



European network of legal experts in
gender equality and non-discrimination

Country report

Non-discrimination

Serbia
2015

Including summaries in
English, French and
German



EUROPEAN COMMISSION

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

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Serbia

Ivana Krstić

Reporting period 1 January 2014 – 31 December 2014

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2015

ISBN 978-92-79-53392-1

doi: 10.2838/023577

DS-02-15-954-3A-N

© European Union, 2015

CONTENTS

EXECUTIVE SUMMARY	5
RÉSUMÉ	13
ZUSAMMENFASSUNG	22
INTRODUCTION	31
1 GENERAL LEGAL FRAMEWORK	34
2 THE DEFINITION OF DISCRIMINATION	35
2.1 Grounds of unlawful discrimination explicitly covered	35
2.1.1 Definition of the grounds of unlawful discrimination within the directives	35
2.1.2 Multiple discrimination	36
2.1.3 Assumed and associated discrimination	37
2.2 Direct discrimination (Article 2(2)(a))	38
2.2.1 Situation testing	38
2.3 Indirect discrimination (Article 2(2)(b))	39
2.3.1 Statistical evidence	40
2.4 Harassment (Article 2(3))	41
2.5 Instructions to discriminate (Article 2(4))	42
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	42
3 PERSONAL AND MATERIAL SCOPE	47
3.1 Personal scope	47
3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)	47
3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)	47
3.2 Material scope	48
3.2.1 Employment, self-employment and occupation	48
3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))	48
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	49
3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))	49
3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))	50
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	50
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	52
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	52
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)	56
3.2.10 Housing (Article 3(1)(h) Directive 2000/43)	58
4 EXCEPTIONS	60
4.1 Genuine and determining occupational requirements (Article 4)	60
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	60
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	62
4.4 Nationality discrimination (Article 3(2))	62
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	64
4.6 Health and safety (Article 7(2) Directive 2000/78)	64

4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	65
4.7.1	Direct discrimination	65
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	66
4.7.3	Minimum and maximum age requirements	67
4.7.4	Retirement	67
4.7.5	Redundancy	68
4.8	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)	69
4.9	Any other exceptions	69
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	70
6	REMEDIES AND ENFORCEMENT	72
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	72
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	77
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	78
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	79
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	80
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	83
8	IMPLEMENTATION ISSUES	88
8.1	Dissemination of information, dialogue with NGOs and between social partners	88
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	89
9	COORDINATION AT NATIONAL LEVEL	91
10	CURRENT BEST PRACTICES	92
11	SENSITIVE OR CONTROVERSIAL ISSUES	93
11.1	Potential breaches of the directives (if any)	93
11.2	Other issues of concern	94
12	LATEST DEVELOPMENTS	95
12.1	Legislative amendments	95
12.2	Case law	95
	ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION	98
	ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS	101

EXECUTIVE SUMMARY

1. Introduction

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

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

These data show that Serbian society is diverse and multicultural and citizens perceive discrimination as a negative phenomenon. According to a survey published in December 2012, citizens believe that discrimination is widespread and mainly occurs in employment.² A large number of respondents believe that society should devote attention to the poor, people with disabilities, women and the elderly. Among the respondents, 24 % believe that society should not devote attention to people of different sexual orientation, while 18 % believe the same for religious minorities. The findings show that the greatest ethnic distance exists is perceived in relation to Albanians and Roma, as 57 % of respondents would not want them as family members.

At the same time, 41.5 % of respondents consider that the Roma are the group most discriminated against in Serbia. They face everyday discrimination in the areas of employment, public services, education and other fields. In addition, people with disabilities face everyday impediments, as many institutions and public spaces are still not accessible to them. Sexual orientation is not explicitly included as a prohibited ground of discrimination in the Constitution of Serbia, but it is included in the comprehensive anti-discrimination law and some other laws which were adopted from 2011 onwards. LGBTI people face problems in the area of employment and in relation to the right of association. However, a Belgrade Gay Pride parade was organised on 28 September 2014, after having been cancelled for several years and with the support of the police. It was held without major incidents and marked a significant step towards the effective exercising of the human rights of LGBTI people in Serbia.

2. Main legislation

The Constitution of Serbia,³ adopted in 2006, contains a broad catalogue of human rights and proclaims equality and prohibits discrimination. Under the Constitution, 'Any direct or indirect discrimination on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited' (Article 21, para. 3). In other words, the

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

² CeSID, UNDP and Commissioner for Protection of Equality (2012), *Report on public opinion research: Citizens' attitudes on discrimination in Serbia*, Belgrade, December 2012.

³ Serbia, Constitution of Serbia (*Ustav Republike Srbije*), *Official Gazette of the Republic of Serbia*, no. 98/2006, 10 November 2006.

Constitution does not provide a definition of discrimination, but it prohibits both direct and indirect discrimination. In addition, it covers prohibition of discrimination on any ground, not just those explicitly mentioned in Article 21, meaning that the provided list is not exhaustive. Furthermore, in Article 21, para. 4 the Serbian Constitution explicitly recognises affirmative action. The Constitution also contains several articles which prohibit discrimination in certain areas or against certain groups.

Article 16, para. 2 of the Constitution provides that the generally accepted rules of customary international law and ratified international treaties are an integral part of the national legal system and should be applied directly. This article, together with Article 194, para. 4, places international treaties below the Constitution and above domestic laws and by-laws. In addition, Article 18 prescribes the very important obligation of the State to interpret human and minority rights to the benefit of promoting the values of a democratic society, pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions which supervise their implementation. The most important universal and regional treaties in the area of human rights have been adopted and incorporated into domestic legislation.⁴

Serbia officially applied for EU membership on 22 December 2009 and acquired candidate status on 1 March 2012. A legal document of great importance is the Stabilisation and Association Agreement (SAA). In its Preamble, the SAA clearly states that Serbia is committed to increasing political and economic freedoms, as well as 'to respect[ing] human rights and the rule of law, including the rights of persons belonging to national minorities'. Article 2 proclaims that Serbia is obliged to respect human rights, as defined and guaranteed in the Universal Declaration of Human Rights,⁵ the European Convention on Human Rights,⁶ the Helsinki Final Act⁷ and the Charter of Paris for a New Europe.⁸ Ever since its democratic changes, and with the goal of joining the EU as soon as possible, Serbia has embarked on a large-scale social, political and economic reform process. In many areas of law, new laws or major amendments to existing legislation have been adopted.

Serbia introduced a set of anti-discrimination legislation, which is primarily based on standards set out in the jurisprudence of the European Court of Human Rights, as well as the provisions of the two EU directives: the Racial Equality Directive⁹ and the Employment Equality Directive¹⁰ from 2000. As stated in the EU Progress Report for Serbia for 2012, 'Serbia's anti-discrimination legislation is broadly in line with European standards'.¹¹ However, in the 2013 Progress Report on Serbia, the European Commission notes: 'Some provisions of the Anti-Discrimination Law have yet to be aligned with the *acquis*. This includes the scope of exceptions from the principle of equal treatment, the

⁴ The Republic of Serbia has ratified all the major human rights conventions: International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), Convention on the Rights of the Child (1989), International Convention on the Rights of Persons with Disabilities (2006), International Convention for the Protection of All Persons from Enforced Disappearance (2006), as well as the European Convention on Human Rights and Fundamental Freedoms (1950), Framework Convention for the Protection of National Minorities (1995) and the Revised European Social Charter (1996).

⁵ [General Assembly resolution 217 A \(III\)](#), 10 December 1948.

⁶ Adopted in Rome, 4 November 1950.

⁷ OSCE, Finland, 1 August 1975.

⁸ OSCE, France, 21 November 1990.

⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180*, 19 July 2000.

¹⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303*, 2 December 2000.

¹¹ European Commission (2012), *Serbia 2012 progress report*, Brussels, 10 October 2012, p. 16.

definition of indirect discrimination and the obligation to provide reasonable accommodation for disabled employees'.¹²

In April 2006, the first anti-discrimination law was adopted: the Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD),¹³ supplemented by the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD).¹⁴ However, the first comprehensive anti-discrimination law was adopted in March 2009.

The Law on the Prohibition of Discrimination (LPD)¹⁵ is an important milestone in securing basic human rights in Serbia through the establishment of systematic law on anti-discrimination. It prohibits a wide range of discriminatory actions. In addition, all the grounds of discrimination provided in EU equality law are covered in the LPD and are significantly expanded. Thus, Article 2, para. 1 prohibits discrimination based on the grounds of 'race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations'. This is an open-ended clause, as the LPD uses the wording 'and other personal characteristics', whether they are real or presumed. The LPD sets out special civil court procedures and establishes an independent body, the Commissioner for Protection of Equality.¹⁶

Finally, the Law on the Protection of the Rights and Freedoms of National Minorities¹⁷ regulates the way in which the rights of people belonging to national minorities are implemented. It enables people belonging to national minorities to exercise their constitutional rights in a democratic political milieu, individually or in community with other members of their ethnic group. This law also provides for the adoption of special measures on equality, especially with regard to the Roma community.

Many other laws also contain anti-discrimination provisions, e.g. the Labour Law,¹⁸ which prohibits discrimination in employment, the Law on the Fundamentals of the Education

¹² European Commission (2013), *Serbia 2013 progress report*, Brussels, 16 October 2013, pp. 36, 45. See also European Commission (2014), *Serbia 2014 progress report*, Brussels, 8 October 2014, p. 44.

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

¹⁴ Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 32/2013, 17 April 2006.

¹⁵ Serbia, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of the Republic of Serbia*, no. 22/2009, 26 March 2009.

¹⁶ For more on the Commissioner see Petrusic, N. (2012), 'Procedural position of the Commissioner for the Protection of Equality in antidiscrimination proceedings', in *Pravni život*, vol. 11, pp. 905-922. Different States have established governmental or quasi-judicial bodies, but in some States they are established as independent bodies, like the Commissioner for Protection of Equality in Serbia. For more on these bodies see Equinet (2012), *Equality bodies and national human rights institutions - Making the link to maximise impact*, European Network of Equality Bodies, Brussels.

¹⁷ Serbia, Law on the Protection of the Rights and Freedoms of National Minorities, *Official Gazette of the Republic of FRY*, no. 11/2002, *Official Gazette of SM*, no. 1/2003, *Official Gazette of the Republic of Serbia*, 172/2009, 27 February 2003.

¹⁸ Serbia, Labour Law (*Zakon o radu*) *Official Journal of the Republic of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, no. 75/2014, 15 March 2005.

System,¹⁹ which introduces inclusive education, the Law on Youth²⁰ the Law on Preschool Education,²¹ the Law on Churches and Religious Organisations²² and the Law on Sports.²³

In addition, criminal law protection against discrimination is regulated by the Criminal Code²⁴ which provides for several criminal offences in connection with the prohibition of discrimination: Article 128 (violation of equality), Article 129 (violation of the right to use language and script) and Article 387 (prohibition of racial and other discrimination). The Law on Misdemeanours²⁵ regulates the procedure and conditions and implementation of misdemeanour charges.

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

3. Main principles and definitions

The LPD recognises seven forms of discrimination: direct and indirect discrimination, violation of the principle of equal rights and obligations, the prevention of calling to account,²⁶ association for the purpose of discriminating, hate speech, harassment and humiliating treatment and severe forms of discrimination.

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

¹⁹ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 72/09, 52/2011, 55/2013, 31 August 2009.

²⁰ Serbia, Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/011, 8 July 2011.

²¹ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 18/010, 3 May 2010.

²² Serbia, Law on Churches and Religious Communities (*Zakon o crkvama i verskim zajednicama*), *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

²³ Serbia, Law on Sports (*Zakon o sportu*), *Official Gazette of the Republic of Serbia*, no. 24/2011, 4 April 2011.

²⁴ Serbia, Criminal Code (*Krivični zakonik*), "The Official Gazette of the Republic of Serbia", no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, October 6, 2005.

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

²⁶ Victimisation is known as prohibition of 'calling to account' in Serbian law.

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

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

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

4. Material scope

The LPD applies in all areas of public and private life, as Article 2, para. 1 defines discrimination as 'any unwarranted discrimination or unequal treatment', which is based on personal characteristics. However, the LPD recognises some special cases of discrimination, such as discrimination in the course of proceedings conducted before public administration bodies, discrimination in the provision of public services and in the use of premises and spaces, discrimination in employment and in education. Thus, the material scope of the LPD goes beyond the areas covered by the two EU directives. However, the European Commission against Racism and Intolerance (ECRI), in its report on Serbia, released after the fourth monitoring cycle, gave a recommendation to amend the LPD to ensure the prohibition of discrimination in the areas of healthcare, housing and social protection.²⁷

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

5. Enforcing the law

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

²⁷ ECRI (2011), *Report on Serbia*, CRI(2011)21, 23 March 2011, p. 15.

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

Article 41 of the LPD provides that anyone who claims to be a victim of discriminatory treatment has the right to initiate a lawsuit. The complainant may request:

- 1) that a ban be imposed on an action that poses a threat of discrimination, a ban on proceeding with a discriminatory action or a ban on repeating a discriminatory action;
 - 2) that the court should establish that the defendant has treated the complainant or another party in a discriminatory manner;
 - 3) that steps be taken to redress the consequences of the discriminatory treatment;
 - 4) compensation for pecuniary and non-pecuniary damage; and
 - 5) that the decision passed on any of the lawsuits referred above be published.
- Furthermore, Article 46 provides that a lawsuit may be initiated by the Commissioner and also by an organisation engaged in the protection of human rights or the rights of a certain group of people.

Several NGOs which focus on human rights and discrimination are active in submitting complaints and initiating lawsuits. They also do situational testing, cooperate with independent institutions and take part in consultation processes concerning the adoption of relevant laws and strategies.

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

6. Equality bodies

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

The procedure of applying to the Commissioner is regulated in Articles 35 to 40 and a general rule is that the provisions of the law regulating general administrative proceedings apply accordingly to procedures involving the Commissioner. A complaint must be forwarded within 15 days from its submission to the alleged violator who has 15 days to respond to it. The Commissioner can propose mediation if both parties agree to it. This obligation is in compliance with the Racial Equality Directive which, in Article 7, para. 1, obliges states to ensure the availability of judicial and/or administrative procedures, including, where appropriate, conciliation procedures. However, if the dispute is not subject to mediation, the Commissioner must give an opinion as to whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint and inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a

violation, they issue a recommendation to the individual against whom the complaint was submitted, suggesting a way of redressing the violation in question. The individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of receipt of the recommendation. The individual must inform the Commissioner of measures taken. However, if the individual fails to redress the violation in question within 30 days, the Commissioner may inform the public in electronic and print media, but cannot punish the violator. Nevertheless, the Commissioner can initiate a notice for misdemeanour proceedings, a criminal charge or initiate a lawsuit if it finds that there is a strategic case for litigation.

In 2014 the Commissioner's office provided many awareness-raising activities on discrimination and mechanisms for protection against discrimination. It issued 109 decisions in complaints procedures, issued 198 recommendations, two opinions on draft laws and general acts and three motions for the assessment of the constitutionality and legality of general acts, initiated two strategic litigations, made 20 public statements and issued six warnings, as well as initiating one misdemeanour charge and six criminal charges. Nevertheless, there is still room for improvement in the capacity of the Commissioner's Office.

7. Key issues

1. Compliance with the two EU anti-discrimination directives

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

- associative discrimination is recognised in the LPD, but its application is limited only to 'members of families' and people close to those being discriminated against;
- the definition of direct discrimination is in line with the definition in the EU directives; however, it is limited to less favourable treatment and does not cover detriment;
- the definition of indirect discrimination doesn't contain the conditional wording ('would') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they incur disadvantages for actual victims;
- the instruction to discriminate is not defined in the LPD and should be included in the law;
- the LPD does not expressly state that situation testing can be used as evidence in court and many questions derive from unclear regulation (for example, who the tester is, whether they have a particular relationship with the individual who reported the discrimination, whether they have been discriminated against previously, etc.);
- the LPD does not contain any specific rule in relation to statistics; the case law is still developing and it is not clear how the courts will treat statistical evidence;
- the LPD does not cover occupational pensions, social advantages and self-employment and it is unclear whether it covers social protection and housing; although certain other laws regulate some of these issues, such as self-employment or housing, these provisions should be included in the LPD;
- the LPD mentions only access to services and not expressly access to goods;
- national legislation provides for an exception for genuine and determining occupational requirements, but the definition does not explicitly state that such a requirement should adhere to the proportionality principle;
- national law does not provide for an exception for employers with an ethos based on religion or belief, but there is a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow;

- the LPD does not explicitly provide an exception for direct discrimination on the ground of age and further judicial interpretation is required, especially on the application of the proportionality test;
- although there is a range of different sanctions which can be imposed in discrimination cases, some problems which exist in practice, such as delays in the proceedings and mild sanctions, influence the effectiveness and proportionality of sanctions;
- the LPDPD does not provide protection from victimisation;
- the LPDPD does not contain a provision on the reversal of the burden of proof;
- class action is not permitted by national law in discrimination cases.

2. Implementation of the existing normative framework

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

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

RÉSUMÉ

1. Introduction

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

Selon le dernier recensement, effectué en 2002, la République de Serbie a une population de 7 498 001 habitants. Les Serbes en représentent 82,86 %, les Hongrois 3,91 %, les Bosniaques 1,81 %, les Roms 1,44 %, les Yougoslaves 1,08 %, les Croates 0,94 %, les Monténégrins 0,92 %, les Albanais 0,82 %, les Slovaques 0,79 %, les Vlachs 0,53 %, les Roumains 0,46 %, les Macédoniens 0,34 %, les Bulgares 0,27 %, les Bunjevci 0,27 %, les Musulmans 0,26 %, ²⁸ les Ruthènes 0,21 %, les Slovènes 0,07 %, les Ukrainiens 0,07 %, les Goranis 0,06 %, les Allemands 0,05 %, les Russes 0,03 % et les Tchèques 0,03 %. La majorité de la population serbe est de confession chrétienne orthodoxe (84,98 %), suivie des catholiques romains (5,48 %), des musulmans (3,2 %) et des protestants (1,08 %). D'autres religions sont également pratiquées en Serbie.

Ces chiffres illustrent la diversité et le multiculturalisme de la société serbe, laquelle perçoit la discrimination comme un phénomène négatif. Il ressort d'une étude publiée en décembre 2012 que les citoyens considèrent que la discrimination est courante et se produit principalement dans le domaine de l'emploi.²⁹ Bon nombre de personnes interrogées estiment que la société devrait accorder de l'attention aux pauvres, aux handicapés, aux femmes et aux personnes âgées. Parmi ces répondants, 24 % sont d'avis que la société ne devrait pas accorder d'attention aux personnes ayant une orientation sexuelle différente, et 18 % partagent cet avis pour ce qui concerne les minorités religieuses. Les conclusions de l'étude montrent que c'est par rapport aux Albanais et aux Roms que les personnes interrogées ressentent le plus grand éloignement ethnique puisque 57 % d'entre elles déclarent qu'elles ne les voudraient pas comme membres de leur famille.

Parallèlement, 41,5 % des personnes interrogées considèrent que les Roms forment le groupe visé par la plus grande discrimination en Serbie et qu'ils se heurtent au quotidien à une discrimination dans les domaines de l'emploi, des services publics, de l'éducation et autres. Les personnes handicapées rencontrent elles aussi des obstacles dans la vie quotidienne du fait que de nombreuses institutions et espaces publics ne leur sont pas accessibles. L'orientation sexuelle n'est pas expressément incluse dans la Constitution de Serbie en tant que motif interdit de discrimination, mais elle figure dans la loi générale antidiscrimination et dans d'autres actes législatifs adoptés à partir de 2011. Les personnes LGBTI rencontrent des difficultés en matière d'emploi ainsi qu'en ce qui concerne le droit d'association. Après avoir été annulée plusieurs années de suite, une Gay Pride a été organisée à Belgrade le 28 septembre 2014 avec l'appui de la police. Elle s'est déroulée sans incident majeur et marque une étape importante sur la voie d'un exercice effectif des droits fondamentaux par les membres de la communauté LGBTI en Serbie.

²⁸ Une personne peut, en Serbie, se déclarer «Musulman» en tant qu'identité ethnique, même si le terme s'applique également dans un contexte d'identité religieuse.

²⁹ CeSID, PNUD et Commissaire à la protection de l'égalité (2012), *Report on public opinion research: Citizens' attitudes on discrimination in Serbia*, Belgrade, décembre 2012.

2. Législation principale

La Constitution de Serbie,³⁰ adoptée en 2006, contient un vaste catalogue de droits de l'homme; elle proclame l'égalité et interdit la discrimination. En vertu de la Constitution, «Toute discrimination directe ou indirecte, fondée sur quelque motif que ce soit, particulièrement la race, le sexe, l'origine nationale ou sociale, la religion, les opinions politiques ou autres, la fortune, la culture, la langue, l'âge, le handicap mental ou physique, est interdite» (article 21, paragraphe 3). En d'autres termes, la Constitution ne contient pas de définition de la discrimination, mais elle interdit tant la discrimination directe qu'indirecte. Elle prévoit en outre une interdiction de discrimination fondée sur quelque motif que ce soit, et non pas uniquement fondée sur les motifs expressément cités à l'article 21, ce qui implique que la liste fournie n'est pas exhaustive. La Constitution serbe reconnaît en outre l'action positive, au paragraphe 4 du même article. Elle contient également plusieurs articles qui interdisent la discrimination dans certains domaines ou à l'égard de certains groupes.

L'article 16, paragraphe 2, de la Constitution dispose que les règles généralement reconnues du droit international et des traités internationaux ratifiés font partie intégrante de l'ordre juridique interne et sont directement applicables. Conjointement à l'article 194, paragraphe 4, cet article exige que les traités internationaux soient conformes à la Constitution tout en les plaçant au-dessus de la législation et des réglementations nationales. L'article 18 prévoit de surcroît l'obligation très importante pour l'État d'interpréter les droits de l'homme et les droits des minorités en faveur de la promotion des valeurs d'une société démocratique, conformément aux normes internationales en vigueur concernant les droits de l'homme et les droits des minorités ainsi qu'à la pratique des institutions internationales qui contrôlent leur mise en œuvre. Les principaux traités universels et régionaux en matière de droits de l'homme ont été adoptés et intégrés à la législation nationale.³¹

La Serbie a officiellement posé sa candidature à l'adhésion à l'UE le 22 décembre 2009 et acquis le statut de pays candidat le 1^{er} mars 2012. L'accord de stabilisation et d'association (ASA) constitue à cet égard un document juridique extrêmement important. Il stipule clairement en effet dans son préambule que la Serbie s'engage à étendre les libertés politiques et économiques et à «respecter les droits de l'homme et l'État de droit, y compris les droits des personnes appartenant aux minorités nationales». L'article 2 dispose que la Serbie est tenue de respecter les droits de l'homme tels qu'ils sont définis et garantis par la Déclaration universelle des droits de l'homme,³² dans la Convention européenne de protection des droits de l'homme et des libertés fondamentales,³³ dans l'Acte final d'Helsinki³⁴ et dans la Charte de Paris pour une nouvelle Europe.³⁵ Dès son changement démocratique, et dans la perspective d'une adhésion aussi rapide que possible à l'UE, la Serbie a entamé un processus de réforme sociale, politique et

³⁰ Serbie, Constitution de Serbie (*Ustav Republike Srbije*), *Journal officiel de la République de Serbie*, n° 98/2006, 10 novembre 2006.

