CPAD, it made the following recommendations: allow under law the creation of a secretariat, or any form of administrative support for the CPAD; give due consideration to the possibility for professionalisation of the members of the CPAD by making this their full-time job and position; for the CPAD to be in a position, similar to the Ombudsperson, to agree upon its annual budget with the Government for funds that should be sufficient for CPAD to be able to exercise its full mandate; consider establishing formal links with the regional offices of the Ombudsperson, in order to expand the reach of the CPAD.<sup>279</sup>

The study's recommendations on independence for the Ombudsperson, which has non-discrimination duties, suggested appointing the Ombudsperson for a single non-renewable term, as a way to reduce susceptibility to political pressure, while in relation to resources it recommended the allocation of sufficient funds for the Ombudsperson to exercise its full mandate.<sup>280</sup>

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<sup>276</sup> Former Yugoslav Republic of Macedonia, Law on the Ombudsperson, 2003, Article 6.

<sup>277</sup> Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, [http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI\\_Study\\_MKD-2012for\\_web.pdf](http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf), pp. 48-49.

<sup>278</sup> Kotevska, Biljana (2012) *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, [http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI\\_Study\\_MKD-2012for\\_web.pdf](http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf), p. 45.

<sup>279</sup> Kotevska, Biljana (2012) *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, [http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI\\_Study\\_MKD-2012for\\_web.pdf](http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf), p. 50.

<sup>280</sup> Kotevska, Biljana (2012) *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, [http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI\\_Study\\_MKD-2012for\\_web.pdf](http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf), pp. 39-40.

Concerns about the independence of the body were further strengthened with the wire-tapping affair. In February 2015, the largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20,000 people that are alleged to have been carried out by the state Counterintelligence Agency.<sup>281</sup> The content of the published recordings removed doubts about the already existing claims of a state capture<sup>282</sup> and extreme concentration of power in the ruling party, including the complete exercise of party control over not only the judiciary, but *all* aspects of society. It is of interest for this report to highlight that what seems to be the voice of the president of the equality body, Dushko Minovski, also featured in the publicly broadcasted conversations; he can be heard to be a person working for the ruling party on the ground during the election campaign, and, even more seriously, to be (ab)using his position as someone in the employment of the Ministry of Labour and Social Policy by instructing people that have been awarded social assistance how to vote.<sup>283</sup>

c) Grounds covered by the designated body/bodies

The Commission on Protection Against Discrimination deals with the following grounds: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political belonging, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, any other ground prescribed by law or ratified international treaty. The Ombudsperson can also deal with the following grounds: sex, race, colour, national, ethnic, social, political, religious, cultural, language, property and social background, disability, origin and any other ground.

d) Competences of the designated body/bodies – and their independent exercise

The Commission on Protection Against Discrimination can receive individual complaints, investigate, provide independent assistance to victims, make recommendations and initiate procedures to establish the responsibility of people who will not obey its recommendations. It has the competence to collect statistics and other data, and to conduct surveys and research on discrimination.

The Ombudsperson can receive individual complaints, investigate, provide independent assistance to victims, make recommendations and submit independent reports to the media and the Parliament. The Ombudsperson is empowered to conduct special research and investigations on specific issues.

e) Legal standing of the designated body/bodies

Under the Anti-discrimination Law, the CPAD does not have the legal authority to bring discrimination complaints or to intervene in legal cases concerning discrimination in court. It can only bring to 'competent authorities' cases of persons to whom a recommendation was directed but who have not acted upon it (Articles 39, 41). However, in 2013, the CPAD made a request to one of the courts and was allowed to intervene in a case of discrimination, which means that although such a competence is not explicitly granted in the Anti-discrimination Law, the CPAD can intervene in legal cases concerning discrimination.

<sup>281</sup> Balkan Insight, 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

<sup>282</sup> The concept of state capture is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'.

<sup>283</sup> A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gipsy by Gipsy, we'll drag them"' [СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме] <http://a1on.mk/wordpress/archives/465799>. Please note that in the national context 'Gipsy' (Циган) is a derogatory word for Roma.

The Ombudsperson can act on a request from an individual or *ex officio*, however it cannot intervene in court cases (Article 13). When the Ombudsperson concludes that violations are made, s/he may make recommendations, suggestions, opinions and indications on how to act upon detected violations; propose a retrial (reopening of the case); initiate disciplinary proceedings against officials or responsible persons; and apply to the competent public prosecutor for initiating criminal procedures.

f) Quasi-judicial competences

In Macedonia the bodies are quasi-judicial institutions.

The CPAD has elements of a quasi-judicial institution, however it does not impose sanctions, but only delivers opinions and recommendations. It can receive a case on any of the grounds in the public and private sphere in order to protect complainants. Complaints are filed free of charge, but need to contain facts and proof to support the claims.

Once the CPAD receives a complaint, it forwards it to the respondent within 15 days of receipt. The respondent has 15 days to reply to the complaint. Altogether, the CPAD must deliver an opinion in 90 days from the day of receipt of the complaint. The respondent to whom a recommendation has been directed needs to act in accordance with it within 30 days of the notification it has received from the CPAD. If a person does not act upon the recommendation, the CPAD can initiate a procedure in front of a 'competent authority'.

