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# Country report

Gender equality



Serbia  
2017

*Justice  
and Consumers*

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Gender equality  
Unit JUST/D2

*European Commission  
B-1049 Brussels*

# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

### **Serbia**

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Reporting period 1 April 2016 – 31 December 2016

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Luxembourg: Publications Office of the European Union, 2017

ISBN 978-92-79-69507-0

doi:10.2838/710280

DS-02-17-717-EN-N

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## **1 Introduction**

### **1.1 Basic structure of the national legal system**

The Republic of Serbia is a constitutional, multi-party, parliamentary democracy. Its history is that of a federal unit within a federal state – the Socialist Federal Republic of Yugoslavia (SFRY). After the dissolution of the SFRY in 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 the decision of the Parliament of Montenegro who declared Montenegro independent. It finally became a single state, which means that the legal competence for anti-discrimination law is directly applicable in all parts of the State. Specific activities within the rights and responsibilities of the Republic and autonomous provinces may be delegated to the local self-government.

Within the original scope of responsibilities, the local self-government unit passes regulations independently, in accordance with its rights and responsibilities determined by the Constitution. The state authorities, the authorities of the autonomous provinces, the authorities of self-government units, and organizations entrusted with the exercise of public powers, are all obliged to monitor the accomplishment of gender-based equality.

Serbia's court system includes courts of general jurisdiction and specialized courts. General jurisdiction courts include the basic courts, the higher courts, the courts of appeal, and the Supreme Court of Cassation. The specialized courts include the Administrative Court, the commercial courts, the Commercial Appellate Court, the misdemeanour courts and the Misdemeanour Appellate Court.

### **1.2 List of main legislation transposing and implementing Directives**

- The Gender Equality Act (GEA)<sup>1</sup> proclaims gender equality in Serbia in all areas of public and private life;
- The Law on the Prohibition of Discrimination (LPD)<sup>2</sup> establishes a coherent system of protection from discrimination in Serbia;
- The Labour Law<sup>3</sup> provides specific provisions against discrimination at work and related to employment;
- The Law on Social Protection<sup>4</sup> regulates the objectives and principles of social protection, rights, procedures for exercising the right to social protection, use of social services, etc.;
- The Law on Health Care<sup>5</sup> regulates the healthcare system, the organization of healthcare services, the rights and obligations of patients, health protection, etc.;
- The Law on Health Insurance<sup>6</sup> governs entitlements deriving from compulsory health insurance of insured persons and other citizens, being covered by

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<sup>1</sup> Gender Equality Act, Official Gazette of the Republic of Serbia, No. 104/2009. This law was adopted on 11 December 2009 and entered into force on 25 December 2009.

<sup>2</sup> Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, No. 22/2009, 26 March 2009. It entered into force 8 days after it was published in the Official Gazette, on 3 April 2009 (except for the provisions relating to the Commissioner for the Protection of Equality which entered into force on 1 January 2010).

<sup>3</sup> Labour Law, Official Journal of the Republic of Serbia, No. 24/2005, 61/2005, 54/2009, 32/2013, No. 75/2014. It entered into force on 23 March 2005. The Law was amended several times, in 2005, 2009, 2013 and 2014.

<sup>4</sup> The Law on Social Protection, Official Gazette of the Republic of Serbia, No. 24/2011.

<sup>5</sup> The Law on Healthcare, Official Gazette of the Republic of Serbia, No. 107/2005, 72/2009, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013, 93/2014, 96/2015, 106/2015. This law was adopted in 2005 and amended several times, in 2009, 2010, 2011, 2012, 2014 and 2015.



- compulsory health insurance, the compulsory health insurance organization and financing, voluntary health insurance and other issues relevant to the health insurance system;
- The Law on Prevention of Domestic Violence<sup>7</sup> provides urgent, adequate and efficient protection and support to victims of domestic violence.

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<sup>6</sup> The Law on Health Insurance, Official Gazette of the Republic of Serbia, No. 107/2005, 109/2005 - corr., 57/2011, 110/2012 – decision CC, 119/2012, 99/2014, 123/2014, 126/2014 – decision CC, 106/2015, 10/2016. This law was adopted in 2005, and amended in 2011, 2012, 2014, 2015 and 2016.

<sup>7</sup> The Law on Prevention of Domestic Violence, Official Gazette of the Republic of Serbia, No. 94/2016, was adopted on 24 November 2016 and entered into force on 25 December 2009.

## **2 General legal framework**

### **2.1 Constitution**

#### **2.1.1 Does your national constitution prohibit sex discrimination?**

The Serbian Constitution<sup>8</sup> in Article 21(3) contains the general anti-discrimination clause, prohibiting any direct or indirect discrimination on any grounds, including sex. Furthermore, Article 15 of the Constitution guarantees gender equality and states: 'The State shall guarantee the equality of women and men and develop equal opportunities policy'.

#### **2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?**

Apart from the two articles mentioned above, the Constitution also contains Article 62 which guarantees the equality of spouses, and stipulates in Paragraph 3 that 'Conclusion, duration or dissolution of marriage shall be based on the equality of man and woman'. Furthermore, Article 110 provides the basis for equality in parliamentary life, as it stipulates that equality and representation of different genders must be realised, in accordance with the law.

#### **2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?**

The constitutional equality clauses, except for Article 21 (3), cannot be enforced against private actors (as opposed to the State).

### **2.2 Equal treatment legislation**

#### **2.2.1 Does your country have specific equal treatment legislation?**

In Serbia, there is a general anti-discrimination law (the Law on the Prohibition of Discrimination), as well as specific legislation which covers only gender (the Gender Equality Act). However, the LPD in Article 2(1) prohibits discrimination on the following grounds: race, skin colour, ancestors, 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 and provides protection to discrimination based on 'other real or presumed personal characteristic.'

In Serbia, there is also the Law on Prevention of Discrimination against Persons with Disabilities, which prohibits discrimination based on disability.<sup>9</sup> This Law prohibits discrimination on the ground of disability and aims to promote the inclusion of persons with disabilities in all spheres of society.<sup>10</sup>

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<sup>8</sup> The Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006.

<sup>9</sup> Law on the Prevention of Discrimination against Persons with Disabilities, Official Gazette of the Republic of Serbia, No. 33/2006, 13/2016.

<sup>10</sup> This Law was followed by the Law on Professional Rehabilitation and Employment of Persons with Disabilities, which was adopted with the aim to create a possibility for persons with disabilities to be included in a larger number in the open labour market, and to improve the quality of their employability and/or employment quality. See the Law on the Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette of the Republic of Serbia, No. 36/2009, 32/2013.

Also, the Law on Protection of Rights and Freedoms of National Minorities<sup>11</sup> provides protection to national minorities from all forms of discrimination in exercising their civil rights and freedoms, and obliges public officials to abstain from acts and regulations that are discriminatory towards them.

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<sup>11</sup> Law on the Protection of Rights and Freedoms of National Minorities, 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.

### **3 Implementation of central concepts**

#### **3.1 Sex/gender/transgender**

##### **3.1.1 Are the terms gender/sex defined in your national legislation?**

Article 10 of the GEA defines both terms: 'sex' relates to biological features of a person, while 'gender' means socially established roles, position and status of women and men in public and private lives out of which, due to social, cultural and historic differences, discrimination ensues on the basis of biologically belonging to a sex.

##### **3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?**

The LPD and the GEA both explicitly prohibit gender as a discrimination ground, but not gender reassignment.<sup>12</sup> However, the Commissioner for the Protection of Equality considers that gender covers gender reassignment as well.<sup>13</sup> In any case, it is covered by an open clause in Article 2(1) of the LPD, which extends protection to discrimination based on 'other real or presumed personal characteristic.'

The LPD in Article 20(1) prohibits denial of rights or granting of privileges, be it overt or covert, pertaining to gender or gender reassignment. This term 'gender reassignment' is also mentioned in the Law on Health Insurance, which stipulates in Article 45 that compulsory health insurance extends to gender reassignment for medical reasons, when the insured person can cover at most 65 % of the cost of health services.

#### **3.2 Direct sex discrimination**

##### **3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?**

Direct discrimination is prohibited and defined in both anti-discrimination laws.

Article 5 of the GEA prohibits direct discrimination which is considered to be 'any unjustified distinction, exclusion or limitation by which, under the same or similar circumstances, by any act or action of the public authorities, the employer or the provider of services, some person or a group of persons are placed or were placed in a subordinate position, namely, by which they might be placed in a gender-wise subordinate position.' This provision limits application of this provision to public authorities, the employer and the provider of services.

Article 6 of the LPD says 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 definition from EU directives. However, it is limited only to less favourable treatment and does not cover detriment.

##### **3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?**

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<sup>12</sup> See, e.g. Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *U.G. e. v. VRS and the Ministry of defence*, complaint No. 07-00-1/2015-02, opinion of 3 April 2015, which concerns discrimination based on gender identity.

<sup>13</sup> See Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M. Đ. v. P.F.*, complaint No. 297/201, opinion of 24 February 2012.

Pregnancy and maternity discrimination are not explicitly prohibited as a form of direct sex discrimination as such, but they are covered by the ground 'sex' and 'family status'.<sup>14</sup> Also, the GEA contains Article 16(1-2) which stipulates that the absence from work due to pregnancy and parenthood must not be any barrier to promotion to a higher rank, advancement or professional training, or ground for assigning a person an inadequate job or for termination of the employment contract. Furthermore, the initiation of proceedings by an employee for gender-based discrimination, harassment, sexual harassment or sexual blackmail may not be considered a justified reason to terminate the employment contract, discontinue the employment or other (contracted) work-based relation, or to declare an employee redundant in accordance with the regulations governing labour (Article 16(3)).

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

In Serbia, there are no difficulties in applying the concept of direct sex discrimination.

### **3.3 Indirect sex discrimination**

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

In Serbia, indirect discrimination is prohibited in national law.

The GEA contains a definition of indirect discrimination in Article 6, which is defined as 'any unjustified distinction, exclusion or limitation by which, under the same or similar circumstances, a person or a group of persons are placed in a subordinate position gender-wise in a personal capacity, by adopting an act or performing an action that is apparently based on the principle of equality and non-discrimination.'

The LPD also defines indirect discrimination. In Article 7 it says that: 'Indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or 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 does not contain any 'would' language, and can be interpreted as limited to actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they in fact cause actual disadvantage on anyone. 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 causes an unequal position of a certain group in practice.

The Commissioner for the Protection of Equality found indirect discrimination in relation to a woman, a mother of two children, who was employed as a doctor at the Ministry of the Interior.<sup>15</sup> She was transferred to a lower-paid job and lost the possibility for accelerated retirement. The Ministry of Interior explained that she had been transferred to a lower-paid job as her performance was less productive compared to other doctors due to the fact that she was not involved in fieldwork which lasted for one to several

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<sup>14</sup> The Commissioner for the Protection of Equality considers discrimination in relation to pregnancy and maternity to be sex discrimination. See e.g. Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *J.M.. against S.M. d.o.o.*, complaint No. 07-00-232/2015-02, opinion of 3 August 2015.

<sup>15</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *N.R.. against the Ministry of Interior*, complaint No. 07-00-648/15-02, opinion of 14 January 2016.

days, outside her place of residence. The Commissioner found indirect discrimination in this case, as among 14 employees who had been transferred to a lower-paid job, 12 were women with small children. Also, the Commissioner found that the employer had not provided any objective and reasonable justification for unfavourable reassignment in this case. Another case concerned a male applicant who had severe osteoporosis. The doctor prescribed the medicine 'Forteo' in order to treat his condition.<sup>16</sup> This medicine was on the list of medicines by the Republic Fund for Health Insurance that can be obtained under the mandatory health insurance, but only to persons who are in post-menopause, namely to women. The Republic Fund for Health Insurance stated that there are no differences in prescribing and dispensing Forteo in terms of age or gender. However, the Commissioner noted that the Republic Fund for Health Insurance in its regulations did not explicitly state that only women can obtain Forteo at the expense of mandatory health insurance, but the requirement for prescribing and dispensing this drug linked to postmenopausal complaints clearly indicates that men, if they meet all other requirements, due to their biological and physiological characteristics, cannot obtain this medicine. Although postmenopausal complaints certainly represent a medical condition, they also indicate the gender of the person going through this process, and completely prevents males from obtaining the drug at the expense of the compulsory health insurance. The Commissioner concluded that by the denial of the right of the D. R. to obtain the prescribed drug Forteo at the expense of the compulsory health insurance, the National Health Insurance Fund was guilty of indirect sex discrimination, which is prohibited by Article 7 of the LPD.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

While the LPD does not contain any specific rule in relation to statistics, the GEA contains several provisions which relate to statistical data, but not to statistical evidence. Furthermore, the Civil Procedure Code does not mention statistical evidence as evidence before the court.<sup>17</sup> It just says in Article 7 that parties are obliged to present all the facts on which they base their claim and to propose evidence which determine that fact.