³¹ La République de Serbie a ratifié toutes les grandes conventions relatives aux droits de l'homme: Pacte international relatif aux droits civils et politiques (1966), Pacte international relatif aux droits économiques, sociaux et culturels (1966), Convention internationale sur l'élimination de toutes les formes de discrimination raciale (1965), Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (1979), Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (1984), Convention relative aux droits de l'enfant (1989), Convention relative aux droits des personnes handicapées (2006), Convention internationale pour la protection de toutes les personnes contre les disparitions forcées (2006), ainsi que la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (1950), la Convention-cadre pour la protection des minorités nationales (1995) et la Charte sociale européenne révisée (1996).

³² Résolution [217 A \(III\)](#) de l'Assemblée générale, 10 décembre 1948.

³³ Adoptée à Rome le 4 novembre 1950.

³⁴ OSCE, Finlande, 1^{er} août 1975.

³⁵ OSCE, France, 21 novembre 1990.

économique de grande envergure et adopté, dans de nombreux domaines du droit, de nouvelles lois ou des amendements à la législation existante.

La Serbie a introduit un ensemble de dispositions législatives antidiscrimination essentiellement fondées sur les normes énoncées dans la jurisprudence de la Cour européenne des droits de l'homme et, à partir de 2000, sur les deux directives européennes (directive relative à l'égalité raciale³⁶ et directive relative à l'égalité dans le domaine de l'emploi³⁷). Si la Commission européenne constate dans son rapport de suivi sur la Serbie de 2012 que la législation antidiscrimination du pays est largement conforme aux normes européennes,³⁸ elle note dans son rapport de suivi en 2013 que certaines dispositions du droit antidiscrimination doivent encore être alignées sur l'acquis, notamment en ce qui concerne la portée des dérogations au principe de l'égalité de traitement, la définition de la discrimination indirecte et l'obligation de prévoir un aménagement raisonnable pour les travailleurs handicapés.³⁹

La première loi antidiscrimination a été adoptée en avril 2006: il s'agit de la loi sur la prévention de la discrimination à l'égard des personnes handicapées,⁴⁰ ultérieurement complétée de la loi sur la réadaptation professionnelle et l'emploi des personnes handicapées.⁴¹ La première loi générale contre la discrimination n'a cependant été adoptée qu'en mars 2009.

La loi sur l'interdiction de la discrimination⁴² marque un tournant en garantissant le respect des droits de l'homme en Serbie au travers d'une loi antidiscrimination systématique. Elle interdit un large éventail d'actes discriminatoires et couvre en outre, en les élargissant considérablement, tous les motifs de discrimination visés par la législation de l'UE en matière d'égalité. Ainsi l'article 2, paragraphe 1, interdit la discrimination fondée sur la race, la couleur de peau, l'ascendance, la citoyenneté, l'appartenance nationale ou l'origine ethnique, la langue, les convictions religieuses ou politiques, le genre, l'identité de genre, l'orientation sexuelle, la situation financière, la naissance, les caractéristiques génétiques, la santé, le handicap, l'état matrimonial et la situation familiale, les convictions antérieures, l'âge, l'apparence, et l'appartenance à une organisation politique, syndicale ou autre. Il s'agit d'une clause ouverte puisque la loi sur l'interdiction de discrimination utilise l'expression «et autres caractéristiques personnelles», qu'elles soient réelles ou présumées. Cette loi prévoit des procédures civiles spéciales et institue un organisme indépendant: le Commissaire à la protection de l'égalité.⁴³

³⁶ Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique, *Journal officiel* L 180, 19 juillet 2000.

³⁷ Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *Journal officiel* L 303, 2 décembre 2000.

³⁸ Commission européenne (2012), *Serbia 2012 progress report*, Bruxelles, 10 octobre 2012, p. 16.

³⁹ Commission européenne (2013), *Serbia 2013 progress report*, Bruxelles, 16 octobre 2013, p. 36 et 45. Voir également Commission européenne (2014), *Serbia 2014 progress report*, Bruxelles, 8 octobre 2014, p. 44.

⁴⁰ Serbie, loi sur la prévention de la discrimination à l'égard des personnes handicapées (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Journal officiel de la République de Serbie*, n° 33/2006, 17 avril 2006.

⁴¹ Serbie, loi sur la réadaptation professionnelle et l'emploi des personnes handicapées (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Journal officiel de la République de Serbie*, n° 36/2009, 32/2013, 17 avril 2006.

⁴² Serbie, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel de la République de Serbie*, n° 22/2009, 26 mars 2009.

⁴³ Pour de plus amples informations concernant le Commissaire, voir Petrusic, N. (2012), «Procedural position of the Commissioner for the Protection of Equality in antidiscrimination proceedings», dans *Pravni život*, vol. 11, p. 905-922. Certains États ont mis en place des organismes gouvernementaux ou quasi-judiciaires, mais d'autres se sont dotés d'organismes indépendants, tel le Commissaire serbe à la protection de l'égalité. Pour des précisions à propos de ces organismes, voir Equinet (2012), *Equality bodies and national human rights institutions - Making the link to maximise impact*, Réseau européen des organismes de promotion de l'Égalité (Equinet), Bruxelles.

Enfin, la loi sur la protection des droits et des libertés des minorités nationales⁴⁴ régit l'exercice de leurs droits par les personnes appartenant à ces minorités. Elle permet à celles-ci d'exercer leurs droits constitutionnels dans un environnement politique démocratique, à titre individuel ou conjointement avec d'autres membres de leur groupe ethnique. Cette loi prévoit également l'adoption de mesures spéciales en matière d'égalité, en ce qui concerne la communauté rom en particulier.

Plusieurs autres lois contiennent également des dispositions antidiscrimination: tel est notamment le cas de la loi sur le travail,⁴⁵ qui interdit la discrimination en matière d'emploi; de la loi sur les principes de base du système d'enseignement,⁴⁶ qui instaure l'éducation inclusive; de la loi sur la jeunesse;⁴⁷ de la loi sur l'enseignement préscolaire;⁴⁸ de la loi sur les églises et les communautés religieuses;⁴⁹ et de la loi sur les sports.⁵⁰

De surcroît, la protection contre la discrimination au titre du droit pénal est régie par le code pénal,⁵¹ qui énonce plusieurs infractions pénales en rapport avec l'interdiction de discrimination: le non-respect de l'égalité (article 128), le non-respect du droit d'usage de la langue et de l'écriture (article 129) et l'interdiction de discrimination raciale et autre (article 387). La loi sur les délits⁵² régit pour sa part les procédures, les conditions et l'exécution des poursuites relatives aux infractions mineures.

La Stratégie pour la prévention et la protection contre la discrimination a été adoptée fin 2013 et le Plan d'action pour sa mise en œuvre a finalement été adopté en octobre 2014.

3. Principes généraux et définitions

La loi sur l'interdiction de la discrimination reconnaît sept formes de discrimination: la discrimination directe et indirecte, la violation du principe de l'égalité des droits et des obligations, l'empêchement de «demander des comptes»,⁵³ l'association à des fins de discrimination, le discours haineux, le harcèlement et le traitement humiliant, et les formes graves de discrimination.

La définition de la discrimination directe est quasiment conforme à celle qui figure dans les directives de l'UE, mais elle se limite à un traitement moins favorable et ne couvre pas le préjudice. La définition de la discrimination indirecte n'utilise pas la formule conditionnelle «serait» et peut donc être interprétée comme se limitant à la survenance réelle d'un désavantage – ce qui ne permet pas de contester des dispositions neutres devant un tribunal avant qu'elles aient défavorisé des victimes réelles. La définition

⁴⁴ Serbie, loi sur la protection des droits et des libertés des minorités nationales, *Journal officiel de la République fédérale de Yougoslavie* n° 11/2002, *Journal officiel de Serbie-Montenegro* n° 1/2003, *Journal officiel de la République de Serbie*, n° 172/2009, 27 février 2003.

⁴⁵ Serbie, loi sur le travail (*Zakon o radu*), *Journal officiel de la République de Serbie*, n° 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 15 mars 2005.

⁴⁶ Serbie, loi sur les principes fondamentaux du système d'enseignement (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Journal officiel de la République de Serbie*, n° 72/09, 52/2011, 55/2013, 31 août 2009.

⁴⁷ Serbie, loi sur la jeunesse (*Zakon o mladima*), *Journal officiel de la République de Serbie*, n° 50/011, 8 juillet 2011.

⁴⁸ Serbie, loi sur l'enseignement préscolaire (*Zakon o predškolskom vaspitanju i obrazovanju*), *Journal officiel de la République de Serbie*, n° 18/010, 3 mai 2010.

⁴⁹ Serbie, loi sur les églises et les communautés religieuses (*Zakon o crkvama i verskim zajednicama*), *Journal officiel de la République de Serbie*, n° 36/2006, 27 avril 2006.

⁵⁰ Serbie, loi sur les sports (*Zakon o sportu*), *Journal officiel de la République de Serbie*, n° 24/2011, 4 avril 2011.

⁵¹ Serbie, code pénal (*Krivični zakonik*), *Journal officiel de la République de Serbie*, n° 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 6 octobre 2005.

⁵² Serbie, loi sur les délits (*Zakon o prekršajima*), *Journal officiel de la République de Serbie*, n° 65/2013, 25 juillet 2013.

⁵³ La rétorsion est désignée en droit serbe par l'expression «empêchement de demander des comptes».

n'utilise pas non plus le libellé «une disposition, un critère ou une pratique apparemment neutre» qui explique de manière plausible ce phénomène. On ne voit pas clairement pourquoi la violation du principe de l'égalité des droits est reconnu en tant que forme spéciale de discrimination, étant donné qu'il s'agit soit d'une discrimination directe, soit d'une discrimination indirecte, et qu'elle sert de critère de discrimination. «L'empêchement de demander des comptes» est une manière de désigner les rétorsions, lesquelles ne sont pas reconnues en tant que forme particulière de discrimination par la directive sur l'égalité raciale et la directive sur l'égalité dans l'emploi, mais sont interdites. Le discours haineux est libellé de façon ambiguë en raison de l'usage de l'expression «et d'autres manières» et il n'est pas reconnu comme une forme spéciale de discrimination dans les directives sur l'égalité raciale et dans l'emploi. La loi sur l'interdiction de la discrimination interdit l'association aux fins de la pratique d'une discrimination visant, entre autres, à inciter à la haine nationale, raciale, religieuse ou autre, à la division ou à l'hostilité. La loi sur l'interdiction de la discrimination mentionne l'injonction de discriminer sans la définir. Le harcèlement y est défini comme une forme particulière de discrimination, et il est envisagé conjointement au traitement humiliant – l'article en question étant cependant confus dans la mesure où le traitement humiliant est une composante possible du harcèlement, mais où le terme «harcèlement» lui-même n'est pas défini.

La loi sur l'interdiction de la discrimination autorise certaines exceptions et dérogations à la clause d'égalité. C'est ainsi que des mesures introduites dans le but d'assurer la pleine égalité, la protection et les avancées d'une personne ou d'un groupe de personnes se trouvant en situation d'inégalité ne sont pas considérées comme constitutives d'une discrimination (article 14). Une discrimination indirecte peut se justifier s'il existe un objectif légitime et que les moyens de réaliser cet objectif sont appropriés et nécessaires. Un traitement différencié, une exclusion ou l'octroi d'une priorité en raison de la spécificité d'un emploi sont autorisés lorsque les caractéristiques personnelles de l'intéressé constituent une condition préalable essentielle et déterminante, et que l'objectif recherché est justifié. Par ailleurs, l'attitude des responsables religieux, lorsqu'elle s'inscrit dans une doctrine ou des convictions religieuses, ou dans les objectifs d'églises et de communautés religieuses dûment accréditées en vertu de la loi régissant la liberté de religion et le statut des églises et des communautés religieuses, n'est pas assimilée à une discrimination. Cet article pose problème dans la mesure où il confère une dispense générale aux responsables religieux, lesquels peuvent pratiquer une discrimination à partir du moment où celle-ci est exigée ou admise par leur doctrine religieuse.

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

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

4. Champ d'application matériel

La loi sur l'interdiction de la discrimination s'applique à tous les domaines de la vie publique et de la vie privée, étant donné que son article 2, paragraphe 1, définit la discrimination comme «toute discrimination ou inégalité de traitement injustifiée» fondée sur des caractéristiques personnelles. La dite loi précise néanmoins quelques cas particuliers de discrimination, tels que la discrimination dans le cadre de procédures se déroulant devant des instances de l'administration publique; la discrimination dans la prestation de services publics et dans l'utilisation des locaux et des espaces; et la discrimination dans l'emploi et dans l'éducation. Le champ d'application matériel de la loi sur l'interdiction de la discrimination dépasse donc les domaines couverts par les deux directives européennes. Ceci dit, dans son rapport sur la Serbie publié à l'issue du quatrième cycle de monitoring, la Commission européenne contre le racisme et l'intolérance (ECRI) recommande de modifier la loi sur l'interdiction de la discrimination en vue de prohiber la discrimination dans les domaines de la santé, du logement et de la protection sociale.⁵⁴

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

5. Mise en application de la loi

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

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

L'article 41 de la loi sur l'interdiction de la discrimination dispose que toute personne se déclarant victime d'un traitement discriminatoire est en droit d'intenter une action en justice. La partie requérante peut demander:

- 1) que soit interdite une action constituant une menace de discrimination, la poursuite d'une action discriminatoire ou la répétition d'une action discriminatoire;
- 2) que la juridiction saisie établisse que la partie défenderesse a traité la partie plaignante ou une autre partie de façon discriminatoire;
- 3) que des mesures soient prises pour remédier aux conséquences du traitement discriminatoire;
- 4) une indemnisation pour préjudice matériel et moral; et

⁵⁴ ECRI (2011), *Rapport sur la Serbie*, CRI(2011)21, 23 mars 2011, p. 15.

- 5) la publication des arrêts rendus dans le cadre de toute action en justice susmentionnée. L'article 46 prévoit en outre qu'une action en justice peut être intentée par le Commissaire ainsi que par une organisation de défense des droits de l'homme ou des droits d'un groupe particulier de personnes.

Plusieurs ONG exerçant leur activité dans le domaine des droits de l'homme et de la lutte contre la discrimination déposent des plaintes et engagent des actions en justice. Elles procèdent également à des tests de situation; elles collaborent avec des institutions indépendantes; et elles participent à des processus consultatifs en rapport avec l'adoption de lois et stratégies pertinentes.

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

6. Organismes de promotion de l'égalité de traitement

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

La procédure de requête auprès du Commissaire est régie par les articles 35 à 40 – la règle générale étant que les dispositions de la loi régissant les procédures administratives générales s'appliquent de la même manière aux procédures impliquant le Commissaire. Le Commissaire doit transmettre la plainte dans un délai de 15 jours, à compter de la date à laquelle il l'a lui-même reçue, à l'auteur présumé des faits, lequel dispose de 15 jours pour y répondre. Le Commissaire peut proposer une médiation si les deux parties y consentent. Cette obligation est conforme à la directive sur l'égalité raciale qui exige en son article 7, paragraphe 1, que les États membres veillent à ce que des procédures judiciaires et/ou administratives soient accessibles, y compris, lorsqu'ils l'estiment approprié, des procédures de conciliation. Cependant, lorsque le conflit ne fait pas l'objet d'une médiation, le Commissaire est tenu, dans un délai de 90 jours à dater de la réception de la plainte, de formuler un avis sur le point de savoir s'il y a eu ou non violation de l'interdiction de discrimination, et d'en informer le plaignant ainsi que la personne à l'encontre de laquelle la plainte a été déposée. Si le Commissaire constate une violation, il adresse une recommandation à la personne visée par la plainte en lui suggérant une manière de réparer la violation en question. Le destinataire de cette recommandation est tenu d'y donner suite et de remédier à la violation constatée dans un délai de 30 jours à compter de la date de réception de la dite recommandation. La personne doit informer le Commissaire des mesures prises. Si toutefois la personne ne remédie pas à la violation constatée dans le délai imparti de 30 jours, le Commissaire peut en informer le public en utilisant des médias électroniques et écrits, mais ne peut sanctionner le contrevenant. Il peut cependant introduire une notification en vue de l'engagement de procédures pour délits mineurs ou pour infractions pénales, ou de l'initiation d'une action en justice s'il estime qu'il y a matière à engager un litige stratégique.

En 2014, le Bureau du Commissaire a mené de nombreuses actions de sensibilisation à propos de la discrimination et des mécanismes permettant de s'en protéger. Il a publié 109 décisions dans le cadre de procédures de plainte, 198 recommandations, deux avis

sur des projets de lois et des actes généraux, et trois motions dans le cadre de l'appréciation de la constitutionnalité et de la légalité d'actes généraux. Il a engagé deux litiges stratégiques; formulé 20 déclarations publiques et six avertissements; et initié une procédure pour délit mineur et six procédures pour infractions pénales. Les capacités du Bureau du Commissaire pourraient toutefois encore être renforcées.

7. Points essentiels

1. Conformité aux deux directives antidiscrimination de l'UE

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

- la discrimination par association est reconnue par la loi sur l'interdiction de la discrimination, mais son application se limite aux «membres de la famille» et aux personnes proches des victimes de la discrimination;
- la définition de la discrimination directe est conforme à celle figurant dans les directives européennes; elle se limite toutefois au traitement moins favorable et ne couvre pas le préjudice;
- la définition de la discrimination indirecte ne contient pas la formule conditionnelle «serait» et peut donc être interprétée comme se limitant à la survenance réelle d'un désavantage – ce qui ne permet pas de contester des dispositions neutres devant un tribunal avant qu'elles aient défavorisé des victimes réelles;
- l'injonction de discriminer n'est pas définie dans la loi sur l'interdiction de la discrimination, et devrait y être incluse;
- la loi sur l'interdiction de la discrimination ne stipule pas expressément que le test de situation peut servir de preuve en justice et la réglementation peu claire en la matière engendre de nombreuses questions (qui procède au test, cette personne a-t-elle un lien particulier avec celle qui signale la discrimination, y a-t-il eu des précédents, etc.);
- la loi sur l'interdiction de la discrimination ne contient aucune règle spécifique par rapport aux statistiques; la jurisprudence est encore embryonnaire et on ne voit pas encore clairement quel traitement les cours et tribunaux vont réserver aux preuves statistiques;
- la loi sur l'interdiction de discrimination ne couvre pas les pensions de retraite professionnelles, les avantages sociaux et le travail indépendant, et il n'est pas certain qu'elle couvre la sécurité sociale et le logement; même si d'autres lois réglementent certains de ces aspects, des dispositions pertinentes devraient figurer dans la loi sur l'interdiction de la discrimination;
- la loi sur l'interdiction de la discrimination mentionne uniquement l'accès aux services, et ne mentionne pas spécifiquement l'accès aux biens;
- la législation nationale prévoit une exception pour les exigences professionnelles essentielles et déterminantes, mais la définition ne précise pas expressément que cette exigence doit répondre au principe de proportionnalité;
- le droit national ne prévoit pas d'exception pour les employeurs dont l'éthique se fonde sur la religion ou les convictions, mais il existe une dispense générale pour les responsables religieux qui peuvent pratiquer une discrimination lorsque celle-ci est exigée ou admise par leur doctrine religieuse;
- la loi sur l'interdiction de la discrimination ne prévoit pas expressément d'exception en ce qui concerne une discrimination directe fondée sur l'âge et une interprétation judiciaire plus poussée s'impose, en rapport plus particulièrement avec l'application du test de proportionnalité;
- en dépit de l'arsenal de sanctions prévues en cas de discrimination, des problèmes constatés dans la pratique, tels que des retards de procédure et des sanctions clémentes, se répercutent sur l'efficacité et la proportionnalité des sanctions;

- la loi sur la prévention de la discrimination à l'égard des personnes handicapées ne prévoit pas de protection contre les rétorsions;
- la loi sur la prévention de la discrimination à l'égard des personnes handicapées ne contient pas de disposition concernant le renversement de la charge de la preuve;
- le droit national n'autorise pas l'action collective en cas de discrimination.

2. Mise en œuvre du cadre normatif existant

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

- la mise en œuvre de la Stratégie pour la prévention et la protection contre la discrimination requiert une approche davantage proactive et systématique; plusieurs problèmes demandent une attention urgente: on songe notamment ici à l'amélioration de l'inclusion sociale des personnes handicapées et des Roms ainsi qu'à l'amélioration de la situation des personnes LGBTI et des personnes séropositives;
- la République de Serbie n'a pas encore mis en place de système unifié et centralisé pour la collecte des données relatives au fonctionnement du régime de protection juridique contre la discrimination, ce qui pose un énorme problème au niveau de l'évaluation et du suivi;
- bien que le nombre d'affaires traitées augmente chaque année, il reste mineur par rapport à un phénomène discriminatoire largement répandu dans toutes les sphères de la société; cette situation s'explique par un manque de sensibilisation et de connaissance concernant la discrimination, et par le manque de détermination des victimes de demander de l'aide;
- même si une formation au droit antidiscrimination a été dispensée aux policiers et magistrats de différentes juridictions, il convient que l'État poursuive cette formation en coopération avec des organisations et experts internationaux.

ZUSAMMENFASSUNG

1. Einleitung

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

Nach der letzten Volkszählung von 2002 hat die Republik Serbien 7.498.001 Einwohner. Serben stellen 82,86 % der Bevölkerung, Ungarn 3,91 %, Bosnier 1,81 %, Roma 1,44 %, Jugoslawen 1,08 %, Kroaten 0,94 %, Montenegriner 0,92 %, Albaner 0,82 %, Slowaken 0,79 %, Walachen 0,53 %, Rumänen 0,46 %, Mazedonier 0,34 %, Bulgaren und Bunjewatzen jeweils 0,27 %, Muslime 0,26 %, ⁵⁵ Russinen 0,21 %, Slowenen und Ukrainer jeweils 0,07 %, Goranen 0,06 %, Deutsche 0,05 % und Russen und Tschechen jeweils 0,03 %. Die Mehrheit der serbischen Bevölkerung gehört dem christlich-orthodoxen Glauben an (84,98 %), gefolgt von Katholiken (5,48 %), Muslimen (3,2 %) und Protestanten (1,08 %). Auch andere Religionen sind in Serbien vertreten.