The Ombudsperson also has elements of a quasi-judicial institution. Under law, state organs should implement its recommendations (Article 32). If state bodies do not respond, the Ombudsperson has the right to inform the higher responsible body, the Parliament and the public through the media.

g) Registration by the bodies of complaints and decisions

In Macedonia the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are not available to the public. However, they are made available in the annual reports. In addition, they could be made available throughout the year upon request. The CPAD has the software to generate such statistics, and it also grants access to anonymised documents from the complete case documentation. Although the software is capable of providing updated statistics on the website, this is not done and the statistics are made public only in the annual reports. Aside from the annual report, the Ombudsperson grants access only to the statistics upon request, but it does not give access to other case documentation. An issue in relation to the statistics coming from the Ombudsperson's office is that they mix the fields and the grounds of discrimination.

h) Roma and Travellers

Neither the Ombudsperson nor the CPAD has shown through their actions thus far that they consider the situation of Roma and Travellers as a priority issue. However, the Ombudsperson has been vocal on many occasions about the complexity and specificities of the problems Roma face, including problems related to discrimination. Moreover, it is thanks to the instruction that the Ombudsperson issued to the CPAD that the CPAD finally resolved a case filed by the Helsinki Committee of the Republic of Macedonia in 2011 regarding the segregation of Roma children in schools in Bitola. As reported above (see section 6.1.b.), the Ombudsperson acted upon a case filed with it by the Network against Discrimination against the CPAD for violating the body's obligation to respond to a filed case within 90 days.

Further to the argument for there being a lack of prioritisation of Roma issues is the fact that even after this intervention, and after breaching all possible procedural deadlines, the CPAD finally decided this case in September 2014, and the applicants received the decision

only in December 2014. The CPAD did not find discrimination on grounds of ethnicity in the case, nor did it find segregation. As already explained above, the CPAD actually found the situation to be a result of the parents' choice to register their children in a specific primary school, however it failed to state on what it bases its argument and bluntly added that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.<sup>284</sup> Although having deliberated on this case for over three years, the CPAD adds a surprisingly short elaboration on its opinion, the largest portion of which consists of a bullet point list of 14 letters/requests that it has sent and received while processing the case, one of which is a rather vague explanation of proceedings which states, 'numerous phone calls on the case topic with relevant sides and numerous meetings on the case topic'. There is no further elaboration as to whom the CPAD talked to or with whom and when they met, and what was discussed and possibly decided. It also disregards reports on Roma children in education and on segregation in education, including a statement from the director of the primary school saying that the parents of children from other ethnicities, although living in the school's region, choose to register their children in other primary schools in order to avoid sending them to school with Roma children.<sup>285</sup>

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<sup>284</sup> Commission for Protection against Discrimination (*Комисија за заштита од дискриминација*), Opinion of the Commission for Protection against Discrimination, 05.09.2014, [http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn\\_pripadnost/07-80.%2005.09.2014.pdf](http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf).

<sup>285</sup> Commission for Protection against Discrimination (*Комисија за заштита од дискриминација*), Opinion of the Commission for Protection against Discrimination, 05.09.2014, [http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn\\_pripadnost/07-80.%2005.09.2014.pdf](http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf).

## 8 IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

#### Dissemination of information

In 2015, the main activities in relation to the dissemination of information, including capacity building of institutions, continued to be organised and implemented by CSOs (with the Network against Discrimination and its members leading most of the initiatives) and the OSCE Mission to Skopje. They regularly include the Ministry of Labour and Social Policy (MLSP) and the Commission for Protection against Discrimination (CPAD) as partners/co-implementers in the activities.

The OSCE completed an analysis of the harmonisation of the national equality and non-discrimination legislation with international standards and an analysis of the internal harmonisation of the laws.<sup>286</sup> It also published a 'Guide on Situation Testing', 'Practicum on the Law on Prevention and Protection against Discrimination' (describing the procedure followed by the CPAD and providing comparative analysis of different European models), and 'Judgements from the European Court of Human Rights and the Court of Justice of the European Union' (a compilation of the case law of international jurisdictions in relation to discrimination cases), as well as preparing an analysis of discrimination, stereotypes and prejudice in primary school textbooks.<sup>287</sup> The OSCE continued its capacity building efforts, reporting that in the period 2011-2015 it had organised the training of 270 judges and 130 lawyers.<sup>288</sup> In addition, in cooperation with the CPAD and MLSP, it published an analysis of discriminatory practices in the field of education, and in cooperation with CPAD a research report on the segregation of Roma children in education.

The civil society organisation H.E.R.A. implemented a project together with the CPAD with the aim of increasing its capacities, visibility and activity in relation to discrimination on grounds of sexual orientation and gender identity. Aside from a public media campaign, which seemed to be well received on social media, this cooperation ultimately resulted in the adoption of a protocol on processing discrimination cases on grounds of sexual orientation and gender identity in front of CPAD,<sup>289</sup> which significantly contributes to the recognition of the legal protection of these two grounds, given that they are still not explicitly included as protection grounds in the open-ended Article 3 of the Anti-discrimination Law.

The MLSP, the British Council, the Citizens Initiative for Equal Opportunities ('Equal Access') and the Organisation of Social Workers of Bitola and Demir Hisar, carried out a project, 'Effective Implementation of the Law for Prevention and Protection Against Discrimination'. They produced a manual for better implementation of the law,<sup>290</sup> with a platform for cooperation between the local authorities relating to the implementation of the law,<sup>291</sup> ultimately resulting in the adoption of a memorandum of understanding through which the duties of the local coordinators were extended to include equality and non-discrimination issues in general and not just on gender. In addition, by the end of 2013 they completed a series of training events on various topics regarding non-discrimination and equality for 600 representatives from the courts, attorneys, various profiles of

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<sup>286</sup> Kotevska, Biljana *Analysis of the harmonization of national equality and non-discrimination legislation* (forthcoming – 2016; OSCE and CPAD).

<sup>287</sup> This analysis has not been published yet.

<sup>288</sup> See the OSCE website: <http://www.osce.org/skopje/194961>.

<sup>289</sup> See flash report: <http://www.equalitylaw.eu/downloads/2963-equality-body-and-civil-society-organizations-join-to-make-sure-that-sexual-orientation-and-gender-identity-is-regarded-as-a-protected-ground-in-macedonia-pdf-86-kb>.

<sup>290</sup> The manual in Macedonian language is accessible on this page:

[http://ednakvimoznosti.mk/img\\_upload/Priracnik%20za%20implementacija%20na%20Zakonot.doc](http://ednakvimoznosti.mk/img_upload/Priracnik%20za%20implementacija%20na%20Zakonot.doc).

