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Non-discrimination

Serbia

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Country report

Non-discrimination

Serbia

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EXECUTIVE SUMMARY

1. Introduction

The Republic of Serbia is a constitutional, multi-party, parliamentary democracy. The multi-party National Assembly of the Republic of Serbia (NARS) was established in 1991. The 10th legislature commenced its work on 16 April 2014 and is notable for the fact that the leading party has a majority in the Parliament, which shapes and influences current parliamentary work in Serbia.

According to the last census in 2002, the Republic of Serbia has 7 498 001 inhabitants. Serbs comprise 82.86 % of the population, Hungarians 3.91 %, Bosniaks 1.81 %, Roma 1.44 %, Yugoslavs 1.08 %, Croatians 0.94 %, Montenegrins 0.92 %, Albanians 0.82 %, Slovaks 0.79 %, Vlachs 0.53 %, Romanians 0.46 %, Macedonians 0.34 %, Bulgarians and Bunjevci 0.27 % each, Muslims 0.26 %, ¹ Rusyns 0.21 %, Slovenes and Ukrainians 0.07 % each, Gorani 0.06 %, Germans 0.05 % and Russians and Czechs 0.03 % each. The majority of the population of Serbia is of the Christian Orthodox faith (84.98 %), followed by Roman Catholics (5.48 %), Muslims (3.2 %) and Protestants (1.08 %). Other religions are also present in Serbia.

2. Main legislation

The Constitution of Serbia,² adopted in 2006, contains a broad catalogue of human rights and proclaims equality and prohibits discrimination (Article 21, par. 3).

Serbia introduced a set of anti-discrimination legislation, which is almost aligned with the two EU directives from 2000.³ In its progress report for Serbia for 2015, the European Commission acknowledges that Serbian non-discrimination legislation is generally in line with European standards, but further alignment is needed, in particular with regard to the scope of exceptions from the principle of equal treatment, the definition of indirect discrimination and the obligation to provide reasonable accommodation for disabled employees.⁴

In April 2006, the first anti-discrimination law was adopted: the Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD),⁵ supplemented by the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD).⁶ However, the first comprehensive anti-discrimination law was adopted in March 2009.

The Law on the Prohibition of Discrimination (LPD)⁷ is an important milestone in securing basic human rights in Serbia through the establishment of systematic law on anti-

¹ People can state 'Muslim' as their ethnic identity in Serbia, while the same term can be used in a context of religious identity.

² Serbia, Constitution of Serbia (*Ustav Republike Srbije*), *Official Gazette of the Republic of Serbia*, no. 98/2006, 10 November 2006.

³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180*, 19 July 2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303*, 2 December 2000.

⁴ European Commission, Serbia 2015 Report, Brussels, 10 November 2015, p.56; text available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf, last accessed on 27 March 2016.

⁵ Serbia, Law on the Prevention of Discrimination against Persons with Disabilities (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 33/2006, 13/2016, 17 April 2006.

⁶ Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 32/2013, 17 April 2006.

⁷ Serbia, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of the Republic of Serbia*, no. 22/2009, 26 March 2009.

discrimination. It prohibits a wide range of discriminatory actions. In addition, all the grounds of discrimination provided in EU equality law are covered in the LPD and are significantly expanded.

Furthermore, the Law on the Protection of the Rights and Freedoms of National Minorities⁸ regulates the way in which the rights of people belonging to national minorities are implemented. It enables people belonging to national minorities to exercise their constitutional rights in a democratic political milieu, individually or in community with other members of their ethnic group.

In 2015, two very important laws were adopted. The Law on the Use of Guide Dogs⁹ was adopted in March 2015, with the aim of enabling people with disabilities to move around using guide dogs on public transport and in all public buildings, as well as in work places. This Law is primarily aimed at the 12 000 citizens who have severe visual impairments, 9 000 citizens who are completely blind and 3 000 citizens who have impaired vision.¹⁰ In addition, the Law on the Use of Sign Language¹¹ was adopted in April 2015 and regulates the use of sign language in the political, educational and employment spheres and other areas of social life. The purpose of this Law is to enable the full inclusion of deaf people in society and the right to use sign language in various procedures in relation to public services, in education, employment and all other areas.

Many other laws also contain anti-discrimination provisions, e.g. the Labour Law,¹² which prohibits discrimination in employment, the Law on the Fundamentals of the Education System,¹³ which introduces inclusive education, the Law on Youth,¹⁴ the Law on Preschool Education¹⁵ and the Law on Churches and Religious Organisations.¹⁶

In addition, criminal law protection against discrimination is regulated by the Criminal Code¹⁷ which provides for several criminal offences in connection with the prohibition of discrimination: Article 128 (violation of equality), Article 129 (violation of the right to use a language or alphabet) and Article 387 (prohibition of racial and other discrimination). The Law on Misdemeanours¹⁸ regulates the procedure and conditions and implementation of misdemeanour charges.

⁸ Serbia, Law on the Protection of the Rights and Freedoms of National Minorities (*Zakon o zaštiti prava i sloboda nacionalnih manjina*), *Official Gazette of the Republic of FRY*, no. 11/2002, *Official Gazette of SM*, no. 1/2003, *Official Gazette of the Republic of Serbia*, 172/2009, 27 February 2003.

⁹ Serbia, Law on the Use of Guide Dogs (*Zakon o kretanju uz pomoć psa vodiča*), *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015.

¹⁰ Social Inclusion and Poverty Reduction Unit, Law on the Use of Guide Dogs, adopted, 25 March 2015, available at <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/>, last accessed on 27 March 2016.

¹¹ Serbia, Law on the Use of Sign Language (*Zakon o upotrebi znakovnog jezika*), *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015.

¹² Serbia, Labour Law (*Zakon o radu*) *Official Journal of the Republic of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, no. 75/2014, 15 March 2005.

¹³ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 72/09, 52/2011, 55/2013, 31 August 2009.

¹⁴ Serbia, Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/011, 8 July 2011.

¹⁵ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 18/010, 3 May 2010.

¹⁶ Serbia, Law on Churches and Religious Communities (*Zakon o crkvama i verskim zajednicama*), *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

¹⁷ Serbia, Criminal Code (*Krivični zakonik*), *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, October 6, 2005.

¹⁸ Serbia, Law on Misdemeanours (*Zakon o prekršajima*), *Official Gazette of the Republic of Serbia*, no. 65/2013, 13/2016, 25 July 2013.

The Strategy for the Prevention of and Protection from Discrimination was adopted in 2013 and supplemented by the Action Plan in October 2014, of which the implementation was successfully initiated in 2015.

3. Main principles and definitions

The LPD recognises seven forms of discrimination: direct and indirect discrimination, violation of the principle of equal rights and obligations, the prevention of calling to account,¹⁹ association for the purpose of discriminating, hate speech, harassment and humiliating treatment and severe forms of discrimination.

The definition of direct discrimination is almost in line with the definition given in the EU directives, but is limited to less favourable treatment and does not cover detriment. The definition of indirect discrimination doesn't contain the conditional wording ('would') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they incur disadvantages for actual victims. It also fails to use the wording 'an apparently neutral provision, criterion or practice' which plausibly explains this phenomenon. It is not clear why the violation of the principle of equal rights is recognised as a special form of discrimination, as it is either direct or indirect discrimination and is used as a test of discrimination. The prohibition of 'calling to account' is, in other words, 'victimisation', but this provision must be aligned with the EU law, in order to include express protection from dismissal. Hate speech is ambiguous, using the wording 'and in other ways' and is not recognised as a special form of discrimination in the Racial Equality and Employment Equality Directives. The LPD forbids association for the purpose of exercising discrimination for, among others, inciting nationally, racially, religiously or otherwise motivated hatred, divisions or enmity. Instruction to discriminate is mentioned in the LPD, but is not defined. Harassment is recognised as a special form of discrimination taken together with humiliating treatment. However, this article is confusing as humiliating treatment is a possible element of harassment, while the term 'harassment' itself is not defined.

The LPD allows some exceptions and exemptions from the equality clause. Thus, 'measures introduced for the purpose of achieving the full equality, protection and progress of an individual or a group of persons in an unequal position shall not be considered to constitute discrimination' (Article 14). Indirect discrimination can be justified if there is a lawful objective and the means of achieving that objective are appropriate and necessary. Different treatment, exclusion or giving priority on account of the specific character of a job is allowed if an individual's personal characteristic constitutes a genuine and decisive precondition for performing the job, and the objective to be achieved is justified. In addition, the conduct of religious officials, which is in accordance with a religious doctrine, beliefs or the objectives of churches and religious organisations entered in the register of religious organisations, in accordance with the law regulating the freedom of religion and the status of churches and religious organisations, is not considered to be discrimination. This article is problematic as it provides a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow.

One of the most far-reaching provisions of the Employment Equality Directive is Article 5, which provides an obligation to make reasonable accommodation for people with disabilities. This requirement is not included in the LPD and does not cover other grounds than disability. On the other hand, the LPDPD provides several justifications for discrimination, although many of them are recognised as positive measures, defined in Article 8. However, the most problematic justification is provided in Article 19, para. 2 of

¹⁹ Victimisation is known as 'calling to account' in Serbian law.

the LPREPD, which allows the organisation of special forms of teaching for children who do not have sufficient intellectual capacity to attend mainstream courses.

In Serbia multiple discrimination is recognised as a severe form of discrimination, which means that more severe penalties should be imposed in cases of multiple or intersecting discrimination.

4. Material scope

The LPD applies in all areas of public and private life, as Article 2, para. 1 defines discrimination as 'any unwarranted discrimination or unequal treatment', which is based on personal characteristics. However, the LPD recognises some special cases of discrimination, such as discrimination in the course of proceedings conducted before public administration bodies, discrimination in the provision of public services and in the use of premises and spaces, discrimination in employment and in education. Thus, the material scope of the LPD goes beyond the areas covered by the two EU directives.

The prohibition of discrimination in employment applies to both the public and private sectors.

The LPD does not cover occupational pensions, social advantages and self-employment and it is unclear whether it covers social protection and housing. Although certain other laws regulate some of these issues, such as self-employment or housing, these provisions should be included in the LPD.

The LPD mentions only access to services and not expressly access to goods.

5. Enforcing the law

Civil proceedings in discrimination cases are regulated by three anti-discrimination laws. The general rule is that provisions from general litigation apply unless it is explicitly regulated differently (*lex specialis*). However, it was necessary to create a special procedure for discrimination cases designed to ensure the provision of effective and efficient civil protection from discrimination, which is in accordance with international and European standards in this area.

The LPDPD provides specific procedural provisions in order to enhance court procedure in cases of discrimination against people with disabilities. However, the LPD sets out the procedure for initiating civil court cases in case of discrimination which can be initiated by anyone who claims to have suffered discriminatory treatment. It includes a provision in relation to the court's jurisdiction for victims of discrimination. The LPD recognises temporary measures and the court must decide about requests for them within three days. It provides that the proceedings must be conducted with urgency (Article 41, para. 3). In addition, Article 45 of the LPD shifts the burden of proof from the complainant to the respondent.

Article 41 of the LPD provides that anyone who claims to be a victim of discriminatory treatment has the right to initiate a lawsuit. The complainant may request: 1) that a ban be imposed on an action that poses a threat of discrimination, a ban on proceeding with a discriminatory action or a ban on repeating a discriminatory action; 2) that the court should establish that the defendant has treated the complainant or another party in a discriminatory manner; 3) that steps be taken to redress the consequences of the discriminatory treatment; 4) compensation for pecuniary and non-pecuniary damage; and 5) that the judgment be published. Furthermore, Article 46 provides that a lawsuit may be initiated by the Commissioner and also by an organisation engaged in the protection of human rights or the rights of a certain group of people.

Affirmative action measures are expressly allowed in the Serbian Constitution and the LPD and are mainly applied in relation to women in politics, Roma in education and people with disabilities in employment.

6. Equality bodies

The institution of the Commissioner for Protection of Equality was established by the LPD as an independent, autonomous and specialised public body which has a wide mandate in the area of the promotion of equality and anti-discrimination in all spheres of society. It has two main responsibilities: the prevention of and protection from discrimination. The Commissioner's Office has a range of measures at its disposal, but from the position of the victim of discrimination the most relevant are to receive and consider claims regarding discrimination, to initiate strategic litigation and to file offence and criminal charges.

The procedure of applying to the Commissioner is regulated in Articles 35 to 40 and a general rule is that the provisions of the law regulating general administrative proceedings apply accordingly to procedures involving the Commissioner. A complaint must be forwarded within 15 days from its submission to the alleged violator who has 15 days to respond to it. The Commissioner can propose mediation if both parties agree to it. This obligation is in compliance with the Racial Equality Directive which, in Article 7, para. 1, obliges states to ensure the availability of judicial and/or administrative procedures, including, where appropriate, conciliation procedures. However, if the dispute is not subject to mediation, the Commissioner must give an opinion as to whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint and inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a violation, they issue a recommendation to the individual against whom the complaint was submitted, suggesting a way of redressing the violation in question. The individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of receipt of the recommendation. The individual must inform the Commissioner of measures taken. However, if the individual fails to redress the violation in question within 30 days, the Commissioner may inform the public in electronic and print media, but cannot punish the violator. Nevertheless, the Commissioner can initiate a notice for misdemeanour proceedings, a criminal charge or initiate a lawsuit if it finds that there is a strategic case for litigation.

In May 2015, Brankica Jankovic was elected as the new Commissioner for a five-year term. The Commissioner's office provided many awareness-raising activities on discrimination and mechanisms for protection against discrimination. The annual report for 2015 was submitted on time (on 15 March 2016)²⁰ and a special report on discrimination against women was prepared in May 2015.²¹ In 2015, 797 complaints were submitted to the specialised body compared to 666 in 2014. The Commissioner received 797 complaints, and issued opinions in 215 cases, provided 17 opinions on draft laws and general acts, and initiated a criminal charge, as well as a misdemeanour charge, nine warnings and 35 announcements.²²

²⁰ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade; text in Serbian available at www.ravnopravnost.gov.rs/rs/izvestaji/izvestaji, last accessed on 27 March 2016.

²¹ Commissioner for Protection of Equality (2015), *Special report of the Commissioner for Protection of Equality on Discrimination against Women*, Belgrade; text in Serbian available at www.ravnopravnost.gov.rs/rs/izvestaji/izvestaji, last accessed on 27 March 2016.

²² Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 8.

Nevertheless, there is still room for improvement in the capacity of the Commissioner's Office, especially concerning spatial and technical capacities and training of employees. In addition, a regional office in Novi Pazar was opened in March 2014, but it didn't meet expectations as only a small number of citizens communicated with the Commissioner and the number of complaints submitted in this part of Serbia is still insignificant.²³

7. Key issues

1. Compliance with the two EU anti-discrimination directives

In Serbia national legislation is mainly in accordance with the two EU anti-discrimination directives from 2000. However, there are some inconsistencies and ambiguities that require further judicial interpretation or changes to the existing legislation:

- associative discrimination is recognised in the LPD, but its application is limited only to 'members of families' and people close to those being discriminated against;
- the definition of direct discrimination is in line with the definition in the EU directives; however, it is limited to less favourable treatment and does not cover detriment;
- the definition of indirect discrimination doesn't contain the conditional wording ('would') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they incur disadvantages for actual victims;
- the instruction to discriminate is not defined in the LPD and should be included in the law;
- the LPD does not expressly state that situation testing can be used as evidence in court and many questions derive from unclear regulation (for example, who the tester is, whether they have a particular relationship with the individual who reported the discrimination, whether they have been discriminated against previously, etc.);
- the LPD does not contain any specific rule in relation to statistics; the case-law is still developing and it is not clear how the courts will treat statistical evidence;
- the LPD does not cover occupational pensions, social advantages and self-employment and it is unclear whether it covers social protection and housing; although certain other laws regulate some of these issues, such as self-employment or housing, these provisions should be included in the LPD;
- the LPD mentions only access to services and not expressly access to goods;
- The LPD should recognise segregation as an aggravated form of discrimination;
- the LPD must include provisions on reasonable accommodation for people with disabilities;
- national law does not provide for an exception for employers with an ethos based on religion or belief, but there is a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow;
- the LPD does not explicitly provide an exception for direct discrimination on the ground of age and further judicial interpretation is required, especially on the application of the proportionality test;
- although there is a range of different sanctions which can be imposed in discrimination cases, some problems which exist in practice, such as delays in the proceedings and mild sanctions, influence the effectiveness and proportionality of sanctions;
- the LPDPD does not provide protection from victimisation, and the definition of victimisation in the LPD has to be further aligned with the EU law, as it does not expressly protect people from dismissal;

²³ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 15.

- the LPDPD does not contain a provision on the reversal of the burden of proof;
- class action is not permitted by national law in discrimination cases.

2. Implementation of the existing normative framework

Although the normative anti-discrimination framework in Serbia mainly respects relevant EU standards, some problems with the implementation of the existing norms are visible in practice:

- the implementation of the Strategy for the Prevention of and Protection from Discrimination requires a more proactive and systematic approach; some problems deserve urgent attention, such as the social inclusion of people with disabilities and Roma which needs significant improvement and the position of LGBTI people and people with HIV/AIDS which must be improved;
- the Republic of Serbia has not yet established a unified and centralised system for collecting data relevant to the functioning of the system of legal protection against discrimination and this fact represents a huge problem in assessing and monitoring discrimination;
- although the number of cases processed rises each year, it is still insignificant in comparison to the widespread nature of discrimination in practice in all spheres of society; the reasons for this lie in insufficient awareness and knowledge about discrimination and the lack of determination of victims to seek help;
- although training on anti-discrimination law has been provided to police and judges of different jurisdictions, the State must continue with this training, in cooperation with international organisations and experts.

RÉSUMÉ

1. Introduction

La République de Serbie est une démocratie parlementaire constitutionnelle et pluripartite. Son Assemblée nationale a été instituée en 1991. La dixième législature, qui a entamé ses travaux le 16 avril 2014, a pour caractéristique que le parti chef de file détient une majorité au Parlement, ce qui façonne et influence le travail parlementaire actuel en Serbie.

Selon le dernier recensement, effectué en 2002, la République de Serbie a une population de 7 498 001 habitants. Les Serbes en représentent 82,86 %, les Hongrois 3,91 %, les Bosniaques 1,81 %, les Roms 1,44 %, les Yougoslaves 1,08 %, les Croates 0,94 %, les Monténégrins 0,92 %, les Albanais 0,82 %, les Slovaques 0,79 %, les Vlach 0,53 %, les Roumains 0,46 %, les Macédoniens 0,34 %, les Bulgares 0,27 %, les Bunjevci 0,27 %, les Musulmans 0,26 %, ²⁴ les Ruthènes 0,21 %, les Slovènes 0,07 %, les Ukrainiens 0,07 %, les Goranis 0,06 %, les Allemands 0,05 %, les Russes 0,03 % et les Tchèques 0,03 %. La majorité de la population serbe est de confession chrétienne orthodoxe (84,98 %), suivie des catholiques romains (5,48 %), des musulmans (3,2 %) et des protestants (1,08 %). D'autres religions sont également pratiquées en Serbie.

2. Législation principale

La Constitution de Serbie, ²⁵ adoptée en 2006, contient un vaste catalogue de droits de l'homme; elle proclame l'égalité et interdit la discrimination (article 21, paragraphe 3).

La Serbie a introduit un ensemble de dispositions législatives antidiscrimination quasiment harmonisées avec les deux directives européennes ²⁶ de 2000. La Commission européenne constate dans son rapport de suivi sur la Serbie de 2015 que la législation antidiscrimination du pays est globalement conforme aux normes européennes, mais qu'un alignement supplémentaire s'impose, notamment en ce qui concerne la portée des dérogations au principe de l'égalité de traitement, la définition de la discrimination indirecte et l'obligation de prévoir un aménagement raisonnable pour les travailleurs handicapés. ²⁷

La première loi antidiscrimination a été adoptée en avril 2006: il s'agit de la loi sur la prévention de la discrimination à l'égard des personnes handicapées, ²⁸ ultérieurement complétée de la loi sur la réadaptation professionnelle et l'emploi des personnes handicapées. ²⁹ La première loi générale contre la discrimination n'a cependant été adoptée qu'en mars 2009.

²⁴ Une personne peut, en Serbie, se déclarer «Musulman» en tant qu'identité ethnique, même si le terme s'applique également dans un contexte d'identité religieuse.

²⁵ Serbie, Constitution de Serbie (*Ustav Republike Srbije*), *Journal officiel de la République de Serbie*, n° 98/2006, 10 novembre 2006.

²⁶ Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique, *Journal officiel L 180*, 19 juillet 2000; Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *Journal officiel L 303*, 2 décembre 2000.

²⁷ Commission européenne, *Serbia 2015 report*, Bruxelles, 10 novembre 2015, p. 56; texte disponible (en anglais) sur http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf, consulté en dernier lieu le 27 mars 2016.

²⁸ Serbie, loi sur la prévention de la discrimination à l'égard des personnes handicapées (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Journal officiel de la République de Serbie*, n° 33/2006, 17 avril 2006.

²⁹ Serbie, loi sur la réadaptation professionnelle et l'emploi des personnes handicapées (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Journal officiel de la République de Serbie*, n° 36/2009, 32/2013, 17 avril 2006.

La loi sur l'interdiction de la discrimination³⁰ marque un tournant en garantissant le respect des droits de l'homme en Serbie au travers d'une loi antidiscrimination systématique. Elle interdit un large éventail d'actes discriminatoires et couvre en outre, en les élargissant considérablement, tous les motifs de discrimination visés par la législation de l'UE en matière d'égalité.

De surcroît, la loi sur la protection des droits et des libertés des minorités nationales³¹ régit l'exercice de leurs droits par les personnes appartenant à ces minorités. Elle permet à celles-ci d'exercer leurs droits constitutionnels dans un environnement politique démocratique, à titre individuel ou conjointement avec d'autres membres de leur groupe ethnique.

Deux lois très importantes ont été adoptées en 2015. La loi sur l'usage de chiens guides,³² adoptée en mars 2015, vise à permettre à des personnes handicapées de se déplacer en utilisant des chiens d'assistance dans les transports publics et dans tous les bâtiments publics, ainsi que sur les lieux de travail. Cette loi s'adresse principalement aux 12 000 citoyens malvoyants, aux 9 000 citoyens totalement aveugles et aux 3 000 citoyens atteints de déficience visuelle.³³ Une loi sur la langue des signes,³⁴ adoptée en avril 2015, régit pour sa part l'utilisation de cette langue dans les domaines de la politique, de l'enseignement et de l'emploi, ainsi que dans d'autres sphères de la vie sociale. Cette loi vise à ce que les personnes sourdes bénéficient d'une inclusion à part entière dans la société ainsi que du droit d'utiliser la langue des signes dans diverses procédures relatives à des services publics, dans l'enseignement, dans l'emploi et dans tout autre domaine.

Plusieurs autres lois contiennent également des dispositions antidiscrimination: tel est notamment le cas de la loi sur le travail,³⁵ qui interdit la discrimination en matière d'emploi; de la loi sur les principes de base du système d'enseignement,³⁶ qui instaure l'éducation inclusive; de la loi sur la jeunesse;³⁷ de la loi sur l'enseignement préscolaire;³⁸ et de la loi sur les églises et les communautés religieuses.³⁹

De surcroît, la protection contre la discrimination au titre du droit pénal est régie par le code pénal,⁴⁰ qui énonce plusieurs infractions pénales en rapport avec l'interdiction de discrimination: le non-respect de l'égalité (article 128), le non-respect du droit d'usage

³⁰ Serbie, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel de la République de Serbie*, n° 22/2009, 26 mars 2009.

³¹ Serbie, loi sur la protection des droits et des libertés des minorités nationales (*Zakon o zaštiti prava i sloboda nacionalnih manjina*), *Journal officiel de la République fédérale de Yougoslavie* n° 11/2002, *Journal officiel de Serbie-Montenegro* n° 1/2003, *Journal officiel de la République de Serbie*, n° 172/2009, 27 février 2003.

³² Serbie, loi sur l'usage de chiens guides (*Zakon o kretanju uz pomoć psa vodiča*), *Journal officiel de la République de Serbie* n° 29/2015, 31 mars 2015.

³³ Unité «Inclusion sociale et réduction de la pauvreté» (gouvernement serbe), loi sur l'usage de chiens guides adoptée le 25 mars 2015, disponible (en anglais) sur <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/>, consulté en dernier lieu le 27 mars 2016.

³⁴ Serbie, loi sur l'usage de la langue des signes (*Zakon o upotrebi znakovnog jezika*), *Journal officiel de la République de Serbie* n° 38/2015, 7 mai 2015.

³⁵ Serbie, loi sur le travail (*Zakon o radu*), *Journal officiel de la République de Serbie*, n° 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 15 mars 2005.

³⁶ Serbie, loi sur les principes fondamentaux du système d'enseignement (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Journal officiel de la République de Serbie*, n° 72/09, 52/2011, 55/2013, 31 août 2009.

³⁷ Serbie, loi sur la jeunesse (*Zakon o mladima*), *Journal officiel de la République de Serbie*, n° 50/011, 8 juillet 2011.

³⁸ Serbie, loi sur l'enseignement préscolaire (*Zakon o predškolskom vaspitanju i obrazovanju*), *Journal officiel de la République de Serbie*, n° 18/010, 3 mai 2010.

³⁹ Serbie, loi sur les églises et les communautés religieuses (*Zakon o crkvama i verskim zajednicama*), *Journal officiel de la République de Serbie*, n° 36/2006, 27 avril 2006.

⁴⁰ Serbie, Code pénal (*Krivični zakonik*), *Journal officiel de la République de Serbie*, n° 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 6 octobre 2005.

d'une langue ou d'un alphabet (article 129) et l'interdiction de discrimination raciale et autre (article 387). La loi sur les délits⁴¹ régit pour sa part les procédures, les conditions et l'exécution des poursuites relatives aux infractions mineures.

La Stratégie pour la prévention et la protection contre la discrimination a été adoptée en 2013 et complétée d'un Plan d'action en octobre 2014; la mise en œuvre de ce dernier a été entamée avec succès en 2015.

3. Principes généraux et définitions

La loi sur l'interdiction de la discrimination reconnaît sept formes de discrimination: la discrimination directe et indirecte, la violation du principe de l'égalité des droits et des obligations, l'empêchement de «demander des comptes»,⁴² l'association à des fins de discrimination, le discours haineux, le harcèlement et le traitement humiliant, et les formes graves de discrimination.

La définition de la discrimination directe est quasiment conforme à celle qui figure dans les directives de l'UE, mais elle se limite à un traitement moins favorable et ne couvre pas le préjudice. La définition de la discrimination indirecte n'utilise pas la formule conditionnelle «serait» et peut donc être interprétée comme se limitant à la survenance réelle d'un désavantage – ce qui ne permet pas de contester des dispositions neutres devant un tribunal avant qu'elles aient défavorisé des victimes réelles. La définition n'utilise pas non plus le libellé «une disposition, un critère ou une pratique apparemment neutre» qui explique de manière plausible ce phénomène. On ne voit pas clairement pourquoi la violation du principe de l'égalité des droits est reconnue en tant que forme spéciale de discrimination, étant donné qu'il s'agit soit d'une discrimination directe, soit d'une discrimination indirecte, et qu'elle sert de critère de discrimination. L'interdiction de «demander des comptes» est la façon de désigner les rétorsions, mais cette disposition doit être harmonisée avec le droit de l'UE afin d'inclure expressément la protection contre le licenciement. Le discours haineux est libellé de façon ambiguë en raison de l'usage de l'expression «et d'autres manières» et il n'est pas reconnu comme une forme spéciale de discrimination dans les directives sur l'égalité raciale et dans l'emploi. La loi sur l'interdiction de la discrimination interdit l'association aux fins de la pratique d'une discrimination visant, entre autres, à inciter à la haine nationale, raciale, religieuse ou autre, à la division ou à l'hostilité. La loi sur l'interdiction de la discrimination mentionne l'injonction de discriminer sans la définir. Le harcèlement y est défini comme une forme particulière de discrimination, et il est envisagé conjointement au traitement humiliant – l'article en question étant cependant confus dans la mesure où le traitement humiliant est une composante possible du harcèlement, mais où le terme «harcèlement» lui-même n'est pas défini.

La loi sur l'interdiction de la discrimination autorise certaines exceptions et dérogations à la clause d'égalité. C'est ainsi que des mesures introduites dans le but d'assurer la pleine égalité, la protection et les avancées d'une personne ou d'un groupe de personnes se trouvant en situation d'inégalité ne sont pas considérées comme constitutives d'une discrimination (article 14). Une discrimination indirecte peut se justifier s'il existe un objectif légitime et que les moyens de réaliser cet objectif sont appropriés et nécessaires. Un traitement différencié, une exclusion ou l'octroi d'une priorité en raison de la spécificité d'un emploi sont autorisés lorsque les caractéristiques personnelles de l'intéressé constituent une condition préalable essentielle et déterminante, et que l'objectif recherché est justifié. Par ailleurs, l'attitude des responsables religieux, lorsqu'elle s'inscrit dans une doctrine ou des convictions religieuses, ou dans les objectifs

⁴¹ Serbie, loi sur les délits (*Zakon o prekršajima*), *Journal officiel de la République de Serbie*, n° 65/2013, 13/2016, 25 juillet 2013.

⁴² La rétorsion est désignée en droit serbe par l'expression «demande de comptes».

d'églises et de communautés religieuses dûment accréditées en vertu de la loi régissant la liberté de religion et le statut des églises et des communautés religieuses, n'est pas assimilée à une discrimination. Cet article pose problème dans la mesure où il confère une dispense générale aux responsables religieux, lesquels peuvent pratiquer une discrimination à partir du moment où celle-ci est exigée ou admise par leur doctrine religieuse.

L'une des dispositions de la directive sur l'égalité dans l'emploi ayant la portée la plus grande est son article 5, qui consacre l'obligation de prévoir un aménagement raisonnable pour les personnes handicapées. Cette exigence ne figure pas dans la loi sur l'interdiction de la discrimination et ne vise aucun autre motif que le handicap. Par ailleurs, la loi sur la prévention de la discrimination à l'égard des personnes handicapées prévoit plusieurs justifications de discrimination, même si beaucoup d'entre elles sont reconnues en tant que mesures positives, définies à l'article 8. La justification la plus problématique figure néanmoins à l'article 19, paragraphe 2, de la loi sur la prévention de la discrimination à l'égard des personnes handicapées – cet article autorisant l'organisation de formes spéciales d'enseignement pour les enfants qui ne possèdent pas les capacités intellectuelles suffisantes pour suivre un enseignement ordinaire.

La discrimination multiple est reconnue en Serbie comme une forme grave de discrimination, ce qui signifie qu'elle peut donner lieu, tout comme la discrimination intersectionnelle, à des pénalités plus lourdes.

4. Champ d'application matériel

La loi sur l'interdiction de la discrimination s'applique à tous les domaines de la vie publique et de la vie privée, étant donné que son article 2, paragraphe 1, définit la discrimination comme «toute discrimination ou inégalité de traitement injustifiée» fondée sur des caractéristiques personnelles. La dite loi précise néanmoins quelques cas particuliers de discrimination, tels que la discrimination dans le cadre de procédures se déroulant devant des instances de l'administration publique; la discrimination dans la prestation de services publics et dans l'utilisation des locaux et des espaces; et la discrimination dans l'emploi et dans l'éducation. Le champ d'application matériel de la loi sur l'interdiction de la discrimination dépasse donc les domaines couverts par les deux directives européennes.

L'interdiction de discrimination dans l'emploi s'applique à la fois au secteur public et au secteur privé.

La loi sur l'interdiction de la discrimination ne couvre pas les pensions de retraite professionnelles, les avantages sociaux et l'emploi indépendant, et il n'est pas certain qu'elle couvre la protection sociale et le logement. Même si d'autres lois réglementent certains de ces aspects, des dispositions pertinentes devraient figurer dans la loi interdisant la discrimination.

La loi sur l'interdiction de la discrimination mentionne uniquement l'accès aux services et ne mentionne pas expressément l'accès aux biens.

5. Mise en application de la loi

Les procédures civiles en cas de discrimination sont régies par trois lois antidiscrimination. La règle générale veut que les dispositions en matière de contentieux général s'appliquent, sauf réglementation différente explicite (*lex specialis*). Il s'est néanmoins avéré nécessaire d'instituer une procédure spéciale pour les cas de discrimination qui, destinée à assurer une protection civile efficace et efficiente contre la discrimination, respecte les normes internationales et européennes dans ce domaine.