However, although judges are reluctant to use statistical data as evidence in court in cases of discrimination, statistical evidence in order to establish indirect discrimination is used by the Commissioner for the Protection of Equality.

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

According to Article 7 of the LPD, 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, and if they cannot be achieved with less intrusion into someone's rights. It is the same justification test as that in the relevant EU directives.

However, Article 6 of the GEA states that indirect discrimination is any unjustified distinction, exclusion or limitation by which, under the same or similar circumstances, a person or a group of persons are placed in a subordinate position gender-wise in a personal capacity, by adopting an act or performing an action that is apparently based on the principle of equality and non-discrimination. This provision does not include a

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<sup>16</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *S.R. against the Republic Fund for the Health Insurance*, complaint No. 00-166/2016-02, opinion from 26 May 2016.

<sup>17</sup> The Civil Procedure Code, Official Gazette of the Republic of Serbia, No. 72/2011, 49/2013 – decision CC, 74/2013 – decision CC and 55/2014.

proportionality test. Nevertheless, Article 4 defines discrimination and explains that 'unjustified distinction, exclusion, limitation and treatment or other measures taken, exists if a measure taken is not justified by a lawful or legitimate aim, and if there is no proportion between the actions taken and the aim to be achieved by such actions. Thus, the proportionality test also applies to Article 6 of the GEA.

In one case from 2016, the Court correctly applied the justification test, finding that difference in treatment did not have an objective and reasonable justification, concluding that it does not pursue a legitimate aim and there is no proportionality between the means employed and the aim sought to be realized.<sup>18</sup> Also, the Commissioner for the Protection of Equality issued several opinions where it applied the proportionality test in cases of indirect discrimination. In one recent opinion, the Commissioner found no justified reason to prescribe free medication for osteoporosis only to the health insured who are in post-menopause, thus discriminating against men.<sup>19</sup>

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There are some difficulties in Serbia in applying the concept of indirect sex discrimination. The main problem is the use of statistical data in order to prove discrimination. Statistical data are used by the Commissioner for the Protection of Equality, but courts are still reluctant to use it.

Also, the definition provided in Article 6 of the GEA does not include a proportionality test and it is questionable how courts will apply it in practice.

### **3.4 Multiple discrimination and intersectional discrimination**

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination - explicitly addressed in national legislation?

Article 13(5) of the LPD recognizes 'discrimination against individuals on the basis of two or more personal characteristics (multiple or intersecting discrimination)' as a serious form of discrimination. This means that a more severe penalty should be imposed in a case of multiple or intersecting discrimination.

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

There is some case law before the Commissioner for the Protection of Equality that addresses multiple discrimination. In 2016, in 102 complaints before the Commissioner, several grounds for discrimination were raised. In the majority of cases age discrimination was indicated, followed by sex, invalidity, marital and family status, health status, and membership of political, trade union and other organisations.<sup>20</sup> However, this does not mean that multiple discrimination was actually 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 a ground for discrimination in their case. The practice of the Commissioner shows that multiple discrimination is most frequent in relation to

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<sup>18</sup> Appellate Court in Nis, 21 Gž. br.1961/16, 31 August 2016.

<sup>19</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *S.R. against the Republic Fund for the Health Insurance*, complaint No. -00-166/2016-02, opinion from 26 May 2016.

<sup>20</sup> The Commissioner for the Protection of Equality, *Regular Annual Report for 2016*, p. 140.

women, due to their sex and marital and family status, and in the area of employment.<sup>21</sup> For example, in 2016, several complaints were submitted against an online employment form, which contained some personal questions, including some questions related to children and marital status.<sup>22</sup> Also, in one case, after returning from maternity leave, two women employed in a court were placed in a lower-paid job.<sup>23</sup> The employer explained that his decision was based on a performance test carried out in 2014, when they were on leave. Due to this practice, the Commissioner for the Protection of Equality found discrimination based on sex and marital status.

The Government in its Strategy for Gender Equality recognized groups of women who are at risk of multiple discrimination. These are: Roma women, women older than 60, young women, women living in rural areas, pregnant women and women with dependent children, women with a different sexual orientation, female victims of domestic violence, women with disabilities, single mothers, women from ethnic minority groups, unemployed and unskilled women.<sup>24</sup>

There still is no solid case law before civil courts in order to assess whether the detrimental effect of multiple discrimination is recognized and whether it provides a basis to award higher compensation.

### 3.5 Positive action

#### 3.5.1 Is positive action explicitly allowed in national legislation?

Article 21(4) of the Serbian Constitution recognizes positive action providing 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.'

The GEA in Article 7 stipulates that it is not considered to be discrimination 'if some special measures are adopted in order to eliminate and prevent an unequal status of women and men and accomplish equal opportunities of both sexes.' Special measures are considered to be measures of a provisional nature aimed to abolish inequality and accelerate and achieve full gender equality in practice (Article 10(4)).

Positive action is also recognized in the LPD, in Article 14, which stipulates 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.'

These definitions comply with the EU definition found in Article 157(4) of the TFEU, particularly as some other provisions in anti-discrimination laws guarantee equal opportunities for both sexes in employment. Thus, Article 16 of the LPD prohibits violation of the principle of equal opportunity in gaining employment or equal conditions in enjoying all the rights pertaining to the sphere of labour. Article 16(3) further proclaims that protective measures towards certain categories of persons, such as women, pregnant women, or women who have recently given birth, shall not be considered to constitute discrimination.

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<sup>21</sup> The Commissioner for the Protection of Equality, *Regular Annual Report for 2016*, p. 140-142.

<sup>22</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.Ž. P. N. v. company K. d.o.o. N.*, complaint No. 07-00-134/2016-02, opinion from 21 April 2016; Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.Ž. P. N. v. company F. d.o.o. K.*, complaint No. 07-00-133/2016-02, opinion from 21 April 2016.

<sup>23</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *S.V. and A.M.M. v. Basic court in Kragujevac*, complaint No. 07-00-9/2016-02, opinion from 18 February 2016.

<sup>24</sup> [National Strategy for Gender Equality for the period 2016-2020](#), adopted on 14 January 2016, p. 30.



The GEA in Article 7 provides that it is not considered to be discrimination if some special measures are adopted in order to eliminate and prevent an unequal status of women and men and accomplish equal opportunities of both sexes. Also, Article 3 stipulates that the public authorities conduct an active policy of equal opportunities in all fields of social life, which means 'the accomplishment of gender equality in all stages of planning, decision-making and implementation of decisions, which are of influence on the status of women and men.' Furthermore, Article 13 stipulates that an employer who employs more than 50 persons for an indefinite period of time is obliged to adopt a plan of measures to eliminate or mitigate unequal gender representation for each calendar year. The employer is obliged to prepare an annual report on the implementation of the plan of measures not later than by 31 January of the current year for the previous year.

The plan of measures and the report must be submitted by the employer to the Ministry in charge of issues concerning gender equality, which defines its content and method. Finally, Article 14 imposes a duty on public authorities to implement positive measures if representation of the less-represented sex in an organizational unit in managing positions and in the management and supervisory bodies is under 30 %.

Finally, the Labour Law provides in Article 22(2) that provisions of the law, general act (Labour rulebook or collective agreement) and employment contracts relating to special protection and assistance to specific categories of employees, such as women on maternity leave and childcare leave and special childcare do not constitute discrimination.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

In the area of employment, the GEA imposes a duty on employers to adopt a plan of measures to eliminate or mitigate unequal gender representation among employees, but this obligation has not been carried out in practice. In one study conducted in 2016 on citizens' perception of discrimination in Serbia, 40 % of the respondents fully supported positive action in the area of employment, while an additional 33 % partially agreed with it.<sup>25</sup> Positive action in the area of education was acceptable for 64 % of respondents for secondary education and 62 % for tertiary education. Also, it is interesting to note that lower-educated persons accepted positive action in greater numbers (48 %), than those with higher education (38 %).

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

Article 14 of the GEA imposes a duty on public authorities to implement positive measures if representation of the less-represented sex in an organizational unit in managing positions and in management and supervisory bodies is under 30 %. However, this duty applies only to public authorities, and has not been carried out in practice. On the other hand, the LPD prohibits discrimination based on sex and the structure of company boards can be challenged under this Law. However, the Gender Equality Index in the Republic of Serbia shows that women are still underrepresented in the boards of the largest quoted companies, as well as at the Central Bank, although Serbia performs slightly better in this respect than the EU average.<sup>26</sup>

<sup>25</sup> Report on the research of public opinion The attitude of citizens towards discrimination in the Republic of Serbia (*Izveštaj o istraživanju javnog mnjenja Odnos građana i građanki prema diskriminaciji u Srbiji*), Commissioner for the Protection of Equality, Belgrade, 2016.

<sup>26</sup> Government of the Republic of Serbia, Gender Equality Index 2016, Coordination Body for Gender Equality of the Government of the Republic of Serbia, the Social Inclusion and Poverty Reduction Unit of the Government of the Republic of Serbia and the Statistical Office of the Republic of Serbia, December 2016.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

In Serbia, the 2002 Law on Local Elections for the first time introduced positive measures for women, stipulating that they have to be included in each electoral list for local elections.<sup>27</sup> Article 20, Paragraph 3 prescribes that one in every four candidates on the list must be a candidate of the under-represented sex, while the total number of the less-represented sex on the list cannot be less than 30 %. It was an amendment of 2007 that prescribed that at least 30 % of candidates from the under-represented sex must be on the list.<sup>28</sup> In 2004, the Law on Election of MPs was amended, introducing the same provision.<sup>29</sup> However, this provision did not impose an obligation to actually adhere to it and, in practice, it did not secure 30 % of the underrepresented gender's representation in Parliament. According to the amendments to the Law regarding the election of MPs since 2011, it is stipulated that in the list of each party every third candidate must be a representative of the underrepresented sex, and this rule for the first time secured 33 % of women in the Serbian Parliament.<sup>30</sup> Currently, there are 86 women MPs (out of 250), or 3.4 % of the total. However, women are less represented in the executive branch. The last Serbian Government was formed on 11 August 2016, having 5 female Ministers, out of 19 Ministers and one Prime Minister. Also, in one case before the Commissioner, a complaint was submitted against one local assembly, as no women had been selected as candidates for president, deputy president, or member of the local council.<sup>31</sup> The president of the local assembly claimed that the GEA does not prescribe the principle of gender equality. However, the Commissioner invoked Article 37 Paragraph 2 of the GEA, which prescribes that gender equality must be ensured when appointing candidates for elections for all positions and appointment to the public authorities, financial and other institutions, and found discrimination in this case.

With the aim to provide conditions for promotion and better inclusion in the process of education and professional training, the GEA stipulates that the public authorities in charge of education can take special measures for the inclusion into these processes of the pupils or groups of pupils who, because of their culture, tradition and social-economic conditions leave the school prematurely (Article 33, Paragraph 1). Measures of special support for pupils or groups of pupils to promote their transfer from lower to higher educational levels can be also taken, for 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. The public authorities in charge of education may also take other special measures, especially measures to encourage education of the less-represented gender in the field of information technology, engineering and technology.

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<sup>27</sup> The Law on Local Elections, *Official Gazette of the Republic of Serbia*, No. 33/02.

<sup>28</sup> Amendments to the Law on Local Elections, *Official Gazette of the Republic of Serbia*, No. 129/07.

<sup>29</sup> The Law on Election of MPs, *Official Gazette of the Republic of Serbia*, Nos 35/2000, 57/2003 -the Constitutional Court decision, 72/2003, 75/2003, 18/2004, 101/2005, 85/2005, 104/2009, 28/2011 -the Constitutional Court decision, and 36/2011.

