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Country report

Non-discrimination

The former
Yugoslav
Republic of
Macedonia

2017

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Country report
Non-discrimination
The former Yugoslav Republic
of Macedonia

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EXECUTIVE SUMMARY

1. Introduction

Macedonia (FYR),¹ a South-East European land-locked multi-ethnic country, declared its independence in 1991, following Yugoslavia's dissolution. It became a European Union membership candidate in 2005 with a recommendation to open negotiations from 2009, and has had a conditional invitation to join the North-Atlantic Treaty Organization since 2008. Although a foreign affairs priority for the country, both these processes are stalled, initially due to the name dispute. However, as noted in several consecutive European Commission progress reports,² this difficulty was later compounded by fundamental rule of law issues and state capture.³ Official domestic priorities remain the implementation⁴ of the Ohrid Framework Agreement,⁵ lowering unemployment rates⁶ and the fight against poverty.⁷

The country entered a period of unrest at the end of 2014, with massive protests by university and high-school students, honoraria workers, independent trade unions, workers fired in the transition and transformation processes, etc. The wire-tapping affair uncovered in February 2015 revealed an even more serious domestic situation. The largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20 000 people, allegedly carried out by the state Counterintelligence Agency.⁸ The content of the published recordings confirmed claims of state capture,⁹ including complete party control not only over the judiciary, but over *all* aspects of society including in relation to equality and non-discrimination.¹⁰ The Ombudsperson opened two cases, as gross and large-scale violations of the right to private and family life were observed, and faced obstruction

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

² European Commission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report* https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf. All hyperlinks accessed: 07.03.2017.

³ The concept of 'state capture' is as per Transparency International's definition: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'. This is also how the European Commission described the situation in the country in the 2016 report. Source: European Commission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report*.

⁴ Although it is not OFA itself that is being implemented, but constitutional, legal provisions and strategic documents that resulted from its signing, the expression 'implementation of OFA' is used for brevity purposes.

⁵ Signed in view of ending the 2001 armed conflict, OFA aims to advance the position of minority ethnic communities not in majority, and to preserve and reflect the multi-ethnic character of the country in public life, including through actions to promote non-discrimination and equitable representation.

⁶ According to the State Statistical Office, the unemployment rate in the last quarter of 2016 was 23.4 % of the active population, while 43.4 % are employed.

⁷ The Laeken indicator of poverty for 2014 (last available statistic) is 22.1 %.

⁸ Balkan Insight, (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

⁹ The concept of 'state capture' is as defined by Transparency International, that is 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'. This is also how the European Commission described the situation in the country in the 2016 report. Source: European Commission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report*.

¹⁰ One of the aired conversations features what seems to be the voice of the (then) President of the equality body, engaged in assisting the ruling party's election campaign, including by instructing people that have been awarded social assistance how to vote thus (ab)using his position in the Ministry of Labour and Social Policy. In addition, what seems to be the voice of the then Minister of Interior was featured in a conversation that clearly shows the pressure on Roma to vote as instructed, while using the term 'Gypsy', which in the national context is considered a derogatory term. Source: 24 Vesti - National TV Broadcaster, 'Roma request resignation from the Minister Jankulovska' [Ромите бараат оставка од министерката Јанкуловска], <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

from state institutions.¹¹ On 5 May 2015, recordings related to the murder of Martin Neshkovski¹² caused spontaneous massive protests, which, although peaceful, were broken up by a violent and over-proportionate reaction by the police who arrested many protesters that night.¹³ This stirred further protest, which led to the Pržino agreement, under which a Special Public Prosecutor's Office was established to prosecute crimes arising from the wiretapped conversations. However, in April 2016, as the first criminal charges were about to reach the courts, the country's President (elected on the ruling party's ticket) granted amnesty to more than 50 politicians, including the highest people in the ruling party, and all for several criminal charges. This brought people back to the streets in what grew into the 'colourful revolution',¹⁴ leading to further political agreements. Pre-term elections were held in December 2016, resulting in a hung Parliament, which has further extended the political crisis.

The country's population is over two million.¹⁵ Ethnic affiliation is important, as sets of rights and positive action measures are tied to the numerical representation of an ethnic community in the total population. The ethnic composition¹⁶ is 64 % ethnic Macedonians, 25 % ethnic Albanians, 4 % ethnic Turks, 3 % ethnic Roma, 2 % ethnic Serbs, 1 % ethnic Bosniaks, 0.5 % ethnic Vlachs and 1 % 'others' (a term used in the Constitution). Numerous activities for the rights of Roma have been undertaken, including within the frame of the Decade of Roma Inclusion, which ended in 2015. However, apart from in relation to political participation,¹⁷ the results are contested.¹⁸ Although the Government claims to be constantly working on minority rights' advancement,¹⁹ hate speech seems to be omnipresent and is widely tolerated. Homophobic statements and hate speech directed towards homosexuals are still very prevalent. Moreover, there were several violent attacks on an LGBT support centre founded by a local civil society organisation (CSO). The attacks have still not been thoroughly investigated, and almost no charges were raised.

Cooperation with CSOs has remained a possibility in theory but has not happened in practice. The Government's approach has continued to be directed towards silencing all critical voices in the country.²⁰ This was taken a step further in the election race and post-election events of the December 2016 elections, with the President of the ruling party announcing the start of a process dubbed as 'desorosisation' – by which he means the process of taking over the control of and dismantling the Open Society Institute Foundation in Macedonia. This was further supported by the establishment of 'S.O.S.' (or 'Stop Operation Soros'), which presents itself as an organisation of concerned citizens, but judging by the close connections of its key people, is most probably just another

¹¹ Ombudsperson of the Republic of Macedonia (2016), *Annual Report of the Ombudsperson for 2015*.

¹² Martin Neshkovski was a young supporter of the ruling party who attended their victory rally on the night of 6 June 2011. Rumours of murder on the main square spread on social media the same night, but the MoI spokesperson denied Neshkovski's murder for over 24 hours. The attempt to cover up the murder caused protests of a size and duration unseen in the country in over a decade. Four years later, the published wiretapped conversation revealed what seem to be the voices of the then minister Jankulovska, the former Prime Minister and a spokesperson, all discussing how to cover up the murder.

¹³ Reuters (2015), 'Macedonian protesters demand resignation of cabinet, clash with police, 5 May 2015, <http://www.reuters.com/article/us-macedonia-government-protests-idUSKBN0NQ2BH20150505>.

¹⁴ Deutsche Welle (2016), 'Protesters hit Macedonia's capital with paint balls and soap suds in a "Colorful Revolution"', 20 April 2016 <http://www.dw.com/en/protesters-hit-macedonias-capital-with-paint-balls-and-soap-suds-in-a-colorful-revolution/a-19201617>.

¹⁵ Although not supported by official numbers, estimates show that 250 000 to 500 000 people have left the country in the past few years, to work abroad.

¹⁶ All numbers presented here are rounded percentages from the 2002 census. A new census was scheduled for 2011, but it was annulled due to lack of clarity in the implementation of the methodology. All statistics by the State Statistical Office can be found at: www.stat.gov.mk/.

¹⁷ There is a Roma minister in the Government, a Roma municipality (Shuto Orizari), Roma MPs, etc.

¹⁸ The Decade of Roma Inclusion was a regional Government initiative for improving the situation of Roma in health, housing, education and employment which ended in 2015.

¹⁹ There were inter-ethnic violence cases in 2011 and in 2012.

²⁰ The report by the Special Rapporteur on freedom of thought and opinion, Freedom House annual reports, Civil Society Organisation Sustainability Index, and Nations in Transit have all record these developments.

example of an organisation funded by the ruling party. The practice of government organised NGOs (or 'GONGOs') persists.

2. Main legislation

The 'Constitution of the Republic of Macedonia',²¹ a written constitution, is the country's highest legal act. It accepts international law as part of domestic law, and as higher than the laws and bylaws. The Constitution provides for protection against discrimination. It upholds the equality of citizens before the Constitution and before law, stating that citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of gender, race, colour, national and social origin, political and religious conviction, property and social status. It provides a protection mechanism for all who find their human rights and freedoms breached, in front of the Constitutional Court. Upholding the monism principle on application of international law (the signed and ratified international documents), the Constitution provides for the domestic use of these documents, thus also for those providing for protection against discrimination and/or upholding the principle of equality.

Until 2010, anti-discrimination provisions were scattered in various laws. In April 2010, the Anti-discrimination Law (ADL)²² - the first comprehensive equality law - was adopted as part of the EU *acquis* approximation process. The ADL does not comply with the directives regarding minimum protected grounds, definitions and forms of discrimination, effective, proportionate and dissuasive sanctions, use of statistical data, and dialogue with the NGO sector. The equality body established by the act - the Commission for Protection against Discrimination (CPAD) - cannot be said to meet the requirements of Directive 2000/43.

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

The ex-post evaluation of the ADL implementation showed that the aims of the law²³ were only partly reached and identified many points where implementation could be improved, justifying the situation as resulting from a lack of allocated funds. Three recommendations for legislative changes were issued: amending the ADL to allow for the establishment of administrative support for the CPAD; explicit prescription of the 'shift of burden of proof' for the CPAD; and enhancing the CPAD accountability mechanisms. Following this, an all-encompassing harmonisation analysis was conducted, which focused on the harmonisation of the ADL with international standards and the harmonisation of other domestic laws and bylaws with the ADL. The analysis identifies many points for legislative changes, both on general issues (such as, for example, amending insensitive terminology on disability) and specific points (specific proposals for articles).²⁴

²¹ English language version of the Constitution of the Republic of Macedonia: Constitution of the Republic of Macedonia <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspix>.

²² Law on prevention and protection against discrimination (*Закон за спречување и заштита од дискриминација*) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015, 31/2016, Const.Ct. Decision: Y.6p.82/2010 (15.09.2010).

²³ As the Anti-discrimination Law does not contain a provision on its aims, by analysing other documents, the ex-post evaluation team identified the aims to be prevention of and protection against discrimination.

²⁴ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation* (OSCE and CPAD), available at: https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equa

3. Main principles and definitions

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

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

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

In 2016, the Ministry of Labour and Social Policy adopted the new strategy, entitled 'Strategy on Equality and Non-discrimination 2016-2020'. The text focuses on fields, rather than on grounds, and makes a positive move in mentioning sexual orientation in the introductory section. According to its text, an evaluation of the implementation of the 2012 National Strategy on Equality and Non-discrimination on grounds of ethnicity, gender, age and disability (the first comprehensive equality public policy) was conducted. However, this evaluation has not been published in whole or in part.

4. Material scope

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

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

[lity and non-discrimination](#) [Анализа на хармонизираноста на домашното законодавство за еднаквоста и недискриминацијата](#).

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

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

5. Enforcing the law

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

There is ambiguity when it comes to addressing complaints of discrimination. Various laws provide various types of proceedings in similar cases. Proceedings vary from inspector control, misdemeanour procedure, litigation procedure, administrative procedure, to criminal procedure. The Anti-discrimination Law (ADL) envisages several

²⁵ Law on Labour Relations (*Закон за работните односи*), Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016; Constitutional Court Decisions: U. no. 139/2005, U. no. 161/2005, U. no. 134/2005, U. no. 187/2005, U. no. 111/2006, U. no. 188/2006, U. no. 170/2006, U. no. 200/2008, U. no. 20/2009, U. no. 176/2009, U. no. 263/2009, U. no. 62/2013, U. no. 114/2014.

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

Administrative procedure before the CPAD is free of charge. This body may give its opinion and recommendation. The procedure can last up to 90 days. If the recommendation is not acted upon, the CPAD can initiate a procedure with a competent body (the law does not specify this further). The CPAD received 60 cases in 2016 - a further drop from 2015 (70 cases). It attributes the decrease in reporting to a lack of financial resources and other issues²⁶ without saying what these issues are or how it came to this finding. However, financial resources cannot explain why fewer people complained to the CPAD in 2016 than in 2015. This is a further drop from 2015, when the first fall in complaints (by over a third) was registered. A more plausible explanation could be a further decline in trust, which started with the wire-tapping affair (see above) and continued with the second CPAD composition appointment.²⁷

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

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

The Ombudsperson is another possible forum for public sector discrimination cases. In 2016, the percentage of discrimination cases remained low: 69 cases were directed to the Ombudsperson (1.83 % of the total number of cases received). As in previous years, the majority of discrimination cases are in the field of employment and on the ground of ethnicity. The fact that the number of cases reported to the Ombudsperson has increased slightly (from 1.2 % in 2015 to 1.83 %), unlike that of the CPAD, further supports an argument of loss of trust in the CPAD as the explanation for the fall in reporting over two consecutive years.

The ADL is silent on situation testing. It is worth noting that Article 206 of the Law on Civil Procedure states that all facts that are important for reaching a decision can be used as evidence, but that it is up to the courts to decide which facts need to be proven and which do not. The Law on Civil Procedure goes on to mention examples of evidence, but situation testing is not one of those examples. Situation testing was initially used in practice only by CSOs, even before the adoption of the Anti-discrimination Law. In 2014, the Macedonian Helsinki Committee (MHC) and the OSCE - Mission to Skopje conducted a

²⁶ See: Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017) *Annual Report for 2016*; 'The drop is due, among other issues, also to lack of financial resources for the operation of the Commission'. [Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата.] Available on the CPAD website: http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

²⁷ On the second composition, see: Flash report 'Appointment of new members of the equality body', <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

joint project on situation testing which resulted in findings that they announced that they would raise as evidence in front of the courts. Further information has not been released.

In 2016, the Ombudsperson conducted a situation testing exercise in order to cross-check a submission it received from a CSO. Namely, the MHC raised a claim for direct discrimination on grounds of sex in the field of healthcare provision, as it found that fathers and men in general are not allowed as companions of hospitalised children in public health facilities. If a child is to be hospitalised, they have to be accompanied by a female. The Ombudsperson conducted a situation test via telephone and found that this really was the case. Relying on its situation testing as proof, the Ombudsperson concluded that there was *indirect*²⁸ discrimination on grounds of sex in the public healthcare service provision.²⁹

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

NGOs support complaints and bring cases of discrimination to public attention. The media still reports discrimination cases in a sensationalist manner, although improvements are evident.

6. Equality bodies

The Anti-Discrimination Law (ADL) provided for the establishment of the first equality body in the country – the CPAD. The CPAD can: give advice and make recommendations on cases of discrimination; provide information and initiate procedures at relevant state bodies; produce reports; provide education and training; initiate changes to legislation; cooperate with local government, NGOs, other equality bodies and international organisations; collect statistical data, establish databases and conduct research. The CPAD works on discrimination cases on the grounds of sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property ownership, health condition, or any other ground stipulated in law or a ratified international treaty.

The CPAD's second composition was appointed in January 2016. It received 60 cases in 2016 - a further drop from 2015 (70 cases; over a third less than in 2014). In 2016, the CPAD has reported the distribution of cases per discrimination ground in percentages and does not provide the full list. It gives the following information: 18 % on personal or social status, 17 % on ethnicity, 15 % on political affiliation, 13 % on gender, 12 % on health status, 10 % on other beliefs 'and so on'. The distribution of cases follows more or less the same tendency from the previous years, with the grounds of 'personal and other status' and 'ethnicity' switching places as first and second most commonly reported ground. The alleged discrimination cases per field are presented in the same manner and are as follows: 40 % in employment and labour relations, 25 % in access to goods and services, 13 % in public information and media, 8 % in judiciary and administration and 8 % in education, science and sports.

²⁸ However, the MHC, the applicant, claimed direct discrimination. Having no access to the files of the case prevents an understanding of the decision of the Ombudsperson as to the form of discrimination that it established.

²⁹ Helsinki Committee of the Republic of Macedonia (2016), 'Info-sheet on Discrimination' (Информатор за дискриминација, May 2016, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf).

There was no equality body before the ADL's adoption. Public sector discrimination duties came under the mandate of the Ombudsperson. The ADL does not regulate the relationship between the Ombudsperson and the CPAD (it operates partly under a memorandum of understanding). According to the Ombudsperson's general mandate, it can accept individual claims, investigate, give recommendations and opinions, initiate procedures, and monitor and research specific issues, focusing protection on the grounds mentioned in the Constitution and covering violations made by public bodies. Amendments to the Ombudsperson's Act made in 2016, which will go into force in April 2017, add promotion to the institution's mandate.³⁰

7. Key issues

The key issues of concern in the national context include:

- sexual orientation is not an explicitly protected ground in the ADL;
- national legislation is not harmonised internally nor with international standards;
- underfunding prevents the national human rights institutions from fully exercising their competences;
- impunity of hate crime and hate speech, especially with regards to sexual orientation;
- rule of law issues and state capture erode trust in institutions, including the judiciary;
- lack of independence of the equality body which, under its present positioning and operation, cannot be seen to be in line with the directives;
- high levels of retaliation against civil society and activists for being critical voices.

³⁰ Law on Ombudsperson (*Закон за народниот правобранител*), Official Gazette of the Republic of Macedonia Nos. 60/2003, 114/2009, 181/2016, 189/2016, Constitutional Court Decisions: U. no. 111/2007.

RÉSUMÉ

1. Introduction

La Macédoine (ARYM),³¹ pays multiethnique et enclavé du sud-est de l'Europe, a déclaré son indépendance en 1991 par suite de la dissolution de la Yougoslavie. Elle est devenue candidate à l'adhésion à l'Union européenne en 2005 avec recommandation d'ouvrir les négociations à partir de 2009, et a reçu en 2008 une invitation conditionnelle à rejoindre l'Organisation du traité de l'Atlantique Nord. Bien qu'ils soient considérés comme une priorité nationale en matière d'affaires étrangères, ces deux processus d'adhésion sont au point mort en raison au départ d'un litige sur le nom. Comme le signalent toutefois plusieurs rapports d'avancement consécutifs publiés par la Commission européenne³² concernant les progrès réalisés par le pays sur la voie de l'adhésion, cette difficulté initiale s'est trouvée ultérieurement exacerbée par des questions d'État de droit fondamental et de captation de l'État.³³ Les priorités nationales officielles demeurent la mise en œuvre³⁴ de l'accord-cadre d'Ohrid,³⁵ la réduction des taux de chômage³⁶ et la lutte contre la pauvreté.³⁷

Le pays est entré fin 2014 dans une période de troubles marquée par d'importants mouvements de protestation de la part d'étudiants des universités et hautes écoles, de travailleurs freelance, de syndicats indépendants, de salariés licenciés dans le cadre des processus de transition et de transformation, etc. L'affaire des écoutes téléphoniques dévoilée en février 2015 a révélé une situation interne plus préoccupante encore. Le principal parti d'opposition a entamé la publication d'enregistrements censés être tirés de l'interception illégale des communications de plus de 20 000 personnes par l'Agence de renseignement macédonienne.³⁸ Le contenu des enregistrements rendus publics confirment les allégations de captation de l'État,³⁹ et notamment un contrôle total du parti non seulement sur l'appareil judiciaire mais sur *tous* les aspects de la société, y

³¹ La dénomination constitutionnelle du pays est «République de Macédoine». Mais en attendant que soit réglé le litige en cours avec la Grèce concernant cette dénomination, la résolution A/RES/47/225 des Nations unies prévoit que l'État est admis comme membre des Nations unies en étant provisoirement désigné sous le nom d'«ancienne République yougoslave de Macédoine», qui est aussi la dénomination retenue par la Commission européenne et utilisée dès lors dans le présent rapport.

³² Commission européenne (2016) «*The Former Yugoslav Republic of Macedonia – Progress Report*». https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf Tous les hyperliens ont été consultés le 7 mars 2017.

³³ Le concept de «captation de l'État» s'entend ici au sens de la définition que lui donne Transparency International, à savoir: «une situation où des personnes physiques, des institutions, des entreprises ou des groupes puissants, qui peuvent être ou non des ressortissants du pays, recourent à la corruption pour peser sur les décisions politiques et l'environnement juridique du pays au profit de leurs propres intérêts». Telle est également la manière dont la Commission européenne décrit la situation du pays dans son rapport d'avancement 2016. Source: Commission européenne (2016), «*The Former Yugoslav Republic of Macedonia – Progress Report*».

³⁴ Même si ce n'est pas l'accord-cadre d'Ohrid proprement dit qui est mis en œuvre, mais des dispositions constitutionnelles et légales ainsi que des documents stratégiques découlant de sa signature, l'expression «mise en œuvre de l'accord-cadre d'Ohrid» est utilisée ici par souci de concision.

³⁵ Signé en vue de mettre fin au conflit armé de 2001, cet accord vise à améliorer la situation des communautés ethniques minoritaires ainsi qu'à préserver et refléter le caractère multiethnique du pays dans la vie publique, y compris au moyen d'actions pour la promotion de la non-discrimination et en faveur d'une représentation équitable.

³⁶ Selon l'Office national de statistique, le taux de chômage atteignait 23,4 % de la population active au dernier trimestre de 2016, et le taux d'emploi 43,4 %.

³⁷ L'indicateur de pauvreté de Laeken était de 22,1 % en 2014 (dernière statistique disponible).

³⁸ Balkan Insight, (2015), «Macedonia PM Accused of Large-Scale Wire-Tapping» (Le Premier ministre macédonien accusé d'écoute téléphonique à grande échelle) (9 février 2015), site web de Balkan Insight, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

³⁹ Le concept de «captation de l'État» s'entend ici au sens que lui donne Transparency International, à savoir: «une situation où des personnes physiques, [des institutions,] des entreprises ou des groupes puissants, qui peuvent être ou non des ressortissants du pays, recourent à la corruption pour peser sur les décisions politiques et l'environnement juridique du pays au profit de leurs propres intérêts».

compris en matière d'égalité et de non-discrimination.⁴⁰ Le Médiateur a ouvert deux procédures étant donné que des cas flagrants de violation à grande échelle du droit à la vie privée et la vie familiale avaient été constatés, mais il s'est heurté à des obstructions de la part d'institutions publiques.⁴¹ Le 5 mai 2015, des enregistrements en rapport avec l'assassinat de Martin Neshkovski⁴² ont suscité des manifestations spontanées et massives qui, bien que pacifiques, ont été dispersées de manière violente et disproportionnée par la police, laquelle a procédé cette nuit-là à de nombreuses arrestations.⁴³ Cette réaction a provoqué de nouvelles manifestations, qui ont conduit à l'accord de Pržino prévoyant la mise en place d'un Procureur spécial chargé de poursuivre les crimes liés aux conversations enregistrées. En avril 2016 toutefois, alors que les premières affaires pénales étaient sur le point d'être portées devant les tribunaux, le Président du pays (élu sur la liste électorale du parti au pouvoir) a amnistié plus de 50 politiciens, y compris les plus haut placés au sein du parti au pouvoir, et tous pour plusieurs accusations pénales – ce qui a fait redescendre les gens dans la rue pour ce qui allait devenir la «révolution colorée»⁴⁴ et déboucher sur de nouveaux accords politiques. Les élections anticipées de décembre 2016 ont abouti à un Parlement sans majorité, ce qui n'a fait qu'intensifier la crise politique.

La population du pays dépasse la barre des deux millions.⁴⁵ L'appartenance ethnique est importante car une série de droits et d'actions positives sont liés à la proportion numérique qu'une communauté ethnique représente dans l'ensemble de la population. La composition ethnique⁴⁶ s'établit comme suit: 64 % de Macédoniens de souche, 25 % d'Albanais de souche, 4 % de Turcs de souche, 3 % de Roms de souche, 2 % de Serbes de souche, 1 % de Bosniaques de souche, 0,5 % de Valaques de souche et 1 % «d'autres» (terme utilisé par la Constitution). Diverses activités en faveur des droits des Roms ont été initiées, y compris dans le cadre de la Décennie de l'intégration des Roms qui s'est achevée en 2015. Ceci dit, hormis ce qui concerne la participation politique,⁴⁷

⁴⁰ L'une des conversations diffusées permet apparemment d'entendre la voix du président (de l'époque) de l'organisme pour la promotion de l'égalité s'engageant à soutenir la campagne électorale du parti au pouvoir en donnant notamment instruction aux bénéficiaires d'une aide sociale sur la manière de voter – (ab)usant ainsi de sa fonction au sein du ministère du Travail et de la politique sociale. De surcroît, une voix qui serait celle de la ministre de l'Intérieur de l'époque apparaît dans une conversation faisant clairement état d'une pression exercée sur les Roms pour qu'ils votent selon les instructions données tout en utilisant le terme «gitan» qui est considéré, dans le contexte national, comme péjoratif. Source: 24 Vesti – Chaîne de télévision nationale, «Des Roms réclament la démission de la ministre Minister Jankulovska» [Ромите бараат оставка од министерката Јанкуловска], <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

⁴¹ Médiateur de la République de Macédoine (2016), *Rapport annuel 2015 du Médiateur*.

⁴² Martin Neshkovski était un jeune sympathisant du parti au pouvoir assistant au rassemblement de célébration de la victoire dans la soirée du 6 juin 2011. Des rumeurs d'assassinat sur la place principale ont circulé sur les réseaux sociaux la nuit même, mais le porte-parole du ministère de l'Intérieur a nié le meurtre de Neshkovski pendant plus de 24 heures. La tentative de dissimulation de ce meurtre a suscité des protestations d'une ampleur et d'une durée sans précédent dans le pays depuis plus de dix ans. Quatre ans plus tard, la publication de la conversation enregistrée révèle les voix qui seraient celles de la ministre (à l'époque) Jankulovska, de l'ancien Premier ministre et d'un porte-parole discutant tous de la manière de couvrir l'assassinat.

⁴³ Reuters (2015), «Des manifestants macédoniens réclament la démission du cabinet, heurtés avec la police», 5 mai 2015, <http://www.reuters.com/article/us-macedonia-government-protests-idUSKBN0N0Q2BH20150505>.

⁴⁴ Deutsche Welle (2016), «Des manifestants débarquent dans la capitale de Macédoine armés de billes de peinture et de mousse de savon pour une «révolution colorée»», 20 avril 2016 <http://www.dw.com/en/protesters-hit-macedonias-capital-with-paint-balls-and-soap-suds-in-a-colorful-revolution/a-19201617>.

⁴⁵ Sans être confirmées par des chiffres officiels, les estimations font état de 250 000 à 500 000 personnes ayant quitté le pays ces quelques dernières années pour aller travailler à l'étranger.

⁴⁶ Tous les chiffres présentés ici sont des pourcentages arrondis tirés du recensement de 2002. Un nouveau recensement était prévu pour 2011, mais il a été annulé en raison d'un manque de clarté au niveau de l'application de la méthodologie. Toutes les statistiques publiées par l'Office national de statistique peuvent être consultées sur son site: www.stat.gov.mk/.