La loi sur la prévention de la discrimination à l'égard des personnes handicapées contient des dispositions procédurales spécifiques pour renforcer les procédures judiciaires lors d'affaires portant sur une discrimination à l'encontre de personnes handicapées. La loi sur l'interdiction de discrimination fixe la procédure à suivre pour initier une affaire au civil en cas de discrimination – cette démarche pouvant être accomplie par toute personne victime d'un traitement discriminatoire. L'une des dispositions porte sur la compétence de la juridiction saisie en ce qui concerne les victimes de discrimination. La loi sur l'interdiction de la discrimination admet les mesures temporaires et il appartient au tribunal de statuer dans un délai de trois jours sur les demandes en ce sens. La loi prévoit que les procédures doivent être menées d'urgence (article 41, paragraphe 3). L'article 45 de cette même loi fait passer en outre la charge de la preuve de la partie plaignante à la partie défenderesse.

L'article 41 de la loi sur l'interdiction de la discrimination dispose que toute personne se déclarant victime d'un traitement discriminatoire est en droit d'intenter une action en justice. La partie requérante peut demander: 1) que soit interdite une action constituant une menace de discrimination, la poursuite d'une action discriminatoire ou la répétition d'une action discriminatoire; 2) que la juridiction saisie établisse que la partie défenderesse a traité la partie plaignante ou une autre partie de façon discriminatoire; 3) que des mesures soient prises pour remédier aux conséquences du traitement discriminatoire; 4) une indemnisation pour préjudice matériel et moral; et 5) la publication de l'arrêt. L'article 46 prévoit en outre qu'une action en justice peut être intentée par le Commissaire ainsi que par une organisation de défense des droits de l'homme ou des droits d'un groupe particulier de personnes.

Des mesures d'action positive sont expressément autorisées par la Constitution serbe et la loi sur l'interdiction de la discrimination. Elles visent plus spécifiquement à une plus grande participation des femmes en politique, des Roms dans l'éducation et des personnes handicapées dans l'emploi.

6. Organismes de promotion de l'égalité de traitement

Le Commissaire à la protection de l'égalité a été institué par la loi sur l'interdiction de la discrimination en tant qu'organisme public indépendant, autonome et spécialisé doté d'un vaste mandat en matière de promotion de l'égalité et de lutte contre la discrimination dans toutes les sphères de la société. Il assume deux responsabilités principales: la prévention de la discrimination et la protection contre la discrimination. Le Bureau du Commissaire a toute une série de mesures à sa disposition, dont les plus pertinentes du point de vue des victimes de discrimination consistent à recevoir et instruire des plaintes et à engager des litiges stratégiques ainsi que des poursuites pour délits mineurs ou infractions pénales.

La procédure de requête auprès du Commissaire est régie par les articles 35 à 40 – la règle générale étant que les dispositions de la loi régissant les procédures administratives générales s'appliquent de la même manière aux procédures impliquant le Commissaire. Le Commissaire doit transmettre la plainte dans un délai de 15 jours, à compter de la date à laquelle il l'a lui-même reçue, à l'auteur présumé des faits, lequel dispose de 15 jours pour y répondre. Le Commissaire peut proposer une médiation si les deux parties y consentent. Cette obligation est conforme à la directive sur l'égalité raciale qui exige en son article 7, paragraphe 1, que les États membres veillent à ce que des procédures judiciaires et/ou administratives soient accessibles, y compris, lorsqu'ils l'estiment approprié, des procédures de conciliation. Cependant, lorsque le conflit ne fait pas l'objet d'une médiation, le Commissaire est tenu, dans un délai de 90 jours à dater de la réception de la plainte, de formuler un avis sur le point de savoir s'il y a eu ou non violation de l'interdiction de discrimination, et d'en informer le plaignant ainsi que la personne à l'encontre de laquelle la plainte a été déposée. Si le Commissaire constate une violation, il adresse une recommandation à la personne visée par la plainte en lui

suggérant une manière de réparer la violation en question. Le destinataire de cette recommandation est tenu d'y donner suite et de remédier à la violation constatée dans un délai de 30 jours à compter de la date de réception de la dite recommandation. La personne doit informer le Commissaire des mesures prises. Si toutefois la personne ne remédie pas à la violation constatée dans le délai imparti de 30 jours, le Commissaire peut en informer le public en utilisant des médias électroniques et écrits, mais ne peut sanctionner le contrevenant. Il peut cependant introduire une notification en vue de l'engagement de procédures pour délits mineurs ou pour infractions pénales, ou de l'initiation d'une action en justice s'il estime qu'il y a matière à engager un litige stratégique.

Une nouvelle Commissaire, Brankica Jankovic, a été élue en mai 2015 pour un mandat de cinq ans. Son bureau a déployé de nombreuses actions de sensibilisation à l'égard de la discrimination et mis en place certains mécanismes permettant de s'en protéger. Le rapport annuel concernant 2015 a été présenté à temps (le 15 mars 2016)⁴³ et un rapport spécial consacré à la discrimination envers les femmes a été réalisé en mai 2015.⁴⁴ Le Commissaire a été saisi de 797 plaintes en 2015 contre 666 en 2014, et il a émis un avis dans 215 cas; il a formulé 17 avis concernant des projets de loi et des actes généraux; il a initié une procédure pour infraction pénale ainsi qu'une procédure pour délit mineur; et il a lancé neuf avertissements et publié 35 communiqués.⁴⁵

Les capacités du Bureau du Commissaire, en termes d'espace et en termes techniques, de même qu'en termes de formation du personnel, bénéficieraient cependant d'un renforcement supplémentaire. Par ailleurs, un bureau régional a été inauguré à Novi Pazar en mars 2014, mais il ne répond pas aux attentes dans la mesure où seul un petit nombre de citoyens ont pris contact avec le Commissaire et où le nombre de plaintes introduites dans cette partie de la Serbie reste négligeable.⁴⁶

7. Points essentiels

1. Conformité aux deux directives antidiscrimination de l'UE

La législation nationale serbe est globalement conforme aux deux directives antidiscrimination adoptées par l'UE en 2000. Un certain nombre d'incohérences et d'ambiguïtés nécessitent néanmoins une interprétation judiciaire plus poussée ou une modification de la législation existante:

- la discrimination par association est reconnue par la loi sur l'interdiction de la discrimination, mais son application se limite aux «membres de la famille» et aux personnes proches des victimes de la discrimination;
- la définition de la discrimination directe est conforme à celle figurant dans les directives européennes; elle se limite toutefois au traitement moins favorable et ne couvre pas le préjudice;
- la définition de la discrimination indirecte ne contient pas la formule conditionnelle «serait» et peut donc être interprétée comme se limitant à la survenance réelle d'un désavantage – ce qui ne permet pas de contester des dispositions neutres devant un tribunal avant qu'elles aient défavorisé des victimes réelles;

⁴³ Commissaire à la protection de l'égalité (2016), *Rapport annuel 2015 du Commissaire à la protection de l'égalité*, Belgrade; texte disponible (en serbe) sur www.ravnopravnost.gov.rs/rs/izveštaji/izveštaji, consulté en dernier lieu le 27 mars 2016.

⁴⁴ Commissaire à la protection de l'égalité (2015), *Rapport spécial du Commissaire à la protection de l'égalité sur la discrimination envers les femmes*, Belgrade; texte disponible (en serbe) sur www.ravnopravnost.gov.rs/rs/izveštaji/izveštaji, consulté en dernier lieu le 27 mars 2016.

⁴⁵ Commissaire à la protection de l'égalité (2016), *Rapport annuel 2015 du Commissaire à la protection de l'égalité*, Belgrade, p. 8.

⁴⁶ Commissaire à la protection de l'égalité (2016), *Rapport annuel 2015 du Commissaire à la protection de l'égalité*, Belgrade, p. 15.

- l'injonction de discriminer n'est pas définie dans la loi sur l'interdiction de la discrimination, et devrait y être incluse;
- la loi sur l'interdiction de la discrimination ne stipule pas expressément que le test de situation peut servir de preuve en justice et la réglementation peu claire en la matière engendre de nombreuses questions (qui procède au test, cette personne a-t-elle un lien particulier avec celle qui signale la discrimination, y a-t-il eu des précédents, etc.);
- la loi sur l'interdiction de la discrimination ne contient aucune règle spécifique par rapport aux statistiques; la jurisprudence est encore embryonnaire et on ne voit pas encore clairement quel traitement les cours et tribunaux vont réserver aux preuves statistiques;
- la loi sur l'interdiction de discrimination ne couvre pas les pensions de retraite professionnelles, les avantages sociaux et le travail indépendant, et il n'est pas certain qu'elle couvre la sécurité sociale et le logement; même si d'autres lois réglementent certains de ces aspects, des dispositions pertinentes devraient figurer dans la loi sur l'interdiction de la discrimination;
- la loi sur l'interdiction de la discrimination mentionne uniquement l'accès aux services, et ne mentionne pas expressément l'accès aux biens;
- la loi sur l'interdiction de la discrimination devrait reconnaître la ségrégation en tant que forme aggravée de discrimination;
- la loi sur l'interdiction de la discrimination doit comporter des dispositions relatives aux aménagements raisonnables en faveur des personnes handicapées;
- le droit national ne prévoit pas d'exception pour les employeurs dont l'éthique se fonde sur la religion ou les convictions, mais il existe une dispense générale pour les responsables religieux qui peuvent pratiquer une discrimination lorsque celle-ci est exigée ou admise par leur doctrine religieuse;
- la loi sur l'interdiction de la discrimination ne prévoit pas expressément d'exception en ce qui concerne une discrimination directe fondée sur l'âge et une interprétation judiciaire plus poussée s'impose, en rapport plus particulièrement avec l'application du test de proportionnalité;
- en dépit de l'arsenal de sanctions prévues en cas de discrimination, des problèmes constatés dans la pratique, tels que des retards de procédure et des sanctions clémentes, se répercutent sur l'efficacité et la proportionnalité des sanctions;
- la loi sur la prévention de la discrimination à l'égard des personnes handicapées ne prévoit pas de protection contre les rétorsions, et la définition des rétorsions figurant dans la loi sur l'interdiction de la discrimination doit être davantage alignée sur le droit de l'UE car elle ne prévoit pas expressément de protection contre le licenciement;
- la loi sur la prévention de la discrimination à l'égard des personnes handicapées ne contient pas de disposition concernant le renversement de la charge de la preuve;
- le droit national n'autorise pas l'action collective en cas de discrimination.

2. Mise en œuvre du cadre normatif existant

Bien que le cadre normatif antidiscrimination de la Serbie respecte globalement les normes pertinentes de l'UE, un certain nombre de problèmes sont observés dans l'application pratique des normes en vigueur:

- la mise en œuvre de la Stratégie pour la prévention et la protection contre la discrimination requiert une approche davantage proactive et systématique; plusieurs problèmes demandent une attention urgente: on songe notamment ici à l'amélioration de l'inclusion sociale des personnes handicapées et des Roms ainsi qu'à l'amélioration de la situation des personnes LGBTI et des personnes séropositives;
- la République de Serbie n'a pas encore mis en place de système unifié et centralisé pour la collecte des données relatives au fonctionnement du régime de protection

juridique contre la discrimination, ce qui pose un énorme problème au niveau de l'évaluation et du suivi;

- bien que le nombre d'affaires traitées augmente chaque année, il reste mineur par rapport à un phénomène discriminatoire largement répandu dans toutes les sphères de la société; cette situation s'explique par un manque de sensibilisation et de connaissance concernant la discrimination, et par le manque de détermination des victimes de demander de l'aide;
- même si une formation au droit antidiscrimination a été dispensée aux policiers et magistrats de différentes juridictions, il convient que l'État poursuive cette formation en coopération avec des organisations et experts internationaux.

ZUSAMMENFASSUNG

1. Einleitung

Die Republik Serbien ist eine parlamentarische Demokratie mit einem Mehrparteiensystem und einer geschriebenen Verfassung. Die aus vielen Parteien bestehende Nationalversammlung der Republik Serbien wurde im Jahr 1991 eingerichtet. Die 10. gesetzgebende Versammlung nahm am 16. April 2014 ihre Arbeit auf und ist davon geprägt, dass die führende Partei eine Mehrheit im Parlament besitzt. Dies prägt und beeinflusst derzeit die parlamentarische Arbeit in Serbien.

Nach der letzten Volkszählung von 2002 hat die Republik Serbien 7 498 001 Einwohner. Serben stellen 82,86 % der Bevölkerung, Ungarn 3,91 %, Bosnier 1,81 %, Roma 1,44 %, Jugoslawen 1,08 %, Kroaten 0,94 %, Montenegriner 0,92 %, Albaner 0,82 %, Slowaken 0,79 %, Walachen 0,53 %, Rumänen 0,46 %, Mazedonier 0,34 %, Bulgaren und Bunjewatzen jeweils 0,27 %, Muslime 0,26 %, ⁴⁷ Russinen 0,21 %, Slowenen und Ukrainer jeweils 0,07 %, Goranen 0,06 %, Deutsche 0,05 % und Russen und Tschechen jeweils 0,03 %. Die Mehrheit der serbischen Bevölkerung gehört dem christlich-orthodoxen Glauben an (84,98 %), gefolgt von Katholiken (5,48 %), Muslimen (3,2 %) und Protestanten (1,08 %). Auch andere Religionen sind in Serbien vertreten.

2. Wichtigste Gesetze

Die Verfassung Serbiens⁴⁸ aus dem Jahr 2006 enthält einen umfassenden Katalog von Menschenrechten (Art. 21 Abs. 3).

Serbien hat eine Reihe von Antidiskriminierungsvorschriften erlassen, die nahezu vollständig an die beiden EU-Richtlinien von 2000 angeglichen sind.⁴⁹ In ihrem Fortschrittsbericht zu Serbien für 2015 bescheinigt die Europäische Kommission, dass die serbischen Antidiskriminierungsvorschriften weitgehend im Einklang mit den EU-Standards stehen, eine weitere Angleichung jedoch erforderlich ist, insbesondere was den Umfang der Ausnahmen vom Gleichbehandlungsgrundsatz, die Definition von mittelbarer Diskriminierung und die Pflicht betrifft, angemessene Vorkehrungen für behinderte Arbeitnehmer zu treffen.⁵⁰

Im April 2006 wurde das erste Antidiskriminierungsgesetz verabschiedet, das Gesetz zur Verhinderung der Diskriminierung von Menschen mit Behinderungen (GVDMB),⁵¹ ergänzt durch das Gesetz zur beruflichen Rehabilitierung und Beschäftigung von Menschen mit Behinderungen (GbRBMB).⁵² Das erste allgemeine Antidiskriminierungsgesetz wurde im März 2009 verabschiedet.

⁴⁷ In Serbien kann als ethnische Identität „Muslim“ angegeben werden, derselbe Begriff kann aber auch in Bezug auf die religiöse Identität verwendet werden.

⁴⁸ Serbien, Verfassung der Republik Serbien (*Ustav Republike Srbije*), Amtsblatt der Republik Serbien, Nr. 98/2006, 10. November 2006.

⁴⁹ Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, ABl. L 180/22, 19. Juli 2000; Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303, 2. Dezember 2000.

⁵⁰ Europäische Kommission, Serbien- Bericht 2015, Brüssel, 10. November 2015, S. 56; abrufbar unter http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf (letzter Zugriff am 27. März 2016).

⁵¹ Serbien, Gesetz zur Verhinderung der Diskriminierung von Menschen mit Behinderungen (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), Amtsblatt der Republik Serbien, Nr. 33/2006, 17. April 2006.

⁵² Serbien, Gesetz zur beruflichen Rehabilitierung und Beschäftigung von Menschen mit Behinderungen (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), Amtsblatt der Republik Serbien, Nr. 36/2009, 32/2013, 17. April 2006.

Das Gesetz über ein Verbot von Diskriminierung (GVD)⁵³, mit dem ein systematisches Gesetz im Bereich Antidiskriminierung eingeführt wurde, ist ein wichtiger Meilenstein für den Schutz der grundlegenden Menschenrechte in Serbien. Es verbietet zahlreiche diskriminierende Handlungen. Außerdem deckt das GVD neben sämtlichen, im Gleichbehandlungsrecht der EU vorgegebenen Diskriminierungsgründen noch einige weitere Gründe ab.

Das Gesetz zum Schutz der Rechte und Freiheiten nationaler Minderheiten⁵⁴ regelt darüber hinaus die Durchsetzung der Rechte von Menschen, die nationalen Minderheiten angehören. Es ermöglicht diesen Angehörigen nationaler Minderheiten, einzeln oder gemeinsam mit anderen Mitgliedern ihrer ethnischen Gruppe, ihre verfassungsmäßigen Rechte in demokratischer Weise auszuüben.

2015 wurden zwei sehr wichtige Gesetze verabschiedet. Im März 2015 wurde das Gesetz über die Verwendung von Blindenhunden⁵⁵ verabschiedet, das es Menschen mit Behinderungen erlaubt, sich mithilfe von Blindenhunden im öffentlichen Verkehr, in öffentlichen Gebäuden sowie am Arbeitsplatz zu bewegen. Das Gesetz richtet sich in erster Linie an die 12 000 Bürgerinnen und Bürger, die schwere Sehbehinderungen haben, die 9000 Bürgerinnen und Bürger, die völlig blind sind und die 3000 Bürgerinnen und Bürger mit Sehbehinderungen.⁵⁶ Ferner wurde im April 2015 das Gesetz über die Verwendung der Gebärdensprache⁵⁷ verabschiedet, das die Verwendung der Gebärdensprache in Politik, Bildung und Beschäftigung sowie anderen Bereichen des gesellschaftlichen Lebens regelt. Ziel dieses Gesetzes ist es, die vollständige Einbeziehung gehörloser Menschen in die Gesellschaft zu ermöglichen und das Recht auf Einsatz der Gebärdensprache in diversen Verfahren in den Bereichen öffentliche Dienstleistungen, Bildung, Beschäftigung und allen sonstigen Bereichen zu gewährleisten.

Viele weitere Gesetze enthalten ebenfalls ein Diskriminierungsverbot, z. B. das Arbeitsgesetz,⁵⁸ das Diskriminierung im Arbeitsleben verbietet, das Gesetz über die Grundlagen des Bildungssystems,⁵⁹ das eine inklusive Bildung einführt, das Jugendgesetz,⁶⁰ das Gesetz über die vorschulische Bildung⁶¹ und das Gesetz über Kirchen und religiöse Vereinigungen.⁶²

Ein strafrechtlicher Schutz vor Diskriminierung ist zudem im Strafgesetzbuch⁶³ geregelt, der in Bezug auf das Diskriminierungsverbot mehrere Straftatbestände kennt: Artikel 128 (Verletzung des Gleichbehandlungsgrundsatzes), Artikel 129 (Verletzung des Rechts zur

⁵³ Serbien, Gesetz über ein Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), Amtsblatt der Republik Serbien, Nr. 22/2009, 26. März 2009.

⁵⁴ Serbien, Gesetz zum Schutz der Rechte und Freiheiten nationaler Minderheiten, Amtsblatt der Bundesrepublik Jugoslawien, Nr. 11/2002, Amtsblatt von Serbien und Montenegro, Nr. 1/2003, Amtsblatt der Republik Serbien, 172/2009, 27. Februar 2003.

⁵⁵ Serbien, Gesetz über die Verwendung von Blindenhunden (*Zakon o kretanju uz pomoć psa vodiča*), Amtsblatt der Republik Serbien, Nr. 29/2015, 31. März 2015.

⁵⁶ Referat für soziale Eingliederung und Armutsbekämpfung, Gesetz über die Verwendung von Blindenhunden, verabschiedet am 25. März 2015, abrufbar unter <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/> (letzter Zugriff am 27. März 2016).

⁵⁷ Serbien, Gesetz über die Verwendung der Gebärdensprache (*Zakon o upotrebi znakovnog jezika*), Amtsblatt der Republik Serbien, Nr. 38/2015, 7. Mai 2015.

⁵⁸ Serbien, Arbeitsgesetz (*Zakon o radu*), Amtsblatt der Republik Serbien, Nr. 24/2005, 61/2005, 54/2009, 32/2013, Nr. 75/2014, 15. März 2005.

⁵⁹ Serbien, Gesetz über die Grundlagen des Bildungssystems (*Zakon o osnovama sistema obrazovanja i vaspitanja*), Amtsblatt der Republik Serbien, Nr. 72/09, 52/2011, 55/2013, 31. August 2009.

⁶⁰ Serbien, Jugendgesetz (*Zakon o mladima*), Amtsblatt der Republik Serbien, Nr. 50/011, 8. Juli 2011.

⁶¹ Serbien, Gesetz über die vorschulische Bildung (*Zakon o predškolskom vaspitanju i obrazovanju*), Amtsblatt der Republik Serbien, Nr. 18/010, 3. Mai 2010.

⁶² Serbien, Gesetz über Kirchen und religiöse Vereinigungen (*Zakon o crkvama i verskim zajednicama*), Amtsblatt der Republik Serbien, Nr. 36/2006, 27. April 2006.

⁶³ Serbien, Strafgesetzbuch (*Krivični zakonik*), Amtsblatt der Republik Serbien, Nr. 85/2005, 88/2005 – Korr., 107/2005 – Korr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 6. Oktober 2005.

Verwendung einer Sprache und eines Alphabets) und Artikel 387 (Verbot der Rassendiskriminierung und anderer Diskriminierung). Das Gesetz über Ordnungswidrigkeiten⁶⁴ regelt die Verfahren, Bedingungen und die Durchsetzung von Ordnungsstrafen.

Die Strategie zur Verhütung von und zum Schutz vor Diskriminierung wurde 2013 verabschiedet und im Oktober 2014 durch einen Aktionsplan ergänzt, dessen Umsetzung 2015 erfolgreich initiiert wurde.

3. Wichtigste Grundsätze und Begriffe

Das GVD kennt sieben Formen von Diskriminierung: unmittelbare und mittelbare Diskriminierung, Verletzung des Grundsatzes der gleichen Rechte und Pflichten, Verhinderung des zur Verantwortung Ziehens,⁶⁵ Vereinigung zum Zweck der Diskriminierung, Hassrede, Belästigung und Herabwürdigung und schwere Formen von Diskriminierung.

Die Definition von unmittelbarer Diskriminierung entspricht fast vollständig der Definition in den EU-Richtlinien, ist jedoch auf eine weniger günstige Behandlung beschränkt und enthält nicht den Begriff des Schadens. Die Definition von mittelbarer Diskriminierung ist nicht konditional formuliert („können“) und kann daher so ausgelegt werden, dass sie nur für eine tatsächlich vorgekommene Benachteiligung gilt, wodurch es unmöglich wird, gegen neutrale Vorschriften vorzugehen, bevor tatsächlich ein Opfer benachteiligt wird. Außerdem verwendet sie nicht den Wortlaut „dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren“, was eine plausible Erklärung für dieses Phänomen bietet. Es ist nicht klar, warum die Verletzung des Grundsatzes der gleichen Rechte als spezielle Form von Diskriminierung angeführt wird, weil dies entweder eine unmittelbare oder eine mittelbare Diskriminierung darstellt und sogar als Test für Diskriminierung verwendet wird. Das Verbot, jemanden „zur Verantwortung zu ziehen“, ist – in anderen Worten – das Verbot von „Viktimisierung“; diese Vorschrift muss jedoch insofern mit dem EU-Recht in Einklang gebracht werden, als sie einen ausdrücklichen Kündigungsschutz beinhalten muss. Die Definition von Hassrede ist zweideutig, weil sie die Formulierung „und auf andere Weise“ verwendet und in der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse und der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung nicht als spezielle Form von Diskriminierung anerkannt ist. Das GVD verbietet Vereinigung zum Zweck der Diskriminierung, worunter unter anderem die Anstiftung zu nationalistisch, rassistisch, religiös oder anderweitig motiviertem Hass und zu Spaltung und Feindschaft gezählt wird. Anweisung zur Diskriminierung wird im GVD erwähnt, jedoch nicht definiert. Belästigung wird mit Herabwürdigung zusammengefasst und als spezielle Form von Diskriminierung anerkannt. Allerdings ist diese Bestimmung verwirrend, weil Herabwürdigung ein mögliches Element von Belästigung darstellt, der Begriff „Belästigung“ selbst jedoch nicht definiert wird.

Das GVD erlaubt einige Ausnahmen vom Gleichbehandlungsgrundsatz. So stellen „Maßnahmen mit dem Zweck, die völlige Chancengleichheit, den Schutz und die Förderung von Einzelpersonen oder eine Gruppe von Personen zu gewährleisten, die in einer nachteiligen Situation sind, keine Diskriminierung dar“ (Artikel 14). Mittelbare Diskriminierung kann gerechtfertigt sein, wenn sie ein rechtmäßiges Ziel verfolgt und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Ungleichbehandlung, Ausgrenzung oder Bevorzugung aufgrund der speziellen Anforderungen einer Tätigkeit ist zulässig, wenn die persönlichen Eigenschaften eine wesentliche und entscheidende Voraussetzung für die Ausübung der Tätigkeit darstellen und es sich um einen

⁶⁴ Serbien, Gesetz über Ordnungswidrigkeiten (*Zakon o prekršajima*), Amtsblatt der Republik Serbien, Nr. 65/2013, 13/2016, 25. Juli 2013.

⁶⁵ Viktimisierung wird im serbischen Recht als „zur Verantwortung ziehen“ bezeichnet.

rechtmäßigen Zweck handelt. Außerdem gilt das Verhalten von religiösen Amtsträgern, das einer religiösen Doktrin, Weltanschauung oder anderen Zielen von Kirchen oder religiösen Vereinigungen entspricht, die gemäß dem Gesetz zur Regelung der Religionsfreiheit und des Status von Kirchen und religiösen Vereinigungen in das Register der religiösen Vereinigungen eingetragen sind, nicht als Diskriminierung. Dieser Artikel ist problematisch, weil er eine Blankobefreiung für religiöse Amtsträger darstellt, denen somit Diskriminierung erlaubt ist, wenn ihre religiösen Doktrinen dies erfordern oder erlauben.

Eine der weitreichendsten Bestimmungen der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung ist Artikel 5, der eine Verpflichtung zu angemessenen Vorkehrungen für Menschen mit Behinderungen enthält. Diese Pflicht ist nicht im GVD enthalten und gilt ausschließlich für den Diskriminierungsgrund Behinderung. Andererseits zählt das GVDMB mehrere Fälle auf, in denen Diskriminierung gerechtfertigt ist, obwohl die meisten davon positive Maßnahmen im Sinne von Artikel 8 betreffen. Die problematischste Rechtfertigung ist jedoch in Artikel 19 Absatz 2 des GbRBMB enthalten, der spezielle Unterrichtsformen für Kinder erlaubt, deren geistige Fähigkeiten nicht ausreichen, um dem regulären Unterricht zu folgen.

In Serbien wird Mehrfachdiskriminierung als schwere Form der Diskriminierung anerkannt, das heißt in Fällen von Mehrfachdiskriminierung oder sich überschneidender Diskriminierung können härtere Strafen verhängt werden.

4. Sachlicher Anwendungsbereich

Das GVD gilt für alle Bereiche des öffentlichen und privaten Lebens, da Artikel 2 Absatz 1 Diskriminierung definiert als „jede ungerechtfertigte Diskriminierung oder Ungleichbehandlung“ aufgrund einer persönlichen Eigenschaft. Allerdings erkennt das GVD einige Sonderfälle von Diskriminierung an, z. B. Diskriminierung in Verfahren vor einer staatlichen Verwaltungsbehörde, Diskriminierung bei der Bereitstellung von öffentlichen Dienstleistungen und bei der Nutzung von Anlagen und Räumen sowie Diskriminierung in den Bereichen Beschäftigung und Bildung. Somit geht der sachliche Anwendungsbereich des GVD über die Bereiche hinaus, die von den beiden EU-Richtlinien abgedeckt sind.

Das Verbot von Diskriminierung im Arbeitsleben gilt sowohl für den privaten, als auch für den öffentlichen Sektor.

Das GVD bezieht weder die betriebliche Altersversorgung noch Sozialleistungen noch selbständige Erwerbstätigkeit mit ein, und es ist unklar, ob es für Sozialschutz und Wohnraumversorgung gilt. Auch wenn einige dieser Bereiche, etwa selbständige Erwerbstätigkeit und Wohnraumversorgung, in bestimmten anderen Gesetzen geregelt sind, sollten diese Bestimmungen in das GVD eingebunden werden.

Das GVD erwähnt nur den Zugang zu Dienstleistungen, nicht aber ausdrücklich den Zugang zu Gütern.

5. Rechtsdurchsetzung

Die Zivilverfahren in Diskriminierungsfällen werden durch drei Antidiskriminierungsgesetze geregelt. Grundsätzlich gelten die Bestimmungen des allgemeinen Prozessrechts, sofern nicht ausdrücklich ein anderes Verfahren festgelegt ist (*Lex specialis*). Es war jedoch notwendig, ein spezielles Verfahren für Diskriminierungsfälle einzurichten, um einen wirksamen und effizienten zivilrechtlichen Schutz vor Diskriminierung gemäß den internationalen und europäischen Standards in diesem Bereich zu gewährleisten.

Das GVDMB enthält spezielle Verfahrensvorschriften, um Klagen gegen die Diskriminierung von Menschen mit Behinderungen zu erleichtern. Das Verfahren zur Einreichung einer zivilrechtlichen Klage in Diskriminierungsfällen ist jedoch im GVD geregelt, wobei jeder Klage einreichen kann, der sich diskriminiert fühlt. Das Gesetz enthält außerdem Vorschriften für die Rechtsmittel, die Opfern von Diskriminierung zur Verfügung stehen. Nach dem GVD kann das Opfer eine einstweilige Verfügung beantragen, über die das Gericht innerhalb von drei Tagen entscheiden muss. Die Verfahren müssen mit besonderer Dringlichkeit durchgeführt werden (Artikel 41 Absatz 3). Außerdem schreibt Artikel 45 des GVD eine Umkehrung der Beweislast vom Kläger zum Beklagten vor.

Nach Artikel 41 des GVD ist jeder berechtigt, Klage einzureichen, der sich wegen einer diskriminierenden Behandlung für beschwert hält. Kläger können folgende Maßnahmen beantragen:

- 1) Verbot einer Handlung, durch die eine Diskriminierung droht, Verbot der Fortsetzung einer diskriminierenden Handlung oder Verbot der Wiederholung einer diskriminierenden Handlung,
- 2) Feststellung durch das Gericht, dass die beklagte Partei die Klagepartei oder eine dritte Partei diskriminiert hat,
- 3) Maßnahmen zur Abhilfe der Folgen der diskriminierenden Behandlung,
- 4) Entschädigung für den erlittenen materiellen und immateriellen Schaden und
- 5) Veröffentlichung des Urteils.

Nach Artikel 46 können auch der/die Gleichstellungsbeauftragte und Organisationen, die sich für den Schutz der Menschenrechte oder der Rechte einer bestimmten Gruppe einsetzen, vor Gericht klagen.

Die serbische Verfassung und das GVD erlauben ausdrücklich positive Fördermaßnahmen und diese richten sich im Bereich Politik vor allem an Frauen, im Bereich Bildung an Roma und im Bereich Beschäftigung an Menschen mit Behinderungen.

6. Gleichbehandlungsstellen

Der Gleichstellungsbeauftragte wurde durch das GVD als unabhängige, eigenständige und spezialisierte staatliche Stelle eingerichtet, in deren weiten Zuständigkeitsbereich auch die Förderung der Chancengleichheit und Gleichbehandlung in allen gesellschaftlichen Bereichen fällt. Der Beauftragte hat zwei Hauptaufgaben: die Prävention von und den Schutz vor Diskriminierung. Dem Büro des Beauftragten stehen zahlreiche Mittel zur Verfügung, von denen aus Sicht der Diskriminierungsoffer sicher die Annahme und Untersuchung von Diskriminierungsbeschwerden, die Einreichung strategischer Klage und die Erstattung von Strafanzeigen besonders wichtig sind.