<sup>291</sup> About the Project (*За проектот*) *Ednakvi moznosti website*, [http://ednakvimoznosti.mk/za\\_proektot.asp](http://ednakvimoznosti.mk/za_proektot.asp).



employees from bodies working on social policy and other areas under the MLSP, as well as in education, health, local self-government, commerce chambers, trade unions, etc.

In 2014 and beginning of 2015, in connection with a PROGRESS project, two CSOs, the MLSP and the CPAD conducted a project for raising public awareness on equality and non-discrimination and advancing the legal framework for countering discrimination. They have conducted various activities (a series of conferences, workshops, a public campaign, photography competition, etc.) all of which aim to further promote the current framework and to discuss possible amendments.<sup>292</sup>

### **Dialogue with NGOs**

The trend of building of negative sentiments around NGOs has continued.<sup>293</sup> Massive protests of university students, followed by protests of high-school students, honoraria workers, and unemployed persons did not change anything in the Government's approach to dialogue with NGOs and citizens.

The adoption of important laws pertaining to human rights issues continues without including NGOs in the processes. Public statements slandering NGOs that criticise Government policies and activities continued. In spite of this, the CPAD continued the practice of good cooperation with CSOs.<sup>294</sup> CPAD has partnered up with CSOs in conducting projects, including a PROGRESS project this past year (see above), and its members regularly participate in CSO events.

The LGBTI Support Centre, which has been in operation since 2012, providing support to LGBTI persons and to their family and friends, has been subject to attacks ever since it was opened. People working at the centre have been physically attacked, and its offices have been damaged several times. Following one of the attacks, the Centre had to close down for renovation for a period of time.<sup>295</sup> No proper investigation and prosecution of the attackers on the LGBT centre has happened yet and no charges have been raised despite numerous calls by CSOs, protests organised demanding action, existing video recordings from which the attackers can be easily identified (available on YouTube), and calls by the European Commission itself.<sup>296</sup>

### **Dialogue between social partners**

The mechanism for social dialogue between social partners is the Economic-social Council. It consists of representatives from the Government, the Unions and the Associations of Employers.<sup>297</sup> It has been reported that this council held over 20 meetings, discussing workers' rights, and other labour relations. However, it cannot be said that this would be in line with what the directives are demanding as promoting a dialogue with a view to giving effect to the principle of equal treatment. Similar councils have also been established

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<sup>292</sup> PolioPlus. From Norm to Practice (*Од норма до пракса*) Polio Plus website, <http://www.polioplus.org.mk/vesti/proekt1.html>.

<sup>293</sup> Notably, whenever the Government and/or Opposition presented a new position or was preparing grounds for introducing/proposing a new policy, or simply just wanted to distract the general public from another emerging problem, an NGO would hold a press conference (mostly NGOs registered a week/two weeks before) to support their claims or harshly refute the opposing side's positions. This was done by both the Government and the Opposition and happened on numerous occasions.

<sup>294</sup> However, a not-so-promising development is the appointment of new members of the equality body, which although falling outside the reporting period is important and warrants a footnote. Please see: <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

<sup>295</sup> For more on this, please see flash Report: <http://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

<sup>296</sup> 'Absence of Reaction to Series of Attacks on the LGBTI Support Centre'. Network against Discrimination. <http://www.equalitylaw.eu/component/edocman/mk-29-lgbti-centre-attacks-no-reactions>.

<sup>297</sup> Ministry of Labour and Social Policy (Министерство за труд и социјална политика) Economic-social Council [http://www.mtsp.gov.mk/socijalno-partnerstvo-ns\\_article-ekonomsko-socijalen-sovet.nspix](http://www.mtsp.gov.mk/socijalno-partnerstvo-ns_article-ekonomsko-socijalen-sovet.nspix).

on local level in seven municipalities. The Organisation of Employers of Macedonia undertook a project that aimed to foster dialogue between the social partners.<sup>298</sup> Part of the project's activities was the promotion of the implementation of *acquis communautaire* in the area of social dialogue.

### **Brief note on activities on Roma**

The Government took part in the implementation of the activities under the Decade of Roma Inclusion (2005-2015).<sup>299</sup> For the whole duration of the Decade, action plans were adopted for each year, and activities were implemented, including the establishment of the Roma Information Centres (RICs), which serve also as points of contact with the NGO sector. Sixteen NGOs ran a contact point as part of the Decade of Roma Inclusion. These monitored the implementation of the plans, carried out advocacy activities, issued recommendations and implemented joint activities. After the closing of the Decade, the Government continued to support the RICs. It also adopted a national 'Strategy on Roma 2014-2020'.<sup>300</sup> In addition to this, the Government continues to have a Minister without Portfolio<sup>301</sup> tasked to coordinate Government activities in relation to the Roma, although still without much visibility.

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### **a) Mechanisms**

No mechanisms exist that ensure all contracts, collective agreements, international rules of undertakings and rules governing independent occupations are not in conflict with (solely) the principle of equal treatment. However, general mechanisms for compliance with the Constitution and national laws, and with legal principles such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori* do exist.

Collective agreements, international rules of undertakings and rules governing independent occupations if challenged can be subject to a review of constitutionality and legality before the Constitutional Court. The Law on Obligations provides that a contract contrary to the Constitution, laws and good customs is null and void.<sup>302</sup> Compliance of contracts, collective agreements, internal rules of undertakings and rules governing independent occupations can be challenged if brought before court, where parts or full documents can be deemed null and void.

The Law on Courts provides that loopholes in laws are no justification for courts to refuse to act on upon a filed case — courts have an obligation to act based on the general principles of law, except when that is strictly forbidden by law.<sup>303</sup> Also, respecting general legal principles is in the tradition and teaching of the legal system, and applies to national laws. These laws almost always include in the final provision section a notion of the *lex*

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<sup>298</sup> Ministry of Labour and Social Policy (Министерство за труд и социјална политика) Social dialogue and possibilities for compromise and balance between the economic and social development (Социјалниот дијалог-можност за компромис и баланс меѓу економскиот и социјалниот развој) <http://vlada.mk/node/1927>.