⁴⁷ Le pays compte un ministre rom au sein du gouvernement, une municipalité rom (Shuto Orizari), des députés roms, etc.

les résultats sont contestés.⁴⁸ Bien que le gouvernement affirme œuvrer en permanence à la promotion des droits des minorités,⁴⁹ le discours haineux semble omniprésent et largement toléré. Les déclarations homophobes et les discours haineux à l'égard des homosexuels restent courants. Un centre de soutien aux personnes LGBT, fondé par une organisation de la société civile (OSC) locale, a fait en outre l'objet de plusieurs attaques violentes. Celles-ci n'ont toujours donné lieu à aucune enquête approfondie et aucune accusation ou presque n'a été portée.

La coopération avec des OSC reste une possibilité sur le plan théorique, mais ne s'est pas concrétisée en pratique. Le gouvernement maintient son approche visant à faire taire toutes les voix critiques dans le pays⁵⁰ – laquelle a franchi une étape supplémentaire lors de la course électorale et des événements post-électorales liés au scrutin de décembre 2016 avec l'annonce par le Président du parti au pouvoir du lancement d'un processus démarrage d'un processus baptisé «désorosisation» – en d'autres termes un processus de reprise du contrôle et de démantèlement de la Fondation macédonienne pour l'Open Society Institute. La démarche a été étayée par la création de «S.O.S.» (*Stop Operation Soros*), qui se présente comme une organisation de citoyens concernés mais qui, à en juger par les liens étroits de ses personnalités clés, n'est vraisemblablement rien d'autre qu'un nouvel exemple d'organisation financée par le parti au pouvoir. La pratique des organisations non gouvernementales organisées par le gouvernement («ONGOG») persiste.

2. Législation principale

La Constitution de la République de Macédoine⁵¹ est une constitution écrite qui représente la loi suprême du pays. Elle admet le droit international en tant que partie intégrante du droit interne, et comme prévalant sur les lois et réglementations. La Constitution assure une protection contre la discrimination. Elle consacre l'égalité des citoyens devant la Constitution et devant la loi, affirmant que tous les citoyens de la République de Macédoine sont égaux dans leurs libertés et leurs droits indépendamment de leur genre, race, couleur de peau, origine nationale et sociale, affiliation politique et religieuse, situation sociale et fortune. Elle prévoit, devant la Cour constitutionnelle, un mécanisme de protection à l'intention de tous ceux qui estiment que leurs libertés et droits fondamentaux n'ont pas été respectés. Proclamant le principe du monisme pour l'application du droit international, à savoir les actes internationaux signés et ratifiés, la Constitution prévoit l'usage national de ces documents, y compris donc ceux qui assurent une protection contre la discrimination et/ou consacrent le principe de l'égalité.

Jusqu'en 2010, les dispositions antidiscrimination étaient dispersées entre plusieurs lois. En avril 2010, la loi antidiscrimination⁵² – première loi générale en matière d'égalité – a été adoptée dans le cadre du processus d'alignement sur l'acquis de l'UE. Cette loi n'est pas conforme aux directives pour ce qui concerne la liste minimale des motifs protégés; les définitions et les formes de discrimination; les sanctions efficaces, proportionnées et dissuasives; l'utilisation de données statistiques; et le dialogue avec le secteur des ONG. L'organisme pour l'égalité institué par cette loi – à savoir la Commission pour la protection contre la discrimination – ne saurait par ailleurs être considéré comme répondant aux exigences de la directive 2000/43.

⁴⁸ La Décennie de l'inclusion des Roms, initiative régionale pour l'amélioration de la situation des Roms en matière de santé, de logement, d'éducation et d'emploi, s'est achevée en 2015.

⁴⁹ Des actes de violence interethnique ont eu lieu en 2011 et en 2012.

⁵⁰ Le rapport du Rapporteur spécial sur la liberté de pensée et d'opinion, les rapports annuels de la *Freedom House*, et *Nations in Transit* sont unanimes à constater ces développements.

⁵¹ Le texte de la Constitution de la République de Macédoine (*Устав на Република Македонија*) peut être consulté en français sur: <http://www.sobranie.mk/constitution-de-la-r-publique-de-mac-doine.nspx>

⁵² Loi sur la prévention et la protection contre la discrimination (*Закон за спречување и заштита од дискриминација*) Journal officiel de la République de Macédoine, n° 50/10, 44/2014, 150/2015. Arrêt de la Cour constitutionnelle: У.р.82/2010 (15 septembre 2010).

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

L'évaluation ex post de la mise en œuvre de la loi antidiscrimination montre que les objectifs de la loi⁵³ n'ont été que partiellement atteints et recense plusieurs points sur lesquels des améliorations pourraient être apportées, justifiant la situation comme le résultat du niveau insuffisant de fonds alloués. Trois recommandations en vue de changements législatifs ont été formulées: une modification de la loi antidiscrimination de façon à permettre l'instauration d'un soutien administratif à la Commission pour la protection contre la discrimination; l'obligation explicite du «renversement de la charge de la preuve» pour cette Commission; et le renforcement de ses mécanismes de responsabilisation. Une analyse globale a dès lors été menée dans une perspective d'harmonisation avec un accent particulier sur l'harmonisation de la loi antidiscrimination avec les normes internationales et l'harmonisation d'autres lois et réglementations nationales avec la loi antidiscrimination. L'analyse identifie de nombreux points requérant un amendement législatif, à caractère à la fois général (adaptation d'une terminologie insensible au handicap, par exemple) et plus spécifique (propositions d'articles particuliers).⁵⁴

3. Principes généraux et définitions

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

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

⁵³ La loi antidiscrimination ne contenant aucune disposition relative à ses objectifs, l'équipe chargée de l'évaluation ex-post a considéré, sur base de l'analyse d'autres documents, qu'il s'agissait de la prévention de la discrimination et de la protection contre la discrimination.

⁵⁴ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation* (OSCE et Commission pour la protection contre la discrimination), disponible sur: https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equality_and_non-discrimination [Анализа на хармонизираноста на домашното законодавство за еднаквоста и недискриминацијата](https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equality_and_non-discrimination).

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

Le ministère du Travail et de la politique sociale a adopté en 2016 une nouvelle stratégie intitulée «Stratégie pour l'égalité et la non-discrimination 2016-2020», dont le texte cible davantage des domaines que des motifs et qui marque une avancée positive en mentionnant l'orientation sexuelle dans sa partie introductive. Selon ce document, la mise en œuvre de la Stratégie nationale 2012 pour l'égalité et la non-discrimination fondée sur l'origine ethnique, le genre, l'âge et le handicap (première politique publique globale en matière d'égalité) a fait l'objet d'une évaluation. Celle-ci n'a toutefois été publiée ni intégralement ni partiellement.

4. Champ d'application matériel

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

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

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

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

Il existe dans le domaine de l'emploi, outre la loi antidiscrimination, une loi sur les relations de travail⁵⁵ qui interdit toute discrimination conformément aux normes fixées par les directives. Les deux lois s'appliquent tant au secteur public qu'au secteur privé.

5. Mise en application de la loi

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

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

Une procédure administrative engagée auprès de la Commission pour la protection contre la discrimination est gratuite. Cette instance peut formuler des avis et des recommandations. La procédure a une durée maximale de 90 jours. Si la recommandation n'est pas suivie d'effet, la Commission en question peut engager une procédure auprès de l'instance compétente (la loi ne fournissant aucune autre précision). La Commission pour la protection contre la discrimination a été saisie de 60 dossiers en 2016, soit un nouveau recul par rapport à 2015 (70 dossiers). Elle attribue cette baisse

⁵⁵ Loi sur les relations de travail (*Закон за работните односи*), Journal officiel de la République de Macédoine n° 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014; arrêts de la Cour constitutionnelle : U. n° 139/2005, U. n° 161/2005, U. n° 134/2005, U. n° 187/2005, U. n° 111/2006, U. n° 188/2006, U. n° 170/2006, U. n° 200/2008, U. n° 20/2009, U. n° 176/2009, U. n° 263/2009, U. n° 62/2013.

des signalements à une insuffisance de ressources financières et à d'autres problèmes⁵⁶ sans toutefois en préciser la nature ni la manière dont elle est parvenue à cette conclusion. Or les ressources financières ne peuvent expliquer pourquoi moins de personnes ont adressé une plainte à la Commission en 2016 qu'en 2015. Il s'agit d'un recul supplémentaire par rapport à 2015 – année durant laquelle une première baisse du nombre de plaintes (plus d'un tiers) avait déjà été enregistrée. Une explication davantage plausible pourrait être une perte de confiance plus nette encore dans l'institution, processus enclenché par l'affaire des écoutes téléphoniques et alimenté ensuite par la désignation des membres à l'occasion de la deuxième composition de la Commission pour la protection contre la discrimination.⁵⁷

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

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

Le Médiateur est une autre tribune à laquelle adresser des allégations de discrimination dans le secteur public. En 2016, le pourcentage de plaintes adressées au Médiateur pour cause de discrimination est resté faible puisqu'il s'agit de 69 cas, soit 1,83 % du nombre total d'affaires dont il a été saisi. Comme les années précédentes, la majorité des dossiers introduits en 2016 concernaient le domaine de l'emploi et le motif de l'origine ethnique. Le fait qu'à l'inverse de la Commission pour la protection contre la discrimination le nombre de cas signalés au Médiateur soit en légère hausse (de 1,2 % en 2015 à 1,83 %) renforce l'argument selon lequel une perte de confiance à l'égard de la première explique la diminution du nombre de cas qui lui ont été signalés au cours des deux dernières années.

La loi antidiscrimination est muette quant au test de situation. Il convient de noter que l'article 206 de la loi sur la procédure civile dispose que tous les faits importants pour parvenir à une décision peuvent servir de preuves, mais qu'il appartient aux cours et tribunaux de décider quels faits doivent être démontrés et quels faits ne doivent pas l'être. La loi sur la procédure civile poursuit en citant des exemples de preuve, mais le test de situation n'y figure pas. Dans la pratique, ce test a été utilisé au départ, avant même l'adoption de la loi antidiscrimination, uniquement par des OSC. En 2014, le

⁵⁶ Voir: Commission pour la protection contre la discrimination (Комисија за заштита од дискриминација) (2017) *Rapport annuel 2016* : la baisse s'explique aussi, entre autres, par un manque de ressources financières pour faire fonctionner la Commission [Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата.] Disponible sur le site de la Commission pour la protection contre la discrimination: http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

⁵⁷ À propos de la deuxième composition, voir: Flash report «Appointment of new members of the equality body», <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

Comité d'Helsinki macédonien (MHC) et l'OSCE - Mission à Skopje ont mené un projet conjoint concernant le test de situation, et ont annoncé qu'ils se serviraient des conclusions de celui-ci comme preuves devant les tribunaux. Aucune autre information n'a été divulguée.

En 2016, le Médiateur a procédé à un test de situation pour vérifier une demande que lui avait adressée une OSC. En l'espèce, la MHC a introduit un recours pour discrimination directe fondée sur le sexe dans le domaine des soins de santé, ayant constaté que les pères et les hommes en général n'étaient pas admis en tant qu'accompagnant d'enfants hospitalisés dans des établissements publics de santé. Lorsqu'un enfant est hospitalisé, il doit être accompagné par une femme. Le Médiateur a procédé à un test de situation par voie téléphonique et constaté que tel était effectivement le cas. S'appuyant sur son test de situation comme élément probant, il a conclu à l'existence d'une discrimination *indirecte*⁵⁸ fondée sur le sexe dans les services publics de santé.⁵⁹

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

Des ONG soutiennent les plaintes déposées et portent certaines affaires de discrimination à l'attention du grand public. Les médias continuent de signaler des faits discriminatoires en recherchant un certain sensationnalisme, en dépit de progrès manifestes à cet égard.

6. Organismes de promotion de l'égalité de traitement

La loi antidiscrimination a créé le premier organisme de promotion de l'égalité de traitement du pays, en l'occurrence la Commission pour la protection contre la discrimination. Celle-ci est habilitée à donner des conseils et formuler des recommandations concernant des cas de discrimination; à fournir des informations et engager des procédures auprès des organismes publics compétents; à produire des rapports; à prêter des services éducatifs et de formation; à initier des changements législatifs; à coopérer avec des administrations locales, des ONG, d'autres organismes de promotion de l'égalité et des organisations internationales; à collecter des données statistiques, à créer des bases de données et à effectuer des recherches. La Commission traite de dossiers de discrimination fondée sur les motifs suivants: sexe, race, couleur de peau, genre, appartenance à un groupe marginalisé, origine ethnique, langue, citoyenneté, origine sociale, religion ou conviction religieuse, autres types de convictions, éducation, affiliation politique, situation personnelle ou sociale, handicap mental ou physique, âge, situation familiale ou état matrimonial, fortune, état de santé ou tout autre motif stipulé dans la législation ou dans un traité international ratifié.

La deuxième composition de la Commission pour la protection contre la discrimination a été décidée en janvier 2016. La Commission a été saisie de 60 dossiers en 2016 – soit un chiffre en diminution par rapport à 2015 (année où les 70 dossiers traités représentaient déjà un recul d'un tiers par rapport à 2014). La Commission pour la protection contre la

⁵⁸ Le MHC, partie plaignante, invoquait toutefois une discrimination directe. Faute de pouvoir accéder aux dossiers de l'affaire, il n'est pas possible de comprendre la décision du Médiateur pour ce qui concerne le type de discrimination qu'il a établi.

⁵⁹ Comité d'Helsinki de la République de Macédoine (2016), «Fiche informative concernant la discrimination» (Информатор за дискриминација), mai 2016, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

discrimination a communiqué en 2016 la répartition des dossiers par motif de discrimination (sous la forme de pourcentages) sans fournir de liste complète. Selon cette information, 18 % des cas concernaient la situation personnelle ou sociale; 17 % l'origine ethnique; 15 % l'affiliation politique; 13 % le genre; 12 % l'état de santé; 10 % d'autres convictions; etc. La répartition des cas suit approximativement la même tendance que les années précédentes: les motifs de «la situation personnelle ou social» et de «l'origine ethnique» ont permuté aux deux premières places des motifs les plus fréquemment invoqués. Les cas de discrimination alléguée répartis par domaine sont présentés de la même manière et s'établissent comme suit: 40 % concernent l'emploi et les relations de travail; 25 % l'accès aux biens et aux services; 13 % l'information publique et les médias; 8 % le système judiciaire et l'administration; et 8 % l'éducation, les sciences et les sports.

Aucun organisme national de promotion de l'égalité n'était en place avant l'adoption de la loi antidiscrimination. Les obligations en matière de discrimination dans le secteur public relevaient du mandat du Médiateur. La loi antidiscrimination ne régit pas les relations entre le Médiateur et la Commission pour la protection contre la discrimination (elles sont partiellement régies par un protocole d'accord). En vertu de son mandat général, le Médiateur peut être saisi de plaintes individuelles, les instruire, formuler des recommandations et des avis, engager des procédures, et assurer un suivi et effectuer des recherches sur des questions spécifiques, en se focalisant sur la protection par rapport aux motifs cités dans la Constitution et sur les infractions commises par des instances publiques. Les amendements apportés à la loi sur le Médiateur, effectués en 2016 avec entrée en vigueur en avril 2017, vont promouvoir davantage le mandat de l'institution.⁶⁰

7. Points essentiels

Les aspects les plus préoccupants dans le contexte national sont:

- le fait que l'orientation sexuelle ne soit pas un motif expressément protégé dans la loi antidiscrimination;
- l'absence d'harmonisation de la législation nationale en droit interne et avec les normes internationales;
- le sous-financement qui empêche les institutions nationales en matière de droits de l'homme d'exercer pleinement leurs compétences;
- l'impunité des crimes de haine et des discours haineux, à l'égard de l'orientation sexuelle plus particulièrement;
- les problèmes d'État de droit et la captation de l'État qui érodent la confiance dans les institutions, y compris dans le système judiciaire;
- le manque d'indépendance de l'organisme pour l'égalité qui, dans son positionnement et son fonctionnement actuels, ne peut être considéré comme conforme aux directives ;
- la sévérité des représailles à l'encontre de la société civile et des activistes qui élèvent des voix critiques.

⁶⁰ Loi sur le Médiateur (*Закон за народниот правобранител*), Journal officiel de la République de Macédoine n° 60/2003, 114/2009, 181/2016, 189/2016, arrêts de la Cour constitutionnelle: U. n° 111/2007.

ZUSAMMENFASSUNG

1. Einleitung

Mazedonien (ehemalige jugoslawische Republik)⁶¹ ist ein multiethnisches Binnenland im Südosten Europas und erklärte sich 1991, nach der Auflösung Jugoslawiens, für unabhängig. Das Land ist seit 2005 Bewerber um die Mitgliedschaft in der Europäischen Union mit einer Empfehlung, die Verhandlungen ab 2009 aufzunehmen, und wurde 2008 unter Vorbehalt eingeladen, dem Nordatlantikpakt beizutreten. Obwohl beide Prozesse für das Land außenpolitische Prioritäten darstellen, sind sie ins Stocken geraten, anfänglich aufgrund des Namensstreits. Wie in mehreren aufeinanderfolgenden Fortschrittsberichten der Europäischen Kommission erwähnt,⁶² wurde diese Schwierigkeit später jedoch durch grundlegende Fragen der Rechtsstaatlichkeit und eine Vereinnahmung des Staates verschärft.⁶³ Offizielle innenpolitische Prioritäten sind nach wie vor die Umsetzung⁶⁴ des Rahmenabkommens von Ohrid,⁶⁵ die Verringerung der Arbeitslosenquote⁶⁶ und die Bekämpfung der Armut.⁶⁷

Ende 2014 trat das Land in eine unruhige Phase ein, mit massiven Protesten von Studenten und Gymnasiasten, Freiberuflern, unabhängigen Gewerkschaften, Beschäftigten, die während der Übergangs- und Transformationsprozesse entlassen worden waren, usw. Die im Februar 2015 aufgedeckte Abhöraffaire offenbarte eine noch ernstere innenpolitische Situation. Die größte Oppositionspartei begann, mutmaßliche Mitschnitte von Gesprächen von mehr als 20 000 Menschen zu veröffentlichen, die vom staatlichen Geheimdienst offenbar illegal abgehört worden waren.⁶⁸ Der Inhalt der veröffentlichten Aufzeichnungen bestätigte die Vorwürfe einer Vereinnahmung des Staates,⁶⁹ einschließlich einer vollständigen Parteikontrolle – nicht nur über die Justiz, sondern über *sämtliche* Aspekte der Gesellschaft, auch in Bezug auf Gleichheit und

⁶¹ Die amtliche Bezeichnung des Landes lautet „Republik Mazedonien“. Bis zur Beilegung des Namensstreits mit Griechenland wurde das Land im Rahmen der UN-Resolution A/RES/47/225 jedoch unter der provisorischen Bezeichnung „ehemalige jugoslawische Republik Mazedonien“ als Mitglied der Vereinten Nationen zugelassen. Diese Bezeichnung wird von der Europäischen Kommission und deshalb auch in diesem Bericht verwendet.

⁶² Europäische Kommission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report* https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf. Letzter Zugriff auf alle Hyperlinks am 07.03.2017.

⁶³ Der Begriff „Vereinnahmung des Staates“ bezeichnet der Definition von Transparency International zufolge: „eine Situation, in der mächtige Personen, Institutionen, Unternehmen oder Gruppen innerhalb oder außerhalb eines Landes sich der Korruption bedienen, um dessen Politik, rechtliches Umfeld und Wirtschaft zum Vorteil ihrer eigenen Interessen zu gestalten“. So hat auch die Europäische Kommission die Situation in Mazedonien in ihrem Bericht von 2016 beschrieben. Quelle: Europäische Kommission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report*.

⁶⁴ Obwohl nicht das Rahmenabkommen von Ohrid selbst umgesetzt wird, sondern verfassungsrechtliche und gesetzliche Bestimmungen und strategische Dokumente, die sich aus der Unterzeichnung des Abkommens ergeben, wird hier der Kürze halber der Ausdruck „Umsetzung des Rahmenabkommens“ verwendet.

⁶⁵ Das Rahmenabkommen von Ohrid wurde Ende 2001 zur Beendigung des bewaffneten Konflikts unterzeichnet und hat das Ziel, die Lage ethnischer Minderheiten zu verbessern und den multiethnischen Charakter des Landes im öffentlichen Leben widerzuspiegeln, insbesondere durch Maßnahmen zur Förderung der Gleichbehandlung und gleichberechtigten Repräsentation von Minderheiten.

⁶⁶ Nach Angaben des Staatlichen Amtes für Statistik belief sich die Arbeitslosenquote im letzten Quartal 2016 auf 23,4 % der Erwerbsbevölkerung, der Anteil der Erwerbstätigen dagegen auf 43,4 %.

⁶⁷ Der Laeken-Indikator für Armut für 2014 (letzte verfügbare Statistik) ist 22,1 %.

⁶⁸ Balkan Insight, (2015), „Macedonia PM Accused of Large-Scale Wire-Tapping“ (09.02.2015), abrufbar auf der Webseite von Balkan Insight unter: <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

⁶⁹ Der Begriff „Vereinnahmung des Staates“ bezeichnet der Definition von Transparency International zufolge „eine Situation, in der mächtige Personen, Institutionen, Unternehmen oder Gruppen innerhalb oder außerhalb eines Landes sich der Korruption bedienen, um dessen Politik, rechtliches Umfeld und Wirtschaft zum Vorteil ihrer eigenen Interessen zu gestalten“. So hat auch die Europäische Kommission die Situation in Mazedonien in ihrem Bericht von 2016 beschrieben. Quelle: Europäische Kommission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report*.

Nichtdiskriminierung.⁷⁰ Die Ombudsperson leitete zwei Verfahren ein, da massive Verstöße gegen das Recht auf Privat- und Familienleben festgestellt worden waren, und war mit Behinderungen seitens der staatlichen Institutionen konfrontiert.⁷¹ Am 5. Mai 2015 führten Mitschnitte, die mit dem Mord an Martin Neshkovski zusammenhingen,⁷² zu massiven spontanen Protesten, die, obwohl friedlich, von der Polizei, die in jener Nacht viele Demonstranten verhaftete, in einer unverhältnismäßigen Reaktion gewaltsam zerschlagen wurden.⁷³ Dies löste weitere Proteste aus, in deren Folge es zum Pržino-Abkommen kam, auf dessen Grundlage eine Sonderstaatsanwaltschaft eingerichtet wurde, um Straftaten zu verfolgen, die aus den abgehörten Gesprächen hervorgingen. Im April 2016, kurz bevor die ersten Anklagen vor Gericht kamen, erließ der (über die Liste der Regierungspartei gewählte) mazedonische Präsident für mehr als 50 Politiker, darunter die jeweils mehrerer Straftaten bezichtigten Spitzenvertreter der Regierungspartei, eine Amnestie. Dies brachte die Menschen erneut auf die Straße. Aus den Protesten entwickelte sich die sogenannte „bunte Revolution“,⁷⁴ die in weitere politische Vereinbarungen mündete. Im Dezember 2016 fanden vorgezogene Wahlen statt, die zu einer Pattsituation im Parlament und damit zu einer Ausweitung der politischen Krise führten.

Das Land hat eine Bevölkerung von mehr als zwei Millionen.⁷⁵ Die ethnische Zugehörigkeit ist wichtig, weil zahlreiche Rechte und Fördermaßnahmen an den zahlenmäßigen Anteil einer ethnischen Gemeinschaft innerhalb der Gesamtbevölkerung geknüpft sind. Die ethnische Zusammensetzung⁷⁶ ist wie folgt: 64 % ethnische Mazedonier, 25 % ethnische Albaner, 4 % ethnische Türken, 3 % ethnische Roma, 2 % ethnische Serben, 1 % ethnische Bosnier, 0,5 % ethnische Walachen und 1 % „sonstige“ (in der Verfassung verwendeter Begriff). Es wurden zahlreiche Aktivitäten für die Rechte der Roma durchgeführt, auch im Rahmen des „Jahrzehnts der Roma-Integration“, das 2015 zu Ende ging. Die Ergebnisse sind, außer was die politische Beteiligung betrifft,⁷⁷ jedoch umstritten.⁷⁸ Auch wenn die Regierung behauptet,

⁷⁰ In einem der veröffentlichten Mitschnitte ist vermutlich die Stimme des (damaligen) Leiters der Gleichbehandlungsstelle zu hören, wie er den Wahlkampf der Regierungspartei unterstützt, indem er unter anderem Menschen, denen soziale Unterstützung gewährt wurde, Anweisungen erteilt, wie sie wählen sollen, und damit seine Position im Ministerium für Arbeit und Sozialpolitik benutzt (bzw. missbraucht). In einem Gespräch, das deutlich zeigt, wie Roma unter Verwendung des Begriffs „Zigeuner“, der im nationalen Kontext als abfällige Bezeichnung gilt, unter Druck gesetzt werden, um den Anweisungen entsprechend zu wählen, ist darüber hinaus vermutlich die Stimme des damaligen Innenministers zu hören. Quelle: 24 Vesti – Nationaler TV-Sender, „Roma fordern Rücktritt von Minister Jankulovska“ (Ромите бараат оставка од министерката Јанкуловска), <http://24vesti.mk/romite-baraat-ostavka-od-minsiterkata-jankulovska>.

⁷¹ Ombudsperson der Republik Mazedonien (2016), *Jahresbericht der Ombudsperson für das Jahr 2015*.

⁷² Martin Neshkovski war ein junger Anhänger der Regierungspartei, der in der Nacht vom 6. Juni 2011 an einer Versammlung zur Feier deren Wahlerfolgs teilnahm. In der gleichen Nacht verbreiteten sich in den sozialen Medien Gerüchte, dass auf dem Hauptplatz ein Mord stattgefunden hatte; der Sprecher des Innenministeriums leugnete die Ermordung Neshkovskis jedoch mehr als 24 Stunden lang. Der Versuch, den Mord zu vertuschen, löste Proteste von einer Dimension und Dauer aus, wie sie das Land seit mehr als einem Jahrzehnt nicht mehr gesehen hatte. Vier Jahre später war in dem veröffentlichten Gesprächsmitschnitt zu hören, wie sich vermutlich der damalige Minister Jankulovska, der ehemalige Premierminister und ein Sprecher darüber unterhielten, wie der Mord vertuscht werden konnte.

⁷³ Reuters (2015), „Macedonian protesters demand resignation of cabinet, clash with police“, 5. Mai 2015, <http://www.reuters.com/article/us-macedonia-government-protests-idUSKBN0N02BH20150505>.

⁷⁴ Deutsche Welle (2016), „Protesters hit Macedonia's capital with paint balls and soap suds in a ‚Colourful Revolution‘“, 20. April 2016 <http://www.dw.com/en/protesters-hit-macedonias-capital-with-paint-balls-and-soap-suds-in-a-colorful-revolution/a-19201617>.