<sup>30</sup> Article 40 a), The Law on the Election of MPs, The Official Gazette of the Republic of Serbia, 35/2000, 57/2003 - decision CCRS, 72/2003, 75/2003, 18/2004, 101/2005, 85/2005, 104/2009, 28/2011 - decision CC, 36/2011. See also the Law on Local Elections, The Official Gazette of the Republic of Serbia, 129/07, 34/10-CC, 54/1; Autonomous Parliamentary Decision on the Election of MPs in the Parliament of the Autonomous Province of Vojvodina, The Official Gazette of the AP Vojvodina, 23/14.

<sup>31</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), A. Ž. J. v. Assembly of municipality Senta, complaint No. 07-00-360/2016-02, opinion from 3 October 2016.

### 3.6 Harassment and sexual harassment

#### 3.6.1 Is harassment explicitly prohibited in national legislation?

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

However, harassment is defined in Article 10(6) of the GEA as any unwanted verbal, non-verbal or physical act, committed with the purpose or effect of violating a person's dignity, and of creating a fear or a hostile, degrading, humiliating or offensive environment that is based on sex. This definition complies with the EU definition found in Article 2(1) (c) of Directive 2006/54.

The Labour Law prohibits harassment in Article 21. Harassment is defined as any unbecoming conduct 'aiming at or amounting to the violation of dignity of a person seeking employment, as well as of an employed person, and which causes fear or creates a hostile, degrading or offensive environment' (Article 21(2)).

In 2016, the Commissioner for the Protection of Equality delivered several opinions finding harassment based on ethnicity and sexual orientation. In one case, the Commissioner found that a member of the local council had insulted and humiliated the Mayor on the basis of her sex and age, stating publicly that it would be better to have a Mayor who is upright, young and honest, than a swollen and hysteric older woman.<sup>32</sup>

#### 3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

Article 12 of the LPD does not restrict its application only to the sphere of employment, and although not expressly mentioned, includes access to goods and services. However, Article 18 of the GEA only mentions harassment in the context of sanctions for the violation of duties at work. Also, the Labour Law restricts its application to the employment area.

#### 3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Sexual harassment is explicitly prohibited in the GEA, and defined as 'any unwanted verbal, non-verbal or physical act of a sexual nature, committed with the aim or with the purpose to violate personal dignity, establishment of intimidating, hostile, humiliating, degrading or offensive environment, which is based on sex' (Article 10(7)). This definition complies with the EU definition in Article 2(1)(d) of Directive 2006/54. Furthermore, the GEA contains a definition of sexual blackmail, which means 'any conduct of the responsible person who, with the intention to seek services of a sexual nature, blackmails another person stating that certain data will be disclosed regarding such person or against someone close to such person or that may harm her or his honour or reputation in case he/she refuses to render the requested services (Article 10(8)).

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<sup>32</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), V.K.K. and S.S. v. P. DJ, complaint No. 07-00-30/2016-02, opinion of 4 April 2016.

Also, the Labour Law contains a definition in Article 21(3), where sexual harassment is defined as 'any verbal, non-verbal or physical behaviour aiming at or amounting to the violation of the dignity of a person seeking employment, as well as an employed person, in the sphere of sexual life, and which causes fear or creates a hostile, degrading or offensive environment.'

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

While the Labour Law restricts the application of sexual harassment to the area of employment, the GEA does not include such a restriction, but it is unclear what is the scope of its application. Article 4 only stipulates that gender-based discrimination is any unjustified differentiation or unequal treatment or failure to treat (exclusion, restriction or prioritizing) aimed at hindering, jeopardizing, preventing or denying the exercise or enjoyment of human rights and freedoms to a person or a group of persons in the area of *politics, economy, social, cultural, civil, family life or any other area*. However, Article 18 only mentions sexual harassment in the context of sanctions for the violation of duties at work.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

The GEA does not specify that harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct, amounts to discrimination. It only says that 'Harassment, sexual harassment or sexual blackmail at work or related to work by an employee against another employee are considered violation of duties at work and constitute grounds to terminate the employment contract, pronouncing the measure of termination of employment, as well as grounds to expel the employee from work (Article 18).

### **3.7 Instruction to discriminate**

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

In Serbia, instruction to discriminate is prohibited, but not defined in the LPD. However, the LPD only prohibits 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, the LPD provides in Article 13(1) that 'causing and inciting inequality, hatred and enmity on the grounds of ... gender.' is considered to be a serious form of discrimination.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Instruction to discriminate is not recognized as a special form of discrimination in Serbian anti-discrimination legislation. It is only recognized as part of association for the purpose of exercising discrimination. Thus, Article 10 of the LPD stipulates that 'It is forbidden to associate for the purpose of exercising discrimination; i.e. this Law prohibits activities of organisations or groups that are aimed at violating freedoms and rights guaranteed by the Constitution, rules of international law and the law, or at inciting nationally, racially, religiously or otherwise motivated hatred, divisions or enmity.' This form of discrimination is not recognized in the GEA.

### **3.8 Other forms of discrimination**

Discrimination by association and assumed discrimination are prohibited in Serbian law. The LPD in Article 2(1) prohibits discrimination based on presumed personal characteristics.

The LPD also prohibits discrimination based on association with persons with particular characteristics in Article 2(1). However, its application is limited to 'family members' and persons close to those being discriminated against.

However, the GEA does not explicitly cover discrimination by association and assumed discrimination.

## **4 Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)**

### **4.1 Equal pay**

#### **4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?**

Yes, the principle of equal pay for equal work or work of equal value has been implemented in national legislation. The Labour Law stipulates in Article 104(2) that employees shall be guaranteed equal earnings for the same work or work of equal value performed with an employer. It defines work of the same value as work requiring the same professional qualification level, the same work abilities, responsibility and physical and intellectual effort (Article 16(3)).

Also, anti-discrimination legislation contains the principle of equal pay. Thus, Article 16(1) of the LPD prohibits discrimination in the sphere of employment, and violation of the principle of equal opportunity in gaining employment or equal conditions for enjoying all rights pertaining to the sphere of employment, including equal pay for work of equal value. Furthermore, the GEA is even more explicit and in Article 17 guarantees the right to equal remuneration for the same work or work of equal value with the same employer, in accordance with the Labour Law, for all employees regardless of their sex.

#### **4.1.2 Is the concept of pay defined in national legislation?**

The Labour Law contains a definition of pay in Article 105. Pay is considered to be earnings realised for work performed and time spent at work, earnings based on the employee's contribution to business success of the employer (bonuses, premiums and the like), and other income based on employment in conformity with the labour rulebook or collective agreement (general act) and contract of employment.

Pay is understood to mean the earnings including tax and dues payable on earnings. Also, pay includes all employment-related income, except for reimbursement of expenses of the employee relating to work in the following cases:

- travelling to and from work, in the amount of the price of public transportation tickets; for the time spent on business trips in the country; for the time spent on business trips abroad, at the minimum amount determined by special regulations; and for accommodation and food for working in the field, if the employer failed to provide to the employee the accommodation and food without compensation (Article 118(1-4));
- a retirement gratuity, in the minimum amount of three average monthly earnings; a refund of funeral expenses in the event of death of a member of immediate family, and to members of the immediate family in the event of death of the employee; and the compensation of damage sustained due to an injury at work or a professional illness (Article 119); and
- employment anniversary bonus and solidarity assistance (Article 120(1)).

This definition mostly complies with the definition of Article 157(2) TFEU, but does not explicitly include 'in kind', although it can be considered that it includes both cash and kind.

#### **4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?**

Serbian law does not explicitly implement Article 4 of Recast Directive 2006/54 in the provision guaranteeing equal pay for equal work, as the abovementioned Article 104 of the Labour Law only guarantees equal remuneration for the same work or work of equal value performed with an employer. However, Article 18 prohibits direct and indirect discrimination of persons seeking employment, as well as employees. Furthermore, Article 20 prohibits discrimination regarding, inter alia, conditions of labour and all rights deriving from an employment relation, which includes remuneration. The GEA in this area refers to the Labour law.

#### 4.1.4 Is a comparator required in national law as regards equal pay?

The provisions described above do not mention a comparator. Thus, whether a hypothetical comparator is allowed or not would have to be defined in case law (a judicial interpretation being required).

#### 4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

Article 104(3) of the Labour Law states that work of the same value presupposes:

- the same professional qualifications;
- the same work abilities;
- the same responsibility; and
- the same physical and intellectual efforts.

#### 4.1.6 Does national (case) law address wage transparency in any way?

No, Serbian (case) law does not address wage transparency. The national Strategy for Prevention and Protection against Discrimination from 2013 emphasizes that it is necessary to eliminate differences in wages between women and men.<sup>33</sup> The Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination for the period 2014-2018 requires further elaboration of the principle of equal pay for men and women and the introduction of sanctions for acting contrary to this principle,<sup>34</sup> but does not require transparency.

According to the National Strategy for Gender Equality (2016-2020), adopted in January 2016, women spend significantly more time performing unpaid jobs which mostly concern housework and child care.<sup>35</sup> They also work in less paid sectors, while the difference in salaries between men and women in the same category is 5.1 %.<sup>36</sup> The particular aim is to improve the economic status of women and their status at the labour market.

#### 4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

The European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency is not applied in Serbia.

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<sup>33</sup> Strategy for Prevention and Protection against Discrimination, Official Gazette of the Republic of Serbia, No. 60/2013, p. 37.

<sup>34</sup> Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination, Official Gazette of the Republic of Serbia, No. 107/2014, p. 62.

<sup>35</sup> National Strategy for Gender Equality, Official Gazette of the Republic of Serbia, No. 04/16, p. 10.

<sup>36</sup> National Strategy for Gender Equality, Official Gazette of the Republic of Serbia, No. 04/16, p. 17.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

In Serbian law there is no justification for pay differences based on gender.

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

In Serbia there are many difficulties in relation to the application of the principle of equal pay for equal work and work of equal value in practice. The problem mostly lies in the fact that there is no transparency in this area and usually, employees do not know the salaries of their co-workers. Also, even if female employees are aware of inconsistencies in their salaries compared to male workers, they do not initiate any available proceedings. Also, in one study conducted in 2016, it was found that the gender pay gap was 14 %.<sup>37</sup> Thus, relevant case law is still lacking in this area, but the State needs to adopt different measures to tackle this issue, such as wage transparency, clearly defining what is considered to be 'pay', combating gender stereotypes, etc.

## 4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Yes, the personal scope in relation to access to employment, vocational training, working conditions etc. is defined in Serbian law. The LPD prohibits in Article 16(2) discrimination in relation to access to employment, vocational training, working conditions, etc. The same is true for the Labour Law and the GEA.

Article 5(1) of the Labour Law defines a worker as a natural person employed with an employer. The Labour Law specifies in Article 2 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 in government agencies, territorial autonomy agencies and local self-government agencies, and public services, as well as to employed foreign nationals and stateless persons, unless otherwise specified by the law. This definition of a 'worker' reflects the relevant case law of the CJEU.

Article 18 of the Labour Law prohibits discrimination based on inter alia sex, race, colour of the skin, age, pregnancy, disability, ethnic origin, religion and sexual orientation.

Article 16(2) of the LPD prohibits discrimination in the sphere of employment and the rights to protection from discrimination are granted to '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.'

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<sup>37</sup> Team for Social inclusion, The World Bank, The possibility of access to economic opportunities for women in Serbia (*Mogućnost pristupa ekonomskim sansama u Srbiji za žene*), June 2016, p. 14.



The GEA prohibits discrimination in employment based on gender and applies to 'a legal entity or natural person employing, i.e. engaging one or several persons to perform work, except for public bodies' (Article 10(9)).

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes, the material scope in relation to (access to) employment is defined in Serbian law. Serbian legislation covers prohibition of discrimination in relation to employment. The Labour Law stipulates in Article 20 that discrimination is prohibited in relation to:

- 1) employment conditions and choice of candidates for performing a specific job;
- 2) conditions of employment and all rights deriving from an employment relation;
- 3) education, vocational training and specialization;
- 4) job promotion; and
- 5) cancelling an employment contract.

The LPD prohibits in Article 16(1) discrimination in the sphere of employment, 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.