Diese Daten zeigen, dass die serbische Gesellschaft vielfältig und multikulturell geprägt ist und die serbische Bevölkerung Diskriminierung als negatives Phänomen wahrnimmt. Gleichzeitig glauben nach einer im Dezember 2012 veröffentlichten Umfrage die meisten Bürger, dass Diskriminierung weit verbreitet ist und vor allem im Arbeitsleben auftritt.⁵⁶ Ein Großteil der Befragten ist der Meinung, dass die Gesellschaft Arme, Menschen mit Behinderungen, Frauen und Senioren besonders unterstützen sollte. Von den Befragten sind 24 % der Meinung, dass die Gesellschaft Menschen mit einer abweichenden sexuellen Ausrichtung nicht besonders unterstützen sollte, 18 % vertreten diese Einstellung gegenüber religiösen Minderheiten. Nach der Umfrage werden Albaner und Roma besonders häufig abgelehnt, 57 % der Teilnehmer würde Angehörige dieser Gruppen nicht als Familienmitglied akzeptieren.

Gleichzeitig sind 41,5 % der Befragten der Meinung, dass die Roma in Serbien am stärksten diskriminiert werden. Roma sind unter anderem bei der Beschäftigung und beim Zugang zu öffentlichen Dienstleistungen und zur Bildung alltäglicher Diskriminierung ausgesetzt. Auch Menschen mit Behinderungen müssen täglich Hindernisse überwinden, weil viele Institutionen und öffentlichen Räume noch immer nicht barrierefrei zugänglich sind. Die sexuelle Ausrichtung wird in der serbischen Verfassung nicht ausdrücklich als geschützter Diskriminierungsgrund genannt, wird jedoch im umfassenden Antidiskriminierungsgesetz und in weiteren Gesetzen berücksichtigt, die nach 2011 verabschiedet wurden. LGBTI-Personen werden im Arbeitsleben benachteiligt und in ihrem Vereinigungsrecht behindert. Allerdings konnte am 28. September 2014 eine Gay Pride Parade in Belgrad unter dem Schutz der Polizei stattfinden, nachdem sie in den Vorjahren mehrmals abgesagt werden musste. Die Veranstaltung konnte ohne größere Vorfälle durchgeführt werden und bedeutet einen wichtigen Schritt nach vorne für die wirksame Ausübung der Menschenrechte der LGBTI-Gemeinschaft in Serbien.

⁵⁵ Bei Volkszählungen können die Befragten als ethnische Identität „Muslim“ angeben, derselbe Begriff wird aber auch als Bezeichnung einer religiösen Identität verwendet.

⁵⁶ CeSID, UNDP und Beauftragter für Chancengleichheit (2012), *Report on public opinion research: Citizens' attitudes on discrimination in Serbia*, Belgrad, Dezember 2012.

2. Wichtigste Gesetze

Die Verfassung Serbiens⁵⁷ aus dem Jahr 2006 enthält einen umfassenden Katalog von Menschenrechten, verankert den Grundsatz der Gleichbehandlung und verbietet Diskriminierung. Nach der Verfassung ist „jede unmittelbare und mittelbare Diskriminierung aus irgendwelchen Gründen, insbesondere aufgrund von Rasse, Geschlecht, nationaler Herkunft, sozialer Herkunft, Geburt, Religion, politischer oder sonstiger Überzeugung, Eigentum, Kultur, Sprache, Alter, geistiger oder körperlicher Behinderung verboten“ (Artikel 21 Absatz 3). Die Verfassung enthält mit anderen Worten zwar keine Definition von Diskriminierung, verbietet jedoch sowohl unmittelbare als auch mittelbare Diskriminierung. Außerdem gilt das Diskriminierungsverbot für jedweden Grund, also nicht nur für die in Artikel 21 genannten Gründe, d. h. es handelt sich um eine nicht abgeschlossene Liste. Außerdem sieht die serbische Verfassung in Artikel 21 Absatz 4 ausdrücklich positive Maßnahmen vor. Die Verfassung enthält noch mehrere weitere Artikel, die Diskriminierung in bestimmten Bereichen oder gegenüber bestimmten Gruppen verbieten.

Gemäß Artikel 16 Absatz 2 der Verfassung bilden das allgemein anerkannte Völkergewohnheitsrecht und das ratifizierte internationale Übereinkommen einen Teil des nationalen Rechtssystems und können unmittelbar angewandt werden. Durch diesen Artikel sowie Artikel 194 Absatz 4 besitzt die Verfassung Vorrang vor internationalen Übereinkommen, aber diese genießen Vorrang vor nationalen Gesetzen und Verordnungen. Außerdem enthält Artikel 18 die sehr wichtige Verpflichtung des Staates, die Menschenrechte und die Rechte von Minderheiten so auszulegen, dass die Werte einer demokratischen Gesellschaft gefördert und dabei die geltenden internationalen Normen für Menschenrechte und die Rechte von Minderheiten sowie die Praxis der internationalen Institutionen, die deren Umsetzung überwachen beachtet werden. Serbien hat die wichtigsten weltweiten und regionalen Übereinkommen im Bereich der Menschenrechte ratifiziert und in nationales Recht überführt.⁵⁸

Serbien reichte am 22. Dezember 2009 seine offizielle Bewerbung um eine EU-Mitgliedschaft ein und erhielt am 1. März 2012 den Status eines Bewerberlandes. Ein sehr wichtiges Rechtsinstrument ist hierbei das Stabilisierungs- und Assoziierungsabkommen (SAA). Gemäß der Präambel des SAA ist Serbien verpflichtet, die politische und wirtschaftliche Freiheit zu verbessern und „die Menschenrechte und die Rechtsstaatlichkeit zu respektieren, auch in Bezug auf die Rechte von Menschen, die nationalen Minderheiten angehören.“ Nach Artikel 2 ist Serbien verpflichtet, die Menschenrechte zu respektieren, die in der Allgemeinen Erklärung der Menschenrechte,⁵⁹ der Europäischen Menschenrechtskonvention,⁶⁰ der Schlussakte von Helsinki⁶¹ und der Charta von Paris für ein neues Europa definiert und garantiert werden.⁶² Seit seiner demokratischen Wende durchläuft Serbien einen umfassenden sozialen, politischen und wirtschaftlichen Reformprozess, dessen Ziel der baldmöglichste Beitritt zur Europäischen

⁵⁷ Serbien, Verfassung der Republik Serbien (*Ustav Republike Srbije*), Amtsblatt der Republik Serbien, Nr. 98/2006, 10. November 2006.

⁵⁸ Die Republik Serbien hat die wichtigsten Menschenrechtsübereinkommen ratifiziert: Den Internationalen Pakt über bürgerliche und politische Rechte (1966), den internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte (1966), das Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung (1965), das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau (1979), das Übereinkommen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe (1984), das Übereinkommen über die Rechte des Kindes (1989), das Übereinkommen über die Rechte von Menschen mit Behinderungen (2006), das Internationale Übereinkommen zum Schutz aller Personen vor dem Verschwindenlassen (2006) sowie die Europäische Menschenrechtskonvention (1950), das Rahmenübereinkommen zum Schutz nationaler Minderheiten (1995) und die revidierte Europäische Sozialcharta (1996).

⁵⁹ [Resolution 217 A \(III\) der Generalversammlung](#), 10. Dezember 1948.

⁶⁰ Angenommen am 4. November 1950 in Rom.

⁶¹ OSZE, Finnland, 1. August 1975.

⁶² OSZE, Frankreich, 21. November 1990.

Union ist. In zahlreichen Rechtsbereichen wurden neue Gesetze verabschiedet oder die bestehenden Gesetze weitgehend überarbeitet.

Serbien hat ein umfassendes Antidiskriminierungsrecht erlassen, dessen Grundlage vorwiegend die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und die Bestimmungen der beiden einschlägigen EU-Richtlinien, der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse⁶³ und der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung⁶⁴, aus dem Jahr 2000 bilden. Der Fortschrittsbericht der EU zu Serbien aus dem Jahr 2012 kommt zu dem Ergebnis, dass „das serbische Antidiskriminierungsrecht im Wesentlichen den europäischen Normen entspricht.“⁶⁵ Allerdings stellt die Europäische Kommission in ihrem Fortschrittsbericht von 2013 fest: „Einige Bestimmungen des Antidiskriminierungsrechts wurden noch nicht an den *Besitzstand* der EU angepasst. Dazu gehören der Umfang der Ausnahmen vom Grundsatz der Gleichbehandlung, die Definition von mittelbarer Diskriminierung und die Pflicht zur Bereitstellung von angemessenen Vorkehrungen für Arbeitnehmer mit Behinderungen.“⁶⁶

Im April 2006 wurde das erste Antidiskriminierungsgesetz verabschiedet, das Gesetz zur Verhinderung der Diskriminierung von Menschen mit Behinderungen (GVDMB),⁶⁷ ergänzt durch das Gesetz zur beruflichen Rehabilitation und Beschäftigung von Menschen mit Behinderungen (GbRBMB).⁶⁸ Das erste allgemeine Antidiskriminierungsgesetz wurde im März 2009 verabschiedet.

Das Gesetz über ein Verbot von Diskriminierung (GVD)⁶⁹, mit dem ein systematisches Gesetz im Bereich Antidiskriminierung eingeführt wurde, ist ein wichtiger Meilenstein für den Schutz der grundlegenden Menschenrechte in Serbien. Es verbietet zahlreiche diskriminierende Handlungen. Außerdem deckt das GVD neben sämtlichen, im Gleichbehandlungsrecht der EU vorgegebenen Diskriminierungsgründen noch einige weitere Gründe ab. So verbietet Artikel 2 Absatz 1 Diskriminierung aufgrund von „Rasse, Hautfarbe, Abstammung, Staatsbürgerschaft, nationaler Zugehörigkeit oder ethnischer Herkunft, Sprache, religiöser oder politischer Überzeugung, Geschlecht, Geschlechtsidentität, sexueller Ausrichtung, finanziellem Status, Geburt, genetischer Merkmale, Gesundheitszustand, Behinderung, Ehe- und Personenstand, früheren Verurteilungen, Alter, Aussehen und Mitgliedschaft in politischen oder sonstigen Vereinigungen oder Gewerkschaften.“ Die Liste ist nicht abgeschlossen, weil das GVD die Formulierung „und andere persönliche Eigenschaften“ verwendet, seien sie echt oder mutmaßlich. Das GVD legt spezielle Zivilverfahren fest und richtet eine unabhängige Stelle ein, den Beauftragten für Chancengleichheit.⁷⁰

⁶³ Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, *Amtsblatt Nr. L 180*, 19. Juli 2000.

⁶⁴ Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, *Amtsblatt Nr. L 303*, 2. Dezember 2000.

⁶⁵ Europäische Kommission (2012), *Fortschrittsbericht Serbien 2012*, Brüssel, 10. Oktober 2012, S. 16.

⁶⁶ Europäische Kommission (2013), *Fortschrittsbericht Serbien 2013*, Brüssel, 16. Oktober 2013, S. 36 und 45. Siehe auch Europäische Kommission (2014), *Fortschrittsbericht Serbien 2014*, Brüssel, 8. Oktober 2014, S. 44.

⁶⁷ Serbien, Gesetz zur Verhinderung der Diskriminierung von Menschen mit Behinderungen (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Amtsblatt der Republik Serbien*, Nr. 33/2006, 17. April 2006.

⁶⁸ Serbien, Gesetz zur beruflichen Rehabilitation und Beschäftigung von Menschen mit Behinderungen (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Amtsblatt der Republik Serbien*, Nr. 36/2009, 32/2013, 17. April 2006.

⁶⁹ Serbien, Gesetz über ein Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), *Amtsblatt der Republik Serbien*, Nr. 22/2009, 26. März 2009.

⁷⁰ Weitere Informationen über das Amt des Beauftragten in Petrusic, N. (2012), Procedural position of the Commissioner for the Protection of Equality in antidiscrimination proceedings, in *Pravni život*, Band. 11, S. 905-922. Viele Staaten haben Regierungsstellen oder außergerichtliche Stellen eingerichtet, doch in einigen Staaten gibt es unabhängige Stellen wie den Beauftragten für Chancengleichheit in Serbien. Weitere Informationen über diese Stellen finden sich in Equinet (2012), *Equality bodies and national human rights*

Das Gesetz zum Schutz der Rechte und Freiheiten nationaler Minderheiten⁷¹ schließlich regelt die Durchsetzung der Rechte von Menschen, die nationalen Minderheiten angehören. Es ermöglicht diesen Angehörigen nationaler Minderheiten, einzeln oder gemeinsam mit anderen Mitgliedern ihrer ethnischen Gruppe, ihre verfassungsmäßigen Rechte in demokratischer Weise auszuüben. Das Gesetz sieht auch spezielle Maßnahmen zur Förderung der Chancengleichheit vor, insbesondere in Bezug auf die Roma-Gemeinschaft.

Viele weitere Gesetze enthalten ebenfalls ein Diskriminierungsverbot, z. B. das Arbeitsgesetz,⁷² das Diskriminierung im Arbeitsleben verbietet, das Gesetz über die Grundlagen des Bildungssystems,⁷³ das eine inklusive Bildung einführt, das Jugendgesetz,⁷⁴ das Gesetz über die vorschulische Bildung,⁷⁵ das Gesetz über Kirchen und religiöse Vereinigungen⁷⁶ und das Sportgesetz.⁷⁷

Ein strafrechtlicher Schutz vor Diskriminierung ist zudem im Strafgesetzbuch⁷⁸ geregelt, der in Bezug auf das Diskriminierungsverbot mehrere Straftatbestände kennt: Artikel 128 (Verletzung des Gleichbehandlungsgrundsatzes), Artikel 129 (Verletzung des Rechts zur Verwendung von Sprache und Schrift) und Artikel 387 (Verbot der Rassendiskriminierung und anderer Diskriminierung). Das Gesetz über Ordnungswidrigkeiten⁷⁹ regelt die Verfahren, Bedingungen und die Durchsetzung von Ordnungsstrafen.

Die Strategie zur Prävention von und zum Schutz vor Diskriminierung wurde Ende 2013 verabschiedet und durch einen Aktionsplan ergänzt, der im Oktober 2014 endgültig angenommen wurde.

3. Wichtigste Grundsätze und Begriffe

Das GVD kennt sieben Formen von Diskriminierung: unmittelbare und mittelbare Diskriminierung, Verletzung des Grundsatzes der gleichen Rechte und Pflichten, Verhinderung des zur Verantwortung Ziehens,⁸⁰ Vereinigung zum Zweck der Diskriminierung, Hassrede, Belästigung und Herabwürdigung und schwere Formen von Diskriminierung.

Die Definition von unmittelbarer Diskriminierung entspricht fast vollständig der Definition in den EU-Richtlinien, ist jedoch auf eine weniger günstige Behandlung beschränkt und enthält nicht den Begriff des Schadens. Die Definition von mittelbarer Diskriminierung ist nicht konditional formuliert („können“) und kann daher so ausgelegt werden, dass sie nur für eine tatsächlich vorgekommene Benachteiligung gilt, wodurch es unmöglich wird, gegen neutrale Vorschriften vorzugehen, bevor tatsächlich ein Opfer benachteiligt wird.

institutions - Making the link to maximise impact, Europäisches Netzwerk für Gleichbehandlungsstellen, Brüssel.

⁷¹ Serbien, Gesetz zum Schutz der Rechte und Freiheiten nationaler Minderheiten, *Amtsblatt der Bundesrepublik Jugoslawien*, Nr. 11/2002, *Amtsblatt von Serbien und Montenegro*, Nr. 1/2003, *Amtsblatt der Republik Serbien*, 172/2009, 27. Februar 2003.

⁷² Serbien, Arbeitsgesetz (*Zakon o radu*) *Amtsblatt der Republik Serbien*, Nr. 24/2005, 61/2005, 54/2009, 32/2013, Nr. 75/2014, 15. März 2005.

⁷³ Serbien, Gesetz über die Grundlagen des Bildungssystems (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Amtsblatt der Republik Serbien*, Nr. 72/09, 52/2011, 55/2013, 31. August 2009.

⁷⁴ Serbien, Jugendgesetz (*Zakon o mladima*), *Amtsblatt der Republik Serbien*, Nr. 50/011, 8. Juli 2011.

⁷⁵ Serbien, Gesetz über die vorschulische Bildung (*Zakon o predškolskom vaspitanju i obrazovanju*), *Amtsblatt der Republik Serbien*, Nr. 18/010, 3. Mai 2010.

⁷⁶ Serbien, Gesetz über Kirchen und religiöse Vereinigungen (*Zakon o crkvama i verskim zajednicama*), *Amtsblatt der Republik Serbien*, Nr. 36/2006, 27. April 2006.

⁷⁷ Serbien, Sportgesetz (*Zakon o sportu*), *Amtsblatt der Republik Serbien*, Nr. 24/2011, 4. April 2011.

⁷⁸ Serbien, Strafgesetzbuch (*Krivični zakonik*), „*Das Amtsblatt der Republik Serbien*“ Nr. 85/2005, 88/2005 – Korr., 107/2005 – Korr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 6. Oktober 2005.

⁷⁹ Serbien, Gesetz über Ordnungswidrigkeiten (*Zakon o prekršajima*), *Amtsblatt der Republik Serbien*, Nr. 65/2013, 25. Juli 2013.

⁸⁰ Viktimisierung wird im serbischen Recht als Verbot des „zur Verantwortung Ziehens“ bezeichnet.

Außerdem verwendet sie nicht den Wortlaut „dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren“, was eine plausible Erklärung für dieses Phänomen bietet. Es ist nicht klar, warum die Verletzung des Grundsatzes der gleichen Rechte als spezielle Form von Diskriminierung angeführt wird, weil dies entweder eine unmittelbare oder eine mittelbare Diskriminierung darstellt und sogar als Test für Diskriminierung verwendet wird. Das Verbot des „zur Verantwortung Ziehens“ ist ein anderer Ausdruck für „Viktimisierung“, die in der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse und der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung nicht als spezielle Form von Diskriminierung anerkannt, jedoch verboten ist. Die Definition von Hassrede ist zweideutig, weil sie die Formulierung „und auf andere Weise“ verwendet und in der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse und der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung nicht als spezielle Form von Diskriminierung anerkannt ist. Das GVD verbietet Vereinigung zum Zweck der Diskriminierung, worunter unter anderem die Anstiftung zu nationalistisch, rassistisch, religiös oder anderweitig motiviertem Hass und zu Spaltung und Feindschaft gezählt wird. Anweisung zur Diskriminierung wird im GVD erwähnt, jedoch nicht definiert. Belästigung wird mit Herabwürdigung zusammengefasst und als spezielle Form von Diskriminierung anerkannt. Allerdings ist diese Bestimmung verwirrend, weil Herabwürdigung ein mögliches Element von Belästigung darstellt, der Begriff „Belästigung“ selbst jedoch nicht definiert wird.

Das GVD erlaubt einige Ausnahmen vom Gleichbehandlungsgrundsatz. So stellen „Maßnahmen mit dem Zweck, die völlige Chancengleichheit, den Schutz und die Förderung von Einzelpersonen oder eine Gruppe von Personen zu gewährleisten, die in einer nachteiligen Situation sind, keine Diskriminierung dar“ (Artikel 14). Mittelbare Diskriminierung kann gerechtfertigt sein, wenn sie ein rechtmäßiges Ziel verfolgt und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Ungleichbehandlung, Ausgrenzung oder Bevorzugung aufgrund der speziellen Anforderungen einer Tätigkeit ist zulässig, wenn die persönlichen Eigenschaften eine wesentliche und entscheidende Voraussetzung für die Ausübung der Tätigkeit darstellen und es sich um einen rechtmäßigen Zweck handelt. Außerdem gilt das Verhalten von religiösen Amtsträgern, das einer religiösen Doktrin, Weltanschauung oder anderen Zielen von Kirchen oder religiösen Vereinigungen entspricht, die gemäß dem Gesetz zur Regelung der Religionsfreiheit und des Status von Kirchen und religiösen Vereinigungen in das Register der religiösen Vereinigungen eingetragen sind, nicht als Diskriminierung. Dieser Artikel ist problematisch, weil er eine Blankobefreiung für religiöse Amtsträger darstellt, denen somit Diskriminierung erlaubt ist, wenn ihre religiösen Doktrinen dies erfordern oder erlauben.

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

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

4. Sachlicher Anwendungsbereich

Das GVD gilt für alle Bereiche des öffentlichen und privaten Lebens, da Artikel 2 Absatz 1 Diskriminierung definiert als „jede ungerechtfertigte Diskriminierung oder

Ungleichbehandlung“ aufgrund einer persönlichen Eigenschaft. Allerdings erkennt das GVD einige Sonderfälle von Diskriminierung an, z. B. Diskriminierung in Verfahren vor einer staatlichen Verwaltungsbehörde, Diskriminierung bei der Bereitstellung von öffentlichen Dienstleistungen und bei der Nutzung von Anlagen und Räumen sowie Diskriminierung in den Bereichen Beschäftigung und Bildung. Somit geht der sachliche Anwendungsbereich des GVD über die Bereiche hinaus, die von den beiden EU-Richtlinien abgedeckt sind. Allerdings hat die Europäische Kommission gegen Rassismus und Intoleranz (ECRI) in ihrem Bericht über Serbien, der nach dem vierten Überprüfungszyklus veröffentlicht wurde, die Empfehlung ausgesprochen, ein Verbot von Diskriminierung in den Bereichen Gesundheitsdienste, Wohnraum und Sozialschutz in das GVD aufzunehmen.⁸¹

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

5. Rechtsdurchsetzung

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

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

Nach Artikel 41 des GVD ist jeder berechtigt, Klage einzureichen, der sich einer diskriminierenden Behandlung ausgesetzt sieht. Der Kläger kann auf folgende Rechtsmittel klagen:

- 1) Verbot einer Handlung, durch die eine Diskriminierung droht, Verbot von Verfahren, die diskriminierende Handlungen vorsehen, oder Verbot der Fortsetzung einer diskriminierenden Handlung,
- 2) Feststellung des Gerichts, dass der Beklagte den Kläger oder eine dritte Partei diskriminiert hat,
- 3) Maßnahmen zur Abhilfe der Folgen der diskriminierenden Behandlung,
- 4) Entschädigung für finanzielle und nicht-finanzielle Schäden und
- 5) Veröffentlichung des Urteils in Bezug auf die oben genannten Rechtsmittel. Nach Artikel 46 können auch der Beauftragte und jede Organisation, die sich für den Schutz der Menschenrechte oder der Rechte einer bestimmten Gruppe engagiert, vor Gericht klagen.

Mehrere NRO, die im Bereich Menschenrechte und Diskriminierung tätig sind, nutzen ihr entsprechendes Beschwerde- und Klagerecht sehr aktiv. Sie führen außerdem

⁸¹ ECRI (2011), *Bericht zu Serbien*, CRI(2011)21, 23. März 2011, S. 15.