⁷⁵ Es liegen zwar keine offiziellen Zahlen vor, Schätzungen gehen aber davon aus, dass in den letzten Jahren zwischen 250 000 und 500 000 Menschen das Land verlassen haben, um im Ausland zu arbeiten.

⁷⁶ Alle Zahlen sind gerundete Prozentangaben aus der Volkszählung von 2002. Für 2011 war eine neue Volkszählung geplant; aufgrund von Unklarheiten bei der methodischen Umsetzung wurde sie jedoch abgesagt. Alle Statistiken des Staatlichen Amtes für Statistik sind zu finden unter: www.stat.gov.mk/.

⁷⁷ Es gibt einen Roma-Minister in der Regierung, eine Roma-Gemeinde (Shuto Orizari), Roma-Abgeordnete usw.

⁷⁸ Das „Jahrzehnt der Roma-Integration“ war eine regionale Initiative der Regierung, mit der die Situation der Roma-Bevölkerung in den Bereichen Gesundheit, Wohnraumversorgung, Bildung und Beschäftigung verbessert werden sollte und die 2015 endete.

kontinuierlich an der Verbesserung der Minderheitenrechte zu arbeiten,⁷⁹ scheinen Hassreden allgegenwärtig zu sein und werden weitgehend toleriert. Homophobe Äußerungen und Hassreden gegen Homosexuelle sind nach wie vor sehr verbreitet. Zudem wurde ein von einer örtlichen zivilgesellschaftlichen Organisation (ZGO) gegründetes Zentrum für LGBT-Personen bereits mehrmals angegriffen. Diese Angriffe wurden noch immer nicht gründlich untersucht und es hat so gut wie keine Anklagen gegeben.

Die Zusammenarbeit mit ZGOs ist theoretisch eine Möglichkeit geblieben, hat in der Praxis aber nicht stattgefunden. Die Politik der Regierung war weiterhin darauf ausgerichtet, alle kritischen Stimmen im Land zum Schweigen zu bringen.⁸⁰ Im Zuge des Wahlkampfes und der auf die Wahlen vom Dezember 2016 folgenden Ereignisse wurde dabei noch einen Schritt weitergegangen: Der Präsident der Regierungspartei kündigte den Beginn einer sogenannten „Entsorosisierung“ an, womit er die Übernahme der Kontrolle und Demontage der Stiftung *Open Society Foundations* in Mazedonien meinte. Zusätzlich unterstützt wurde dies durch die Gründung von „S.O.S.“ (Stop Operation Soros), die sich selbst als eine Organisation betroffener Bürger präsentiert, bei der es sich, den engen Verbindungen ihrer Schlüsselfiguren nach zu urteilen, aber höchstwahrscheinlich lediglich um eine weitere von der Regierungspartei finanzierte Organisation handelt. Die Praxis der staatlich organisierten NGOs (auch „GONGOs“ genannt) besteht weiterhin.

2. Wichtigste Gesetze

Die Verfassung der Republik Mazedonien⁸¹ ist eine geschriebene Verfassung und oberstes Gesetz des Landes. Sie akzeptiert das internationale Recht als Bestandteil des nationalen Rechts und räumt ihm Vorrang vor den Gesetzen und Verordnungen ein. Die Verfassung schützt vor Diskriminierung. Mit der Bestimmung, dass die Bürger der Republik Mazedonien die gleichen Freiheiten und Rechte besitzen, ungeachtet von Geschlecht, Rasse, Hautfarbe, nationaler oder sozialer Herkunft, politischer und religiöser Überzeugung, Grundeigentum und sozialem Status, betont sie die Gleichheit der Bürger vor der Verfassung und den Gesetzen. Jeder, der sich in seinen Menschenrechten und Grundfreiheiten verletzt fühlt, hat durch die Verfassung die Möglichkeit, vor dem Verfassungsgericht zu klagen. In Übereinstimmung mit einem monistischen Rechtsverständnis hat internationales Recht (die unterzeichneten und ratifizierten internationalen Abkommen) direkte Anwendung im nationalen Rechtssystem und bietet damit auch Schutz vor Diskriminierung bzw. Verstößen gegen den Gleichbehandlungsgrundsatz.

Bis 2010 waren die Antidiskriminierungsvorschriften über mehrere Gesetze verteilt. Im Rahmen des Prozesses der Annäherung an den Besitzstand der Union wurde im April 2010 das Antidiskriminierungsgesetz⁸² (ADG) – das erste umfassende Gleichstellungsgesetz – beschlossen. Das Gesetz erfüllt in folgenden Punkten nicht die Anordnungen der Richtlinien: mindestens zu schützende Diskriminierungsgründe, Definitionen und Formen von Diskriminierung, wirksame, verhältnismäßige und abschreckende Sanktionen, Verwendung statistischer Daten und Dialog mit NROs. Die im Zuge des ADG eingerichtete Gleichbehandlungsstelle – die Kommission zum Schutz vor Diskriminierung (KSchD) – erfüllt ebenfalls nicht die Anforderungen der Richtlinie 2000/43.

⁷⁹ 2011 und 2012 kam es zu Fällen von Gewalt zwischen ethnischen Gruppen.

⁸⁰ Der Bericht des Sonderberichterstatters für Gedanken- und Meinungsfreiheit, die Jahresberichte von *Freedom House*, der Nachhaltigkeitsindex der Organisation der Zivilgesellschaft und *Nations in Transit* haben allesamt diese Entwicklungen dokumentiert.

⁸¹ Englische Fassung der Verfassung der Republik Mazedonien (*Устав на Република Македонија*): *Constitution of the Republic of Macedonia* <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.aspx>.

⁸² Gesetz zur Verhinderung von und zum Schutz vor Diskriminierung (Закон за спречување и заштита од дискриминација), Gesetzblatt der Republik Mazedonien Nr. 50/10, 44/2014, 150/2015, 31/2016. Beschluss des Verfassungsgerichts: У.6р.82/2010 (15.09.2010).

Das ADG schützt folgende Diskriminierungsgründe: Hautfarbe, Geschlecht, Zugehörigkeit zu einer marginalisierten Gruppe, ethnische Zugehörigkeit, Sprache, Staatsbürgerschaft, soziale Herkunft, Bildung, politische Zugehörigkeit, persönlicher und sozialer Status, Familienstand, geistige oder körperliche Behinderung, Grundeigentum und Gesundheitszustand. Da es Glaube nur eingeschränkt und sexuelle Orientierung überhaupt nicht erwähnt, schützt das Gesetz nicht ausdrücklich alle in den Richtlinien vorgegebenen Diskriminierungsgründe. Allerdings ist der Artikel 3 eine offene Klausel („jedes andere in einem Gesetz oder einem ratifizierten internationalen Abkommen geschützte Merkmal“) und enthält Gründe, die von den Richtlinien nicht erfasst werden.

Die Ex-post-Evaluierung der Umsetzung des ADG ergab, dass die Ziele des Gesetzes⁸³ nur zum Teil erreicht wurden, zählte viele Punkte auf, in denen die Umsetzung verbessert werden könnte, und begründete die Situation mit den zu geringen bereitgestellten Mitteln. Es wurden drei Empfehlungen für gesetzliche Änderungen formuliert: Änderung des ADG, um Voraussetzungen für eine administrative Unterstützung der KSchD zu schaffen; ausdrückliche Verpflichtung der KSchD zur Verlagerung der Beweislast; Verbesserung der Rechenschaftsmechanismen der KSchD. Im Anschluss daran wurde eine umfassende Harmonisierungsanalyse durchgeführt, die sowohl die Harmonisierung des ADG mit internationalen Standards als auch die Harmonisierung anderer nationaler Gesetze und Verordnungen mit dem ADG untersuchte. Die Analyse ergab zahlreiche Punkte für gesetzliche Änderungen, sowohl allgemeiner Art (z. B. Änderung der unsensiblen Terminologie im Bereich Behinderung) als auch zu konkreten Punkten (konkrete Vorschläge für einzelne Artikel).⁸⁴

3. Wichtigste Grundsätze und Begriffe

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

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

Vor der Verabschiedung des ADG waren die Definitionen von Diskriminierung auf mehrere Gesetze verteilt. Da das ADG in seinen Übergangs- und Schlussvorschriften keine Vereinheitlichung der Bestimmungen dieser unterschiedlichen Gesetze vorsieht,

⁸³ Da das Antidiskriminierungsgesetz selbst keine Bestimmung zu seinen Zielsetzungen enthält, kam das mit der Ex-post-Evaluierung betraute Team durch Auswertung anderer Dokumente zu dem Ergebnis, dass es sich bei den Zielen um die Verhütung von und den Schutz vor Diskriminierung handelt.

⁸⁴ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation* (OSZE und KSchD), abrufbar unter: https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equality_and_non-discrimination [Анализа на хармонизираноста на домашното законодавство за еднаквоста и недискриминацијата](#).

stehen die Institutionen, die das Gesetz umsetzen sollen, vor der Frage, welches Gesetz bzw. welche Bestimmung sie in einem bestimmten Fall anwenden sollen, d. h. welche Bestimmungen Vorrang haben. *Lex specialis derogat legi generali* und *lex posterior derogat legi priori* sind traditionelle juristische Grundsätze, aber Richter verlassen sich, selbst bei scheinbar widersprüchlichen Bestimmungen, in der Regel eher auf die bestehende Rechtsprechung als auf allgemeine rechtliche Grundsätze. Allgemeine Rechtsgrundsätze werden nur dann angewendet, wenn eine Partei versucht, eine Gesetzeslücke auszunutzen (gemäß dem Gerichtsverfassungsgesetz).

2016 beschloss das Ministerium für Arbeit und Sozialpolitik die neue „Strategie für Gleichstellung und Nichtdiskriminierung 2016-2020“. Das Dokument befasst sich nicht mit Gründen, sondern mit Bereichen und stellt eine positive Entwicklung dar, indem es sexuelle Orientierung im Einleitungsteil erwähnt. Dem Dokument zufolge wurde die Umsetzung der „Nationalen Strategie für Gleichstellung und Nichtdiskriminierung aus Gründen der ethnischen Zugehörigkeit, des Geschlechts, des Alters oder einer Behinderung“ (erste umfassende politische Strategie für Gleichbehandlung) einer Bewertung unterzogen. Diese Bewertung ist jedoch weder ganz noch teilweise veröffentlicht worden.

4. Sachlicher Geltungsbereich

Das Antidiskriminierungsgesetz (ADG) gilt sowohl für den privaten als auch für den öffentlichen Sektor und für alle Bereiche. Dem Gesetz zufolge ist das Diskriminierungsverbot insbesondere zu beachten in den Bereichen Beschäftigung und Arbeitsverhältnisse, Mitgliedschaft und Mitwirkung in Gewerkschaften, politischen Parteien, NROs, Stiftungen und anderen Mitgliederorganisationen, soziale Sicherheit, einschließlich von Sozialschutz, Renten- und Berufsunfähigkeitsversicherung, Krankenversicherung und Gesundheitsversorgung, Bildung, Zugang zu Gütern und Dienstleistungen und Wohnraumversorgung. Damit geht das Gesetz über die Richtlinien hinaus. Auch andere Gesetze enthalten ein Verbot von Diskriminierung und definieren den sachlichen Geltungsbereich. All diese Gesetze gelten sowohl für den öffentlichen als auch für den privaten Sektor, mit Ausnahme des Gesetzes über die Ombudsstelle, das nur im öffentlichen Bereich vor Diskriminierung schützt.

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

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

- Schutzmechanismen für spezielle Gruppen (Art. 15): Schutz von Schwangeren und Müttern, elternlosen Kindern, Jugendlichen, Alleinerziehenden und Menschen mit Behinderung; Chancengleichheit von Frauen und Männern; Beschäftigungsförderung; allgemeine und berufliche Bildung für Menschen mit Behinderung; ein erwartetes Mindest- und Höchstalter für den Zugang zu bestimmten Stufen der allgemeinen und beruflichen Bildung, sofern dieses zur Erreichung eines rechtmäßigen Ziels objektiv gerechtfertigt ist, und das erforderliche Alter das Ausmaß dieser Ungleichbehandlung im Hinblick auf die Natur der Fort- oder Ausbildung oder die Umstände ihrer Ausübung und das Ausmaß dieser Ungleichbehandlung nicht den Rahmen übersteigt, der für die Erreichung des rechtmäßigen Ziels notwendig ist; Fördermaßnahmen für bestimmte Personen oder Gruppen, die wegen eines Diskriminierungsgrundes benachteiligt sind, zum Zweck der Verbesserung der Chancengleichheit, solange diese Maßnahmen notwendig sind; Maßnahmen zum Schutz der Merkmale und der Identität von Personen, die einer ethnischen, religiösen oder sprachlichen Minderheit angehören, und deren Rechte zur Pflege und Entwicklung der eigenen Identität, allein oder gemeinsam mit anderen Mitgliedern der Gruppe, und Maßnahmen zur Schaffung günstiger Bedingungen für die Förderung dieser Identität und Maßnahmen im Bereich der Aus- und Weiterbildung, mit denen die Teilhabe ethnischer Minderheiten gewährleistet wird, sofern diese Maßnahmen notwendig sind.

Im Bereich Beschäftigung wird das Diskriminierungsverbot neben dem ADG auch vom Gesetz über Arbeitsverhältnisse⁸⁵ gewährleistet, das Diskriminierung gemäß den in den Richtlinien enthaltenen Vorgaben verbietet. Diese Gesetze gelten sowohl für den öffentlichen als auch für den privaten Sektor.

5. Rechtsdurchsetzung

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

Was die Behandlung von Diskriminierungsbeschwerden betrifft, bestehen Unklarheiten. Unterschiedliche Gesetze sehen für ähnliche Fälle unterschiedliche Verfahrensweisen vor. Möglich sind unter anderem behördliche Kontrollen, Ordnungsverfahren, zivilrechtliche Klagen, Verwaltungsverfahren oder Strafverfahren. Das ADG sieht mehrere Schutzverfahren vor, nämlich Verwaltungsverfahren, Klagen und Ordnungsverfahren.

Verwaltungsverfahren vor der KSchD sind kostenlos. Die Kommission kann Gutachten und Empfehlungen erstellen. Das Verfahren kann bis zu 90 Tage dauern. Wenn die Empfehlungen nicht befolgt werden, kann die KSchD ein Verfahren bei einer zuständigen Stelle anstrengen (das Gesetz führt dies nicht näher aus). 2016 gingen bei der KSchD 60 Beschwerden ein – ein weiterer Rückgang im Vergleich zu 2015 (70 Fälle). Die Kommission schreibt diesen Rückgang der gemeldeten Fälle mangelnden finanziellen Mitteln und anderen Sachverhalten zu,⁸⁶ ohne zu sagen, um welche Sachverhalte es sich dabei handelt oder wie sie zu diesem Ergebnis kommt. Finanzielle Mittel können

⁸⁵ Gesetz über Arbeitsverhältnisse (*Закон за работните односи*), Gesetzblatt der Republik Mazedonien Nr. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016; Urteile des Verfassungsgerichts: U. Nr. 139/2005, U. Nr. 161/2005, U. Nr. 134/2005, U. Nr. 187/2005, U. Nr. 111/2006, U. Nr. 188/2006, U. Nr. 170/2006, U. Nr. 200/2008, U. Nr. 20/2009, U. Nr. 176/2009, U. Nr. 263/2009, U. Nr. 62/2013.

⁸⁶ Siehe: Kommission zum Schutz vor Diskriminierung (*Комисија за заштита од дискриминација*) (2017), *Jahresbericht 2016*; „Der Rückgang ist unter anderem auch auf mangelnde finanzielle Mittel für die Arbeit der Kommission zurückzuführen.“ (*Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата.*) Abrufbar auf der Webseite der KSchD unter: http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

allerdings nicht erklären, warum sich 2016 weniger Menschen bei der KSchD beschwerten als 2015. Dies ist ein weiterer Rückgang im Vergleich zu 2015, als der erste Einbruch in der Zahl der Beschwerden (um über ein Drittel) verzeichnet wurde. Eine plausible Erklärung könnte sein, dass sich der Vertrauensverlust, der mit der Abhöraffaire (siehe oben) begann und sich mit der Bestellung der zweiten KSchD fortsetzte, weiter verschärft hat.⁸⁷

Auch vor den ordentlichen Gerichten kann auf der Grundlage des ADG Klage eingereicht werden. Bei gleichzeitigen Verfahren legt das Gesetz keine Rangfolge fest. Es legt aber fest, dass, wenn ein Verfahren vor Gericht angestrengt wird, kein Verfahren bei der KSchD angestrengt werden kann. Das Gesetz sagt jedoch nicht, was zu tun ist, wenn ein Verfahren bei der KSchD angestrengt wurde und danach (aber noch vor Abschluss des Verfahrens bei der KSchD) ein weiteres Verfahren vor Gericht angestrengt wird. Hinzu kommt, dass die Beziehungen zwischen Verfahren vor der Ombudsstelle und vor der KSchD nicht gesetzlich geregelt sind, sondern einer gemeinsamen Absichtserklärung der beiden Stellen unterliegen.

Nach dem ADG hängt das Ergebnis des Verfahrens davon ab, für welches Verfahren die betroffene Person sich entscheidet. Im Verwaltungsverfahren wird innerhalb von 30 Tagen eine Empfehlung zur Beseitigung des Verstoßes (d. h. der Diskriminierung) ausgesprochen, bei einer Klage wird gegebenenfalls Schadensersatz zugesprochen und bei Ordnungsverfahren können Geldbußen in Höhe von 70 bis 1000 Euro (in der Landeswährung zu entrichten) verhängt werden. Das Strafgesetzbuch sieht für Diskriminierung Geldstrafen und andere Sanktionen vor. Diese Bestimmungen wurden bisher noch nie angewandt.

Die Ombudsperson ist ein weiteres mögliches Forum für Beschwerden über Diskriminierung im öffentlichen Sektor. Auch 2016 war der Anteil der Diskriminierungsbeschwerden gering: Insgesamt wurden der Ombudsperson 69 derartige Beschwerden vorgelegt (1,83 % aller eingereichten Beschwerden). Wie schon in den vorangegangenen Jahren bezogen sich die meisten Diskriminierungsbeschwerden auf den Bereich der Beschäftigung und den Diskriminierungsgrund ethnische Zugehörigkeit. Die Tatsache, dass die Zahl der bei der Ombudsperson eingereichten Beschwerden im Gegensatz zur Zahl der bei der KSchD eingereichten geringfügig zugenommen hat (von 1,2 % im Jahr 2015 auf 1,83 %), unterstützt zusätzlich das Argument, dass es der Vertrauensverlust gegenüber der KSchD ist, der für den Rückgang der Fallzahlen in zwei aufeinanderfolgenden Jahren verantwortlich ist.

Das ADG schweigt zum Thema Testing-Verfahren. Zu erwähnen ist in diesem Zusammenhang, dass nach Artikel 206 Zivilprozessgesetz alle Fakten, die für eine Entscheidungsfindung von Bedeutung sind, als Beweismittel verwendet werden können, dass es aber den Gerichten obliegt zu entscheiden, welche Fakten bewiesen werden müssen und welche nicht. Das Zivilprozessgesetz nennt einige Beispiele für Beweismittel, Testing-Verfahren sind jedoch nicht darunter. Ursprünglich wurden Testing-Verfahren in der Praxis nur von ZGOs eingesetzt, sogar schon vor Verabschiedung des Antidiskriminierungsgesetzes. 2014 führten das mazedonische Helsinki-Komitee und die OSZE-Mission in Skopje ein gemeinsames Projekt zum Thema Testing-Verfahren durch, dessen Ergebnisse, so wurde angekündigt, vor Gericht als Beweismittel herangezogen werden sollten. Weitere Informationen wurden nicht veröffentlicht.

2016 führte die Ombudsperson ein Testing-Verfahren durch, um eine Beschwerde zu überprüfen, die sie von einer ZGO erhalten hatte. Konkret hatte das mazedonische Helsinki-Komitee eine Beschwerde wegen unmittelbarer Diskriminierung aufgrund des

⁸⁷ Zur zweiten Bestellung siehe: Flash-Report „Appointment of new members of the equality body“, <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

Geschlechts im Bereich der Gesundheitsversorgung eingereicht, da es festgestellt hatte, dass Väter und Männer im Allgemeinen als Begleitpersonen für Kinder, die in staatlichen Gesundheitseinrichtungen stationär behandelt werden, nicht zugelassen sind. Wird ein Kind ins Krankenhaus eingewiesen, so muss es von einer weiblichen Person begleitet werden. Die Ombudsperson führte ein telefonisches Testing-Verfahren durch und stellte fest, dass dies tatsächlich zutraf. Ausgehend auf ihrem Testing-Verfahren als Beweismittel kam die Ombudsperson zu dem Ergebnis, dass eine *mittelbare*⁸⁸ Diskriminierung aufgrund des Geschlechts in der staatlichen Gesundheitsversorgung vorlag.⁸⁹

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

NROs unterstützen Klagen und machen die Öffentlichkeit auf Diskriminierungsfälle aufmerksam. Die Medien berichten über Diskriminierungsfälle nach wie vor in sensationalistischer Weise, wenngleich Verbesserungen festzustellen sind.

6. Gleichbehandlungsstellen

Im Zuge des ADG wurde die erste Gleichbehandlungsstelle des Landes eingeführt – die Kommission zum Schutz vor Diskriminierung (KSchD). Die KSchD hat folgende Befugnisse: Beratung und Empfehlungen in Diskriminierungsfällen, Information und Initiierung von Verfahren bei den zuständigen Behörden, Erstellen von Berichten, Durchführung von Bildungs- und Schulungsmaßnahmen, Anstoßen von Gesetzesänderungen, Zusammenarbeit mit Kommunalverwaltungen, NROs, anderen Gleichbehandlungsstellen und internationalen Organisationen, Erhebung statistischer Daten, Einrichtung von Datenbanken und Forschungsarbeit. Die KSchD bearbeitet Fälle von Diskriminierung aufgrund folgender Merkmale: biologisches Geschlecht, Rasse, Hautfarbe, soziales Geschlecht, Zugehörigkeit zu einer marginalisierten Gruppe, ethnische Zugehörigkeit, Sprache, Staatsangehörigkeit, soziale Herkunft, Religion oder religiöse Überzeugung, andere Arten von Weltanschauung, Bildung, politische Zugehörigkeit, persönlicher und sozialer Status, geistige oder körperliche Behinderung, Alter, Familienstand, Grundeigentum, Gesundheitszustand oder jedes andere, in einem Gesetz oder einem ratifizierten internationalen Abkommen genannte Merkmal.

Im Januar 2016 wurde die KSchD zum zweiten Mal bestellt. 2016 gingen bei der Kommission 60 Beschwerden ein – ein weiterer Rückgang im Vergleich zu 2015 (70 Fälle; mehr als ein Drittel weniger als 2014). 2016 gab die KSchD die Verteilung der Beschwerden nach Diskriminierungsgrund in Prozentzahlen bekannt, legte jedoch nicht die vollständige Liste vor. Die entsprechenden Angaben lauten wie folgt: 18 % der Beschwerden entfallen auf persönlichen oder sozialen Status, 17 % auf ethnische Zugehörigkeit, 15 % auf politische Zugehörigkeit, 13 % auf Geschlecht, 12 % auf Gesundheitszustand, 10 % auf andere Weltanschauungen „und so weiter“. Die Verteilung der Fälle weist mehr oder weniger das gleiche Muster wie in früheren Jahren auf, wobei sich die Merkmale „persönlicher oder sozialer Status“ und „ethnische Zugehörigkeit“ als

⁸⁸ Die Beschwerdeführerin, das mazedonische Helsinki-Komitee, hatte jedoch *unmittelbare* Diskriminierung geltend gemacht. Da kein Zugang zu den Untersuchungsakten besteht, ist es unmöglich, die Entscheidung der Ombudsperson hinsichtlich der von ihr festgestellten Diskriminierungsform nachzuvollziehen.

⁸⁹ Helsinki-Komitee der Republik Mazedonien (2016), „Infoblatt Diskriminierung“ (*Информатор за дискриминација*), Mai 2016, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

am häufigsten und am zweithäufigsten gemeldeter Diskriminierungsgrund ablösen. Die mutmaßlichen Diskriminierungsfälle nach Bereich werden in gleicher Weise dargestellt und verteilen sich wie folgt: 40 % in Beschäftigungs- und Arbeitsverhältnissen, 25 % beim Zugang zu Gütern und Dienstleistungen, 13 % im Bereich öffentliche Information und Medien, 8 % in Justiz und Verwaltung und 8 % in Bildung, Wissenschaft und Sport.

Vor Verabschiedung des ADG gab es keine Gleichbehandlungsstelle. Die Antidiskriminierungspflichten des öffentlichen Sektors fielen in den Aufgabenbereich der Ombudsperson. Die Beziehung zwischen der Ombudsperson und der KSchD wird im ADG nicht geregelt (letztere arbeitet zum Teil auf der Grundlage einer gemeinsamen Absichtserklärung). Dem allgemeinen Mandat der Ombudsstelle zufolge kann diese Einzelbeschwerden entgegennehmen und untersuchen, Empfehlungen aussprechen und Gutachten erstellen, Verfahren einleiten sowie spezielle Themen beobachten und untersuchen, mit Schwerpunkt auf den in der Verfassung geschützten Diskriminierungsgründen und auf Verstößen, die von staatlichen Stellen begangen werden. Im Zuge von Änderungen des Gesetzes über die Ombudsperson, die 2016 beschlossen wurden und im April 2017 in Kraft treten, wird das Mandat der Einrichtung um die Förderung der Menschenrechte erweitert.⁹⁰

7. Schlüsselprobleme

Zu den wichtigsten Problemen in Mazedonien gehören folgende:

- sexuelle Orientierung ist im allgemeinen Antidiskriminierungsgesetz kein ausdrücklich geschützter Diskriminierungsgrund;
- die nationalen Rechtsvorschriften sind weder intern noch mit den internationalen Standards harmonisiert;
- die Unterfinanzierung verhindert, dass die nationalen Menschenrechtsinstitutionen ihre Aufgaben in vollem Umfang wahrnehmen;
- Hassverbrechen und Hassreden, vor allem im Zusammenhang mit sexueller Orientierung, bleiben straffrei;
- Rechtsstaatlichkeitsmängel und Vereinnahmung des Staates untergraben das Vertrauen in die Institutionen, einschließlich der Justiz;
- der Gleichbehandlungsstelle mangelt es an Unabhängigkeit und sie kann, in ihrer derzeitigen Aufstellung und Arbeitsweise, nicht als richtlinienkonform gelten;
- starke Repressalien gegen Zivilgesellschaft und Aktivisten bei kritischen Äußerungen.