Also, the GEA stipulates in Article 11 that any employer is obliged to provide to employees, regardless of their sex, equal opportunities and treatment, in relation to the accomplishment of rights resulting from employment and work-related rights, in accordance with the relevant employment law. It also proclaims equal access to jobs and positions (Article 14), equality in employment and hiring for work (Article 15), equality in promotion, advancement or professional training (Article 16), equal remuneration for the same work or work of equal value (Article 17), equality in vocational training and training (Article 19), equality in termination of employment and hiring for work (Article 20), equal representation in trade unions and associations of employers (Article 21), and promotion in employment (Article 22).

This scope is more limited than the scope of Article 14(1) of Recast Directive 2006/54 as it does not explicitly mention self-employment, occupation and vocational guidance, but they are also included in Article 11(1) of the GEA, as it says that 'Any employer is obliged to provide to employees, regardless of their sex, equal opportunities and treatment, in relation to the accomplishment of rights resulting from employment and work-related rights.'

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes, the exception on occupational activities has been implemented into Serbian law.

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

The LPD stipulates in Article 16(3) 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 taken is unjustified, and if the measures taken are not proportional to the objective achieved’.

Also, the Labour Law contains the same provision and stipulates in Article 22, Paragraph 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.

The duty of assessment of the occupational activities according to Article 31(3) of Recast Directive 2006/54 still does not apply in Serbia.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes, the exception on protection for women, in particular as regards pregnancy and maternity, has been implemented in Serbian law.

The Serbian Constitution stipulates in Article 60(5) that women are provided with special protection at work and special work conditions in accordance with the law.

The Labour Law stipulates in Article 12(2) that an employed woman shall be entitled to special protection in the course of pregnancy and childbirth. The Labour Law stipulates that an employer may not request from the candidate information relating to family and/or marital status and family planning, and/or to be furnished with documents and other evidence having no direct bearing on the performance of jobs the employment relationship is established for (Article 26(2)). Moreover, an employer may not make the establishment of the employment relationship dependent on a pregnancy test, unless the relevant jobs involve considerable risk for the health of the woman and child, as determined by a competent healthcare agency (Article 26(3)).

Also, Article 16(3) of the LPD stipulates that it shall not be considered to constitute discrimination to take protective measures towards certain categories of persons, such as women, pregnant women, and women who have recently given birth. The GEA further stipulates that absence from work because of pregnancy and parenthood must not be any barrier to promotion to a higher rank, advancement or professional training, or ground for assigning a person an inadequate job or terminating the employment contract.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

There are no particular difficulties related to the personal and material scope of national law in relation to access to work, vocational training, employment, working conditions etc.

However, in practice, many problems exist. Thus, fewer women are employed than men - 35 % compared to 50%. There are 57 568 men in leadership positions, compared to 25 772 women.<sup>38</sup> The practice of the Commissioner shows that sex discrimination is very much present in the employment sphere (289 complaints in which 49.2% claimed to be

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<sup>38</sup> National Strategy for Gender Equality, Official Gazette of the Republic of Serbia, No. 04/16, p. 17.

discrimination based on sex)<sup>39</sup> and the most common violations are during the hiring process when employers demand that the candidate be of a particular gender, and reassignments to a lower position or a position with a lower income upon returning from parental leave.<sup>40</sup> Also, traditional gender stereotypes influence the fact that women dedicate significant time to unpaid jobs and childcare. The majority of citizens believe that successful women neglect their family duties and that a higher salary unavoidably brings family problems.<sup>41</sup>

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<sup>39</sup> Ibid, p. 102.

<sup>40</sup> The Commissioner for the Protection of Equality, *Special Report on Discrimination of Women 2015*, p. 106.

<sup>41</sup> Ibid, p. 102.

## **5 Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)**

### **5.1 Pregnancy and maternity protection**

#### **5.1.1 Does national law define a pregnant worker?**

The Labour Law in Article 12 only states that an employed woman is entitled to special protection during pregnancy.

This definition is not consistent with the definition in Article 2 of Directive 92/85 as it does not include information to the employer on her condition, but it is logical that a pregnant woman needs to inform her employer about her state in order to receive special protection. On the other hand, a pregnant woman is protected even if she did not inform her employer about her pregnancy, but he/she found out that she was pregnant and acted contrary to provisions which require protection during pregnancy.

#### **5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?**

Yes, protective measures mentioned in Articles 4-7 of Directive 92/85 have been implemented in Serbian law.

The LPD provides in Article 16(3) that it cannot be considered as discrimination when protective measures are taken regarding certain categories of employees, such as women, pregnant women, and women who have recently given birth.

The Labour Law provides in Article 22(2) that provisions of the law, labour rulebook or collective agreement (general act) and employment contracts relating to special protection and assistance to specific categories of employees, such as women on maternity leave, on childcare leave, and special childcare leave shall not be considered as discrimination. It also protects motherhood in Articles 89 – 93a. Article 89 stipulate that an employed woman may not work during her pregnancy in jobs that, in terms of the findings of a medical agency, are harmful to her health and the health of the child, and particularly in jobs requiring lifting heavy weight or jobs characterized by harmful radiation or exposure to extreme temperatures and vibrations. Article 90 stipulates that an employed woman during the first 32 weeks of her pregnancy may not work overtime or at night, should such work, according to the findings of a competent medical agency, be harmful to her health and the health of the child. Also, an employed woman may not work overtime or at night during the last 8 weeks of her pregnancy. Article 91 provides that one of the parents with a child under three may work overtime and/or at night only upon their consent in writing. A self-supporting parent with a child not older than seven, or a child with a serious disability, may work overtime and/or at night only upon their consent in writing. Article 92 provides that an employer may reschedule the working hours of an employed woman during her pregnancy, and of an employed parent with a child under three years, or a child with a serious psycho-physical ailment, but only upon consent of the employee in writing. These rights also apply to an adoptive parent and/or guardian of the child (Article 93). Finally, Article 93 a) stipulates that the employer shall provide that the employed woman, upon returning to work after the birth of the child, during the first year enjoys the right to one or more breaks during working hours with a total duration of 90 minutes, or the right to reduce the daily working hours by 90 minutes, in order to be able to breastfeed her child, if the daily working hours of the employed women equal six or more hours. The break or the reduced working hours shall be considered as part of the working hours that shall be compensated to the employed woman by remuneration in the amount of the basic earnings, increased by seniority compensation.

These provisions are in accordance with Articles 4-7 of Directive 92/85, and in some aspects even provide wider protection, especially in relation to the age of children that can initiate this special protection.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes, dismissal is prohibited in Serbian law from the beginning of the pregnancy until the end of the maternity leave. Article 187 of the Labour Law provides that an employer cannot cancel the employment contract with an employee during pregnancy, maternity leave, leave for childcare (parental leave) and leave for special childcare. If an employee has a fixed-term contract, it will be extended until the expiry of the maternity leave.

The decision to terminate the employment contract is null and void if at the date of termination of employment the employer was aware of the existence of the circumstances described above, or if the employee, within 30 days of receipt of the notice of termination, informs the employer of the existence of these circumstances, and submits the appropriate certificate of an authorized physician or other competent authority.

Furthermore, Article 183 stipulates that the use of maternity leave, absence from work for childcare and absence from work for special childcare are not justified reasons to terminate an employment contract.

Serbian law does not allow dismissals in exceptional cases as stipulated in Article 10(1). Even if an employee is made redundant during her maternity leave, the Labour Law protects her from the termination of the employment. However, after the return from parental leave, an employer may cancel the employment contract with an employee should there be a justified reason relating to the employee's work ability, his conduct, and the employer's needs, should due to technological, economic or organisational changes, the performing of a particular job become unnecessary, or the scope of the job become reduced (Article 179(9)). However, Article 182 stipulates that in this case, the employer may not employ another person to perform the same jobs within six months from the day of termination of the employment relation. Should it be necessary, prior to the expiry of this time limit, to perform the same job, the priority for concluding the employment contract shall be applied to the employee whose employment relationship was terminated.

In one case before the Commissioner for the Protection of Equality, a woman claimed to have been discriminated against as her employment contract had been terminated immediately after her return from parental leave.<sup>42</sup> However, the Commissioner found no discrimination in this case, bearing in mind that her workplace had disappeared due to organizational changes in the company, together with that of another 44 employees (out of 66 in the company), both women and men. However, there is a widespread practice to transfer women who are on maternity leave to a lower-paid job, and if there is no objective justification, the Commissioner will find discrimination.<sup>43</sup>

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

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<sup>42</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *S.K.P. against I.T. SC.G. d.o.o.*, complaint No. 07-00-730/2015-02, opinion from 8 March 2016.

<sup>43</sup> See, e.g. Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M. D. against Directorate for property of the Autonomous Province of Vojvodina*, complaint No. 07-00-264/2016-02, opinion from 4 August 2016.

The employer is not allowed to dismiss an employee from the beginning of her pregnancy until the end of her maternity leave as indicated above. In addition to the provisions in the Labour Law, the GEA stipulates in Article 16(3) that the absence from work due to pregnancy and parenthood can be no reason to terminate the employment contract, according to the Labour Law.

## **5.2 Maternity leave**

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

According to Article 94(1) of the Labour Law, an employed woman is entitled to a leave from work due to pregnancy and childbirth (maternity leave), as well as to a leave from work for childcare (parental leave), of 365 days altogether. An employed woman is entitled to commence maternity leave, based on findings of a competent medical agency, 45 days at the earliest, and 28 days in any case, prior to the time of the expected delivery (Article 94(2)). The maternity leave shall be three full months from the day of childbirth (Article 94(3)).

The maternity leave of three full months from the day of childbirth also applies should a child be stillborn or die before the expiry of maternity leave (Article 95).

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

An employed pregnant woman must commence maternity leave 28 days before the expected date of delivery (Article 94(2)), and cannot be on maternity leave shorter than three full months (Article 94(3)).

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Article 16(2) of the Labour Law stipulates that an employer is obliged to provide to an employee conditions of employment and to organize work such as to achieve safety and protection of life and health at work, in conformity with the law and other regulations. Also, some other provisions were described above which protect an employee from hazardous jobs or from night work during pregnancy.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

The Labour Law stipulates in Article 94(7) that during maternity leave and childcare leave, a female employee is entitled to compensation of earnings, in conformity with the law. Also, Article 157 provides that the criterion for establishing manpower redundancy shall not include the absence of an employee temporarily prevented to work due to pregnancy, maternity leave, and childcare leave. This means that during maternity leave a woman has a right to maternity pay.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

The Law on financial support for families with children<sup>44</sup> provides that the amount of maternity pay is equal to the average basic salary paid in the past twelve months prior

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<sup>44</sup> The Law on Financial Support for Families with Children, Official Gazette of the Republic of Serbia, No. 16/2002, 115/2005, 107/2009, 104/14 – CC.

to the month in which maternity leave was taken, up to a maximum amount of five average salaries in Serbia (Article 11(1)). If an employee has worked for less than 12 months, for the months that are missing, the salary is calculated as 50 % of the average monthly salary (Article 11(2)). The average monthly salary is determined based on data published by the public authority in charge of statistics (Article 7).

Maternity pay is higher than sick pay, which a minimum of 65 % of average earnings in the preceding three months before the month in which the temporary impediment for work occurred, on the condition that it may not be lower than the minimum salary, where the impediment for work was caused by illness or injury sustained outside work (Article 115(1)).

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

The amount of maternity pay is equal to the average basic salary.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

No, there are no conditions for eligibility for benefits applicable in Serbian legislation.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

While the Labour Law and the LPD include provisions on gender discrimination in employment, only Article 16(2) of the GEA explicitly provides that the absence from work because of pregnancy and parenthood can be no reason to assign a person an inadequate job and terminate the employment contract in accordance with the Labour Law. Upon returning from maternity leave an employee continues working under the terms and conditions applicable until maternity leave, unless changes have been introduced through an annex to the contract of employment.

### **5.3 Adoption leave**

5.3.1 Does national legislation provide for adoption leave?

The Labour Law provides for adoption leave. Article 97 stipulates that an adoptive parent of a child under five is entitled, for taking care of the child, to be absent from work for eight consecutive months, from the day the child arrives at the adoptive family, and at most until the child turns five. If the child is adopted before it is three months old, the adoptive parent is entitled, for the purpose of childcare, to be absent from work until the child is 11 months old. This right is stipulated in Article 97(3) and belongs to a person in whose care the child is for adaptation before establishing the adoption, and after the adoption to one of the adoptive parents. During the absence from work for the purpose of childcare, an adoptive parent is entitled to compensation of earnings in conformity with the law. This compensation is also stipulated in Article 10(2) of the Law on financial support for families with children.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

No, this provision is not explicitly included in the Labour Law, but can be argued to exist based on provisions in the Law on the Prohibition of Discrimination and the Labour Law (general anti-discrimination provisions).