<sup>299</sup> For more information on the projects implemented in the context of the Decade of Roma Inclusion and MLSP activities on Roma rights and integration, please see: Проекти произлезени од декадата на Ромите, (Roma Decade Related Projects) Ministry of Labour and Social Policy Website, <http://www.mtsp.gov.mk/proekti-proizlezени-od-dekadata-na-romite.nspх>.

<sup>300</sup> Стратегија за Ромите 2014-2020 (Strategy on Roma 2014-2020), [http://arhiva.vlada.mk/registar/files/Strategija\\_Romite\\_%202014-2020.pdf](http://arhiva.vlada.mk/registar/files/Strategija_Romite_%202014-2020.pdf).

<sup>301</sup> The website and profile of the Minister without Portfolio can be accessed at this link: [www.mbr-ds.gov.mk/?q=node/2](http://www.mbr-ds.gov.mk/?q=node/2).

<sup>302</sup> Former Yugoslav Republic of Macedonia, Law on Obligations (Закон за облигациони односи), 2001, Article 95, paragraph 1. Official Gazette of the Republic of Macedonia No. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009, 116/2009, 123/2013.

<sup>303</sup> Former Yugoslav Republic of Macedonia, Law on Courts, 2006.

*specialis derogat legi generali* including changes made on the principle *lex posterior derogat legi priori*.

b) Rules contrary to the principle of equality

Harmonisation of the legal framework with the Anti-discrimination Law has been identified as a general strategic goal in the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability' adopted in May 2012. The action plan for the implementation of the strategy envisaged that this activity would be completed by the end of 2013,<sup>304</sup> however this activity has not been conducted.

In 2014 and 2015, with OSCE support, the CPAD conducted an in-depth assessment of the harmonisation of the Anti-discrimination Law with international equality and non-discrimination standards, and of other laws/provisions pertaining to equality and non-discrimination with the Anti-discrimination Law and with international standards. The study identifies points for harmonisation, contains concrete proposals for amendments of legislative provisions from a range of laws, but also draws some general conclusions, including a need for urgent harmonisation of the Anti-discrimination Law with international standards followed by harmonisation of other laws with the Anti-discrimination Law, as well as reviews of the terminology on disability, criteria for access to public service and the position of LGBTIQ persons. The study also identifies a need for gender mainstreaming, equalisation of married and unmarried couples and a change in policy-making processes which will, in principle, result in the consideration of equality and non-discrimination when adopting laws and policies, including scrutinising them for possible indirect effects.<sup>305</sup> This study has not yet been published.

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<sup>304</sup> Ministry of Labour and Social Policy (2013), *Action Plan - 2013 for implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender for 2012-2015*, p.5. [www.mtsp.gov.mk/WBStorage/Files/akciski\\_1\\_eng.doc](http://www.mtsp.gov.mk/WBStorage/Files/akciski_1_eng.doc).

<sup>305</sup> Kotevska, Biljana *Analysis of the harmonization of national equality and non-discrimination legislation* (forthcoming – 2016; OSCE and CPAD).

## 9 COORDINATION AT NATIONAL LEVEL

The MLSP is tasked with coordinating issues on anti-discrimination on the grounds covered in this report, as well as on other grounds mentioned in national legislation.<sup>306</sup> There is a department for equal opportunities, as well as a deputy-minister tasked with non-discrimination issues.<sup>307</sup> Aside from this ministry, several other sections from the executive Government also have duties that touch upon anti-discrimination on the grounds covered in this report:

- Inter-ministerial body on human rights (seated in the Ministry of Foreign Affairs): tasked with, inter alia, strengthening coordination of all activities of the ministries and other bodies of the Government with competences in human rights;
- Minister without Portfolio: tasked with coordination of all Government activities pertaining to Roma (including implementation of the Decade of Roma Inclusion 2005-2015).

There are also coordinating bodies tasked with monitoring the implementation of strategic documents related in part to the discrimination grounds that are the subject of this report, notably the ones on disability and age.

In 2014, the Ministry of Labour and Social Policy adopted an action plan for implementation of the Anti-discrimination Law 2015-2020, which it devised with the help of the OSCE Mission in Skopje. Harmonisation of the national equality and non-discrimination legal framework, increasing the capacities of the competent institutions and their coordination, as well as awareness-raising activities are part of the planned activities. Implementation of the action plan started in 2015. Although no official update on its progress has been published, some of the activities have started, such as preparation of the new equality strategy (see below) and the analysis of the harmonisation of the national legislation with international standards and of the internal harmonisation of the legislation with the Anti-discrimination Law.

The 2012-2015 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender',<sup>308</sup> and its accompanying action plan<sup>309</sup> were the first documents of their kind in the country, establishing the general goals of the strategy and specific goals for each targeted discrimination ground. The general strategic goals are: advancing the legal framework for equality and non-discrimination; strengthening the capacities of the institutional mechanisms for the prevention and protection against discrimination and promotion of equal treatment; and awareness raising in respect of recognising forms of discrimination and promoting the concepts of non-discrimination and equal opportunities. The strategy does not provide for positive action measures. A public debate on the new 'Strategy on Equality and Non-discrimination 2016-2020' was organised towards the end of 2015. However, by the end of the reporting period, the new strategy had not yet been adopted.<sup>310</sup>

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<sup>306</sup> Ministry of Labour and Social Policy: [www.mtsp.gov.mk/?ItemID=21E7AB9648BFC441AFD588BA0183B4A3](http://www.mtsp.gov.mk/?ItemID=21E7AB9648BFC441AFD588BA0183B4A3).