Situationstests durch, arbeiten mit unabhängigen Institutionen zusammen und nehmen an Anhörungsverfahren zu einschlägigen Gesetzen und Strategien teil.

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

6. Gleichbehandlungsstellen

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

Das Beschwerdeverfahren beim Beauftragten ist in Artikel 35 bis 40 geregelt und grundsätzlich gelten die allgemeinen Bestimmungen der Verwaltungsverfahrensordnung auch für Verfahren vor dem Beauftragten. Eingehende Beschwerden müssen innerhalb von 15 Tagen an den Beklagten weitergeleitet werden, der dann 15 Tage Zeit hat, um eine Stellungnahme abzugeben. Der Beauftragte kann ein Schlichtungsverfahren durchführen, wenn beide Parteien dem zustimmen. Dies entspricht Artikel 7 Absatz 1 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse, der die Mitgliedstaaten verpflichtet sicherzustellen, dass Opfer ihre Ansprüche auf dem Gerichts- und/oder Verwaltungsweg sowie, wenn die Mitgliedstaaten es für angezeigt halten, in Schlichtungsverfahren geltend machen können. Wenn der Streit nicht durch eine Schlichtungsverfahren geregelt wird, muss der Beauftragte jedoch innerhalb von 90 Tagen nach Eingang der Beschwerde in einer Stellungnahme entscheiden, ob das Diskriminierungsverbot verletzt wurde, und den Beschwerdeführer und die Person, gegen die sich die Beschwerde richtet, über seine Entscheidung informieren. Wenn der Beauftragte eine Verletzung feststellt, erstellt er eine Empfehlung an die Person, gegen die sich die Beschwerde richtet, in der Mittel zur Abhilfe der Verletzung vorgeschlagen werden. Der Beklagte muss diese Empfehlungen befolgen und innerhalb von 30 Tagen die vorgeschlagenen Maßnahmen zur Abhilfe der Verletzung treffen. Außerdem muss er den Beauftragten über die Durchführung der Maßnahmen informieren. Wird die Verletzung nicht innerhalb von 30 Tagen berichtigt, kann der Beauftragte dies in elektronischen Medien und Printmedien öffentlich machen, er hat jedoch keine weiteren Sanktionsmöglichkeiten. Allerdings kann der Beauftragte ein Ordnungsverfahren beantragen, Strafanzeige stellen oder Klage einreichen, wenn der Fall von strategischer Bedeutung ist.

Im Jahr 2014 führte das Büro des Beauftragten zahlreiche Aufklärungskampagnen über Diskriminierung und die Mechanismen zum Schutz vor Diskriminierung durch. Es erstellte 109 Stellungnahmen im Rahmen von Beschwerdeverfahren, 198 Empfehlungen, zwei Gutachten zu Gesetzentwürfen und allgemeinen Gesetzen und drei Anträge auf Überprüfung der Verfassungs- und Rechtmäßigkeit von Gesetzen. Er strengte zwei strategische Klagen an, machte 20 öffentliche Äußerungen, sprach sechs Verwarnungen aus und stellte eine Anzeige wegen Ordnungswidrigkeiten und sechs Strafanzeigen. Dennoch kann die Kapazität des Büros des Beauftragten durchaus noch weiter verbessert werden.

7. Wichtige Punkte

1. Übereinstimmung mit den beiden Gleichbehandlungsrichtlinien der EU

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

- Diskriminierung aufgrund von Assoziierung wird im GVD zwar anerkannt, bezieht sich jedoch nur auf „Familienmitglieder“ und Menschen, die dem Diskriminierungsopfer nahe stehen,
- die Definition von unmittelbarer Diskriminierung entspricht der Definition in den EU-Richtlinien, ist jedoch auf eine weniger günstige Behandlung beschränkt und enthält nicht den Begriff des Nachteils,
- die Definition von mittelbarer Diskriminierung ist nicht konditional formuliert („können“) und kann daher so ausgelegt werden, dass sie nur für eine tatsächlich vorgekommene Benachteiligung gilt, wodurch es unmöglich wird, gegen neutrale Vorschriften vorzugehen, bevor ein Opfer tatsächlich benachteiligt wird,
- Anweisung zur Diskriminierung ist im GVD nicht definiert und sollte in das Gesetz aufgenommen werden,
- das GVD legt nicht ausdrücklich fest, dass Situationstests vor Gericht als Beweis zulässig sind. Diese mangelnde Klarheit lässt viele Fragen offen (zum Beispiel wer die Testperson ist, ob Testpersonen ein bestimmtes Verhältnis zu der Person haben dürfen, die wegen Diskriminierung klagt, ob die Testpersonen früher diskriminiert wurden, usw.),
- das GVD enthält keine speziellen Vorschriften über statistische Daten, das Fallrecht ist noch recht beschränkt und es ist nicht klar, wie die Gerichte statistische Beweise bewerten,
- das GVD gilt nicht für Betriebsrenten, soziale Vergünstigungen und selbständige Beschäftigung und es ist unklar, ob es für Sozialschutz und Wohnraum gilt. Obwohl andere Gesetze einige dieser Bereiche, wie selbständige Beschäftigung und Wohnraum, regulieren, sollten entsprechende Bestimmungen in das GVD aufgenommen werden,
- das GVD erwähnt nur den Zugang zu Dienstleistungen und nicht ausdrücklich den Zugang zu Gütern,
- das nationale Recht sieht Ausnahmen für wesentliche und entscheidende berufliche Anforderungen vor, die Definition schreibt jedoch nicht ausdrücklich vor, dass für diese Anforderungen der Grundsatz der Verhältnismäßigkeit gilt,
- das nationale Recht kennt keine Ausnahme für Arbeitgeber, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, gewährt jedoch religiösen Amtsträgern eine Blankovollmacht zur Diskriminierung, wenn dies von ihrer religiösen Doktrin gefordert oder erlaubt ist,
- das GVD enthält keine ausdrückliche Ausnahmeregelung für unmittelbare Diskriminierung aufgrund des Alters, daher ist hier eine weitere juristische Klärung, insbesondere in Bezug auf die Prüfung der Verhältnismäßigkeit erforderlich,
- obwohl es zahlreiche Sanktionsmöglichkeiten in Diskriminierungsfällen gibt, ist deren Anwendung in der Praxis mit Problemen behaftet, z. B. reduzieren lange Verfahren und milde Sanktionen die Wirksamkeit und Verhältnismäßigkeit der Sanktionen,
- das GVDMB bietet keinen Schutz vor Viktimisierung,
- das GVDMB enthält keine Bestimmungen zur Umkehrung der Beweislast,
- das serbische Recht erlaubt in Diskriminierungsfällen keine Sammelklagen.

2. Umsetzung des geltenden Rechtsrahmens

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

- die Umsetzung der Strategie zur Prävention von und zum Schutz vor Diskriminierung erfordert ein stärker proaktives und systematisches Vorgehen;

einige Probleme benötigen dringende Aufmerksamkeit, zum Beispiel muss die soziale Eingliederung von Menschen mit Behinderungen und von Roma verbessert werden und dies gilt auch für die Situation von LGBTI-Personen und von Menschen mit HIV/AIDS,

- die Republik Serbien verfügt noch nicht über ein einheitliches und zentrales System zur Erfassung von Daten über die Funktion des Rechtsschutzes vor Diskriminierung. Dies erschwert die Analyse und Überwachung des Problems Diskriminierung enorm,
- obwohl die Fallzahlen von Jahr zu Jahr zunehmen, sind sie im Vergleich zur Häufigkeit von Diskriminierung in allen gesellschaftlichen Bereich noch immer verschwindend gering. Gründe hierfür sind mangelndes Bewusstsein und fehlendes Wissen über Diskriminierung und der fehlende Wille der Opfer, ihre Rechte durchzusetzen,
- obwohl bereits viele Polizisten und Richter verschiedener Rechtsbereiche zum Thema Gleichbehandlungsrecht fortgebildet wurden, muss der Staat seine Fortbildungsmaßnahmen in Zusammenarbeit mit internationalen Organisationen und Experten weiter fortsetzen.

INTRODUCTION

The national legal system

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

List of main legislation transposing and implementing the directives

The Republic of Serbia adopted the Law on the Prohibition of Discrimination (LPD) on 26 March 2009,⁸² thereby establishing an integral system of protection from discrimination within the country's legal system. It entered into force eight days after it was published in the Official Gazette, on 3 April 2009 (except for the provisions relating to the Commissioner for the Protection of Equality which entered into force on 1 January 2010). The Law has not thus far been amended.

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

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

The Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD) prohibits discrimination based on disability. The Law was adopted on 17 April 2006 and entered into force on 1 January 2007.⁸³ This Law prohibits discrimination on the ground of disability and aims to promote the inclusion of people with disabilities in all spheres of society. It addresses various forms of discrimination against people with disabilities which were previously included piecemeal in a number of different laws (such as social security, employment and labour laws, family law, public healthcare laws, public education laws, pension and disability, etc.). This Law was followed by the Law on the Professional

⁸² Serbia, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of the Republic of Serbia*, no. 22/2009, 26 March 2009; English version available at <http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia>, last accessed on 24 October 2015.

⁸³ Serbia, Law on the Prevention of Discrimination against Persons with Disabilities (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 33/2006, 17 April 2006.

Rehabilitation and Employment of Persons with Disabilities (LPREPD),⁸⁴ which was adopted with the aim of creating the possibility for greater numbers of people with disabilities to be included in the open labour market and to improve the quality of their employability and/or employment. The Law was amended on 8 April and entered into force on 16 April 2013.⁸⁵

The Law on the Protection of the Rights and Freedoms of National Minorities⁸⁶ was adopted on 27 February and entered into force on 7 March 2003. It provides protection to national minorities from all forms of discrimination in exercising their civil rights and freedoms, and the duty of public officials to refrain from acts and regulations that are discriminatory towards them. It further creates instruments that guarantee and protect the special rights of minorities to minority self-governance in the fields of education, use of language, media and culture. The law regulates the way in which the rights of people belonging to national minorities are implemented. Those rights include: the right of national affiliation, the right to co-operate with co-nationals in the country and abroad, the right to use one's native language, the right to use national symbols and all the other rights which protect the specificity of national minorities in the fields of special interest to them (use of the language of the national minorities in the work of bodies and organisations with public competencies, education and public information in the languages of the national minorities, preservation and protection of cultural heritage, etc.). The law has been amended several times, in 2003, 2009 and 2013.

The Labour Law⁸⁷ was adopted on 15 March and entered into force on 23 March 2005. It provides specific provisions against discrimination at work and related to employment. Thus, while the LPD contains general anti-discrimination provisions, the Labour Law provides for more specific provisions related to discrimination at work and entitles employees to initiate lawsuits and claim damages based on anti-discrimination provisions in the Labour Law. It contains an open anti-discrimination clause, but explicitly mentions the following grounds of discrimination: gender, birth, language, race, skin colour, age, pregnancy, health condition, disability, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial capacity, and membership of political, labour union or other organisations. In particular, the Labour Law prohibits discrimination with respect to employment conditions and the choice of candidates for an employment position; working conditions and rights; professional development and training; career development; and termination of employment by the employer. The Law has been amended several times, in 2005, 2009, 2013 and 2014.

Many other laws also contain anti-discrimination provisions, such as the Law on Fundamentals of the Education System,⁸⁸ which introduces an inclusive education and

⁸⁴ Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 17 April 2006.

⁸⁵ Serbia, Amendments to the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Izmene i dopune Zakona o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 32/2013, 8 April 2013.

⁸⁶ Serbia, Law on the Protection of the Rights and Freedoms of National Minorities, (*Zakon o zaštiti prava i sloboda nacionalnih manjina*) *Official Gazette of FRY*, no. 11 of 27 February 2002, *Official Gazette of Serbia and Montenegro*, no. 1/2003 – Constitutional Charter, *Official Gazette of the Republic of Serbia*, no. 72/2009 – other law, *Official Gazette of the Republic of Serbia*, no. 97/2013 – decision of the Constitutional Court, 27 February 2003.

⁸⁷ Serbia, Labour Law (*Zakon o radu*), *Official Journal of the Republic of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, no. 75/2014, 15 March 2005.

⁸⁸ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 72/09, 52/2011, 55/2013, 31 August 2009.

prohibits discrimination in education, the Law on Youth,⁸⁹ the Law on Preschool Education,⁹⁰ the Law on Churches and Religious Organisations,⁹¹ the Law on Sport,⁹² etc.

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

⁸⁹ Serbia, Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

⁹⁰ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 18/2010, 3 May 2010.

⁹¹ Serbia, Law on Churches and Religious Organisations (*Zakon o crkvama i verskim zajednicama*), *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

⁹² Serbia, Law on Sport (*Zakon o sportu*), *Official Gazette of the Republic of Serbia*, no. 24/2011, 99/2011 – other laws, 4 April 2011.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Serbian constitution⁹³ from 2006 includes the following articles dealing with non-discrimination.

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

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

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

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

These provisions apply to all areas covered by the directives, as the material scope of the above-mentioned provisions is broader than those of the directives.

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clause can be enforced against the state, as well as against private actors.

⁹³ Serbia, Constitution of Serbia (*Ustav Republike Srbije*), *Official Gazette of the Republic of Serbia* no. 98/2006, 10 November 2006.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

As in the EU directives, national law does not provide definitions of the different grounds of discrimination. However, the interpretation of the terms is equivalent to those in EU law, although jurisprudence in the area of anti-discrimination is not yet very developed. In addition, since international law is directly applicable in Serbia, in the event of inconsistencies in the interpretation of different terms, the judge can directly apply definitions provided in EU directives and CJEU jurisprudence.

However, some problems arise due to the fact that Serbia does not have a single, comprehensive definition of disability, which is instead defined in several laws, by-laws and policy documents. Some older laws contain a medical definition of disability,⁹⁴ while Article 3, para. 1 of the LPDPD defines people with disabilities as people with a congenital or acquired physical, sensory, intellectual or emotional (psycho-social) impairment who are, due to social or other barriers, unable or have limited opportunities to engage in social activities at the same level as others, regardless of whether they are capable of carrying out such activities with the use of technical aids or support services.

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

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

2.1.2 Multiple discrimination

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

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

...

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

...’

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

In Serbia, the Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*) is aware of the negative consequences and detrimental effects of multiple discrimination. In 2014, in 120 complaints before the Commissioner, the applicants invoked several grounds for discrimination. In the majority of these cases, age discrimination was indicated (46 cases), followed by marital and family status (42), nationality (38), membership of political organisations, trade unions and other organisations (35), religious and political belief (32) and sex (23).⁹⁵ However, this does not mean that multiple discrimination was present in all these cases, as it is usual for applicants to name several grounds of discrimination when they are not sure what personal characteristic was the ground for discrimination in their case.

The practice of the Commissioner shows that multiple discrimination is most frequent in relation to women, due to their sex and marital and family status and in the area of employment. In 2014, a human rights organisation submitted a complaint regarding an online bank job application form, which included the following questions: father’s name, marital status and children.⁹⁶ In another case, a disputed video clip that was broadcasted within one humanitarian campaign included the words of a boy who said that, ‘Since my mother has been ill, she’s been unable to take care of us and so I live in the Children’s Village’, while in the background a woman in a wheelchair can be seen.⁹⁷ The Commissioner found that it is unacceptable for one of the few mentions of mothers with disabilities in public is in the context of their inability to take care of their children and that this film promotes stereotyped gender roles of women and men in relation to parenthood.

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

⁹⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014 (Redovan godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2014. godinu)*, Belgrade, p. 105. text is available in English at http://www.ravnopravnost.gov.rs/downloads/files/regular_annual_report_of_the_cpe_2014_spojeno.pdf, last accessed on 24 October 2015.

⁹⁶ Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.Z.P.N. v. the Bank*, opinion no. 07-00-33/2014-02, 10 March 2014.

⁹⁷ See Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *I.B. and M. z.p.n. v. F.S.*, opinion no. 07-00-354/2014-02, 28 October 2014.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

There is still a lack of relevant case law, but it is of interest to mention one decision by the Commissioner for Protection of Equality from 2012 where, in the process of the selection of candidates for professional training at the Centre for Basic Police Training of the Ministry of the Interior of the Republic of Serbia, an application by M.S. was rejected.⁹⁸ It was found that the applicant did not prove that he did not have dual citizenship. The application submitted by M. S. fulfilled all other conditions, but was rejected, allegedly for his failure to comply with the requirements pertaining to citizenship. However, the decision was not based on an established fact or piece of evidence, but was made on the basis of the assumption that M. S. had dual citizenship, as he had only been entered in the Register of Yugoslav citizens in 1998. By rejecting his application, the Commissioner found that the candidate selection committee perpetrated an act of discrimination on the grounds of a presumed personal characteristic of M. S. – dual citizenship.

b) Discrimination by association

In Serbia the LPD prohibits discrimination based on association with people with particular characteristics. Article 2, para. 1 states that, 'the terms "discrimination" and "discriminatory treatment" shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as *members of their families, or persons close to them*, be it overt or covert, on the grounds of race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, or membership of political, trade union and other organisations and other real or presumed personal characteristics' (emphasis added). In other words, the definition of discrimination says that unequal treatment occurs 'in relation to individuals or groups, as well as members of their families, or persons close to them'. However, its application is limited to 'family members' and people close to those discriminated against⁹⁹.

Article 3, para. 2 of the LPDPD contains the same provision in relation to discrimination based on disability. It also includes the possibility for a lawsuit to be initiated by the individual with a disability who is a victim of discrimination, their legal representative and

⁹⁸ See Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.S. v. the Centre for Basic Police Training of the Ministry of the Interior of the Republic of Serbia*, opinion no. 360, 21 March 2012.

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

an individual accompanying them at the time they experience the discrimination (in other words, someone who is discriminated against on the ground of their association with a person with disabilities). Thus, the national law is in line with the judgment in Case C-303/06 *Coleman v Attridge Law and Steve Law*.

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

a) Prohibition and definition of direct discrimination

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

b) Justification of direct discrimination

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

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

2.2.1 Situation testing

a) Legal framework

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

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

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

b) Practice

In Serbia, situation testing is used in practice. It is considered as proof before the Commissioner for Protection of Equality and forms the basis for further action by the Commission, such as the initiation of litigation in discrimination cases, recommendations, warnings, etc. It is provided by NGOs whose activists have undergone specific training and work in cooperation with the Commissioner. According to the Commissioner's 2014 annual report, in the last two years one NGO has submitted 63 complaints against dental clinics which refused to provide services to people infected with HIV and 52 complaints against cosmetic salons refusing to provide services to people infected with hepatitis.¹⁰⁰ In another case, an NGO conducted situational testing in the case of discrimination in a recruitment process,¹⁰¹ while the Commissioner initiated strategic litigation in two cases based on situational testing which showed that a bank and an estate agent refused to offer services to Roma.¹⁰²

However, as early as 2004, the Supreme Court of Serbia ruled in the famous *Krsmanovaca* case that, in the absence of the national anti-discrimination law provisions, the court can interpret and directly apply ratified international conventions.¹⁰³ This decision sets an important legal precedent, being the first decision by a Serbian court in relation to discrimination against Roma regarding access to public facilities. It also provided direction for subsequent cases and confirmed that 'situational testing' (accepted for the first time by a Serbian court in this case) represents admissible evidence.¹⁰⁴

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

a) Prohibition and definition of indirect discrimination

In Serbia indirect discrimination is prohibited in national law. The LPD defines indirect discrimination. In Article 7 it states that, 'Indirect discrimination shall occur if an individual or a group of individuals, on account of their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.' However, the definition of indirect discrimination doesn't contain the conditional wording ('would be placed in a less favourable position') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it

¹⁰⁰ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, pp. 34, 66.

¹⁰¹ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 52.

¹⁰² Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014* Belgrade, p. 64.

¹⁰³ Decision of the Supreme Court of Serbia, Rev. 229/2004/1, dated 21 April 2004.

¹⁰⁴ After the *Krsmanovaca* case, situation testing was admitted in another case (the *Club Acapulco* case), decided in 2007. Here, the Fourth Municipal Court sentenced a security worker from the Club Acapulco nightclub in Belgrade to two years' imprisonment because he banned three Roma from entering the club due to their ethnic origin. After this event, the NGO, the Humanitarian Law Center, conducted latest on 25 July 2003 which confirmed that the security staff were directly discriminating against the Roma population based on their ethnic origin. See IV Municipal Court, No. III K – 1432/04, judgment of 19 April 2007.

impossible to challenge apparently neutral provisions before they incur disadvantages for actual victims. It also uses the wording 'an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination' instead of the wording 'an apparently neutral provision, criterion or practice', when the essence of this form of discrimination is neutrality which, in practice, leads to an unequal position for a certain group.

b) Justification test for indirect discrimination

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

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Serbia there are national rules permitting data collection. Data are provided by the National Employment Service and the Office of Statistics. The Statistical Office of the Republic of Serbia (*Republički zavod za statistiku*) is a special professional organisation in the public administration system which, according to the Law on Official Statistics,¹⁰⁵ is responsible for performing technical tasks related to the adoption of programmes, the organisation and conducting of statistical research, data collection, statistical analysis, publication of data, etc. All data subjects are required to submit the requested information to the Statistical Office, which on the other hand provides data protection and confidentiality.

Serbia has not yet established a unified and centralised system for collecting data relevant to the functioning of the system of legal protection against discrimination, and this fact represents a huge problem in assessing and monitoring discrimination. However, the Statistical Office of the Republic of Serbia holds some data, such as in the areas of employment, education etc., which could also be relevant for the assessment of the existence of discrimination. It should be mentioned that the collection of some data is sensitive (e.g. religious affiliation, sexual orientation, etc.) and the right to privacy in providing these data is prescribed in the Law on Personal Data Protection.¹⁰⁶ This Law governs the conditions for the collection and processing of personal data, protection and the limitations to that protection, as well as data security. Personal data protection is provided for each individual irrespective of their 'nationality, residence, race, age, sex, language, religious, political and other belief, national or social origin, property, birth, education, social status and other personal characteristics' (Article 1, para. 2).

The LPD does not contain any specific rule in relation to statistics. The case law is still developing and it is not clear how the courts will treat statistical evidence. However, it must be said that it is permitted by national law in order to establish indirect

¹⁰⁵ Serbia, Law on Official Statistics (*Zakon zvaničnoj statistici*), *Official Gazette of the Republic of Serbia*, no. 104/2009, 16 December 2009.