## **5.4 Parental leave**

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Directive 2010/18 has not been explicitly implemented in Serbia.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

The Labour Law, which recognizes the right to parental leave, applies to both the public and the private sector.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

The scope of the Labour Law includes contracts of employment for part-time workers, fixed-term contract workers, and employment contracts with a temporary agency.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The total duration of parental leave from 3 months after the birth of the baby until the expiry of 365 days since the day of commencement of maternity leave (Article 94(4) of the Labour Law). However, Article 94a) (1) provides an even longer period of parental leave for an employed woman for the third and every subsequent new-born child for the duration of two years in total. This right also belongs to an employed woman who gives birth in the first delivery to three or more children, as well as to an employed woman who has given birth to one, two or three children, and who gives birth in the subsequent delivery to two or more children (Article 94 a((2)). Also, this right belongs to the father of a child, but only if the mother abandons the child, dies, or is prevented due to other justified reasons to exercise this right (serving a prison term, serious illness etc.), or if the mother is not employed (Article 94(5)).

5.4.5 Is the right of parental leave individual for each of the parents?

Parental leave is recognized to one parent of the child. However, a father has a very limited possibility to acquire this right. Only the compensation during parental leave is subject to agreement between parents and can be changed over time.<sup>45</sup>

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Parental leave only applies to a parent who does not work full time and takes care of his/her child, and cannot be taken piecemeal.

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<sup>45</sup> Article 4 of the Rulebook on Detailed Conditions and the Manner of Exercising the Right to Financial Support to Families with Children, Official Gazette of the Republic of Serbia, No. 29/2002, 80/2004, 123/2004, 17/2006, 107/2006, 51/2010, 73/2010 and 27/2011 – CC decision.



- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

There is no notice period.

- 5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Serbian law protects adoptive parents by recognising adoptive leave and leave for the care of an adoptive child. Rights and obligations that exist between biological parents and their children exist also between adoptive parents and an adopted child. According to Article 97(3) an adoptive parent of a child under five years of age is entitled, in order to take care of the child, to be absent from work for eight consecutive months from the day of adoption, until the child becomes five years old. If the child is three months old on the day of adoption, an adoptive parent is entitled to be absent from work until the child becomes 11 months old.

Also, Article 22(1) of the Labour Law prescribes that special protection and assistance provided to, among others, adoptive parents are not considered to be discrimination. Article 93 further prescribes additional protection: adoptive parents with a child under three years of age may work overtime and by night only with their written consent; and an employer may reschedule the working hours of an employed adoptive mother.

- 5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

There is no work and/or length of service requirement in order to benefit from parental leave. However, 100 % of compensation will be provided to a parent who has worked for at least 6 continuous months. For a parent having worked between 3 and 6 months the compensation will be 60 %, and for less than 3 months, compensation will be 30 % of the salary (Article 12(2) of the Law on financial support for families with children).

- 5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

There is no situation where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organization.

- 5.4.11 Are there special arrangements for small firms?

There are no special arrangements for small firms.

- 5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

The parental leave for children with a disability or a long-term illness is the same as for parents of other children. However, the Labour Law stipulates in Article 96 that one of the parents of a child in need of special care due to a serious psycho-physical ailment, is entitled, upon expiry of the maternity and parental leave, to be absent from work, or to work half of the full working hours, at most until the child turns five. This right can be exercised based on the opinion of an agency competent to assess the degree of the child's psycho-physical ailment, in conformity with the law. During that time, the employee is entitled to compensation of earnings, in conformity with the law. While working half of the full working hours, the employee shall be entitled to earnings in

conformity with the law, labour rulebook or collective agreement (general act) and employment contract, and for the other half of the full working hours - to compensation of earnings, in conformity with the law.<sup>46</sup> Article 98 further provides that a parent who takes care of a person suffering from cerebral palsy, poliomyelitis, or of a type of plegia or muscular dystrophy or other serious disease, based on the findings of a competent medical agency, and upon their request, may work reduced working hours, but not less than half of the full working hours. This employee is entitled to appropriate earnings, commensurate to the time spent at work, in conformity with the law, labour rulebook or collective agreement (general act) and the employment contract. According to Article 100, one parent is entitled to the absence from work until the child turns three.

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

The GEA in Article 16(2) stipulates that absence from work because of pregnancy and parenthood must not be ground for assigning a person an inadequate job and terminate an employment contract in accordance with the law regulating the labour. Although not explicitly included in the Labour Law and the LPD, less favourable treatment can be challenged through the general anti-discrimination provisions.

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Upon returning from parental leave, an employee continues working under the terms and conditions applicable before parental leave, unless changes have been introduced through an annex to the contract of employment. Although not explicitly mentioned, Article 1 of the GEA stipulates that any employer is obliged to provide to employees, regardless of their sex, equal opportunities and treatment, in relation to the accomplishment of rights resulting from employment and work-related rights, in accordance with the relevant employment law, and defines in Article 4 that gender-based discrimination is any unjustified differentiation or unequal treatment or failure to treat (exclusion, restriction or prioritizing) aimed at hindering, jeopardizing, preventing or denying exercising or enjoyment of human rights and freedoms to a person or a group of persons in the area of, among other, economy, social, and family life.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

The rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

The employment contract remains in force for the duration of the parental leave and during this period the contract cannot be terminated.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

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<sup>46</sup> Conditions, procedure, and the manner of exercising the right to be absent from work for special childcare is regulated in detail by the Minister in charge of social childcare.

There is continuity in the entitlement to social security cover (Article 85(2)5) of the Law on Social Protection). Also, healthcare is covered during the period of parental leave (Article 11(2)2) of the Law on Healthcare), and the Law on Health Insurance recognizes the right to healthcare provided by virtue of compulsory health insurance covering medical examinations and treatment of women relating to family planning, pregnancy, delivery and the postnatal period of up to 12 months after delivery (Article 34(2)).

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

According to the Labour Law, during parental leave, a female employee and/or father are entitled to compensation of earnings, in conformity with the law (Article 94(7)). The parental leave is paid by the employer, who refunds the paid amount from the budget of the State through municipalities.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

The social security system in Serbia provides for an allowance during parental leave, according to Article 85(2)5). The amount of this allowance is adjusted twice a year (on 1 April and 1 October) and currently has two forms: parental allowance and child allowance. The first is in the following amounts:

- for the first child EUR 310 (RSD 38 274.15 );
- for the second child EUR 1205 (RSD 149 666.43) in 24 instalments;
- for the third child EUR 2170 (RSD 269 387.25) in 24 instalments; and
- for the fourth child EUR 2890 (RSD 359 179.20) in 24 instalments.<sup>47</sup>

This allowance is not recognized for adoptive parents, as the parental allowance is a measure of prenatal policy, and its goal is to encourage having children.

The second allowance for the parent who has a salary in the amount of EUR 82 (RSD 10 032.67) is EUR 27 (RSD 3 477.57).<sup>48</sup>

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

Serbian legislation includes more favourable provisions in relation to the duration of parental leave and of leave for the care of a seriously ill child and a child with a disability.

## 5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

The Labour Law in Article 77 stipulates that a father has 7 days of paternity leave when his spouse gives birth. This is a paid leave, which means that a father has 100 % compensation during the leave. Although the Labour Law recognises only married couples, Article 65(5) of the Constitution stipulates that cohabitation is to be equated to marriage in accordance with the law.

<sup>47</sup> See Roditelj Srbija (Parents of Serbia), *Iznos roditeljskog dodatka* (The Amount of Parental Allowance), <http://roditeljsrbija.com/iznos-roditeljskog-i-decijeg-dodatka/2/>, accessed 13 March 2017.

<sup>48</sup> See Roditelj Srbija (Parents of Serbia), *Iznos decijeg dodatka* (The Amount of Child Allowance), <http://roditeljsrbija.com/iznos-roditeljskog-i-decijeg-dodatka/3/>, accessed 13 March 2017.

- 5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

Not explicitly, but they are protected under the anti-discrimination clauses in the Labour Law, the LPD and the GEA.

## **5.6 Time off/care leave**

- 5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

The Labour Law stipulates in Article 77(1) that an employee has the right to a paid absence leave for a maximum of seven workdays in a calendar year, in cases of serious illness of a member of their immediate family, and in other cases as determined in the general act (labour rulebook or collective agreement) and the employment contract. Members of the immediate family are considered to be: the spouse, children, brothers, sisters, parents, adoptive parents, adoptee, guardian and other persons who live in a joint family household with the employee (Article 77(4)).

However, the Law in Articles 96-100 sets out the leave for special care of a child or another person. Article 96(1) provides that one of the parents of a child in need of special care due to a serious psycho-physical ailment, shall be entitled, upon expiry of the maternity and parental leave, to be absent from work, or to work half of the full working hours, at most until the child turns five. This right is exercised based on the opinion of an agency competent to assess the degree of the child's psycho-physical ailment, in conformity with the law. During this leave, an employee is entitled to compensation of earnings, in conformity with the law (Article 96(3)). The employee can also request to work half time, and in that case, he/she is entitled to compensation for another half of the full working hours (Article 96(4)). Conditions, procedure, and the manner of exercising the right to absence from work for special care of a child is regulated in detail by the Minister in charge of social childcare. This right also pertains to one of the adoptive parents, foster parents, and/or guardian of the child, should the child, due to a psycho-physical ailment, need special care (Article 99). They are entitled to absence from work until the child turns three (Article 100(1)).

Also, according to Article 98(1), a parent or a guardian and/or a person who takes care of a person suffering from cerebral palsy, poliomyelitis, or of a type of plegia or muscular dystrophy or other serious disease, based on the findings of a competent medical agency, and upon their request, may work reduced working hours, but not less than half of the full working hours. An employee working reduced working hours is entitled to appropriate earnings, commensurate to the time spent at work, in conformity with the law, labour rulebook or collective agreement (general act) and the employment contract (Article 98(2)).

In any other case, the employer may grant to an employee unpaid leave, during which time the rights and duties relating to the employee's employment stay, unless otherwise determined for specific rights and duties by law, labour rulebook or collective agreement (general act) and contract of employment (Article 78).

Moreover, the Labour Law provides other measures to help the employee with a seriously ill child or child with a disability. Article 91(2) protects a parent with a child that has a serious disability: they can work overtime and/or work at night only upon their consent in writing.

## **5.7 Leave in relation to surrogacy**

### **5.7.1 Is parental leave available in case of surrogacy?**

Surrogacy is still not defined or allowed in Serbia, and the draft of the Civil Code includes an introduction of surrogate motherhood in Serbia.<sup>49</sup>

The only provision that currently exists in relation to surrogacy is Article 56(25) of the Law on the treatment of fertility in biomedically assisted fertilization procedures.<sup>50</sup> This Article prohibits in these procedures the involvement of a woman who intends to give her child to a third party after its birth, with or without paying any fees or achieving any tangible or intangible benefits, as well as offering services or surrogate motherhood by a woman or any other person with or without paying any fees or achieving other tangible or intangible benefits.

## **5.8 Leave sharing arrangements**

### **5.8.1 Does national law provide a legal right to share (part of) maternity leave?**

Maternity leave cannot be shared under Serbian law. An employee cannot choose to take maternity leave on a part-time basis.

### **5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?**

Parental leave is recognized for one parent. Serbian law recognizes parental leave of the father in very limited cases, such as if the mother abandons the child, dies, or is prevented due to other justified reasons to exercise this right (serving a prison term, serious illness etc.). The father also has this right if the mother is not employed.

## **5.9 Flexible working time arrangements**

### **5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?**

The Labour Law stipulates in Article 39 that an employment relationship may also be established as part-time employment for either an indefinite or a definite period of time (Article 39). In this case, an employee has all rights deriving from the employment relationship, proportionally to the time spent at work. However, there is no possibility to reduce working time on request.

### **5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?**

The Labour Law only provides in Article 92 that an employer may reschedule the working hours of an employed woman in course of pregnancy, and of an employed parent with a child under three, or a child with a serious psycho-physical ailment, only upon consent of the employee in writing. An adoptive parent and/or guardian of the child has the same right (Article 93).