Das Beschwerdeverfahren beim Beauftragten ist in Artikel 35 bis 40 geregelt und grundsätzlich gelten die allgemeinen Bestimmungen der Verwaltungsverfahrensordnung auch für Verfahren vor dem Beauftragten. Eingehende Beschwerden müssen innerhalb von 15 Tagen an den Beklagten weitergeleitet werden, der dann 15 Tage Zeit hat, um eine Stellungnahme abzugeben. Der Beauftragte kann ein Schlichtungsverfahren durchführen, wenn beide Parteien dem zustimmen. Dies entspricht Artikel 7 Absatz 1 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse, der die Mitgliedstaaten verpflichtet sicherzustellen, dass Opfer ihre Ansprüche auf dem Gerichts- und/oder Verwaltungsweg sowie, wenn die Mitgliedstaaten es für angezeigt halten, in Schlichtungsverfahren geltend machen können. Wenn der Streit nicht durch eine Schlichtungsverfahren geregelt wird, muss der Beauftragte jedoch innerhalb von 90 Tagen nach Eingang der Beschwerde in einer Stellungnahme entscheiden, ob das Diskriminierungsverbot verletzt wurde, und den Beschwerdeführer und die Person, gegen die sich die Beschwerde richtet, über seine Entscheidung informieren. Wenn der

Beauftragte eine Verletzung feststellt, erstellt er eine Empfehlung an die Person, gegen die sich die Beschwerde richtet, in der Mittel zur Abhilfe der Verletzung vorgeschlagen werden. Der Beklagte muss diese Empfehlungen befolgen und innerhalb von 30 Tagen die vorgeschlagenen Maßnahmen zur Abhilfe der Verletzung treffen. Außerdem muss er den Beauftragten über die Durchführung der Maßnahmen informieren. Wird die Verletzung nicht innerhalb von 30 Tagen berichtigt, kann der Beauftragte dies in elektronischen Medien und Printmedien öffentlich machen, er hat jedoch keine weiteren Sanktionsmöglichkeiten. Allerdings kann der Beauftragte ein Ordnungsverfahren beantragen, Strafanzeige stellen oder Klage einreichen, wenn der Fall von strategischer Bedeutung ist.

Im Mai 2015 wurde Brankica Jankovic für einen Zeitraum von fünf Jahren zur neuen Gleichstellungsbeauftragten gewählt. Die Gleichstellungsbehörde hat zahlreiche Aufklärungskampagnen zum Thema Diskriminierung und zu den Instrumenten zum Schutz vor Diskriminierung durchgeführt. Der Jahresbericht 2015 wurde fristgerecht (am 15. März 2016) vorgelegt⁶⁶, und im Mai 2015 wurde ein Sonderbericht zum Thema Frauendiskriminierung erstellt.⁶⁷ 2015 gingen bei der Fachbehörde 797 Beschwerden ein, im Vergleich zu 666 Beschwerden im Jahr 2014. Die Behörde nahm 797 Beschwerden entgegen, gab in 215 Fällen eine Stellungnahme ab, legte 17 Gutachten über Gesetzentwürfe und allgemeine Rechtsakte vor, stellte eine Strafanzeige und initiierte ein Ordnungswidrigkeitsverfahren, neun Verwarnungen und 35 Bekanntmachungen.⁶⁸

Trotzdem gibt es im Hinblick auf die Kapazität des Büros der Gleichstellungsbeauftragten noch Raum für Verbesserungen, insbesondere was die räumlichen und technischen Kapazitäten sowie die Schulung der Mitarbeiterinnen und Mitarbeiter betrifft. Im März 2014 wurde außerdem ein Regionalbüro in Novi Pazar eröffnet. Es hat die Erwartungen jedoch nicht erfüllt, da nur wenige Bürgerinnen und Bürger mit dem Beauftragten Kontakt aufnehmen und die Zahl der Beschwerden in diesem Teil Serbiens nach wie vor gering ist.⁶⁹

7. Wichtige Punkte

1. Übereinstimmung mit den beiden Gleichbehandlungsrichtlinien der EU

Das serbische Recht entspricht im Wesentlichen den beiden Gleichbehandlungsrichtlinien der EU aus dem Jahr 2000. Allerdings gibt es einige Widersprüche und Zweideutigkeiten, die eine weitere juristische Klärung oder eine Gesetzesänderung erfordern:

- Diskriminierung aufgrund von Assoziierung wird im GVD zwar anerkannt, bezieht sich jedoch nur auf „Familienmitglieder“ und Menschen, die dem Diskriminierungsopfer nahe stehen,
- die Definition von unmittelbarer Diskriminierung entspricht der Definition in den EU-Richtlinien, ist jedoch auf eine weniger günstige Behandlung beschränkt und enthält nicht den Begriff des Nachteils,
- die Definition von mittelbarer Diskriminierung ist nicht konditional formuliert („können“) und kann daher so ausgelegt werden, dass sie nur für eine tatsächlich

⁶⁶ Gleichstellungsbeauftragte (2016), *Ordentlicher Jahresbericht der Gleichstellungsbeauftragten für 2015*, Belgrad; abrufbar (auf Serbisch) unter www.ravnopravnost.gov.rs/rs/izveštaji/izveštaji (letzter Zugriff am 27. März 2016).

⁶⁷ Gleichstellungsbeauftragte (2015), *Sonderbericht der Gleichstellungsbeauftragten zum Thema Frauendiskriminierung*, Belgrad; abrufbar (auf Serbisch) unter www.ravnopravnost.gov.rs/rs/izveštaji/izveštaji (letzter Zugriff am 27. März 2016).

⁶⁸ Gleichstellungsbeauftragte (2016), *Ordentlicher Jahresbericht der Gleichstellungsbeauftragten für 2015*, Belgrad, S. 8.

⁶⁹ Gleichstellungsbeauftragte (2016), *Ordentlicher Jahresbericht der Gleichstellungsbeauftragten für 2015*, Belgrad, S. 15.

- vorgekommene Benachteiligung gilt, wodurch es unmöglich wird, gegen neutrale Vorschriften vorzugehen, bevor ein Opfer tatsächlich benachteiligt wird,
- Anweisung zur Diskriminierung ist im GVD nicht definiert und sollte in das Gesetz aufgenommen werden,
 - das GVD legt nicht ausdrücklich fest, dass Situationstests vor Gericht als Beweis zulässig sind. Diese mangelnde Klarheit lässt viele Fragen offen (zum Beispiel wer die Testperson ist, ob Testpersonen ein bestimmtes Verhältnis zu der Person haben dürfen, die wegen Diskriminierung klagt, ob die Testpersonen früher diskriminiert wurden, usw.),
 - das GVD enthält keine speziellen Vorschriften über statistische Daten, das Fallrecht ist noch recht beschränkt und es ist nicht klar, wie die Gerichte statistische Beweise bewerten,
 - das GVD gilt nicht für Betriebsrenten, soziale Vergünstigungen und selbständige Beschäftigung und es ist unklar, ob es für Sozialschutz und Wohnraum gilt. Obwohl andere Gesetze einige dieser Bereiche, wie selbständige Beschäftigung und Wohnraum, regulieren, sollten entsprechende Bestimmungen in das GVD aufgenommen werden,
 - das GVD erwähnt nur den Zugang zu Dienstleistungen und nicht ausdrücklich den Zugang zu Gütern,
 - das GVD sollte Segregation als eine schwere Form von Diskriminierung berücksichtigen,
 - in das GVD müssen Vorschriften über angemessene Vorkehrungen für Menschen mit Behinderungen aufgenommen werden,
 - das nationale Recht kennt keine Ausnahme für Arbeitgeber, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, gewährt jedoch religiösen Amtsträgern eine Blankovollmacht zur Diskriminierung, wenn dies von ihrer religiösen Doktrin gefordert oder erlaubt ist,
 - das GVD enthält keine ausdrückliche Ausnahmeregelung für unmittelbare Diskriminierung aufgrund des Alters, daher ist hier eine weitere juristische Klärung, insbesondere in Bezug auf die Prüfung der Verhältnismäßigkeit erforderlich,
 - obwohl es zahlreiche Sanktionsmöglichkeiten in Diskriminierungsfällen gibt, ist deren Anwendung in der Praxis mit Problemen behaftet, z. B. reduzieren lange Verfahren und milde Sanktionen die Wirksamkeit und Verhältnismäßigkeit der Sanktionen,
 - das GVDMB bietet keinen Schutz vor Viktimisierung, und die Definition von Viktimisierung im GVD muss dem Unionsrecht stärker angeglichen werden, da sie keinen ausdrücklichen Kündigungsschutz enthält,,
 - das GVDMB enthält keine Bestimmungen zur Umkehrung der Beweislast,
 - das serbische Recht erlaubt in Diskriminierungsfällen keine Sammelklagen.

2. Umsetzung des geltenden Rechtsrahmens

Obwohl der Rechtsrahmen im Bereich Gleichbehandlung in Serbien die einschlägigen EU-Normen im Wesentlichen erfüllt, zeigen sich in der Praxis einige Probleme bei der Umsetzung:

- die Umsetzung der Strategie zur Prävention von und zum Schutz vor Diskriminierung erfordert ein stärker proaktives und systematisches Vorgehen; einige Probleme benötigen dringende Aufmerksamkeit, zum Beispiel muss die soziale Eingliederung von Menschen mit Behinderungen und von Roma verbessert werden und dies gilt auch für die Situation von LGBTI-Personen und von Menschen mit HIV/AIDS,
- die Republik Serbien verfügt noch nicht über ein einheitliches und zentrales System zur Erfassung von Daten über die Funktion des Rechtsschutzes vor Diskriminierung. Dies erschwert die Analyse und Überwachung des Problems Diskriminierung enorm,
- obwohl die Fallzahlen von Jahr zu Jahr zunehmen, sind sie im Vergleich zur Häufigkeit von Diskriminierung in allen gesellschaftlichen Bereich noch immer

- verschwindend gering. Gründe hierfür sind mangelndes Bewusstsein und fehlendes Wissen über Diskriminierung und der fehlende Wille der Opfer, ihre Rechte durchzusetzen,
- obwohl bereits viele Polizisten und Richter verschiedener Rechtsbereiche zum Thema Gleichbehandlungsrecht fortgebildet wurden, muss der Staat seine Fortbildungsmaßnahmen in Zusammenarbeit mit internationalen Organisationen und Experten weiter fortsetzen.

INTRODUCTION

The national legal system

The Republic of Serbia is a constitutional, multi-party, parliamentary democracy. It has a history of being a federal unit within a federal state – the Socialist Federal Republic of Yugoslavia (SFRY). After the dissolution of the SFRY during the 1990s, it was again structured as a federal state with two federal units and known as the Federal Republic of Yugoslavia (FRY). From 2003 to 2006, Serbia was part of the State Union of Serbia and Montenegro, into which the Federal Republic of Yugoslavia had been transformed. On 5 June 2006, the National Assembly of Serbia declared Serbia the successor to the State Union, following a decision by the Parliament of Montenegro declaring the independence of Montenegro. Thus Serbia finally became a single state. The legal competence for anti-discrimination law is therefore directly applicable in all parts of the State, as Serbia is now a unitary state.

List of main legislation transposing and implementing the directives

In the past decade, several general and specialised anti-discrimination laws have been adopted in the Republic of Serbia.

The Law on the Prohibition of Discrimination (LPD) was adopted on 26 March 2009,⁷⁰ thereby establishing an integral system of protection from discrimination within the country's legal system. It entered into force eight days after it was published in the Official Gazette, on 3 April 2009 (except for the provisions relating to the Commissioner for Protection of Equality which entered into force on 1 January 2010). The Law has not thus far been amended.

The LPD expressly prohibits the following grounds of discrimination: race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance and membership of political, trade union and other organisations. However, it also includes other grounds of discrimination, as it has an open clause containing the words 'and other real or presumed personal characteristics'.

In addition, the definition of discrimination in Article 2, para. 1, defines discrimination as 'any unwarranted discrimination or unequal treatment' and does not limit its application to specific areas of life. It also contains special cases of discrimination covering the following areas: discrimination in the course of proceedings conducted before bodies of the public administration, discrimination in the employment sector, discrimination in the provision of public services and in the use of premises and spaces, and discrimination in the sphere of education and professional training.

The Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD) prohibits discrimination based on disability. The Law was adopted on 17 April 2006 and entered into force on 1 January 2007.⁷¹ This Law prohibits discrimination on the ground of disability and aims to promote the inclusion of people with disabilities in all spheres of

⁷⁰ Serbia, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of the Republic of Serbia*, no. 22/2009, 26 March 2009; English version available at <http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia>, last accessed on 24 October 2015.

⁷¹ Serbia, Law on the Prevention of Discrimination against Persons with Disabilities (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 33/2006, 17 April 2006. After the cut-off date of this report, the Law was amended in 2016 in order to prescribe the right of blind or visually impaired persons to use personal facsimile stamps to sign legal documents. *Official Gazette of the Republic of Serbia*, no. 13/2016, 19 February 2016.

society. It addresses various forms of discrimination against people with disabilities which were previously included piecemeal in a number of different laws (such as social security, employment and labour laws, family law, public healthcare laws, public education laws, pension and disability laws, etc.). This Law was followed by the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD),⁷² which was adopted with the aim of creating the possibility for greater numbers of people with disabilities to be included in the open labour market and to improve the quality of their employability and/or employment. The Law was amended on 8 April and entered into force on 16 April 2013.⁷³

The Law on the Protection of the Rights and Freedoms of National Minorities⁷⁴ was adopted on 27 February and entered into force on 7 March 2003. It provides protection to national minorities from all forms of discrimination in exercising their civil rights and freedoms, and the duty of public officials to refrain from acts and regulations that are discriminatory towards them. It further creates instruments that guarantee and protect the special rights of minorities to minority self-governance in the fields of education, use of language, media and culture. The law regulates the way in which the rights of people belonging to national minorities are implemented. Those rights include the right of national affiliation, the right to co-operate with co-nationals in the country and abroad, the right to use one's native language, the right to use national symbols and all the other rights which protect the specificity of national minorities in the fields of special interest to them (use of the language of the national minorities in the work of public bodies and agencies, education and public information in the languages of the national minorities, preservation and protection of cultural heritage, etc.). The law has been amended several times, in 2003, 2009 and 2013.⁷⁵

The Labour Law⁷⁶ was adopted on 15 March and entered into force on 23 March 2005. It provides specific provisions against discrimination at work and related to employment. Thus, while the LPD contains general anti-discrimination provisions, the Labour Law provides for more specific provisions related to discrimination at work and entitles employees to initiate lawsuits and claim damages based on anti-discrimination provisions contained within it. It contains an open anti-discrimination clause, but explicitly mentions the following grounds of discrimination: gender, birth, language, race, skin colour, age, pregnancy, health condition, disability, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial capacity, and membership of political, labour union or other organisations. In particular, the Labour Law prohibits discrimination with respect to employment conditions and the choice of candidates for an employment position; working conditions and rights; professional development and training; career development; and termination of

⁷² Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 17 April 2006.

⁷³ Serbia, Amendments to the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Izmene i dopune Zakona o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 32/2013, 8 April 2013.

⁷⁴ Serbia, Law on the Protection of the Rights and Freedoms of National Minorities (*Zakon o zaštiti prava i sloboda nacionalnih manjina*), *Official Gazette of FRY*, no. 11 of 27 February 2002, *Official Gazette of Serbia and Montenegro*, no. 1/2003 – Constitutional Charter, *Official Gazette of the Republic of Serbia*, no. 72/2009 – other law, *Official Gazette of the Republic of Serbia*, no. 97/2013 – decision of the Constitutional Court, 27 February 2003.

⁷⁵ On 3 March 2016, the Action Plan for Exercising the Rights of National Minorities was adopted, as envisaged by the Action Plan for negotiation Chapter 23. It completes Serbia's strategic commitment aimed at the improvement of the institutional and legislative framework in the field of human and minority rights. The document contains 11 chapters: personal status; prohibition of discrimination; culture and media; freedom of religion; the use of language and script; education; democratic participation; representation of national minorities in public sector and public enterprises; national councils; economic position of national communities; and international cooperation.

⁷⁶ Serbia, Labour Law (*Zakon o radu*), *Official Journal of the Republic of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, no. 75/2014, 15 March 2005.

employment by the employer. The Law has been amended several times, in 2005, 2009, 2013 and 2014.

Many other laws also contain anti-discrimination provisions, such as the Law on Fundamentals of the Education System,⁷⁷ which introduces inclusive education and prohibits discrimination in education, the Law on Youth,⁷⁸ the Law on Preschool Education,⁷⁹ the Law on Churches and Religious Organisations,⁸⁰ etc.

In addition, two very important laws were adopted in 2015. The Law on the Use of Guide Dogs,⁸¹ was adopted on March 2015, with the aim of enabling people with disabilities to move around using guide dogs on public transport, in all public buildings and in workplaces. This Law is primarily aimed at the 12 000 citizens who have severe visual impairments, 9 000 citizens who are completely blind and 3 000 citizens who have impaired vision,⁸² but is not limited only to Serbian nationals. The Law on the Use of Sign Language⁸³ was adopted in April 2015 and regulates the use of sign language in the political, educational and employment spheres and other areas of social life. The purpose of this Law is to enable the full inclusion of deaf people in society and the right to use sign language in various procedures in relation to public services, in education, employment and all other areas.

The Strategy for the Prevention of and Protection from Discrimination was adopted in June 2013 and was followed by the Action Plan, which was finally adopted in October 2014.

⁷⁷ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 72/09, 52/2011, 55/2013, 35/2015 authentic interpretation, 68/2015, 31 August 2009.

⁷⁸ Serbia, Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

⁷⁹ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 18/2010, 3 May 2010.

⁸⁰ Serbia, Law on Churches and Religious Organisations (*Zakon o crkvama i verskim zajednicama*), *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

⁸¹ Serbia, Law on the Use of Guide Dog (*Zakon o kretanju uz pomoć psa vodiča*), *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015.

⁸² Social Inclusion and Poverty Reduction Unit, 'Law on the Use of Guide-Dogs adopted', 25 March 2015, available at <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/>, last accessed on 27 March 2016.

⁸³ Serbia, Law on the Use of Sign Language (*Zakon o upotrebi znakovnog jezika*), *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Serbian Constitution⁸⁴ of 2006 includes the following articles dealing with non-discrimination.

Article 21 proclaims the equality of everyone before the law and the right to equal legal protection, without any discrimination. Article 21, para. 3 contains an anti-discrimination clause: 'Any direct or indirect discrimination on any grounds, particularly race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability, shall be prohibited.'

The Constitution does not provide a definition of discrimination, but prohibits both direct and indirect discrimination. It also makes provision for the prohibition of discrimination on any ground, not just those explicitly mentioned in Article 21, meaning that the list is not exhaustive. Thus, this provision applies to all areas covered by the EU directives, although sexual orientation is not explicitly included in Article 21. In Article 21, para. 4 the Serbian Constitution recognises affirmative action, stating that, 'special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination'.

Article 15 guarantees gender equality and states that, 'The State shall guarantee the equality of women and men and develop equal opportunities policy'. The Constitution also contains Article 62 which guarantees the equality of spouses.

Article 76 provides that, 'Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection' (para.1), and that, 'Any discrimination on the grounds of affiliation to a national minority shall be prohibited' (para. 2). Paragraph 3 of this article states that, 'specific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavourable living conditions which particularly affect them'.

Articles 15 and 76 also apply to all areas covered by the directives, as the material scope of the above-mentioned provisions is broader than those of the directives (including economic, social, cultural and political life)

All the above-mentioned constitutional anti-discrimination provisions are directly applicable, while Article 15, Article 21, para. 4, and Article 76, para. 3, require further adoption of laws and regulations that will enable their implementation.

The constitutional equality clause prescribed in Article 21, para. 3 and Article 76, para. 2 can be enforced against the state, as well as against private actors.

⁸⁴ Serbia, Constitution of Serbia (*Ustav Republike Srbije*), *Official Gazette of the Republic of Serbia* no. 98/2006, 10 November 2006.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

Article 2, para. 1 of the comprehensive anti-discrimination Law on the Prohibition of Discrimination (LPD) explicitly prohibits discrimination on the grounds of race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, and membership of political, trade union and other organisations. However, it is an open clause and provides protection from discrimination based on 'other real or presumed personal characteristic'.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

As in the EU directives, national law does not provide definitions of the different grounds of discrimination. However, the interpretation of the terms is equivalent to those in EU law, although jurisprudence in the area of anti-discrimination is not yet very developed. In addition, since international law is directly applicable in Serbia, in the event of inconsistencies in the interpretation of different terms, the judge can directly apply definitions provided in EU directives and CJEU jurisprudence. Nevertheless, judges are reluctant to directly apply international norms so it is important to define some grounds that can be interpreted differently, such as religion which refers to theistic, atheistic and agnostic beliefs, according to the jurisprudence of the European Court of Human Rights.⁸⁵

Some problems arise due to the fact that Serbia does not have a single, comprehensive definition of disability, which is instead defined in several laws, by-laws and policy documents. Some older laws contain a medical definition of disability,⁸⁶ while Article 3, para. 1 of the LPDPD defines people with disabilities as people with a congenital or acquired physical, sensory, intellectual or emotional (psycho-social) impairment who are, due to social or other barriers, unable or have limited opportunities to engage in social activities at the same level as others, regardless of whether they are capable of carrying out such activities with the use of technical aids or support services.

On the other hand, Article 3, para. 1 of the Law on the Professional Rehabilitation and Employment of Persons with Disabilities defines people with disabilities as people who live with the permanent consequences of a physical, sensory, mental or psychiatric impairment or disease that cannot be eliminated by any treatment or medical rehabilitation and are faced with social and other limitations and barriers affecting their working capacity and possibility of finding or retaining employment, and who have no possibility or have reduced possibilities of being involved in the labour market or applying for employment on equal terms with other persons. This definition determines the concept of 'long-term impairments' as impairments that cannot be eliminated by any treatment or medical rehabilitation, which creates permanent consequences. Having

⁸⁵ See, e.g. ECtHR, *Dimitras and Others v. Greece*, App. no. [42837/06](#), [3269/07](#), [35793/07](#) and [6099/08](#), 3 June 2013.

⁸⁶ The Law on the Fundamentals of the Education System defines a disability in the educational system as 'children and students with developmental impairments and disabilities', i.e. 'handicapped students', according to the Law on Higher Education. See Serbia, Law on Higher Education (*Zakon o visokom obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 76/2005, 100/2007 – authentic interpretation, 97/2008, 94/2010, 93/2012, 89/2013, 52/2011, 99/2014, 45/2015, 68/2015, 26 June 2005. According to the Law on Pension and Disability Insurance, a disability exists when an insured person experiences total loss of their working capacity due to changes in their health resulting from an injury at work, occupational disease, injury outside of work or illness which cannot be eliminated by any treatment or medical rehabilitation. See Serbia, Law on Pension and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of the Republic of Serbia*, no. 34/2003, 64/2004 – CC decision, 84/2004 – CC decision, 85/2005, 101/2005, 63/2006, 5/2009, 107/2009, 93/2012, 108/2013, 75/2014, 142/2014, 2 April 2003.

different definitions of disability in different laws leads to legal uncertainty, as each definition applies in the area of law which is governed by that legal instrument.

'Race' and 'ethnic origin' are not defined in the LPD either. Case law in which 'race' is invoked as a ground of discrimination is almost non-existent. According to the general reports by the Commissioner for Protection of Equality, in 2010⁸⁷ and 2012⁸⁸ no-one claimed to be a victim of race discrimination, while in 2011 there was only one complaint,⁸⁹ in 2013 five complaints⁹⁰ and in 2015 only two complaints.⁹¹ In one handbook prepared by the Commissioner's Office, 'race' is explained, for example, as discrimination against African Americans. National affiliation and ethnic origin are considered to be one ground of discrimination and in the same handbook these grounds are explained as discrimination against Roma.⁹² Thus, it can be said that the logic of the *Timishev* case is followed: 'race' is considered to represent the idea of biological classification of human beings into subspecies, while 'ethnic origin' refers to the idea of societal groups marked by common characteristics, such as nationality, religion, language, cultural and traditional origins.⁹³ In 2015, 119 (18.4 %) complaints were submitted to the Commissioner claiming discrimination based on ethnicity. The majority of these cases dealt with unequal treatment of Roma or other national minorities (Albanian, Hungarian, Romanian, etc.). For example, a health centre refused to issue a medical file to a Roma girl and, as a consequence, she was unable to obtain any health checks or vaccinations.⁹⁴

2.1.2 Multiple discrimination

According to Article 13 of the LPD, multiple discrimination is recognised as a severe form of discrimination. Article 13 says:

'The following shall be considered to constitute severe forms of discrimination:

...

5. discrimination against individuals on the basis of two or more personal characteristics (multiple or intersecting discrimination);

...'

This means that a more severe penalty should be imposed in cases of multiple or intersecting discrimination, in other words discrimination against individuals on the basis of two or more personal characteristics, such as race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, and membership of political, trade union and other organisations, or any other ground.

⁸⁷ Commissioner for Protection of Equality (2011), *Regular annual report of the Commissioner for Protection of Equality for 2010*, Belgrade, p. 52.

⁸⁸ Commissioner for Protection of Equality (2013), *Regular annual report of the Commissioner for Protection of Equality for 2012*, Belgrade, p. 66.

⁸⁹ Commissioner for Protection of Equality (2012), *Regular annual report of the Commissioner for Protection of Equality for 2011*, Belgrade, p. 51.

⁹⁰ Commissioner for Protection of Equality (2014), *Regular annual report of the Commissioner for Protection of Equality for 2013*, Belgrade, p. 101.

⁹¹ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 253.

⁹² Petrusic, N. and Beker, K., *Šta je diskriminacija i kako se od nje zaštititi?* [What is discrimination and how to protect from discrimination?], Partnership for Tolerance and Protection from Discrimination in Serbia, www.ravnopravnost.gov.rs/jdownloads/files/jednostavna_verzija_praktikuma_za_zastitu_od_diskriminacije.pdf, last accessed on 27 March 2016.

⁹³ See ECtHR, *Timishev v. Russia*, App. no. 55762/00 and 55974/00, 13 December 2005, para. 55, <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-218-Timishev-v.-Russia-full-case.pdf>, last accessed on 5 June 2016.

⁹⁴ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *J.B. v. Health center*, complaint no. 07-00-524/2014-02, opinion from 17 March 2015.

In Serbia, the Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*) is aware of the negative consequences and detrimental effects of multiple discrimination, and acknowledges that multiple discrimination has been recognised in Serbia only recently.⁹⁵

In 2015, 797 complaints were submitted to the Commissioner for Protection of Equality. Of the 554 in which grounds were mentioned, 94 complaints contain two or more grounds for discrimination. However, this does not mean that multiple discrimination was present in all these cases, as it is usual for applicants to name several grounds of discrimination when they are not sure what personal characteristic was the ground for discrimination in their case.

The Commissioner's practice shows that multiple discrimination is most frequent in relation to women, due to their sex and marital and family status, particularly in the area of employment, as well as in cases of women with disabilities who are Roma.⁹⁶

There is still no solid jurisprudence before the civil courts in order to assess whether the detrimental effect of multiple discrimination is recognised and whether it provides a basis for awarding higher compensation.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

Article 2, para. 1 of the LPD prohibits discrimination based on presumed personal characteristics. It states that, 'the terms "discrimination" and "discriminatory treatment" shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, or membership of political, trade union and other organisations and other real or *presumed personal characteristics*' (emphasis added).

There is still a lack of relevant case law, but it is of interest to mention one decision by the Commissioner for Protection of Equality from 2015. In this case, a police officer submitted a complaint against his subordinate, who discriminated against him on grounds of health status, trade union membership and sexual orientation.⁹⁷ Among other things, he claimed that he was assaulted and disrespected because of his support for the LGBTI community, and that he was compelled to declare his sexual orientation. The Commissioner found no discrimination in relation to health status and trade union membership. However, the Commissioner found that it was likely that discrimination based on sexual orientation had occurred, bearing in mind the existence of social distancing from the LGBTI community (33 % of respondents in one study stated that they do not want to work with colleagues of a different sexual orientation), the facts of the case and the dominant traditional and patriarchal model of behaviour which is particularly prevalent in the police and the military. However, the Commissioner

⁹⁵ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 146; text in Serbian available at www.ravnopravnost.gov.rs/rs/izveštaji/izveštaji, last accessed on 27 March 2016.

⁹⁶ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 146.

⁹⁷ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *B.K. v. the D.L.*, complaint no. 07-00-549/2014-02, opinion from 24 March 2015.

considered that the subordinate had offered enough evidence to prove that his behaviour was not based on the presumed sexual orientation of the complainant.⁹⁸

b) Discrimination by association

In Serbia the LPD prohibits discrimination based on association with people with particular characteristics. Article 2, para. 1 states that, 'the terms "discrimination" and "discriminatory treatment" shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as *members of their families, or persons close to them*, be it overt or covert, on the grounds of race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, or membership of political, trade union and other organisations and other real or presumed personal characteristics' (emphasis added). In other words, the definition of discrimination says that unequal treatment occurs 'in relation to individuals or groups, as well as members of their families, or persons close to them'. However, its application is limited to 'family members' and people close to those discriminated against.⁹⁹

Article 3, para. 2 of the LPDPD contains the same provision in relation to discrimination based on disability. It also includes the possibility for a lawsuit to be initiated by the individual with a disability who is a victim of discrimination, their legal representative and an individual accompanying them at the time they experience the discrimination (in other words, someone who is discriminated against on the ground of their association with a person with disabilities). Thus, the national law is in line with the judgment in the *Coleman* case.¹⁰⁰

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

a) Prohibition and definition of direct discrimination

In Serbia direct discrimination is prohibited by Article 2, para. 1 of the LPD. Article 6 of the LPD states that, 'Direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission'. This definition is almost in line with the definition in the EU directives. However, it is limited to less favourable treatment and does not cover detriment

b) Justification of direct discrimination

According to the wording of Article 6, there is no justification of direct discrimination. However, the LPD allows some exceptions and exemptions from the equality clause. Firstly, according to Article 14, 'measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position shall not be considered to constitute discrimination'. In addition, different treatment, exclusion or giving priority on account of the specific character of a job, is

⁹⁸ In this case, there was no mention of the *Coleman* (ECJ, C-303/06, *Coleman v. Attridge*, 17 July 2008) and *Nikolova* cases (ECJ, 83714, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015).

⁹⁹ There is no definition of 'persons close to them' and judicial interpretation is required in order to define who is covered under 'discrimination by association'.

¹⁰⁰ ECJ, *Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008.

allowed if an individual's personal characteristic constitutes a genuine and decisive precondition for performing the job, and the objective to be achieved is justified.

Furthermore, the conduct of religious officials, which is in accordance with a religious doctrine, beliefs or the objectives of churches and religious communities included in the register of religious communities, in accordance with the law regulating the freedom of religion and the status of churches and religious communities, is not considered to be discrimination (Article 18, para. 2). This article is problematic as it provides a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow.

2.2.1 Situation testing

a) Legal framework

In Serbia situation testing is permitted in national law, as it stems from the provision on legal standing for initiating a lawsuit. Thus, Article 46, para. 3 of the LPD stipulates that a lawsuit can be initiated by 'a person who had deliberately exposed themselves to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case'. The LPD further regulates that testers shall be obliged to inform the Commissioner for Protection of Equality of what they intend to do, unless the circumstances do not allow it, and to inform the Commissioner in writing of the action undertaken and the results provided by testing. However, the Commissioner does not have the power to disagree with the testing being undertaken. Even if the tester does not initiate a lawsuit, a court may hear them as a witness. Finally, the tester may not be subjected to a claim of shared responsibility for the damage resulting from a discriminatory act.

The LPD does not expressly state that situation testing will be used as evidence in court and the Civil Procedure Code (as *lex generalis*) is silent on this matter. However, it stems from the provision stating that the tester can be heard as a witness in court and from court jurisprudence.

Many questions derive from the unclear regulation, such as who the tester is, whether they have a particular relationship with the person who has reported discrimination, whether they have been discriminated against previously, whether they have any basic knowledge about the testing process, whether they operate alone, whether their primary objective is evidence gathering for another party or to initiate a lawsuit, which includes notification of and reporting to the Commissioner, and the role of the Commissioner in this regard.

b) Practice

In Serbia, situation testing is used in practice. It is considered as proof before the Commissioner for Protection of Equality and forms the basis for further action by the Commission, such as the initiation of litigation in discrimination cases, recommendations, warnings, etc. It is provided by NGOs whose activists have undergone specific training and work in cooperation with the Commissioner. In August 2012, a public call was issued with the aim of awarding funding to NGOs for the purpose of implementing situational testing of discrimination. A total of 23 NGOs were selected, which appointed two representatives who participated in three training sessions for situational testing of discrimination.¹⁰¹

¹⁰¹ Commissioner for Protection of Equality (2013), *Regular Annual of the Commissioner for Protection of Equality for 2012*, Belgrade, p. 104.