¹⁰⁶ Serbia, Law on Personal Data Protection (*Zakon o zaštiti podataka o ličnosti*), *Official Gazette of the Republic of Serbia*, no. 97/2008, 104/2009 – other law, 68/2012 – decision of the CC 107/2012, 23 October 2008.

discrimination. Sometimes it is very important to have statistical data and they are widely used where possible in cases submitted to the Commissioner for Protection of Equality.

b) Practice

In Serbia statistical evidence in order to establish indirect discrimination is used in practice by the Commissioner for Protection of Equality and mostly in cases in relation to pregnancy. However, statistical evidence is not so widely used in practice by the courts, as case law is still developing and most cases fall within the category of direct discrimination. The Civil Procedure Code does not mention statistical evidence as evidence before the court.¹⁰⁷ It just states in Article 7 that parties are obliged to present all the facts on which they base their claim and to provide evidence which determines those facts. Thus, further judicial interpretation is required in this matter.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

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

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

b) Scope of liability for harassment

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

Employers are liable for harassment. They are also liable for harassment perpetrated by an employee, if they didn't prevent it or undertake appropriate measures, as an employer is obliged to create the conditions for a healthy working environment. This obligation also stems from the Law on the Prevention of Bullying at Work¹⁰⁸ (although there is a clear distinction between discrimination and bullying), which states that employers are responsible for their own acts of bullying and are vicariously liable if other employees or management engage in bullying (Article 4). In addition, employees are

¹⁰⁷ Serbia, Civil Procedure Code (*Zakon o parničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 72/2011, 49/2013 – decision CC, 74/2013 – decision CC and 55/2014, 3 September 2011.

¹⁰⁸ Serbia, Law on the Prevention of Bullying at Work (*Zakon o sprečavanju zlostavljanja na radu*), *Official Gazette of the Republic of Serbia*, no. 36/2010, 26 May 2010.

obliged to refrain from bullying, otherwise they are responsible for the violation of their duties at work (Article 11).

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

Article 34 of the Criminal Code stipulates that anyone who, with intent, incites another to commit a criminal offence shall be punished as prescribed by law for such offences. Article 387 prohibits racial and other discrimination, Article 128 outlaws the violation of equality (Article 128) and the most important Article 317 prohibits incitement of national, racial and religious hatred and intolerance.¹⁰⁹

b) Scope of liability for instructions to discriminate

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

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

a) Implementation of the duty to provide reasonable accommodation in the field of employment

In Serbia, the LPDPD prescribes in Article 11, para. 4 that one of the actions in connection with the promotion of employment of people with disabilities is to ensure technical, professional and financial support for the adjustment of work tasks, the

¹⁰⁹ Serbia, Criminal Code (*Krivični zakonik*), *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014, 6 October 2005.

workplace or both work tasks and the workplace, including technical and technological aids for the purpose of enhancing opportunities for people with disabilities to find and retain employment. Article 22, para. 4 further prescribes that discrimination occurs in the case of refusal to carry out a technical adaptation of the workplace that enables a person with disabilities to carry out their work effectively, if the costs of adaptation are not borne by the employer or are not excessive in relation to the gain achieved by the employer who is employing a person with disabilities.

Furthermore, the LPREPD prescribes that people with disabilities can be employed under general and special conditions (Article 22). While 'general conditions' means the job placement without adjusted work activities, workplace or work activities and workplace, 'special conditions' means job placement with the adjustment of work activities, workplace, or work activities and workplace. The law further clarifies that the adjustment of work activities can be the adjustment of the work process and work tasks (Article 22, para. 3). Adjustment of the workplace can mean the technical and technological equipment of a workplace, tools, space and equipment in accordance with the capabilities and needs of the individual with disabilities. It may also include professional assistance to support the individual with disabilities in initiation to the job or workplace, through counselling, training, assistance services and support in the workplace, work monitoring, development of personal work methods and evaluation of efficiency.

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

b) Practice

The lack of this duty to provide reasonable accommodation in the LPD leads to a high unemployment rate among people with disabilities and has reduced their possibilities of inclusion in the labour market. Data from the World Bank indicate that only about 13 % of people with disabilities in Serbia are employed.¹¹⁰ An additional concern is the fact that 10 % of these 13% are employed in the NGO sector, that is, most of them are employed in organisations dedicated to people with disabilities and only 1 % in the economy and public sector. Thus, the unemployment rate among people with disabilities is three times higher in comparison to the rest of the population. Nevertheless, it is positive that the LPDPD provides these duties, but relevant case law is still lacking on this issue.

c) Definition of disability and non-discrimination protection

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

The Law on the Professional Rehabilitation and Employment of Persons with Disabilities also provides a definition of people with disabilities as people who live with the permanent consequences of a physical, sensory, mental or psychiatric impairment or disease that cannot be eliminated by any treatment or medical rehabilitation and are faced with social and other limitations and barriers affecting their working capacity and possibility of finding or retaining employment, and who have no possibility or have reduced possibilities of being involved in the labour market or applying for employment

¹¹⁰ See Government of the Republic of Serbia (2012) *Initial report on the implementation of the Convention on the Rights of Persons with Disabilities (Inicijalni izveštaj o implementaciji Konvencije o pravima osoba sa invaliditetom)*, Belgrade, para. 24.

on equal terms with other persons (Article 3, para. 1). Thus, this definition is based on a social model of disability and determines the concept of 'long-term impairments' as impairments that cannot be eliminated by any treatment or medical rehabilitation, which creates permanent consequences.

d) Duties to provide reasonable accommodation outside the field of employment

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

e) Failure to meet the duty of reasonable accommodation

In Serbia failure to meet the duty of reasonable accommodation in both the field of the provision of services and the use of facilities, as well as in employment, counts as discrimination. Article 2, para. 1 of the LPD, as well as Article 3, para. 2 of the LPDPD, clearly state that discrimination occurs as an act or omission. More specifically, the LPDPD prescribes in Article 22, para. 4 that discrimination occurs in the case of a *refusal* to carry out a technical adaptation of the workplace that enables efficient work by people with disabilities

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

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

g) Accessibility of services, buildings and infrastructure

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

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

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

Regarding physical access to buildings, Article 5 of the Law on Planning and Construction¹¹¹ specifies that facilities for public and commercial use must fulfil the

¹¹¹ Serbia, Law on Planning and Construction (*Zakon o planiranju i izgradnji*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 81/2009 - corr., 64/2010 - decision CC, 24/2011, 121/2012, 42/2013 - decision CC, 50/2013 - decision CC, 98/2013 - decision CC, 132/2014, 145/2014, 3 September 2009.

condition that people with disabilities, children and the elderly are provided with appropriate access to and movement within them. In addition, residential buildings with ten and more units must be designed to meet accessibility requirements. During 2013, the Commissioner for Protection of Equality tested a total of 23 buildings of government bodies for accessibility, and only four buildings fully met accessibility standards.¹¹² The basis for the report on the accessibility of buildings of government bodies is the increasing number of complaints submitted. In the Republic of Serbia people with disabilities face barriers in their daily activities when using transport, when entering and moving through private and public buildings, and in the use of home appliances, electronic and digital systems, services and products.

In December 2014 the Commissioner for Protection of Equality issued an opinion that the hotel V. discriminated against M.S., an individual with disabilities, as some parts of the hotel were not accessible to him.¹¹³ The Commissioner did not accept the arguments of the management of the hotel that the hotel was not informed in advance that it would host a person with disabilities, that it is a two-star hotel, which does not have an obligation to install a lift. The Commissioner found that the entrance of the hotel was inaccessible, that some other facilities were inaccessible as well (the reception, bar, restaurant, swimming pool, TV room and fitness room) and that the hotel must take all necessary measures to ensure an accessible entrance to the hotel and the rooms in which it provides services.

However, it can be derived from the jurisprudence of the Supreme Court of Cassation that it is reasonable to accept that accessibility is a long-term process which causes financial burdens and that it will not be considered to be discrimination if a failure to secure accessibility is linked with a lack of material resources.¹¹⁴

h) Accessibility of public documents

Article 5 of the Law on Free Access to Information of Public Importance¹¹⁵ stipulates that everyone has the right to be informed if a public authority holds specific information of public importance and has the right to be allowed to see a document containing information of public importance, the right to a copy of that document and the right to receive a copy of the document upon request, by mail, fax, electronic mail or in another way. This right must be exercised under equal conditions, notwithstanding citizenship, temporary or permanent residence, seat, or personal characteristics, such as race, faith, nationality, ethnicity, gender or any other personal characteristic (Article 6).

In addition, the Law on Public Information¹¹⁶ and the Law on Electronic Communications¹¹⁷ bring positive novelties introduced by the explicit reference to people with disabilities. Thus, the Law on Public Information requires in Article 5, para. 2 public financial support for the unhindered exercising of the rights of people with disabilities to public information, especially the freedom to receive ideas, information and opinions. The

¹¹² Commissioner for Protection of Equality (2013) *Report on the accessibility of buildings of government bodies for persons with disabilities (Izveštaj o pristupačnosti poslovnih zgrada državnih organa osobama sa invaliditetom)*, Belgrade, pp. 5-8.

¹¹³ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *M.S. v. the hotel V. in M.*, opinion no. 07-00-351/14-02, 1 December 2014. See also complaint *Assembly of tenants v. the Building Directorate of Serbia*, opinion no. 07-00-244/2014-02, 19 November 2014.

¹¹⁴ Supreme Court of Cassation, Rev., 99/11, 10 February 2011.

¹¹⁵ Serbia, Law on Free Access to Information of Public Importance (*Zakon o slobodnom pristupu informacijama od javnog značaja*), *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009 i 36/2010, 31 December 2004.

¹¹⁶ Serbia, Law on Public Information (*Zakon o javnom informisanju*), *Official Gazette of the Republic of Serbia*, no. 43/2003, 61/2005, 71/2009, 89/2010 – decision CC, 41/2011 – decision CC, 22 April 2003.

¹¹⁷ Serbia, Law on Electronic Communications (*Zakon o elektronskim komunikacijama*), *Official Gazette of the Republic of Serbia*, no. 44/2010, 60/2013 – decision CC and 62/2014, 30 June 2010.

Electronic Communications Law contains several articles which have the purpose of securing the availability of electronic communication for people with disabilities.

Despite the fact that there are 30 000 deaf and hearing impaired people in Serbia, there are only 30 sign language interpreters. Although a Draft Law on the Use of Sign Language was prepared in 2013, it has still not been adopted by the Parliament. In one case before the Commissioner for Protection of Equality the Aikido Association claimed that S.s. and S. didn't provide access to information and documents in an adequate electronic form, accessible for people with visual impairments.¹¹⁸ The Commissioner found that S.s. and S. was providing information about the activities and work of the association without respect for the particular requests and needs of specific categories of people with disabilities, bearing in mind the particular aims and status of this organisation.

¹¹⁸ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *Aikido Association v. S.s. and S.*, opinion no. 07-00-616/2013-02, 25 December 2013.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Serbia there is a residence requirement for protection under the relevant national laws transposing the directives. Thus, the LPD prescribes that the law applies to 'an individual residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether that individual is a national of the Republic of Serbia, some other state or a stateless person'. It can be derived from the wording that this requirement means legal residence and not only presence on the state territory, as there is a difference between the terms 'reside' (*boraviti*) and 'is present' (*nalazi se na*). This dilemma is not resolved, even with Article 3, para. 2, which states that a foreigner, in accordance with international treaties, has all the rights guaranteed by the Constitution and by law, with the exception of those rights that, in accordance with the Constitution and the law, are only enjoyed by the citizens of the Republic of Serbia.

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

a) Natural and legal persons

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

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

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

b) Private and public sector including public bodies

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

In Serbia the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination. Thus Article 4, para. 2 stipulates that *everyone* shall be obliged to respect the principle of equality and the prohibition of discrimination. Article 2, para. 4 defines what is meant by the term 'public administration body' - a state body, autonomous province body, local government body, public company, institution, public agency or other organisation entrusted with

public authority, as well as a legal entity established or financed in its entirety, or predominantly, by the Republic, an autonomous province or local authority.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

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

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

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

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

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

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

The Law on Employment and Unemployment Insurance governs employment-related activities and institutions competent for employment affairs, the rights and obligations of

unemployed people and employers, active employment policy, unemployment insurance and other matters relevant to employment, raising employment levels and preventing long-term unemployment in the Republic of Serbia (Article 1).¹¹⁹ Unlike the Labour Law, the Law on Employment and Unemployment Insurance does cover self-employment. Thus, Article 43, para. 4 on active employment measures includes support for self-employment, while Article 51 defines that support. Article 52 prescribes further education and training in order to promote self-employment. Article 5, para. 1 prohibits discrimination as it is defined in the LPD and guarantees freedom of choice of employment and occupation. Employment activities comprise dissemination of information on employment opportunities and conditions; job matching within the country and internationally; vocational guidance and career counselling; and implementation of active employment policy measures (Article 6).

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

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

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

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

Article 20, para. 1 of the Labour Law prescribes the prohibition of discrimination regarding employment conditions, working conditions and all the rights deriving from employment relations and (in para. 5) cancellation of an employment contract.

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

- Occupational pensions constituting part of pay

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

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

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

¹¹⁹ Serbia, Law on Employment and Unemployment Insurance (*Zakon o zapošljavanju i osiguranju za slučaj nezaposlenosti*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 88/2010, 28 May 2009.

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

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

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

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

In Serbia national legislation includes membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment. The Constitution of the Republic of Serbia contains a provision (Article 55) which guarantees freedom of political, union and any other form of association, as well as the right to refrain from joining any association.

Article 18 of the Labour Law prohibits direct and indirect discrimination of people seeking employment, as well as employees, on the ground, among others, of involvement in trade unions. Article 6 defines a trade union as 'an autonomous, democratic and independent organisation of employees, joined on a voluntary basis, for the purpose of acting on behalf of, representing, advancing and protecting their professional, labour, economic, social, cultural and other individual and collective interests'.

Article 16, para. 1 of the LPD prohibits discrimination only in relation to joining a trade union in the area of employment. However, Article 25 prohibits discrimination 'against an individual or a group of persons on the grounds of their political beliefs, or membership or non-membership of a political party or a trade union'.

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

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

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

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

Article 25 of the Law on Social Protection¹²⁰ prohibits discrimination in the area of social protection which is based on 'race, sex, age, national origin, social background, sexual orientation, religion, political, trade union or other opinion, property status, culture, language, disability, the nature of social exclusion or other personal characteristics'.

The Law on Healthcare¹²¹ guarantees the right to healthcare for citizens of the Republic of Serbia, as well as to any other person who has permanent or temporary residence in the territory of the Republic of Serbia (Article 3). According to Article 25, every citizen has the right to healthcare, exercised with respect to the highest possible standards of human rights, and respecting their moral, cultural, religious and philosophical beliefs. The principles in the areas of healthcare include, among others: 1) the principle of accessibility (physically, geographically and economically available), especially at the primary level (Article 19); 2) the prohibition of discrimination in the provision of healthcare based on race, sex, age, national origin, social background, religion, political or other opinion, property status, culture, language, type of illness, mental or physical disability (Article 20); and 3) the principle of comprehensiveness, which involves the inclusion of all citizens of the Republic of Serbia in the healthcare system.

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

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

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

¹²⁰ Serbia, Law on Social Protection (*Zakon o socijalnoj zaštiti*), *Official Gazette of the Republic of Serbia*, no. 24/2011, 4 April 2011.

¹²¹ Serbia, Law on Healthcare (*Zakon o zdravstvenoj zaštiti*), *Official Gazette of the Republic of Serbia*, no. 107/2005, 72/2009 – other laws, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – other laws, 93/2014, 2 December 2005.

- Article 3.3 exception

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

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

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

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

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

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

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

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

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

Article 6 guarantees everyone the right to education. Citizens of the Republic of Serbia are equal with regard to exercising their rights to education, regardless of gender, race, nationality, religion or language, social and cultural background, economic status, age, physical and mental constitution, disability, political affiliation or other personal characteristic. The Law guarantees the right to education of foreign citizens and stateless persons, under the same conditions and in the manner prescribed for citizens of the

Republic of Serbia. Article 44 prohibits activities that threaten, humiliate, discriminate or segregate people or groups of people in educational institutions, on the basis of race, nationality, ethnicity, language, religion or gender, physical or psychological characteristics, disability, health, age, social or cultural background, economic status or political affiliation, as well as on other grounds stipulated by the LPD. It also prohibits encouraging or failing to prevent such activities. , which sets out the details of the prohibition of discrimination. This article expressly allows special measures that have been introduced to achieve full equality for, protection of and advancement of people or groups of people who are in an unequal position.

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

Other specific laws regulate different levels of education (preschool,¹²² primary,¹²³ secondary,¹²⁴ and higher education¹²⁵) and all contain provisions on the prohibition of discrimination, which cover different grounds. However, Article 3, para. 1 of the Law on the Fundamentals of the Education System applies as a systemic law, as well as Article 2, para. 1 of the LPD, which means that all grounds covered in the two EU directives are covered by these laws as well.

- Pupils with disabilities

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

The Law on the Fundamentals of the Education System adopted in 2009 introduced for the first time an inclusive education and provides that people with disabilities have the right to education respecting their educational needs in the mainstream education system, with additional individual or group support in a special preschool group or school, in compliance with this and special laws (Article 6, para. 3). In certain cases, pupils with disabilities will be enrolled in special schools, but the majority of them are integrated within the mainstream school system. Those pupils with disabilities who attend

¹²² Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 18/2010, 23 March 2010. The principles of preschool education include, inter alia, equal rights and access to all forms of preschool education, without discrimination on the basis of gender, social, cultural, ethnic, religious or other affiliation, place of residence or domicile, material or health conditions, disability, as well as on other grounds, in accordance with the law (Article 4, par. 2, sec. 1).

¹²³ Serbia, Law on Primary Education (*Zakon o osnovnom obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 55/2013, 25 June 2013. Article 9 states that the main task of the school is to provide education of good quality and education for every child and student, under the same conditions, no matter where the school is located, or where the education takes place. People carrying out educational work and other people employed in schools must promote equality among all students and actively oppose all forms of discrimination and violence.

¹²⁴ Serbia, Law on Secondary Education (*Zakon o srednjem obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 55/2013, 25 June 2010. Article 2, para. 1, sec. 6 provides as one of the goals of secondary education respect for equality in relation to racial, ethnic, cultural, linguistic, religious, gender, sex and age characteristics, tolerance and respect for diversity.

¹²⁵ Serbia, Law on Higher Education (*Zakon o visokom obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 76/2005, 97/2008, 93/2012, 99/2014, 2 September 2009. This Law recognises the principle of respect for human rights and civil freedoms, including prohibition of all forms of discrimination and equality of higher education institutions, regardless of their founder or form of ownership (Article 4, para. 1, sec. 6 and 9).

mainstream schools need special support and have an individual teaching plan. However, there is still opposition to inclusive education. In addition, support for children with disabilities is financed from the local budget and the level of support depends on the place of residence. The number of teaching assistants, who are supposed to provide help for the children and teachers, is minimal and their situation is not regulated in a uniform and precise manner. Furthermore, many teachers have had no training on how to teach and work with children with disabilities, which causes some problems in practice.

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

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

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

Since Article 19, para. 2, unduly makes a distinction between children with intellectual disabilities and other children, in 2011 the Commissioner for Protection of Equality submitted an initiative to amend this article, but the initiative was not supported.¹²⁶

The number of complaints submitted to the Commissioner for Protection of Equality in recent years shows that there are still problems in the field of education, particularly in relation to children with disabilities and Roma children. Consequently, although the Commissioner highlights the fact that the normative framework has been improved, as well as the visibility of people with disabilities, they nevertheless still face discrimination in all areas of life, most prominently in, among others, education.¹²⁷ In particular the Commissioner found that many young people with disabilities experience barriers in their access to higher education.¹²⁸

- Trends and patterns regarding Roma pupils

In Serbia specific patterns exist in education regarding Roma pupils, such as segregation. Segregation of Roma children is still present in certain schools; there are schools attended by a large percentage of Roma children, which also leads to segregation, and there are frequent problems related to the attitudes of the teaching staff and the

¹²⁶ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), opinion no. 1080/2011, 3 November 2011.

¹²⁷ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 38.

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

community towards Roma pupils.¹²⁹ As the Advisory Committee on the Framework Convention for the Protection of National Minorities found in 2014, it is necessary to 'eliminate segregation of Roma children in education and devise without delay measures to effectively increase access to mainstream education as well as to improve education outcomes for Roma children'.¹³⁰

In 2012, the national Commissioner for Protection of Equality found segregation of Roma children in one preschool¹³¹ and one primary school¹³² in Serbia. It was found that the preschool was segregated for two years, while the primary school enrolled Roma children in separate, special classes for a period of five years. Lessons for Roma children took place in a separate building in the same school complex, so Roma children were physically separated from other children. The Commissioner submitted two notices for the initiation of misdemeanour proceedings against the preschool institution and primary school.¹³³ However, the judge issued the minimum fine, demonstrating that he did not understand the detrimental effect of such segregation for Roma children.¹³⁴ In the case of the primary school, the judge issued a fine of RSD 30 000 (EUR 250) to the legal person and RSD 5 000 (EUR 40) to the head teacher.¹³⁵ In determining the amount and type of punishment, the court found as an aggravating circumstance the fact that it was an offence of a serious nature, while as a mitigating circumstance it found that the head teacher was a middle-class father of three children and that the offence did not cause serious consequences, although the children were completely separated from their peers for several years.

In 2013, the Commissioner for Protection of Equality received information from NGOs that in one primary school Roma children were segregated. The school is situated near a Roma settlement. Since parents can enrol children in any school they want to, only Roma children attended this school. In the complaint, it was stated that the Ministry of Education and other competent authorities were informed about this problem but that they did not take measures in order to ensure that the school was not attended only by Roma children. The school's principal said that the school had been trying every year to attract the enrolment of non-Roma children, to organise presentations and promotion in the media but the parents of Serbian children were only interested in the number of Roma children in the classes. The Commissioner for Protection of Equality issued the opinion that the school, the city administration and the Ministry of Education had not committed discrimination in their conduct and activities. However, these institutions were recommended to take all possible measures and activities, by working together and in cooperation with civil society organisations, in order to solve the problem of segregation, that is, of too many Roma children compared to other children attending this school.

The situation was not significantly better in 2014.¹³⁶ Only 6 % of Roma children aged three to four were enrolled in preschool education, while just 69 % of Roma children

¹²⁹ Commissioner for Protection of Equality (2014), *Regular annual report of the Commissioner for Protection of Equality for 2013*, Belgrade, p. 43. Text is available in English at http://www.ravnopravnost.gov.rs/jdownloads/files/redovan_izvestaj_2013_eng.pdf, last accessed on 24 October 2015.

¹³⁰ Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Serbia adopted on 28 November 2013, ACFC/OP/III(2013)006, Strasbourg, 23 June 2014, pp. 2, 9.

¹³¹ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *D. z. r.d.m. v. PU m.n.p.*, opinion no. 88, 17 January 2012.

¹³² Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *D. z. r.d.m. v. Primary school A.s.l.d.*, opinion no. 84, 20 January 2012.