⁹⁰ Gesetz über die Ombudsperson (*Закон за народниот правобранител*), Gesetzblatt der Republik Mazedonien Nrn. 60/2003, 114/2009, 181/2016, 189/2016, Entscheidungen des Verfassungsgerichts: U. Nr. 111/2007.

INTRODUCTION

The national legal system

The former⁹¹ Yugoslav Republic of Macedonia⁹² is a unitary, semi-parliamentarian, civil law country, which adopts the monism principle regarding the relationship between international and municipal law, the former being considered part of the latter, and superior to domestic laws and bylaws,⁹³ and where, if it is deemed fit and appropriate, courts can use the final judgments of the European Court for Human Rights (ECtHR), International Criminal Court (ICC), or any other international court with jurisdiction over the country.⁹⁴ Although in theory directly applicable, references to international law in the jurisprudence of the domestic courts are still very rare and, in practice, the courts do not seem to treat it as higher in the national legal hierarchy than the national laws.

The Constitution prescribes the principle of the separation of powers. The three branches of power are: legislative, executive and judicial.⁹⁵

Legislative power is vested in the Assembly of the Republic (the Parliament). The members are elected on what the Constitution and the laws set out as general, direct and free elections, and by secret ballot.⁹⁶ The Parliament has the power to adopt and amend the Constitution, ratify international treaties as well as to adopt and amend laws. There are special procedures in place that aim to ensure that no law touching upon issues of relevance for the non-majority ethnic communities in the country will be adopted without them. This voting mechanism is called the Badinter principle and it requires that a law gain two-thirds of the votes of the members with an affiliation to one of the non-majority ethnic communities. The Parliament has a Standing Inquiry Committee on Human Rights, tasked to follow and alert the Parliament on developments related to human rights. The Parliament also elects and appoints the members of the two national human rights institutions – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson.

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

⁹¹ As per the UN Resolution A/RES/47/225 (see footnote below), 'former' is spelled with a small letter to signal that this is a provisional description.

⁹² The constitutional name of the country is 'Republic of Macedonia'. However, pending settlement with Greece on the (on-going) name dispute, under the UN Resolution A/RES/47/225, the country was admitted as a UN member under the temporary reference 'The former Yugoslav Republic of Macedonia'. The temporary reference is used for the purposes of this report because it is the reference that the European Commission uses to refer to the country.

⁹³ Article 118 of the Constitution states: 'International agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law'. Source: Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia, www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspix. All hyperlinks were accessed on 24 March 2016.

⁹⁴ The former Yugoslav Republic of Macedonia, Law on Courts, 2006. Article 18(5). Full title: The former Yugoslav Republic of Macedonia, Law on Courts (*Закон за судовите*), Official Gazette of the Republic of Macedonia No. 58/2006, 62/2006, 35/2008, 150/2010; Constitutional Court Decisions: U.no.256/2007 (16.04.2008), U.no.74/2008 (10.09.2008), U.no.124/2008 (14.01.2009), U.no.12/2011 (29.02.2012).

⁹⁵ Please see section 11 below for information on the wire-tapping affair, which cast doubt on the respect for the separation of powers and the rule of law in the country in general.

⁹⁶ The wire-tapping affair also raises issues in relation to elections.

Equal Opportunities of Women and Men is based in the MLSP; each state administrative body has a legal obligation to appoint a coordinator for equal opportunities.⁹⁷

The judiciary consists of the courts.⁹⁸ There are 27 courts of first instance (14 with basic competences, and 13 with expanded competences), four courts of appeal, and one Supreme Court. There is also an Administrative Court (court of first instance), and a Higher Administrative Court (court of second instance) with competence in processing administrative cases. Aside from the ordinary courts, there is the Constitutional Court, the primary duty of which is to decide on the constitutionality of laws and bylaws.⁹⁹

There are two institutions that can be considered as national human rights institutions, both acting as quasi-judicial bodies - the CPAD (the national equality body), and the Ombudsperson (which has duties pertaining to human rights extending beyond equality and non-discrimination).

Local governance in the country is organised through decentralisation of local self-government units. These units are made up of 80 municipalities¹⁰⁰ and the City of Skopje (as a separate local self-government unit).

Protection in discrimination cases, depending on the personal and material scope of the case, can be sought under several procedures: criminal procedure,¹⁰¹ civil procedure,¹⁰² administrative procedure,¹⁰³ quasi-judicial procedure,¹⁰⁴ and a procedure before the Constitutional Court.¹⁰⁵

List of main legislation transposing and implementing the directives

The Law on Prevention and Protection against Discrimination¹⁰⁶ (the Anti-discrimination Law, ADL) was adopted on 8 April 2010, and entered into force on 21 April 2010 (implementation began on 1 January 2011). It was last amended on 22 February 2016. Under Article 3, an open-ended clause, the following discrimination grounds are explicitly protected: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, other forms of belief,

⁹⁷ The former Yugoslav Republic of Macedonia, Law on Equal Opportunities of Women and Men, 2013. Full title: The former Yugoslav Republic of Macedonia, Law on Equal Opportunities of Women and Men (*Закон за еднакви можности на жените и мажите*), Official Gazette of the Republic of Macedonia No.06/2012, 30/2013, 166/2014, 150/2015.

⁹⁸ The Judicial Council is the body established to secure and guard the autonomy and independence of the courts. Under the Law on the Academy of Judges and Public Prosecutors a public institution was established for vocational training of candidates for judges and public prosecutors.

⁹⁹ Please see section 11 below on the allegations of the complete control of the ruling party over the judiciary as well as on the way in which the appointment of judges has been operating.

¹⁰⁰ The former Yugoslav Republic of Macedonia, Law on Territorial Organisation of Local Self-government, 2004, Article 16. Full title: The former Yugoslav Republic of Macedonia, Law on Territorial Organisation of Local Self-government (*Закон за територијална организација на локалната самоуправа*), Official Gazette of the Republic of Macedonia, No.55/2004, 12/2005, 98/2008, 149-2014; Constitutional Court Decision: U.no. 40/2005 (26.10.2005).

¹⁰¹ Criminal procedure is an option for discrimination cases that amount to a criminal offence.

¹⁰² Under various laws, in civil proceedings (more details follow in the report below).

¹⁰³ Including for misdemeanours.

¹⁰⁴ Procedures before the CPAD and the Ombudsperson.

¹⁰⁵ Citizens have the right to lodge 'Requests for protection of human rights and freedoms' to the Constitutional Court when they believe that they have been discriminated against on the grounds stipulated in the Constitution. This is a procedure based on urgency, and is envisaged as a mechanism to safeguard the set of rights laid out in the Constitution from unconstitutional acts (laws and bylaws). However, the effectiveness of this mechanism is still under question (according to the ECtHR, a legal remedy needs to be effective not just in theory but also in practice) because of the very low success rate of applicants. In the more than 20 years that it has been in operation, the Constitutional Court has only once decided in favour of applicants seeking protection under such a request, and has discarded almost all of the filed cases.

¹⁰⁶ The former Yugoslav Republic of Macedonia, Anti-discrimination Law, 2010. Full title: Law on Prevention and Protection against Discrimination (*Закон за спречување и заштита од дискриминација*) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015, 31/2016, Constitutional Court Decision: U.no.82/2010.

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

The Law on Labour Relations¹⁰⁷ (Labour Law) was adopted on 28 July 2005, entered into force on 5 August 2005 and was last amended on 15 February 2016. Under Article 6(1), an open ended clause, the following grounds are covered by the law: racial or ethnic origin, colour, gender, age, health condition (i.e. disability), religious, political or other belief, membership of trade unions, national or social origin, family status, property and financial situation, sexual orientation or other personal circumstances. The Labour Law applies to labour relations among employers and employees established by conclusion of employment contracts (Article 1), which is understood as any contractual relationship between the employee and the employer where the employee takes part in the employer's organised working process voluntarily, for salary and other remunerations, personally and continuously carries out the work according to the instructions and under the supervision of the employer (Article 5(1)1).

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

¹⁰⁷ The former Yugoslav Republic of Macedonia, Labour Law, 2005. Full title: Law on Labour Relations (*Закон за работните односи*) Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016; Constitutional Court Decisions: U.no. 139/2005, U.no. 161/2005, U.no. 134/2005, U.no. 187/2005, U.no. 111/2006, U.no. 188/2006, U.no. 170/2006, U.no. 200/2008, U.no. 20/2009, U.no. 176/2009, U.no. 263/2009, U.no. 62/2013, U.no.114/2014.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

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

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

In theory, these provisions are directly applicable, but this is not so in practice.¹⁰⁸ Under the Constitution, every citizen may invoke the protection of freedoms and rights prescribed in the Constitution before the ordinary courts and before the Constitutional Court, through a procedure based upon the principles of priority and urgency. However, the ordinary courts have a practice of rejecting Constitution-based human rights claims. The Constitution also guarantees judicial protection of the legality of individual acts of the state administration and of other public institutions (Article 50). So, the letter of the law says that the constitutional provisions are directly applicable, but the practice says otherwise. The mechanisms enabling ordinary courts to directly apply the constitutional anti-discrimination provision have not been used.¹⁰⁹ In practice, regardless of the procedure invoked, courts insist that a lawsuit is brought invoking provisions of specific laws, and tend not to implement the Constitution directly. On the other hand, the Constitutional Court's positioning and practice is such that it does not enter into revisions of ordinary courts' verdicts and decisions.¹¹⁰ As a result, there are no requests for interpretation of constitutional provisions from the ordinary courts to the Constitutional Court and there is no practice of referencing the Constitutional Court by the ordinary courts.

Although judicial interpretation would be required, there is no reason to expect that constitutional equality clauses cannot be enforced against private actors (in addition to against the state). However, in view of the comments above on the actual use of these provisions before the ordinary courts, the practical relevance of this is questionable.

¹⁰⁸ See section 1(b) of the 2013 Report: <http://www.equalitylaw.eu/downloads/4174-fyr-macedonia-country-report-non-discrimination-2013-1-11-mb>.

¹⁰⁹ This does not mean that ordinary courts do not mention provisions from the Constitution.

¹¹⁰ See, for example, Constitutional Court cases: U.No.55/2015 (para.4) [24.06.2015]; U.No.152/2012-0-0 (para.4) [14.11.2012]; U.No.172/2002 (para.4) [25.12.2002]; U.No.37/1997 (para.3) [19.03.1997].

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The *Analysis of the Harmonization of National Equality and Non-discrimination Legislation*, published in 2016, emphasises the need for harmonisation of the discrimination grounds in two phases. The first phase should be a harmonisation of the Anti-discrimination Law with the country's obligations under international law (including the EU directives, in terms of the explicit inclusion of sexual orientation) and the second one should be a harmonisation of all domestic laws with the Anti-discrimination Law.¹¹¹

The following grounds of discrimination are explicitly prohibited in national law,¹¹² including under specific anti-discrimination law and the Constitution, as laid out below.

- The Constitution: sex, race, colour of skin, national or social origin, political and religious belief, property and social status (closed list of grounds) (Article 9); sex, race, colour, language, religion, national or social origin, property or social status (Article 54).
- Law on Prevention and Protection against Discrimination: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, other forms of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health condition (open-ended clause) (Article 3).
- Law on Courts: article on aims and functions of courts states that courts aim to secure equality, equal rights and non-discrimination on any ground (Article 3 (1) to (3)); everybody has equal access to the courts (Article 6(1)); during the election of judges and lay judges, there should be no discrimination on the basis of sex, race, colour of skin, national and social background, political and religious beliefs, or property or social status (Article 43(1)).
- Criminal code:¹¹³ article on breach of equality among citizens covers sex, race, colour, national or social origin, political and religious belief, property and social position, language or any other personal quality or occurrence (Article 137(1)); article on incitement of national, racial or religious hatred, divisions and intolerance covers national belonging, race and religious belief (Article 319(1)); article on spread of racist and xenophobic materials through computer systems covers racial, colour, national or ethnic origin, or religious belief (Article 394-r); article on racial and other discrimination covers race, colour, national or ethnic origin (Article 417(1)).
- Law on Execution of the Sanctions:¹¹⁴ race, colour, sex, language, religion, political or other beliefs, national or social origin, kindred, property and social status or other status. Grounds refer to the person whose sanction is being executed. Special mention is made of the religious feelings, personal convictions and moral norms of

¹¹¹ Kotevska B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹¹² Other laws which include provisions with discrimination grounds are the following: Law on Media (Article 4), Law on Audio and Audio-visual Media Services (Articles 45, 53, 61), Law on Culture (Article 4(1)), Law on Agencies for Temporary Employment (Article 3b(3)), Law on Insurance in Case of Unemployment (Article 1a(2)), Law on Employment and Work of Foreigners (Article 4(8)), Law on Public Prosecutors (Article 5(2)), Law on Border Control (Article 8(3)), Law on Customs Administration (Article 13(1)).

¹¹³ The former Yugoslav Republic of Macedonia, Criminal Code, 1996. Full title: Criminal Code (Кривичен законик), Official Gazette of Republic of Macedonia, No. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015; Constitutional Court Decisions: U.no. 220/200, U.no. 210/2001, U.no. 206/2003, U.no. 228/2005. Arts. 39(5), 137(1), 144(4), 319, 386, 394r(1), 417(1).

¹¹⁴ The former Yugoslav Republic of Macedonia, Law on Execution of the Sanctions, 2006. Full title: Law on Execution of the Sanctions (Закон за вработување на инвалидни лица), Official Gazette of Republic of Macedonia, No. 2/2006, 57/2010, 170/2013, 43/2014, 166/2014, 33/2015, 98/2015, 11/2016; Constitutional Court Decisions: U.no. 9/2006, 65/2006, 179/2011, 226/2015.

the persons against whom the sanctions are enforced and which must be respected (Article 4(2) and (3)).

- Law on Labour Relations: race or ethnic origin, colour, sex, age, health condition i.e. disability, religious, political or other belief, membership of a trade union, national or social origin, family status, property status, sexual orientation, or other personal circumstances (Article 6(1)).
- Law on Volunteering:¹¹⁵ race, colour, sex, age, health status or disability, religious or other conviction, national or social origin, family status, property status, sexual orientation, and other personal circumstances (Article 9).
- Law on Voluntary Financed Pension Insurance:¹¹⁶ sex, race, colour, language, faith and religion, political or other position, national or social origin, belonging to a national or ethnic minority, or on grounds of property, family, health condition and age (Article 3).
- Law on Primary Education:¹¹⁷ sex, race, colour, national, social, political, religious, property and social background (Article 2(2))
- Law on Secondary Education:¹¹⁸ sex, race, colour, national and social origin, religion, political beliefs, property and social position (Article 3(3)).
- Law on Higher Education:¹¹⁹ selection criteria for enrolment will guarantee equality of all candidates on grounds of race, colour, sex, language, religion, political or other belief, ethnic, national or social origin, property, birth, social position, disability, sexual orientation and age (Article 108(5)).
- Law on the Protection of Children:¹²⁰ race, colour, sex, language, religious conviction, political and other belief, national, ethnic or social origin, cultural and other affiliation, property status, disability, birth, or other status (Article 12(1)).
- Law on Social Protection:¹²¹ sex, race, colour, national, ethnic social, political, religious, cultural, language, property and social belonging, disability and origin (Article 20(1)).
- Law on Patients' Rights:¹²² sex, race, colour, language, religion, political or any other belief, national or social origin, belonging to a national minority, material position, birth origin, sexual orientation or any other status (Article 5(2)).

¹¹⁵ The former Yugoslav Republic of Macedonia, Law on Volunteering, 2007. Full title: Law on the Volunteering (*Закон за волонтерство*), Official Gazette of Republic of Macedonia, No. 85/2007, 161/2008, 147/2015.

¹¹⁶ The former Yugoslav Republic of Macedonia, Law on Voluntary Financed Pension Insurance, 2008. Full title: Law on Voluntary Financed Pension Insurance (*Закон за доброволно капитално финансирано пензиско осигурување*), Official Gazette of Republic of Macedonia, No. 7/2008, 124/2010, 17/2011, 13/2013, Constitutional Court Decisions: U.no. 117/2008, U.no. 162/2008.

¹¹⁷ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008. Full title: Law on Primary Education (*Закон за основното образование*), Official Gazette of Republic of Macedonia, No. 103/2008, 33/2010, 116/2010, 156/2010, 18/2011, 51/2011, 100/2012, 24/2013, 41/2014, 116/2014, 135/2014, 10/2015, 98/2015, 145/2015, 30/2016, 127/2016; Constitutional Court Decisions: U.no. 212/2008 (01.04.2009), U.no. 202/2008 (15.04.2009), U.no.234/2008 (24.06.2009), U.no.226/2008 (01.07.2009).

¹¹⁸ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995. Full title: Law on Secondary Education (*Закон за средното образование*), Official Gazette of Republic of Macedonia, No. 44/1995, 24/1996, 34/1996, 35/1997, 82/1999, 29/2002, 40/2003, 42/2003, 67/2004, 55/2005, 113/2005, 35/2006, 30/2007, 49/2007, 81/2008, 92/2008, 33/2010, 116/2010, 156/2010, 18/2011, 42/2011, 51/2011, 6/2012, 100/2012, 24/2013, 41/2014, 116/2014, 135/2014, 10/2015, 98/2015, 145/2015, 30/2016, 127/2016; Constitutional Court Decisions: U.no. 355/1995, U.no. 210/2000, U.no. 83/2003, U.no. 31/2005, U.no. 102/2005, U.no. 226/2008.

¹¹⁹ The former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities, 2008. Full title: Law on Employment of Persons with Disabilities (*Закон за вработување на инвалидни лица*), Official Gazette of Republic of Macedonia, No. 35/2008, 103/2008, 26/2009, 83/2009, 99/2009, 115/2010, 17/2011, 51/2011, 123/2012, 15/2013, 24/2013, 41/2014, 116/2014, 130/2014, 10/2015, 20/2015, 98/2015, 145/2015, 154/2015, 30/2016, 120/2016, 127/2016. Constitutional Court Decisions: U.no. 80-2008, U.no. 162-2008, U.no. 98-2011, U.no. 57-2013.

¹²⁰ The former Yugoslav Republic of Macedonia, Law on the Protection of Children, 2013. Full title: Law on the Protection of Children (*Закон за заштита на децата*), Official Gazette of Republic of Macedonia, No. 23/2013, 12/2014, 44/2014, 144/2014, 10/2015, 25/2015, 150/2015, 192/2015, 27/2016.

¹²¹ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009. Full title: Law on Social Protection (*Закон за социјалната заштита*), Official Gazette of Republic of Macedonia No. 79/2009, 36/2011, 51/2011, 166/2012, 15/2013, 79/2013, 187/2013, 38/2014, 44/2014, 116/2014, 180/2014, 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015, 30/2016; Constitutional Court Decision: U.no.165/2009.

- Law on Public Health:¹²³ race, sex, national or social origin, property status, religious belief, sexual orientation, or status of a person with disability (Article 16(5)).
- Law on Health Protection:¹²⁴ race, sex, age, national belonging, social origin, religious conviction, political or other belief, property status, culture, language, type of illness, psychosocial¹²⁵ and physical disability (Article 9).
- Law on Mental Health:¹²⁶ sex, language, religion, political or other belief, national or social origin, kindred, property and social position or other status (Article 20(4))
- Law on Equal Opportunities of Women and Men: race, colour, gender, belonging to a marginalised group, ethnic belonging, language, citizenship, social origin, religion or a religious belief, education, political belonging, personal or social status, mental¹²⁷ or physical disability, age, family or marital status, property status, health condition or any other ground (Article 4(3)).

In conclusion, the grounds protected in the Constitution and in various laws across national legislation can be summarised as follows: race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, political or other beliefs, membership of a trade union, education, political affiliation, personal or social status, kindred, disability (usually under the wording 'mental or physical impairment'), age, family or marital status, national or social origin, position of the family, property status, health condition, language, sexual orientation or other personal circumstances, any other ground prescribed by law or ratified international treaty.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

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

A 2013 research study highlighted the fact that two elements of this definition, 'specific position in the society' and 'certain types of violence', stand out as being unclear. The former refers to an easily identifiable characteristic or group (such as, geographic position or smaller religious community) matched with unequal access to resources or to opportunities (for example infrastructure, education, employment), whereas the latter is

¹²² The former Yugoslav Republic of Macedonia, Law on Patients' Rights, 2009. Full title: Law on Patients' Rights (*Закон за заштита на правата на пациентите*), Official Gazette of Republic of Macedonia No. 82/2008, 12/2009, 53/2011, 150/2015.

¹²³ The former Yugoslav Republic of Macedonia, Law on Public Health, 2010. Full title: Law on Public Health (*Закон за јавно здравје*), Official Gazette of Republic of Macedonia No. 22/2010, 136/2011, 144/2014, 149/2015, 37/2016.

¹²⁴ The former Yugoslav Republic of Macedonia, Law on Health Protection, 2012. Full title: Law on Health Protection (*Закон за здравствена заштита*), Official Gazette of Republic of Macedonia, No. 43/2012, 145/2012, 87/2013, 164/2013, 39/2014, 43/2014, 132/2014, 188/2014, 10/2015, 61/2015, 154/2015, 192/2015, 17/2016, 37/2016. Constitutional Court Decisions: U.no. 59/2012, U.no. 69/2012, U.no. 101/2014.

¹²⁵ Literal translation would be 'psychological invalidity' (*психички инвалидитет*).

¹²⁶ The former Yugoslav Republic of Macedonia, Law on Mental Health, 2006. Full title: Law on Mental Health (*Закон за менталното здравје*), Official Gazette of Republic of Macedonia, No. 71/2006, 150/2015.

¹²⁷ This would include intellectual disability, but probably not psychosocial disability.

to be interpreted in accordance with the criminal law.¹²⁸ Also, it can be argued that 'persons that are protected under this ground are persons who are likely to be discriminated against on several grounds'¹²⁹ and that:

'For some of these persons, the claim for protection against unjustified unequal treatment on grounds of belonging to a marginalised group would best reflect the status that these persons have and which needs to be protected (for example sex workers), while for other groups this ground should be applied if in the circumstances of the specific case it can be concluded that the determining conditions will be the conditions of specific position in society and susceptibility to violence.'¹³⁰

In addition, although it does not define disability, the ADL refers to 'physical and mental disability', out of which 'mental disability' could be interpreted to include psychosocial disability and intellectual disability. In addition to this, several other laws include various terms to refer to disability and various types of disability. A 2015 analysis of the harmonisation of the national legislation found insensitive disability terminology to be a cross-cutting issue. The analysis was conducted on 139 laws, out of which 40 laws referred to disability; in all of these 40 laws the terminology used could not be considered to be in line either with the spirit of the directives, or with the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the country is a party.¹³¹

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

It is important to note, however, that ratified international treaties stand higher than laws in the national legal hierarchy. As reported in Annex 2, the country has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women, the CRPD and the Convention on the Rights of the Child, so interpretation of the discrimination grounds ensuing from these treaties should be considered as valid at the national level. The same applies to the European Convention on Human Rights and to the Framework Convention on National Minorities, to which the country is also a party. The resourcefulness and absolute necessity of turning to international law for the definitions of the discrimination grounds is made clear in the *Guide on Discrimination Grounds*, published by the Commission for Protection against Discrimination (the national equality body) in cooperation with the OSCE. In particular, the guide relies heavily on international law sources (including practice from the human rights bodies and courts) in order to carve out the definitions of the discrimination grounds prescribed under the national law.¹³²

¹²⁸ Kotevska, B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: www.osce.org/skopje/116789?download=true pp. 51-52.

¹²⁹ Najcevska, M. and Kadriu, B. (2008), *Terminology glossary for discrimination*, Skopje, OSCE and MCIC. p. 61.

¹³⁰ Kotevska, B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: www.osce.org/skopje/116789?download=true pp. 51-52.

¹³¹ The analysis was conducted on 139 laws. Table 2 includes all provisions that contain disability terminology that needs revising. Source: Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹³² Kotevska, B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: www.osce.org/skopje/116789?download=true.

In conclusion, national law does not provide definitions for age, ethnicity, race, sexual orientation and disability.¹³³ No compliance-related problems arising from this have been reported so far.

2.1.2 Multiple discrimination

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

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

In Macedonia, there is no case law dealing with multiple discrimination. As in previous years, the only¹³⁴ institution reporting multiple discrimination cases is the CPAD. In 2016, the CPAD received 20 cases (33 % of its annual case load) where applicants claimed discrimination on several grounds. However, the outcome is not reported separately.¹³⁵

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

b) Discrimination by association

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

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

a) Prohibition and definition of direct discrimination

In Macedonia, direct discrimination is prohibited in national law. It is defined in the Anti-discrimination Law, however the definition is unnecessarily more complicated than the one in the directives. Under the Anti-discrimination Law, direct discrimination is taken to occur when a person is treated less favourably, or when there is a differentiation, exclusion, or limitation that results or could result in deprivation, violation or restriction of the equal recognition or exercise of human rights and basic freedoms as compared to the treatment that another person has or could have in the same or similar conditions (Article 6(1)). A person is considered to be both a natural and a legal person (under Article 5(1-9)), and this has not been interpreted so far as to exclude groups from the protection. As opposed to the simple comprehensive encompassing wording of the definition contained in the directives, this definition includes types of treatment (which are gradations of less favourable treatment), thus adding the risk of excluding gradations not mentioned in the definition if restrictive judicial interpretation is applied. It ties the definition to human rights and basic freedoms, which is the formulation contained in the

¹³³ For disability it notes two types – mental disability and physical disability. On this matter, please see section 2.1.1 above.

¹³⁴ Please note that at the time of writing of this report, the annual report for 2016 of the Constitutional Court had not yet been published.

¹³⁵ Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017) *2016 Annual Report*, CPAD Website http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

Constitution. Given the weak practice of using international human rights law in domestic courts, this could also be interpreted restrictively by courts (meaning only to apply to discrimination by deprivation, violation or restriction of the equal recognition or exercise of rights mentioned in the Constitution).

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

b) Justification of direct discrimination

Although the Anti-discrimination Law does not allow for direct discrimination (justification *strictu sensu*) (Article 6(1)), it does contain provisions where differences in treatment will not be considered as discriminatory. These are prescribed in more general terms and are not tied to single grounds (Article 14). However, several grounds are much more frequently listed in the justifications - notably religion or belief, age, ethnic origin and gender (for more on exceptions, see section 4 below). There are tests that must be satisfied to justify such difference in treatment, which include: objective justification, proportionality, legitimate aim, appropriateness and necessity, genuine and determining occupational requirement. This also includes the possibility for the justification of ethnicity as a 'genuine and determining occupational requirement' (Article 14(1)). Although the wording of the provision states 'overstepping the level necessary for implementation' instead of 'proportional', it can be expected that its interpretation will largely be in line with the Racial Equality Directive.