Also, the Labour Law stipulates that the employer will provide that the employed woman, upon returning to work prior to expiry of the first year after the birth of the child, has the right to one or more breaks during working hours for a total duration of 90

<sup>49</sup> Text available in Serbian at <http://www.mpravde.gov.rs/files/NACRT.pdf>, accessed 13 March 2017.

<sup>50</sup> The Law on the Treatment of Fertility in Biomedically Assisted Fertilization Procedures, Official Gazette of the Republic of Serbia, No. 72/2009.

minutes, or the right to reduce the daily working hours by 90 minutes, in order to be able to breastfeed her child, if the daily working hours of the employed woman equal six or more hours. This break will be considered as a part of the working hours that will be compensated to the employed woman as remuneration in the amount of the basic earnings, increased by seniority compensation. (Article 93 a)).

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

According to Article 42 of the Labour Law, an employment relationship can be established to perform work outside the employer's premises and/or at home. In this case, an employment contract has to include, among other things, working hours in accordance with work standards; type of work and the methods and organisation of work; conditions of work and the way of supervision over the employee's work; the amount of earnings for the work performed and the pay-day schedule; utilization of the employee's instruments of work and the compensation for their utilization; reimbursement of other work expenses and the way they are defined; and other rights and obligations. However, an employee is not entitled to work from home or remotely on request.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future?

There are no possibilities for flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future.

## **6 Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?**

In respect of occupational pensions, Serbian anti-discrimination law does not cover prohibition of discrimination.

Serbia has no occupational pension insurances.

### **6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

N/A.

### **6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

N/A.

### **6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?**

No.

### **6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?**

No.

### **6.6 Is sex used as an actuarial factor in occupational social security schemes?**

No.

### **6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

N/A.

## **7 Statutory schemes of social security (Directive 79/7)**

### **7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?**

The principle of equal treatment for men and women in matters of social security has been implemented in national legislation.

The GEA stipulates in Article 4 that gender-based discrimination is any unjustified differentiation or unequal treatment or failure to treat (exclusion, restriction or prioritizing) aimed at hindering, jeopardizing, preventing or denying the exercise or enjoyment of human rights and freedoms to a person or a group of persons in the social area, among others. It also stipulates in Article 23(1) that gender-based discrimination is prohibited on the occasion of accomplishment and enjoyment of rights in the area of social care, regardless of the subjects arranging or implementing this care. It further provides that in order to improve the financial position of self-supporting and unemployed parents, the allocation of budgetary funds shall be effectuated at the level of the Republic of Serbia, the autonomous province and self-government units pursuant to law. Furthermore it provides an obligation for social and healthcare institutions and other institutions dealing with protection of women and children to adjust their work organization and working hours to the requirements of their clients.

The LPD prohibits discrimination that is considered to occur in the case of conduct contrary to the principle of gender equality, i.e. the principle of observing the equal rights and freedoms of women and men in political, economic, cultural and other aspects of public, professional, private and family life; this means it also applies to social life (Article 20).

Finally, the Law on Social Protection prohibits discrimination of the beneficiary of social protection based on, inter alia, sex (Article 25).

### **7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The personal scope of Serbian law relating to statutory social security schemes is broader, as Article 4 of the Law on Social Protection stipulates that each individual or family in need of help and support to overcome their social and subsistence difficulties, and to create conditions in order to meet their basic needs have the right to social security. Article 41 further specifies that the beneficiary cannot achieve basic living conditions with their work, income from property or from other sources.

### **7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 Paragraph 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The material scope of Serbian law relating to statutory social security schemes is broader than specified in Article 3(1-2) of Directive 79/9. According to Article 41(3) this scheme covers the beneficiary whose well-being, security and productive life in society is threatened by risk due to age, disability, illness, family and other life circumstances.



**7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.**

Serbian law does not make exclusions from the material scope as specified in Article 7 of Directive 79/7.

**7.5 Is sex used as an actuarial factor in statutory social security schemes?**

Sex is not used as an actuarial factor in statutory social security schemes.

**7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

There are no specific difficulties in Serbia in relation to implementing Directive 79/7.

## **8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

### **8.1 Has Directive 2010/41/EU been explicitly implemented in national law?**

Directive 2010/41/EU has not been explicitly implemented in Serbian law.

### **8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)**

The LPD does not cover self-employment. The GEA does not mention self-employment, except in Article 22(2) where it says that promotion of employment and self-employment of the less-represented sex is allowed. The agency in charge of employment shall promote employment and self-employment of the less-represented sex by including a large number of persons of that particular sex in some active employment policy measures, which include: affirmation of equal opportunities in the labour market, career guidance, professional information, counselling and individual employment plans, additional education and training, other activities aimed at promotion of self-employment and employment of the less-represented sex.

In addition, the Labour Law in Article 20 prohibits discrimination with regard to access to employment, selection and recruitment (Paragraph 1), and job promotion (Paragraph 4), and does not cover self-employment and occupation. However, the Law on Employment and Unemployment Insurance governs employment-related activities and institutions competent for employment affairs, rights and obligations of the unemployed person and the employer, active employment policy, unemployment insurance and other matters relevant to employment, creating employment and preventing long-term unemployment in the Republic of Serbia (Article 1).<sup>51</sup> This Law covers self-employment. Article 43, Paragraph 4 includes in the active employment measures the support to self-employment, while Article 51 defines this support. Article 52 stipulates further education and training in order to promote self-employment. Article 5, Paragraph 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 in Serbia and abroad; vocational guidance and career counselling; and implementation of active employment policy measures (Article 6).

The Law on Employment and Unemployment Insurance in Article 51(2) defines self-employment as 'starting a sole proprietorship, cooperative, agricultural estate or some other form of entrepreneurship by an unemployed person or jointly by a group of unemployed persons, as well establishing a company if the founder enters into a contract of employment with the company.' In other words, self-employed workers are those workers who working on their own account or with one or several partners or in a cooperative hold the type of jobs defined as self-employment jobs.

### **8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.**

In Serbia, all self-employed workers are considered part of the same category. Serbian legislation does not recognize life partners.

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<sup>51</sup> Law on Employment and Unemployment Insurance, Official Gazette of the Republic of Serbia, No. 36/2009, 88/2010, 38/2015.

#### **8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?**

Serbian law has not implemented Article 4 of Directive 2010/41/EU explicitly in relation to self-employed activities, although it can be argued that Article 2(1) of the GEA includes it as it stipulates that gender equality means equal participation of women and men in all fields of the public and the private sector, and that the prohibition of harassment and sexual harassment, as well as of the instruction to discriminate apply, also in this area. Thus, the material scope of national law relating to equal treatment in self-employment is more restricted than specified in Article 4 Directive 2010/41/EU.

#### **8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?**

The Labour Law stipulates in Article 156 that the public organization in charge of employment is bound to communicate to the employer a proposal of measures with the aim of preventing or reducing, as much as possible, the number of notices of cancellation of employment contracts, and/or to ensure retraining, additional training, self-employment and other measures aimed at finding new employment for redundant employees.

Despite the fact that the Serbian Government supports women's entrepreneurship,<sup>52</sup> together with local self-governments, international organizations and NGOs, women in Serbia face more unfavourable conditions for the development of their enterprises than men due to their position in the labour market, the gender gap in property ownership, greater involvement of women in the home, and the still strong gender stereotypes which cause a lack of confidence among women and influence their willingness to initiate their own business venture.<sup>53</sup> The main problems are: difficulty in obtaining funds from financial institutions and lack of initial capital, inadequate tax incentives, the property usually being registered in the husband's name, weak business contacts, the lack of information, inflexible childcare, difficulties in adjusting to family and business duties, etc.<sup>54</sup>

#### **8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?**

Serbia has a system for social protection of self-employed workers. A self-employed woman has a right to maternity leave and parental leave for 365 days, and the right to leave for special childcare. A self-employed woman during maternity and parental leave has a right to compensation, according to Article 10 and 11 of the Law on financial support to families with children. Pursuant to this Law, the total amount of compensation is defined under Article 11 of the Law, and its recipients are persons who prior to the exercise of this right had been self-employed for more than six months continuously.

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<sup>52</sup> For example, every three years, the autonomous administrative body responsible for gender equality presents a programme to encourage employment and self-employment of women, which includes measures and activities to encourage employment and self-employment of women who have been jobless for more than two years, single parents, mothers with children under three, and women who have been made redundant.

<sup>53</sup> See Rada Arandjelovic, *Fueling the Economic Potential of Women in Serbia, Overview of the situation in female entrepreneurship in Serbia, obstacles most often encountered by women in business and proposed answers*, available at <http://www.policycafe.rs/documents/financial/research-and-publications/A2F-for-women/Women%20Entrepreneurship%20Thesis.pdf>, accessed 13 March 2017, p. 5.

<sup>54</sup> National Strategy for Gender Equality, Official Gazette of the Republic of Serbia, No. 04/16, p. 19.

They also enjoy healthcare protection during pregnancy and maternity and parental leave.

In Serbia, there is only one system of social protection, and there is no choice between various systems.

**8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?**

Article 8 of Directive 2010/41/EU regarding maternity benefits for self-employed persons has been implemented in Serbian law.

The Labour Law stipulates in Article 203 that an individual can independently perform an activity as entrepreneur, in conformity with the law.

A self-employed woman has a right to maternity leave and parental leave for 365 days, and the right to leave for special childcare. A self-employed woman during maternity and parental leave has a right to compensation, and the basis for calculating the amount of compensation is the taxable profit in the last 12 months prior to maternity leave.<sup>55</sup> This means that maternity allowance depends on prior profit. A self-employed woman has the possibility to temporarily close shop, or to temporarily entrust that activity to another person (Article 2(3)7) of the Rulebook).The payment is made by the Municipality in monthly instalments.

The maternity allowance for self-employed women is granted on a mandatory basis and there is no choice between systems.

**8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?**

No, as occupational social security is not recognized in Serbia.

**8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.**

N/A.

**8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?**

No, Article 14(1) a) of Recast Directive 2006/54 has not been explicitly implemented in Serbian law as regards self-employment.

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<sup>55</sup> Article 2(3)6) and Article 9(3) of the Rulebook on Detailed Conditions and the Manner of Exercising the Right to Financial Support to Families with Children.

## **9 Goods and services (Directive 2004/113)**

### **9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?**

Whereas the GEA does not contain provisions on equal access to goods and services, the LPD in Article 17(1) prohibits discrimination in the provision of public services, but not goods. In one case decided in 2016, the Commissioner found discrimination on the ground of marital and family status.<sup>56</sup> This case concerned a mother who entered the bus, with a baby in a stroller. The bus driver did not want to start driving until the stroller was not folded up and she was holding her baby in her arms. Considering that such a manner of driving was unsafe for her baby, and insisting that her baby was safer in the stroller, she refused to comply with the driver's orders. In the end, she was actually forced to leave the bus, as the driver did not want to drive on.

### **9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.**

The material scope of Serbian law relating to access to goods and services is more restricted than what is specified in Article 3 of Directive 2004/113, as it does not cover goods.

The LPD states in Article 17(1) that discrimination occurs '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 group 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 by private or public authorities, entities, companies, etc.). Further, Article 17(2) of the LPD also guarantees to everyone 'the right to equal access to premises in public use (premises where the head offices of public administration organs are located, premises used in the sphere of education, healthcare, social welfare, culture, sports, tourism, premises used for the purpose of environmental protection, protection against natural disasters and the like), as well as public spaces (parks, squares, streets, pedestrian crossings and other public transport routes, etc. ), in accordance with the law.' In relation to services, the scope is therefore equal as it also applies both to the public and to the private sector, including public bodies and outside the area of private and family life.

### **9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?**

There are no explicit exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education.

### **9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.**

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<sup>56</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.M. against the JKP GSP Belgrade* complaint No. 07-00-423/16-02, opinion of 11 November 2016.

Differences in treatment in the provision of goods and services are not justified in Serbian law, except for indirect discrimination when difference in treatment is justified by a lawful objective and the means of achieving that objective are appropriate and necessary (Article 7 of the LPD).

**9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?**

The Law on Insurance<sup>57</sup> does not address the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services. The GEA, however, prohibits gender discrimination in all areas of life (Article 4), but in practice, for some forms of insurance (such as life and health insurance) individuals' premiums and benefits depend on different factors (age, occupation, duration of premium), including sex.