¹³³ See Application no. 237/2011, from 23 December 2011; Application no. 211/2011, from 23 December 2011.

¹³⁴ See also Application no. 211/2011, from 23 December 2011.

¹³⁵ See Court for Misdemeanours in Novi Pazar, Pr. br. 684/12-69, 13 September 2013. See also Pr. br. 7 – 4162/ 13-67, 14 May 2014.

¹³⁶ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 37.

attended primary schools (in comparison with 97 % of children among the rest of the population).¹³⁷ Even worse, only 22 % of Roma children attended secondary school, in comparison to 89 % of children among the rest of the population.

It is worth mentioning that a broad offer of teaching in and of minority languages is available in Serbia at preschool, primary and/or secondary levels, depending on the situation of the national minority concerned.¹³⁸ The number of minorities which use this possibility can be found in the Third Report submitted by Serbia to the Advisory Committee on the Framework Convention for the Protection of National Minorities.¹³⁹ This right is mostly exercised by the Hungarian (17 091 pupils or 974 classes), Bosniak (10 825 pupils or 361 classes) and Albanian (8 327 pupils or 416 classes) minorities, who attend single-nationality classes or even single-nationality schools in municipalities in which they are in the majority, which also leads to their isolation. However, although the situation significantly improved in this area, some obstacles prevent the greater use of the possibility for children to learn in their mother tongue, such as a lack of political will to apply relevant legal provisions at local level in some cases, continued resistance in this respect by some school principals, the organisation of optional mother-tongue classes at inconvenient times and in inconvenient locations, and a lack of adequate textbooks.¹⁴⁰

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

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

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

The LPDPD contains several provisions which relate to the provision of services to people with disabilities. Thus, Article 13, para. 1 prohibits discrimination based on disability in terms of the availability of services and access to public premises. Article 13, para. 2 of the LPDPD defines the service as any service which a legal entity or an individual, with or without pay, provides in the course of its activities or permanent occupation. In addition,

¹³⁷ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 37.

¹³⁸ The Committee of Ministers, Resolution CM/Res CMN (2015) 8 on the implementation of the Framework Convention for the Protection of National Minorities by Serbia, 1 July 2015.

¹³⁹ Third Report submitted by Serbia pursuant to Article 25, para. 2 of the Framework Convention for the Protection of National Minorities, received on 14 March 2013, ACFC/SR/III(2014)001, Strasbourg, 14 March 2013, pp. 311-343.

¹⁴⁰ Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Serbia adopted on 28 November 2013, ACFC/OP/III(2013)006, Strasbourg, 23 June 2014, p. 9.

Article 13, para. 3 explains what is meant by premises and public areas: premises in the fields of education, health, social protection, culture, sport, tourism, or premises used for the protection of the environment or protection from the natural disasters etc.; and Article 13, para. 4 sets out what are considered to be public areas (such as parks, green spaces, squares, pedestrian crossings and other public roads).

Discrimination includes, in particular:

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

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

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

- Distinction between goods and services available publicly or privately

In Serbia national law distinguishes between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association). However, the term 'public services' used in Article 17, para. 1 refers to services available to the public (whether provided by private or public authorities, entities, companies, etc.). For example, in 2013, the Commissioner for Protection of Equality found discrimination based on ethnicity when the owner of a restaurant engaged a musician by telephone and then, when the musician appeared in his restaurant and his employees saw that he was of Roma origin and informed the owner, the musician and his daughter were expelled with the explanation that the owner did not allow access to Roma.¹⁴¹

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

¹⁴¹ See Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *G.N. and K.N. v. M.N.*, opinion no. 07-00-32/2013-01, 16 July 2013.

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

In Serbia national anti-discrimination legislation does not explicitly include housing as formulated in the Racial Equality Directive. The LPD does not include housing in Section III where it covers special cases of discrimination. However, Article 4, para. 1 of the LPD says that all people are equal and shall enjoy equal status and equal legal protection regardless of personal characteristics. This provision does not limit application of the LPD only to special cases of discrimination, and it means that housing is also protected. The Advisory Committee on the Framework Convention for the Protection of National Minorities also noted that it is protected, but that further clarifications still appear to be needed as regards the scope of protection provided by the LPD in the fields of housing and social protection.¹⁴² This is why the Advisory Committee recommended 'that the authorities take all necessary steps to ensure that the wording of the Law on the Prohibition of Discrimination does not prevent persons from national minorities from bringing claims of discrimination in the fields of housing and social protection, and amend the Law if necessary to achieve this'.¹⁴³

There is a special law that deals with housing: the Law on Social Housing.¹⁴⁴ This Law was adopted in 2009, enabling the creation of social housing stock by means of which local governments could provide housing for the most vulnerable groups and thus realise a part of the conditions for successful social integration. This Law stipulates that the right to housing must be accorded to homeless people, those who do not have an adequate standard of housing and those who are on very low incomes and cannot obtain housing under market conditions (Article 10, para. 1).

The order of priority is decided on the basis of:

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

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

- Trends and patterns regarding housing segregation for Roma

In Serbia there are patterns of housing segregation and discrimination against the Roma. Roma face discrimination and exclusion in all spheres of life. Unemployment is particularly high among the Roma and those who are employed are usually in low paid positions. Poverty is widespread and many people do not have access to such necessities

¹⁴² Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Serbia adopted on 28 November 2013, ACFC/OP/III(2013)006, Strasbourg, 23 June 2014, p. 7.

¹⁴³ Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Serbia adopted on 28 November 2013, ACFC/OP/III(2013)006, Strasbourg, 23 June 2014, p. 16.

¹⁴⁴ Serbia, Law on Social Housing (*Zakon o socijalnom stanovanju*), Official Gazette of the Republic of Serbia, no. 72/2009, 3 September 2009.

as electricity or even clean water. Living conditions are particularly appalling in informal settlements where mainly Roma displaced from Kosovo or forcibly returned from abroad live. They tend to move towards bigger cities where they have more opportunities and usually live in informal settlements on peripheral sites. Many of them are exposed to forcible eviction. The most famous case happened in 2012, when 100 Roma families from the Bellville settlement in Belgrade were evicted. A combination of bureaucratic incompetence, inertia and discrimination has resulted in a failure to resettle them. The majority of these families are still living in squalid, ethnically segregated metal containers and around 50 may never be resettled.¹⁴⁵ According to the Commissioner for Protection of Equality's annual report for 2014, they are still the most discriminated group in Serbia.¹⁴⁶ The Commissioner finds that Roma are mostly discriminated against in the areas of education, employment, healthcare and housing.¹⁴⁷

In September 2014, the Draft Law on the Legalisation of Sustainable Informal Roma Settlements was completed, presented to the public and submitted to the Commissioner for Protection of Equality for assessment and opinion.

¹⁴⁵ Amnesty International, Serbia: 'Forcibly evicted Roma still awaiting resettlement despite EU millions', 8 April 2015, available at: <http://www.amnesty.org/en/articles/news/2015/04/serbia-forcibly-evicted-roma-still-awaiting-resettlement-despite-eu-millions/>, last accessed on 24 December 2015.

¹⁴⁶ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 29.

¹⁴⁷ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 37.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

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

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

- Exception for employers with an ethos based on religion or belief

In Serbia national law does not provide for an exception for employers with an ethos based on religion or belief as it is defined in Article 4, para. 2 of Directive 2000/78/EC. However, the LPD provides for a somewhat different exception by stipulating in Article 18, para. 2 that, 'The conduct of priests, that is to say, religious officials, which is in keeping with a religious doctrine, beliefs or the objectives of churches and religious communities entered in the register of religious communities, in accordance with the law regulating the freedom of religion and the status of churches and religious communities, shall not be considered to constitute discrimination'. The register is maintained by the ministry responsible for religious affairs in accordance with the Law on Churches and Religious Communities.¹⁴⁸ This provision is unclear, as it is not entirely certain what type of conduct this would pertain to; and it seems to be very problematic as it provides a blanket exemption for religious officials.

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

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

¹⁴⁸ Serbia, Law on Churches and Religious Organisations (*Zakon o crkvama i verskim zajednicama*), *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

The Law on Churches and Religious organisations recognises traditional churches¹⁴⁹ and religious communities,¹⁵⁰ confessional communities¹⁵¹ and other religious organisations¹⁵² (Article 4).

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

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

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

- Religious institutions affecting employment in state funded entities

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

¹⁴⁹ Article 10, para. 1 treats traditional churches as those which have a centuries-long historical continuity and whose legal subjectivity was acquired on the basis of special laws, and they are: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church, the Christian Reformed Church and the Evangelical Christian Church.

¹⁵⁰ Traditional religious communities are those which have a centuries-long historical continuity and whose legal subjectivity was acquired on the basis of special laws, and they are: the Islamic religious community and the Jewish religious community (Article 10, para. 2).

¹⁵¹ In Article 16 'confessional communities' are defined as all churches and religious organisations whose legal status was regulated with an application in accordance with two laws adopted in the former Yugoslavia. These two laws are the Law on the Legal Status of Religious Organisations (*Zakon o pravnom položaju verskih zajednica*), Official Gazette of the FPRY, no. 22/1953 and the Law on the Legal Status of Religious Organisations (*Zakon o pravnom položaju verskih zajednica*), Official Gazette of the SRS, no. 44/1977.

¹⁵² There is no further, more precise definition of the category of 'other religious organisations'.

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

In one case, the Commissioner for Protection of Equality dealt with a complaint against the Orthodox Theological Faculty in Belgrade, due to discrimination based on religious beliefs.¹⁵³ The Faculty prescribed in its statutes that, for admission to undergraduate studies and graduate (master) studies, it was necessary that an individual obtain the consent of the competent bishop, as well as that, to apply for positions as professors, assistants and researchers, it was necessary to obtain the consent (blessing) of the competent bishop. The Commissioner issued an opinion that prescribing conditions did not violate the LPD, as it is completely unclear under what criteria the competent bishop gives approval, nor is it known that any individual has been deprived of consent because of their religion or religious beliefs. However, the Commissioner noted that these statutory formulations created legal uncertainty as a result of the unpredictability of the outcome of the proceedings on the request for consent. Therefore, in order to prevent indirect discrimination, the Commissioner recommended that obtaining consent either be removed from the statutes or be precisely defined.

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

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

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

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

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

¹⁵³ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *A.S. v. the Orthodox Theological Faculty in Belgrade*, opinion no. 1065, 15 October 2012.

Serbia, in accordance with international treaties, shall have all the rights guaranteed by the Constitution and by law, with the exception of those rights which, in accordance with the Constitution and the law, are only enjoyed by citizens of the Republic of Serbia.

In Serbia citizenship is explicitly mentioned as a protected ground in Article 2, para. 1 of the LPD. There have not been many cases in relation to discrimination based on citizenship. For example, in 2013 only nine complaints were submitted to the Commissioner for Protection of Equality,¹⁵⁴ compared to seven in 2014.¹⁵⁵

In one case, a pregnant Albanian woman, married to a Serbian citizen, was denied health insurance.¹⁵⁶ The National Health Insurance Fund (NHIF) had stated that the complainant was obliged to pay a certain amount of money each month, as her husband was unemployed and she could not be insured as a member of his immediate family. The Fund was guided by an opinion issued by the Ministry of Health, which stated that a foreign citizen, spouse or cohabiting partner of an individual who had health insurance as an unemployed person could not exercise the right to obligatory health insurance paid from budgetary funds. The Commissioner found that the complainant was discriminated against, based on her citizenship, without objective and reasonable justification.

In addition, in 2012, the committee for the selection of candidates for professional training at the Centre for Basic Police Training of the Ministry of the Interior rejected an application because the candidate did not prove that he did not have dual citizenship. The application was rejected, allegedly for his failure to comply with the requirements pertaining to citizenship, but the decision was based on the assumption that M. S. had dual citizenship as he had only been entered in the Register of Yugoslav citizens in 1998. The Commissioner found that, by rejecting his application, the selection committee perpetrated an act of discrimination on the grounds of a presumed personal characteristic of M. S. – dual citizenship.¹⁵⁷

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

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

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

¹⁵⁴ Commissioner for Protection of Equality (2014), *Regular annual report of the Commissioner for Protection of Equality for 2013*, Belgrade, p. 107.

¹⁵⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 163.

¹⁵⁶ Commissioner for Protection of Equality (2014), *Regular annual report of the Commissioner for Protection of Equality for 2013*, Belgrade, pp. 103 – 104.

¹⁵⁷ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *M.S. v. the Centre for Basic Police Training of the Ministry of the Interior*, opinion no. 360, 21 March 2012.

Serbia, the ethnic minority which is considered to be most discriminated against are Roma.

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

a) Benefits for married employees

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

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

b) Benefits for employees with opposite-sex partners

In Serbia it does not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

Although the LPD prohibits discrimination based on sexual orientation (Article 2, para. 1), Article 21 limits the application to privacy, stating that sexual orientation is a private matter and that discriminatory treatment on account of the declaration of someone's sexual orientation is prohibited. In other words, Article 21 does not provide any standing for combating discrimination in the area of benefits. Further judicial interpretation of Article 2, para. 1 in relation to discrimination on the ground of sexual orientation is required, as it is possible that the Commissioner for Protection of Equality and judges will interpret the scope of this article differently. Therefore, a change to the existing legislation is necessary, as well as the introduction of the institution of registered partnerships. Another problem is the general atmosphere in society due to which many members of sexual minorities do not openly reveal their sexual orientation and therefore do not invoke this provision in practice.

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

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

Article 12, para. 1 of the Labour Law states that an employee shall have the right to safety and protection of life and health at work. According to Article 16, para. 2, employers are obliged to provide their employees with working conditions which ensure safety and the protection of life and health at work in conformity with the law and other regulations. The Law further prescribes that employees are entitled to safety and the protection of life and health at work in conformity with the law (Article 80). Article 12, para. 4 entitles employees with disabilities to special protection. Article 22, para. 2 establishes that provisions relating to special protection of people with disabilities shall not be considered as discrimination. Finally, Article 101 prescribes that employers are

obliged to enable employees with disabilities to perform their work according to their remaining working capacity. Employers shall, in accordance with the pension and disability insurance regulations, provide appropriate alternative tasks for an employee who is assessed to be at risk of becoming disabled by performing certain tasks.

Article 12, para. 4 entitles employees under 18 and employees with disabilities to special protection. In addition, Article 22, para. 2 stipulates that provisions of the law, general acts and employment contracts relating to special protection and assistance for specific categories of employees, cannot be considered to be discrimination. Those categories are: disabled people, women on a leave from work due to pregnancy and childbirth (maternity leave), and on a leave for tending the child (paternity leave), and during special care for the child (if one of the parents of a child in need of special care due to a serious degree of psycho-physical ailment, upon expiry of the maternity and paternity leave, is absent from work, or work half of the full working hours, at most until the child becomes five years old). There are also provisions relating to special rights of parents, adoptive parents, guardians and foster parents. Article 84 lists jobs which are prohibited for employees under 18. It also protects motherhood (Articles 89 – 93a) and people with disabilities (Articles 101-102).

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

4.7.1 Direct discrimination

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

- Justification of direct discrimination on the ground of age

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

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

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

In 2013, 68 complaints were submitted¹⁵⁸ to the Commissioner for Protection of Equality, while the number grew to 78 in 2014.¹⁵⁹ It is illustrative to mention that the Commissioner found in one case that setting an age limit for applications for a competition within the framework of support for students of the city municipality of

¹⁵⁸ Commissioner for Protection of Equality (2014), *Regular annual report of the Commissioner for Protection of Equality for 2013*, Belgrade, p. 82.

¹⁵⁹ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 164.

Vracar was not discrimination.¹⁶⁰ The complainant claimed to have been discriminated against on the basis that the municipality confined applications for its programme of student support to those under 30 who were recent graduates. This programme aimed to support young people, not by providing employment but by enabling them to gain professional experience to improve their job prospects. It was held that the reason for setting an age limit was of an affirmative nature, which could not be considered discrimination and that it was aimed at improving the situation of young people without work experience in the labour market.

a) Permitted differences of treatment based on age

In Serbia national law permits differences in treatment based on age for any activities within the material scope of Directive 2000/78/EC. It is permitted if it can be demonstrated that an age limit is applied in certain cases in order to improve the situation of a certain age group. In already mentioned case against the municipality of Vracar, it was established that the reason for setting an age limit was of an affirmative nature, which cannot be considered discrimination and that it was aimed at improving the situation of young people without work experience in the labour market.

b) Occupational pension schemes' fixed ages for admission or entitlements

In Serbia there are no occupational pension schemes.

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

In Serbia there are no special conditions set by law for older or younger workers in order to promote their vocational integration, or for people with caring responsibilities to ensure their protection. However, although there is no general-scope law which sets special conditions for these groups, it does not mean that special conditions are not established at a local level, mostly in order to promote the employment of young people.¹⁶¹

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

¹⁶⁰ Serbia, Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), complaint *T.K. v. GO Vracar*, opinion no. 07-00-82/2013-02, 20 May 2013.

¹⁶¹ The basis for affirmative measures is presented in the Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

Certain categories of workers can, exceptionally, in circumstances and under conditions set out in the Law on Pension and Disability Insurance,¹⁶² be entitled to a pension (Article 7). Under Article 42, those categories are police officers, some categories of employees at the Ministry of Foreign Affairs, members of the Security Information Agency, members of the Military Security Agency and Military Intelligence Agency; employees of the Administration for the execution of plenipotentiary sanctions, authorised officials of the Tax Police, military personnel and other police officers.

4.7.3 Minimum and maximum age requirements

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

4.7.4 Retirement

a) State pension age

In Serbia there is no state pension age at which individuals must begin to collect their state pensions. There is only an age when an employee can decide to submit a request for early retirement.

According to Article 19 a) of the Law on Pension and Disability Insurance, men can retire at the age of 65 and with a minimum of 15 years of pension insurance contributions, and can submit a request for early retirement at the age of 55 and with a minimum of 40 years of pension insurance. Women can retire when they reach the age of 60 years and six months¹⁶³ and have a minimum of 15 years of pension insurance (and can request early retirement at 54 years and four months and with 36 years and four months of pension insurance). However, the state pension age is rising, as the minimum age limit is extended each year, and by 2023 men will only be able to submit a request for early retirement at the age of 58 and with 40 years of contributions, compared to 58 and 38 years of contributions for women. Both sexes retire after 45 years of pension insurance contributions, no matter what their age.

b) Occupational pension schemes

In Serbia there are no occupational pension schemes.

c) State imposed mandatory retirement ages

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

In the public sector, the mandatory retirement age for both sexes is 65. There is a possibility of extending this period for an additional three years in higher education for university professors.

¹⁶² Serbia, Law on Pension and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of the Republic of Serbia*, no. 34/2003, 64/2004 - decision CC, 84/2004 - other law, 85/2005, 101/2005 - other law, 63/2006 - decision CC, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014 and 142/2014, 2 April 2003.

¹⁶³ The retirement age for women will increase each year until 2031, when it will reach 64 years and nine months.

d) Retirement ages imposed by employers

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

e) Employment rights applicable to all workers irrespective of age

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

f) Compliance of national law with CJEU case law

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

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

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Serbia national law permits age or seniority to be taken into account in selecting workers for redundancy. Section XI of the Labour Law regulates redundancy and stipulates in Article 155 that the solution to finding redundancy plans has to include the following information: the reasons for the work of the employees no longer being needed; the total number of employees with the employer; the number, professional qualification structure, age and years of insurance contributions of redundant employees, and the jobs they perform; the criteria for establishing the redundancy; measures for finding alternative employment: transfer to other work assignments, employment with another employer, retraining or additional training, part-time work, but not shorter than half the full-time position, and other measures; the means for resolving the socio-economic status of redundant employees; and the time limit within which the employment contract will be terminated.

b) Age taken into account for redundancy compensation

In Serbia national law provides compensation for redundancy. This is not affected by the age of the worker. Financial compensation is calculated from the first day of insurance until the termination of insurance, and the total amount depends on the number of

insurance years. In other words, severance pay for redundancy dismissal is different for a worker with one year of tenure, five years of tenure, 10 years of tenure or more. However, it can indirectly have a different impact on younger age groups which mostly have fewer years of tenure and, thus receive a lower amount of redundancy compensation.

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

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

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

4.9 Any other exceptions

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

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

a) Scope for positive action measures

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

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

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

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

b) Main positive action measures in place on national level

Positive measures in relation to education for vulnerable ethnic groups (primarily Roma) – With the aim of providing conditions for the promotion of and greater inclusion in the process of education and professional training, the Gender Equality Act (GEA) prescribes that the public authorities in charge of education can undertake special measures for the inclusion of pupils or groups of pupils who, because of their culture, tradition and social-economic conditions, leave school prematurely (Article 33, para. 1).¹⁶⁴ Measures of special support for pupils or groups of pupils in their transition from lower to higher educational levels can also be undertaken, namely, for the continuation of their education. The public authorities in charge of education shall establish special teaching curricula for the return of pupils to schools and other educational institutions – '*broad social policy measures*'.

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

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

¹⁶⁴ Serbia, Gender Equality Act (*Zakon o ravnopravnosti polova*), *Official Gazette of the Republic of Serbia*, no. 104/2009, 16 December 2009. This duty is included in the GEA, as the problem of early school drop-out is primarily perceived to be a gender issue, due to the fact that the drop-out rate is higher among girls, particularly Roma girls. However, the percentage of early school drop-outs among Roma boys is also very high, and therefore, it would be more logical to include this duty in the LPD.

Serbia for the fund for the professional rehabilitation and employment of people with disabilities.¹⁶⁵ In addition, an employer receives a wage subsidy for a duration of 12 months for an employee with disabilities and without work experience who is hired for an indefinite period of time. This subsidy is equivalent to 75 % of the salary costs associated with contributions for mandatory social insurance, but not more than the minimum wage determined in accordance with the regulations - '*quotas*'; *broad policy measures*.

Positive measures for national minorities, particularly Roma – The Law on the Protection of National Minorities prescribes that authorities shall adopt legal rules, individual legal acts and measures with the aim of securing full and effective equality for people belonging to national minorities (Article 4, para. 1). Article 4, para. 2 sets an obligation on authorities to undertake positive measures with the aim of improving the status of Roma, which won't be considered as discrimination. These measures apply, in particular, to the parliamentary sphere, as the Law on the Election of MPs¹⁶⁶ stipulates in Article 81, para. 2 that the threshold of 5 % does not apply to parties and coalitions of parties of national minorities. Their list must win 0.4 % of the total votes in order to secure its first MP seat – '*broad policy measures*'.

¹⁶⁵ This obligation is defined in the Regulation on the monitoring of the execution of duties on the employment of persons with disabilities and the method of proving the execution of these obligations (*Pravilnik o načinu praćenja izvršavanja obaveze zapošljavanja osoba sa invaliditetom i načinu dokazivanja izvršavanja te obaveze*) *Official Gazette of the Republic of Serbia*, no. 33/2010, 48/2010-corr., and 113/2013.