<sup>307</sup> Ministry of Labour and Social Policy: [www.mtsp.gov.mk/?ItemID=380B6B1D444D5047B575F402122ED94A](http://www.mtsp.gov.mk/?ItemID=380B6B1D444D5047B575F402122ED94A).

<sup>308</sup> Ministry of Labour and Social Policy (2012), *Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол 2012-2015* (National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender 2012-2015), [www.mtsp.gov.mk/WBStorage/Files/strategija\\_ednakvost.doc](http://www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc).

<sup>309</sup> Ministry of Labour and Social Policy (2013), *Action Plan - 2013 for implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender for 2012-2015*, [www.mtsp.gov.mk/WBStorage/Files/akciski\\_1\\_eng.doc](http://www.mtsp.gov.mk/WBStorage/Files/akciski_1_eng.doc).

<sup>310</sup> Please note that this was also the case at the time of writing of this report.

## 10 CURRENT BEST PRACTICES

In the current national context, there are not many good practices that can be pointed to, especially as issues of equality and non-discrimination became the focus of state institutions less than five years ago, with the adoption of the first comprehensive legislation.

From the developments in 2015, the best practice would be the outcome of the joint project implemented by Health Education and Research Association (H.E.R.A.) and the national equality body (the CPAD), which resulted in the adoption of a protocol on processing discrimination cases on grounds of sexual orientation and gender identity. In the absence of a political will to put forward legislative amendments that will explicitly include sexual orientation and gender identity in Article 3 of the Anti-discrimination Law, the CSO and the equality body joined forces to draft a protocol, thus devising instruments that will boost visibility of these two grounds. The annex to the protocol is the new form for reporting discrimination cases, which explicitly includes sexual orientation and gender identity as discrimination grounds.<sup>311</sup>

Apart from this, one of the best practices remains the implementation of the principle of equitable and just representation of all ethnicities in the public administration (see section 5 above). Although no full and encompassing report has been published as to the results of the implementation, it is noticeable from the Ombudsperson's annual reports that the number of people from the minorities who are employed in the administration is constantly rising.

Another good practice is the exercise of the promotional mandate by the Ombudsperson for several years, including on issues of equality and non-discrimination, regardless of the lack of legal grounds for this, and in spite of the very low budget that the institution is annually awarded (see section 7 above). Although a legislative proposal was put through parliamentary procedure in February 2015 for expanding the mandate of the Ombudsperson to include promotional responsibilities as well as to complete additional alignments with the Paris Principles, as of the date of this report, it has not progressed any further in Parliament.

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<sup>311</sup> See also text below.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

The national anti-discrimination legislation is in breach of the directives in several areas outlined below. Breaches of the text and the spirit of the directives are as follows:

- In general:
  - o The Constitution and the laws are not consistent in the terminology that they use on discrimination and grounds of discrimination, thus generating legal uncertainty.
  - o The Constitution and the laws prescribe various different procedures (it could be said that this allows forum shopping to take place) and rather vague sanctions.
- The Constitution:
  - o The principle of equality is stated only for citizens of the country.
  - o It contains a closed list of grounds for protection against discrimination, and disability, age and sexual orientation are not part of this list. Belief is part of this provision, however only political and religious belief.<sup>312</sup>
  - o Terminology used in the Constitution for people with disabilities cannot be considered as in compliance with the spirit of the directives.
- Anti-discrimination Law:

#### Essential weaknesses:

- o The object of the law is not precisely defined. This resulted in the adoption of an anti-discrimination law that does not aim to contribute to the upholding of the principle of equality, which lies at the heart of the directives.
- o The area of implementation of the law is not precisely defined.
- o Although the act contains a list of grounds in an open-ended provision, it does not explicitly include all standard EU grounds of discrimination. Namely, sexual orientation is not listed as a protected ground in this law.<sup>313</sup>
- o According to the directives, persons who consider themselves wronged because the principle of equal treatment has not been applied to them need only establish facts from which it may be presumed that there has been discrimination. The Anti-discrimination Law places a huge part of the burden in proving discrimination on the complainant, asking for submission of *'facts and*

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<sup>312</sup> Out of the other grounds protected on EU level, gender is also not part of this provision, although sex is.

<sup>313</sup> However, the practice of the CPAD shows that it does consider sexual orientation as a protected ground, as it has processed several cases pertaining to this ground, using the open-ended character of this provision. In addition, in December 2015, as a result of a project implemented by CPAD together with H.E.R.A. (a civil society organisation), the CPAD adopted a protocol for handling discrimination cases on grounds of sexual orientation and gender identity. The biggest achievement of this action is probably not the protocol itself, as it largely reiterates rules of procedure already established under other (legal and internal) acts, but is instead the annex to the protocol, which is an amended form for filing a complaint to the CPAD. The form that CPAD had used previously included a special section where all protected grounds from Article 3 of the ADL were numbered and the claimant had to circle one of them. This section did not contain sexual orientation and gender identity, whereas in the amended form, an additional option is included where the claimant can circle 'sexual orientation and gender identity'. Although somewhat symbolic, it is reasonable to expect that it will encourage people who want to claim discrimination on such grounds. Moreover, it shows an effort by the current equality body members to leave some legacy for their successors. For more on this, please see: <http://www.equalitylaw.eu/downloads/2963-equality-body-and-civil-society-organizations-join-to-make-sure-that-sexual-orientation-and-gender-identity-is-regarded-as-a-protected-ground-in-macedonia-pdf-86-kb> and the text of the protocol (in Macedonian): <http://hera.org.mk/wp-content/uploads/2015/11/Protokol-Zastita-od-diskriminacija-MK.pdf>.

*proofs* from which the act or action of discrimination can be *established*,<sup>314</sup> unlike the directives, which set a requirement for *facts* from which the discrimination may be *presumed* (emphasis added). This means that although the law claims that it is not for the complainant to prove the facts but for the respondent, we cannot say that it provides for a reversed burden of proof, as per the directives, because, as a step towards proving the facts, a burden is placed on the complainant by asking for proof aside from laying out of all the known facts in relation to the case and leaving the respondent to show these facts to be non-existent (i.e. it makes a step from *onus proferendi* to *onus probandi*).