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

2.2.1 Situation testing

a) Legal framework

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

b) Practice

In Macedonia, situation testing was initially used in practice only by civil society organisations (CSOs). Even before the adoption of the Anti-discrimination Law in 2010, CSOs were carrying out training and practicing situation testing.¹³⁶ In 2014, the Macedonian Helsinki Committee and the OSCE - Mission to Skopje conducted a joint project on situation testing which resulted in findings that they announced they will raise

¹³⁶ The situation testing training was on the ground of ethnicity in access to goods and services. (Information and source known to the author of the report).

as evidence before the courts. Further information has not been released. The situation testing concerned the exercise of the right to freedom of movement of Roma people, and the tests were conducted at border crossings throughout the country.

In 2016, the Ombudsperson conducted a situation testing in order to cross-check a submission it received from a CSO. Namely, the Macedonian Helsinki Committee (MHC) raised a claim for direct discrimination on grounds of sex in the field of healthcare provision, as it found that fathers and men in general are not allowed as companions of hospitalised children in public health facilities. If a child is to be hospitalised, they have to be accompanied by a female. The Ombudsperson conducted a situation test via telephone and found that this really was the case. Relying on its situation testing as proof, the Ombudsperson concluded that there was *indirect*¹³⁷ discrimination on the ground of sex in the public healthcare service provision.¹³⁸

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

a) Prohibition and definition of indirect discrimination

In Macedonia, indirect discrimination is prohibited in national law. It is defined. The Anti-discrimination Law fully replicates the definition of indirect discrimination from the directives. Indirect discrimination on any protected ground is taken to occur when an apparently¹³⁹ neutral provision, criterion or practice would put a person or a group at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 6(2)).

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

b) Justification test for indirect discrimination

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

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

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

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

c) Comparison in relation to age discrimination

¹³⁷ However, the applicant (the MHC) claimed direct discrimination. Having no access to the files of the case prevents an understanding of the decision of the Ombudsperson as to the form of discrimination that it had established.

¹³⁸ Helsinki Committee of the Republic of Macedonia (2016), ‘Info-sheet on Discrimination’ (Информатор за дискриминација, (May 2016), available at: http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

¹³⁹ Please note that a literal translation of the term used for ‘apparently’ in the Macedonian language version of the law would be ‘obviously’. However, this is a clear language error, as the term in the Albanian version of the law (also an official version of the law) is ‘*të dukshme*’ (‘apparently’). Thus, the intent of the legislature seems clear.

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

2.3.1 Statistical evidence

a) Legal framework

In Macedonia, there are national rules permitting data collection. The main legislation in this area is the Law on State Statistics. Data are collected covering all five grounds except for sexual orientation. The data are anonymous and therefore the collection of such data does not conflict with the Law on Protection of Personal Data.¹⁴⁰

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

The Ministry of Information Society and Administration collects data on administrative servants in the form of a Register of Public Sector Employees.¹⁴¹ The data to be collected and the access to the register are specified in a bylaw. The data are not publically available, and only persons specified in the rulebook can have access to the register. The data are not anonymous and include the following grounds covered by the directives: ethnic origin, disability, sex and age.

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

Statistics are not used in litigation. However, they are widely used for designing strategic policy documents and action plans (including those on positive action). The ministerial cabinet uses statistics extensively in national strategies and positive action measures. With regard to issues of ethnicity, use of data includes planning employment of under-represented non-majority communities (national minorities) and the priorities in relation to the now-closed Decade of the Roma¹⁴² and the 'National Strategy on Roma 2014-2020'.¹⁴³

On disability, statistics were used for the 'National Strategy on Equalisation of the Rights of Persons with Disabilities'¹⁴⁴ and on age, they were used for the 'National Strategy on the Elderly'.¹⁴⁵ Statistics were also used in the 2016-2020 'National Strategy on Equality and Non-discrimination'¹⁴⁶ and for its predecessor - the 'National Strategy on Equal

¹⁴⁰ The former Yugoslav Republic of Macedonia, Law on Protection of Personal Data (2005), Full title: Law on Protection of Personal Data (*Закон за заштита на лични податоци*) Official Gazette of the Republic of Macedonia No. 7/2005, 103/2008, 124/2010, 135/2011, 43/2014, 153/2015, 99/2016.

¹⁴¹ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Full title: Law on Administrative Servants (*Закон за административни службеници*) Official Gazette of the Republic of Macedonia, No. 27/2014, 199/2014, 48/2015, 154/2015, 5/2016, 142/2016. Article 7(1)-(9).

¹⁴² For more information on the projects implemented within the frame of the Decade of the Roma and MLSP activities on Roma rights and integration, please see: *Проекти произлезени од декадата на Ромите* (Roma Decade Related Projects), Ministry of Labour and Social Policy Website, <http://www.mtsp.gov.mk/proekti-proizlezени-od-dekadata-na-romite.nspх>.

¹⁴³ Strategy on Roma 2014-2020 (*Стратегија за Ромите 2014-2020*),

http://arhiva.vlada.mk/registar/files/Strategija_Romite_%202014-2020.pdf.

¹⁴⁴ National Strategy on Equalisation of the Rights of Persons with Disabilities (*Национална стратегија за изедначување на правата на лицата со инвалидност 2010-2018 - ревидирана*) <http://mtsp.gov.mk/WBStorage/Files/FINALNA%20Revidirana%20Nacionalna%20Strategija.pdf>.

¹⁴⁵ National Strategy on the Elderly (*Национална стратегија за стари лица 2010-2020*) <http://mtsp.gov.mk/WBStorage/Files/Strategija%20za%20stari%20lica%20juni.pdf>.

¹⁴⁶ National Strategy on Equality and Non-discrimination (*Национална стратегија за еднаквост и недискриминација 2016-2020*)

Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability,¹⁴⁷ as well as for the 2015-2020 'National Action Plan for the Implementation of the Law on Prevention and Protection against Discrimination'.¹⁴⁸

In Macedonia, the law is silent on using statistical evidence in order to establish indirect discrimination. It neither permits nor prohibits it, which means it would be possible to use statistical evidence in discrimination cases. Statistical evidence is only mentioned in the law as part of the duties of the CPAD (Article 24(10)). Statistical evidence is not mentioned in provisions regulating the procedure before the CPAD or in other procedural laws.

Statistical evidence as such is not mentioned elsewhere in national law. The Law on State Statistics¹⁴⁹ does not discuss the use of statistical data as evidence in general, meaning it also does not mention such a possibility in the context of indirect discrimination. Thus, no procedures or conditions for admissibility of such statistical evidence exist, making a breakthrough and usage of such data a distant possibility.

b) Practice

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Macedonia, harassment is prohibited in national law. It is defined under the Anti-discrimination Law. Harassment is taken to occur when there is an act that violates the dignity of a person or group of persons on any of the discrimination grounds, with an aim to or result in violation of the dignity of a specific person or creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 7). The personal and material scope match the scope of the ADL – they apply to both natural and legal persons, in the public and private sphere in all fields of social life. The definition complies with the directives.

Harassment does not constitute a criminal offence. It is part of the provisions of the Law on Labour Relations, which deal with harassment, sexual harassment and mobbing. The definition of harassment is in line with the directives (Article 9, 9-a). This definition states that harassment is an unwanted conduct related to the protected grounds with the purpose or effect of violating the dignity of the applicant for employment or the worker, and of creating an intimidating, hostile, humiliating or offensive environment (Article 9(3)). Sexual harassment is every verbal, non-verbal or physical conduct of a sexual character with the purpose or effect of violating the dignity of the job applicant or

http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

¹⁴⁷ National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability (*Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол*) http://mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc.

¹⁴⁸ National Action Plan for the Implementation of the Law on Prevention and Protection against Discrimination (*Национален акциски план за спроведување на Законот за заштита и спречување од дискриминација 2015-2020*) http://www.mtsp.gov.mk/content/word/NAP%20for%20ADL%202015-2020_MK.doc.

¹⁴⁹ The former Yugoslav Republic of Macedonia, Law on State Statistics (1997), Full title: Law on State Statistics (*Закон за државната статистика*) Official Gazette of the Republic of Macedonia No. 54/1997; 21/2007; 51/2011; 104/2013; 42/2014, 192/2015, 27/2016.

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

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

It is important to note that in 2013 a special Law on Protection against Harassment in the Workplace¹⁵⁰ was adopted. In terms of the elements constituting harassment, the definitions of the different types of harassment — psychological and sexual — are in line with the ones in the directives. This legislation also outlaws instruction or incitement to harass. The law is silent as to the grounds it covers for psychological harassment. For sexual harassment, the ground — sex — is contained in the title of the type of harassment, although without any clear guidance as to whether multiple grounds could also be considered. An important note here is that the legislature obviously intended to create a distinction between harassment in the workplace and other activities that would not be considered as such, including 'any unjustified distinction during unequal treatment towards the employee on any ground of discrimination which is prohibited and for which protection is provided for under a law'.¹⁵¹

b) Scope of liability for harassment

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

The Law on Protection against Harassment in the Workplace applies to the field of employment. The liability scope is the same as the one under the Law on Labour Relations. An important note here is that the legislator obviously intended to create a distinction between harassment at the workplace and other activities that would not be considered as such, including 'any unjustified distinction during unequal treatment towards the employee on any ground of discrimination which is prohibited and for which protection is provided for under a law'.¹⁵²

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

¹⁵⁰ The former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Full title: Law on Protection against Harassment in the Workplace (*Закон за заштита од вознемирување на работно место*) Official Gazette of the Republic of Macedonia No.79/2013.

¹⁵¹ The former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Article 8(3).

¹⁵² The former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Article 8(3).

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Macedonia, instructions to discriminate are prohibited in national law. Instructions are not defined. The Anti-discrimination Law contains an article on invoking and inciting discrimination, which also includes instructions to discriminate. Notably, this article states that it considers as discrimination every activity that directly or indirectly invokes, encourages, instructs or instigates another person to commit discrimination (Article 9). The personal and material scope match the scope of the ADL – they apply to both natural and legal persons, in the public and private sphere in all fields of social life.

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

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

It is important to note that a case whose facts point to possible elements of instruction to discriminate was put before the Commission for Protection against Discrimination (CPAD) in 2013. The case involves discrimination against Roma persons hired for the provision of services through a sub-contracted company. In this case, the sub-contracted company, Land Service, was asked by the contracted company, MARCEM, to 'remove' all employees of Roma ethnic origin who worked in the food department at City Mall (one of the largest trade centres in Skopje). In this case, the CPAD found that there was direct discrimination on grounds of ethnic belonging by the contracted company, but it did not find instruction to discriminate. The case was filed by Sumnal, a CSO dealing with Roma rights.¹⁵³ Land Service itself later filed a case at the CPAD, however the CPAD did not initiate proceedings, as it has already decided on the matter. Land Service also filed a request to the Constitutional Court for protection of freedoms and rights (protection against discrimination). However, in line with the already established principle of the Constitutional Court, Land Service's case was rejected as it had been filed by a legal and not a natural person.¹⁵⁴ There has still been no follow up on this case.¹⁵⁵

In Macedonia, instructions do explicitly constitute a form of discrimination.¹⁵⁶

b) Scope of liability for instructions to discriminate

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

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

¹⁵³ Commission for Protection against Discrimination (*Комисија за заштита од дискриминација*) No.07-633/4 Association for Development of the Roma Community Sumnal vs Marcem DOO Skopje, 23.05.2013.

¹⁵⁴ Constitutional Court (*Уставен Суд*) Decision U.no.65/2013-0-0, 06.11.2013.

¹⁵⁵ It is important to note, however, that the supermarket, which was part of an international chain of supermarkets and was serviced by Land Service and MARCEM, closed for business in autumn 2015.

¹⁵⁶ The former Yugoslav Republic of Macedonia, Anti-discrimination Law, 2010. Article 9.

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

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

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

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

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

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

The Anti-discrimination Law, which also applies in the field of employment, tackles the issue of reasonable accommodation in two ways, by first defining adjustment of infrastructure and services and second by defining discrimination against people with disability – both considered to be forms of discrimination. It defines adjustment of infrastructure and services as an act of undertaking appropriate measures, where needed in a particular case, to enable a person with 'mental'¹⁵⁷ or physical disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer (Article 5(12)). This definition is similar in wording to Article 5 of Directive 2000/78, although it is limited to infrastructure and service. It also does not define what would be a disproportionate burden for employers or whether the availability of financial assistance from the state is to be taken into account in assessing whether there is a disproportionate burden. The second point is the definition of discrimination against people with disability. Notably, the law deems the lack of measures undertaken for the removal of obstacles and limitations, or the absence of measures for the adjustment of infrastructure, space, usage of publicly available resources or participation in public and social life for people with mental disability and physical disability to amount to discrimination (Article 8(2)). However, the law does not go into this issue in any more detail.

The Law on Labour Relations does not specifically mention reasonable accommodation for people with disabilities. The Law on Employment of People with Disabilities¹⁵⁸ also does not contain a definition of reasonable accommodation, but it contains references to accommodation-related measures for improving employment conditions and the conditions for the execution of work duties of people with disabilities. The law establishes a duty on the employer to provide for working space, equipment, and other relevant conditions for work and for the adaptation of the working environment (Article 7(2)). Employers' measures undertaken to accommodate people with disability are subject to

¹⁵⁷ Mental disability could be understood to include psychosocial disability and intellectual disability.

¹⁵⁸ The former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities, 2000.

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

b) Practice

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

c) Definition of disability and non-discrimination protection

In the Anti-discrimination Law, disability is understood as intellectual and physical disability,¹⁵⁹ however this law does not go into more details than this in defining disability. Thus, in the context of reasonable accommodation, disability is to be understood in the same way.

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

In Macedonia, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. The Anti-discrimination Law deems lack of measures undertaken for the removal of obstacles and limitations, or for the adjustment of infrastructure, space, usage of publicly available resources or participation in public and social life, including in education and training (Article 15(3)), for people with intellectual disability or physical disability to amount to discrimination (Article 8(2)).¹⁶⁰ The article uses the same formulation as is used in the field of employment.

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

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

The Anti-discrimination Law classifies the lack of reasonable accommodation for people with intellectual or physical disabilities as discrimination (Article 8(2)).¹⁶¹ However, the Law on Employment of People with Disabilities and the Law on Construction do not include specific sanctions if proper adaptation is not carried out. This failure is not considered to be discrimination. In addition, the misdemeanour provisions in the Anti-discrimination Law do not contain a special provision on fines regarding lack of reasonable accommodation as per Article 8(2).

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

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

¹⁵⁹ Psychosocial disability is not explicitly covered thus suggesting a gap in the scope of disability protected under the law. The analysis of the harmonisation of the national legislation identified this gap and recommended that a general term 'disability' remains in the law, in order to prevent limiting disability to intellectual disability or physical disability. Source: Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹⁶⁰ Psychosocial disability is not explicitly covered thus suggesting a gap in the scope of disability protected under the law. The analysis of the harmonisation of the national legislation identified this gap and recommended that a general term 'disability' remains in the law, in order to prevent limiting disability to intellectual disability or physical disability. Source: Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹⁶¹ Please see above footnote on psychosocial disability – same explanation applies.

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

Limited accommodation in respect of ethnicity can be found in the Law on Holidays of the Republic of Macedonia.¹⁶² Under this law, vacation days are to be granted for the specific celebrations of some ethnic communities (Articles 1 and 2).

Limited accommodation in respect of religion is mentioned in the Law on Holidays of the Republic of Macedonia. Under this law, vacation days are to be granted for religious celebrations on the basis of the faith of the employee (Articles 1 and 2).¹⁶³

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

g) Accessibility of services, buildings and infrastructure

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

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

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

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

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

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

¹⁶² The former Yugoslav Republic of Macedonia, Law on Holidays (1998), Full title: Law on Holidays of the Republic of Macedonia (*Закон за празниците во Република Македонија*) Official Gazette of the Republic of Macedonia, No. 21/98, 18/2007.

¹⁶³ The former Yugoslav Republic of Macedonia, Law on Holidays (1998).

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

The Law on Construction also states that:

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

The same law states that there is no need for approval to build structures that allow and facilitate the movement of people with disability in the building.¹⁶⁴ Furthermore, public and business facilities

'must ensure unimpeded access to persons with a disability as prescribed by this Law within four years of the date of entry into force of this law, and adapt outside staircases for public use within two years of the date of the entry into force of this Law' (the law entered into force on 5 November 2009).¹⁶⁵

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

'are little or not applied at all, both in adapting existing buildings and in the construction of new buildings. This includes inadequate public areas with high kerbs, inconvenient pedestrian crossings, sidewalks, parking spots, access to bus stations, adapted toilets for persons in wheelchairs, etc.'¹⁶⁶

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

h) Accessibility of public documents

No such requirements currently exist. An earlier example of good practice from 2014 was the publication in Braille of an advertisement for the employment of people with disabilities, by the Government.¹⁶⁷ This was not a general recruitment advert - only people with disabilities could apply for the positions.

¹⁶⁴ The former Yugoslav Republic of Macedonia, Law on Construction (2009). Full title: Law on Construction (Закон за градење) Official Gazette, No. 130/2009, 124/2010, 18/2011, 36/2011, 54/2011, 13/2012, 144/2012, 25/13, 79/13, 137/13, 163/2013, 27/2014, 28/2014, 42/2014, 115/2014, 149/2014, 187/2014, 44/2015, 129/2015, 217/2015, 226/2015, 30/2016; 31/2016; 39/2016; 71/2016; 132/2016; Constitutional Court Decisions: U.no. 262/2009 (02.02.2011), U.no. 212/2010 (30.03.2011), U.no. 114/2015 (11.05.2016).

¹⁶⁵ The former Yugoslav Republic of Macedonia, Law on Construction (2009), Article 170.

¹⁶⁶ Ministry of Labour and Social Policy (2014), *Initial report of the Republic of Macedonia pursuant to article 35, paragraph 1 of the Convention on the Rights of Persons with Disabilities*, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMKD%2f1&Lang=en.

¹⁶⁷ Press24 (2014), 'People with visual impairments hailed vacancy ad for employment of 300 persons with disability', (Слепите лица го поздравилја огласот за вработување 300 лица со инвалидност), www.press24.mk/slepите-lica-go-pozdravija-oglasot-za-vrabotuvanje-300-lica-so-invalidnost.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Macedonia, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. On provisions of relevance for non-discrimination, the Constitution sets a requirement of citizenship in order for a person to enjoy the protection of rights under the Constitution, including protection against discrimination. Stricter conditions also apply to residents without Macedonian citizenship with regards to employment and acquiring social protection.¹⁶⁸ In other areas, including self-employment, access to training and membership in workers' organisations, there is no legal inhibition and there are no reports of less favourable treatment. With regard to the Constitution, the approach implemented in practice gives foreign citizens the opportunity to participate in the social and economic life of the country. No such requirement exists under the Anti-discrimination Law.

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

3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)

a and b) Protection against discrimination and liability for discrimination

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

As the law uses the term 'person' throughout for both protection against discrimination and liability for discrimination, it is clear that such a distinction is not made. Many of the cases brought to the CPAD are by legal persons, and more often than not the alleged discriminator is a legal person. In addition, there has been no interpretation so far which would exclude groups from the protection.¹⁶⁹ However, there is a distinction when speaking of the sanctions, as fines for misdemeanours are divided between fines for natural and for legal persons and vary in amount (Articles 42 to 45). Furthermore, it should be noted that under the Constitution, only citizens are included in the general equality clause, and also that the Constitutional Court's practice is clear that human rights protection, which also includes protection against discrimination, can be sought by natural persons only.

¹⁶⁸ The former Yugoslav Republic of Macedonia, Law on Social Protection (2009), Article 15.

¹⁶⁹ Cases which do not carry initials in the front are brought by legal persons: Commission for Protection against Discrimination, Opinions, <http://kzd.mk/?q=node/116>.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In Macedonia, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination and for the purpose of liability for discrimination. The Anti-discrimination Law states that the law applies to all natural and legal persons (Article 2) and that it covers both the private and the public sector, including public bodies (Article 4).

b) Liability for discrimination

In Macedonia, the personal scope of anti-discrimination law covers both private and public sectors, including public bodies, for the purpose of liability for discrimination (Article 4).

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

The Anti-discrimination Law applies to all sectors of public and private employment and occupation (Article 4). Articles 6 to 11 of the Law on Labour Relations¹⁷⁰ prohibit various aspects of discrimination in labour relations and, in general, do not distinguish between different types of actors (public or private, secular or religious). It states that it regulates the labour relations of workers employed by the state, local government, public institutions, public enterprises, institutes, foundations, organisations and other legal and individual employers, unless another law determines otherwise.¹⁷¹

Having agreed with the general approach, it should be noted that practically all major areas of public employment are covered also by the Law on Administrative Servants,¹⁷² the Law on the Police,¹⁷³ the Law on Defence and the Law on Foreign Affairs for labour relations of the employees in the respective ministries.

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

In Macedonia, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including

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

¹⁷¹ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 3.

¹⁷² The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014).

¹⁷³ The former Yugoslav Republic of Macedonia, Law on the Police (2006), Full title: Law on the Police (Закон за полицијата), Official Gazette of the Republic of Macedonia No. 114/2006, 06/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016, 120/2016. Article 96 and The former Yugoslav Republic of Macedonia, Law on Internal Affairs (2014), Full title: Law on Internal Affairs (Закон за внатрешни работи) Official Gazette of the Republic of Macedonia No. 42/2014, 116/2014, 33/2015, 5/2016, 120/2016, 127/2016, 142/2016, 190/2016.

selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the all grounds, in both private and public sectors, as described in the directives.

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

The general non-discrimination article in the Law on Labour Relations¹⁷⁴ encompasses selection criteria, recruitment conditions, treatment at work, promotion, professional training and other benefits, as well as ending employment. A specific ban on discrimination in vacancy announcements is prescribed in the Law on Labour Relations.¹⁷⁵ However, in relation to access, both in that provision and the law overall, the protection against discrimination for people with disabilities can be considered as being very weak because, although the applicant is not obliged to submit a health certificate when concluding an employment contract, the employer can send her or him for a medical examination.¹⁷⁶ The only legal limitation is that the examination should be strictly and necessarily linked to the specific post.

None of the provisions in the non-discrimination articles should be interpreted as restrictions on the employer's right to refuse to hire a person who does not meet the occupational requirements in that particular field, as long as the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.¹⁷⁷

Conditions for access to employment and criteria for various professional activities in the public sector are mostly determined by specialised laws. However, no equivalent and consistent approach or scope of protection is contained in these laws. Health status is mentioned as a condition for employment in the Law on the Police and the Law on Army Service, and in the Law on Administrative Servants.¹⁷⁸ The Law on Administrative Servants sets out general conditions for employment as an administrative servant, which aside from general health capability, also include citizenship, active knowledge of the Macedonian language, being at least 18 years of age, and having no criminal conviction in relation to conducting a profession or duty (Article 31(1)).¹⁷⁹

There is an established system of state inspection that conducts supervision of the implementation of the Law on Labour Relations, and of other laws and regulations for labour relations, collective agreements and job contracts that regulate the rights and obligations of the employee and the employer. Such inspections are carried out by the state body responsible for labour inspection.¹⁸⁰

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

In Macedonia, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment.

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

¹⁷⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 6.

¹⁷⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 24.

¹⁷⁶ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 25.

¹⁷⁷ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 8.

¹⁷⁸ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014).

¹⁷⁹ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Article 31(1).

¹⁸⁰ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 256.

Aside from this law, the Law on Labour Relations contains a provision stating that for equal work, workers should be equally paid. The only category explicitly mentioned is women,¹⁸¹ however in the general provisions section, in Article 7(4), it explicitly states that discrimination is prohibited on all grounds mentioned in Article 6 (which include all the directives grounds) in relation to, inter alia, 'working conditions, all rights from a labour relation and in relation to such a relation, including equality of pay'.

The Law on Administrative Servants devotes a chapter – Chapter XIV — to salaries, without mentioning equality of pay. It establishes the following as the main elements on which salary is based: education level, level of working position, and years of experience.¹⁸² No case law on this new law exists.

3.2.3.1 Occupational pensions constituting part of pay

There are three laws dealing with pensions.¹⁸³ However, only one of these contains a prohibition of discrimination: the Law on Voluntary Fully Funded Pension Insurance (Article 3).¹⁸⁴ It states that voluntary, fully funded pension insurance schemes are prohibited from discriminating against members on the grounds of sex, race, colour, language, faith and religion, political or other orientation, national or social origin, belonging to a national or ethnic minority, or on the basis of property, family, health and age.

However, in the same law it states that a company cannot refuse membership of the Voluntary Pension Fund to any employee if the person is at least 15 years old and not more than 70 years of age.¹⁸⁵ This means that disability is not a ground for refusal, although if it is treated as a health condition it falls under anti-discrimination protection. The Law on Voluntary Fully Funded Pension Insurance does not include any sanction equivalent to the prohibition of discrimination for voluntary pension schemes. There are no articles on discrimination or equality in the framework Law on Pensions and Disability Insurance¹⁸⁶ and in the Law on Mandatory Fully Funded Pension Insurance.

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

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

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

¹⁸¹ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 108.

¹⁸² The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Articles 85 to 97.

¹⁸³ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance (2012), Full title: Law on Pension and Disability Insurance (*Закон за пензиско и инвалидско осигурување*), Official Gazette of the Republic of Macedonia No.98/2012, 166/2012, 15/2013, 170/2013, 43/2014, 44/2014, 97/2014, 113/2014, 160/2014, 188/2014, 20/2015, 61/2015, 97/2015, 129/2015, 147/2015, 154/2015, 173/2015, 217/2015, 27/2016, 120/2016, 132/2016; The former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008; The former Yugoslav Republic of Macedonia, Law on Mandatory Fully Funded Pension Insurance (*Закон за задолжително капитално пензиско осигурување*), 2002, Official Gazette of the Republic of Macedonia No.29/2002, 85/2003, 40/2004, 113/2005, 29/2007, 88/2008, 48/2009, 50/2010, 171/2011, 36/2011, 98/2012, 13/2013, 164/2013, 44/2014, 192/2015, 30/2016; Constitutional Court Decision: U.no.163/2002 (02.04.2003), U.no.165/2008 (11.03.2009).

¹⁸⁴ The former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008.

¹⁸⁵ The former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008, Article 94.

¹⁸⁶ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

Though not expressly using the wording of Article 3(1)(b) of Directive 2000/43, the prohibitions against discrimination in access to vocational guidance, professional training, continuing professional training and practical work experience are stipulated in the general prohibition on discrimination in the Law on Labour Relations¹⁸⁷ and in laws on different stages of education. National legislation gives everyone equal rights to acquire higher education and to be educated throughout their lives, and equal rights to lifelong learning.¹⁸⁸

According to the Law on Higher Education,¹⁸⁹ citizens of the country are equally entitled to education in higher educational institutions in the country. The approach to nationality is different, and foreign nationals can use the principle of reciprocity (meaning that if Macedonian students are given national treatment in a certain country, nationals of that country may study in Macedonia as if they were Macedonian citizens). The right to education of stateless persons has still to be determined in law and under ratified international agreements.