At the end of 2013, the Commissioner initiated a lawsuit against a bank, as a bank official had refused to open an account for a Roma woman. Evidence was obtained by an NGO whose activist conducted situation testing. The higher court in Belgrade rejected the claim as unfounded on 7 September 2015, and the Commissioner submitted a complaint to the Appellate court.¹⁰² In another strategic case, a real estate agency refused to provide a service to a Roma man, claiming that it did not have an apartment for rent that matched his needs. However, an NGO dealing with Roma rights conducted situation testing and proved that this was a case of discrimination. In November 2015, the proceeding was terminated as this agency was erased from the register of companies.¹⁰³

As early as 2004, the Supreme Court of Serbia ruled in the renowned *Krsmanovaca* case that, in the absence of national anti-discrimination law provisions, the court can interpret and directly apply ratified international conventions.¹⁰⁴ This decision sets an important legal precedent, being the first decision by a Serbian court in relation to discrimination against Roma regarding access to public facilities. It also provided direction for subsequent cases and confirmed that 'situational testing' (accepted for the first time by a Serbian court in this case) represents admissible evidence.¹⁰⁵

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

a) Prohibition and definition of indirect discrimination

In Serbia indirect discrimination is prohibited in national law. The LPD defines indirect discrimination. In Article 7 it states that, 'Indirect discrimination shall occur if an individual or a group of individuals, on account of their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.' However, the definition of indirect discrimination doesn't contain the conditional wording ('would be placed in a less favourable position') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge apparently neutral provisions before they incur disadvantages for actual victims. It also uses the wording 'an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination' instead of the wording 'an apparently neutral provision, criterion or practice', when the essence of this form of discrimination is neutrality which, in practice, leads to an unequal position for a certain group.

b) Justification test for indirect discrimination

Indirect discrimination can be justified if an apparently neutral act, action or omission has a lawful objective and the means of achieving that objective are appropriate and necessary. The means will be proportionate if they are closely linked to the achievement of the legitimate aim, which cannot be achieved with less intrusion into someone's rights. It is the same justification test as contained in the relevant EU directives.

¹⁰² Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 8, p. 174.

¹⁰³ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 175.

¹⁰⁴ Supreme Court of Serbia, Rev. 229/2004/1, 21 April 2004.

¹⁰⁵ After the *Krsmanovaca* case, situation testing was admitted in another case (the *Club Acapulco* case), decided in 2007. Here, the Fourth Municipal Court sentenced a security worker from the Club Acapulco nightclub in Belgrade to two years' imprisonment because he banned three Roma from entering the club due to their ethnic origin. After this event, the NGO, the Humanitarian Law Center, conducted situational testing on 25 July 2003 which confirmed that the security staff were directly discriminating against the Roma population based on their ethnic origin. See IV Municipal Court, No. III K – 1432/04, 19 April 2007.

c) Comparison in relation to age discrimination

National law does not specify how a comparison is to be made in relation to age discrimination.

2.3.1 Statistical evidence

a) Legal framework

In Serbia there are national rules permitting data collection. Data are provided by the National Employment Service and the Office of Statistics. The Statistical Office of the Republic of Serbia (*Republički zavod za statistiku*) is a special professional organisation in the public administration system which, according to the Law on Official Statistics,¹⁰⁶ is responsible for performing technical tasks related to the adoption of programmes, the organisation and conducting of statistical research, data collection, statistical analysis, publication of data, etc. All data subjects are required to submit the requested information to the Statistical Office, which on the other hand provides data protection and confidentiality.

Serbia has not yet established a unified and centralised system for collecting data relevant to the functioning of the system of legal protection against discrimination, and this fact represents a huge problem in assessing and monitoring discrimination. However, the Statistical Office of the Republic of Serbia holds some data, such as in the areas of employment, education etc., which could also be relevant for the assessment of the existence of discrimination. It should be mentioned that the collection of some data is sensitive (e.g. religious affiliation, sexual orientation, etc.) and the right to privacy in providing these data is prescribed in the Law on Personal Data Protection.¹⁰⁷ This Law governs the conditions for the collection and processing of personal data, protection and the limitations to that protection, as well as data security. Personal data protection is provided for each individual irrespective of their 'nationality, residence, race, age, sex, language, religious, political and other belief, national or social origin, property, birth, education, social status and other personal characteristics' (Article 1, para. 2).

The LPD does not contain any specific rule in relation to statistics. The case law is still developing and it is not clear how the courts will treat statistical evidence. However, it must be said that it is permitted by national law in order to establish indirect discrimination. Sometimes it is very important to have statistical data and they are widely used where possible in cases submitted to the Commissioner for Protection of Equality.

b) Practice

In Serbia statistical evidence in order to establish indirect discrimination is used in practice by the Commissioner for Protection of Equality and mostly in cases in relation to pregnancy. However, statistical evidence is not so widely used in practice by the courts, as case law is still developing and most cases fall within the category of direct discrimination. The Civil Procedure Code does not mention statistical evidence as evidence before the court.¹⁰⁸ It just states in Article 7 that parties are obliged to present

¹⁰⁶ Serbia, Law on Official Statistics (*Zakon zvaničnoj statistici*), *Official Gazette of the Republic of Serbia*, no. 104/2009, 16 December 2009.

¹⁰⁷ Serbia, Law on Personal Data Protection (*Zakon o zaštiti podataka o ličnosti*), *Official Gazette of the Republic of Serbia*, no. 97/2008, 104/2009 – other law, 68/2012 – decision of the CC 107/2012, 23 October 2008.

¹⁰⁸ Serbia, Civil Procedure Code (*Zakon o parničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 72/2011, 49/2013 – decision CC, 74/2013 – decision CC and 55/2014, 3 September 2011.

all the facts on which they base their claim and to provide evidence which determines those facts. Thus, further judicial interpretation is required in this matter.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Serbia harassment is prohibited in national law. In the LPD it explicitly constitutes a form of discrimination. However, it is not defined, as Article 12 prohibits harassment and humiliating treatment together, which is confusing. Thus, it states that, 'It is forbidden to expose an individual or a group of persons, on the basis of their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment.' In other words, this article defines humiliating treatment and this is confusing as humiliating treatment is a possible element of harassment.

However, Article 21, para. 2 of the Labour Law prohibits harassment and provides a definition of these terms. Thus, harassment means any unwanted conduct aiming at or amounting to the violation of the dignity of an individual seeking employment, as well as of an employee, and which causes fear or creates a hostile, degrading or offensive environment.

In the LPDPD, harassment is not defined and is not recognised as a special form of discrimination, but is considered to be a more severe form of discrimination if it is committed in certain areas and by certain actors.

b) Scope of liability for harassment

The scope of liability for harassment is not defined in the LPD, but derives from the Labour Law, and is enshrined in Article 12 which states that employees have the right to protection of their personal integrity and dignity.

Employers are liable for harassment. They are also liable for harassment perpetrated by an employee, if they didn't prevent it or undertake appropriate measures, as an employer is obliged to create the conditions for a healthy working environment. This obligation also stems from the Law on the Prevention of Bullying at Work¹⁰⁹ (although there is a clear distinction between discrimination and bullying), which states that employers are responsible for their own acts of bullying and are vicariously liable if other employees or management engage in bullying (Article 4). In addition, employees are obliged to refrain from bullying, otherwise they are responsible for the violation of their duties at work (Article 11).

In the sphere of employment, Article 16 of the LPD prescribes that the employer is liable if they violate 'the principle of equal opportunity for gaining employment or equal conditions for enjoying all the rights pertaining to the sphere of labour, such as the right to employment, free choice of employment, promotion, professional training and professional rehabilitation, equal pay for work of equal value, fair and satisfactory working conditions, paid vacation, joining a trade union and protection from unemployment'. Those who enjoy protection are 'a person who is employed, a person doing temporary or occasional work, or working on the basis of a contract of service or some other kind of contract, a person doing additional work, a person performing a public function, a member of the army, a person seeking employment, a student or pupil doing work practice and undergoing training without concluding a contract of

¹⁰⁹ Serbia, Law on the Prevention of Bullying at Work (*Zakon o sprečavanju zlostavljanja na radu*), *Official Gazette of the Republic of Serbia*, no. 36/2010, 26 May 2010.

employment, a person undergoing professional training and advanced training without concluding a contract of employment, a volunteer or any other person who works on any grounds whatsoever’.

In 2015, the Commissioner for Protection of Equality delivered opinions where complainants claimed to be exposed to harassment. In some cases, the Commissioner didn’t find enough proof that harassment had occurred.¹¹⁰ However, in one case, an NGO activist was travelling from Belgrade to Subotica by bus and witnessed the bus driver requesting refugees to move from the front to the back of the bus, regardless of the seat number written on their bus tickets. The Commissioner found that the bus driver committed harassment and humiliating treatment against refugees.¹¹¹

The most interesting case concerns M.V., aged 41, who was a major in the Serbian Armed Forces, with 22 years of military service. She started to use hormone therapy in preparation for gender reassignment. As a result, she was subjected to a psychiatric examination, but the doctors found that she was capable of professional military service. Despite this, the Chief of the Headquarters of the Serbian Armed Forces suggested that M.V. should terminate her military service and retire. The Department of Human Resources of the Armed Forces sent a letter to the Ministry of Defence asking for the termination of M.V.’s professional military service, underlining the fact that M.V. had an ‘established psychiatric diagnosis which could have adverse consequences for the reputation of the Serbian Army’. Acting on this suggestion, the Minister of Defence issued an order for the termination of professional military service and the Chief of Staff issued a decision on M.V.’s dismissal from the professional army.

The Commissioner for Protection of Equality found that it cannot be accepted that the wording used in the letter can be considered as a ‘technical administrative error’. This expression is unacceptable as it is based on negative stereotypes and prejudices about the gender identity of M.V., and unequivocally expresses a negative value judgment. Thus, the Commissioner found that these acts violated Article 12 of the LPD, which prohibits harassment and degrading treatment, as it constitutes insults and offends the dignity of M.V.¹¹²

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Serbia instructions to discriminate are prohibited in national law. Instructions are not defined. However, the LPD prohibits only the activities of organisations for the purpose of e.g. ‘inciting nationally, racially, religiously or otherwise motivated hatred, divisions or enmity’ (Article 10). This constitutes a form of discrimination.

In addition, Article 13, para. 1 of the LPD provides that, ‘causing and inciting inequality, hatred and enmity on the grounds of national, racial or religious affiliation, language, political opinions, gender, gender identity, sexual orientation or disability’ is considered to be a severe form of discrimination’.

Article 34 of the Criminal Code stipulates that anyone who, with intent, incites another to commit a criminal offence shall be punished as prescribed by law for such offences.

¹¹⁰ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, pp. 125, 126.

¹¹¹ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), N h. C. v. N. Ad. N., complaint no. 07-00-479/2015-02, opinion from 23 November 2015.

¹¹² Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), NGO E. v. The Army of the Republic of Serbia and the Minister of Defence, complaint no. 07-00-1/2015-02, opinion from 3 April 2015.

Article 387 prohibits racial and other discrimination, Article 128 outlaws the violation of equality (Article 128) and the most important Article 317 prohibits incitement of national, racial and religious hatred and intolerance.¹¹³

In 2015, the Commissioner for Protection of Equality submitted a criminal charge against the editor of the online journal, *Sandžak PRESS*, claiming that the article 'The truth about homosexuals' violates Article 387, para. 4 of the Criminal Code by expressing ideas, theories and views which directly incite hatred and discrimination against members of sexual minorities.¹¹⁴ In this case, the Commissioner exercised its authority to initiate a criminal charge and didn't issue an opinion on Article 13, para. 1 of the LPD.

b) Scope of liability for instructions to discriminate

In Serbia the instructor and the discriminator are liable if they associate for the purpose of inciting hatred under the LPD (civil responsibility) and are subject to criminal liability for incitement of national, racial and religious hatred and intolerance in the Criminal Code.

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 Serbia, the LPREPD prescribes in Article 11, para. 4 that one of the actions in connection with the promotion of employment of people with disabilities is to ensure technical, professional and financial support for the adaptation of work tasks, the workplace or both work tasks and the workplace, including technical and technological aids for the purpose of enhancing opportunities for people with disabilities to find and retain employment. However, this provision does not give an individual right to claim reasonable accommodation under the LPREPD.

In addition, Article 22, para. 4 of the LPDPD further prescribes that discrimination occurs in the case of refusal to carry out a technical adaptation of the workplace that enables a person with disabilities to carry out their work effectively, if the costs of adaptation are not borne by the employer or are not excessive in relation to the gain achieved by the employer who is employing a person with disabilities. This provision gives the right to reasonable accommodation to workers, but it is not clear if this right extends to job applicants, as well.

Furthermore, the LPREPD prescribes that people with disabilities can be employed under general and special conditions (Article 22). While 'general conditions' means the job placement without adapted work activities, workplace, or work activities and workplace, 'special conditions' means job placement with the adaptation of work activities, workplace, or work activities and workplace. The LPREPD further clarifies that the adaptation of work activities can be adjustments to the work process and work tasks (Article 23, para. 3). Adaptation of the workplace can refer to the technical and technological equipment used in a workplace, tools, space and equipment in accordance with the capabilities and needs of the individual with disabilities. It may also include professional assistance to support the individual with disabilities in induction to the job or workplace, through counselling, training, assistance services and support in the

¹¹³ Serbia, Criminal Code (*Krivični zakonik*), *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 6 October 2005.

¹¹⁴ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 176.

workplace, work monitoring, development of personal work methods and evaluation of efficiency.

However, the duty to provide reasonable accommodation is not included in the LPD.

b) Practice

The lack of this duty to provide reasonable accommodation in the LPD leads to a high unemployment rate among people with disabilities and has reduced their possibilities of inclusion in the labour market. Although it is positive that the LPDPD provides these duties, the relevant case law is still lacking on this issue, as the reasonable accommodation duty is not recognised in the LPD. Consequently, in its progress report for Serbia for 2015, the European Commission acknowledges that Serbian non-discrimination legislation is generally in line with European standards, but further alignment is needed, in particular in regard to the obligation to ensure reasonable accommodation for employees with disabilities.¹¹⁵

c) Definition of disability and non-discrimination protection

The LPDPD prohibits discrimination based on disability and defines people with disabilities as people with a congenital or acquired physical, sensory, intellectual or emotional (psycho-social) impairment who are, due to social or other barriers, unable or have limited opportunities to engage in social activities at the same level as others, regardless of whether they are capable of carrying out such activities with the use of technical aids or support services (Article 3, para. 1).

The LPREPD also provides a definition of people with disabilities as people who live with the permanent consequences of a physical, sensory, mental or psychiatric impairment or disease that cannot be eliminated by any treatment or medical rehabilitation and are faced with social and other limitations and barriers affecting their working capacity and possibility of finding or retaining employment, and who have no possibility or have reduced possibilities of being involved in the labour market or applying for employment on equal terms with other persons (Article 3, para. 1). Thus, this definition is based on a social model of disability and determines the concept of 'long-term impairments' as impairments that cannot be eliminated by any treatment or medical rehabilitation, which creates permanent consequences.

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

In Serbia there is a duty to provide reasonable accommodation for people with disabilities in the field of the provision of services and the use of facilities and services. Thus, the LPDPD describes as discrimination a 'refusal to carry out a technical adaptation of the facility, necessary to provide a service to users with disabilities' (Article 13, para. 5, sec. 3).

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

In Serbia failure to meet the duty of reasonable accommodation in both the field of the provision of services and the use of facilities, as well as in employment, counts as discrimination. The LPDPD prescribes in Article 22, para. 4 that discrimination occurs in the case of a *refusal* to carry out a technical adaptation of the workplace that enables

¹¹⁵ European Commission, Serbia 2015 Report, Brussels, 10 November 2015, p.56; text available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf, last accessed on 27 March 2016.

efficient work by people with disabilities. In addition, Article 2, para. 1 of the LPD, as well as Article 3, para. 2 of the LPDPD, clearly state that discrimination occurs as an act or omission and it can be interpreted as a failure to provide reasonable accommodation.

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

In Serbia there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Serbia national law requires services available to the public, buildings and infrastructure to be designed and built in a way which ensures accessibility for people with disabilities.

The LPD does not define accessibility, but it stipulates in Article 17, para. 2 that, 'Everyone shall have the right to equal access to premises in public use (such as buildings where the head offices of public administration bodies are located, premises used in the spheres of education, healthcare, social welfare, culture, sports and tourism, and premises used for the purpose of environmental protection and protection against natural disasters), as well as public spaces (such as parks, squares, streets, pedestrian crossings and public transport roads), in accordance with the law'. This means that it covers accessibility in all areas of public life (public institutions, education, healthcare, social welfare, culture, sports, tourism and premises used for the purpose of environmental protection and protection against natural disasters). Public authorities, as well as private institutions and individuals who open facilities to the public, have a duty to ensure accessibility.

Article 13 of the LPDPD prohibits discrimination on the basis of disability in terms of the availability of services and access to facilities for public use and to public areas.

Regarding physical access to buildings, Article 5 of the Law on Planning and Construction¹¹⁶ specifies that facilities for public and commercial use must fulfil the condition that people with disabilities, children and the elderly are provided with appropriate access to and mobility within them. In addition, residential buildings with ten and more units must be designed to meet accessibility requirements. However, in one document submitted to the UN Committee on the Rights of Persons with Disabilities, the Protector of Citizens (Ombudsman) stated that the inconsistent enforcement of the above-mentioned regulations providing for accessibility made the exercise of the fundamental rights of persons with disabilities difficult. The Protector emphasised the fact that during 2014 he collected data on the accessibility of public buildings from local authorities and found that most towns and municipalities are undertaking specific actions and measures to provide accessibility, but most buildings still remain inaccessible.¹¹⁷

The Law on Traffic Safety prescribes in Article 24 that a blind person who participates independently as a pedestrian in areas where traffic is present should move around with the aid of a white cane and/or a trained guide dog.¹¹⁸ This provision is further elaborated

¹¹⁶ Serbia, Law on Planning and Construction (*Zakon o planiranju i izgradnji*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 81/2009 - corr., 64/2010 - decision CC, 24/2011, 121/2012, 42/2013 - decision CC, 50/2013 - decision CC, 98/2013 - decision CC, 132/2014, 145/2014, 3 September 2009.

¹¹⁷ Protector of Citizens, *Selected list of issues on the implementation of the UN Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, no 22/12/15, Belgrade, 31 July 2015, p. 4; available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fIFL%2fSRB%2f21317&Lang=en, last accessed on 27 March 2016.

¹¹⁸ Serbia, Law on Traffic Safety (*Zakon o bezbednosti saobraćaja*), *Official Gazette of the Republic of Serbia*, no. 41/2009, 53/2010, 10172011, 10 June 2009.

in the Law on the Use of Guide Dogs,¹¹⁹ which was adopted in March 2015 with the aim of enabling people with disabilities to move around using guide dogs on public transport, in all public buildings and in workplaces. This Law is primarily aimed at the 12 000 citizens who have severe visual impairments, 9 000 citizens who are completely blind and 3 000 citizens who have impaired vision¹²⁰ and should help them to move around more freely.¹²¹ However, the Law is not limited only to Serbian nationals.

h) Accessibility of public documents

Article 5 of the Law on Free Access to Information of Public Importance¹²² stipulates that everyone has the right to be informed if a public authority holds specific information of public importance and has the right to be allowed to see a document containing information of public importance, the right to a copy of that document and the right to receive a copy of the document upon request, by mail, fax, electronic mail or in another way. This right must be exercised under equal conditions, notwithstanding citizenship, temporary or permanent residence, location of headquarters (in the case of a legal entity), or personal characteristics, such as race, faith, nationality, ethnicity, gender or any other personal characteristic (Article 6).

In addition, the Law on Public Information and Media¹²³ and the Law on Electronic Communications¹²⁴ introduce positive innovations with explicit reference to people with disabilities. Thus, the Law on Public Information and Media sets out the obligation to provide access to information and communication. Article 12 prescribes that authorities must take measures to ensure the smooth receipt of information intended for the public, in an appropriate form and by use of appropriate technologies, and provide part funding or other conditions for the operation of the media outlets which publish the information in sign language, Braille or in another way to facilitate the exercise of the rights of people with disabilities pertaining to the public information sector. The Law on Electronic Communications contains several articles which have the purpose of securing the availability of electronic communication for people with disabilities. However, access to information and communications is still very difficult for people with sensory impairments.¹²⁵

Despite the fact that there are around 30 000 deaf and hearing impaired people in Serbia, there are only 30 sign language interpreters. Finally, after several years of its preparation, the Law on the Use of Sign Language¹²⁶ was adopted in April 2015. This Law regulates the use of sign language in political, educational, employment and other areas of social life. The purpose of this Law is to enable the full inclusion of deaf people in society and the right to use sign language in various procedures in relation to public

¹¹⁹ Serbia, Law on the Use of Guide Dogs, *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015.

¹²⁰ Social Inclusion and Poverty Reduction Unit, Law on Movement Using Guide-Dogs Adopted, 25 March 2015, available at <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/>, last accessed on 27 March 2016.

¹²¹ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 6.

¹²² Serbia, Law on Free Access to Information of Public Importance (*Zakon o slobodnom pristupu informacijama od javnog značaja*), *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009, 36/2010, 31 December 2004.

¹²³ Serbia, Law on Public Information and Media (*Zakon o javnom informisanju i medijima*), *Official Gazette of the Republic of Serbia*, no. 83/2014, 58/2015, 13 August 2014.

¹²⁴ Serbia, Law on Electronic Communications (*Zakon o elektronskim komunikacijama*), *Official Gazette of the Republic of Serbia*, no. 44/2010, 60/2013 – CC decision, 62/2014, 30 June 2010.

¹²⁵ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 6; available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SRB&Lang=EN, last accessed on 27 March 2016.

¹²⁶ Serbia, Law on the Use of Sign Language, *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015.

services, in education, employment and all other areas. With this Law, sign language becomes an official language for the hearing impaired, providing a legal basis for greater accessibility to information and communication.¹²⁷

¹²⁷ After the cut-off date of this report, the Law on the Prevention of Discrimination against Persons with Disabilities was amended in February 2016 in order to guarantee the right of blind or visually impaired persons to use personal facsimile stamps to sign legal documents. The Amendments to the Law on the Prevention of Discrimination against Persons with Disabilities *Official Gazette of the Republic of Serbia*, no. 13/2016, 19 February 2016.

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 Serbia there is a residence requirement for protection under the relevant national laws transposing the directives. Thus, the LPD prescribes that the law applies to 'an individual residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether that individual is a national of the Republic of Serbia, some other state or a stateless person'. It can be derived from the wording that this requirement means legal residence and not only presence on the state territory, as there is a difference between the terms 'reside' (*boraviti*) and 'is present' (*nalazi se na*). Thus, the LPD requires that a person is resident in the Republic of Serbia, regardless of their citizenship. In the case of a cross-border worker (for example, someone who resides in Croatia and works in Serbia), it can be argued that this person is not covered by the LPD. But Article 21 of the Constitution also applies, which means that the LPD must be interpreted in accordance with the constitutional provisions and provide protection in this case as well. This dilemma is not resolved, even with Article 3, para. 2, which states that a foreigner, in accordance with international treaties, has all the rights guaranteed by the Constitution and by law, with the exception of those rights that, in accordance with the Constitution and the law, are only enjoyed by the citizens of the Republic of Serbia.

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

a) Natural and legal persons

In Serbia, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination. Article 3, para. 1 states that *everyone* has the right to adequate protection from all forms of discrimination.

In Serbia the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. Thus, Article 4, para. 2 provides that *everyone* shall be obliged to respect the principle of equality and the prohibition of discrimination.

Article 2, para. 3 of the LPD defines the terms 'person' and 'everyone', which shall be used to designate individuals residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether those individuals are nationals of the Republic of Serbia, another state or stateless persons, as well as any legal entity registered or operating on the territory of the Republic of Serbia.

b) Private and public sector including public bodies

In Serbia the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination. Article 3, para. 1 of the LPD states that *everyone* shall have the right to adequate protection from all forms of discrimination by the authorised courts and other public administration bodies of the Republic of Serbia. In addition, Article 2, para. 1 says that discrimination can occur against *persons* and groups, as well as members of their families or persons close to them. Article 2, para. 2 explains that the terms 'person' and 'everyone' means individuals, as well as 'any legal entity registered or operating on the territory of the Republic of Serbia'.

In Serbia the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination. Thus Article

4, para. 2 stipulates that *everyone* shall be obliged to respect the principle of equality and the prohibition of discrimination. Article 2, para. 4 defines what is meant by the term 'public administration body' - a state body, autonomous province body, local government body, public company, institution, public agency or other organisation entrusted with public authority, as well as a legal entity established or financed in its entirety, or predominantly, by the Republic, an autonomous province or local authority.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

Article 2 of the Labour Law specifies that it applies to 'all employees who work in the territory of the Republic of Serbia with a national or foreign legal entity and/or a natural person, as well as to employees assigned to work abroad by an employer, unless otherwise specified by the law'. It also applies to employees of government agencies, agencies in the autonomous provinces and local authorities and public services, as well as to employed foreign nationals and stateless persons, unless otherwise specified by the law. Article 18 prohibits discrimination based on, among others, sex, race, skin colour, age, pregnancy, disability, ethnic origin, religion and sexual orientation.

Article 16, para. 2 of the LPD prohibits discrimination in the sphere of labour and the right to protection from discrimination is enjoyed by 'a person who is employed, a person doing temporary or occasional work, or working on the basis of a contract of service or some other kind of contract, a person doing additional work, a person performing a public function, a member of the army, a person seeking employment, a student or pupil doing work practice and undergoing training without concluding a contract of employment, a person undergoing professional training and advanced training without concluding a contract of employment, a volunteer or any other person who works on any grounds whatsoever'. The LPD covers all five grounds of discrimination prohibited in the Racial Equality Directive and Employment Equality Directive.

The LPREPD prescribes the prohibition of discrimination against people with disabilities and applies to the employer who is a 'domestic or foreign legal entity or individual who employs one or several persons, i.e. the Republic of Serbia for employees of state bodies, autonomous province for employees of provincial bodies and local authority for employees of local authorities' (Article 3, para. 3).

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 Serbia national legislation includes conditions for access to employment, self-employment or 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 the private and public sectors as described in the directives.

Article 1, para. 1 of the Labour Law governs 'Rights, duties and responsibilities arising from employment, and/or in the area of work' which shall be regulated by this Law and by specific laws, in conformity with the ratified international conventions. Article 20 prohibits discrimination with regard to access to employment, selection and recruitment (para. 1), and job promotion (para. 4). Thus, it does not cover self-employment and

occupation. The Labour Law covers all five grounds covered by the relevant EU directives.

The Law on Employment and Unemployment Insurance governs employment-related activities and institutions competent for employment affairs, the rights and obligations of unemployed people and employers, active employment policy, unemployment insurance and other matters relevant to employment, raising employment levels and preventing long-term unemployment in the Republic of Serbia (Article 1).¹²⁸ Unlike the Labour Law, the Law on Employment and Unemployment Insurance does cover self-employment. Thus, Article 43, para. 4 on active employment measures includes support for self-employment, while Article 51 defines that support. Article 52 prescribes further education and training in order to promote self-employment. Article 5, para. 1 prohibits discrimination as it is defined in the LPD and guarantees freedom of choice of employment and occupation. Employment activities comprise dissemination of information on employment opportunities and conditions; job matching within the country and internationally; vocational guidance and career counselling; and implementation of active employment policy measures (Article 6).

Article 16, para. 1 of the LPD prohibits discrimination in the sphere of labour. It prohibits any violation of the principle of equal opportunities in obtaining employment or equal conditions for enjoying all the rights pertaining to the sphere of labour, such as the right to employment, free choice of occupation, promotion, professional training and professional rehabilitation, equal pay for work of equal value, fair and satisfactory working conditions, paid vacation, joining a trade union and protection from unemployment. Thus, this Law does not cover self-employment.

Article 21, para. 1 of the LPDPD establishes the prohibition of discrimination on the ground of disability in relation to employment and seeking employment. This law does not cover self-employment and occupation.

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

In Serbia national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.

Article 20, para. 2 of the Labour Law prescribes the prohibition of discrimination regarding employment conditions, working conditions and all the rights deriving from employment relations and cancellation of an employment contract (in para. 5).

Article 16, para. 1 of the LPD covers, among other things, equal conditions for the enjoyment of all the rights pertaining to the sphere of labour, equal pay for work of equal value, fair and satisfactory working conditions, and protection from unemployment.

3.2.3.1 Occupational pensions constituting part of pay

In respect of occupational pensions, anti-discrimination law does not cover prohibition of discrimination. However, according to Article 119, para. 5 of the Labour Law, an employer is entitled to pay a premium for voluntary supplementary pension insurance to employees, and this is considered to constitute 'pay', which is subject to the Labour Law and the LPD.

¹²⁸ Serbia, Law on Employment and Unemployment Insurance (*Zakon o zapošljavanju i osiguranju za slučaj nezaposlenosti*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 88/2010, 28 May 2009.

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

Article 16, para. 1 of the LPD covers the right to vocational training and professional rehabilitation within and outside the employment relationship. This right is broadly enjoyed by 'a person who is employed, a person doing temporary or occasional work, or working on the basis of a contract of service or some other kind of contract, a person doing additional work, a person performing a public function, a member of the army, a person seeking employment, a student or pupil doing work practice and undergoing training without concluding a contract of employment, a person undergoing professional training and advanced training without concluding a contract of employment, a volunteer or any other person who works on any grounds whatsoever' (Article 16, para. 2).

In other words, this right is also guaranteed for people who perform some kind of practical work experience, although there is no employment relationship. Article 19, para. 1 prescribes that everyone has the right to professional training in education in equal circumstances, in accordance with the law. It includes higher education and adult lifelong learning courses.

The Labour Law prohibits discrimination in Article 20, para. 3 in relation to education, vocational training and specialisation. In addition, the whole of Section IV regulates the area of education, vocational training and specialisation.

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 Serbia, national legislation expressly includes membership of and involvement in workers' or employers' organisations as formulated in the directives for the ground of disability, and does not recognise it for other grounds.

Article 12, para. 1 of the LPDPD prohibits discrimination in associations on the ground of disability. The Law further clarifies that this discrimination includes refusal to grant membership, the establishment of special conditions of membership, denial of the right to vote and to be elected to the management bodies of the association, as well as the establishment of special conditions for the selection of people with disabilities to the management bodies of the association. However, the establishment or operation of associations of people with disabilities and other forms of self-organisation are not considered to be discrimination.

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

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

The Constitution of Serbia guarantees to everyone the right to protection of their mental and physical health (Article 68) and the right to social protection for citizens and families who require welfare for the purpose of overcoming social subsistence difficulties and creating the conditions to provide for themselves and their families (Article 69).

Article 25 of the Law on Social Protection¹²⁹ prohibits discrimination in the area of social protection which is based on 'race, sex, age, national origin, social background, sexual orientation, religion, political, trade union or other opinion, property status, culture, language, disability, the nature of social exclusion or other personal characteristics'.

The Law on Healthcare¹³⁰ guarantees the right to healthcare for citizens of the Republic of Serbia, as well as to any other person who has permanent or temporary residence in the territory of the Republic of Serbia (Article 3). According to Article 25, every citizen has the right to healthcare, exercised with respect to the highest possible standards of human rights, and respecting their moral, cultural, religious and philosophical beliefs. The principles in the areas of healthcare include, among others: 1) the principle of accessibility (physically, geographically and economically available), especially at the primary level (Article 19); 2) the prohibition of discrimination in the provision of healthcare based on race, sex, age, national origin, social background, religion, political or other opinion, property status, culture, language, type of illness, mental or physical disability (Article 20); and 3) the principle of comprehensiveness, which involves the inclusion of all citizens of the Republic of Serbia in the healthcare system.