- Unlike the EU directives, which state that 'Member States shall encourage dialogue with non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds foreseen in the Directives, with a view to promoting the principle of equal treatment', the national legislation does not mention cooperation with NGOs.
- The forms of discrimination as well as their definitions are not fully harmonised with European ones. The definition of direct discrimination is unnecessarily complicated.
- The law contains a wide, imprecise list of exceptions from discrimination. Such a list opens space for legal uncertainty. Moreover, some of these exceptions can be considered to be in breach of the EU directives. For example, it will not constitute discrimination if members of duly registered religions (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)). This would mean that this excuses these members even if, in doing so, they are discriminating on the grounds mentioned in Article 3 of the Anti-discrimination Law.
- The mechanism for protection provided in the law is not precisely defined. Selection of members of the equality body is prone to political influence. Moreover, the competence of the members cannot be secured, as the law does not strictly require them to have education and practice related to 'human rights' but to social sciences in general. Such a provision can cause problems in practice.<sup>315</sup> Also, although the CPAD is financed under the state budget, the state allocated budget is not enough for this body to exercise its full mandate, thus bringing its effectiveness under question.
- The provisions on the sanctions provided in the law cannot be considered to be good grounds for making effective, dissuasive and proportionate sanctions.

#### Technical weaknesses:

- The law contains an article with definitions of terms used in the law that added to the terminological confusion that already existed before its adoption, instead of contributing to the resolution of such confusion. This list also contained terms not used in the law at all. Furthermore, legal terms and key concepts were unnecessarily redefined (for example the term 'family').
- The law did not provide for any transitional provisions, preparatory activities for commencement of the implementation of the law, or for any deadlines for initiation and completion of these activities.
- The law did not provide procedures for the unification of provisions, notably nulling or amending provisions in other laws that are not in line with this law as a *lex specialis*.

<sup>314</sup> Former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010, Articles 25(2) and 38.

<sup>315</sup> This was already the case with the establishment of the Commission for Protection Against Discrimination. For more on this, please see: flash Report, 'The Assembly of the Republic of Macedonia appointed the members of the Commission for Protection against Discrimination' (01.02.2011), [http://www.equalitylaw.eu/index.php?option=com\\_edocman&task=document.viewdoc&id=2186&Itemid=295](http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2186&Itemid=295).



#### Ex-post evaluation of the implementation of the law:

- In 2013, the Ministry of Labour and Social Policy (MLSP) conducted an ex-post evaluation of the implementation of the Anti-discrimination Law, evaluating the process and the results from the implementation of this law, focusing on the prevention of discrimination and protection against discrimination. The results show that the aims of the law were only partly reached, which, according to the evaluation report, is justified given the amount of state-budget funds allocated for the law's implementation. Although noting numerous points where implementation can be improved, the report explicitly spelled out only three recommendations for legislative changes for improving the implementation: amending the Anti-discrimination Law to allow for the establishment of administrative support for the CPAD; explicit prescription of the 'shift of burden of proof' for the CPAD; and enhancing the CPAD accountability mechanisms.
- Other laws:
  - Other laws are not fully in line with the Anti-discrimination Law, nor with the directives (in their terminology, listing protected grounds, definitions of direct discrimination, omitting victimisation, social dialogue, etc.). The harmonisation of the legal framework with the ADL has been identified as a general strategic goal in the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability' adopted in May 2012, and was part of the activities set out under the action plan for its implementation for 2013, including a continuous monitoring of the legislation from the perspective of international standards, in particular the EU directives and the CJEU practice.<sup>316</sup> However, this harmonisation has not yet taken place.
  - An exception to this would be the Law on Labour Relations, which needs very few amendments to be in line with the directives. These necessary steps would be to amend the definition of harassment, which is not completely in accordance with the directives,<sup>317</sup> to add provisions on instruction to discriminate, as well as clarifying the potential for positive actions and reasonable accommodation for people with disability.<sup>318</sup>

## **11.2 Other issues of concern**

As noted in the last European Commission's progress report, the country is backsliding in terms of fulfilment of political criteria for membership, especially with regards to independence of the judiciary. The same trend also applies to advancing the protection of human rights in general, and equality and non-discrimination more specifically. Retrogression of protection of rights in law and in practice continued. In times of general failure of the system to administer justice, vast politisation of society and partisanship of state institutions, the problems are very general and very serious. These also affect the practical implementation of the national legislation.

The end of 2014 and beginning of 2015 saw massive protests by university and high-school students, honoraria workers, independent trade unions, workers fired in the transition and transformation processes, etc. In February 2015 the wire-tapping affair revealed an even more serious domestic situation. The largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20,000 people that are alleged to have been carried out by the state Counterintelligence

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<sup>316</sup> Ministry of Labour and Social Policy (2013) *Action Plan - 2013 for implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender for 2012-2015*, p.5 [www.mtsp.gov.mk/WBStorage/Files/akciski\\_1\\_eng.doc](http://www.mtsp.gov.mk/WBStorage/Files/akciski_1_eng.doc).

<sup>317</sup> The Law on Labour Relations definition refers to establishing behaviour, instead of creating an offensive environment. Source: Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

<sup>318</sup> Former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 9.