The selection of candidates by the university cannot be discriminatory on the grounds of race, colour of skin, sex, language, religion, political or other beliefs, ethnic, national or social origin, property, birth, social position, disability, sexual orientation or age.¹⁹⁰

The Law on Adult Education states that the aim of adult education is to provide an opportunity for everyone in all adult groups to achieve their appropriate educational level and enable them to acquire knowledge, skills and attitudes that will comply with the requirements of society and the labour market (Article 4).¹⁹¹

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

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

The Law on Labour Relations only provides for the freedom of workers and employers to establish and participate or not in the work of such an association.¹⁹² There are no anti-discrimination provisions related to the grounds of the directives. Having said that, it should be also noted that *mutatis mutandi* the general anti-discrimination provision in the Law on Labour Relations should be applicable to these situations as well. Following the same line of reasoning, the provisions in the Anti-discrimination Law would also be applicable.

¹⁸⁷ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 7.

¹⁸⁸ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 3.

¹⁸⁹ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 7.

¹⁹⁰ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 108.

¹⁹¹ The former Yugoslav Republic of Macedonia, Law on Adult Education, 2008. Full title: The former Yugoslav Republic of Macedonia, Law on Adult Education (*Закон за образование на возрасните*), Official Gazette of the Republic of Macedonia No.07/2008, 17/2011, 51/2011, 74/2012, 41/2014, 144/2014, 146/2015, 30/2016; Constitutional Court Decision: U.no. 46/2008.

¹⁹² The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Articles 183, 184, 185, 198.

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

In Macedonia, national legislation prohibits discrimination in the following area: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

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

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

The general and specific provisions on prohibition of discrimination in social services are also listed in the Law on Social Protection;¹⁹³ racial and ethnic origin and disability are protected as grounds, while belief, age and sexual orientation are not. According to the Law on Social Protection, the ban is related to both public institutions for social care and private institutions.¹⁹⁴ Protection in cases of discrimination in the field of social care is covered by the potential for the 'applicant or user of social protection to seek protection from the competent authority'.¹⁹⁵ In cases of discrimination, there is a shift of the burden of proof¹⁹⁶ and financial sanctions of EUR 3 000-5 000 (to be paid in national currency) are envisaged.¹⁹⁷

The Law on Health Protection defines, as one of the basic principles of the provision of healthcare, the principle of equity, which it defines through the prohibition of discrimination. Notably, in Article 9, the law states that the healthcare is realised through prohibition of discrimination in provision of healthcare protection on grounds of race, sex, age, nationality, social origin, religion, political or other belief, property status, culture, language, type of illness, 'mental'¹⁹⁸ or physical disability.¹⁹⁹ It does not include sexual orientation as one of the protected grounds, but it could be included pending judicial interpretation. Article 2 of the Law on Health Insurance states that health insurance is mandatory for all citizens on the principles of 'comprehensiveness, solidarity, equality and effective use of resources under conditions determined by Law'.²⁰⁰

The Law on the Protection of Children has articles on discrimination.²⁰¹ In addition to definitions of direct and indirect discrimination, specific measures are included for the protection of children and their parents or guardians when applying for social care.

¹⁹³ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 21.

¹⁹⁴ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 20.

¹⁹⁵ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 22.

¹⁹⁶ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 23.

¹⁹⁷ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 254.

¹⁹⁸ Includes intellectual and psychosocial disability.

¹⁹⁹ The former Yugoslav Republic of Macedonia, Law on Health Protection (*Закон за здравствената заштита*), 2012.

²⁰⁰ The former Yugoslav Republic of Macedonia, Law on Health Insurance (*Закон за здравственото осигурување*), 2000. Full title: The former Yugoslav Republic of Macedonia, Law on Health Insurance (*Закон за здравственото осигурување*), Official Gazette of the Republic of Macedonia No. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008, 98/2008, 6/2009, 67/2009, 50/2010, 156/2010, 53/2011, 26/2012, 16/2013, 91/2013, 187/2013, 43/2014, 44/2014, 97/2014, 112/2014, 113/2014, 188/2014, 20/2015, 61/2015, 98/2015, 129/2015, 150/2015, 154/2015, 192/2015, 217/2015; Constitutional Court Decision: U.no.85/2000, U.no.173/2000, U.no.37/2001, U.no.60/2006, U.no.40/2007, U.no.167/2006, U.no.45/2006, U.no. 199/2008, U.no.109/2009, U.no.185/2009, U.no.112/2011.

²⁰¹ The former Yugoslav Republic of Macedonia, Law on the Protection of Children (*Закон за заштита на децата*), 2013, Articles 12, 13, 14, 15.

However, the procedure is so complicated that it is very unlikely that these articles will be used in practice (especially because the whole procedure should be carried out by the potential victims without any institutional help).

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

In Macedonia, national legislation prohibits discrimination in the following area: social advantages as formulated in the Racial Equality Directive.

The Constitution states that the Republic provides for social protection and social security of citizens in accordance with the principle of social justice. It guarantees the right to assistance to those who are infirm or unfit for work. It also provides for particular protection for people with disability and ensures that their involvement in social life is possible.²⁰²

Social advantages are stipulated by law. For instance, the Law on Social Protection envisages that due to age and disability, beneficiaries of social financial assistance are relieved from the obligation to conduct public service duties in a duration of up to 90 days.²⁰³ This law also contains a general anti-discrimination provision (Article 20) and an article defining direct and indirect discrimination (Article 21). Although not explicitly addressed, discrimination in the area of social advantages is likely to be unlawful also under the Anti-discrimination Law (Article 4(1), line 3). Albeit not containing a special anti-discrimination provision specifically concerning social advantages, it is safe to conclude that the legal framework implicitly upholds the concept of non-discrimination with regard to the social advantages.

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

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

In Macedonia, national legislation prohibits discrimination in the following area: education as formulated in the Racial Equality Directive.

Under the Anti-discrimination Law, discrimination is prohibited in the educational process, at all levels and in all forms, both private and public. All directive grounds are explicitly listed in the provision on protected grounds, apart from sexual orientation. Aside from the Anti-discrimination Law (Article 4(2)), laws that regulate primary²⁰⁴ and secondary²⁰⁵ education also prohibit discrimination. Primary and secondary education is compulsory in the country. The legislation covers the directives' grounds of race or ethnic origin and belief (political and religious), while disability, age, sexual orientation and belief (other aspects) are missing.

²⁰² Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Article 35. Official Website of the Assembly of the Republic of Macedonia, <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>.

²⁰³ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 55.

²⁰⁴ Article 2 of the Law on Primary Education states: 'Every child has the right to primary education. (2) Discrimination on the grounds of sex, race, colour, national, social, political, religious, property and social background in realisation of the rights of education and primary education, as defined by this Law are prohibited.' Source: The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008.

²⁰⁵ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 3.

Macedonia has a negative net migration rate of -0.5 per 1 000 population.²⁰⁶ In the 2015 'migrant crisis' the country served as a transit point on the so-called Balkan Route, rather than a destination country. Thus, no case law has been developed on enforcement and no implementation issues have been raised in general, including in education. If a discrimination case were raised, migrants should receive the same treatment as any citizen of the country or any other person, because the Anti-discrimination Law does not distinguish between persons who hold citizenship of Macedonia and others. This applies across all fields of application of the law, including the field of education.

a) Pupils with disabilities

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

The laws that regulate primary²⁰⁷ and secondary²⁰⁸ education prohibit discrimination, and although they do not cover disability as a ground for discrimination, they include specific articles dealing with the education of children with disabilities. In this sense, a parent of a child with 'special educational needs' has the right to enrol the child at primary school, except in cases where the 'special educational needs' of the child are such that the child should be taught in a specialised primary school. Also, students with special educational needs are to be provided with appropriate conditions for acquiring basic education and life skills in regular and special primary schools and are entitled to individual assistance for the acquisition of primary education.²⁰⁹

The manner and conditions for the enrolment of students with special educational needs in primary schools is determined by the Minister of Education, on a proposal of the Bureau for Development of Education (an independent body within the ministry).²¹⁰ According to Macedonian legislation there is specialised primary education for children with disabilities and specialised schools are considered equivalent to state schools.²¹¹ In general, children are enrolled in these specialised schools instead of being enrolled in mainstream schools (as discussed below). The Law on Higher Education²¹² does not explicitly prohibit discrimination on the ground of disability; however, there are articles on the special benefits for students with disabilities (exemption from payment of tuition fees,²¹³ selection of students,²¹⁴ and special benefits provided by the university).²¹⁵ It also lists special conditions for enrolment of students with a citizenship other than Macedonian. Special curricula for students with disabilities are developed by the Department for Development of Education.²¹⁶

At present, the dominant practice seems to be segregated education of children with disabilities, rather than their inclusion in mainstream schools. This can be confirmed by the practice of children being taken out of primary education at the request of parents

²⁰⁶ International Organisation for Migration – Macedonia profile, *IOM Website*, <https://www.iom.int/countries/former-yugoslav-republic-macedonia>.

²⁰⁷ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 2.

²⁰⁸ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 3.

²⁰⁹ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 6.

²¹⁰ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 51.

²¹¹ Currently there are: four primary schools for students with moderate intellectual disabilities; one elementary school for children with more severe intellectual disabilities; a primary school for blind and visually impaired children; a primary school for deaf and hearing impaired children; a primary school for students with serious physical disabilities; two secondary schools for students with moderate intellectual disabilities; a school for blind and partially blind students; a school for deaf and hard of hearing students; 80 special classes for pupils in regular primary schools; and two day care centres for young people with moderate or severe combined disabilities. These schools enrol in total about 1 700 students. Please see: The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 186.

²¹² The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 7.

²¹³ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 87.

²¹⁴ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 108.

²¹⁵ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 150.

²¹⁶ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 30.

among other things, because of resistance on the part of teaching staff to teaching children with disabilities and because of bullying by other children.²¹⁷ According to the Law on Primary Education, children with disabilities are entitled to shorter class time, a lower number of children per class and the engagement of specialists. However, both the *Holistic Report on Persons with Disabilities in Macedonia*,²¹⁸ produced by the Open the Windows project and the 2013 Ombudsperson's information report on the inclusion of children with disabilities in education²¹⁹ (which followed the 2006 special report)²²⁰ confirm that the implementation of the standards prescribed in the law is problematic. The holistic report underlines that the practical application of legal provisions entails a lot of problems and obstacles that do not allow for the provision of adequate and equal access to education for children with disabilities, thus practising this right often results in discrimination.²²¹

There are separate secondary schools for children with 'special needs'.²²² Secondary school students with 'special educational needs' are educated under adjusted programmes for job training.²²³ Open the Windows aims to promote assistance technology for children with disabilities from primary school.²²⁴ There are no specific articles that regulate the education of children with disabilities in ordinary secondary schools; these are out of the reach of children with disabilities.

b) Trends and patterns regarding Roma pupils

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

According to the data from the State Statistical Office, one in 10 Roma children completes primary education (please also note that 95 % of the children on the streets are Roma children),²²⁵ in spite of the fact that primary (as well as secondary) education is compulsory in the country. According to the United Nations Children's Fund (UNICEF), Roma children have the lowest level of educational achievement: 39 % of Roma do not attend primary school and the lowest proportion of children attending primary school is observed in the poorest wealth quintile (86.3 %), and among the Roma (61.1 %).²²⁶

The 'Strategy on Roma 2014-2020' (the successor to the 2005 Roma strategy), was adopted in 2014.²²⁷ Like its predecessor, this strategy also has education for Roma as a

²¹⁷ Open the Windows (2015), *Holistic Report on Persons with Disabilities in Macedonia* (Холистички извештај за лицата со попреченост во Македонија) (Otvorete gi prozorcite, 2015), p.22.

²¹⁸ Open the Windows (2015), *Holistic Report on Persons with Disabilities in Macedonia* (Холистички извештај за лицата со попреченост во Македонија) (Otvorete gi prozorcite, 2015).

²¹⁹ Ombudsperson of the Republic of Macedonia (2013), *Информација за состојбата со вклученоста на децата со посебни потреби во основните и средните посебни училишта* (Information of the Ombudsperson on the Inclusion of Children with Disabilities in Primary and Secondary Special Schools), available at: <http://ombudsman.mk/upload/documents/2013/Izvestaj-Posebni%20ucilista-2014.pdf>.

²²⁰ Ombudsperson of the Republic of Macedonia (2006), *Посебен извештај на народниот правобранител за вклученоста на децата со посебни потреби во образованието* (Special Report of the Ombudsperson on the Inclusion of Children with Disabilities in Education), available at: <http://ombudsman.mk/upload/documents/Posebni%20potrebi%20na%20decata1%20-mak.pdf>.

²²¹ There are cases of non-admittance of children with disabilities into regular primary education, or in some other cases these children were admitted at first, but after a certain period they were expelled, thus leaving their parents to cope with the children on their own. Teachers themselves have problems dealing with these children because they are not trained adequately to work with them and to find the most appropriate methods for including children with special needs in school activities.

²²² The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 43.

²²³ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 50.

²²⁴ Open the Windows website: <http://openthewindows.org>.

²²⁵ Institute on Human Rights (2013), *Breaking the Wall of Silence*, https://www.ihr.org.mk/uploads/publications_pdf/diskriminacijaromi.pdf.

²²⁶ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²²⁷ There are also several policy documents targeting Roma women. For more, please see MLSP website at: <http://mtsp.gov.mk/?ItemID=6FC822BBA79A61429117F41943673AE4>.

priority. The strategy highlighted the following concerns with regard to the situation of the Roma population (of relevance for education): the poor economic and social position of a significant number of Roma families; the high percentage of children not attending preschool education; the small number of children attending elementary education; lack of adequate conditions in the homes; economic exploitation of children; lack of sufficient knowledge of Macedonian language; high number of children dropping out of education; and a lack of awareness for the need of education.²²⁸ Eight Roma information centres were established to support the implementation of the strategy and to monitor, inter alia, the situation on the ground.²²⁹

Segregation of Roma pupils continues to be a burning issue. According to the strategy, some parents of Roma origin intentionally enrol their non-disabled children in special schools for children with moderate intellectual disabilities where they can learn crafts. The reasons for this include the fact that it is much easier for the children to complete these schools and find employment.²³⁰ Segregation often occurs in the process of education. However, in spite of numerous inspections and public statements, no sanctions have been imposed in relation to segregation in schools.²³¹

However, the many studies published on the issue of Roma education in the country, and on segregation in particular, paint a more nuanced picture. Studies such as the Open Society Institute (OSI) report,²³² Roma Education Fund reports,²³³ Macedonian Helsinki Committee and the ERRC report,²³⁴ a UNICEF 2008 situation analysis²³⁵ and a 2009 segregation in education analysis,²³⁶ a CPAD report,²³⁷ an Institute of Human Rights REF supported study²³⁸ and an Foundation Open Society Macedonia analysis,²³⁹ have all reached very similar conclusions on segregation and enrolment barriers. They find that the most significant problems in Roma education are similar to those faced by Roma throughout the Western Balkans. Critical²⁴⁰ issues include low enrolment, poor performance, and a high drop-out rate for Roma children, combined with in-school

²²⁸ Ministry of Labour and Social Policy (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020)

<http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

²²⁹ For more information on the Roma Information Centres, please see Ministry of Labour and Social Policy website: <http://mtsp.gov.mk/?ItemID=16963527D912DC41B48380E0B6034274>.

²³⁰ Ministry of Labour and Social Policy, (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020)

<http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

²³¹ Ministry of Labour and Social Policy, (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020)

<http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

²³² Open Society Institute (2007), *Equal Access to Quality Education for Roma, Volume 2: Croatia, Macedonia, Montenegro and Slovakia*, www.opensocietyfoundations.org/sites/default/files/equal_20071218.pdf.

²³³ Roma Education Fund (2007), *Advancing Education of Roma in Macedonia*, www.romaeducationfund.hu/sites/default/files/publications/macedonia_report.pdf.

²³⁴ Referenced in this report: http://insoc.org.mk/files/MC_civil%20society%20monitoring%20report_MC_web.pdf.

²³⁵ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfyr-macedonia/MK_SITAN_ENG.pdf.

²³⁶ UNICEF (2009), *Multiculturalism and interethnic relations in education* (Мултикултурализмот и меѓуетничките односи во образованието), [www.unicef.org/tfyr-macedonia/New_MKVersionsm2\(3\).pdf](http://www.unicef.org/tfyr-macedonia/New_MKVersionsm2(3).pdf).

²³⁷ CPAD (2014), *Segregation of Roma Children in Education* http://eprints.ugd.edu.mk/16407/1/Reserach%20on%20Roma%20segregation_MK%20BAL.pdf.

²³⁸ Institute of Human Rights (2013), *Breaking the Wall of Silence*, https://www.ihr.org.mk/uploads/publications_pdf/diskriminacijaromi.pdf.

²³⁹ Foundation Open Society Macedonia (FOOM) (2015), *Segregation of Roma in Education in Macedonia* (Skopje).

²⁴⁰ Other important issues range from general living conditions, to discrimination, up to clear examples of segregation (including making Roma children sit in the last rows in classes, complaints by parents from other ethnicities that they do not want their children to study with Roma children, even reporting getting lower grades with explicit comments by the teacher that the grade is lower because the student is of Roma ethnic origin). Source: Institute on Human Rights (2013), *Breaking the Wall of Silence*, https://www.ihr.org.mk/uploads/publications_pdf/diskriminacijaromi.pdf.

segregation and discrimination, referral to special schools, restricted access to preschool, and a lack of support for further education.²⁴¹

A case was filed with the CPAD by the Helsinki Committee of the Republic of Macedonia in 2011 regarding the segregation of Roma children in schools in Bitola. After breaching all possible procedural deadlines, the CPAD finally decided this case in September 2014, and the applicants received the decision in December 2014. CPAD did not find discrimination on grounds of ethnicity in the case, nor did it find segregation. The CPAD actually found the situation to be a result of the parents' choice to register their children in a specific primary school, however it failed to state on what it bases its argument, and bluntly added that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.²⁴² Although having deliberated on this case for over three years, the CPAD added a surprisingly short elaboration on its opinion, the largest portion of which consists of a bullet point list of 14 letters/requests that it has sent and received while processing this case, one of which is a rather vague explanation of proceedings which states, 'numerous phone calls on the case topic with relevant sides and numerous meetings on the case topic'. There is no further elaboration as to whom the CPAD talked to or with whom and when they met, and what was discussed and possibly decided. It also disregards reports on Roma children in education and on segregation in education, including a statement from the director of the primary school saying that the parents of children from other ethnicities, although living in the school's region, choose to register their children in other primary schools in order to avoid sending them to school with Roma children.²⁴³ Interestingly enough, at the same time that CPAD adopted this opinion, it was working on a study on segregation of Roma pupils, which was published in November 2014 and found the following: 'In the period from 2010 to 2014, a high portion of segregation of Roma children is noticeable in both regular and in special schools, and in regular and special classes, which represents *an indirect systemic and long-lasting discrimination*' (emphasis added).²⁴⁴

In 2016, five CSOs,²⁴⁵ supported by the OSCE - Mission to Skopje, submitted an *actio popularis* claim on Roma segregation in education against the Government. They claimed interest on grounds of long-term work in the area and findings from studies which they have published, all of which they claim show beyond doubt the segregation of Roma children in education. The first instance court accepted that they have a legitimate interest to represent such a case, but the court went on to dismiss the case on that ground that it lacked express authorisation by the person that finds him/herself discriminated against. As discussed below in this report, that is a criterion in the ADL under Article 41(4), for class action, and not for *actio popularis*. As discussed elsewhere, requesting such authorisation defies the very purpose of *actio popularis*. The court also requested that such authorisation is provided in writing without calling upon any legal provision to support this claim. The CSOs complained to the higher instance court.²⁴⁶

²⁴¹ Roma Education Fund (2007), *Advancing Education of Roma in Macedonia*, www.romaeducationfund.hu/sites/default/files/publications/macedonia_report.pdf.

²⁴² Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

²⁴³ Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

²⁴⁴ CPAD (2014), *Segregation of Roma Children in Education* http://eprints.ugd.edu.mk/16407/1/Reserach%20on%20Roma%20segregation_MK%20BAL.pdf.

²⁴⁵ NGO KHAM Delcevo, Open Society Foundation Macedonia (FOOM), Macedonian Helsinki Committee (MHK), Institute for Human Rights (IHR) and European Roma Rights Centre (ERRC).

²⁴⁶ The case is still not publically available. Information was acquired by the author of this report from persons involved in the preparation of the legal documents related to the process.

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

In Macedonia, national legislation prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive. The Anti-discrimination Law includes access to goods and services in the fields of the law's implementation (Article 4), and applies to all the grounds of the directives and more (Articles 3 and 5(3)), except for sexual orientation which is not explicitly included in this article or the law, although, as Article 3 is an open-ended provision and includes ratified international treaties as well as other grounds established under law, there is space to seek protection on this ground as well. It is also important to note that Article 11, which is part of the chapter on forms of discrimination, establishes that 'disabling or limiting the use of goods and services to persons or groups of persons on any of the grounds established in Article 5, point 3 of this law is discrimination'.

3.2.9.1 Distinction between goods and services available publicly or privately

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

The Law on Consumer Protection²⁴⁷ notes that a merchant providing public services through a distribution network must allow users to join and use the network and e-services under non-discriminatory, previously known and agreed conditions.²⁴⁸ There are no specific grounds for discrimination mentioned.

The equality body continues to deal with this field, as it did in the previous years.²⁴⁹ In 2016, three persons (applicants S.X., R.X., and S.X.) applied to the CPAD claiming discrimination on the ground of skin colour (Article 3, ADL) in access to services (Article 4, ADL) because they were not allowed to enter a pool in Skopje. In their application to the equality body, S.X. stated that the first time they came to the pool, none of them was allowed to go in. Two days later, his wife and daughter (which he, in his application, claims have a fair skin) went first and were let in after they bought a ticket. When S.X. and his son, (who has darker skin, according to his claim) came to enter, they were not allowed to do so. They were also told that they needed to have a special pass (in Macedonian, 'пропустница') in addition to a ticket. S.X. brought the case to the equality body submitting only his claim and a video from which, the CPAD concludes, it could be clearly seen that they were not allowed to enter. On that basis, the CPAD shifted the burden of proof, and asked the legal person managing the pool on behalf of the Municipality Aerodrom (a municipality falling under the city of Skopje), to respond. The delivery of the CPAD communication failed twice, although it was established that the legal person and potential discriminator was contacted at the correct address. The CPAD then said: 'In line with Article 38 [of the ADL], the burden to prove that there was no discrimination falls on the [...] [potential discriminator], who failed to respond to the claim. On grounds of this, [the equality body], in line with Article 24(1) and Articles 28 and 29 of the [ADL] gives the following opinion' and goes on to find direct discrimination

²⁴⁷ The former Yugoslav Republic of Macedonia, Law on Consumer Protection (*Закон за заштита на потрошувачите*), 2004. Full text: The former Yugoslav Republic of Macedonia, Law on Consumer Protection (*Закон за заштита на потрошувачите*), Official Gazette of the Republic of Macedonia No. 38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015, 152/2015.

²⁴⁸ The former Yugoslav Republic of Macedonia, Law on Consumer Protection, 2004, Article 119.

²⁴⁹ One of the cases initially processed by the equality body, and later (March 2015), taken to court, concerned accessibility of pavements for persons with disability in the town of Delcevo. Both the equality body and the Delcevo court of first instance found discrimination. Commission for Protection Against Discrimination (*Комисија за заштита од дискриминација*) (2015), *2014 Annual Report of the Commission for Protection Against Discrimination*, p.14, www.sobranie.mk/materialdetails.aspx?materialId=d93111d8-975d-471e-be2c-e07a2df372f3; Primary Court Delcevo (*Основен суд Делчево*), Judgment P-4. no. 14/2014 (20.03.2015).

on grounds of skin colour in relation to access to services (in this case, access to the pool). No claims for liability on part of the municipality were considered.²⁵⁰

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

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

Under Article 104 of the Law on Housing,²⁵¹ a regulatory commission was established with a mandate, *inter alia*, to prevent discrimination in the field of housing,²⁵² however the provision does not contain any further explanations as to protective mechanisms, nor does it mention grounds of discrimination. Disability is only mentioned insofar as the manager of the building should know the standards and norms for accessibility for persons with disabilities in a residential facility (Article 19(12)) (under the same article, this can also be taken as imposing an obligation on her/him to initiate court procedures against the constructors for improper and incomplete execution of the appropriate actions).

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

In relation to discrimination against migrants, the same general note made for the field of education applies to housing issues. Macedonia has a negative net migration rate of 0.5 per 1 000 population.²⁵³ In the 2015 'migrant crisis', the country served as a transit point on the so-called Balkan Route, rather than a destination country. Thus, no case law has been developed on enforcement and no implementation issues have been raised in general. If a discrimination case is raised, migrants should be given the same treatment as any citizen of the country or any other person, because the Anti-discrimination Law does not distinguish between Macedonian citizens and citizens of other countries. This holds across all fields of application of the law, thus including housing.

²⁵⁰ Case No. 08/1744 - *S.X., H.X., and S.X. v Pool "Biser"*, CPAD (08.11.2016), available at (in Macedonian only) http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2016/boja_koza/1744_SH_Aerodrom.pdf.

²⁵¹ The former Yugoslav Republic of Macedonia, Law on Housing (*Закон за домување*), 2009. Full title: The former Yugoslav Republic of Macedonia, Law on Housing (*Закон за домување*), Official Gazette of the Republic of Macedonia No. 99/2009, 57/2010, 36/2011, 54/2011, 13/2012, 55/2013, 163/2013, 42/2014, 199/2014, 146/2015, 31/2016; Constitutional Court Decisions: U.no. 246/2009 (14.07.2010), U.no.14/2010 (15.09.2010).

²⁵² The former Yugoslav Republic of Macedonia, Law on Housing, 2009, Article 104.

²⁵³ International Organisation for Migration – Macedonia profile, *IOM Website*, <https://www.iom.int/countries/former-yugoslav-republic-macedonia>.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Macedonia, there are patterns of housing segregation and discrimination against the Roma. Roma are primarily concentrated in 10 municipalities, and the Roma population is usually concentrated in one part of the town,²⁵⁴ with 95 % of Roma living in towns, while only 5 % live in villages.²⁵⁵ About 70 % of Roma do not have any proof of ownership over their property.