¹⁶⁶ Serbia, Law on the Elections of MPs (*Zakon o izboru narodnih poslanika*), *Official Gazette of the Republic of Serbia*, no. 35/2000, 57/2003 - decision CC, 72/2003 - other law, 75/2003 - corr. dr. other law, 18/2004, 101/2005 - other law, 85/2005 - other law, 104/2009 - other law, 28/2011 - decision CC 36/2011, 10 October 2000.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

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

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

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

- court prohibition of further discriminatory behaviour;
- remedy actions to remove the consequences of discriminatory behaviour;
- the court's confirmation that an action or behaviour is discriminatory; and
- compensation for pecuniary and non-pecuniary damages incurred due to discriminatory behaviour.¹⁶⁷

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

Article 44 provides that revision, a special appellate review for legal questions and serious breaches of procedure, is always available in cases of discrimination (no time limit). This law allows temporary measures at the request of the complainant, when initiating a lawsuit, in the course of the proceedings and after the termination of the proceedings, until the court decision is enforced. The court is allowed to pass a temporary measure in order to prevent discriminatory treatment, with a view to eliminating the danger of violence or major irreparable damage.¹⁶⁸ The court is obliged to decide on a request to pass a temporary measure within 48 hours of receiving the request. However, the LPDPD does not recognise a reversal of the burden of proof.

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

¹⁶⁷ In this complaint, the rules in the Law on Contracts and Torts applies, including the statute of limitations (Article 376). See Law on Contracts and Torts (*Zakon o obligacionim odnosima*), *Official gazette of SFRY*, no. 29/1978, 39/1985, 45/1989 - CCY, 57/1989, *Official gazette of SRY*, no. 31/1993, 22/1999, 23/1999, 35/1999, 44/1999, *Official gazette of SCG*, no. 1/2003 - Constitutional Charter, 1 July 1978.

¹⁶⁸ A request to pass a temporary measure must prove the necessity of doing so in order to eliminate the danger of violence, use of force, or irreparable damage (Article 45, para. 2).

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

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

Civil litigation with advocacy element - Under Article 46 of the LPD, the Commissioner for Protection of Equality can initiate lawsuit. The Commissioner decides in which cases they will file a claim, taking into account whether it is a case of strategic litigation; in other words a case of frequent and widespread discrimination in respect of which there are good prospects for success (so far litigation has been initiated 13 times).¹⁶⁹ The litigation proceedings are initiated and conducted in the general public interest, in order to contribute to the consistent implementation of legislation and improvement of legal practice, to further encourage victims of discrimination to initiate anti-discrimination litigation, to uphold the rule of law and to contribute to the improvement of access to justice.

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

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

¹⁶⁹ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 33.

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

Mediation - The Law on the Peaceful Resolution of Labour Disputes¹⁷⁰ prescribes the jurisdiction of the National Agency for the Peaceful Resolution of Labour Disputes in procedures in both individual and collective disputes. This includes conciliation, mediation and, in fewer cases, arbitration. The law distinguishes between individual and collective labour disputes. Collective labour disputes are, for example, disputes about collective agreements, unions and strikes. On the other hand, individual labour disputes are disputes about minimum wages, termination of employment, payout of a minimum wage, as well as discrimination and bullying (Article 3).

Mediation is also prescribed by the Law on Mediation,¹⁷¹ which was adopted on 31 May 2014 and came into force on 1 January 2015. The adoption of this law made some improvements and advancements to the existing system, which dates from 2005, and brings changes in terms of refinement and development of existing solutions which have proven inefficient in practice. The basic principles of mediation are that it should be conducted on a voluntary basis, in a procedure with strictly personal participation by the parties where the equal treatment of the parties, privacy of procedure, confidentiality, neutrality, urgency and the prohibition of the use of evidence in other proceedings are guaranteed. Agreement in the mediation procedure is achieved with the assistance of mediators who are appointed by and registered with the Ministry of Justice and Public Administration. The legal effectiveness of the agreement reached in the mediation procedure is equal to that of a court decision and the agreement is enforceable through enforcement proceedings. Initiating mediation causes an interruption in the running of the statute of limitation for a period of 60 days in a court proceeding.

The Commissioner for Protection of Equality can offer mediation and in 2014 it was offered in four cases, but in none was it accepted. The Commissioner is entitled, but not obliged, to suggest or recommend mediation after an assessment of whether the case is suitable for mediation. On the other hand, the Commissioner is required to recommend mediation to the parties before taking the first action in the proceedings on the complaint.

Misdemeanour procedure - This procedure is regulated by a special law.¹⁷² It can be initiated by certain bodies (administrative bodies, authorised inspectors, public prosecutors, etc.). Inspectors can initiate a misdemeanour procedure in order to secure the legality and safe operation and practices of public authorities (they can also review documents, take statements, see the premises, order enforcement measures, notify other authorities, etc. In addition, this procedure can be initiated by the individual who was discriminated against. The Commissioner for Protection of Equality can initiate a misdemeanour notice, but cannot punish a discriminator with a fine directly. The LPD makes provision for several misdemeanours, regulated in 11 articles (Articles 50-60).

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

- Article 128 prescribes a violation of equality;

¹⁷⁰ Serbia, Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rešavanju radnih sporova*), *Official Gazette of the Republic of Serbia*, no. 125/2004, 104/2009, 22 November 2004.

¹⁷¹ Serbia, Law on Mediation (*Zakon o posredovanju u rešavanju sporova*), *Official Gazette of the Republic of Serbia*, no. 55/2014, 23 May 2014.

¹⁷² Serbia, Law on Misdemeanours (*Zakon o prekršajima*), *Official Gazette of the Republic of Serbia*, no. 65/2013, 25 July 2013.

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

By means of Article 54a of the Criminal Code, racial, religious, national, ethnic and sexual hatred is considered an aggravating circumstance.

Complaint procedure – This procedure before the Commissioner for Protection of Equality is a specific procedure, which has the characteristics of a special administrative procedure. Article 40, para. 4 of the LPD expressly stipulates that the procedure before the Commissioner shall be conducted pursuant to the provisions of the Law on General Administrative Procedure.¹⁷³ The procedure for submitting a complaint is regulated in Articles 35 to 40. A complaint must be forwarded within 15 days of its submission to the alleged perpetrator of the violation who has 15 days to respond to it. The Commissioner must give an opinion on whether there has been a violation of the prohibition of discrimination within 90 days of the day of receiving a complaint, and must inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a violation, they will issue a recommendation to the individual against whom the complaint was submitted, suggesting a means of redressing the violation in question. The individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of receipt of the recommendation. The individual must inform the Commissioner of the measures taken. However, if the individual fails to redress the violation in question within 30 days, the Commissioner may inform the public in the press and online. If the discriminator fails to comply with the recommendation, the individual(s) exposed to the discriminatory act can decide to initiate a lawsuit, or the Commissioner for Protection of Equality can initiate a lawsuit in a case of strategic litigation. The Commissioner can also initiate a misdemeanour notice or a criminal charge.

b) Barriers and other deterrents faced by litigants seeking redress

There is a certain overlap between the three anti-discrimination laws, as disability and gender discrimination can be challenged under the general and specific law on discrimination. However, it seems that discrimination based on disability has thus far mostly been challenged under the specific law, while cases based on gender discrimination are mostly challenged under the LPD, although the GEA is better equipped to protect the victim of discrimination. The jurisdiction for cases of discrimination was transferred in January 2014 from the basic to the higher courts¹⁷⁴ and some relevant jurisprudence is still developing.

However, there are several problems in practice. Firstly, in some cases higher courts dismiss lawsuits for lack of jurisdiction, holding that they can decide only on discrimination cases in employment, while basic courts have jurisdiction to decide on discrimination cases in other areas of life. Furthermore, they sometimes dismiss a lawsuit as the human rights organisation submitting the lawsuit is not represented by an attorney, although they have legal standing to submit a lawsuit. Judges have problems

¹⁷³ Serbia, Law on the General Administrative Procedure (*Zakon o opštem upravnom postupku*), *Official Gazette of the Republic of Serbia*, no. 33/97, 31/2001, 30/2010, 11 May 2010.

¹⁷⁴ Serbia, Law on the Organisation of the Courts (*Zakon o uređenju sudova*), *Official Gazette of the Republic of Serbia*, no. 116/2008, 104/2009, 101/2010, 31/2011 – other laws, 78/2011 – other law, 101/2011, 101/2013, 22 December 2008.

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

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

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

c) Number of discrimination cases brought to justice

In Serbia there are no available statistics on the number of cases related to discrimination brought to justice. However, statistics are available on the complaints submitted to the Commissioner for Protection of Equality. Thus, in 2014, 666 complaints were submitted to this specialised body, of which two were initiated by the Commissioner as lawsuits.¹⁷⁵

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

d) Registration of discrimination cases by national courts

In Serbia discrimination cases are not registered as such by national courts. Usually they are registered as labour disputes or bullying. These data are available to the public only if a decision is posted on the website of a particular court (they are put into a database for which a subscription is needed), or if someone requests the data under the Law on Free Access to Information of Public Importance.¹⁷⁶ However, even in this case, some decisions will not be included, due to being wrongly classified.

¹⁷⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 8.

¹⁷⁶ Serbia, Law on Free Access to Information of Public Importance (*Zakon o slobodnom pristupu informacijama od javnog značaja*), *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009 i 36/2010, 5 November 2004.

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

a) Standing to act on behalf of victims of discrimination (representing them)

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

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

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

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

b) Standing to act in support of victims of discrimination

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

c) Actio popularis

In Serbia national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**). This right is not recognised in the LPD, but derives from the Law on Contract and Torts,¹⁷⁷ which in Article 156 establishes a duty to eliminate danger of injury or loss.

¹⁷⁷ The Law on Contract and Torts (*Zakon o obligacionim odnosima*) „The Official Gazette of the SFRJ”, no. 29/78, 39/85, 45/89 - decision CCJ and 57/89, Official Gazette of the SRJ, no. 31/93 and Official Gazette of the Republic of Serbia SCG, no. 1/2003 – Constitutional Charter, 1 July 1978.

This provision means that everyone can demand that appropriate measures be taken to prevent damage to them or to an unspecified number of people. This is particularly applicable in discrimination cases.¹⁷⁸

Although the Commissioner for Protection of Equality is not allowed to initiate *actio popularis* under the LPD, they can initiate so-called proto-action *popularis* in a strategic case or, in other words, if a case demonstrates frequent and widespread discrimination in respect of which there are good prospects for success. It was previously unclear whether the Commissioner needs consent in the case of two or more victims of discrimination, as it is necessary in the case of one person. In September 2014, the Supreme Court of Cassation put an end to this debate and held that the Commissioner did not need written consent as the case affected a group of people - children of Roma origin.¹⁷⁹ In this case, the Commissioner initiated a lawsuit against a fast-food restaurant, because a security worker did not allow the children of Roma origin to enter the restaurant with a woman who wanted to buy them food. The Supreme Court of Cassation noted that the complaint was not directed at the Commissioner's finding of discrimination against a particular individual, in which case the Commissioner would be required to obtain written consent to the filing of the lawsuit, but to establish the existence of discrimination against a group of people.

d) Class action

In Serbia national law does allow associations, organisations and trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.¹⁸⁰

The Civil Procedure Code from 2011 introduced so-called organisational claims for the protection of collective rights and interests,¹⁸¹ but in 2013, the Constitutional Court proclaimed the articles which regulate this procedure to be unconstitutional. As a consequence of this decision, on 23 June 2014, the third basic court in Belgrade rejected the first collective claim submitted by an association of bank clients on the issue of foreign currency loans in Swiss francs which covered 10 000 clients.¹⁸²

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

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

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

¹⁷⁸ Article 156 prescribes that everyone may demand from another to eliminate a source of danger threatening considerable damage to them or to an unspecified number of persons, as well as to refrain from an activity causing disturbance or risk of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures (para. 1). On the request of an interested person, the court shall order adequate measures to be taken to prevent the emergence of damage or disturbance, or to eliminate the source of risk – at the expense of the individual who is the source of the risk, should they fail to act accordingly (par. 2).

¹⁷⁹ See Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 128.

¹⁸⁰ For more on the collectivisation of legal remedies, see Babovic, B. (2012), 'Collectivisation of legal redress against discrimination', in *Pravni život*, vol. 11/2012, pp. 1013-1023.

¹⁸¹ They were introduced for the protection of collective rights and interests and for the protection of consumers (Articles 495-505). Civil Procedure Code (*Zakon o parničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 72/2011, 28 September 2011.

¹⁸² See Efektiva, 'Kolektivna tužba odbačena kao nedozvoljena!?' ('Collective claim rejected as unadmitted?'), 8 July 2014, <http://efektiva.rs/aktuelnosti-krediti/kolektivna-tuzba-odbacena-kao-nedozvoljena>.

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

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

The case law still does not provide clear rules on the application of this principle. It also seems from the textual interpretation of the relevant articles that this rule applies only in cases of direct and indirect discrimination. However, it must be interpreted to mean that the rule on the burden of proof also applies to harassment.¹⁸³

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

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

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

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

In Serbia there are measures of protection against victimisation. Victimisation is enshrined in the LPD as a special form of discrimination.¹⁸⁴ Article 9 says that, 'Discrimination shall exist if an individual or a group of persons is unwarrantedly treated worse than others are treated or would be treated, solely or predominantly on account of requesting or intending to request protection from discrimination, or due to having offered or intending to offer evidence of discriminatory treatment'. In other words, this law protects victims of discrimination, as well as people other than the complainant, such as witnesses and someone who helps the victim of discrimination to bring a complaint. However, there is still a lack of relevant case law on this matter, as well as judicial interpretation as to whether the reversal of the burden of proof applies to victimisation under the LPD.

Victimisation is not protected by the LPDPD.

¹⁸³ See Petrusić, N., Krstić, I., Marinković, T. (2014), *Commentary on the Law on the Prohibition of Discrimination*, Commissioner for Protection of Equality, Judicial Academy, Belgrade, p. 188.

¹⁸⁴ Victimisation is known as 'calling to account' in Serbian law.

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

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

In Serbia there is a range of applicable sanctions in discrimination cases. Article 43, para. 4 of the LPD expressly allows compensation for material and non-material damage in discrimination cases.¹⁸⁵ Article 43, para. 4 of the LPDPD also expressly provides for compensation of damages which occur due to a discriminatory act.¹⁸⁶ The principles set out in the Law on Contract and Torts apply for determining the type of damage, and a causal link between the discriminatory act and the damage.

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

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

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

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

The LPD (Articles 50-60) and the LPDPD (Articles 46-52) prescribe the fines which can be imposed in misdemeanour proceedings. In addition, other laws which contain anti-

¹⁸⁵ If the complainant is the Commissioner for Protection of Equality, an organisation engaged in the protection of human rights or the rights of a certain group of people, or a person who deliberately exposed themselves to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case, the compensation cannot be claimed.

¹⁸⁶ According to Article 43 of the LPDPD, the complainant can request: (1) court prohibition of further discriminatory behaviour, (2) remedy actions to remove the consequences of discriminatory behaviour, (3) the court's confirmation that an action or behaviour is discriminatory, and (4) compensation for pecuniary and non-pecuniary damages incurred due to discriminatory behaviour.

discrimination clauses also prescribe misdemeanours, such as the Labour Law and the Law on the Fundamentals of Education.

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

b) Ceiling and amount of compensation

In Serbia there is no ceiling on the maximum amount of compensation that can be awarded, and the amount is subject to the judge's discretion. However, the average amount in the current jurisprudence cannot be deemed appropriate in comparison to the amount of compensation in some other areas. This particularly applies to compensation of non-pecuniary damages. For example, there were several cases involving discrimination against people with disabilities and their carers on public transport, who experienced insults and harassment from bus drivers and passengers as they used special cards for free ride, to which they were entitled by law. In these cases, the court found that discrimination had taken place and ordered pecuniary damages, but with regard to non-pecuniary damages the court believed that it shouldn't award the amount requested or it awarded a token amount in comparison to other cases (e.g. insult).¹⁸⁷

Monetary fines for misdemeanours range from between RSD 10 000 and RSD 50 000 (EUR 80 to EUR 400) for individuals (Articles 50-60), to the sum of between RSD 10 000 and RSD 100 000 (EUR 80 to EUR 800) for legal entities (Articles 52-60), which cannot be considered to be dissuasive. The same can be said for the LPDPD, which in Articles 46 to 52 prescribes the same range of monetary fines. Despite the fact that anticipated fines are not very high, in practice, judges usually impose minimal fines. An illustrative example is a case of segregation of Roma children in a primary school. In this case, for several years Roma children attended separate classes in an old building, located in the same courtyard as the new building, where the other pupils learn.¹⁸⁸ The judge imposed a fine of RSD 30 000 (EUR 250) on the school and RSD 5 000 (EUR 45) on the principal. In determining the amount and type of punishment, the court found as an aggravating circumstance the fact that it was an offence of a serious nature, while as a mitigating circumstance the court found that the principal was a father of three children, earning a middle-range income, and that the offence did not cause serious consequences, although the children were completely separated from their peers for several years.

For criminal acts, the following sanctions can be imposed:

- Violation of Article 128 (violation of equality) up to three years' imprisonment and for the more severe form three months' to five years' imprisonment;
- Violation of Article 129 (violation of the right to use a language or alphabet) monetary fine or up to one year of imprisonment;
- Violation of Article 317 (instigation or exacerbation of ethnic, racial and religious hatred or intolerance) from 6 months' to 10 years' imprisonment;
- Violation of Article 344a (instigation of ethnic, racial and religious or other hatred or intolerance by means of actions or slogans at sporting events or public gatherings) from 3 months' to 12 years' imprisonment;
- Violation of Article 387 (racial and other discrimination) from three months' to five years' imprisonment for the more severe form).

¹⁸⁷ See, for example, Supreme Court of Cassation, Rev. 3602/10, 16 December 2010; Supreme Court of Cassation, Rev. 66/12, February 2012.

¹⁸⁸ See Court for Misdemeanours in Novi Pazar, Pr. br. 684/12-69, 13 September 2013; see also Court for Misdemeanours in Novi Pazar, Pr. br. 7 – 4162/ 13-67, 14 May 2014.

c) Assessment of the sanctions

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

In anti-discrimination cases, it is important to establish an urgent procedure and to allow a quick remedy for people exposed to discrimination. Although Article 41, para. 2 of the LPD provides that the proceedings shall be conducted swiftly, in practice discrimination cases are not treated as urgent. It usually takes more than three years to receive a final decision, which influences the effectiveness of sanctions.

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

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

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

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

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

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

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

The Commissioner shall be relieved of their duty:

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

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

The Commissioner shall have the right to a salary equal to that of a judge of the High Court of Cassation, as well as the right to reimbursement of the expenses incurred in connection with performing their function. The Commissioner shall be entitled to the immunity enjoyed by representatives of the people in the National Assembly (Article 31). The Commissioner has an expert service to help them in performing the work they are authorised to do. They are also entitled to appoint three assistants. In addition, the Commissioner decides independently, in accordance with the law, on the employment of staff members for the expert service, on the basis of the need for the professional and efficient discharge of the work the Commissioner is authorised to do. The funds required for the work of the Commissioner, their assistants and the expert service is provided from the budget of the Republic of Serbia, acting on a proposal submitted by the Commissioner. The Commissioner's head office is in Belgrade and a regional office in Novi Pazar was opened in March 2014. The Commissioner is planning to establish another three regional offices to ensure better availability.

- c) Although the Law ensures the independence of the Commissioner for Protection of Equality, the attitude of the authorities towards the institution is unsatisfactory. The election of the first Commissioner in May 2010 was marked by opposition from NGOs to the elected candidate. Moreover, the first year of her work was dominated by the efforts of establishing the Office, building the institution's capacities and enhancing the visibility of the institution. Thus, the Office was opened in June 2011, in premises which were not adequate in terms of accessibility and technical and spatial capacity. The situation remains unchanged, although the number and range of activities of the Office have increased over time. Grounds covered by the designated body/bodies

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

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

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

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

- e) Legal standing of the designated body/bodies

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

On the other hand, the Commissioner has legal standing to initiate a discrimination lawsuit, under Article 46 of the LPD. The Commissioner decides in which cases they will initiate a lawsuit, taking into account whether it is a case of strategic litigation; in other words a case of frequent and widespread discrimination in respect of which there are good prospects for success (so far litigation has been initiated 13 times).¹⁸⁹ The litigation

¹⁸⁹ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 33.

is initiated and conducted in the general public interest, in order to contribute to the consistent implementation of legislation and improvement of legal practice, to further encourage victims of discrimination to initiate anti-discrimination litigation, to uphold the rule of law and to contribute to the improvement of access to justice.

However, in order to initiate a lawsuit, the Commissioner needs the consent of the person who has experienced discrimination. It was previously unclear whether the Commissioner needs consent in the case of two or more persons, and *argumentum a contrario* leads to the conclusion that in these situations the Commissioner does not require the explicit consent of the people who have experienced discrimination.¹⁹⁰ Some courts rejected this argument, but in September 2014, the Supreme Court of Cassation revoked the decision of the High Court in Smederevo and the decision of the First Basic Court in Belgrade, and returned the case for retrial.¹⁹¹ This decision is very important as the court held that the Commissioner did not need written consent, as the case affected a group of people - children of Roma origin. The Supreme Court of Cassation noted that the complaint was not directed at the Commissioner's finding of discrimination against a particular individual, in which case the Commissioner would be required to obtain written consent to the filing of the lawsuit, but to establish the existence of discrimination against a group of people.

The Commissioner can demand the following:

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

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

f) Quasi-judicial competences

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

This procedure before the Commissioner for Protection of Equality is a specific procedure, which has the characteristics of a special administrative procedure. Article 40, para. 4 of the LPD expressly stipulates that the procedure before the Commissioner shall be conducted pursuant to provisions of the Law on General Administrative Procedure.¹⁹² The procedure for submitting a complaint is regulated in Articles 35 to 40. A complaint must be delivered within 15 days from its submission to the alleged perpetrator of the violation who has 15 days to respond to it. The Commissioner must give an opinion on whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint, and must inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a

¹⁹⁰ Petrušić, N., Krstić, I., Marinković, T. (2014), *Commentary on the Law on the Prohibition of Discrimination*, Commissioner for Protection of Equality, Judicial Academy, Belgrade, p. 915.

¹⁹¹ See Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 128.

¹⁹² Serbia, Law on General Administrative Procedure (*Zakon o opštem upravnom postupku*), *Official Gazette of the Republic of Serbia*, no. 33/1997, 31/2001, 30/2010, 25 July 1997.

violation, they will issue a recommendation to the individual against whom the complaint was submitted, suggesting a means of redressing the violation in question. Although this decision is called a recommendation in the Law, it is obligatory. Thus, the individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of the day of receiving it. The individual must inform the Commissioner of the measures taken. However, if the perpetrator fails to redress the violation in question within 30 days, the Commissioner may inform the public in the press and online (Article 40, para. 2 of the LPD).