The LPD applies to all areas of life, but does not mention social protection in Section III, where it covers special cases of discrimination. Article 27 forbids discrimination against an individual or a group of persons on the grounds of their health, and discrimination against their family members. The Law further explains that it will be considered that discrimination occurs 'especially if an individual or a group of persons is unwarrantedly denied healthcare services, has special conditions imposed for the provision of healthcare services, is denied diagnosis and has information withheld pertaining to their current health condition or the already undertaken or intended measures for treatment or rehabilitation, and, in the case of harassment, receives insults and disparagement in the course of staying at a healthcare institution'.

The LPDPD recognises a more severe type of discrimination in the case of discrimination against people with disabilities in the provision of health services (Article 17). The Law defines that discrimination occurs where the following actions take place due to an individual's disability:

- refusal to provide health services for people with disabilities;
- establishing special conditions for providing health services to people with disabilities if the conditions are not justified by medical reasons;
- rejection of a diagnosis and denial of adequate information on the current state of health measures taken, or intended treatment and rehabilitation of people with disabilities; and
- any harassment, insulting or belittling of people with disabilities during their stay in a health institution.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

Serbian law does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

¹²⁹ Serbia, Law on Social Protection (*Zakon o socijalnoj zaštiti*), *Official Gazette of the Republic of Serbia*, no. 24/2011, 4 April 2011.

¹³⁰ Serbia, Law on Healthcare (*Zakon o zdravstvenoj zaštiti*), *Official Gazette of the Republic of Serbia*, no. 107/2005, 72/2009 – other laws, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013, 93/2014, 96/2015, 106/2015, 2 December 2005.

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

In Serbia national legislation does not include social advantages as formulated in the Racial Equality Directive. The concept of social advantages is not recognised as such, but some benefits do exist in Serbia which are granted solely on the basis of employment status. Article 119 of the Labour Law recognises as other income a refund of funeral expenses in the event of the death of a member of the immediate family, and to members of the immediate family in the event of the death of the employee. An employer shall be bound to pay the funeral expenses, in conformity with the general act. A general collective agreement and special collective agreements further specify what social advantages are granted to employees and under what conditions.

In Serbia the lack of a definition of social advantages does not cause problems.

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

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

Article 19, para. 1 of the LPD guarantees to everyone the right to different levels of education (preschool, primary, secondary and higher education and professional training) under equal conditions. The protected grounds are those enshrined in Article 2, para. 1: race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations and other real or presumed personal characteristics.

The Law further specifies that it is forbidden to obstruct or prevent admission to an educational institution for an individual or a group of persons on the grounds of their personal characteristics, or to exclude them from these institutions, to obstruct or prevent their attendance of classes and participation in other educational activities, to categorise pupils on the basis of personal characteristics, to maltreat them and unwarrantedly differentiate among them in other ways, and to treat them in an unequal manner (Article 19, para. 2). It is also forbidden to discriminate against educational institutions that operate in accordance with the law and other regulations, and against people who use or have used the services of these institutions in accordance with the law (Article 19, para. 3).

However, the Law on the Fundamentals of the Education System is a systemic law in the area of education which prescribes an inclusive education. It states that the educational system must secure for all children, students and adults equal rights to and accessibility of education without discrimination on the basis of gender, social, cultural, ethnic, religious or other affiliation, residence, material or health conditions, difficulties and delays in development and disability, as well as on other grounds (Article 3, para. 1).

Article 6 guarantees everyone the right to education. Citizens of the Republic of Serbia are equal with regard to exercising their rights to education, regardless of gender, race, nationality, religion or language, social and cultural background, economic status, age, physical and mental constitution, disability, political affiliation or other personal characteristic. The Law guarantees the right to education of foreign citizens and stateless persons, under the same conditions and in the manner prescribed for citizens of the Republic of Serbia. Article 44 prohibits activities that threaten, humiliate, discriminate or segregate people or groups of people in educational institutions, on the basis of race, nationality, ethnicity, language, religion or gender, physical or psychological characteristics, disability, health, age, social or cultural background, economic status or political affiliation, as well as on other grounds stipulated by the LPD. It also prohibits

encouraging or failing to prevent such activities. Article 44, para. 3 expressly allows special measures that have been introduced to achieve full equality for, protection of and advancement of people or groups of people who are in an unequal position.

In addition, Article 102, para. 5 of this law stipulates that, in order to obtain approval for a textbook, it is necessary to assess whether it meets the quality standards pertaining to content, pedagogical and psychological requirements, teaching methodology, linguistic requirements, development, graphic, artistic and technical requirements and whether it enables the attainment of education principles and objectives, among which are equality and the prohibition of discrimination (Article 3, para. 1) and the development and respect of equality in relation to racial, national, cultural, linguistic, religious, gender, sex and age characteristics, tolerance and respect for diversity (Article 14, para. 15).

Other specific laws regulate different levels of education (preschool,¹³¹ primary,¹³² secondary¹³³ and higher education)¹³⁴ and all contain provisions on the prohibition of discrimination, which cover different grounds. However, Article 3, para. 1 of the Law on the Fundamentals of the Education System applies as a systemic law, as well as Article 2, para. 1 of the LPD, which means that all grounds covered in the two EU directives are covered by these laws as well.

a) Pupils with disabilities

In Serbia the general approach to education for pupils with disabilities does raise certain issues.

The Law on the Fundamentals of the Education System adopted in 2009 introduced inclusive education for the first time and provides that people with disabilities have the right to education respecting their educational needs in the mainstream education system, with additional individual or group support in a special preschool group or school, in compliance with this and special laws (Article 6, para. 3). In certain cases, pupils with disabilities will be enrolled in special schools, but the majority of them are integrated within the mainstream school system. According to one report from July 2015, there are 41 schools in Serbia for children with developmental impairments (23 primary schools with preschool departments, 17 schools for primary and secondary education with preschool departments and 1 secondary school).¹³⁵

¹³¹ Serbia, Law on Preschool Education, *Official Gazette of the Republic of Serbia*, no. 18/2010, 23 March 2010. The principles of preschool education include, inter alia, equal rights and access to all forms of preschool education, without discrimination on the basis of gender, social, cultural, ethnic, religious or other affiliation, place of residence or domicile, material or health conditions, disability, as well as on other grounds, in accordance with the law (Article 4, par. 2, sec. 1).

¹³² Serbia, Law on Primary Education (*Zakon o osnovnom obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 55/2013, 25 June 2013. Article 9 states that the main task of the school is to provide education of good quality and education for every child and student, under the same conditions, no matter where the school is located, or where the education takes place. People carrying out educational work and other people employed in schools must promote equality among all students and actively oppose all forms of discrimination and violence.

¹³³ Serbia, Law on Secondary Education (*Zakon o srednjem obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 55/2013, 25 June 2010. Article 2, para. 1, sec. 6 provides as one of the goals of secondary education respect for equality in relation to racial, ethnic, cultural, linguistic, religious, gender, sex and age characteristics, tolerance and respect for diversity.

¹³⁴ Serbia, Law on Higher Education, *Official Gazette of the Republic of Serbia*, no. 76/2005, 97/2008, 93/2012, 99/2014, 45/2015 – authentic interpretation, 68/2015, 2 September 2009. This Law recognises the principle of respect for human rights and civil freedoms, including prohibition of all forms of discrimination and equality of higher education institutions, regardless of their founder or form of ownership (Article 4, para. 1, sec. 6 and 9).

¹³⁵ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 20.

Those pupils with disabilities, who are integrated within the mainstream school system, need special support and have an individual teaching plan. According to the Law, parents make the final decision on which school to enrol their children in and schools must respect the decision of the parents, although in some schools there is a lack of additional support for children with disabilities. In practice, other problems also exist. Many schools are still inaccessible and there is also a lack of transportation, inaccessible books and teaching equipment which make difficult or prevent children from attending lessons.¹³⁶ In addition, support for children with disabilities is financed from the local budget and the level of support depends on the place of residence. The number of teaching assistants, who are supposed to provide help to the children and teachers, is minimal and their situation is not clearly and uniformly regulated. Furthermore, many teachers have had no training on how to teach and work with children with disabilities, which causes problems in practice.

In 2015, the father of a blind girl submitted a complaint to the Commissioner for Protection of Equality claiming that the municipality didn't secure transport to and from school, adapted textbooks or a teaching assistant for his child. The Commissioner found that the municipality is obliged to provide transport, but not to secure textbooks and teaching assistants, as this is the duty of the school and the Ministry of Education.¹³⁷ The Commissioner considered that the municipality had acted in a discriminatory manner by omitting to provide free transport to and from school for the pupil with a disability, which prevented her from full inclusion in the education system. The Commissioner issued a recommendation, but the municipality didn't implement it.¹³⁸

In July 2015, the Law on Textbooks¹³⁹ was adopted with the aim of defining textbooks in all accessible formats: audio, audiovisual, large print and Braille (Article 10, para. 5). This Law also recognises the use of special books for children with developmental disabilities. However, Article 4, para. 1 prescribes that the content and format of textbooks for children with developmental disabilities can be adjusted to their capabilities and needs. In other words, it may be shorter in content and therefore lead to differences in achievement. The Commissioner for Protection of Equality gave an opinion that introducing special textbooks for children with developmental disabilities is contrary to the LPD, but despite this opinion, the provision on special textbooks was introduced in the Law.¹⁴⁰

In addition, Article 18 of the LPDPD prohibits discrimination based on disability at all levels of education. It is prohibited:

- 1) to deny admission of pupils and students with disabilities to educational institutions which correspond to their previously acquired knowledge and educational capabilities;
- 2) to exclude people with disabilities from educational institutions for reasons related to their disability;
- 3) to set non-disability as a special condition for admission to an educational institution, including the submission of a certificate of health and prior checking of psychological and physical abilities, unless that requirement is in accordance with the regulations governing the particular field of education.

¹³⁶ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 20.

¹³⁷ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *N.P. v. primary school*, complaint no. 07-00-44/2015-02, opinion from 20 April 2015.

¹³⁸ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 106.

¹³⁹ Serbia, Law on Textbooks (*Zakon o udžbenicima*), *Official Gazette of the Republic of Serbia*, no. 68/2015, 12 August 2015.

¹⁴⁰ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 24.

However, Article 19 provides two exceptions to the prohibition of discrimination: checking the specific preferences of preschool children, pupils or students for admission to an educational institution for a particular subject or group of subjects, their artistic affinities or a special talents; and the organisation of specific forms of teaching or education for pupils and preschool children who, due to insufficient intellectual capacity, cannot follow regular courses, and their referral to these forms of teaching or education, if this is done on the basis of actions by a competent authority, which determines the need for such education.

Since Article 19, para. 2, unduly makes a distinction between children with intellectual disabilities and other children, in 2011 the Commissioner for Protection of Equality submitted an initiative to amend this article, but the initiative has not yet received support.¹⁴¹

b) Trends and patterns regarding Roma pupils

In Serbia specific patterns exist in education regarding Roma pupils, such as segregation. Segregation of Roma children is still present in certain schools; there are schools attended by a large percentage of Roma children, which also leads to segregation, and there are frequent problems related to the attitudes of the teaching staff and the community towards Roma pupils. The Commissioner for Protection of Equality in its Report for 2015 underlines the fact that the position of the Roma is still pitiful in all spheres of life, particularly in education.¹⁴²

In March 2015, Nils Muižnieks, Council of Europe Commissioner for Human Rights, visited Serbia and found that there is inadequate and insufficient access to quality education for Roma, through segregation in education.¹⁴³ He also referred to existing legislation that provides a good basis for protection in this regard, as well as the authorities' commitment to ensure equal access to mainstream education for all children without discrimination on any ground. He also relies on the report of the European Roma Rights Center (ERRC), which found that the problem includes the lack of adequate assistance for Roma children to stay in mainstream education; a lack of access for Roma parents to information which would help them make adequate educational choices for their children; and discriminatory treatment of Roma children in mainstream education by education staff, including instances of humiliation by teachers in front of their peers.¹⁴⁴

Furthermore, in July 2015, the Committee of Ministers of the Council of Europe adopted a Resolution on the implementation of the Framework Convention for the Protection of National minorities.¹⁴⁵ The Committee of Ministers issued the Government with a recommendation to immediately pursue efforts to eliminate the segregation of Roma children in education and to devise without delay measures to effectively increase access to mainstream education, as well as to improve education outcomes for Roma children.

¹⁴¹ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), opinion no. 1080/2011, 3 November 2011.

¹⁴² Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 9.

¹⁴³ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Serbia, from 16 to 20 March 2015, Comm Dh (2015) 14, 8 July 2015, para. 61; available at: <https://wcd.coe.int/ViewDoc.jsp?p=&id=2331051&Site=CommDH&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true>, last accessed on 27 March 2016.

¹⁴⁴ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Serbia, from 16 to 20 March 2015, Comm Dh (2015) 14, 8 July 2015, para. 63.

¹⁴⁵ Resolution CM/ResCMN(2015)8 on the implementation of the Framework Convention for the Protection of National Minorities by Serbia (adopted by the Committee of Ministers on 1 July 2015 at the 1232nd meeting of the Ministers' Deputies), 1 July 2015; available at: <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/ResCMN%282015%29&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true>, last accessed on 27 March 2016.

In October 2015, the NGO Praxis issued a report on the socio-economic position of Roma women.¹⁴⁶ The research was conducted from February to August 2015 and covers 100 female and 100 male Roma respondents. The research showed that around 31 % of female and 35 % of male respondents had completed primary school. Overall, 10 % of male and 17 % of female respondents had never attended school. The reasons for these statistics are poverty, the failure of parents to register children in birth registers and distance from schools, as well as the attitude of parents, relatives and the community to school. In addition, 34 % of male and 39 % of female respondents were enrolled in primary school, but did not complete it due to poverty and migration as a consequence of poverty.

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 Serbia national legislation does not include access to and supply of goods and services as formulated in the Racial Equality Directive. Article 17, para. 1 of the LPD prohibits discrimination in the provision of public services, but not goods, and does not include housing. It states that discrimination is considered to take place 'if a legal or physical entity, within the framework of its/his/her activities or profession, refuses to provide a service on the grounds of a personal characteristic of an individual or a group of persons, or if the said entity, in order to provide the service in question, requires the fulfilment of some condition that is not required of other individuals or groups of persons, or if the said entity unwarrantedly gives priority to another individual or a group of persons when it comes to providing a service'. In other words, the term 'public services' refers to services available to the public (whether provided by private or public authorities, entities, companies, etc.).

Furthermore, Article 17, para. 2 of the LPD also guarantees to everyone 'the right to equal access to premises in public use (such as premises where the head offices of public administration bodies are located, premises used in the spheres of education, healthcare, social welfare, culture, sports and tourism, premises used for the purpose of environmental protection and protection against natural disasters), as well as public spaces (such as parks, squares, streets, pedestrian crossings and other public transport roads), in accordance with the law'.

The LPDPD contains several provisions which relate to the provision of services to people with disabilities. Thus, Article 13, para. 1 prohibits discrimination based on disability in terms of the availability of services and access to public premises. Article 13, para. 2 of the LPDPD defines the service as any service which a legal entity or an individual, with or without pay, provides in the course of its activities or permanent occupation. In addition, Article 13, para. 3 explains what is meant by premises and public areas: premises in the fields of education, health, social protection, culture, sport, tourism, or premises used for the protection of the environment or protection from natural disasters etc.; and Article 13, para. 4 sets out what are considered to be public areas (such as parks, green spaces, squares, pedestrian crossings and other public roads).

Discrimination includes, in particular:

- refusal to provide services to people with disabilities, unless the provision of the services would endanger the life or health of people with disabilities or other people;

¹⁴⁶ Praxis, *Access to socioeconomic rights for Roma women in Serbia*, October 2015; available at: www.equalrightstrust.org/ertdocumentbank/Access%20to%20Socioeconomic%20Rights%20for%20Roma%20Women.pdf, last accessed on 27 March 2016.

- the provision of services to people with disabilities under different and more onerous conditions than those under which the service is provided to other users, unless the provision of services under usual conditions endanger the life or health of people with disabilities or other people; and
- refusal to make technical adaptations to facilities necessary to provide services to people with disabilities (Article 13, para. 5).

Article 14 further prescribes that an increase in the costs of services which is proportional to the costs of the services provided, provision of services that serve to meet the specific needs of people with disabilities, as well as activities intended to eliminate and combat new forms of discrimination in this area cannot be deemed as discrimination. The Law prescribes as a particularly serious type of discrimination harassment, insults and humiliation of people with disabilities when these acts are performed by a person providing services directly or by their superior (Article 15). The owner of a property in public use, as well as the public company responsible for the maintenance of public spaces, is obliged to provide access to buildings for public use and public areas for all people with disabilities, regardless of the type and degree of their disability (Article 16, para. 1).

The owner of a property in public use is obliged to adapt the facility in order to meet the conditions for its accessibility for people with disabilities (Article 16, para. 3).

3.2.9.1 Distinction between goods and services available publicly or privately

In Serbia national law distinguishes between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association). However, the term 'public services' used in Article 17, para. 1 refers to services available to the public (whether provided by private or public authorities, entities, companies, etc.).

The LPDPD also prohibits discrimination based on disability in terms of the availability of services and access to public premises. Article 13, para. 2 of the LPDPD defines the service as any service which a legal entity or individual, with or without pay, provides in the course of its activities or permanent occupation.

In 2015, 8.3 % of all complaints submitted to the Commissioner for Protection of Equality came from people who considered themselves to be victims of discrimination in relation to the provision of services.¹⁴⁷ Furthermore, every third complaint submitted relates to discrimination based on disability.¹⁴⁸ In one case, the Commissioner found discrimination in the case of a person with multiple sclerosis who was not able to extend the expiry date of his payment card.¹⁴⁹ A bank official denied him this service as he was not able to sign the necessary documentation, although he could have given a fingerprint. The Commissioner also found discrimination in a case where a post office,¹⁵⁰ and in another case a bus station,¹⁵¹ were not accessible for wheelchair users. Another complaint was submitted by an individual, aged 77, who was unable to apply for a loan for pensioners, as there was a condition that they should be no older than 75 years at the time of the

¹⁴⁷ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 102.

¹⁴⁸ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 174.

¹⁴⁹ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *S.S. v. Bank P.Š.*, complaint no. 07-00-471/2014-02, opinion from 26 January 2015.

¹⁵⁰ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *S.B. v. JP Post Serbia*, complaint no. 07-00-240/15-02, opinion from 18 August 2015.

¹⁵¹ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.B. v. SP L*, complaint no. 07-00-231/2015-02, opinion from 3 August 2015.

payment of the final instalment.¹⁵² The bank claimed that it has a right and a duty to identify and assess risks and to decide under what conditions it will approve loans. The Commissioner found that the bank cannot prescribe discriminatory conditions in relation to age, but that it is allowed to assess risk in each individual case.

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

In Serbia national anti-discrimination legislation does not explicitly include housing as formulated in the Racial Equality Directive. The LPD does not include housing in Section III where it covers special cases of discrimination. However, Article 4, para. 1 of the LPD says that all people are equal and shall enjoy equal status and equal legal protection regardless of personal characteristics. This provision does not limit the application of the LPD to the special cases of discrimination covered by part III of the Law, and it means that housing is also protected.

There is a special law that deals with housing: the Law on Social Housing.¹⁵³ This Law was adopted in 2009, enabling the creation of social housing stock by means of which local authorities could provide housing for the most vulnerable groups and thus realise a part of the conditions for successful social integration. This Law stipulates that the right to housing must be accorded to homeless people, those who do not have an adequate standard of housing and those who are on very low incomes and cannot obtain housing under market conditions (Article 10, para. 1).

The order of priority is decided on the basis of:

- 1) residential status;
- 2) income;
- 3) health condition;
- 4) disability;
- 5) the number of household members;
- 6) assets.

Priority is given to people belonging to vulnerable social groups, which are defined as young people, orphans, single parents, families with many children, single-person households, people over 65 years of age, people with disabilities, military veterans and members of their families, civil veterans, refugees and internally displaced persons, Roma and members of other disadvantaged groups. For each social programme, the Government and local authorities set conditions and criteria, taking into account those contained in Article 10, para. 1. They must, however, be in accordance with the measures and policies defined in strategic documents of the Republic of Serbia which aim to encourage balanced regional development and the overall development of the country.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Serbia there are patterns of housing segregation and discrimination against the Roma. Roma face discrimination and exclusion in all spheres of life. Unemployment is particularly high among the Roma and those who are employed are usually in low paid positions. Poverty is widespread and many people do not have access to such necessities as electricity or even clean water. Living conditions are particularly appalling in informal settlements where mainly Roma displaced from Kosovo or forcibly returned from abroad live. They tend to move towards bigger cities where they have more opportunities and

¹⁵² Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *D.A. v. K. Bank D.*, complaint no. 07-00-299/2015-02, opinion from 10 September 2015.

¹⁵³ Serbia, Law on Social Housing (*Zakon o socijalnom stanovanju*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 3 September 2009.

usually live in informal settlements on peripheral sites. Many of them are exposed to forcible eviction. This is documented in many reports.

For example, Nils Muižnieks, Council of Europe Commissioner for Human Rights, expressed his concern that many Roma, including those forcibly displaced by the wars, remain without access to adequate housing.¹⁵⁴ He acknowledges that some local integration programmes have been implemented, such as three social apartment buildings with 60 apartments for displaced persons from collective centres. Some local integration housing projects have been implemented as well. However, only a limited number of displaced persons have benefited from those programmes.¹⁵⁵ He also found that around 23 000 displaced Roma live in informal settlements without adequate housing, employment or access to water and sanitation, and with limited enjoyment of their social and economic rights.¹⁵⁶ Of 593 Roma settlements, 217 are informal (140 in the Belgrade area). The Commissioner also witnessed the seriously substandard living conditions in two settlements in the Belgrade area. Furthermore, in a Praxis report published in October 2015, it was found that 'the poorest part of the Roma population lives in extremely adverse conditions and the Roma housing problem is one of the most serious problems concerning the respect for human rights and the right to adequate housing'.¹⁵⁷

In September 2014, the Draft Law on the Legalisation of Sustainable Informal Roma Settlements was completed, presented to the public and submitted to the Commissioner for Protection of Equality for assessment and opinion. However, in 2015, the Government decided to adopt the Law on Retrospective Planning Permission with the aim of establishing a procedure for legitimising buildings which are built without the proper permits.¹⁵⁸ Yet this Law does not contain provisions which expressly relate to informal Roma settlements and therefore does not resolve this specific issue.

¹⁵⁴ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Serbia, from 16 to 20 March 2015, Comm Dh (2015) 14, 8 July 2015, p. 1.

¹⁵⁵ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Serbia, from 16 to 20 March 2015, Comm Dh (2015) 14, 8 July 2015, para. 51.

¹⁵⁶ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Serbia, from 16 to 20 March 2015, Comm Dh (2015) 14, 8 July 2015, para. 54.

¹⁵⁷ Praxis, *Access to socio-economic rights for Roma women in Serbia*, October 2015, p. 15.

¹⁵⁸ Serbia, Law on the Legitimation of Objects (*Zakon o legalizaciji objekata*), *Official Gazette of the Republic of Serbia*, no. 96/2015, 4 December 2015.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Article 16, para. 3 of the LPD states that, 'different treatment, exclusion or giving priority on account of the specific character of a job, for which an individual's personal characteristic constitutes a genuine and decisive precondition for performing the said job, if the objective to be achieved is justified, shall not be considered to constitute discrimination'. This definition does not explicitly state that such a requirement should adhere to the proportionality principle. However, Article 8 of the LPD is applicable in this case, as it says that a violation of the principle of equality shall occur, 'if an individual or a group of persons, on account of his/her or their personal characteristics, is unwarrantedly denied rights and freedoms or has obligations imposed that, in the same or a similar situation, are not denied to or imposed upon another person or group of persons, if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not proportional with the objective achieved'.

In addition, the Labour Law contains the same provision and prescribes in Article 22, para. 1 that different treatment, exclusion or giving priority on account of the specific character of a job shall not be considered as discrimination where the nature of a job is such, or where a job is performed in such conditions, that it constitutes a genuine and decisive precondition for performing the said job and where the purpose intended to be achieved is justified.

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

In Serbia national law does not provide for an exception for employers with an ethos based on religion or belief as it is defined in Article 4, para. 2 of Directive 2000/78/EC. However, the LPD provides for a somewhat different exception by stipulating in Article 18, para. 2 that, 'The conduct of priests, that is to say, religious officials, which is in keeping with a religious doctrine, beliefs or the objectives of churches and religious communities entered in the register of religious communities, in accordance with the law regulating the freedom of religion and the status of churches and religious communities, shall not be considered to constitute discrimination'. The register is maintained by the ministry responsible for religious affairs in accordance with the Law on Churches and Religious Organisations.¹⁵⁹ This provision is unclear, as it is not entirely certain what type of conduct this would pertain to; and it seems to be very problematic as it provides a blanket exemption for religious officials.

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

In Serbia there are specific provisions 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.

¹⁵⁹ Serbia, Law on Churches and Religious Organisations, *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

The Law on Churches and Religious Organisations recognises traditional churches¹⁶⁰ and religious communities,¹⁶¹ confessional communities¹⁶² and other religious organisations¹⁶³ (Article 4).

All other religious organisations (communities), including those already registered, need to seek re-registration through the newly established procedures which mean that they are required to fulfil additional criteria. The process is discriminatory and could cause groups which currently enjoy legal status to lose that status.

The Law on Churches and Religious Organisations guarantees general religious freedom to religious organisations which are registered. Article 2 prohibits discrimination, but only against natural persons as opposed to legal persons (i.e. it does not address discrimination between churches or communities). The law does not make it clear that everyone is entitled to enjoy freedom of religion irrespective of whether or not they are a member of a church or religious community which has been registered in accordance with the Law on Churches and Religious Organisations.

Article 6 guarantees the independence of churches and religious organisations from the State and proclaims their equality before the law, as well as the fact that they are free and autonomous in determining their religious identities. Article 8, para. 2 further establishes that the performance of priestly duties and religious services are subject to autonomous regulations by churches and religious communities. However, confessional communities and other religious organisations are exempt from these rights and freedoms. Furthermore, neither they nor unregistered religious organisations are entitled to the rights and benefits enshrined in Articles 26-30, such as property rights and tax exemptions. They may also have difficulty in printing and distributing literature and materials, opening bank accounts, securing sites and spaces for prayer and worship and in property sales. Moreover, only the children of members of the 'traditional churches and religious communities' can receive religious education in accordance with their own denomination.

- Religious institutions affecting employment in state funded entities

In Serbia religious institutions are permitted to select people (on the basis of their religion) for employment or dismissal from a job if the post is in a State entity or in an entity financed by the State. Religious institutions can discriminate, if this is required or allowed by their religious doctrines. Article 6 of the Law on Churches establishes that churches and religious communities are independent of the State and equal before the law. They are free and autonomous in defining their identity. Churches and religious communities have the right to independently regulate and conduct their structure and organisation and to independently conduct their internal and public affairs. Churches can obtain accreditation and establish schools at all levels of education which have the right to be financed from State funds (Article 36, para. 2). In order to promote religious freedoms and education, the State may offer financial support to religious educational

¹⁶⁰ Article 10, para. 1 treats traditional churches as those which have a centuries-long historical continuity and whose legal subjectivity was acquired on the basis of special laws, and they are: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church, the Christian Reformed Church and the Evangelical Christian Church.

¹⁶¹ Traditional religious communities are those which have a centuries-long historical continuity and whose legal subjectivity was acquired on the basis of special laws, and they are: the Islamic religious community and the Jewish religious community (Article 10, para. 2).

¹⁶² In Article 16 'confessional communities' are defined as all churches and religious organisations whose legal status was regulated with an application in accordance with two laws adopted in the former Yugoslavia. These two laws are the Law on the Legal Status of Religious Organisations (*Zakon o pravnom položaju verskih zajednica*), Official Gazette of the FPRY, no. 22/1953 and the Law on the Legal Status of Religious Organisations (*Zakon o pravnom položaju verskih zajednica*), Official Gazette of the SRS, no. 44/1977.

¹⁶³ There is no further, more precise definition of the category of 'other religious organisations'.

institutions which are not included in the education system. Religious education institutions have organisational and curricular autonomy (Article 37, para. 1).

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

In Serbia national anti-discrimination legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC).

Article 16, para. 2 of the LPD, which prohibits discrimination in the sphere of labour, also establishes protection for members of the army. It also specifies that some categories can be exposed to protective measures, such as women, pregnant women, women who have recently given birth, parents, minors and people with disabilities.

In addition, Article 23 of the LPDPD stipulates that the following are not considered to constitute discrimination based on disability: the selection of candidates without disabilities who showed the best result on an assessment of psychological and physical abilities, which are directly related to the job requirements; and the adoption of incentive measures to fast-track employment of people with disabilities, in accordance with the law governing the employment of people with disabilities.

However, some specific professions are not exempt from the application of this law and in such cases the genuine occupational requirement exemption can be applied.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Serbia national law does not include exceptions relating to difference in treatment based on nationality. Article 2, para. 2 of the LPD explains that the terms 'person' and 'everyone' in the Law are used to designate an individual residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether that individual is a national of the Republic of Serbia, another state or a stateless person, as well as any legal entity registered or operating on the territory of the Republic of Serbia. Furthermore, Article 3 proclaims that everyone shall have the right to obtain effective protection from all forms of discrimination from the authorised courts and other public administration bodies of the Republic of Serbia. A foreign national in the Republic of Serbia, in accordance with international treaties, shall have all the rights guaranteed by the Constitution and by law, with the exception of those rights which, in accordance with the Constitution and the law, are only enjoyed by citizens of the Republic of Serbia.

In Serbia citizenship is explicitly mentioned as a protected ground in Article 2, para. 1 of the LPD. There have not been many cases in relation to discrimination based on citizenship. In 2015, only 17 complaints were submitted to the Commissioner for Protection of Equality claiming discrimination based on citizenship.¹⁶⁴

In one case, a married couple submitted a complaint against the Directorate for child, social and primary health protection of the city of Nis. The woman was denied the right to one-off financial assistance for unemployed pregnant women, the right to parental allowance and one-off financial assistance for the first-born child in a family, because she had Albanian citizenship. The Commissioner for Protection of Equality found that, in the case of the first two allowances, discrimination didn't occur, as it was necessary to be

¹⁶⁴ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 253.

resident in the city of Nis for a certain period of time and this condition was not fulfilled in this case. However, refusing to pay the last allowance only due to the fact that the mother of the child was a foreign citizen is a discriminatory act.¹⁶⁵

In another similar case, the father of a child had Serbian citizenship. Not only did the Commissioner find the existence of discrimination for refusing to pay the one-off allowance for the first-born child in a family, but it also noted that this behaviour is contrary to the Constitutional Court decision that the provisions of the Law on financial support for families with children must be interpreted in a way that they allow a father who fulfils the conditions set out in the Law to receive this allowance if he has Serbian citizenship.¹⁶⁶

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

National minorities sometimes differ from ethnic minorities in that they represent part of the nation with its own nation state. Thus, the former Yugoslavia officially made a distinction between nationalities and ethnic groups. This division has been blurred. However, Article 2 of the Law on the Protection of Rights and Freedoms of National Minorities defines national minorities as a group of citizens of Serbia who are sufficiently representative, although in a minority situation within the territory of Serbia, who belong to an indigenous group of the population with a lasting and firm connection with Serbia and possess some distinctive features, such as language, national or ethnic affiliation, origin or religion, by means of which they differ from the majority of the population. In addition, the definition goes on to state that members of a national minority should demonstrate concern about the preservation of their common identity, including culture, tradition, language or religion.

Today, discrimination based on nationality is considered to be discrimination based on citizenship, while discrimination based on ethnic origin relates to ethnic minorities whose culture, origin and lifestyle differs from the majority. Usually they are citizens, but if they are not citizens, then an overlap between 'nationality' and 'ethnic origin' can occur. In Serbia, the ethnic minority which is considered to be most discriminated against is the Roma.

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

a) Benefits for married employees

In Serbia it constitutes unlawful discrimination in national law if an employer only provides benefits to those employees who are married. Article 2, para. 1 of the LPD prohibits discrimination based on family and marital status and the Constitution equates marriage and cohabitation, in accordance with the law (Article 62, para. 5).