Roma generally live in informal settlements on the outskirts of urban centres, which that further obstructs their access to basic social services. In general, while many Macedonians live in privately owned apartments (former state-owned public housing that was made available for sale), some 15 to 25 % of the population live in about 100 informal urban settlements.²⁵⁶ According to the same source, '95 % (or 47 408) of Roma live in informal settlements located on the peripheries of Macedonia's cities. These settlements are typified by higher levels of unemployment, crime, illiteracy, juvenile delinquency, drug abuse and other social problems, all of which can negatively affect children's social development.'²⁵⁷

There are no official statistics on racist incidents and discrimination in housing against Roma. However, the media and NGOs report cases of institutional violence and assault against Roma,²⁵⁸ particularly police raids and evictions (after the Roma are accused of residing in unlawfully built buildings), that deprive the Roma of their housing, and do not provide them with alternative accommodation.²⁵⁹

An older (2008) report on the conditions of housing and health in the Roma community, which is to date the one with most robust and primary data, states that Roma families often live in badly built, sub-standard houses, without in-house water supplies and sanitation. Data show that 7.25 % of the families live in improvised houses built from non-construction materials (cardboard, nylon, tin, plastic, etc.), 29.5 % in dilapidated and montage houses, and only 63 % in solid-construction houses.²⁶⁰ More than 10 % of the families don't have access to any kind of water supply. The sewerage conditions are extremely bad, with an estimate of 50 % of families having no access to proper solution for the discharge of the sewage and communal water.²⁶¹

In 2016, the European Roma Rights Centre (ERRC) initiated a case against the country in front of the ECtHR on Article 3, Article 8, Article 14 in conjunction with Articles 3, 8 and

²⁵⁴ CRPRC Studiorum and Mesecina (ЦРПС Студиорум и Месечина) (2008), *Report on the condition of housing and health among the Roma Community in Macedonia*, www.studiorum.org.mk/?p=41.

²⁵⁵ Samet Skenderi (2014) *Домување на ромите и социјална интеграција во Република Македонија* (Housing of Roma and Social Intergration in the Republic of Macedonia). p.7.

²⁵⁶ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²⁵⁷ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²⁵⁸ National Roma Centrum (Национален ромски центар) *Report to the Committee on Economic, Social and Cultural Rights of the United Nations* (Извештај до комитетот за економски, социјални и културни права на Обединетите нации), www.nationalromacentrum.org.mk/publikacii/istrazuvanja/izvestaj-do-komiteto-za-ekonomski/; Kanal 5, 'Discoteque Kalipso Prohibits Entrance to Roma' (Во дискотеката Калипсо во Берово е забранет влезот за Ромите) [Cache]; A1, 'Entrance Banned for Roma at the New Aqua Park' (Забранет влез за Роми во новиот Аква парк) [31.07.2013].

²⁵⁹ Helsinki Committee for Human Rights of the Republic of Macedonia (2014), *Assessment of the Progress of the Roma Decade* (Проценка на напредокот на декадата на ромите), www.mhc.org.mk/?ItemID=3DE4E8C7F50F194281021DB76FAD9E1E.

²⁶⁰ Roma houses are small, planned to serve only elementary needs, with housing space of less than 5 m² per member for more than 50 % of the families. About 40 % of the families live in shared houses. Only 16 % of the houses have a toilet and bathroom in the house; 77 % of the families use a toilet in the yard and 58 % use a tap in the yard.

²⁶¹ CRPRC Studiorum and Mesecina (ЦРПС Студиорум и Месечина), *Report on the condition of housing and health among the Roma Community in Macedonia*, www.studiorum.org.mk/?p=41.

10, and Article 13 in conjunction with Articles 3 and 8.²⁶² This case concerns the eviction of over 120 Roma from the Poligon settlement in Skopje. They are very poor people, living in an informal settlement and some of them have been there for many years. Their houses have been torn down many times before being repeatedly rebuilt. The Government destroyed their houses and the local water pump. In a month that was full of storms and floods, these people were left in the open air without a roof over the heads. The ERRC reports that the people have been offered accommodation in a shelter centre, but that it does not have enough space in it (and is already notorious for its cramped, degrading conditions and inter-ethnic violence). The ERRC did not succeed in securing interim measures but the case is pending.²⁶³

²⁶² *ERRC in the case of Bekir and others v. Macedonia* (08.11.2016)
<http://www.errc.org/cms/upload/file/application-eviction-bekir-and-others-v-macedonia-november-2016.pdf>

²⁶³ *ERRC in the case of Bekir and others v. Macedonia* (08.11.2016)
<http://www.errc.org/cms/upload/file/application-eviction-bekir-and-others-v-macedonia-november-2016.pdf>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

Article 8 of the Law on Labour Relations²⁶⁴ uses wording on exemptions from occupational requirements in the context of access to labour, which corresponds to the language of Article 4 of Directive 2000/43/EC. Notably, the law states that

'it will not be considered discrimination making a difference, exclusion or giving priority in terms of a certain thing, when the nature of the work is such or the work is performed in such conditions that the characteristics associated with some of the cases Article 6 of this law are essential and decisive conditions for performing the work, providing that the objective to be achieved is justified and the requirement has been carefully considered.'²⁶⁵

Although a careful consideration of the requirement (*одмерен*) is not the same as being proportionate (*пропорционален*), there is room to interpret it as such. However, from the publically available data it cannot be concluded whether such an interpretation has been applied in practice.

The grounds covered by the Law on Labour Relations are broader than the protected grounds of the two directives, and the differences in treatment in cases of determining occupational requirements need not only be based on the five grounds mentioned in the directives, but can cover all protected grounds.²⁶⁶

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

In Macedonia, national law provides for an exception for employers with an ethos based on religion or belief. The Anti-discrimination Law includes such an exception fully in compliance with Article 4(2) of Directive 2000/78 (Article 14(3-4)). However, under this same law it does not constitute discrimination if members of legally registered²⁶⁷ churches and religious communities (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)), which goes beyond religion and into the realm of any belief which they might have in their founding and internal acts, programmes or statutes.

²⁶⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

²⁶⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 8.

²⁶⁶ The directives' grounds of race, belief, disability, age and sexual orientation are all covered, and the Law on Labour Relations goes beyond them in an open-ended list: sex, health condition, membership of a trade union, social origin, position of the family, property, or other personal circumstances.

²⁶⁷ There have been issues with registration; these were grounded in inter-religious disputes rather than in discrimination by one religion against another. The most notable cases in this regard would be the cases of Vraniškovski and of the Bektaši community. For more on religious freedom in Macedonia, see: <https://www.state.gov/documents/organization/256427.pdf>.

The Law on the Legal Position of Churches, Religious Communities and Religious Groups²⁶⁸ contains no specific articles on employment and labour relations. Other laws also do not include specific provisions on exemptions for employers with an ethos based on religion or belief. However, in the exemptions from prohibition of discrimination in the Law on Labour Relations there is sufficient space for churches, religious communities and groups to be exempt in accordance with Article 4(2) of Directive 2000/78 (Article 8).

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

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

However, these provisions are not in the Anti-discrimination law. The laws that regulate the founding and eligible activities of associations (civil society organisations, foundations,²⁶⁹ as well as religious communities and religious groups) regulate this issue, stating that an association will cease to exist if it engages in such actions contrary to the Constitution and laws, and violates other people's rights, which includes the right to non-discrimination. The Anti-discrimination Law contains no such anti-conflict provision. It should be noted, however, that it would not constitute discrimination if members of religions registered under law (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)). This would mean that it excuses these members even if, in doing so, they are discriminating on the grounds mentioned in Article 3, however there is no case law on this provision yet. It also declares that it will not constitute discrimination when a marriage, out-of-wedlock union and family are regulated exclusively as unions of opposite sexes i.e. of one man and one woman (Article 14(6) of the Anti-discrimination Law).

In the Law on the Legal Position of Churches, Religious Communities and Religious Groups, there are no specific articles related to such conflicts. So far there is no case law on the issue. However, the Macedonian Orthodox Church and the Islamic Religious Community have very clearly expressed their opinions that sexual orientation should not be mentioned in the anti-discrimination legislation.²⁷⁰ Also, the end of 2010 saw an initiative on their behalf to open a cycle of constitutional changes that should, in their words, strengthen the traditional form of the family, but which are clearly intended to target homosexuals. Notably, these changes state that a marriage is a union of one woman and one man, as well as to insert provisions that will limit the possibility for homosexuals to adopt children. The draft amendments to the Constitution, which entered parliamentary procedure and proposed a definition of marriage as a union of one man and one woman, as well as mandatory registration of unmarried couples ('out-of-wedlock communities') defined in the same manner, were not adopted by the Parliament. Thus, this issue is, for now, closed.

- Religious institutions affecting employment in state funded entities

In Macedonia, religious institutions are not permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the state. However, there was an attempt in that direction with the introduction of religious education into state elementary schools. Without any legal basis, the two main religious groups – the Macedonian Orthodox Church and Islamic Religious

²⁶⁸ The former Yugoslav Republic of Macedonia, Law on the Legal Position of the Church, Communities of Faith and Religious Groups (*Закон за правна положба на црква, верска задница и религиозна група*), 2007. Official Gazette of the Republic of Macedonia No. 113/07.

²⁶⁹ The former Yugoslav Republic of Macedonia, Law on Associations and Foundations (*Закон за здруженија и фондации*), 2010, Article 4. Official Gazette of the Republic of Macedonia No.52/2010, 135/2011.

²⁷⁰ Dnevnik Newspaper, 'Oriented Towards Sexual Discrimination' (*Ориентирани кон сексуална*) (only in print).

Community – selected the teachers. However, the Constitutional Court, acting upon a petition by NGOs, declared the introduction of religious education null and void.²⁷¹

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

In Macedonia, national legislation provides for an exception for the armed forces in relation to age (Article 3(4), Directive 2000/78). There is no specific disability exception, but there is a general health and physical condition requirement.

The Law on Army Service establishes different age limitations, and disability is a ground for losing military status. Professional soldiers must not be older than 26 years of age²⁷² at the day of the closing of the recruitment advert. The contract is renewable every three years up to a maximum age of 45.²⁷³ Junior officers must not be older than 25 years of age (or 33 years of age, depending on experience, qualifications, as well as previous status in the armed forces, if any),²⁷⁴ or senior officers older than 30 years of age when entering the Army (or 35 years of age if coming to the senior officer position from a junior officer position).²⁷⁵ The upper limit for civilian personnel is 40 years of age. The retirement age for active military and civilian personnel is 25 years of pension insurance, out of which 15 have been spent in army service (if this has not been fulfilled, and army service has ended, the Ministry of Defence must provide for further employment or education to allow the person to accumulate the years necessary to reach retirement age).²⁷⁶

According to the 2014 amendments to this law, after 45 years of age, professional soldiers will be transferred to an appropriate position in the central state or municipal administration, under a contract with an unlimited duration. There is a retroactive application for this provision, according to which it also applies to professional soldiers whose army service ceased under the law previously due to reaching the maximum age limit of 35 or 38 years of age, if they have an unemployed person status up to 31 December 2013.²⁷⁷

As noted above, there is no specific disability exception, but there is a general health and physical condition requirement. As they stand, the Army's specific requirements in relation to health and good physical condition are substantial barriers for persons with disability to enter the Army.²⁷⁸ As noted in the 2015 analysis on the harmonisation of the national equality legislation, the medical check up that is mandatory for issuing a certificate for fulfilling these criteria includes checking the nervous system and 'mental condition', 'mental disorders' in the family (including epilepsy), sight and hearing senses, personal habits and physical injuries – one of the rulebooks even includes notes on tattoos as part of this assessment. This is documented in detail in the above-mentioned 2015 analysis, which identifies a number of provisions that include a general health condition as a discriminatory criterion, meaning that this criterion is a cross-cutting discriminatory issue, preventing access to public service.²⁷⁹

²⁷¹ Constitutional Court, Decision U.No. 202/2008, (15.04.2009).

²⁷² The former Yugoslav Republic of Macedonia, Law on Army Service (*Закон за служба во армијата*), 2010, Article 36. Full title: The former Yugoslav Republic of Macedonia, Law on Army Service (*Закон за служба во армијата*), Official Gazette of the Republic of Macedonia No. 36/2010, 23/2011, 47/2011, 148/2011, 55/2012, 29/2014, 33/2015, 193/2015, 71/2016; Constitutional Court, Decision: U.no.60/2010, (22.09.2010).

²⁷³ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 40, 42, 43.

²⁷⁴ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 34 and 35.

²⁷⁵ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 32.

²⁷⁶ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 220 (paragraph 2).

²⁷⁷ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 40-a, 40-6.

²⁷⁸ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 31 and 202-210.

²⁷⁹ See Table 3 in: Kotevska B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

Even if the disability is a result of army service it would still lead to loss of military status. The best scenario is that the person could remain as civilian personnel retaining the salary received and rank held prior to the health degradation (or would drop one rank down, if the same rank could not be awarded).²⁸⁰ An extra three days of vacation are provided for personnel with a disability or a person taking care of a disabled child.²⁸¹

Ethnicity is dealt with in law in several respects, all of which rest on the constitutional principle of equitable and just representation which, bluntly put, means that the representation of each ethnic group needs to be equal to the percentage of the population found in the census. Persons belonging to minorities should be adequately and fairly represented in the Army providing that they are duly trained and competent.²⁸² Public vacancy ads need to be published in, *inter alia*, at least one newspaper printed in a language used by at least 20 % of the population in the country.²⁸³ With regard to the oath, the document to be signed is both in Macedonian and in the language of that person.²⁸⁴

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

'citizens of the Republic of Macedonia have citizenship of the Republic of Macedonia [and it declares] the free expression of national identity [as] a fundamental value'.²⁸⁵

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

In Macedonia, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law. Nationality understood as origin from another country is not covered by the Anti-discrimination Law. However, citizenship, understood as the legal link of a person with a certain country, is part of the grounds covered by the Anti-discrimination Law (Article 3).²⁸⁶ Although not explicitly referred to, the same would be true for stateless persons.

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

Nationality understood as origin from another country is not covered by the Anti-discrimination Law. However, citizenship, understood as the legal link of a person with a

²⁸⁰ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 78.

²⁸¹ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 98 (para.2).

²⁸² The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 30 (para.5).

²⁸³ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 39 (para.2).

²⁸⁴ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 7 (para.2).

²⁸⁵ Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia. www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx. Articles 4 and 6.

²⁸⁶ However, please see the exceptions in relation to nationality mentioned in section 4.4.b.

certain country, is part of the grounds covered by the Anti-discrimination Law (Article 3).²⁸⁷ Although not explicitly referred to, the same would be true for stateless persons.

The lack of clarity deepens in some laws that refer to nationality and ethnicity as different grounds for discrimination.²⁸⁸ No definition is provided, which also adds to the confusion of the terms, since in some laws the term 'national belonging' is used.²⁸⁹ The courts consistently use the terms 'foreigner' and 'foreign' when referring to nationals of another country.

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

a) Benefits for married employees

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

Macedonian legislation does not mention the right of employers to provide benefits solely to a certain category of employees (such as those married or with children). However, the constitutional provision under which the Republic provides particular care and protection for the family²⁹⁰ could be interpreted as opening space for, *inter alia*, such privileges.²⁹¹ An addition to this argumentation is the provision that is part of an article on unequal treatment that will not be considered as discrimination, in the Anti-discrimination Law, which includes the regulation of the family, marriage, and out of wedlock partnerships as limited to opposite sex partners (Article 15(6)).

b) Benefits for employees with opposite-sex partners

In Macedonia, it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. Same-sex partnership is not recognised under Macedonian legislation, while the Law on Family and Marriage clearly states that marriage is a union between a man and a woman, and the same applies for unmarried couples recognised under this law. There has not been a case on these issues. Moreover, the Anti-discrimination Law provides as part of the article on unequal treatment that will not be considered as discrimination, the regulation of the family, marriage, and out of wedlock partnerships as limited to opposite sex partners (Article 15(6)). A 2015 analysis of the harmonisation of the national equality and non-discrimination legislation against international standards and of the harmonisation at the national level with the comprehensive Anti-discrimination Law raises the issue of inequalities in relation to out-of-wedlock partnerships as well as to partnerships and marriages of same sex couples. It notes that limiting partnerships solely to opposite-sex couples is discriminatory and not in line with the ECHR and the practice of the ECtHR.²⁹²

²⁸⁷ However, please see the exceptions in relation to nationality mentioned below.

²⁸⁸ For example, Article 3 of the Law on Voluntary Fully Funded Pension Insurance and Article 20 of the Law on Social Protection.

²⁸⁹ Article 6 of the Law on Primary Education and Article 6 of the Law on Labour Relations.

²⁹⁰ Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx. Article 40.

²⁹¹ One needs to bear in mind here that although family is not defined in the Constitution, it is defined in the Law on Family as a community of parents and children and/or other relatives, provided that they live in the same household (Article 2(1); Law on Family).

²⁹² Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

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

a) Exceptions in relation to disability and health/safety

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

This article states that

'it will not be considered discrimination making a difference, exclusion or giving priority in terms of a certain thing, when the nature of the work is such or work is performed in such conditions that the characteristics associated with some of the cases in Article 6 of this law are an essential and decisive condition for performing the work, providing that the objective to be achieved is justified and the requirement is carefully considered.'²⁹³

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

The Law on Labour Relations does not specify exceptions in relation to health and safety on any other ground, thus the legitimacy and proportionality test indicated in the Law on Labour Relations would be applicable for exceptions based on dress codes or religious tenets (Article 8). However, the law does provide for other health and safety related special protective measures in relation to employees under 18 years of age, as well as for older employees²⁹⁴ (over 57 years of age for women and 59 years of age for men). The protection encompasses hours of work, night work, work in special conditions and supplementary vacation (for workers under 18) and prohibition of overtime work and night shifts (for older workers), as well as other special measures provided in this and other laws.²⁹⁵ There are also exceptions for protective measures related to pregnancy and parenting.²⁹⁶

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

4.7.1 Direct discrimination

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

²⁹³ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 8.

²⁹⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XV.

²⁹⁵ See The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII: Protection of Workers under 18 Years, and Chapter XV: Special protection of older workers.

²⁹⁶ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 161.

a) Justification of direct discrimination on the ground of age

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

b) Permitted differences of treatment based on age

In Macedonia, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78. The Anti-discrimination Law contains a clause that is in line with the test required in Article 6 of Directive 2000/78 (Article 14(9)). The Law on Labour Relations provides for specific protective measures in relation to employees younger than 18, as well as for older employees (over 57 years of age for women and 59 years of age for men). The protection encompasses hours of work, night work, work in special conditions and supplementary vacation (for workers under 18) and prohibition of overtime work and night shifts (for older workers), as well as other special measures provided by this and other laws.²⁹⁷

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

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

The pension system is composed of three pillars established by three laws: the Law on Voluntary Fully Funded Pension Insurance, the Law on Pension and Disability Insurance, and the Law on Mandatory Fully Funded Pension Insurance. The Law on Pension and Disability Insurance²⁹⁸ establishes the general age of retirement, which is 64 years of age for men and 62 years of age for women. At least 15 years of pension contributions (i.e. working years covered by pension insurance) is also required (Article 18).

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

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

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

The Law on Labour Relations provides for specific protective measures in relation to employees younger than 18 years of age.²⁹⁹ The protection encompasses hours of work, night work, work in special conditions and supplementary vacation. It allows for providing special protection for older workers (Article 179). The same law restricts overtime and night work for older workers (Article 180). The same restrictions apply to persons with caring responsibilities for children not older than seven years of age.³⁰⁰

²⁹⁷ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII: Protection of Workers under 18 Years, and Chapter XV: Special protection of older workers.

²⁹⁸ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

²⁹⁹ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII.

³⁰⁰ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 164.

4.7.3 Minimum and maximum age requirements

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

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

Law on Labour Relations establishes 15 years of age as the minimum age for employment (Article 250). There is a general prohibition on the employment of children under 15 years of age, except for recording films, preparing and performing arts, stage and other similar works (cultural, artistic, sports and advertising activities). A special procedure and approval is required for this. There are also special provisions for the work of students (as practical work experience) and for apprentices.³⁰¹

4.7.4 Retirement

a) State pension age

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

The Law on Pension and Disability Insurance³⁰² establishes the general pension age as 64 years of age (for men) or 62 years of age (for women) with at least 15 years of pension contributions accrued.³⁰³ If someone chooses to continue working, they are not entitled to receive a pension; pension payments can only start after a person ceases working. The Law on Pension and Disability Insurance provides for different criteria for the calculation of pensions in special cases.³⁰⁴ According to this law, pension and disability insurance rights depend on wages earned and the total length of contributions. The amount of the awarded age pension depends on the monthly average wage, which determines the pension base, while the percentage of the pension is determined according to the length of pension contributions.

b) Occupational pension schemes

In Macedonia, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wishes to work longer, payments from such occupational pension schemes can be deferred, and the individual can continue to work if their employer agrees, but not after the age of 67.³⁰⁵ An individual cannot collect a pension and still work.

c) State imposed mandatory retirement ages

In Macedonia, there is a state-imposed mandatory retirement age. The state-imposed retirement age is mandatory. Under the Law on Labour Relations, Article 104, when an employee reaches the age of 64, but wants to work longer, s/he can continue to do so,

³⁰¹ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 251.

³⁰² The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

³⁰³ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

³⁰⁴ The standard calculation system is given in Articles 18 and 18-a of the Law on Pension and Disability Insurance; The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

³⁰⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

but only until the age of 67.³⁰⁶ There are no sanctions in the Law on Labour Relations tied to a breach of this provision. Under the Law on Pension and Disability Insurance, the age set for acquiring the right to a pension by age remains as 62 for women and 64 for men.³⁰⁷

d) Retirement ages imposed by employers

In Macedonia, national law does not permit employers to set retirement ages by contract, collective bargaining or unilaterally. The retirement ages are as set in the national legislation (the Law on Labour Relations and the Law on Pension and Disability Insurance). However, according to the Law on Labour Relations, individual employment contracts or collective agreements may determine rights for workers that are more favourable than those determined by law (Article 12).³⁰⁸ The same article stipulates that employers cannot include clauses introducing fewer rights than those established in the Constitution and law. National collective agreements for the public sector and the economy do not mention reductions or expansions of the pensionable age in any sector.

e) Employment rights applicable to all workers irrespective of age

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

f) Compliance of national law with CJEU case law

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

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

b) Age taken into account for redundancy compensation

In Macedonia, national law does provide compensation for redundancy. Article 97 of the Law on Labour Relations provides the criteria applied to calculate the compensation.

³⁰⁶ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104. Please note that the article used to set different limits for men (67) and women (65). However, on the basis of a CSO-led initiative, in 2016 the Constitutional Court decision annulled this part, and equalised the limit for men and women. Source: Constitutional Court Decision No. 114/2014-0-1 (29.06.2016), available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/475a0c0c3291f1e6c1257ff10041c84d?OpenDocument>. It is also worth noting that, at the time of writing of this report, there is a case pending in front of the Constitutional Court challenging Article 98(5-6) - the provision in the Law on Administrative Servants which is to mirror this provision from the Law on Labour Relations. That initiative is available here: <http://www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/d364c10eb773c490c1258089004acdd0?OpenDocument&Highlight=0.дискриминација>.

³⁰⁷ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012, Article 18.

³⁰⁸ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

Although the number of years an employee has spent working for an employer is one of the criteria for establishing the amount of compensation, this is not tied to the age of the worker.

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

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

4.9 Any other exceptions

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

'the following shall not be deemed to be discrimination: the measures provided for in the Law on Employment Promotion (Article 15(2)), the measures for protection of the specifics and identity of the persons belonging to ethnic, religious or linguistic minorities and their right to maintain and develop their own identity individually or in a community with other members of their group as well as to stimulate conditions for promotion of that identity (Article 15(8)); and the special measures to benefit the persons or groups placed in a less favourable position as a result of any of the discriminatory grounds, for the purpose of equalising their opportunities, as long as those measures are necessary (Article 15(6))'.³⁰⁹

³⁰⁹ The former Yugoslav Republic of Macedonia, Anti-discrimination Law, 2010.

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

a) Scope for positive action measures

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

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

Ethnic origin seems to be the dominant ground for undertaking positive action, and has its basis in the 2001 amendments to the Constitution, which were tailored according to the Ohrid Framework Agreement (a political agreement ending the 2001 conflict). It is also reflected in the exceptions section of the ADL, in Article 15(8), as a protective mechanism which will not be considered to constitute discrimination.³¹⁰ Several institutions are tasked to ensure the proper implementation of these measures, the main ones being the Secretariat for Implementation of the Ohrid Framework Agreement, the Committee for Inter-Community Relations and the Agency for Realisation of the Rights of the Communities. The Committee for Inter-Community Relations considers issues of inter-community relations in the Republic and makes appraisals and proposals for their solution, and can propose positive action measures to Parliament, which decides in plenary on such issues. The Parliament is obliged to take into consideration the appraisals and proposals of the committee and to make decisions regarding them. In the event of a dispute among members of the Parliament regarding the application of the voting procedure specified in Article 69(2), the committee will decide by majority vote whether the procedure applies. The Committee for Inter-Community Relations consists of seven members from each of the ranks of the ethnic Macedonians and ethnic Albanians within the Parliament, and five members from among the ethnic Turks, Serbs, Vlachs, Roma and Bosniaks. The members of the Committee are elected by the Parliament.

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

On disability, the main instrument for positive action measures related to persons with disabilities is the Law on Employment of People with Disabilities.³¹¹ Its main goals are the integration of people with disability in the working environment and their safety in the workplace. In a recent statement, the director of the State Agency for Employment said that, from the start of the implementation of this law until to the end of 2016, almost EUR 34 million (MKD 2.088.660.754) was spent on the 'employment of persons with disabilities, adaptations of working places, purchase of equipment, training of persons

³¹⁰ The same is done in Article 15(5) for equality between men and women.

³¹¹ The former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities, 2000, Article 2.

with disabilities as well as construction and expansion of working space.³¹² A new draft law that was initiated by the Ministry of Labour and Social Policy, has still not entered parliamentary procedure, although the governmental policies in relation to employment of persons with disabilities continued.

In 2016, the Government published a special call for 'self-employment' of persons with disabilities, which will run as part of the operational plan on increasing employment in the country in general. Under this plan, almost EUR 10 000 can be awarded to a person with a disability in order to set up a company, buy the necessary equipment, and also, by choice, for employing two more people, for which the grant covers the national minimum wage.³¹³ Also in 2016, the Government announced a project supporting the purchase of automobiles for persons with disabilities. The following is a quote (translated into English) from the Government announcement:

'Persons with at least 80 % "invalidity" in the lower extremities, completely "blind persons" and "deaf persons", and persons with moderate, medium and severe intellectual disability will be refunded up to MKD 180 000 [EUR 3 000] for paid custom taxes, value added tax and excise related to the purchase of the automobile.'³¹⁴

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

A new strategy – 'National Strategy on Equality and Non-discrimination (2016-2020)' – was adopted in 2016.³¹⁵ It has the same general goals as its predecessor – the 2012-2015 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender',³¹⁶ which are: advancing the legal framework for equality and non-discrimination; strengthening capacity and advancing the work and cooperation of the institutional mechanisms for the prevention and protection against discrimination and promotion of equal treatment; raising awareness in recognising forms of discrimination; and promoting the concepts of non-discrimination and equal opportunities. The introduction of the strategy states that it was prepared on the basis of an evaluation of the implementation of the previous strategy which, according to the text, found that the strategy had had a positive role in the development of discrimination policy in the country.³¹⁷ This evaluation has not been published.