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

In Serbia the Commissioner registers the number of complaints and decisions by ground and field. These data are available to the public online, in regular annual and special reports, as well as in particular publications issued by the Commissioner. For example, in 2014, the Commissioner received 666 complaints. In respect of 144 complaints, the personal characteristic was not mentioned. In 522 complaints (78.4 %) the personal characteristic invoked was as follows: 124 (18 %) – ethnicity; 97 complaints (14.15 %) – health status; 78 complaints (11.3 %) – age; 70 complaints (10.1 %) – disability; 28 complaints (4.15 %) – religious beliefs; 36 complaints (5.2 %) – political opinion; 58 complaints (8.4 %) – membership of political, trade and other organisations; 53 complaints (7.7 %) – sex; 52 complaints (7.5 %) – family status; 31 complaints (4.5 %) – any other status; 23 complaints (3.3 %) – property status; 18 complaints (2.6 %) – sexual orientation; seven complaints (1 %) – citizenship; five complaints (0.7 %) – gender identity; five complaints (0.75 %) – appearance; three complaints (0.4 %) – conviction; and one complaint – colour and ancestry.¹⁹³

With regard to the areas where discrimination occurs, the number of complaints was as follows: employment (242 complaints or 36.3 %); public authorities (111 complaints or 16.7 %); access to public services and facilities (104 complaints or 15.6 %); media (41 complaints or 6.2 %); education (38 complaints or 5.7 %); collective minority rights (22 complaints or 3.3 %); healthcare (17 complaints or 2.6 %); private relations (13 complaints or 2 %); social protection (10 complaints or 1.5 %); culture, art and sport (nine complaints or 1.3 %); public sphere (eight complaints or 1.2 %); pension (seven complaints or 1 %); judiciary (five complaints or 0.8%), property rights (two complaints or 0.3 %); religious freedoms (one complaint or 0.1 %); functioning of trade unions (one complaint or 0.1 %); and other areas (24 complaints or 3.6 %).¹⁹⁴ The Report contains some other data, such as the number of male/female applicants; and who submitted complaints (individuals / organisations / legal entities / state institutions / groups / individuals).

h) Roma and Travellers

The Commissioner recognises that Roma are among the most discriminated against groups in Serbia, which is highlighted in all the regular annual reports. Every year on April 8, the International Romani Day, the Commissioner issues a press release drawing attention to the fact that the situation of the Roma minority is still poor and that Roma are the most discriminated against group in Serbia.

The Commissioner finds that the media most frequently reports cases of discrimination in relation to women, LGBTI people, people with disabilities and Roma.¹⁹⁵ In its 2014 annual

¹⁹³ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 163.

¹⁹⁴ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, pp. 168 – 169.

¹⁹⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 9.

report, the Commissioner urged work to start immediately on the adoption of a new national strategy for the improvement of the situation of Roma, as the strategy adopted in 2005 expires in 2015.¹⁹⁶ The Commissioner also recommends work to be intensified on the implementation of measures established by national, provincial and local strategic documents and action plans, with the aim of achieving the full equality of deprived, vulnerable and marginalised social groups, primarily Roma.¹⁹⁷ Roma are frequently exposed to open and widespread hate speech, while discrimination against this national minority is very present in the areas of education, employment, healthcare and housing, as evidenced by the complaints submitted to the Commissioner for Protection of Equality.¹⁹⁸ Although some positive trends are visible, the Commissioner concludes that it is necessary to undertake a different range of measures to achieve substantial changes.

Roma children are still discriminated against in education and, in previous years some cases of their segregation were recorded, as well as statistics with alarming data on the percentages of Roma children who attend preschool and secondary schools. The life expectancy for Roma is shorter by 12.4 years than that of the general population, and the mortality rate is greater by 28 % than the mortality rate in Serbia, while the mortality of Roma children under five years is even twice as big as that of the general population.¹⁹⁹ According to the Commissioner, at the end of 2014, the Office for Human and Minority Rights completed a baseline study for the preparation of the Strategy for the Inclusion of Roma in Serbia, which is in compliance with the Europe 2020 Strategy, and which presents a starting point for the Second Decade of Roma.²⁰⁰ The purpose of this Strategy is to focus on education, employment, housing and health, while special attention will be dedicated to gender equality, the situation of IDPs, the improvement of the situation and protection of Roma children, as well as the protection of Roma cultural identity.

¹⁹⁶ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade.

¹⁹⁷ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade.

¹⁹⁸ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 37.

¹⁹⁹ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 38.

²⁰⁰ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade.

8 IMPLEMENTATION ISSUES

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

- Legal protection against discrimination

In relation to dissemination of information about legal protection against discrimination, the Commissioner for Protection of Equality publishes brochures and handbooks for different professionals and the wider public in order to inform them about discrimination and to explain the available remedies if discrimination takes place. It actively works on the visibility of the institution, appears in the media and organises a moot court for law students.

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

- Measures to encourage dialogue with NGOs

The Commissioner for Protection of Equality cooperates with international organisations and international and national NGOs. They are very important partners in advising about complex discrimination cases, providing important information about discrimination cases and for situation testing.

- Measures to promote dialogue between social partners

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

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

- The situation of Roma and Travellers

The Commissioner for Protection of Equality deals with cases of discrimination against Roma and issues public announcements on their situation. In addition, the Ombudsman deals with some cases of discrimination against Roma within its jurisdiction, especially in relation to cases of forced eviction. Furthermore, the Roma community also has a National Council for the Roma National Minority, established under the Law on National Councils of National Minorities.²⁰¹ It is an elected body which has the exclusive right to manage issues of education, official use of language and public information for Roma. In addition, a Council of National Minorities of the Republic of Serbia was established with the aim of preserving, improving and protecting the national, ethnic, religious, linguistic

²⁰¹ Serbia, Law on National Councils of National Minorities (*Zakon o nacionalnim savetima nacionalnih manjina*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 20/2014 - decision CC, 55/2014, 3 September 2009.

and cultural characteristics of national minorities, including Roma.²⁰² Among other things, the Council monitors the implementation of cooperation between national councils and the competent authorities of the Republic of Serbia, autonomous provinces and municipalities.

The Office for Human and Minority Rights of the Government of Serbia has a section for national minorities, which includes the Group for the Advancement of Roma and Assistance for Migrants. This body has a duty to undertake activities related to coordination and cooperation with relevant ministries in order to initiate, prepare and realise operational measures for the implementation of the Strategy and Action Plan for the Advancement of the Situation of Roma; to cooperate with local government with the aim of implementing local action plans; as well as the implementation and supervision of the Decade of Roma Inclusion for the period 2005-2015. The Government adopted a Decision on the Establishment of the Council for the Improvement of the Situation of Roma and the Implementation of the Roma Decade.²⁰³ The Council receives administrative and technical support from the Office for Human and Minority Rights. Its role is to prepare proposals for the building of a comprehensive and coherent policy to improve the situation of the Roma population and the implementation of the Decade of Roma Inclusion; to give opinions on the planned budgetary resources; and to provide opinions and expert explanations for the realisation of important social indicators, etc.

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

a) Mechanisms

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

b) Rules contrary to the principle of equality

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

It is very important for the Commissioner for Protection of Equality to provide opinions on draft laws and other regulations and to initiate the introduction of new laws and other regulations, as well as adopting amendments to existing ones. For example, in 2013, the Commissioner issued six opinions related to draft laws and other documents, and submitted two proposals for the assessment of the constitutionality and legality of

²⁰² Decision on the Establishment of the Council for National Minorities (*Odluka o obrazovanju Saveta za nacionalne manjine*), *Official Gazette of the Republic of Serbia*, no. 50/2009, 10 July 2009.

²⁰³ Decision on the Establishment of the Council for the Improvement of the Situation of Roma and the Implementation of the Roma Decade (*Odluka o obrazovanju Saveta za unapređenje položaja Roma i sprovođenje Dekade uključivanja Roma*), *Official Gazette of the Republic of Serbia*, no. 24/2008, 7 March 2008.

general legal acts to the Constitutional Court of Serbia.²⁰⁴ In 2014, the Commissioner issued two opinions related to draft laws and other acts and submitted three proposals for the assessment of the constitutionality and legality of general legal acts to the Constitutional Court of Serbia.²⁰⁵

²⁰⁴ Commissioner for Protection of Equality (2014), *Regular annual report of the Commissioner for Protection of Equality for 2013*, Belgrade, p. 41.

²⁰⁵ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 50.

9 COORDINATION AT NATIONAL LEVEL

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

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

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

10 CURRENT BEST PRACTICES

The work of the Commissioner for Protection of Equality during its five-year mandate must be evaluated as successful, as the Commissioner, despite technical and spatial constraints, issued opinions in 884 cases and recommendations in 198 cases, provided 16 opinions on draft laws and general acts and initiated 13 strategic litigations, seven misdemeanour proceedings and seven criminal charges, as well as issuing many warnings and announcements. The Commissioner established some solid case law, organised many training sessions and round tables, issued numerous handbooks and guides and contributed to awareness-raising about discrimination and the legal framework for protection against discrimination.

A Gay Pride march was finally organised in September 2014, after being banned for four years. Although the march took place amid a huge security presence, including special forces and armoured vehicles. It was finally organised, demonstrating the right of freedom of association for LGBTI people.

One of the most important achievements in the implementation of the Strategy for the Advancement of the Situation of Roma is the institutionalisation of teaching assistants for Roma pupils.

The Ministry of Education, in cooperation with governmental and international organisations, as well as with NGOs, has organised a number of activities, programmes and initiatives aimed at increasing the number of Roma children in regular education, improving the quality of education and providing support to students for successful and continued education. Among these activities are: positive measures for admission to secondary schools and universities, the Functional Basic Education for Roma programme, the Protection of Roma Children from Discrimination in Education project, training and appointment of advisors who are responsible for improvements to Roma education, implementation of a local act on plans for improvements to Roma education, increased enrolment of Roma children in preschool institutions, a special model for the introduction of Roma assistants to schools, and other systemic measures to improve educational opportunities for the Roma population. These measures are a good starting point for increasing the number of educated Roma and their inclusion in Serbia's educational system.

In 2013, amendments to the Law on Extra-judicial Procedures²⁰⁶ were adopted, allowing retrospective registration in birth registers. This legislative change enabled a start to be made in 2014 to solving the problems of around 6 000 invisible Roma who couldn't exercise any constitutional rights due to their lack of documents. These changes came as the result of a consultation process with NGOs which provide free legal aid to Roma and which were aware of the existing problems.

²⁰⁶ Serbia, Law on Extra-judicial Procedures (*Zakon o vanparničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 25/1982 and 48/1988, 46/1995 – other law, 18/2005 – other law, 85/2012, 45/2013 – other law, 55/2014 and 6/2015, 4 May 1982.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

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

- The definition of discrimination

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

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

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

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

- Proving discrimination

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

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

- Material scope

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

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

- Exceptions from discrimination

In relation to exemptions, national legislation provides for an exception for genuine and determining occupational requirements, but the definition does not explicitly state that such a requirement should adhere to the proportionality principle.

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

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

- Remedies, enforcement and sanctions

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

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

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

11.2 Other issues of concern

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

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

12 LATEST DEVELOPMENTS

12.1 Legislative amendments

The most important change in 2014 in relation to discrimination was introduced in Article 23, para. 7 of the Law on the Organisation of the Courts²⁰⁷, which transferred the jurisdiction for decisions on discrimination cases in civil matters from the basic courts to the higher courts. This was a positive change, but caused some problems in the interpretation of the provision, as some higher courts dismissed the complaint for lack of jurisdiction, holding that they only rule on discrimination cases in the sphere of employment.

Furthermore, amendments to the Labour Law which entered into force in July 2014 changed the old terminology in relation to people with disabilities and abolished insulting and stigmatising terms. The Law also introduces new rules on shifting the burden of proof from the complainant to the defendant if it is likely that discrimination took place (Article 5).

12.2 Case law

Name of the court: Higher court in Belgrade

Date of decision: 19 June 2014

Name of the parties: Data not provided by the court

Reference number: N/A

Address of the webpage: N/A

Brief summary: In this case, the complainant claimed that he was discriminated against by the first basic court in Belgrade, as it didn't complete the judicial proceedings for compensation of the violation of the right to a trial within a reasonable time limit, although the Constitutional Court had found a violation of this right in October 2012. The Court rejected the complaint as the claim did not show that the treatment was based on any personal characteristic.

Name of the court: Higher court in Belgrade

Date of decision: 3 June 2014

Name of the parties: Data not provided by the court

Reference number: N/A

Address of the webpage: N/A

Brief summary: In this case, the complainant concluded a contract on 24 months for vocational training, in order to be entitled to take the bar exam. She claimed that her employment was terminated without a reasoned decision by her employer, the Commercial Court, and as a consequence she didn't receive any compensation as she was not performing a judicial function. She claims to have been discriminated against on the basis of her lower social position and working status. If she had been a judge or a prosecutor, she would have received compensation equivalent to six monthly salaries. The Court found that this was not a case of discrimination, as the complainant was not discriminated against based on any personal characteristic.

Name of the court: Higher court in Kragujevac

Date of decision: 4 July 2014

Name of the parties: Data not provided by the Court

Reference number: Posl. Br. III. 18/14

Address of the webpage: N/A

²⁰⁷ Serbia, Law on the Organisation of the Courts (*Zakon o uređenju sudova*), *Official Gazette of the Republic of Serbia*, no. 116/2008, 104/2009, 101/2010, 31/2011 – other laws, 78/2011 – other law, 101/2011, 101/2013, 22 December 2008.

Brief summary: In this case, the complainant claimed that she was discriminated against in the area of employment based on her health. Namely, she was working as a typist between 2006 and 2009 in the ordinary court of Kragujevac. In 2006, she developed health problems due to which she couldn't perform her role as typist. Thus, she was moved to another post. Under the Action Plan for solving the problem of surplus employees in judicial bodies, she opted for the termination of her employment, and this was voluntarily. After the termination of her contract, she received a severance payment. The Court found that this was not a case of discrimination, as she voluntarily chose the redundancy programme. In order to reach this conclusion, the Court compared the position of other employees with the same employer and found that other employees with health conditions who didn't opt for this social programme were still working there.

Name of the court: Higher court in Pancevo

Date of decision: 26 May 2014

Name of the parties: Data not provided by the Court

Reference number: 3 P1 br. 5/14

Address of the webpage: N/A

Brief summary: In this case the Basic Court in Vrsac found that there was direct discrimination because the employee was placed in a disadvantaged position in comparison to other employees on the basis of their ethnic origin. In this case, the employer insulted and threatened the employee on the basis of his ethnicity prevented him from receiving professional development and training on the job and refused him an increase in salary and payment for overtime, the right to rest and the right to the same type and quantity of hot meals compared to employees of other nationalities.²⁰⁸ However, the High Court in Pancevo found that the employee was exposed to an atmosphere of fear at work, but not to discrimination, because there are no indications that this treatment was based on any personal characteristic of the complainant'.²⁰⁹ In other words, it was not established that the employer treated the employee differently due to his ethnicity. The Court reached this conclusion by comparing similar groups of employees with the same employer, but it is problematic that the judge commented only on the statements of employers who denied that there was any difference in treatment between employees of different ethnicities, when evidence should be provided that discrimination did not occur.

Name of the court: Appellate court in Belgrade

Date of decision: 21 June 2014

Name of the parties: Gay Straight Alliance v. Dragan Marković Palma

Reference number: GŽ. 2426

Address of the webpage: N/A

Brief summary: The Gay Straight Alliance submitted a claim against the well-known politician, Dragan Marković Palma, because of a statement he gave to journalists from print and electronic media: 'The attitude of the United Serbia party and my personal view is: we are against any gathering where homosexuals demonstrate in the streets of Belgrade and want to show something which is a disease as a normal thing'.

The first instance court found that this claim was unfounded, as the politician issued a statement on behalf of an organisation that stands for the 'healthy family, which means that individuals are born within the marriage between a man and a woman and are not children of a "surrogate family" in which two people of the same sex play at being mum and dad'.²¹⁰ In addition, the court found that political parties have the right to express their views. It recalled that freedom of expression is one of the fundamental values of a

²⁰⁸ See Basic Court in Vrsac, no. II 6. P. 1. 749/10, 1 March 2012.

²⁰⁹ For similar judgments see also the Higher Court in Pancevo, no. 2 P1. br. 6/14, 14 May 2014; Higher Court in Pancevo, no. 3 P 1 br. 7/14, 11 April 2014.

²¹⁰ See First Appellate Court in Belgrade, 73. P. br. 15378/2012, 17.9.2013.

democratic society, which is protected even in the case of information which may shock or offend others, as it requires pluralism in society.

It is particularly shocking that the court found that, during a time when hate speech and open calls for various forms of discrimination are common in political life and in the media in Serbia, this statement did not meet the conditions enshrined in the Law on the Prohibition of Discrimination to be discriminatory behaviour.

Fortunately, the Court of Appeal in Belgrade, as a second instance court in this case, held that limiting the freedom of expression is not unlawful, as it is 'the prohibition of speech which spreads the ideas that incite discrimination, and which may have harmful effects on the democratic process and the development of society as a whole'. Thus, the court found that the defendant behaved in a discriminatory manner.

Cases which relate to Roma discrimination

During 2014, 124 complaints in relation to discrimination based on ethnicity were submitted to the Commissioner for Protection of Equality, which was 18 % of all the complaints received (666 complaints in total). Of these, 40 % claimed discrimination against Roma. In addition, in 2014, five criminal charges for incitement of racial hatred, racial and religious hatred and intolerance against Roma were initiated, as well as two strategic litigations. In one case, a lawsuit was initiated against the president of a local community who, on 17 July 2014, said that the community was experiencing difficult times, since neither floods, nor earthquakes degraded it as much as Roma IDPs from Kosovo.²¹¹ He also said that members of his community could not mix with them. This statement was quoted in the majority of media in Serbia.

In a second case, an employer was seeking employees for the job of picking raspberries and stated in a document entitled 'Note' that he would not accept Roma due to their disagreements with workers of other ethnicities and the possible consequences that could arise during the course of their period with the employer.

Concerning complaints, in one case, a pizza restaurant didn't want to employ a Roma woman who was qualified for the post as she had experience of working in pizza restaurants and a bakery.²¹² In this case, situational testing was performed in order to prove the case of discrimination. In another case, 16 complaints were submitted against an electricity company which, without warning, stopped supplying electricity and provided two electric power distribution numbers for a whole settlement.²¹³ The company claimed that it resorted to this measure due to non-payment of bills and problems with the illegal use of electricity. This change resulted in higher bills as the common bill was calculated at the higher tariff.

It can be concluded that the majority of cases of discrimination against Roma exist in the area of employment and the supply of goods and services, although their situation in other areas of life is still very poor, such as in education, housing and healthcare.

²¹¹ See Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 59.

²¹² Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *Organizations P. and Ž. p. v. catering shop M.*, complaint no. 07-00-726/2013-02, 19 May 2014.

²¹³ Commissioner for Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *The group of citizens v. P. d. J.*, complaint no. 07-00-268/2014-02, 30 September 2014.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Country: Serbia

Date: 18 April 2015

Title of legislation (including amending legislation)	Title of the law: The Law on the Prohibition of Discrimination Abbreviation: LPD Date of adoption: 26 March 2009 Latest amendments: N/A Entry into force: 7 April 2009 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: explicitly race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations It is an open clause
	Civil law
	Material scope: all areas of public life
	Principal content: prohibition of direct and indirect discrimination, violation of the principle of equal rights and obligations, calling to account ²¹⁴ associating for the purpose of exercising discrimination, hate speech and disturbing and humiliating treatment
Title of legislation (including amending legislation)	Title of the law: The Gender Equality Act Abbreviation: GEA Date of adoption: 11 December 2009 Latest amendments: N/A Entry into force: 25 December 2009 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: gender
	Civil law
	Material scope: all areas of public and private life
	Principal content: direct and indirect discrimination, harassment, sexual harassment
Title of legislation (including amending legislation)	Title of the law: The Law on the Prevention of Discrimination against Persons with Disabilities Abbreviation: LPDPD Date of adoption: 17 April 2006 Latest amendments: N/A Entry into force: 1 January 2007 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: disability
	Civil law
	Material scope: all areas of public life
	Principal content: direct and indirect discrimination, violation of the principle of equal rights and obligations, humiliating treatment
Title of legislation (including amending legislation)	Title of the law: The Law on the Professional Rehabilitation and Employment of Persons with Disabilities Abbreviation: LPREPD

²¹⁴ Victimisation is known as 'calling to account' in Serbian law.

amending legislation)	Date of adoption: 13 May 2009 Latest amendments: 16 April 2013 Entry into force: 15 May 2009 (Article 24 and 29 on 24 May 2010) Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: disability
	Civil law
	Material scope: employment
	Principal content: affirmation of equal opportunities
Title of legislation (including amending legislation)	Title of the law: The Law on the Protection of Rights and Freedoms of National Minorities Abbreviation: LPRFNM Date of adoption: 27 February 2002 Latest amendments: 6 November 2013 Entry into force: 7 March 2002 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: national, ethnical, racial and language
	Civil law
	Material scope: education, use of language, information, culture, participation in public affairs
	Principal content: prohibition of discrimination, affirmative actions
Title of legislation (including amending legislation)	Title of the law: The Labour Law Abbreviation: LL Date of adoption: 15 March 2005 Latest amendments: 21 July 2014 Entry into force: 23 March 2005 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: gender, birth, language, race, skin color, age, pregnancy, health condition, invalidity, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial capacity, membership in political, labor union or other organizations It is an open clause
	Civil/administrative law
	Material scope: employment
	Principal content: direct and indirect discrimination
Title of legislation (including amending legislation)	Title of the law: The Law on Fundamentals of the Education Abbreviation: LFE Date of adoption: 31 August 2009 Latest amendments: 26 June 2013 Entry into force: 11 September 2009 Web link: http://www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: racial, national, ethnic, linguistic, religious background or gender, physical and psychological characteristics, developmental impairments and disabilities, health condition, age, social and cultural origin, financial status or political views
	Civil/administrative law
	Material scope: education
	Principal content: direct and indirect discrimination
Title of legislation (including amending legislation)	Title of the law: Criminal Code Abbreviation: CC Date of adoption: 6 October 2005 Latest amendments: 1 January 2006

legislation)	Entry into force: 11 September 2014 Web link: http://www.paragraf.rs/propisi/krivicni_zakonik.html Grounds covered: race, colour, religion, nationality, ethnicity or any other personal characteristic
	Criminal law
	Material scope:
	Principal content: direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Serbia

Date: 1 January 2015

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

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

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries
(http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>).