In one case before the Commissioner, a female client had accidentally discovered that her insurance company prescribed different amounts of premium for men and women (EUR 276.84 for women and EUR 168.72 for men).<sup>58</sup> The health insurance company explained that there was no law which prohibits the use of sex as a factor in the calculation of premiums and that the amount of the premiums was based on statistical data on requests for compensation received in the previous reporting period. It also stated that for the life insurance the mortality table was applied, which was different for men and women, and demonstrated that the level of insured risk may be different for the two sexes. Finally, it explained that women were protected by a higher insurance rate as they had more benefits in providing medical services. The Commissioner found that the LPD was applicable to the premium and that this amounted to sex discrimination which was not justified due to the fact that women did not receive any additional health services which were covered by their premium compared to men. The Commissioner particularly underlined that the different life expectancy for men and women did not only depend on the sex of particular person, but was also determined by economic and social environment, life habits, diet, consumption of alcohol or tobacco, the practice of leisure activities, etc. It is also important to note that the Commissioner relied on the judgment delivered in *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des Ministres*.<sup>59</sup>

**9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.**

The exception of Article 5(2) of Directive 2004/113 has not been interpreted in Serbia. Risk factors based on sex in connection with insurance premiums and benefits are used in practice and are still not considered to be incompatible with the principle of equal treatment of men and women.

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<sup>57</sup> Law on Insurance, Official Gazette of the Republic of Serbia, No. 139/14, June 2015.

<sup>58</sup> Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M. J. against U. insurance*, complaint No. 07-00-93/2016-02, opinion from 10 June 2016.

<sup>59</sup> C-236/09, CJEU, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des Ministres*, 1 March 2011.

**9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?**

The GEA stipulates in Article 7 that it is not considered discrimination if some special measures are adopted in order to eliminate and prevent an unequal status of women and men and accomplish equal opportunities of both sexes. Also, the LPD allows measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position. As this Law is to ensure equal access to services, positive measures are allowed in relation to access to and supply of services.

**9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.**

Serbian legislation does not make any specific reference to pregnancy, maternity and parenthood in relation to access and supply of goods and services as a source of gender discrimination. As a consequence, discriminatory practices are less visible and more difficult to tackle. However, the past few years have seen an increase in the establishment of new services aimed to help parents during parenthood, such as private kindergartens, childcare services, playgrounds, etc. Also, it is important to mention Article 25 of the GEA, which stipulates that social and healthcare institutions and other institutions dealing with the protection of women and children are obliged to adjust their work organization and working hours to the requirements of their clients.

## **10 Violence against women and domestic violence in relation to the Istanbul Convention**

### **10.1 Has your country ratified the Istanbul Convention?**

Serbia has ratified the Istanbul Convention on 31 October 2013. However, Serbia has made reservations regarding Article 30(2) and Article 44(1)(e), and Paragraphs 3-4, until it harmonizes its criminal legislation with these provisions. While Article 30(2) is to ensure an adequate state compensation to those who have sustained serious bodily injury or impairment of health, Article 44 concerns establishment of jurisdiction by a person who has her or his habitual residence in their territory. Also, Article 44(3) stipulates that for the prosecution of sexual violence, including rape, forced marriage, female genital mutilation and forced abortion and forced sterilization, States Parties shall take the necessary legislative or other measures to ensure that their jurisdiction is not subordinated to the condition that the acts are criminalised in the territory where they were committed, as well as that the prosecution of those offences can only be initiated following the reporting by the victim of the offence or the submitting of information by the State of the place where the offence was committed. This means that the pre-existing legal framework in Serbia was not fully in compliance with the obligation under the Convention, particularly in relation to criminal legislation. This change requires the introduction of some new legislation and the redefinition of some existing criminal acts.

In its progress report for Serbia for 2016, the European Commission ascertained that the CoE Istanbul Convention needs to be adequately implemented, and the protection of women against all forms of violence needs to be strengthened.<sup>60</sup> First, the Law on the Police<sup>61</sup> was adopted on 4 January 2016 and Article 28 prescribes that in a case of reported violence or threat of domestic violence, the police is obliged to immediately take all necessary measures, in cooperation with other competent bodies, in order to prevent or stop the violence that may result in bodily injury or deprivation of life. More importantly, on 23 November 2016, the National Assembly adopted the first Law on Prevention of Domestic Violence.<sup>62</sup> Its purpose is to secure effective prevention of domestic violence and to provide urgent, adequate and efficient protection and support to victims of domestic violence. Domestic violence is broadly defined to include physical, sexual, psychological, or economic violence. Victims of domestic violence have the right to information, the right to free legal aid, and the right to an individual plan of protection and support. The Law regulates the procedure for protecting victims of domestic violence, including risk recognition and risk assessment. Public authorities are obliged to act in a timely manner, and to provide legal aid, psychosocial and other support for recovery, empowerment and self-reliance for each victim. The Law will be implemented from 1 June 2017.

Also, in 2016, the Criminal Code was amended and now criminalizes genital mutilation, stalking and sexual harassment.<sup>63</sup>

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<sup>60</sup> European Commission, Serbia 2016 Report, SWD (2016) 361 final, 9 November 2016, p. 63, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2016/20161109\\_report\\_serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_serbia.pdf)

<sup>61</sup> The Law on the Police, Official Gazette of the Republic of Serbia, No. 6/2016, adopted on 28 January 2016 and entered into force on 5 February 2016.

<sup>62</sup> The Law on Prevention of Domestic Violence, Official Gazette of the Republic of Serbia, No. 94/2016, adopted on and will be implemented from 1 June 2017, adopted on 24 November 2016 and entered into force on 2 December 2016.

<sup>63</sup> Amendments to the Criminal Code, Official Gazette of the Republic of Serbia, No. 94/2016.



## **11 Enforcement and compliance aspects (horizontal provisions of all directives)**

### **11.1 Victimisation**

#### **11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?**

The provisions on victimisation have been implemented in Serbian legislation. The Gender Equality Act does not use the term 'victimisation', but it stipulates in Article 4(2) that it is considered to be discrimination if a person is unjustifiably treated or might be treated in a worse manner than another person, explicitly or mainly because such person is seeking or intends to seek legal protection against discrimination or if a person has offered or intends to offer evidence of discriminatory treatment. Furthermore, victimisation is enshrined in the LPD as a special form of discrimination.<sup>64</sup> 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 other persons, such as witnesses, or persons who help a victim of discrimination to bring a complaint.

However, relevant case law is still lacking on this topic.

### **11.2 Burden of proof**

#### **11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?**

Serbian legislation provides for a shift of the burden of proof in sex discrimination cases.

The GEA contains a provision on the shift of the burden of proof in Article 49(2), which provides that if the 'claimant has made it probable during the proceedings that an act of gender-based discrimination was committed, the burden of proof that such an act had not caused any violation of the principle of equality, namely of the principle of equal rights and obligations, will be borne by the defendant.'

The LPD contains the same provision in Article 45.

These provisions comply with EU law, specifically in light of case C-415/10 *Kelly and Meister*. However, 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 a case of direct and indirect discrimination. The interpretation should be, however, that the rule on the shift of the burden of proof also applies to harassment and victimisation.<sup>65</sup>

### **11.3 Remedies and Sanctions**

#### **11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.**

In Serbia, there is a range of applicable sanctions in sex discrimination cases.

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<sup>64</sup> Victimization is called 'calling to account' in Serbian law.

<sup>65</sup> See Petrusic, N., Krstic, I., Marinkovic, T., *Commentary on the Law on the Prohibition of Discrimination*, The Commissioner for the Protection of Equality, Judicial Academy, Belgrade, 2014, p. 188.

The special civil procedure is regulated by Articles 43-51 of the GEA, which includes some specific provisions designed to help victims of sex discrimination.

Article 43 provides measures that can be requested by the civil court:

- to establish the violation caused by the discriminatory act;
- to prohibit the pursuing of activities threatening to inflict a violation;
- to prohibit further activities and/or repetition of activities that caused a violation;
- to relocate turnover of means, namely the objects having made a violation (textbooks that are discriminatory or present a certain sex in a stereotype manner, printed matter, advertising aids, promotional material, etc.);
- to eliminate the violation and *restitution in integrum*; and
- to receive compensation for pecuniary and non-pecuniary damages.

These proceedings are treated as especially urgent (Article 47). The first hearing must be held within 15 days from the receipt of the lawsuit. The time to respond to the lawsuit is 8 days. The decision on the motion to issue a temporary measure must be adopted by the court within 3 days from the date of receipt of the motion. Temporary measures are allowed if the proponent makes it probable that there is a concrete danger of violation of some right due to discriminatory actions and that there would be considerable pecuniary and non-pecuniary damage if the interim measure is not ordered (Article 50).

The time to make an objection to the decision on the interim measure amounts to 48 hours from the receipt of the decision. The decision concerning the objection is to be adopted within the next 48 hours. The term to file an appeal against the decision in the proceedings to accomplish civil legal protection because of gender-based discrimination is 8 days, and the second instance court is obliged to decide on the appeal within 3 months from the date of its submission, pursuant to the law governing civil procedure.

Article 43(4) of the LPD expressly allows compensation for material and non-material damage in a case of discrimination.<sup>66</sup> Article 43, Paragraph 4 of the LPDPD also expressly provides compensation of damages that occurred due to a discriminatory act.<sup>67</sup> The principles from the Law on Contract and Torts apply to determination of the type of damage, and a causal link between the discriminatory act and damage.

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

- to impose a ban on an activity that poses the threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity;
- that the court establish that the defendant has treated the claimant or another party in a discriminatory manner;
- to take steps to redress the consequences of discriminatory treatment; and
- that the decision passed in any of the lawsuits referred to above be published.

The GEA and the LPD include fines that can be imposed in misdemeanour proceedings, ranging from EUR 80 to 800 (RSD 10 000 to 100 000).

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<sup>66</sup> If the claimant is the Commissioner for the Protection of Equality, an organization engaged in the protection of human rights or the rights of a certain group of people, or a person who deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case, the compensation cannot be claimed.

<sup>67</sup> According to Article 43 of the LPDPD, the claimant can request: (1) court prohibition of further discriminatory behaviour, (2) remedying 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 caused by discriminatory behaviour.

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

- Violation of Article 128 (violation of equality): a maximum of 3 years of imprisonment and for the more severe form 3 months to 5 years of imprisonment;<sup>68</sup> and
- Violation of Article 387 (racial and other discrimination) from 3 months to 5 years of imprisonment for the more severe form.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

Anti-discrimination laws (the LPD and the GEA), the Labour Law and the Criminal Code provide different ranges of sanctions for discriminatory behaviour. These sanctions can be civil and criminal sanctions and fines. However, there are several problems which affect effectiveness, proportionality and dissuasiveness of sanctions.

First, anti-discrimination proceedings are urgent, but they are not treated as such in practice. Another problem is the execution of decisions of the court.

The sanctions imposed are not very high, especially in relation to compensation for non-pecuniary damages. Problems also lie in the fact that the monetary fines that can be imposed range from EUR 40 to 800, which is only symbolic in comparison to some other laws.

On the other hand, both anti-discrimination laws offer the possibility of introducing a temporary measure in order to prevent discriminatory treatment, with a view to eliminating the danger of violence or some major irreparable damage. Also, the two anti-discrimination laws include different measures, from the prohibition of discriminatory acts and compensation to the publication of the court decision, which has proved to be a very efficient measure in Serbia, especially in relation to the opinion issued by the Commissioner for the Protection of Equality.

#### **11.4 Access to courts**

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

In Serbia, the access to courts is safeguarded for alleged victims of sex discrimination. The GEA has several provisions which guarantee the access to courts, such as Article 46, which stipulates that the alleged victim of sex discrimination can initiate a lawsuit before the court of general jurisdiction, as well as before the court in whose territory the claimant has permanent residence or temporary residence. Also, this is the only anti-discrimination law in Serbia that provides release from advanced payment of the costs of proceedings: in Article 48 the GEA stipulates that in the proceedings to accomplish civil protection from gender-based discrimination, the claimant is released from advance payment of the costs of proceedings, which are paid from court funds.