However, Article 3, para. 3 of the Family Law establishes that marriage is the cohabitation of a man and a woman. There is no law on registered partnerships, notwithstanding the Model Law on Registered Same-Sex Partnerships which was prepared during 2013 by several NGOs and presented to the public in 2014. In other words, the existing legislation recognises marriage only between opposite-sex couples. Although Article 2, para. 1 of the LPD prohibits discrimination based on sexual orientation, Article 21 only states that sexual orientation is a private matter and that every person has the right to declare their sexual orientation. There is still no relevant case-law which casts light on the scope of this provision.

¹⁶⁵ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.D. v. Directorate of the city of Nis*, complaint no. 07-00-151/2015-02, opinion from 10 august 2015.

¹⁶⁶ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *J. and S.P. v. Directorate of City of Nis*, complaint no. 07-00-168/2015-02, opinion from 10 August 2015.

b) Benefits for employees with opposite-sex partners

In Serbia it does not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners, as many provisions of the Labour Law concerning certain family benefits require marital status or extramarital community which is considered to be the cohabitation of partners of the opposite sex.

Although the LPD prohibits discrimination based on sexual orientation (Article 2, para. 1), Article 21 limits the application to privacy, stating that sexual orientation is a private matter and that discriminatory treatment on account of the declaration of someone's sexual orientation is prohibited. In other words, Article 21 does not provide any standing for combating discrimination in the area of benefits. On the other hand, Article 2, para. 1 prohibits any unlawful discrimination based, among others, on sexual orientation, and someone can argue that this provision prohibits benefits provided only to employees with opposite-sex partners. Bearing in mind the current case-law, it is probable that the Commissioner for Protection of Equality and judges will interpret the scope of Article 21 and Article 2, para. 1 in relation to sexual orientation differently. Therefore, a change to the existing legislation is necessary, as well as the introduction of the institution of registered partnerships. Another problem is the general atmosphere in society due to which many members of sexual minorities do not openly reveal their sexual orientation and therefore do not invoke this provision in practice.

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

In Serbia there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). The LPD provides in Article 16, para. 3 that undertaking protective measures towards certain categories of employees (such as women, pregnant women, women who have recently given birth, parents, minors and people with disabilities) cannot be considered as discrimination.

Article 12, para. 1 of the Labour Law states that an employee shall have the right to safety and protection of life and health at work. According to Article 16, para. 2, employers are obliged to provide their employees with working conditions which ensure safety and the protection of life and health at work in conformity with the law and other regulations. The Law further prescribes that employees are entitled to safety and the protection of life and health at work in conformity with the law (Article 80). Article 12, para. 4 entitles employees with disabilities to special protection. Article 22, para. 2 establishes that provisions relating to special protection of people with disabilities shall not be considered as discrimination. Finally, Article 101 prescribes that employers are obliged to enable employees with disabilities to perform their work according to their remaining working capacity. Employers shall, in accordance with the pension and disability insurance regulations, provide appropriate alternative tasks for an employee who is assessed to be at risk of becoming disabled by performing certain tasks.

Article 12, para. 4 entitles employees under 18 and employees with disabilities to special protection. In addition, Article 22, para. 2 stipulates that provisions of the law, general acts and employment contracts relating to special protection and assistance for specific categories of employees, cannot be considered to be discrimination. Those categories are: people with disabilities, women on leave from work due to pregnancy and childbirth (maternity leave), and on leave to look after a child (parental leave), and during special care for a child (in the case of a child requiring special care due to serious physical or psychological need, where the parent, upon expiry of the maternity and paternity leave, is absent from work, or works half-time, at most until the child reaches the age of five). There are also provisions relating to special rights for parents, adoptive parents, guardians and foster parents. Article 84 lists jobs which are prohibited for employees under 18. It also protects motherhood (Articles 89-93a) and people with disabilities (Articles 101-102).

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

4.7.1 Direct discrimination

In Serbia the LPD does not provide an exception for direct discrimination on the ground of age.

a) Justification of direct discrimination on the ground of age

In Serbia Article 23, para. 1 of the LPD prohibits discrimination against individuals on the ground of age and does not mention any exceptions. However, a possible justification for direct discrimination on the ground of age is provided in Article 14, which prescribes positive measures and says that, 'measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position shall not be considered to constitute discrimination'.

In addition, it can be considered that a genuine and occupational requirement, as established in Article 16, para. 3, can justify direct discrimination based on age. The same provision is contained in the Labour Law in Article 21, para. 1.

There is still no significant case law on this ground of discrimination, except for cases brought before the Commissioner for Protection of Equality. Although the LPD prohibits discrimination on this ground, awareness of this issue remains low. Thus, many job advertisements contain discriminatory conditions and age discrimination is very prevalent in the area of employment.

In 2015, 61 complaints (or 9.4 %) submitted to the Commissioner for Protection of Equality claimed age discrimination, compared to 11.3 % in 2014.¹⁶⁷ However, this ground of discrimination still ranks very high – among the top four grounds. One third of complaints (20) concerns discrimination against children (aged under 18), 15 complaints concern elderly people (+65), while 26 complaints concern different age limitations and conditions.¹⁶⁸ Of these complaints, 21 concern employment, 13 the actions of public authorities, 12 education and professional training, and seven provision of public services. In 2015, several complaints were submitted against health centres which set age conditions for specialisation by doctors.¹⁶⁹ In one case, the complainant was discriminated against as the selection commission for enrolment in one preschool institution didn't treat the mother of a child as a regular student, purely due to the fact that she was 37 years old.¹⁷⁰

b) Permitted differences of treatment based on age

In Serbia national law permits differences in treatment based on age for any activities within the material scope of Directive 2000/78/EC. Thus, Article 16, para. 3 of the LPD prescribes that different treatment is permissible on account of the specific nature of a job, for which an individual's specific age constitutes a genuine and decisive condition for performing the job, if the objective to be achieved is justified. In addition, it is permissible to provide protective measures for certain categories of people, such as

¹⁶⁷ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 253.

¹⁶⁸ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 113.

¹⁶⁹ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *D.B. v. DZ I.* complaint no. 07-00-208/2015-02, opinion from 31 July 2015.

¹⁷⁰ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *I.D. v. PU*, complaint no. 07-00-359/2015-02, opinion from 19 October 2015.

children. Furthermore, Article 23, para. 2 stipulates that the elderly constitute a specific, protected group.

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

In Serbia there are no occupational pension schemes.

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

In Serbia there are no special conditions set by law for older or younger workers in order to promote their vocational integration, or for people with caring responsibilities to ensure their protection. However, although there is no general-scope law which sets special conditions for these groups, it does not mean that special conditions are not established at a local level, mostly in order to promote the employment of young people.¹⁷¹

The LPD only provides in Article 23, para. 2 that, 'Older people shall have the right to dignified living conditions, without discrimination, and especially the right to equal access and protection from neglect and harassment in the course of receiving healthcare services and other public services'. The Labour Law protects young workers. Thus, Article 84 prescribes that employees younger than 16 cannot work in posts which require particularly hard physical work, exposure to harmful radiation or materials which pose a risk to health. Employees between the ages of 18 and 21 can perform such hazardous tasks only if a medical professional determines that such work is not harmful to their health (Article 85). Employees under the age of 18 cannot work for more than eight hours per day (a maximum of 35 hours per week) and cannot do overtime or night work, except for in some particular cases (Article 88). Certain safeguards are applicable in the case of pregnancy and early motherhood (Articles 89-93a). The Labour Law sets some conditions for absence from work for employees in the case of them needing to provide special care for a child with long-term illness or disabilities, or to provide special care for an adopted or foster child (Articles 96-100). In addition, the Labour Law protects people with disabilities (Articles 101-103).

Certain categories of workers can, exceptionally, in circumstances and under conditions set out in the Law on Pension and Disability Insurance,¹⁷² be entitled to a pension (Article 7). Under Article 42, those categories are police officers, some categories of employees at the Ministry of Foreign Affairs, members of the Security Information Agency, members of the Military Security Agency and Military Intelligence Agency; employees of the Administration for the execution of plenipotentiary sanctions, authorised officials of the Tax Police, military personnel and other police officers.

4.7.3 Minimum and maximum age requirements

In Serbia there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

¹⁷¹ The basis for affirmative measures is presented in the Law on Youth, *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

¹⁷² Serbia, Law on Pension and Disability Insurance, *Official Gazette of the Republic of Serbia*, no. 34/2003, 64/2004 - decision CC, 84/2004 - other law, 85/2005, 101/2005 - other law, 63/2006 - decision CC, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 2 April 2003.

4.7.4 Retirement

a) State pension age

In Serbia the state pension age at which individuals must begin to collect their state pensions is 65. However, an employee can decide to submit a request for early retirement.

If an individual wishes to work longer, the pension cannot be deferred, except for certain jobs (doctors or university professors), when it can be deferred for an additional three years (until the individual reaches 68).

An individual cannot collect a pension and still work

According to Article 19 a) of the Law on Pension and Disability Insurance, men can retire at the age of 65 and with a minimum of 15 years of pension insurance contributions, and can submit a request for early retirement at the age of 55 and with a minimum of 40 years of pension insurance. Women can retire when they reach the age of 60 years and six months¹⁷³ and have a minimum of 15 years of pension insurance (and can request early retirement at 54 years and four months and with 36 years and four months of pension insurance). However, the state pension age is rising, as the minimum age limit is extended each year, and by 2023 men will only be able to submit a request for early retirement at the age of 58 and with 40 years of contributions, compared to 58 and 38 years of contributions for women. Both sexes retire after 45 years of pension insurance contributions, no matter what their age.

However, in practice, some women are forced to retire when they reach the age of 60 years and six months, although it is their right to choose if they want to retire, or to work until 65. In addition, the Law on the Method for Determining the Maximum Number of Employees in the Public Sector was adopted on 31 July 2015,¹⁷⁴ prescribing in Article 20, para. 1 that in the public sector employment will be terminated when the employee reaches the age and insurance period provided by the Law on Pension and Disability Insurance. Exceptionally, the employment relationship can be extended for a certain period, in order to provide professional and continuous performance of the job, but this cannot extend beyond 65 years (Article 20, para. 3). Thus, this provision refers to women who are not able to exercise their right to choose to retire earlier or to work until they reach 65. On 8 October 2015, the Constitutional Court revoked the discriminatory Article 20.¹⁷⁵

b) Occupational pension schemes

In Serbia it is not possible to receive payment from any employer-funded pension arrangements, since occupational pension schemes are not recognised as such in Serbia. The only system that exists is the mandatory public pension system.¹⁷⁶

c) State imposed mandatory retirement ages

¹⁷³ The retirement age for women will increase each year until 2031, when it will reach 64 years and nine months, and in 2032 it will be 65.

¹⁷⁴ Serbia, Law on the Method for Determining the Maximum Number of Employees in Public Sector (*Zakon o načinu određivanja maksimalnog broja zaposlenih u javnom sektoru*), *Official Gazette of the Republic of Serbia*, no. 68/15, 4 August 2015.

¹⁷⁵ Constitutional Court of Serbia, IUz-244/2015, decision from 8 October 2015.

¹⁷⁶ However, voluntary pension savings are also possible, although the introduction of mandatory private funds has been dismissed. See the Law on Voluntary Pension Funds and Pension Plans (*Zakon o dobrovoljnim penzijskim fondovima i penzijskim planovima*), *Official Gazette of the Republic of Serbia*, no. 85/05 and 31/11, 13 October 2005.

In Serbia there is a state-imposed mandatory retirement age which is generally applicable. Thus, according to Article 19 of the Law on Pension and Disability Insurance, the retirement age is 65 years, with a minimum of 15 years of pension contributions, or after 45 years of contributions.

When an employee reaches 65, there is no possibility to continue to work and to defer their pension. However, the retiree can continue to work in the form of a service contract. In addition, in the public sector, the mandatory retirement age for both sexes is 65. There is a possibility of extending this period for an additional three years in higher education for university professors and doctors.

d) Retirement ages imposed by employers

In Serbia national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

e) Employment rights applicable to all workers irrespective of age

The Labour Law protects employees against dismissal and applies to all workers irrespective of age, until they reach the mandatory retirement age. Article 20 prohibits any discrimination in relation to dismissal. However, Article 187 protects employees during pregnancy, maternity leave, absence from work for childcare and leave for special childcare, when an employer cannot terminate the contract of employment.

f) Compliance of national law with CJEU case law

In Serbia national legislation is in line with the CJEU case law on age regarding compulsory retirement. There is no possibility of working beyond pensionable age, although a retired person can perform certain jobs on the basis of service contracts. Although there are differences in pensionable age between male and female workers, they both retire at 65, so the earlier pension is a possibility, not a requirement. The automatic termination of employment contracts for employees who meet the conditions as regards age and minimum years of service during which pension contributions were paid has been a feature of employment law in many Member States and is widely used in employment relationships.

It is a mechanism which is based on a balance which must be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement. This is why the retirement age for women will be higher each year until 2031 in Serbia when it will reach 64 years and nine months, with the objective of equalising the required conditions for both sexes. However, there is an exception allowing university professors to work for three more years (until the age of 68) if they receive permission from their respective departments, the faculty council and the university. The same exception applies to doctors.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Serbia national law permits age or seniority to be taken into account in selecting workers for redundancy. Section XI of the Labour Law regulates redundancy and stipulates in Article 155 that the solution to finding redundancy plans has to include the following information: the reasons for the work of the employees no longer being needed; the total number of employees with the employer; the number, professional qualification structure, age and years of insurance contributions of redundant employees,

and the jobs they perform; the criteria for establishing the redundancy; measures for finding alternative employment: transfer to other work assignments, employment with another employer, retraining or additional training, part-time work, but not shorter than half a full-time position, and other measures; the means for resolving the socio-economic status of redundant employees; and the time limit within which the employment contract will be terminated.

b) Age taken into account for redundancy compensation

In Serbia national law provides compensation for redundancy. This is not affected by the age of the worker. Financial compensation is calculated from the first day of insurance until the termination of insurance, and the total amount depends on the number of insurance years. In other words, severance pay for redundancy dismissal is different for a worker with one year of tenure, five years of tenure, 10 years of tenure or more. However, it can indirectly have a different impact on younger age groups which mostly have fewer years of tenure and, thus receive a lower amount of redundancy compensation.

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 Serbia national anti-discrimination law does not include exceptions which seek to rely on Article 2, para. 5 of the Employment Equality Directive.

The Constitution of Serbia prescribes that some human rights may be restricted by the law if the Constitution permits such a restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of the restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right (Article 20, para. 1). This section of the Constitution relies on the European Convention on Human Rights. However, the Constitution only permits a restriction in relation to special measures, introduced in order to achieve full equality of individuals or groups of individuals in a substantially unequal position compared to other citizens. Other restrictions of the principle of equality are not allowed by the Constitution.

4.9 Any other exceptions

In Serbia no other exceptions to the prohibition of discrimination (on any ground) are provided in national law.

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

a) Scope for positive action measures

In Serbia positive action in respect of racial and ethnic origin, religion and belief, disability, age and sexual orientation is provided for in national law.

Article 21, para. 4 of the Constitution recognises that special measures, introduced in order to achieve full equality of individuals or groups of individuals in a substantially unequal position compared to other citizens, shall not be deemed to be discrimination.

Article 14 of the LPD also prescribes that measures which are introduced for the purpose of achieving the full equality, protection and progress of an individual or a group of people in an unequal position shall not be considered to constitute discrimination.

The LPDPD provides that there is no discrimination if a provision of a law, a regulation, a decision or a special measure was adopted with the aim of improving the situation of people with disabilities, their family members and associations of persons with disabilities, when this special support is necessary in order to ensure they can enjoy and exercise their rights under the same conditions as the general population (Article 8, para. 1). Furthermore, a 'decision or the retention of existing laws or measures aimed at eliminating or repairing the adverse situation of people with disabilities who are given special support' is not considered to be discrimination either (Article 8, para. 2).

b) Main positive action measures in place on national level

Positive measures in relation to education for vulnerable ethnic groups (primarily Roma) – With the aim of providing conditions for the promotion of and greater inclusion in the process of education and professional training, the Gender Equality Act (GEA) prescribes that the public authorities in charge of education can undertake special measures for the inclusion of pupils or groups of pupils who, because of their culture, tradition and social-economic conditions, leave school prematurely (Article 33, para. 1).¹⁷⁷ Measures of special support for pupils or groups of pupils in their transition from lower to higher educational levels can also be undertaken, namely, for the continuation of their education. The public authorities in charge of education shall establish special teaching curricula for the return of pupils to schools and other educational institutions – '*broad social policy measures*'.

Positive measures for people with disabilities in the area of employment – Article 24 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities establishes a duty for employers with at least 20 employees to employ a certain number of people with disabilities. An employer with 20 to 49 employees is obliged to employ one person with disabilities (Article 24, para. 2). An employer with 50 or more employees is obliged to employ at least two people with disabilities and one more for every additional 50 employees (Article 24, para. 3). This obligation is not imposed on a newly established employer for a period of 24 months from the day of the establishment of the business.

However, according to Article 26, an employer can be relieved of this obligation if they pay a sum of at least 50 % of the average salary per employee for every person with a disability whom they do not employ. This amount is paid to the budget of the Republic of

¹⁷⁷ Serbia, Gender Equality Act (*Zakon o ravnopravnosti polova*), *Official Gazette of the Republic of Serbia*, no. 104/2009, 16 December 2009. This duty is included in the GEA, as the problem of early school drop-out is primarily perceived to be a gender issue, due to the fact that the drop-out rate is higher among girls, particularly Roma girls. However, the percentage of early school drop-outs among Roma boys is also very high, and therefore, it would be more logical to include this duty in the LPD.

Serbia for the fund for the professional rehabilitation and employment of people with disabilities.¹⁷⁸ In addition, an employer receives a wage subsidy for a duration of 12 months for an employee with disabilities and without work experience who is hired for an indefinite period of time. This subsidy is equivalent to 75 % of the salary costs associated with contributions for mandatory social insurance, but not more than the minimum wage determined in accordance with the regulations - '*quotas*'; *broad policy measures*.

Positive measures for national minorities, particularly Roma – The Law on the Protection of National Minorities prescribes that authorities shall adopt legal rules, individual legal acts and measures with the aim of securing full and effective equality for people belonging to national minorities (Article 4, para. 1). Article 4, para. 2 sets an obligation on authorities to undertake positive measures with the aim of improving the status of Roma, which won't be considered as discrimination. These measures apply, in particular, to the parliamentary sphere, as the Law on the Election of MPs¹⁷⁹ stipulates in Article 81, para. 2 that the threshold of 5 % does not apply to parties and coalitions of parties of national minorities. Their list must win 0.4 % of the total votes in order to secure its first MP seat – '*broad policy measures*'.

¹⁷⁸ This obligation is defined in the Regulation on the monitoring of the execution of duties on the employment of persons with disabilities and the method of proving the execution of these obligations (*Pravilnik o načinu praćenja izvršavanja obaveze zapošljavanja osoba sa invaliditetom i načinu dokazivanja izvršavanja te obaveze*) *Official Gazette of the Republic of Serbia*, no. 33/2010, 48/2010-corr., and 113/2013.

¹⁷⁹ Serbia, Law on the Elections of MPs (*Zakon o izboru narodnih poslanika*), *Official Gazette of the Republic of Serbia*, no. 35/2000, 57/2003 - decision CC, 72/2003, 75/2003 - corr, 18/2004, 101/2005, 85/2005 - other law, 104/2009, 28/2011 - decision CC 36/2011, 10 October 2000.

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

Civil procedure - Civil proceedings in discrimination cases are regulated by three anti-discrimination laws (LPD, LPDPD and GEA). The general rule is that provisions from general litigation apply (which are enshrined in the Civil Procedure Code) unless it is explicitly regulated differently (*lex specialis*). However, it was necessary to create a special procedure for discrimination cases as general litigation is not adapted to the specific content and particularities of the proceedings in discrimination cases, nor does it secure the provision of legal protection that is of satisfactory quality. A special civil action is designed to ensure the provision of effective and efficient civil protection from discrimination which is in accordance with international and European standards in this area.

The LPDPD establishes specific procedural provisions in order to enhance the court procedure in cases of discrimination against people with disabilities. These provisions are changing provisions which regulate the general civil procedure. Firstly, apart from the local court of general jurisdiction, the court situated in the area where the complainant is domiciled or has temporary residence shall also have jurisdiction over the proceedings (Article 41). The complainant can request:

- court prohibition of further discriminatory behaviour;
- remedy actions to remove the consequences of discriminatory behaviour;
- the court's confirmation that an action or behaviour is discriminatory; and
- compensation for pecuniary and non-pecuniary damages incurred due to discriminatory behaviour.¹⁸⁰

Furthermore, monetary fines and criminal offences apply to individuals and entities for the violation of provisions prohibiting discrimination against people with disabilities.

Article 44 provides that revision, a special appellate review for legal questions and serious breaches of procedure, is always available in cases of discrimination (no time limit). This law allows temporary measures at the request of the complainant, when initiating a lawsuit, in the course of the proceedings and after the termination of the proceedings, until the court decision is enforced. The court is allowed to pass a temporary measure in order to prevent discriminatory treatment, with a view to eliminating the risk of violence or major irreparable damage.¹⁸¹ The court is obliged to decide on a request to pass a temporary measure within 48 hours of receiving the request. However, the LPDPD does not recognise a reversal of the burden of proof.

The LPD also sets out the procedure for initiating lawsuits in cases of discrimination which can be initiated by anyone who claims to have suffered discriminatory treatment. It includes the same provisions in relation to the court's jurisdiction for victims of

¹⁸⁰ In this complaint, the rules in the Law on Contracts and Torts applies, including the statute of limitations (Article 376). See Law on Contracts and Torts (*Zakon o obligacionim odnosima*), *Official gazette of SFRY*, no. 29/1978, 39/1985, 45/1989 - CCY, 57/1989, *Official gazette of SRY*, no. 31/1993, 22/1999, 23/1999, 35/1999, 44/1999, *Official gazette of SCG*, no. 1/2003 - Constitutional Charter, 1 July 1978.

¹⁸¹ A request to pass a temporary measure must prove the necessity of doing so in order to eliminate the risk of violence, use of force, or irreparable damage (Article 45, para. 2).

discrimination and revision as the LPDPD. The LPD also recognises temporary measures, although the court must decide about the request not within 48 hours, but within three days. It also provides several positive solutions to protect victims of discrimination. Firstly, it provides that the proceedings will be conducted swiftly (Article 41, para. 3). Secondly, Article 45 of the LPD shifts the burden of proof from the complainant to the respondent in the following way. If the complainant proves the likelihood of the defendant's having committed an act of discrimination, the burden of providing evidence that no violation of the principle of equality has occurred will fall on the defendant. This means that the complainant must prove to a reasonable degree of likelihood that the defendant committed an act of discrimination. If they succeed in this, the defendant has a duty to prove that the act was not a violation of the principle of equality.

The provisions of the GEA go further than those mentioned in the other two anti-discrimination laws in order to ensure efficiency, such as time limits for certain legal acts, provisions on the collection of data on cases and release from prior payment of litigation costs until the case is decided. These additional measures which are envisaged for gender have not been envisaged for the other protected grounds.

Civil litigation with advocacy element - Under Article 46 of the LPD, the Commissioner for Protection of Equality can initiate lawsuits. The Commissioner decides in which cases they will file a claim, taking into account whether it is a case of strategic litigation; in other words a case of frequent and widespread discrimination in respect of which there are good prospects for success (so far litigation has been initiated 13 times, and no new strategic litigation was initiated in 2015).¹⁸² The litigation proceedings are initiated and conducted in the general public interest, in order to contribute to the consistent implementation of legislation and improvement of legal practice, to further encourage victims of discrimination to initiate anti-discrimination litigation, to uphold the rule of law and to contribute to the improvement of access to justice.

Labour dispute - As the Labour Law prohibits discrimination in Articles 18-20, an individual can decide to initiate a labour dispute if discrimination occurs in the area of employment. An employee has the choice to initiate a labour dispute or an anti-discrimination proceeding, which can be initiated even if the labour dispute is not complete.

The Civil Code governs the rules on proceedings in labour law disputes in order to provide adequate protection. Jurisdiction in such cases, in addition to the court of general territorial jurisdiction for the respondent, lies with the court on whose territory the work is being performed or was performed, if the complainant in a labour-related dispute is an employee (Article 60). This procedure is regulated by several articles (436-441). Article 438 prescribes that in labour-related litigation, and in particular prior to determining time limits and scheduling hearings, the court shall always take due account of the necessity of resolving labour disputes swiftly. In the course of the proceedings, Article 439 provides that the court may also *ex officio* order temporary measures to be applied in enforcement proceedings for the prevention of violent acts or the alleviation of irreparable damage. The court shall issue a ruling on the temporary measures at the request of a party within a time limit of eight days from the date of the request being submitted. No specific appeal shall be permitted against a ruling of a court on injunctions. In addition, in a judgment ordering the performance of a specific obligation, the court will determine a time limit of eight days for its execution (Article 439). An appeal may be submitted within a time limit of eight days (Article 440). Finally, a review shall be allowed in litigation pertaining to labour disputes on employment, the course of employment and termination of employment (Article 441). The latest amendments from 2014 provide a

¹⁸² Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 171.

new rule: if, during proceedings concerning illegal termination, the court determines that there were grounds for termination, but the employer has not complied with the procedure, the court shall reject the employee's request to return to work and in terms of damages they will be awarded the sum of six monthly salaries.

Mediation - The Law on the Peaceful Resolution of Labour Disputes¹⁸³ prescribes the jurisdiction of the National Agency for the Peaceful Resolution of Labour Disputes in procedures in both individual and collective disputes. This includes conciliation, mediation and, in fewer cases, arbitration. The law distinguishes between individual and collective labour disputes. Collective labour disputes are, for example, disputes about collective agreements, unions and strikes. On the other hand, individual labour disputes are disputes about minimum wages, termination of employment, payout of a minimum wage, as well as discrimination and bullying (Article 3).

Mediation is also prescribed by the Law on Mediation,¹⁸⁴ which was adopted on 31 May 2014 and came into force on 1 January 2015. The adoption of this law made some improvements and advancements to the existing system, which dates from 2005, and brings changes in terms of refinement and development of existing solutions which have proven inefficient in practice. The basic principles of mediation are that it should be conducted on a voluntary basis, in a procedure with strictly personal participation by the parties where the equal treatment of the parties, privacy of procedure, confidentiality, neutrality, urgency and the prohibition of the use of evidence in other proceedings are guaranteed. Agreement in the mediation procedure is achieved with the assistance of mediators who are appointed by and registered with the Ministry of Justice and Public Administration. The legal effectiveness of the agreement reached in the mediation procedure is equal to that of a court decision and the agreement is enforceable through enforcement proceedings. Initiating mediation causes an interruption in the running of the statute of limitation for a period of 60 days in a court proceeding.

The Commissioner for Protection of Equality is also entitled, but not obliged, to suggest or recommend mediation after an assessment of whether the case is suitable for mediation. On the other hand, the Commissioner is required to recommend mediation to the parties before taking the first action in the proceedings under the complaint. If both parties accept mediation, the complaint procedure is suspended until the end of the mediation process. If the parties reach an agreement, the procedure is completed, whereas if there has been no agreement reached through the mediation process, the complaint procedure before the Commissioner is continued.

In 2012, the Commissioner for Protection of Equality established a working group which prepared a mediation model adjusted to the characteristics of discrimination cases.¹⁸⁵ This form of mediation is based on the concept of restorative justice and contains specific criteria and the manner of selecting cases suitable for mediation. Therefore, an analysis must first be carried out as to whether the case is suitable for a strategic lawsuit, as strategically important cases of discrimination should be submitted to the court. In addition, the principle of the mediator's neutrality has been redefined, in the sense that the mediator must not be morally neutral towards discrimination itself, but must quite clearly show that it is morally unacceptable.

The mediation procedure is conducted by a mediator appointed by an authorised official of the Commissioner, from a list of authorised mediators. Only qualified persons, who are

¹⁸³ Serbia, Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rešavanju radnih sporova*), *Official Gazette of the Republic of Serbia*, no. 125/2004, 104/2009, 22 November 2004.

¹⁸⁴ Serbia, Law on Mediation (*Zakon o posredovanju u rešavanju sporova*), *Official Gazette of the Republic of Serbia*, no. 55/2014, 23 May 2014.

¹⁸⁵ Commissioner for Protection of Equality (2013), *Regular annual report of the Commissioner for Protection of Equality for 2012*, Belgrade, p. 90.

not employed by the Commissioner, can be included in the list of mediators, provided they meet the criteria and closely defined requirements established by the Commissioner.

During 2012, the first training programme was conducted and successfully completed by 22 people.¹⁸⁶ In 2013, the list was extended to an additional 17 people, making a total of 39 mediators. During 2013-2015, the Commissioner organised training and published a handbook for mediators for conducting mediation in discriminating cases, as well as training for employees in order to recognise discrimination cases suitable for mediation.¹⁸⁷

In 2015, mediation was offered and accepted for the first time in two cases. In one case, the complainant claimed that a local newspaper published a story on its website which discriminated against and humiliated him for his extremely short stature. In another case, a complainant considered that some comments posted on the Facebook page of a legal entity producing traditional souvenirs were offensive towards Bosniaks and Muslims. The mediation was successfully concluded in both cases.¹⁸⁸

Misdemeanour procedure – This procedure is regulated by a special law.¹⁸⁹ It can be initiated by certain bodies (administrative bodies, authorised inspectors, public prosecutors, etc.). Inspectors can initiate a misdemeanour procedure in order to secure the legality and safe operation and practices of public authorities (they can also review documents, take statements, see the premises, order enforcement measures, notify other authorities, etc. In addition, this procedure can be initiated by the individual who was discriminated against. The Commissioner for Protection of Equality can initiate a misdemeanour notice, but cannot punish a discriminator with a fine directly. The LPD makes provision for several misdemeanours, regulated in 11 articles (Articles 50-60).

Criminal procedure – The criminal law is set out in the Criminal Code which contains several provisions relating to discrimination:

- Article 128 prescribes a violation of equality;
- Article 129 prescribes the violation of the right to use a language or alphabet;
- Article 317 establishes as a criminal offence the instigation or exacerbation of ethnic, racial and religious hatred or intolerance;
- Article 344a prohibits the instigation of ethnic, racial and religious or other hatred or intolerance by means of actions or slogans at sporting events or public gatherings;
- Article 387 prohibits propagation of the idea of racial superiority or racial intolerance or discrimination.

In 2015, only one criminal charge was submitted by the Commissioner.¹⁹⁰ It concerns the editor of the electronic newspaper, *Sandžak PRESS*, who on 24 December 2014 published an article entitled 'The truth about homosexuals'. This article expressed ideas, attitudes and theories about homosexuals which incited hatred towards sexual minorities.

¹⁸⁶ Commissioner for Protection of Equality (2013), *Regular annual report of the Commissioner for Protection of Equality for 2012*, Belgrade, p. 92.

¹⁸⁷ Commissioner for Protection of Equality (2013), *Regular annual report of the Commissioner for Protection of Equality for 2012*, Belgrade, p. 16.

¹⁸⁸ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 73.

¹⁸⁹ Serbia, Law on Misdemeanours (*Zakon o prekršajima*), *Official Gazette of the Republic of Serbia*, no. 65/2013, 13/2016, 25 July 2013.

¹⁹⁰ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 176.

By means of Article 54a of the Criminal Code, racial, religious, national, ethnic and sexual hatred is considered an aggravating circumstance. However, it is rarely applied in practice.

Complaint procedure – This procedure before the Commissioner for Protection of Equality is a specific procedure, which has the characteristics of a special administrative procedure. Article 40, para. 4 of the LPD expressly stipulates that the procedure before the Commissioner shall be conducted pursuant to the provisions of the Law on General Administrative Procedure.¹⁹¹ The procedure for submitting a complaint is regulated in Articles 35 to 40. A complaint must be forwarded within 15 days of its submission to the alleged perpetrator of the violation who has 15 days to respond to it. The Commissioner must give an opinion on whether there has been a violation of the prohibition of discrimination within 90 days of the day of receiving a complaint, and must inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a violation, they will issue a recommendation to the individual against whom the complaint was submitted, suggesting a means of redressing the violation in question. The individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of receipt of the recommendation. The individual must inform the Commissioner of the measures taken. However, if the individual fails to redress the violation in question within 30 days, the Commissioner may inform the public in the press and online. If the discriminator fails to comply with the recommendation, the individual(s) exposed to the discriminatory act can decide to initiate a lawsuit, or the Commissioner for Protection of Equality can initiate a lawsuit in a case of strategic litigation. The Commissioner can also initiate a misdemeanour notice or a criminal charge.