Agency.<sup>319</sup> The content of the published recordings removed doubts about the already existing claims of a state capture<sup>320</sup> and extreme concentration of power in the ruling party, including the complete exercise of party control over not only the judiciary, but *all* aspects of society. The Ombudsperson opened two cases in relation to the wire-tapping affair, as gross and large-scale violations of the right to private and family life. The Ombudsperson expressed outrage about the lack of response from the Counterintelligence Agency to its requests for additional information in the context of gathering of information pursuant to the aforementioned cases. The Ombudsperson has reported this obstacle to the Parliament, but no assistance or feedback from the Parliament has been noted.<sup>321</sup>

It is of interest for this report to highlight that what seems to be the voice of the President of the equality body, Dushko Minovski, also featured in the publicly broadcasted conversations; he can be heard to be a person working for the ruling party on the ground during the election campaign and, even more seriously, to be (ab)using his position (that of being employed in the Ministry of Labour and Social Policy) by instructing people that have been awarded social assistance how to vote. In addition to this, what seems to be the voice of the then Minister of Interior Gordana Jankulovska<sup>322</sup> was featured in a conversation that clearly shows the pressure the Roma community has been under to go out on election day and vote as instructed.<sup>323</sup> Following the release of this recording, Roma organisations protested against the Government, demanding Jankulovska's resignation,<sup>324</sup> after which she published what was intended to be an apology to the Roma community, however the letter was a mere rehearsal of all actions undertaken in the country to improve the position of Roma, rather than an apology.<sup>325</sup>

As noted above, a new study on harmonisation of the national equality and non-discrimination legislation called for urgent revision of the Anti-discrimination Law. In view of the seriousness of the state situation, as described above, this is not and will not be a priority in the next year. The CPAD continued to receive a lot of training and support from the OSCE Mission to Skopje and to be included in projects coordinated and led by CSOs. This might help with overcoming the deficiencies in the quality of the body's appointed members. However, the problem of not having administrative support for its work is ongoing, in spite of the announcement of a Government decision to resolve this issue being made last year.<sup>326</sup>

The problem of misrepresentation and misunderstanding of the notion and scope of grounds remains, the main ones being:

- Disability is still a cause for stigma. Policies regarding accommodation and positive actions for people with disability are formally adopted, but are not implemented.

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<sup>319</sup> Balkan Insight, (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

<sup>320</sup> The concept of 'state capture' is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'.

<sup>321</sup> Ombudsperson of the Republic of Macedonia (2016), *Annual Report of the Ombudsperson for 2015*.

<sup>322</sup> Gordana Jankulovska resigned 12 May 2015.

<sup>323</sup> A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gipsy by Gipsy, we'll drag them"' [СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме] <http://a1on.mk/wordpress/archives/465799>. Please note that in the Former Yugoslav Republic of Macedonia context 'Gipsy' (Циган) is a derogatory word for Roma.

<sup>324</sup> 24 Vesti - National TV Broadcaster, 'Roma request resignation from the Minister Jankulovska' [Ромите бараат оставка од министерката Јанкуловска], <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

<sup>325</sup> This letter is no longer available online.

<sup>326</sup> An additional problem created by the appointment of the new composition of the CPAD falls outside of the reporting period, however it is mentioned here as it adds to the arguments on party-controlled state institutions. For more on this, see: <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

However, a positive move in this direction was the ratification of the Convention on Rights of People with Disability and its accompanying Optional Protocol.

- Sexual orientation is continuously stigmatised, or, at best, ignored. The latest example was the 'National strategy for equality and non-discrimination on ethnic affiliation, age, disability and sex', which was adopted in 2012. The new strategy, which is to be implemented in the period 2016-2020, has the title 'on equality and non-discrimination', so hopefully it will not exclude sexual orientation. However, the text has been discussed only on one public discussion and is not adopted yet.

Hate speech is still vastly tolerated. Debates around the Anti-discrimination Law were filled with hate speech directed towards homosexuals, and to people who publicly advocated for and supported inserting sexual orientation as a protected ground. The most staggering examples are examples of hate speech by journalists who are known to be close to the ruling party (including the only two journalists on whose shows the Prime Minister appears as a guest, one of whom accompanied the Prime Minister on a 2014 Government visit to a foreign country). Such hate speech features homophobic statements and spreads ethnic hatred, as well as degradation on grounds of sex.

## 12 LATEST DEVELOPMENTS IN 2015

### 12.1 Legislative amendments

- A newly adopted Law on Misdemeanours caused a chain reaction of changes in other laws including in the Anti-discrimination Law. As a result, the fines for natural persons have been lowered, as they have been for legal persons. However, the lawmakers removed from the law the potential for responsible persons from public bodies to be subject to fines. This was previously not the case. However, it seemed that the adoption of the new law was a populist measure resulting from a series of protests, public debates and studies that show how much the fines have been raised in the years of the current ruling party, as well as the number of actions that have been turned into misdemeanours and criminal offences.

### 12.2 Case law

**Name of the court:** Court of First Instance Delcevo

**Date of decision:** 20.03.2015

**Name of the parties:** *V.M. v. Municipality of Delcevo*

**Reference number:** Case Judgment P-4, NO.14/2014

**Address of the webpage:** <http://www.equalitylaw.eu/downloads/2863-fyr-macedonia-disability-discrimination-pdf-59-kb><sup>327</sup>

**Brief summary:** The claimant is the grandfather of a child with psychosocial disability claiming that lack of adaptation of infrastructure (in his case – pavements) creates an obstacle to free movement for his grandson, as they live on one of the main streets in the town and the child cannot leave the house by himself as there is no pavement and no aids for movement. He had asked and was promised by the municipality several times that it would do the necessary adaptations, however no adaptations had been made.

The claimant first brought the case before the Commission for Protection against Discrimination (CPAD),<sup>328</sup> which found discrimination on grounds of disability due to lack of reasonable accommodation – a form of discrimination under the national law. The claimant also asked the Ombudsperson to intervene, but even after it did (there was a communication from the Ombudsperson to the Municipality in which the Ombudsperson points out the violation), no improvement of the situation followed. Therefore, the claimant took the case to court.

The court of first instance in Delcevo established discrimination, as did the CPAD, and requested that the discriminator removes the obstacles for realising the right of movement, i.e. by adjusting the infrastructure in a way that will no longer pose obstacles for the child to leave his house, as requested by the claimant. It also awarded damages for suffered fear and psychological pain.