However, another problem in accessing the court is the unwillingness of the victim to go to court, the lack of knowledge about the existing legal anti-discrimination framework,

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<sup>68</sup> In 2016, Article 128 was extended to also include gender identity. Amendments to the Criminal Code, Official Gazette of the Republic of Serbia, No. 94/2016.

strongly rooted traditional stereotypes which entail a greater degree of tolerance, lack of family support in some cases, etc.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

In Serbia, the access to courts is safeguarded for anti-discrimination/gender equality interest groups and other legal entities.

A civil lawsuit can be initiated, with the consent of the discriminated person, on his/her behalf, by the trade union or the associations whose objectives are related to promotion of gender equality. These subjects may join the claimant in the capacity of the intervening party. Moreover, in cases of discrimination violating the rights of a larger number of persons, they may initiate the proceedings on their own behalf. A person whose right has been violated may join the claimant in the capacity of intervening party. (Article 43(2) of the GEA)).

After entering the proceedings, i.e. after the initiation of the proceedings, organizations may inform, through mass media or in another adequate manner, other persons who have suffered damage, trade unions and associations, about the initiated proceedings and invite them to join the claimant as intervening party or co-claimant (Article 43(3) of the GEA). A new claimant may join the proceedings subsequently together with the claimant and without the consent of the defendant after the new claimant has entered the main hearing (Article 43(4) of the GEA).

Also, the LPD provides in Article 35(3) that the lawsuit may be initiated by an organization 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 person whose rights have been violated. Trade unions can represent a member in a labour dispute, a lawyer holding a bar exam (Article 85(3) of the Civil Procedure Code). The LPD requires that if discriminatory treatment solely affects one particular person, organizations may initiate a lawsuit only with his/her consent given in writing. Otherwise, this consent is not required.

However, the right to intervention is not explicitly mentioned in the LPD, but it is based on Article 35(3 - 4), which gives standing for initiating lawsuits to organizations and to the Commissioner for the Protection of Equality. These rights also derive from the Civil Procedure Code (Articles 215-217) which is *lex generalis* to the LPD, and recognizes the right to intervention in someone else's anti-discrimination lawsuit to those who have legal authority to initiate the lawsuit. Article 215(1) states that 'If a person has a legal interest in assisting one of the parties in the on-going litigation between other persons, such person may join that party.' The person who intervenes may become involved in the litigation at any time during the proceedings, until the judgment about the claim comes into effect, as well as during the proceedings continued by submitting a legal remedy (Article 215(2)).

Although the GEA is better equipped to serve victims of gender discrimination, there is still no case law under this specialized anti-discrimination law and victims have chosen the LPD for civil protection.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

Serbia still has no Law on Free Legal Aid, but victims of gender discrimination can receive legal aid from different benefactors (mostly NGOs) in the form of information, legal advice and representation. This legal aid can also be obtained by the Commissioner

for the Protection of Equality in the form of information and legal advice, but also in the form of initiating a lawsuit in a strategic case of discrimination.

### **11.5 Equality body**

#### **11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?**

Yes: The Commissioner for the Protection of Equality,  
<http://www.ravnopravnost.gov.rs/index.php?lang=en&pismo=eng>.

The Commissioner has the competence to deal with all grounds of discrimination covered in the LPD. It explicitly covers 'race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability', and all other grounds of discrimination not mentioned in Article 2(1).

The Commissioner is an independent, autonomous and specialized state body elected by Parliament, which has a wide mandate in the area of the promotion of equality and anti-discrimination in all areas of social life.

The Commissioner has a range of measures available, but from the perspective of victims of discrimination the most relevant is to receive and consider claims regarding discrimination, to provide an opinion and recommendations in concrete cases, to provide information to the complainant on his/her rights and possibilities of initiating a court procedure or other type of protection measures, and to file complaints for protection from discrimination on behalf of but with the approval of the discriminated person and to file offence reports against the prohibited discrimination act.<sup>69</sup> In short, it has two main responsibilities: to prevent and to protect from discrimination.

### **11.6 Social partners**

#### **11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?**

Social partners in Serbia play an important role in ensuring compliance with and enforcement of gender equality law, although their work can be more intensive and larger. The Confederation of Autonomous Trade Unions of Serbia, Women's Section performs activities aimed at empowering women, increasing their visibility and representation in the trade union organs, improving gender equality, equality in case of employment, protection of women's rights and protection of maternity, abolishing discrimination.<sup>70</sup> The Section organizes seminars and round tables, publishes brochures, and cooperates with governmental bodies, NGOs and international organizations on different matters.

The GEA contains two important provisions in relation to the role of trade unions. Article 21 stipulates that in collective negotiations, trade unions and associations of employers should make efforts to ensure that 30 % of the representatives of the less-represented

<sup>69</sup> The Commissioner also submits annual and special reports to Parliament on the situation in the equality protection field; informs the public about the most common, typical and severe cases of discrimination; monitors the enforcement of the law 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 with regard to the fight 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 self-governments; and recommends equality measures to state bodies and institutions.

<sup>70</sup> See more on the website of CATUS, Women's Section, at <http://www.sindikat.rs/ENG/women.html>, accessed 13 March 2017.

gender are included in the committees to hold negotiations in compliance with the law regulating employment (namely, the number of representatives of less-represented gender proportional to the participation of that particular gender in the membership of trade unions and associations of employers). Moreover, trade unions have a significant role in civil protection from gender discrimination. An anti-discrimination lawsuit can be initiated, with the consent of the discriminated person, on his/her behalf, by the trade union or the associations whose objectives are related to promotion of gender equality. These subjects may join the claimant in the capacity of intervening party. In case of discrimination violating the rights of a larger number of persons, trade unions and associations may initiate proceedings on their own behalf.

After entering the proceedings, namely after the initiation of the proceedings, trade unions and associations may inform, through mass media or in another adequate manner, other persons who have suffered damage, trade unions and associations about the initiated proceedings and invite them to join the claimant as the intervening party or the co-claimant (Article 43).

### **11.7 Collective agreements**

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

According to the amendments to the Labour Law, from June 2014, the provisions of all collective agreements not contrary to the law remained in force until 29 January 2015. Therefore, new collective agreements were concluded in the first half of 2015, in order to comply with the amendments to the Labour law and in order to support the affirmation of social dialogue. Also, a special collective agreement was signed for the public authorities,<sup>71</sup> providing better working conditions and more rights for employees. It provides some further protection for pregnant workers and those on maternity leave and leave for childcare.

The Labour Law specifies the minimum rights of employees, together with the General Collective Agreement which is not designed to implement gender equality law.<sup>72</sup> However, it has been explained in this report what the scope is of gender protection enshrined in the Labour Law. The Labour Law is relevant for all employers, regardless of their business activities. Since special collective agreements used to provide more extensive rights for employees, with the latest changes, an employer will have more freedom to determine the rights of their employees.

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<sup>71</sup> Special collective agreement for the public authorities, Official Gazette of the Republic of Serbia, No. 25/2015, 50/2015.

<sup>72</sup> The Minister of Labour and Social Policy rendered a Decision stipulating that the General Collective Agreement shall apply to all employers in the territory of the Republic of Serbia; Official Gazette of the Republic of Serbia, No. 104/2008, Annex I, 8/2009 Annex II, 11 November 2008. It has applied since 1 January 2009.

## 12 Overall assessment

Serbian anti-discrimination law is mostly in accordance with the EU gender equality *acquis*. In some areas, Serbian legislation has even introduced more favourable provisions in relation to the duration of parental leave and leave for the care of a seriously ill child and a child with a disability. The Gender Equality Act contains some important provisions, such as the recognition of positive measures, guarantee of gender equality in all areas of public and private life, and the initiation of special civil lawsuits.

However, there are also some gaps in the existing legislation. Pregnancy and maternity discrimination are not explicitly prohibited as a form of direct sex discrimination. The GEA does not specify that harassment and sexual harassment, as well as any less favourable treatment based on the person's rejection of or submission to such conduct, amounts to discrimination. Instruction to discriminate is not recognized as a special form of discrimination in Serbian anti-discrimination legislation. Serbian law does not address wage transparency. Also, surrogacy is still not defined and allowed in Serbia. There is no possibility for flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future. The Law on Protection from Discrimination does not cover self-employment. Moreover, Serbian legislation does not make any specific references to pregnancy, maternity and parenthood in relation to the access and supply of goods and services as a form of gender discrimination. Finally, legislation does not explicitly guarantee that an employed woman, after returning from maternity leave, should remain in the same job. Also, there is an overlap with the LPD in relation to civil procedure, and unfortunately, there has been no case law under the GEA so far (although it provides better protection in respect to terms and release from advance payment of the costs of proceedings). However, Serbia made an effort to adopt the Law on Prevention of Domestic Violence which is expected to provide effective prevention and protection of domestic violence after June 2017. Also, the Action Plan for Chapter 23 envisaged amendments to the Law on the Protection from Discrimination in order to fully align it with the EU *acquis* and the first consultations were held at the end of 2016.

However, another problem is the implementation of existing legislation. Although several national strategies were adopted in order to tackle discrimination and many measures were implemented in order to improve sex equality, women still face everyday discrimination, particularly in the workplace. In January 2016, the Strategy for Gender Equality was adopted for the period 2016-2020, supplemented by the Action Plan.<sup>73</sup> This strategic document is based on an evaluation of the Action Plan for the implementation of the Evaluation of the National Strategy for an Improvement of the Position of Women and the Advancement of Gender Equality for the period 2010-2015. This Evaluation, adopted in October 2015, demonstrates that in many key areas the desired effects had not been achieved. The participation of women in public authorities outside the legislature is still at a low level; the economic status of women is poor; violence against women, including femicide, is widespread; media content is still characterized by sexism and misogyny. Measures for employment, entrepreneurship and economic empowerment, as well as measures for the advancement of multiple discriminated groups, have yielded poor results.

There are many difficulties in relation to the application of the principle of equal pay for equal work and work of equal value in practice, as well as in relation to access to work, vocational training, employment, working conditions etc. In general, many women are asked about their family plans in interviews, and many of them are faced with limited access to work and with termination of their employment contract after returning from

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<sup>73</sup> National Strategy for Gender Equality, Official Gazette of the Republic of Serbia, No. 04/16. Text in Serbian available at <http://www.mgsi.gov.rs/lat/dokumenti/nacionalna-strategija-za-rodnu-ravnopravnost-za-period-od-2016-do-2020-godine-sa-akcionim>, accessed 13 March 2017.

parental leave. Also, fathers are still not equal in their rights to take parental leave, and apart from the unsatisfactory legal norm, the cause of this should be sought in the deeply rooted gender stereotypes and traditional roles for women and men. The report on Time Use in the Republic of Serbia<sup>74</sup> indicates that the most important differences in the use of time reflect daily activities and the disparate burden of women and men in relation to paid work and unpaid household activities. On average, men spend almost twice as long on paid activities (3 hours and 44 minutes), while women spend 2 hours and 4 minutes. However, women are engaged in unpaid work twice as long as men – 4 hours and 36 minutes compared to 2 hours and 5 minutes. Women spend most time on cooking (around 1.5 hours), whilst men spend only 10 minutes on the preparation of food. On cleaning, women spend more than one hour, compared to 15 minutes for men. Also, on childcare women spend 38 minutes compared to 17 minutes for men. Therefore, it is not a surprise that women are recognised as one of the most discriminated groups in Serbia in the study on the Attitude of citizens towards discrimination conducted in 2016.<sup>75</sup>

It can be concluded that the implementation of existing legislation must be improved in practice, and that all relevant partners must implement different measures in order to comprehensively combat sex discrimination and tackle gender stereotypes, including some legislative amendments, which are expected to be included in a new Gender Equality Act. However, the adoption of this law, which was expected to occur at the end of 2015, shows some misunderstanding of and resistance to combating gender discrimination. The name of the law was twice changed from the Law on Gender Equality to the Law on Sex Equality and, finally, to the Law on the Equality of Women and Men. The Draft Law was withdrawn from the parliamentary procedure in February 2016 and it has not been adopted yet.

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<sup>74</sup> Time use in the Republic of Serbia in 2010 and 2015 (*Koriscenje vremena u Republici Srbiji u 2010. i 2015*), Statistical Office of the Republic of Serbia, 30 November 2016.

<sup>75</sup> Respondents believe that the most discriminated groups in Serbia are: Roma (23 %), LGBT (12 %), women (9 %), the poor (6 %) and national minorities (4 %).



## Annexes

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