In 2015, 797 complaints were submitted to the Commissioner for Protection of Equality.¹⁹²

b) Barriers and other deterrents faced by litigants seeking redress

There is a certain overlap between the three anti-discrimination laws, as disability and gender discrimination can be challenged under the general and specific law on discrimination. However, it seems that discrimination based on disability has thus far mostly been challenged under the specific law, while cases based on gender discrimination are mostly challenged under the LPD, although the GEA is better equipped to protect the victim of discrimination. The jurisdiction for cases of discrimination was transferred in January 2014 from the basic to the higher courts¹⁹³ and some relevant jurisprudence is still developing.

However, there are several problems in practice. Firstly, in some cases higher courts dismiss lawsuits for lack of jurisdiction, holding that they can decide only on discrimination cases in employment, while basic courts have jurisdiction to decide on discrimination cases in other areas of life.¹⁹⁴ Furthermore, they sometimes dismiss a lawsuit as the human rights organisation submitting the lawsuit is not represented by an attorney, although they have legal standing to submit a lawsuit. Judges have problems with applying the provision on shifting the burden of proof, although some progress is visible in 2015. In addition, it is problematic for them to identify the right comparator

¹⁹¹ Serbia, Law on General Administrative Procedure (*Zakon o opštem upravnom postupku*), *Official Gazette of the Republic of Serbia*, no. 33/97, 31/2001, 30/2010, 11 May 2010.

¹⁹² Commissioner for Protection of Equality (2016), *Regular Annual Report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 8.

¹⁹³ Serbia, Law on the Organisation of the Courts (*Zakon o uređenju sudova*), *Official Gazette of the Republic of Serbia*, no. 116/2008, 104/2009, 101/2010, 31/2011 – other laws, 78/2011, 101/2011, 101/2013, 106/2015, 40/2015, 13/2016, 22 December 2008.

¹⁹⁴ Appellate court in Belgrade, no. P. 103/15, decision from 1 July 2015.

group, to apply the proportionality test, or to even identify the real ground for discrimination. In some cases, judges mix up discrimination and bullying and do not understand that not all unequal treatment can be considered to be discrimination (the different treatment must be based on a personal characteristic). Cases are not decided with urgency and courts usually award small amounts for non-pecuniary damages, demonstrating that they still do not understand the detrimental effect of discriminatory treatment. The same applies to courts for misdemeanours and the range of fines is very small compared to other acts contained in other laws outside of discrimination (around EUR 80 to EUR 800).

Although the procedure before the Commissioner is free of charge, the Law on Free Legal Aid has still not been adopted and legal aid in discrimination cases is limited and depends on NGOs specialised in dealing with discrimination cases. Another problem is the length of proceedings, as Serbia is facing a huge problem of trials which last for an unreasonably long time. There is also a problem with the enforcement of court decisions. The courts are subject to changes in their organisation and many buildings and courtrooms are not fully accessible for people with disabilities. Furthermore, mediation in discrimination cases should be used more often and this requires the creation of rules that will encourage the development of specific forms of mediation, including mediation in discrimination cases, which should be relocated from the courts.

Finally, although the Commissioner has a wide range of mechanisms at its disposal, they are not very efficient, as most recommendations are not fully considered and respected. Reasons for this arise from the fact that the Commissioner is not authorised to punish a perpetrator of discrimination by imposing fines and is not able to initiate proceedings *ex officio* when they have knowledge of discriminatory conduct. It also remains unclear whether the court is bound by the Commissioner's opinion on the existence or not of discrimination in a discrimination case brought to the court.

c) Number of discrimination cases brought to justice

In Serbia there are no available statistics on the number of cases related to discrimination brought to justice. However, statistics are available on the complaints submitted to the Commissioner for Protection of Equality. As mentioned above, in 2015, 797 complaints were submitted to this specialised body compared to 666 in 2014, and none were initiated by the Commissioner as lawsuits.¹⁹⁵

Although the number of cases processed rises each year, it is still insignificant in comparison to the widespread nature of discrimination cases in practice in all spheres of society. The reasons for this lie in insufficient awareness and knowledge about discrimination and the lack of determination of victims to seek help.

d) Registration of discrimination cases by national courts

In Serbia discrimination cases are not registered as such by national courts. Usually they are registered as labour disputes or bullying. These data are available to the public only if a decision is posted on the website of a particular court (they are put into a database for which a subscription is needed), or if someone requests the data under the Law on Free Access to Information of Public Importance.¹⁹⁶ However, even in this case, some decisions will not be included, due to being wrongly classified.

¹⁹⁵ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 8.

¹⁹⁶ Serbia, Law on Free Access to Information of Public Importance, *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009 i 36/2010, 5 November 2004.

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)

In Serbia associations, organisations and trade unions are entitled to act on behalf of victims of discrimination. Article 35, para. 3 of the LPD provides that a lawsuit may be initiated by an organisation engaged in the protection of human rights or the rights of a certain group of people, on behalf of and with the agreement of the individual whose rights have been violated. Trade unions can represent a member in a labour dispute, through a lawyer who has passed the bar exam (Article 85, para. 3 of the Civil Procedure Code).

The LPDPD does not provide the possibility for organisations to initiate a lawsuit.

The LPD requires that, if discriminatory treatment solely affects a particular individual, organisations may initiate a lawsuit only with their consent, given in writing. Otherwise, consent is not needed.

Standing does not depend on the number of years of operation of the organisation. It is only important to consult the statutes of each organisation and to demonstrate that it deals with human rights or the protection of certain vulnerable groups. Organisations can submit different claims stipulated in the LPD, except for pecuniary and non-pecuniary damages, because they initiate proceeding in order to protect an individual or group of people who are exposed to discriminatory acts, and in order to prove discrimination.

b) Engaging in support of victims of discrimination

In Serbia associations, organisations and trade unions are entitled to act in support of victims of discrimination. The right to intervention is not explicitly mentioned in the LPD, but it stems from Article 35, paras. 3 and 4 which grant standing to initiate lawsuits to organisations and to the Commissioner for Protection of Equality. These rights also derive from the Civil Procedure Code (Articles 215-217), which is *lex generalis* to the LPD, and accords the right to intervention in someone else's anti-discrimination lawsuit to those who have legal authority to initiate a lawsuit. Thus, Article 215, para. 1 states that, 'If an individual has a legal interest in assisting one of the parties in litigation, such an individual may join that party'. The individual who intervenes may become involved in the litigation at any time during the proceedings, until the judgment on the claim comes into effect, as well as during the proceedings for extraordinary legal remedy (Article 215, para. 2).

c) Actio popularis

In Serbia national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**). This right is not recognised in the LPD, but derives from the Law on Contract and Torts,¹⁹⁷ which in Article 156 establishes a duty to eliminate danger of injury or loss.

¹⁹⁷ The Law on Contract and Torts *Official Gazette of the SFRJ*, no. 29/78, 39/85, 45/89 - decision CCJ and 57/89, *Official Gazette of the SRJ*, no. 31/93 and *Official Gazette of the Republic of Serbia* SCG, no. 1/2003 - Constitutional Charter, 1 July 1978.

This provision means that everyone can demand that appropriate measures be taken to prevent damage to them or to an unspecified number of people. This is particularly applicable in discrimination cases.¹⁹⁸

Although the Commissioner for Protection of Equality is not allowed to initiate *actio popularis* under the LPD, they can initiate so-called *proto-action popularis* in a strategic case or, in other words, if a case demonstrates frequent and widespread discrimination in respect of which there are good prospects for success. It was previously unclear whether the Commissioner needs consent in the case of two or more victims of discrimination, as it is necessary in the case of one person. In September 2014, the Supreme Court of Cassation put an end to this debate and held that the Commissioner did not need written consent as the case affected a group of people – children of Roma origin.¹⁹⁹ In this case, the Commissioner initiated a lawsuit against a fast-food restaurant, because a security worker did not allow children of Roma origin to enter the restaurant with a woman who wanted to buy them food. The Supreme Court of Cassation noted that the complaint was not directed at the Commissioner's finding of discrimination against a particular individual, in which case the Commissioner would be required to obtain written consent to the filing of the lawsuit, but to establish the existence of discrimination against a group of people. However, in one case, the Court dismissed the claim as the case concerned three particular children and the NGO initiating the lawsuit didn't have their written consent.²⁰⁰

d) Class action

In Serbia national law does allow 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.²⁰¹

The Civil Procedure Code from 2011 introduced so-called organisational claims for the protection of collective rights and interests,²⁰² but in 2013, the Constitutional Court proclaimed the articles which regulate this procedure to be unconstitutional. As a consequence of this decision, on 23 June 2014, the third basic court in Belgrade rejected the first collective claim submitted by an association of bank clients on the issue of foreign currency loans in Swiss francs which covered 10 000 clients.²⁰³

The Law on Consumer Protection from 2014 regulates protection of the collective interests of consumers, but this protection has been moved from civil (as it was regulated in the Civil Procedure Code from 2011) to administrative procedure.

¹⁹⁸ Article 156 prescribes that anyone may demand from another to eliminate a source of danger threatening considerable damage to them or to an unspecified number of persons, as well as to refrain from an activity causing disturbance or risk of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures (para. 1). On the request of an interested person, the court shall order adequate measures to be taken to prevent the emergence of damage or disturbance, or to eliminate the source of risk – at the expense of the individual who is the source of the risk, should they fail to act accordingly (para. 2).

¹⁹⁹ See Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 128.

²⁰⁰ Higher court in Belgrade, no. 7 P 782/15, decision from 29 May 2015.

²⁰¹ For more on the collectivisation of legal remedies, see Babovic, B. (2012), 'Collectivisation of legal redress against discrimination', in *Pravni život*, vol. 11/2012, pp. 1013-1023.

²⁰² They were introduced for the protection of collective rights and interests and for the protection of consumers (Articles 495-505). Civil Procedure Code (*Zakon o parničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 72/2011, 49/2013 – CC decision, 74/2013 – CC decision, 55/2014, 28 September 2011.

²⁰³ See Efektiva, 'Kolektivna tužba odbačena kao nedozvoljena!?' ('Collective claim rejected as unadmitted?'), 8 July 2014, <http://efektiva.rs/aktuelnosti-krediti/kolektivna-tuzba-odbacena-kao-nedozvoljena>.

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

In Serbia national law requires a shift of the burden of proof from the complainant to the respondent.

The LPD prescribes a shift of the burden of proof in civil proceedings, unlike the LPDPD, which does not provide a rule on reversing the burden of proof from complainant to defendant in cases of discrimination based on disability.

Article 45, para. 1 of the LPD provides that, 'if the court establishes that a direct act of discrimination has been committed, or if that fact is undisputed by the parties to the lawsuit, the defendant may not be relieved of responsibility by supplying evidence that they are not guilty'. If the complainant proves the likelihood of the defendant's having committed an act of discrimination, the burden of providing evidence that no violation of the principle of equality or the principle of equal rights and obligations has occurred shall fall on the defendant (Article 45, para. 2).

The case-law still does not provide clear rules on the application of this principle. It also seems from the textual interpretation of the relevant articles that this rule applies only in cases of direct and indirect discrimination. However, it must be interpreted to mean that the rule on the burden of proof also applies to harassment.²⁰⁴

However, the rules on the burden of proof, despite being enshrined in the procedural part of the LPD, are not procedural in their nature, but substantive. As a consequence, the court decides whether particular conduct constitutes discrimination, and it is declared only in the explanation of the verdict. Thus, the defendant does not know if the complainant proved the likelihood of discrimination and if the burden of proof shifted to them.

This situation is further exacerbated by the fact that the Civil Procedure Code (which applies as *lex generalis*) imposes a duty to present all the facts necessary to justify its submission at the preparatory session or at the first hearing, to submit evidence, to take a stand on the allegations and evidence provided by the opposing party, as well as to propose a time frame for the implementation of the procedure (Article 308).

Amendments to the Labour Law, which entered into force in July 2014, introduced a new rule on the shift of the burden of proof from complainant to defendant if there is a likelihood that discrimination took place, including harassment (Article 23, para. 2).

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

In Serbia there are measures of protection against victimisation. Victimisation is enshrined in the LPD as a special form of discrimination.²⁰⁵ Article 9 says that, 'Discrimination shall exist if an individual or a group of persons is unwarrantedly treated worse than others are treated or would be treated, solely or predominantly on account of requesting or intending to request protection from discrimination, or due to having offered or intending to offer evidence of discriminatory treatment'. In other words, this law protects victims of discrimination, as well as people other than the complainant, such as witnesses and someone who helps the victim of discrimination to bring a complaint. However, there is still a lack of relevant case law on this matter, as well as judicial interpretation as to whether the reversal of the burden of proof applies to victimisation under the LPD. However, it is necessary to align the definition of victimisation in the LPD

²⁰⁴ See Petrusić, N., Krstić, I., Marinković, T. (2014), *Commentary on the Law on the Prohibition of Discrimination*, Commissioner for Protection of Equality, Judicial Academy, Belgrade, p. 188.

²⁰⁵ Victimisation is known as 'calling to account' in Serbian law.

with that given in the two EU directives from 2000, in order to provide protection against dismissal, and any other consequence that may arise as a reaction to the complaint.

In 2015, two complaints were submitted claiming protection from victimisation. In one case, a person claimed that he was moved to a lower paid job after his communication with the Commissioner. On the other hand, the employer explained that he replaced the complainant a month before he received the official letter from the Commissioner and that he didn't know about the complaint. However, during the procedure, the employer didn't offer any evidence that showed objective and justified reasons for this move. Therefore, the Commissioner requested the employer to eliminate the consequences of the discriminatory act.²⁰⁶ In another case, the mother of a Roma baby submitted a complaint against a police station as her application to register the residence of her daughter was rejected. After she communicated with the Commissioner, she was invited to the police station for an interview regarding the complaint. The Commissioner considered that this behaviour could be considered as 'calling to account' (victimisation) and requested a public apology for this discriminatory act, as well as for the child's residence to be registered, and the organisation of anti-discrimination training for police officers at that station.²⁰⁷

Victimisation is not protected by the LPDPD.

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

In Serbia there is a range of applicable sanctions in discrimination cases. Article 43, para. 4 of the LPD expressly allows compensation for material and non-material damage in discrimination cases.²⁰⁸ Article 43, para. 4 of the LPDPD also expressly provides for compensation of damages which occur due to a discriminatory act.²⁰⁹ The principles set out in the Law on Contract and Torts apply for determining the type of damage, and a causal link between the discriminatory act and the damage.

However, according to Article 43 of the LPD, the complainant may also demand the following:

- for a ban to be imposed on an action that poses the threat of discrimination, a ban on proceeding with a discriminatory action, or a ban on repeating a discriminatory action;
- that the court establish that the defendant has treated the complainant or another party in a discriminatory manner;
- for steps to be taken to redress the consequences of the discriminatory treatment; and
- that the decision passed be published.

²⁰⁶ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 139.

²⁰⁷ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *H.B. v. PS*, complaint no. 7-00-00518/2013-02, opinion from 17 March 2015.

²⁰⁸ If the complainant is the Commissioner for Protection of Equality, an organisation engaged in the protection of human rights or the rights of a certain group of people, or a person who deliberately exposed themselves to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case, compensation cannot be claimed.

²⁰⁹ According to Article 43 of the LPDPD, the complainant can request: (1) court prohibition of further discriminatory behaviour, (2) remedy actions to remove the consequences of discriminatory behaviour, (3) the court's confirmation that an action or behaviour is discriminatory, and (4) compensation for pecuniary and non-pecuniary damages incurred due to discriminatory behaviour.

In some cases, the court will order some of these measures, but will not award the compensation. It is very illustrative to mention that the Belgrade Higher Court rendered its first judgment pursuant to Article 11 of the LPD which prohibits hate speech in 2011. The case involved readers' comments against the LGBTI community in response to an article published on the website of a daily newspaper. The court found that the newspaper acted in a discriminatory manner against LGBTI people by allowing the posting of such comments. The court ordered the publication of the impugned comments on the website to be banned and ordered the newspaper to publish the entire judgment on it, but rejected compensation.

As discrimination cases are urgent, it is sometimes necessary to pass a temporary measure in order to prevent discriminatory treatment and victimisation, with a view to eliminating the risk of violence or major irreparable damage. Both anti-discrimination laws prescribe that the complainant may demand temporary measures, when initiating a lawsuit, in the course of the proceedings and after the termination of the proceedings, until the court decision is enforced. The request for the adoption of a temporary measure must prove the necessity of doing so in order to eliminate the risk of violence or irreparable damage. The court is obliged to issue its decision on a request for the adoption of a temporary measure immediately or within a very short period of time. The LPDPD stipulates 48 hours for a decision at the very latest, while the LPD prescribes three days.

The LPD (Articles 50-60) and the LPDPD (Articles 46-52) prescribe the fines which can be imposed in misdemeanour proceedings. In addition, other laws which contain anti-discrimination clauses also prescribe misdemeanours, such as the Labour Law and the Law on the Fundamentals of Education.

Finally, some acts can be considered to be criminal acts, for which it is possible to impose monetary fines or imprisonment.

b) Ceiling and amount of compensation

In Serbia there is no ceiling on the maximum amount of compensation that can be awarded, and the amount is subject to the judge's discretion. However, the average amount in the current jurisprudence cannot be deemed appropriate in comparison to the amount of compensation in some other areas. This particularly applies to compensation of non-pecuniary damages. For example, there have been several cases involving discrimination against people with disabilities and their carers on public transport, who experienced insults and harassment from bus drivers and passengers as they used special cards for free travel, to which they were entitled by law. In these cases, the court found that discrimination had taken place and ordered pecuniary damages, but with regard to non-pecuniary damages the court believed that it shouldn't award the amount requested or it awarded a token amount in comparison to other cases (e.g. insult).²¹⁰

Monetary fines for misdemeanours range from between RSD 10 000 and RSD 50 000 (EUR 80 to EUR 400) for individuals (Articles 50-60), to the sum of between RSD 10 000 and RSD 100 000 (EUR 80 to EUR 800) for legal entities (Articles 52-60), which cannot be considered to be dissuasive. The same can be said for the LPDPD, which in Articles 46 to 52 prescribes the same range of monetary fines. Despite the fact that anticipated fines are not very high, in practice, judges usually impose minimal fines. An illustrative example is a case of segregation of Roma children in a primary school. In this case, for several years Roma children attended separate classes in an old building, located in the

²¹⁰ See, for example, Supreme Court of Cassation, Rev. 3602/10, 16 December 2010; Supreme Court of Cassation, Rev. 66/12, February 2012.

same courtyard as the new building, where the other pupils learn.²¹¹ The judge imposed a fine of RSD 30 000 (EUR 250) on the school and RSD 5 000 (EUR 45) on the principal. In determining the amount and type of punishment, the court found as an aggravating circumstance the fact that it was an offence of a serious nature, while as a mitigating circumstance the court found that the principal was a father of three children, earning a middle-range income, and that the offence did not cause serious consequences, although the children were completely separated from their peers for several years.

For criminal acts, the following sanctions can be imposed:

- Violation of Article 128 (violation of equality) up to three years' imprisonment and for the more severe form three months' to five years' imprisonment;
- Violation of Article 129 (violation of the right to use a language or alphabet) monetary fine or up to one year of imprisonment);
- Violation of Article 317 (instigation or exacerbation of ethnic, racial and religious hatred or intolerance) from six months' to 10 years' imprisonment;
- Violation of Article 344a (instigation of ethnic, racial and religious or other hatred or intolerance by means of actions or slogans at sporting events or public gatherings) from three months' to 12 years' imprisonment;
- Violation of Article 387 (racial and other discrimination) from three months' to five years' imprisonment for the more severe form).

On 16 April 2015, an individual was assaulted by unknown persons who were shouting: 'Stop, you faggot!', 'Where are you going, faggot?' and similar. He was knocked down and kicked several times by attackers who continued to call him 'fagot', threatening to kill him. Criminal charges were initiated by the NGO YUCOM on 20 April, and the victim was questioned about the attack several days later. On 13 May, he was informed that his attackers had been identified and that criminal charges had been submitted under Article 344 for abusive behaviour. However, on 31 August he was again assaulted by unknown persons and those attackers were not identified. Surprisingly, on 3 November 2015, he was informed that the First basic public prosecutor's office had rejected the criminal charges on the basis of discontinuing the prosecution without further action, applying the principle of opportunity.²¹² This principle means that the public prosecutor assesses whether there is an actual and legal reason for initiating the procedure, and then decides whether prosecution is expedient in a particular case, bearing in mind what is in the public interest. On November 2015, YUCOM submitted a constitutional complaint to the Constitutional Court, claiming that the prosecutor didn't assess that the attack was motivated by hatred based on the presumed sexual orientation of the individual concerned, although Article 54a recognises behaviour motivated by hatred as a special aggravating circumstance. They also claimed that the behaviour of the prosecutor's office can be considered as discrimination, particularly bearing in mind that the LGBTI community is one of the most discriminated against groups in Serbia.

c) Assessment of the sanctions

Over recent years there has been an increase in the number of discrimination cases, but in practice there are several problems which affect the effectiveness of sanctions.

In anti-discrimination cases, it is important to establish an urgent procedure and to allow a quick remedy for people exposed to discrimination. Although Article 41, para. 2 of the LPD provides that the proceedings shall be conducted swiftly, in practice discrimination

²¹¹ See Court for Misdemeanours in Novi Pazar, Pr. br. 684/12-69, 13 September 2013; see also Court for Misdemeanours in Novi Pazar, Pr. br. 7 – 4162/ 13-67, 14 May 2014.

²¹² First basic Prosecutor's Office, KT no. 3017/15 and Keo 1247/15, 19 October 2015.

cases are not treated as urgent. It usually takes more than three years to receive a final decision, which influences the effectiveness of sanctions.

Another problem in discrimination cases lies in the application of the principle of shifting the burden of proof, which is prescribed in the LPD, but not in the LPDPD. It is very important to use the mechanism of shifting the burden of proof as otherwise it will be hard to prove discrimination and to apply an adequate sanction.

It has already been mentioned that sanctions imposed in discrimination cases are very mild, especially in relation to compensation for non-pecuniary damages. Another problem is the fact that the monetary fines which can be imposed are symbolic in comparison to the fines imposed in areas other than discrimination. In addition, in practice, judges for misdemeanours impose the lowest fines, even in very serious cases of discrimination. This shows that, despite the fact that knowledge among judges about the prohibition of discriminatory acts has increased, they are still not fully aware of the detrimental effect of discriminatory acts. On the other hand, both anti-discrimination laws provide different measures, from the prohibition of the discriminatory act, to compensation and the publication of the court decision, which has proved to be a very effective measure in Serbia. The same is indicated in the practice of the Commissioner for Protection of Equality, whose opinions are mostly respected, in order to prevent their publication.

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

In Serbia a 'specialised body' – the Commissioner for Protection of Equality – has been designated for the promotion of equal treatment irrespective of any ground, including racial or ethnic origin, in accordance with Article 13 of the Racial Equality Directive.

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

The Commissioner for Protection of Equality was established by the LPD as an independent, autonomous and specialised state body which has a wide mandate in the area of the promotion of equality and anti-discrimination in all spheres of society. The Commissioner is elected by the Parliament, acting upon a proposal submitted by the committee authorised to deal with constitutional matters (Article 28, para. 1). The Commissioner may not perform any other public or political function or any political activity, in accordance with the law (Article 28, para. 5). The Commissioner is elected for a period of five years and can be re-elected once (Article 29). According to Article 30, the Commissioner's function shall cease: upon the expiry of their mandate; if they submit a resignation notice in writing to the National Assembly; if they fulfil the conditions for retirement, in accordance with the law; if they are relieved of their duty, and in case of death. The decision to relieve the Commissioner of their duty shall be passed by the National Assembly.

The Commissioner shall be relieved of their duty:

- if they perform their work unprofessionally and negligently;
- if it is established, by an enforceable court decision, that the Commissioner has committed a criminal offence punishable by a prison sentence, when the nature of the offence makes them unworthy and unfit to perform the function of Commissioner;
- if they lose their citizenship and;
- if they perform another public function or professional activity, if they perform another duty or a job that could influence their independence, or if they act contrary to the law regulating conflict of interest when it comes to performing public functions.

The National Assembly shall pass a decision to relieve the Commissioner of their duty by a majority vote of the overall number of representatives of the people.

The Commissioner shall have the right to a salary equal to that of a judge of the High Court of Cassation, as well as the right to reimbursement of the expenses incurred in connection with performing their function. The Commissioner shall be entitled to the immunity enjoyed by representatives of the people in the National Assembly (Article 31). The Commissioner has an expert service to help them in performing the work they are authorised to do. They are also entitled to appoint three assistants. In addition, the Commissioner decides independently, in accordance with the law, on the employment of staff members for the expert service, on the basis of the need for the professional and efficient discharge of the work the Commissioner is authorised to do. The funds required for the work of the Commissioner, their assistants and the expert service is provided from the budget of the Republic of Serbia, acting on a proposal submitted by the Commissioner. The Commissioner's head office is in Belgrade and a regional office in Novi Pazar was opened in March 2014. However, according to the Report for 2015, this regional office didn't meet expectations as only a small number of citizens communicated

with the Commissioner and the number of complaints submitted in this part of Serbia is still insignificant.²¹³

Although the Law ensures the independence of the Commissioner for Protection of Equality, the attitude of the authorities towards the institution is better, but still unsatisfactory. The Office was opened in June 2011, in premises which were not adequate in terms of accessibility and technical and spatial capacity. The situation remains unchanged, although the number and range of activities of the Office have increased over time. This is why the Commissioner repeated in its reports that there is a need to improve the spatial capacity for the Commissioner's work.²¹⁴

At the end of 2015, the Commissioner finally received a decision on moving to other premises which meet the spatial and technical requirements.²¹⁵

c) Grounds covered by the designated body/bodies

The Commissioner is competent to deal with all grounds of discrimination enshrined in the LPD. Thus, it explicitly covers 'race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance and membership of political, trade union and other organisations', and all other grounds of discrimination not mentioned in Article 2, para. 1.

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

The Commissioner has a range of measures enshrined in Article 33 of the LPD, which can be divided into two groups: prevention of and protection from discrimination. From the point of view of victims of discrimination, the Commissioner's most relevant tasks are to receive and consider claims regarding discrimination, to provide an opinion and recommendations in concrete cases, to provide information to the complainant on their rights and the possibility of initiating a lawsuit or other type of protection measures and to file lawsuits for protection from discrimination on behalf of, but with the approval of, the individual who has experienced discrimination. Also, the Commissioner can initiate a misdemeanour notice against an act of discrimination.

The Commissioner also submits annual reports (Article 48) and special reports (Article 49) to the Parliament on the situation in the field of protection of equality; warns the public about the most frequent, typical and severe cases of discrimination; monitors the enforcement of laws and other regulations, initiates the adoption of or amendments to such regulations, and provides an opinion on the provisions of the law and other regulations for the purpose of implementing and developing protection against discrimination; establishes and maintains cooperation with bodies in charge of equality and human rights protection on the territories of the autonomous provinces and local authorities; and recommends equality measures to state bodies and institutions aimed at ensuring equality.

The Commissioner submits regular annual reports on the work done to the National Assembly in March each year. These reports contain an evaluation of the situation in Serbia concerning the protection of equality, and activities carried out by the Commissioner. In addition, the Commissioner can prepare and submit special reports on its own initiative, or upon the request of the National Assembly. These reports contain

²¹³ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 15.

²¹⁴ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 28.

²¹⁵ After the cut-off date of this report, in October 2016, the Commissioner finally moved to new premises.

analyses of the position of certain discriminated groups and recommendations for the improvement of that position by undertaking measures to combat discrimination more effectively.

The annual report for 2015 was submitted on time (on 15 March 2016)²¹⁶ and one special report on discrimination against women was prepared in May 2015.²¹⁷

e) Legal standing of the designated body/bodies

In Serbia the Commissioner is not entitled to initiate *ex officio* a complaint procedure in cases in which they have knowledge of discriminatory behaviour, unless the victim submits a claim.

On the other hand, the Commissioner has legal standing to initiate a discrimination lawsuit, under Article 46 of the LPD. The Commissioner decides in which cases they will initiate a lawsuit, taking into account whether it is a case of strategic litigation; in other words a case of frequent and widespread discrimination in respect of which there are good prospects for success (so far litigation has been initiated 13 times).²¹⁸ The litigation is initiated and conducted in the general public interest, in order to contribute to the consistent implementation of legislation and improvement of legal practice, to further encourage victims of discrimination to initiate anti-discrimination litigation, to uphold the rule of law and to contribute to the improvement of access to justice.

However, in order to initiate a lawsuit, the Commissioner needs the consent of the person who has experienced discrimination. In September 2014, the Supreme Court of Cassation held that the Commissioner does not need written consent if the case affects a group of people – children of Roma origin.²¹⁹ This decision is very important as the court noted that the complaint was not directed at the Commissioner's finding of discrimination against a particular individual, in which case the Commissioner would be required to obtain written consent to the filing of the lawsuit, but to establish the existence of discrimination against a group of people. However, in another case from 2015, the Appellate court from Belgrade rejected a complaint as the organisation didn't have the written consent of three Roma children who were allegedly discriminated against.²²⁰ The court explained that in this case all three children (siblings in one Roma family) were known, and that consent is only needed in a case of two or more unidentified persons.

The Commissioner can demand the following:

- for a ban to be imposed on an action that poses a threat of discrimination, a ban on proceeding with a discriminatory action, or a ban on repeating a discriminatory action;
- that the court should establish that the defendant has treated the complainant or another party in a discriminatory manner;
- for steps to be taken to redress the consequences of the discriminatory treatment;
- that the decision passed be published. The Commissioner cannot claim compensation for pecuniary and non-pecuniary damages, which can be demanded by victims of discrimination when they initiate a lawsuit on their own.

²¹⁶ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade.

²¹⁷ Commissioner for Protection of Equality (2015), *Special report of the Commissioner for Protection of Equality on Discrimination against Women*, Belgrade; text in Serbian available at <http://www.ravnopravnost.gov.rs/rs/извештаји/извештаји>, last accessed on 27 March 2016.

²¹⁸ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 171.

²¹⁹ See Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 128.

²²⁰ Appellate court in Belgrade, no.7 P. 782/15, decision from 29 May 2015.

The Commissioner for Protection of Equality can initiate a misdemeanour notice, as well as a criminal charge, but is not entitled to punish a discriminator with a fine directly.

f) Quasi-judicial competences

In Serbia the Commissioner is a quasi-judicial institution as it receives complaints and issues decisions on them.

This procedure before the Commissioner for Protection of Equality is a specific procedure, which has the characteristics of a special administrative procedure. Article 40, para. 4 of the LPD expressly stipulates that the procedure before the Commissioner shall be conducted pursuant to provisions of the Law on General Administrative Procedure.²²¹ The procedure for submitting a complaint is regulated in Articles 35 to 40. A complaint must be delivered within 15 days from its submission to the alleged perpetrator of the violation who has 15 days to respond to it. The Commissioner must give an opinion on whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint, and must inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a violation, they will issue a recommendation to the individual against whom the complaint was submitted, suggesting a means of redressing the violation in question. Although this decision is called a recommendation in the Law, it is obligatory. Thus, the individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of the day of receiving it. The individual must inform the Commissioner of the measures taken. However, if the perpetrator fails to redress the violation in question within 30 days, the Commissioner may inform the public in the press and online (Article 40, para. 2 of the LPD).

g) Registration by the body/bodies of complaints and decisions

In Serbia the Commissioner registers the number of complaints and decisions by ground and field. These data are available to the public online, in regular annual and special reports, as well as in particular publications issued by the Commissioner. For example, in 2015, the Commissioner received 797 complaints. In respect of 243 complaints, the personal characteristic was not mentioned. In 554 complaints the personal characteristic invoked was as follows: 143 (22.1 %) – sex; 119 complaints (18.4 %) – ethnic origin; 73 complaints (11.3 %) – disability; 61 complaints (9.4 %) – age; 35 complaints (5.4 %) – religious beliefs; 31 complaints (4.8 %) – sexual orientation; 24 complaints (3.7 %) – family status; 23 complaints (3.5 %) – health status; 21 complaints (3.2 %) – membership of political and trade unions; 21 complaints (3.2 %) – gender identity; 17 complaints (2.6 %) – citizenship; 12 complaints (1.8 %) – property status; two complaints (0.3 %) – for colour, appearance, language, conviction and race; and one complaint (0.1 %) – genetic features.²²²

With regard to the areas where discrimination occurs, the number of complaints was as follows: employment (289 complaints or 36.2 %); public authorities (185 complaints or 23.2 %); access to public services and facilities (66 complaints or 8.3 %); media (53 complaints or 6.6 %); education (39 complaints or 4.9 %); public sphere (29 complaints or 3.6 %); healthcare (18 complaints or 2.3 %); housing (13 complaints or 1.65 %); private relations (12 complaints or 1.5 %); social protection (12 complaints or 1.5 %); pension (11 complaints or 1.4 %); collective minority rights (nine complaints or 1.1 %); functioning of trade unions and other organisations (seven complaints or 0.9 %); culture, art and sport (seven complaints or 0.9 %); judiciary (three complaints or 0.4 %),

²²¹ Serbia, Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, no. 33/1997, 31/2001, 30/2010, 25 July 1997.