**Name of the court:** Court of Second Instance Skopje

**Date of decision:** 23.09.2015

**Name of the parties:** *Macedonian Young Lawyers Association v. Ministry of Interior*

**Reference number:** XXVIII П4-1228/13

**Address of the webpage:** not available

**Brief summary:** The court of second instance confirmed the verdict from May 2014 from the court of first instance, which found that prohibiting the exit from the country of Roma citizens on grounds of reasonable doubt that they will be seeking asylum in an EU Member State was discriminatory. The claimant, on whose behalf the Macedonian Young Lawyers

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<sup>327</sup> The judgment is not publicly available, which is why the author has used a link to the flash report, reporting the judgment.

<sup>328</sup> This case was reported in the 2014 report. See here: <http://www.equalitylaw.eu/downloads/3709-2015-mk-country-report-ln-final>.

Association (MYLA) acted, wanted to cross the border with his family in order to travel to an EU country in order to attend a relative's wedding. He was not let out of the country by the border officer, who also marked his passport, which means that the next time that he wants to travel abroad, the border officers will know that he has been refused exit before.

The court of second instance found that the court of first instance was right to conclude that, although the country has a right to protect the visa-free regime with the EU Member States, it needs to do this in a way that will not violate the equality of its citizens. Thus, the court goes on to conclude, the act of the border officer was discriminatory, it violated the principle of equality and was a clear breach of the Law on Prevention and Protection against Discrimination.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country: Former Yugoslav Republic of Macedonia**

**Date: 31 December 2015**

<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Law on Prevention and Protection against Discrimination Abbreviation: Anti-discrimination Law Date of adoption: 08.04.2010 Latest amendments: 02.09.2015 Entry into force: 21.04.2010 Webpage: <a href="http://www.slvesnik.com.mk/Issues/1654343CD9A0E24998781907DC19A99F.pdf">www.slvesnik.com.mk/Issues/1654343CD9A0E24998781907DC19A99F.pdf</a> Grounds covered: Sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property, health condition, or any other ground or stipulated by law or ratified national treaty.</p> <p>Civil law</p> <p>Material scope: All areas (draws specific attention to: public employment, private employment, access to goods and services, social protection, education).</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate, reasonable accommodation, creation of a specialised body.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Law on Labour Relations Abbreviation: Labour Law Date of adoption: 28.07.2005 Entry into force: 05.08.2005 Latest amendments: 31.07.2015 Webpage: <a href="http://www.slvesnik.com.mk/Issues/ABCBBB808C582943B4A3287BD0629357.pdf">www.slvesnik.com.mk/Issues/ABCBBB808C582943B4A3287BD0629357.pdf</a> Grounds covered: Race, colour, sex, age, health condition, disability, religious, political or other belief, membership of trade union, national or social origin, position of the family, property, sexual orientation or other personal issue.</p> <p>Civil law</p> <p>Material scope: Public employment, private employment.</p>

	Principal content: Regulation of labour relations. Of relevance here: prohibition of direct and indirect discrimination, harassment.
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Law on Social Protection Abbreviation: LSP Date of adoption: 24.06.2009 Entry into force: 02.07.2009 Latest amendments: 05.11.2015 Webpages: Text of the law (2009), as in Official Gazette: <a href="http://www.slvesnik.com.mk/Issues/7CEA639634D1054DB351E7FB985665DC.pdf">www.slvesnik.com.mk/Issues/7CEA639634D1054DB351E7FB985665DC.pdf</a> Grounds covered: Sex, race, colour, nationality, ethnicity, social status, political, religious, cultural, language, property and social background, disability and origin.</p> <p>Civil law</p> <p>Material scope: Social protection, social advantages.</p> <p>Principal content: Social protection. Of relevance here: prohibition of direct and indirect discrimination.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Law on Employment of Persons with disability Abbreviation: LEPD Date of adoption: 02.06.2000 Latest amendments: 27.08.2015 Entry into force: 10.06.2000 Web link: <a href="http://www.slvesnik.com.mk/Issues/CE827065C11B4A1ABA5546F974EFDA94.pdf">www.slvesnik.com.mk/Issues/CE827065C11B4A1ABA5546F974EFDA94.pdf</a> Grounds covered: Disability</p> <p>Civil law</p> <p>Material scope: Public employment, private employment</p> <p>Principal content: Employment of persons with disability, including shelter companies.</p>

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country: Former Yugoslav Republic of Macedonia**

**Date: 31 December 2015**

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	09.11.1995	10.04.1997	No	Yes	Yes
Protocol 12, ECHR	04.11.2000	13.07.2004	No	Yes	Yes
Revised European Social Charter	27.05.2009	21.10.2011	No	No	Yes
International Covenant on Civil and Political Rights	(succession) <sup>329</sup>	18.01.1994	No	Yes	Yes
Framework Convention for the Protection of National Minorities	25.07.1996	10.04.1997	No	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	(succession)	18.01.1994	No	Yes	Yes
Convention on the Elimination of All Forms of Racial Discrimination	(succession)	18.01.1994	No	Yes	Yes

<sup>329</sup> Under the Constitutional Law adopted for implementing the Constitution of the Republic of Macedonia, as one of the republics to succeed from the Socialist Federative Republic of Yugoslavia (SFRY), the country assumes all obligations from SFRY membership in international organisations and with other countries, as provided by common principles of international law. This Law also calls upon the Vienna conventions for succession (1978 and 1982) for guidance on regulating the succession. Source: Constitutional Law adopted for implementing the Constitution of the Republic of Macedonia (*Уставен закон за спроведување на Уставот на Република Македонија*), Official Gazette of the Republic of Macedonia No.52/91.

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention on the Elimination of Discrimination Against Women	(succession)	18.01.1994	No	Yes	Yes
ILO Convention No. 111 on Discrimination	n/a	17.11.1991	No	Yes	Yes
Convention on the Rights of the Child	(succession)	02.12.1993	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	14.12.2011	No	Yes	Yes



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