²²² Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 253.

property rights (two complaints or 0.2 %); and other areas (two complaints or 0.2 %).²²³ The Report contains some other data, such as the number of male/female applicants; and who submitted complaints (individuals / organisations / legal entities / state institutions / groups / individuals).

h) Roma and Travellers

The Commissioner recognises that Roma are among the most discriminated against groups in Serbia, which is highlighted in all the regular annual reports. Every year on April 8, International Romani Day, the Commissioner issues a press release drawing attention to the fact that the situation of the Roma minority is still poor and that Roma are the most discriminated against group in Serbia. The Commissioner noted in its report for 2015 that Roma are frequently exposed to open and widespread hate speech, while discrimination against this national minority is very present in the areas of education, employment, healthcare and housing.²²⁴ Some statistics demonstrate that only 6 % of children age 3-4 are included in preschool programmes, 69 % attend primary school, and just 22 % secondary school. For the past five years, a great number of complaints concerns alleged discrimination against Roma. All strategic litigations, initiated in 2014, concern discrimination against Roma, as well as criminal charges for inciting ethnic hatred against Roma. Therefore, the Commissioner concludes that it is necessary to engage all social actors to improve the position of Roma and combat discrimination against them.

In its 2014 annual report, the Commissioner urged work to start immediately on the adoption of a new national strategy for the improvement of the situation of Roma, as the strategy adopted in 2005 expires in 2015.²²⁵ During 2015, an inter-sector and expert working group was established for the preparation of the new Strategy for social inclusion of Roma in the Republic of Serbia for the period 2015 to 2025. Public debate was initiated in November and was completed in December 2015.²²⁶ The aim of this strategic document is to create conditions for the social inclusion of Roma, to reduce poverty among them and to eliminate discrimination against them. It outlines five main areas: education, housing, health, employment and social protection. The Strategy is directed towards the establishment of mechanisms for the implementation, planning, monitoring and improvement of measures and activities; the development of the capacities of local authorities to efficiently provide protection to Roma; safeguarding adequate funds; and securing the inclusion of Roma representatives in planning and implementation of strategic measures.

The Commissioner also recommends work to be intensified on the implementation of measures established by national, provincial and local strategic documents and action plans, with the aim of achieving the full equality of deprived, vulnerable and marginalised social groups, primarily Roma.²²⁷

²²³ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, pp. 257.

²²⁴ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 101.

²²⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade. 16.

²²⁶ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 62.

²²⁷ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 249.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- Legal protection against discrimination

In relation to dissemination of information about legal protection against discrimination, the Commissioner for Protection of Equality publishes brochures and handbooks for different professionals and the wider public in order to inform them about discrimination and to explain the available remedies if discrimination takes place. It actively works on the visibility of the institution, appears in the media and organises a moot court for law students. In 2015, a third competition was organised in partnership with the Judicial Academy and the Open Society Foundation and supported by USAID. The competition was open to law students from undergraduate and master programmes. In total, 27 teams applied for the competition (75 students), that is 40 % higher than in 2014.²²⁸ The competition was held in the building of the Administrative court in Belgrade, and the topic was religious discrimination.

The Commissioner has the authority to recommend to public authorities measures for achieving equality. Recommendations can be directed towards ensuring that public authorities take measures to prevent and eliminate institutional discrimination and improve the functioning of the institutions, as well as to undertake positive measures in order to provide full equality, protection and advancement of people or groups who are in an unequal position compared to other citizens. In 2015, the Commissioner issued 215 recommendations.²²⁹

- Measures to encourage dialogue with NGOs

The Commissioner for Protection of Equality cooperates with international organisations and international and national NGOs. They are very important partners in advising about complex discrimination cases, in being important partners in joint activities, in providing important information about discrimination cases and for situation testing. In 2015, many meetings were organised with different organisations, and the Commissioner participated in several seminars, round tables and conferences organised by NGOs. In addition, in 2015, NGOs submitted 101 complaints, showing that they are the most valuable partners of the Commissioner.²³⁰

- Measures to promote dialogue between social partners

In order to promote dialogue between social partners, the Commissioner for Protection of Equality organises conferences, round tables, presentations and lectures on different issues. It also takes part in different training courses. The Commissioner's Office advises people about their rights and refers them to other institutions, if it finds that it is not a discrimination case.

On 16 November 2015, the Commissioner organised an annual conference, bringing together all relevant partners and presenting its practice and the challenges in its

²²⁸ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 237.

²²⁹ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 251.

²³⁰ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 55.

work.²³¹ This event was broadcast, giving the opportunity to all citizens in Serbia to be informed about the efforts of all social partners to combat discrimination in Serbia.

The Office for Human and Minority Rights (*Kancelarija za ljudska i manjinska prava*) also undertakes a lot of activities in relation to discrimination. The Action Plan for the implementation of the Strategy for the Prevention of and Protection from Discrimination was adopted on 3 October 2014 and its implementation began in 2015. The Strategy and the Action Plan are the results of consultations with the relevant NGOs and social partners.

- The situation of Roma and Travellers

The Commissioner for Protection of Equality deals with cases of discrimination against Roma and issues public announcements on their situation. In addition, the Ombudsman deals with some cases of discrimination against Roma within its jurisdiction, especially in relation to cases of forced eviction. Furthermore, the Roma community also has a National Council for the Roma National Minority, established under the Law on National Councils of National Minorities.²³² It is an elected body which has the exclusive right to manage issues of education, official use of language and public information for Roma. In addition, a Council of National Minorities of the Republic of Serbia was established with the aim of preserving, improving and protecting the national, ethnic, religious, linguistic and cultural characteristics of national minorities, including Roma.²³³ Among other things, the Council monitors the implementation of cooperation between national councils and the competent authorities of the Republic of Serbia, autonomous provinces and municipalities.

The Office for Human and Minority Rights of the Government of Serbia has a section for national minorities, which includes the Group for the Advancement of Roma and Assistance for Migrants. This body has a duty to undertake activities related to coordination and cooperation with relevant ministries in order to initiate, prepare and realise operational measures for the implementation of the Strategy and Action Plan for the Advancement of the Situation of Roma; to cooperate with local government with the aim of implementing local action plans; as well as the implementation and supervision of the Decade of Roma Inclusion for the period 2005-2015. The Government adopted a Decision on the Establishment of the Council for the Improvement of the Situation of Roma and the Implementation of the Roma Decade.²³⁴ The Council receives administrative and technical support from the Office for Human and Minority Rights. Its role is to prepare proposals for the building of a comprehensive and coherent policy to improve the situation of the Roma population and the implementation of the Decade of Roma Inclusion; to give opinions on the planned budgetary resources; and to provide opinions and expert explanations for the realisation of important social indicators, etc.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

²³¹ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 235.

²³² Serbia, Law on National Councils of National Minorities (*Zakon o nacionalnim savetima nacionalnih manjina*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 20/2014 - decision CC, 55/2014, 3 September 2009.

²³³ Decision on the Establishment of the Council for National Minorities (*Odluka o obrazovanju Saveta za nacionalne manjine*), *Official Gazette of the Republic of Serbia*, no. 50/2009, 10 July 2009.

²³⁴ Decision on the Establishment of the Council for the Improvement of the Situation of Roma and the Implementation of the Roma Decade (*Odluka o obrazovanju Saveta za unapređenje položaja Roma i sprovođenje Dekade uključivanja Roma*), *Official Gazette of the Republic of Serbia*, no. 24/2008, 7 March 2008.

In Serbia there are no mechanisms to ensure that contracts, collective agreements, internal rules of companies and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment. However, if there is a claim that a certain rule is in contravention with the Constitution and the LPD, proposals for an assessment of its constitutionality and legality can be submitted to the Constitutional Court of Serbia. In addition, the general principles of the national system pertain, such as, '*lex specialis derogat legi generali*' (special rules prevail over general rules) and '*lex posteriori derogat legi priori*' (more recent rules prevail over less recent rules).

b) Rules contrary to the principle of equality

In Serbia there are some laws, regulations or rules which are contrary to the principle of equality. In order to identify all of them, specific research needs to be undertaken on this issue. The problem is that members of working groups established for the adoption of certain laws do not usually have enough expertise in anti-discrimination law. Furthermore, there are some laws which were adopted before the LPD was adopted in 2009.

It is very important for the Commissioner for Protection of Equality to provide opinions on draft laws and other regulations and to initiate the introduction of new laws and other regulations, as well as adopting amendments to existing ones. In 2014, the Commissioner issued two opinions related to draft laws and other acts and submitted three proposals for the assessment of the constitutionality and legality of general legal acts to the Constitutional Court of Serbia,²³⁵ compared to 17 opinions and one proposal for the assessment of constitutionality in 2015.²³⁶

²³⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 50.

²³⁶ Commissioner for Protection of Equality (2016), *Regular annual report of the Commissioner for Protection of Equality for 2015*, Belgrade, p. 251.

9 COORDINATION AT NATIONAL LEVEL

The Office for Human and Minority Rights, established in August 2012, provides expert services to the Government and relevant ministries related to the protection and promotion of human and minority rights; monitors the compliance of national legislation with international treaties and other international acts on human and minority rights; makes initiatives to amend national legislation; deals with general issues relating to the status of people belonging to national minorities; monitors the status of people belonging to national minorities living in the territory of the Republic of Serbia; and monitors the exercise of minority rights.

The Government adopted the Strategy for the Prevention of and Protection from Discrimination on 27 June 2013 and the associated Action Plan in 2 October 2014. The Strategy was presented as a system of public policy measures and instruments which Serbia needs to implement with the aim of reducing all forms and types of discrimination. It has been adopted for the period 2013-2018 and is aimed at preventing discrimination and improving the situation of nine vulnerable groups (women; children; people with disabilities; senior citizens; LGBTI people; national minorities; refugees, internally displaced persons and other vulnerable migrants; people whose health condition may be the grounds for discrimination; and members of religious communities) who are most often exposed to discrimination.

The Commissioner for Protection of Equality, the Office for Human and Minority Rights and the Council for National Minorities are involved in the implementation of the Strategy. The Action Plan for the implementation of the Strategy was adopted for the period 2014-2018. The framework for the implementation of strategic objectives is set out in the Action Plan, which should enable the realisation of the objectives and measures established by the Strategy and systematic monitoring of their implementation. The Action Plan envisages specific measures and actions necessary for the realisation of strategic objectives, deadlines, responsible entities and resources for implementation. It also defines the indicators of the fulfilment of activities, based on which monitoring of the extent of their implementation will be conducted, as well as indicators for evaluating the objectives and the resources necessary for the achievement of established measures.

10 CURRENT BEST PRACTICES

The work of the Commissioner for Protection of Equality during its six-year mandate must be evaluated as successful, despite technical and spatial constraints. In May 2015, Brankica Jankovic, a new Commissioner for Protection of Equality was elected, and she immediately continued to perform all the duties of her predecessor. In 2015, the Commissioner received 797 complaints, and issued opinions in 215 cases, provided 17 opinions on draft laws and general acts and initiated a criminal charge, as well as misdemeanour charge, nine warnings and 35 announcements. The Commissioner organised many training sessions and round tables, issued numerous handbooks and guides and contributed to awareness-raising about discrimination and the legal framework for protection against discrimination.

The second Gay Pride event and the first Trans Pride were organised on 20 September 2015, peacefully and without any incidents.

Bearing in mind that specialisation among judges is needed, as well as enhanced capacity and sensitivity to deal with complex issues, training for trainers on anti-discrimination at the Judicial Academy was introduced at the end of 2015, with the support of the OSCE Mission in Serbia. The training programme has three main objectives: 1) to increase knowledge in the field of non-discrimination, including the national legal framework and applicable international law among judges; 2) to harmonise court practice in this area of law by enabling judges from different courts to specialise and become recognised authorities in this field, ; and 3) to have the possibility in the *follow-up* activities to exchange ideas and discuss controversial legal issues with other judges from the higher and appellate courts.

The Commissioner for Protection of Equality continued the successful cooperation with the Office of the Council of Europe in Belgrade, as the coordinator of their joint project, *'Don't judge a book by its cover – Living Library in Serbia'*. The aim of this project is to lessen the effect of negative stereotypes and prejudice as key causes of discrimination. The project is supported by the Ministry of Youth and Sport of the Republic of Serbia. National training for the organisers of Living Library was held in Sremski Karlovci for members of 19 organisations, with the aim of strengthening a new generation of organisers of Living Libraries in Serbia who would join the existing network. Living Library was present for the fourth time at the Education Fair Zvonce, part of the Book Fair in Belgrade. Living Library held 787 'readings', compared to 2014 when it had 287 'readings'. Another Living Library was organised in December 2015 in Novi Sad, with 171 'readings'.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

In Serbia national legislation is mainly in accordance with the two EU anti-discrimination directives from 2000. However, there are some inconsistencies and ambiguities that require further judicial interpretation or changes to the existing legislation.

- The definition of discrimination

Associative discrimination is recognised in the LPD, but its application is limited only to 'members of families' and people close to those being discriminated against.

The definition of direct discrimination is in line with the definition in the EU directives. However, it is limited to less favourable treatment and does not cover detriment.

The definition of indirect discrimination doesn't include the conditional wording 'would' and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge apparently neutral provisions before they incur disadvantages for actual victims.

Furthermore, instruction to discriminate is not defined in the LPD and should be included in the law.

- Proving discrimination

The LPD does not expressly state that situation testing can be used as evidence in court. Many questions derive from unclear regulation, such as who the tester is; whether they have a particular relationship with the individual who reported the discrimination; whether they have been discriminated against previously; whether they have any basic knowledge about the testing process; and whether they operate alone. In addition, there is the question of whether their primary objective is evidence gathering for another party or to initiate a lawsuit, which includes notification of and reporting to the Commissioner; and the role of the Commissioner in this regard.

The LPD does not contain any specific rule in relation to statistics. The case-law is still developing and it is not clear how the courts will treat statistical evidence.

- Material scope

The LPD does not cover occupational pensions, social advantages and self-employment and it is unclear whether it covers social protection and housing. Although certain other laws regulate some of these issues, such as self-employment or housing, these provisions should be included in the LPD.

The LPD mentions only access to services and not expressly access to goods.

The LPD should recognise segregation as an aggravated form of discrimination.

- Exceptions from discrimination

The LPD should be amended to include provisions on reasonable accommodation for persons with disabilities.

National law does not provide for an exception for employers with an ethos based on religion or belief, but there is a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow.

Furthermore, the LPD does not explicitly provide an exception for direct discrimination on the ground of age and further judicial interpretation is required, especially on the application of the proportionality test.

- Remedies, enforcement and sanctions

Although there is a range of different sanctions which can be imposed in discrimination cases, some problems which exist in practice, such as delay in the proceedings and mild sanctions, influence the effectiveness and proportionality of sanctions.

Victimisation is recognised in the LPD, but it has to be further aligned with EU law, as it does not expressly protect people from dismissal.

The LPDPD does not provide protection from victimisation. In addition, the LPDPD does not contain a provision on the reversal of the burden of proof, although the LPD does include this concept.

Finally, class action is not permitted by national law in discrimination cases.

11.2 Other issues of concern

The main issue of concern is the lack of relevant anti-discrimination knowledge among prosecutors and judges. Although several training sessions have been organised, this is still not enough and the current situation requires the implementation of different measures: the introduction of an obligatory anti-discrimination course at university level, workshops on anti-discrimination during initial training at the Judicial Academy, as well as mandatory seminars for the regular continuing professional development for judges from different jurisdictions. Of particular importance is the organisation of training in relevant international and European standards in this area of law, including workshops on prejudices and stereotypes.

Another issue is the very low sanctions policy for discriminatory acts, which shows that judges are still not aware of the very detrimental effects of discrimination. It is also important to provide training on the shift of the burden of proof, as this concept is not applied in practice and is limited to some legal solutions contained in the Civil Procedure Code.

Finally, it is necessary to enhance the statistical parameters and database for monitoring court proceedings concerning discrimination cases.

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

Two very important laws were adopted in 2015. The Law on the Use of Guide Dogs,²³⁷ was adopted in March 2015, with the aim of enabling people with disabilities to move around using guide dogs on public transport and in all public buildings, as well as in work places. This Law is primarily aimed at the 12 000 citizens who have severe visual impairments, 9 000 citizens who are completely blind and 3 000 citizens who have impaired vision,²³⁸ but is not limited only to Serbian nationals. In addition, the Law on the Use of Sign Language²³⁹ was adopted in April 2015 and regulates the use of sign language in political, educational, employment and other areas of social life. The purpose of this Law is to enable the full inclusion of deaf people in society and the right to use sign language in various procedures in relation to public services, in education, employment and all other areas.

12.2 Case law

Cases which relate to discrimination against Roma

Name of the court: Appellate Court in Belgrade

Date of decision: 1 July 2015

Name of the parties: CPE v. Nicefoods restaurants DOO Belgrade

Reference number: P. 103/15

Address of the webpage:

Brief summary: A lawsuit was brought against the fast food restaurant, MD, due to the fact that a member of its security staff did not allow three Roma children to enter the restaurant in the company of a woman who wanted to buy them food. The first-instance court, in a decision dated 30 October 2012, rejected the lawsuit due to the fact that the plaintiff did not have the agreement of the persons claimed to have been directly discriminated against.²⁴⁰ On 19 December 2012, the Commissioner for Protection of Equality lodged a complaint against the decision of the first-instance court, and the High Court in Belgrade rejected the complaint.²⁴¹ The Court of Cassation reversed these decisions,²⁴² and returned the case for retrial. However, the High Court in Belgrade declared its incompetence in this case, and referred the case to the basic court.²⁴³ The higher court reasoned that it has jurisdiction to decide cases on bullying and discrimination in the workforce, while for all other cases it is the basic court which has jurisdiction here. However, the Appellate Court opined that it is illogical that the higher court should try only workforce discrimination cases, and decided that the higher court should decide the case.

Name of the court: Appellate Court in Belgrade

Date of decision: 9 April 2015

Name of the parties: CPE v. company Alka

²³⁷ Serbia, Law on the Use of Guide Dogs, *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015.

²³⁸ Social Inclusion and Poverty Reduction Unit, Law on the Use of Guide Dogs, adopted 25 March 2015, available at <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/>, last accessed on 27 March 2016.

²³⁹ Serbia, Law on the Use of Sign Language, *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015.

²⁴⁰ First Basic Court in Belgrade, no. P. 1604172012, 30 October 2012.

²⁴¹ Higher court in Smederevo, no. G. 840/13, 2 October 2013.

²⁴² Supreme Court of Cassation, no. Rev. 853/2014, 19 November 2014.

²⁴³ Higher court in Belgrade, no. P. 998/14, 16 March 2015. In the amendments to the Law on the Organisation of the Courts of Serbia, the application of which started in January 2014, the authority for decisions on anti-discrimination court procedures was transferred from the basic courts to the higher courts.

Reference number: GŽ. br. 1394/15

Address of the webpage: N/A

Brief summary: A lawsuit was filed against a real estate agency, after situation testing for discrimination was carried out by an NGO dealing with the protection of the rights of the Roma national minority. On the basis of the report on situation testing, it was established that the agency refused to provide services and offer an apartment to a volunteer discrimination tester who was a member of the Roma national minority and who wanted to rent an apartment. He was denied the service with the explanation that the agency 'had no apartments matching his request'. One hour later, the situational testing monitor – a young man who was not a member of the Roma national minority – went to the agency and said he wanted to rent an apartment under the same conditions as the volunteer discrimination tester. He was provided with the service. The lawsuit was initiated by the CPE. However, the High Court in Belgrade decided to refer the case to the Commercial Court, as the defendant was in the process of liquidation.²⁴⁴ However, the Appellate Court rejected this decision and reasoned that this was not a commercial dispute, but a dispute for a lawsuit in anti-discrimination proceedings. Finally, on 17 November 2015 the High Court in Belgrade suspended the proceeding, as the defendant was removed from the list of companies in the register.

Name of the court: Appellate Court in Belgrade

Date of decision: 13 November 2015

Name of the parties: Praxis v. D.S., director of a primary school

Reference number: GŽ. 3840/15

Address of the webpage: N/A

Brief summary: In this case a lawsuit was initiated by the NGO Praxis, which deals with human rights. The organisation claimed that a Roma family with three children was discriminated against, as the principal of the school refused to enrol one child, although two of the child's siblings were enrolled in the school. Praxis claimed that the principal stated that the parents would have to wait with the third child, as the school already had a lot of Roma children, and that she knew that the parents would go to another school where they could enrol all three children. However, the High Court in Belgrade rejected the claim, as Praxis did not have consent for the claim.²⁴⁵ The court reasoned that all three children belong to the same family and that they were known by name. Thus, the act did not relate to indefinite, unknown persons – children of Roma nationality in general – in which case consent would not be needed. The Appellate Court reaffirmed this decision.

Name of the court: High Court in Belgrade

Date of decision: 7 September 2015

Name of the parties: CPE v. V. bank

Reference number: 4 P 346/2014

Address of the webpage: N/A

Brief summary: At the end of 2014, the CPE initiated a lawsuit against a bank for refusing to open an account for a Roma person. The evidence for discrimination was obtained in situation testing, conducted by the NGO dealing with human rights. The testing showed that the bank refused to open an account for a Roma woman, but provided this service to a tester, who came two hours later to the same bank official. The High Court in Belgrade rejected the claim as unfounded. The CPE submitted a complaint and the proceeding is ongoing, before the Appellate Court in Belgrade. The court took into account that the bank official was rewarded for good performance, and stated that it doubts whether the Roma client clearly explained what kind of service she actually needed.

²⁴⁴ Higher Court in Belgrade, no. 3 P. 345/14, 4 March 2015.

²⁴⁵ Higher Court in Belgrade, no. P. 78215, 29 May 2015.

Name of the court: High Court in Belgrade

Date of decision: 22 October 2015

Name of the parties: CPE v. I. C.

Reference number: I. P. br. 519/2014

Address of the webpage: N/A

Brief summary: The CPE initiated a lawsuit against an employer for discrimination against Roma. Namely, an advertisement for the position of raspberry harvester was posted on a website and a Roma woman sent an email stating that she and her husband were interested in this job since they already had some experience in harvesting raspberries. She also requested information on working conditions and wages for the job. She received a reply on the same day and together with the requested information she received two documents, entitled 'Contract' and 'Notes'. The document titled 'Notes' contained information on what clothes to bring to the farm, as well as the necessary documents, such as ID and health cards. However, it also included the following remark: 'People of Roma nationality cannot be employed because of quarrels with employees of other nationalities and possible consequences that can occur in the accommodation provided by the employer'.

The employer claimed that he and his parents had already employed several Roma, that he did not have prejudices towards them, that he had Roma friends and that he was not denying their employment rights. However, he also claimed that the remark related to the accommodation provided and that the majority of employees have prejudices towards Roma which had caused some problems and conflicts among employees in previous years. These conflicts related to the majority of them not wanting to sleep in the same room with Roma, but the employer couldn't ensure separate rooms for them. He also stated that in 2014 among 25 employees, one Roma man was hired as a raspberry harvester. That Roma employee testified that the employer employed him without any problems and that some other Roma employees were engaged as well, but since those other Roma had lighter skin, the employer probably didn't know that they were of Roma origin.

The CPE demanded, aside from the lawsuit, that the court set a temporary measure so as to remove the 'Notes' document from the public domain. The court ordered an interim measure and requested the employer to withdraw the discriminatory document.²⁴⁶

The court relied on several provisions of the LPD: Article 2, para. 1 (1) which defines discrimination; Article 6 which prohibits direct discrimination; Article 16, para. 1 which prohibits discrimination in employment; as well as Article 24 which prohibits discrimination of national minorities. It also took into account Article 14 of the European Convention on Human Rights which prohibits discrimination. The Court also relied on two Constitutional provisions: Article 21 which prohibits discrimination, and Article 76 para. 2, which prohibits discrimination of national minorities. The court found direct discrimination based on national affiliation, and underlined that discrimination offends dignity, honour, reputation and personal integrity.

Name of the court: High Court in Belgrade

Date of decision: 8 June 2015

Name of the parties: CPE v. M. V.

Reference number: 8 P. br. 577/14

Address of the webpage: N/A

Brief summary: The CPE initiated a lawsuit against the president of the municipality of Sirča, because he made the following statement on 17 July 2014: 'Sirča is going through an extremely hard period. No earthquake or flood degraded Sirča as much as the immigration of Roma people from Kosovo did. We are not racists but we cannot live with

²⁴⁶ Appellate Court in Belgrade, no. P. 519/14, 1 September 2014.

them because it ruins our peace. The inhabitants of Sirča used to run to the hills in times of Turkish invasion, to Trgovište, and it seems that we will have to do the same now. We cannot mix with them'. Many media in Serbia reported on this statement and the Commissioner claimed that the speech represents a severe form of direct discrimination against members of the Roma national minority. The High Court in Belgrade found that the president of the municipality committed an aggravated form of discrimination against the Roma population in the form of incitement of racial hatred, as prescribed in Article 13, para. 1, sec. 1 of the LPD.²⁴⁷

²⁴⁷ In this case, Article 13, para. 1, sec. 1 of the LPD was invoked as the Commissioner did not initiate a criminal, but a civil procedure.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Country: Serbia

Date: 31 December 2015

| | |
|--|---|
| Title of legislation (including amending legislation) | Title of the law: The Law on the Prohibition of Discrimination Abbreviation: LPD Date of adoption: 26 March 2009 Latest amendments: N/A Entry into force: 7 April 2009 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: explicitly race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations It is an open clause |
| | Civil law |
| | Material scope: all areas of public life |
| | Principal content: prohibition of direct and indirect discrimination, violation of the principle of equal rights and obligations, calling to account ²⁴⁸ associating for the purpose of exercising discrimination, hate speech and disturbing and humiliating treatment |
| | |
| Title of legislation (including amending legislation) | Title of the law: The Gender Equality Act Abbreviation: GEA Date of adoption: 11 December 2009 Latest amendments: N/A Entry into force: 25 December 2009 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: gender |
| | Civil law |
| | Material scope: all areas of public and private life |
| | Principal content: direct and indirect discrimination, harassment, sexual harassment |
| Title of legislation (including amending legislation) | Title of the law: The Law on the Prevention of Discrimination against Persons with Disabilities Abbreviation: LPDPD Date of adoption: 17 April 2006 Latest amendments: N/A Entry into force: 1 January 2007 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: disability |
| | Civil law |
| | Material scope: all areas of public life |
| | Principal content: direct and indirect discrimination, violation of the principle of equal rights and obligations, humiliating treatment |
| Title of legislation (including amending legislation) | Title of the law: The Law on the Professional Rehabilitation and Employment of Persons with Disabilities Abbreviation: LPREPD |

²⁴⁸ Victimisation is known as 'calling to account' in Serbian law.

| | |
|--|--|
| amending legislation) | Date of adoption: 13 May 2009 Latest amendments: 16 April 2013 Entry into force: 15 May 2009 (Article 24 and 29 on 24 May 2010) Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: disability |
| | Civil law |
| | Material scope: employment |
| | Principal content: affirmation of equal opportunities |
| Title of legislation (including amending legislation) | Title of the law: The Law on the Protection of Rights and Freedoms of National Minorities Abbreviation: LPRFNM Date of adoption: 27 February 2002 Latest amendments: 6 November 2013 Entry into force: 7 March 2002 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: national, ethnical, racial and language |
| | Civil law |
| | Material scope: education, use of language, information, culture, participation in public affairs |
| | Principal content: prohibition of discrimination, affirmative actions |
| Title of legislation (including amending legislation) | Title of the law: The Labour Law Abbreviation: LL Date of adoption: 15 March 2005 Latest amendments: 21 July 2014 Entry into force: 23 March 2005 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: gender, birth, language, race, skin colour, age, pregnancy, health condition, invalidity, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial capacity, membership in political, labour union or other organizations It is an open clause |
| | Civil/administrative law |
| | Material scope: employment |
| | Principal content: direct and indirect discrimination |
| Title of legislation (including amending legislation) | Title of the law: The Law on Fundamentals of the Education Abbreviation: LFE Date of adoption: 31 August 2009 Latest amendments: 13 August 2015 Entry into force: 11 September 2009 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: racial, national, ethnic, linguistic, religious background or gender, physical and psychological characteristics, developmental impairments and disabilities, health condition, age, social and cultural origin, financial status or political views |
| | Civil/administrative law |
| | Material scope: education |
| | Principal content: direct and indirect discrimination |
| Title of legislation (including amending) | Title of the law: Criminal Code Abbreviation: CC Date of adoption: 6 October 2005 Latest amendments: 10 October 2014 |

| | |
|---------------------|---|
| legislation) | Entry into force: 14 November 2005 Web link: http://www.paragraf.rs/propisi/krivicni_zakonik.html Grounds covered: race, colour, religion, nationality, ethnicity or any other personal characteristic |
| | Criminal law |
| | Material scope: all indicated areas employment, access to goods or services (including housing), social protection, social advantages, education if the act is enough serious to be considered as criminal act |
| | Principal content: direct and indirect discrimination |

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Serbia

Date: 31 December 2015

| Instrument | Date of signature (if not signed please indicate) Dd/mm/yyyy | Date of ratification (if not ratified please indicate) Dd/mm/yyyy | Derogation s/ reservation s relevant to equality and non- discrimination | Right of individual petition accepted? | Can this instrument be directly relied upon in domestic courts by individuals? |
|---|---|--|--|---|---|
| European Convention on Human Rights (ECHR) | 3.4.2003 | 3.3.2004 | N/A | Yes | Yes |
| Protocol 12, ECHR | 3.4.2003 | 3./3.2004 entered into force 1.4.2005 | N/A | Yes | Yes |
| Revised European Social Charter | 22.3.2005 | 14.9.2009 entered into force 1.11.2009 | declaration: Among 98 paragraphs, it did not accepted 10: (2.4; 10.5; 19.11; 19.12; 27.1; 27.2; 27.3; 31.1.; 31.2; 31.3) | Ratified collective complaints protocol? No | Yes |
| International Covenant on Civil and Political Rights | | 12.3.2001 (succession) | No | Yes | Yes |
| Framework Convention for the Protection of National Minorities | | 11.5.2001 (accession) entered into force 1.9.2001 | | | Yes |
| International Covenant on Economic, Social and Cultural Rights | | 12.3.2001 (succession) | No | No | Yes |
| Convention on the Elimination of All Forms of Racial Discrimination | | 12.3.2001 (succession) | No | Yes | Yes |

| Instrument | Date of signature (if not signed please indicate) Dd/mm/yyyy | Date of ratification (if not ratified please indicate) Dd/mm/Yyyy | Derogations/ reservations relevant to equality and non-discrimination | Right of individual petition accepted? | Can this instrument be directly relied upon in domestic courts by individuals? |
|---|---|--|--|---|---|
| Convention on the Elimination of Discrimination Against Women | | 12.3.2001 (succession) | No | Yes | Yes |
| ILO Convention No. 111 on Discrimination | | 24.11.2000 | No | | Yes |
| Convention on the Rights of the Child | | 12.3.2001 (succession) | No | | Yes |
| Convention on the Rights of Persons with Disabilities | 17.12.2007 | 31.7.2009 | No | Yes | Yes |

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