³¹² Ministry of Labour and Social Policy – news archive (in Macedonian language only), http://www.mtsp.gov.mk/fevruari-2017-ns_article-zapocnuva-proektot-centar-za-vrabotuvanje-na-lica-so-hendikep.nspix.

³¹³ Ministry of Labour and Social Policy – news archive (in Macedonian language only), http://www.mtsp.gov.mk/fevruari-2017-ns_article-zapocnuva-proektot-centar-za-vrabotuvanje-na-lica-so-hendikep.nspix.

³¹⁴ Ministry of Labour and Social Policy – news archive (in Macedonian language only), "Government support for purchase of automobiles" (Владина поддршка за лицата со инвалидност за набавка на автомобил) http://www.mtsp.gov.mk/juli-2016-ns_article-vladina-poddrshka-za-licata-so-invalidnost-za-nabavka-na-avtomobil.nspix.

³¹⁵ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

³¹⁶ Ministry of Labour and Social Policy (2012), *National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender 2012-2015* (Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол 2012-2015), www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc.

³¹⁷ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* [Национална стратегија за еднаквост и недискриминација 2016-2020],

Unlike its predecessor, this strategy focuses on fields, rather than grounds. Moreover, compared to the previous document, it includes a reference to 'LGBTI' persons in the mission of the strategy:

'Effective protection against discrimination and respect for the principle of equal opportunities and prohibition of discrimination on any person and/or groups of persons, on grounds of their personal characteristics, and especially of the vulnerable groups (ethnic communities, women, LGBTI persons, persons with mental and physical disability, elderly, children, refugees, persons with lower social status, internally displaced persons, and other vulnerable groups, members of religious communities and every person who has been treated differently without objective justification and a legitimate aim).'³¹⁸

b) Main positive action measures in place on national level

Quotas (ethnicity, including Roma)

There is a special secretariat within the Government charged with the implementation of the Ohrid Framework Agreement.³¹⁹ Although no quotas exist on paper, they do exist in practice due to the implementation of the principle of equitable representation, which is used when implementing positive actions. This principle operates on the basis of self-identification and aims to bring about representation of the communities in the institutions to reflect the representation and composition of the ethnic communities in society according to the latest census results (for example, a target percentage for the Albanian population would be a representation of 25 %, as this is the percentage of the Albanian community from the total population of the country, according to the 2002 census).

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

Additional social and other measures (Roma)

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

Preferential treatment (disability)

Preferential treatment of people with disabilities is provided for in the 'National Strategy for Equalisation of the Rights of People with Disabilities 2010-2018' (and its predecessor). The strategy acts as an operational framework for the UN Convention on the Rights of Persons with Disabilities.³²⁰ This convention was ratified in November 2011.

http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

³¹⁸ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)*.

³¹⁹ Although it is not OFA itself that is being implemented, but constitutional, legal and policy documents resulting from its signing, the expression 'implementation of OFA' is used here to avoid long explication pretexts for the wave of reforms after 2001 resulting from it being signed.

³²⁰ Ministry of Labour and Social Policy (2010), *National Strategy for Equalisation of the Rights of Persons with Disabilities*, <http://mtsp.gov.mk/WBStorage/Files/FINALNA%20Revidirana%20Nacionalna%20Strategija.pdf>.

The country submitted the initial report to the UN Committee on the Rights of Persons with Disabilities in 2014. However, as can be seen from this report, save for training activities with interpreters and pharmacists reported as undertaken pursuant to Article 21 (Freedom of Expression and Opinion, and Access to Information),³²¹ no other information on the implementation or the progress of this strategy exists.

Broad social policy (age)

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

There is a 'National Strategy for Elderly People 2010-2020'.³²² However results from its implementation are not yet expected, as the coordinating body tasked to follow its implementation was only recently established. However, special programmes for recreation (free ski trips and use of thermal baths facilities) and transport (free use of public transport in the capital on selected week days, and use of train transportation in the whole territory of the country on selected week days) have been implemented. There are also housing facilities and newly built housing for elderly persons.

As noted above, given the negative migration rate, no need for such measures in relation to migrants has been established and no such measures have been put in place.

³²¹ The initial report can be accessed at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/275/23/PDF/G1527523.pdf?OpenElement>.

³²² Ministry of Labour and Social Policy (2010), *Национална стратегија за стари лица 2010-2020* (National Strategy for Elderly People 2010-2020), <http://mtsp.gov.mk/WBStorage/Files/Strategija%20za%20stari%20lica%20juni.pdf>.

6 REMEDIES AND ENFORCEMENT

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

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

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

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

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

Litigation proceedings can be initiated before ordinary courts, based on the provisions of the Anti-discrimination Law (Chapter VI, Articles 34-41). The law does not resolve the priority of the procedures, in case of simultaneous procedures. It states that if a procedure is raised before a court, no procedure can be raised before the CPAD. However, it does not say what one does if a procedure is raised before the CPAD, and after that another procedure is started in front of a court before the procedure before the CPAD has ended. Also, the law does not regulate the relations between the procedures in front of the Ombudsperson and the CPAD, in cases of overlap. This issue has been resolved by a memorandum of understanding between the two institutions.³²³

Under the Anti-discrimination Law, the outcome of a claim depends on the procedure that one chooses to pursue. The CPAD registered 60 cases in 2016. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation could lead to an award of regular compensation; while the misdemeanour procedure envisages fines in the range of EUR 400 to 1 000 (to be paid in national currency).

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

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

³²³ A memorandum for cooperation between these two institutions and the Commission for Equal Opportunities of Women and Men of the Assembly of Republic of Macedonia and the Macedonian Women Lobby was signed in December 2011.

lawyer is an obligation and the claimant must pay the court costs in advance. Moreover, if a claimant loses a lawsuit against a state employer, he or she has to pay the costs of the State Defender.³²⁴ As it is a judicial litigation, there are strict time limits for all procedural actions.

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

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

Although non-binding, if the CPAD finds discrimination, it issues an opinion accompanied by recommendations. The person to whom the recommendation is directed needs to act upon it, and notify the CPAD within a deadline of 30 days (Article 28(2) and (3)). However, the CPAD has no power to push for the enforcement of its opinion; it is not legally binding and there is no appeal procedure. If the person does not act upon the recommendation, the CPAD can open a procedure to a competent body (the law does not specify further which body would be considered as a competent body) to establish the person's responsibility (Article 29).

b) Barriers and other deterrents faced by litigants seeking redress

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

Watchdog CSOs have reported a substantial backlog in the CPAD's handling of cases.³²⁵ The Network against Discrimination (a network of CSOs working on equality and non-discrimination issues) reported that in 2014 it submitted seven cases to the CPAD, four cases to the Ombudsperson, as well as other cases, responses, requests and so on to other institutions. Of these, the CPAD resolved four out of the seven cases, not finding discrimination in any of them, and the Ombudsperson resolved all four cases submitted to it. Three of the four cases were discrimination cases, and the Ombudsperson found discrimination in all three. The fourth case is a case that the Network against Discrimination brought against the CPAD.

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

³²⁴ The State Defender is a state budget financed institution. However, it has a practice of requesting litigation costs as private solicitors. When combined with court costs, this is a serious burden on the claimant.

³²⁵ See: <http://www.equalitylaw.eu/downloads/2864-fyr-macedonia-cso-network-annual-report-pdf-72-kb>.

to choose. The network also notes that, up to the present day, the Ombudsperson, although having a more limited mandate, seems to be a more efficient institution in resolving cases when compared to the CPAD.

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

c) Number of discrimination cases brought to justice

In Macedonia, there are partially available statistics on the number of cases related to discrimination brought to justice. There are statistics on the work of the CPAD, the Ombudsperson and the Constitutional Court, however statistics from ordinary courts are lacking.

The CPAD received 60 cases in 2016, as opposed to 70 cases in 2015 and 106 cases in 2014. In its annual report, the CPAD attributes the decrease in reporting to a lack of financial resources,³²⁶ without saying how it links these two. The text suggests that other issues may be contributing to the underreporting,³²⁷ but it does not explain this further. This year, the CPAD reports the distribution of cases per discrimination ground in percentages and does not provide the full list. It gives the following information: 18 % on personal or social status, 17 % on ethnicity, 15 % on political affiliation, 13 % on gender, 12 % on health status, 10 % on other beliefs, 'and so on'.³²⁸ The distribution of cases thus follows more or less the same tendency as in previous years, with the grounds 'personal and other status' and 'ethnicity' switching places as first and second most commonly reported ground. The alleged discrimination cases per field are presented in the same manner. The reported distribution per field is as follows: 40 % in employment and labour relations, 25 % in access to goods and services, 13 % in public information and media, 8 % in judiciary and administration and 8 % in education, science and sports.

According to the Ombudsperson's report, 69 cases were filed as non-discrimination and equitable representation cases (which represent 1.83 % of the total number of cases, compared to 53 cases and 1.2 % in the previous year). The Ombudsperson has added a category of cases on 'persons and children with disabilities', under which it reports having received 15 cases (or 0.4 % of the total number of cases). As was the case in the previous year, the Ombudsperson did not publish detailed statistics on the grounds and fields in which the cases were filed, but noted a continuing trend on the previous years in that the dominant field remained employment and the dominant ground was ethnicity. Two tendencies can be noted in the report. The percentage of discrimination cases filed to the Ombudsperson rose by 20 % compared with last year, and there was an increase in the number of cases in the area of working relations.

In 2015, the Constitutional Court³²⁹ received 13 cases in relation to the protection of human rights and fundamental freedoms (protection against discrimination falls within this category and seven of the cases were cases for protection against discrimination). This is the same number of cases as in 2014, when it experienced a substantial drop in reporting compared to previous years: there were 22 cases in 2013, 25 cases in 2012

³²⁶ According to the CPAD's annual report, 'The drop is due, among other issues, to a lack of financial resources for the operation of the Commission. [Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата.]'. See: Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017), *Annual Report 2016*, available on the CPAD Website: <http://myla.org.mk/wp-content/uploads/2016/09/Annual-report-on-the-Efficiency-of-the-Legal-Protection-of-Human-Rights-2016-1.pdf>.

³²⁷ Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017), *2016 Annual Report*. CPAD Website http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

³²⁸ Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) 2016 Annual Report. CPAD Website http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

³²⁹ At the time of writing of this report, the 2016 report has still not been published.

and 23 cases in 2011. In this reporting period, the Constitutional Court did not report specifically on the outcome of these cases.³³⁰

d) Registration of discrimination cases by national courts

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

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

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

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

b) Engaging in support of victims of discrimination

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

c) Actio popularis

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

However, the actio popularis practice before the courts recently came to light through a 2016 court case and paints a picture that is different from the quasi-judicial practice (reported above) and from the Constitutional Court practice (also reported above). In this case, five CSOs,³³¹ supported by the OSCE - Mission to Skopje, submitted an actio popularis claim on Roma segregation in education against the Government. They claimed an interest on the grounds of long-term work in the area and findings from studies that they have published, all of which they claim show beyond doubt the segregation of Roma children in education. The first instance court accepted that they have a legitimate interest to present such a case, but the court went on to dismiss the case on the basis

³³⁰ Overview of the Work of the Constitutional Court in 2015 [Преглед на работата на Уставниот Суд за 2015 година] (February 2016)
[http://www.ustavensud.mk/domino/WEBSUD.nsf/5c166321711d7484c1257361002e29e9/5c39305b6fca45aac1257ff6003ee58c/\\$FILE/Преглед%20за%20работа%20на%20Уставниот%20суд%20на%20PM-2015.pdf](http://www.ustavensud.mk/domino/WEBSUD.nsf/5c166321711d7484c1257361002e29e9/5c39305b6fca45aac1257ff6003ee58c/$FILE/Преглед%20за%20работа%20на%20Уставниот%20суд%20на%20PM-2015.pdf).

³³¹ The five CSOs were: NGO KHAM Delcevo, FOOM, MHK, IHR and ERRC.

that the CSOs did not have the express authorisation of the person that finds him/herself discriminated against. As discussed below in this report, that is a criterion in the ADL under Article 41(4), for class action, and not for *actio popularis*. As discussed elsewhere, requesting such authorisation defies the very purpose of *actio popularis*. The court also requested that such authorisation be provided in writing without calling upon any legal provision to support this claim. The CSOs complained to the higher instance court.³³²

d) Class action

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

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

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

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

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

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

³³² The case is still not publically available. Information has been acquired by the author of this report from persons involved in the preparation of the legal documents related to the process.

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

In Macedonia, there are legal measures of protection against victimisation. The Anti-discrimination Law declares victimisation to be a form of discrimination. Victimisation is extended beyond the person who reports discrimination, to the person who files the complaint and to any witnesses (Article 10). So far, this has not been interpreted as to exclude groups from the protection. The Constitution also provides for protection against victimisation, as it states that a citizen cannot be called to account or suffer adverse consequences for attitudes expressed in petitions, unless they entail the committing of a criminal offence (Article 24). The Law on Labour Relations provides for protection against victimisation³³³ in a procedure related to psychological harassment (referred to in the law as mobbing). This protection also extends to cover witnesses. Protection against victimisation is also granted under the new Law on Psychological and Sexual Harassment (Article 30).

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

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

Under the Anti-discrimination Law, sanctions vary according to the procedure. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation could lead to regular compensation awards; and the misdemeanour procedure envisages fines in the range of EUR 70³³⁴ to 1 000, to be paid in national currency (Articles 42 to 45(6)). Alignment with the new Law on Misdemeanours (adopted 23 July 2015), resulted in amendments to Chapter VII-Misdemeanours, of the Anti-discrimination Law. Following the amendments, paragraphs one in Articles 42-45 are now on legal persons, paragraphs two on responsible persons from the legal person, and paragraphs three for responsible persons at the public bodies, while new fourth paragraphs are added for natural persons. The charges for legal persons are raised, the fines for responsible persons with public duties and natural persons are lowered, whereas the fines for the responsible person in the legal person are set on a strict scale, which is the mid-value from the amount that was prescribed thus far. Before the amendments, paragraph one prescribed fines for 'anyone' who conducts the above noted actions, paragraph two set out fines for the responsible person from the legal person (be it private or public) and paragraph three set out fines for the legal person itself.

In labour cases as well as other civil court litigation, only compensation for pecuniary and non-pecuniary damages can be claimed.³³⁵ In cases of child and social protection, sanctions are fines imposed in a misdemeanour procedure. These can amount to EUR 500 to 1 000 (to be paid in national currency) in child protection cases and EUR 3 000 to 5 000 (to be paid in national currency) in cases concerning social protection.³³⁶

b) Ceiling and amount of compensation

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

c) Assessment of the sanctions

³³³ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 11(3).

³³⁴ The lowest fine dropped from EUR 100 to EUR 70 with the 2015 amendments of the ADL.

³³⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Articles 264-266.

³³⁶ Please bear in mind that the average gross monthly salary in the country is approximately EUR 400.

At present no conclusions can be drawn as to whether the available sanctions are likely to be effective, proportionate and dissuasive, as required by the directives. When compared to the available sanctions provided for other misdemeanours³³⁷ and so on, the anti-discrimination sanctions cannot be seen as dissuasive, effective or proportionate. This is also the finding of the analysis of the harmonisation of the equality and non-discrimination legislation.³³⁸

³³⁷ For example, the value of the fine in some discrimination cases is equal to the value of a fine for throwing a cigarette butt on the street.

³³⁸ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

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

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

The Anti-discrimination Law, adopted in the course of harmonising the national legislation with the *acquis*, provided for the establishment of an equality body – the Commission for Protection against Discrimination (CPAD).³³⁹ This commission is tasked to deal with both the public and the private sector. It is the first specialised body for equal treatment. According to the preparation materials of the Anti-discrimination Law, the CPAD is the body established and tasked with equality according to the transposition process.

Before this, the Ombudsperson was the only institution that had duties for the protection of the principles of non-discrimination and equality as part of its broader mandate for the protection of human rights in the public sector.³⁴⁰ It has a special unit focused on non-discrimination and equitable and just representation.

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

According to the Anti-discrimination Law,³⁴¹ the CPAD is established as an autonomous and independent body. The CPAD is composed of seven members appointed by the Parliament with five-year mandates. Macedonian citizens with regular residence in the country, university degrees and experience in human rights are eligible for membership. Applications are collected through a public call for applications.

The commission is financed through the state budget, but its activities can also be funded through other sources. The members of the commission receive honorarium of two average monthly salaries³⁴² (around EUR 800 gross per month). However, its annually allocated budget in the state budget remains very small, creating a barrier to the CPAD fully exercising its duties. The CPAD has been a beneficiary of several projects conducted by CSOs, and has been one of the main institutions in the focus of the OSCE Mission in Skopje anti-discrimination project for the past four years. The CPAD's annual report for 2016 demonstrates a drop-in cooperation with the body; most of the activities recorded as such cooperative efforts were from activities that had spilled over from projects in 2015. In addition, the OSCE had already announced its exit strategy from the CPAD, under which it is to completely stop providing support to the body by 2020.

This reflects the escalating concern over the independence of the body following the appointment of its second composition. The mandate of the first composition of the Commission for Protection against Discrimination (the equality body) expired in December 2015. The appointment of that composition raised serious concerns for civil society organisations and the parliamentary opposition. These concerns run along three main lines: failure to fulfil the prescribed criteria for membership, failure to select far better qualified candidates, and failure to meet the Paris Principles (appointment of persons from the executive branch in a decision-making role and composition which does not reflect the society at large). On 11 January 2016, the Assembly appointed the seven new members (with one reappointment).³⁴³ Among the newly appointed members there

³³⁹ The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2014, Articles 16 to 33.

³⁴⁰ The former Yugoslav Republic of Macedonia, Law on the Ombudsperson, 2003, Articles 6, 11.

³⁴¹ The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010.

³⁴² The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010, Article 21.

³⁴³ Parliament website, 'Proposal for a decision for appointment of the members of the Commission for protection against discrimination [Предлог-одлука за именување на членови на Комисијата за заштита од дискриминација]', <http://www.sobranie.mk/materialdetails.nsp?materialId=631e99a8-f038-41d6-ae48-1589f8985e41>.

are persons who, aside from being publicly known as supporters of the ruling party, have publicly voiced homophobic statements and have relativized discrimination, hate crime and hate speech. Opposition members of Parliament voiced strong objections to the appointment of two of the now-appointed members, due to their open support for the Government.³⁴⁴ This also raised concerns among human rights activists and civil society organisations. The largest network of organisations working on equality and non-discrimination, the Network for Protection against Discrimination, published a public reaction to the new composition, calling into question the competence of the members and stating that people who are discriminated against cannot get justice from Government supporters.³⁴⁵

The first public appearance of the newly appointed president of the equality body on a debate on hate speech and hate crime did not alleviate these concerns. Aside from showing a lack of understanding and sensitivity to equality and non-discrimination issues, and among other things, the president highly relativized the grave position of the LGBT community in the country and praised the Government's efforts in relation to the position of Roma and other minorities. He expressed no critical stance towards the human rights situation in general and equality and non-discrimination in the country whatsoever.³⁴⁶

Concerns about the CPAD's independence have existed from its very inception, and not without reason. These started with the issues surrounding the first composition of the body,³⁴⁷ but escalated with the new composition of the body, as discussed above. The way the members of the CPAD are connected to the ruling party seems to be well illustrated by the content of the conversations published during the wire-tapping affair. In February 2015, the largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20 000 people that are alleged to have been carried out by the state Counterintelligence Agency.³⁴⁸ The content of the published recordings removed doubts about the already existing claims of a state capture³⁴⁹ and extreme concentration of power in the ruling party, including the complete exercise of party control over not only the judiciary, but *all* aspects of society. It is raised here as of interest for this report because, aside from pillar rule of law issues, it had direct implications for the CPAD. In particular, what seems to be the voice of the (then) president of the equality body, Dushko Minovski, also featured in the publicly broadcasted conversations; he can be heard to be a person working for the ruling party on the ground during the election campaign, and, even more seriously, to be (ab)using his position as someone in the employment of the Ministry of Labour and Social Policy by instructing people who have been awarded social assistance what party to vote for.³⁵⁰

The other relevant body is the Ombudsperson – the oldest national Human Rights institution in the country. The Ombudsperson is tasked to protect the constitutional and

³⁴⁴ Video recording from the parliamentary debate: <http://reporter.mk/nashi-faci/bogoev-vlasta-ne-smee-da-bide-pribezhish/>.

³⁴⁵ Macedonian Helsinki Committee Website, 'Incompetent Composition of the Commission for Protection against Discrimination [Некомпетентен состав на Комисијата за заштита од дискриминација]', <http://www.mhc.org.mk/announcements/357#.Vssc28cj0wB>.

³⁴⁶ TV Debate 'Open Hate Speech in Public Discourse [Отворено: Говор на омраза во јавниот дискурс]' <https://www.youtube.com/watch?v=YNQXh4MOO08>.

³⁴⁷ Country Report 2013 <http://www.equalitylaw.eu/downloads/4174-fyr-macedonia-country-report-non-discrimination-2013-1-11-mb> p.86.

³⁴⁸ Balkan Insight (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

³⁴⁹ The concept of state capture is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'.

³⁵⁰ A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gipsy by Gipsy, we'll drag them"' [СДСМ: Јанкулоска вели – За уши, циган по циган ќе вадиме] <http://a1on.mk/wordpress/archives/465799>. Please note that in the national context 'Gipsy' (Циган) is a derogatory word for Roma.

legal rights of citizens when violated by state bodies and other authorities and organisations with public powers. This quasi-judicial institution has a mandate to safeguard *inter alia* principles of non-discrimination, and adequate and equitable representation of communities in the organs of state power, bodies of local government and public institutions and services (Article 77).³⁵¹

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

Any Macedonian citizen can be appointed Ombudsperson if they meet the general conditions specified in law for employment, and if they are a graduate lawyer with over nine years' experience in legal affairs, whose activity is proven in the field of protection of citizens' rights and who enjoys a suitable reputation for performing the function of Ombudsperson.³⁵² The Ombudsperson and the Deputy Ombudsperson cannot be held responsible for actions, measures and activities undertaken in exercising their function. The independence and autonomy of the office is guaranteed by the Constitution and by law.

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

A study on national human rights institutions in Macedonia looked at both these institutions, aiming to assess them against the international framework of standards, including the EU *acquis*. For the CPAD, on the part of the legal framework, related to issues raised in this question of the report, it recommended that: a guarantee for pluralism of the CPAD beyond ethnicity should be entered in the law in order to enable the composition of CPAD to mirror the society as a whole; the law should include an obligation for the Parliament to debate the CPAD annual report, accompanied with an obligation for representatives from the Government to be present at the session where this report will be discussed; and that the general reference to social sciences should be excluded from the provision, so as to allow only people with specific equality and non-discrimination or human rights education and experience to be able to stand as candidates for members of the CPAD.³⁵³ Also, it reiterated previous findings that 'the discussions at the parliamentary session devoted to the appointment on members, prove the whole process of the establishment of the first composition of the first equality body in the country as a highly politicised one.'³⁵⁴ On the resources of the CPAD, it made the following recommendations: allow under law the creation of a secretariat, or any form of administrative support for the CPAD; give due consideration to the possibility for professionalisation of the members of the CPAD by making this their full-time job and position; for the CPAD to be in a position, similar to the Ombudsperson, to agree upon its

³⁵¹ Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp?x, Article 77.

³⁵² The former Yugoslav Republic of Macedonia, Law on the Ombudsperson, 2003, Article 6 (as amended and as will enter into force on 07.04.2017).

³⁵³ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf, pp. 48-49.

³⁵⁴ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, p. 45.

annual budget with the Government for funds that should be sufficient for CPAD to be able to exercise its full mandate; consider establishing formal links with the regional offices of the Ombudsperson, in order to expand the reach of the CPAD.³⁵⁵

The study's recommendations on independence for the Ombudsperson, which has non-discrimination duties, suggested appointing the Ombudsperson for a single non-renewable term, as a way to reduce susceptibility to political pressure, while in relation to resources it recommended the allocation of sufficient funds for the Ombudsperson to exercise its full mandate.³⁵⁶

c) Grounds covered by the designated body/bodies

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

As far as the protection against discrimination of migrants is concerned, migration is not considered a priority issue because of the national context. Specifically, as already stated above in respect of education and housing, Macedonia has a negative net migration rate of -0.5 per 1 000 population,³⁵⁷ and serves as a transit point, rather than a destination country. Thus, no case law has been developed on the enforcement of the law and no implementation issues have been raised. The current rules state that migrants should receive the same treatment as any citizen of the country or any other person; the Anti-discrimination Law does not distinguish between persons who hold citizenship of Macedonia and others. This applies across all fields of application of the law. Migrants should also have access to the two NHRIs which have an equality mandate: the Ombudsperson is concerned that equal treatment should be provided in the public sector, and the CPAD is concerned with equal treatment in both the public and the private sector. The fact that no cases on discrimination against migrants have been reported are, in the opinion of the author of this report, a result of two main factors. First, as mentioned above, Macedonia is a transit country. Secondly, during the first half of the 2015 'migrant crisis', and the largest wave of refugees, the country considered the refugees to be illegal immigrants because they were entering on illegal crossing points. The fact that they are fleeing from persecution was not taken into consideration, and many were deprived of their liberty by being kept in a transit centre for migrants.³⁵⁸ Thus one can hardly imagine migrants reaching out to state institutions to be protected against discrimination.

However, if migrants were to stay in Macedonia, it is to be expected that, in practice, they would be exposed to wide discrimination, not only in the private but also in the public sector, as can be seen in the example of the train ticket prices. The railway transport public enterprise raised the prices of train tickets for the trains going from the southern border crossing (entrance from Greece) to the north one (exit towards Serbia) for migrants several times. The equality body (the CPAD), did not intervene, although the Ombudsperson did. It demanded that the railway transport public enterprise stop

³⁵⁵ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, p. 50.

³⁵⁶ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, pp. 39-40.

³⁵⁷ International Organisation for Migration – Macedonia profile, *IOM Website*, <https://www.iom.int/countries/former-yugoslav-republic-macedonia>.

³⁵⁸ The Ombudsperson spoke out and reacted to the inhuman conditions in the centres on several occasions.

charging migrants expensive tickets and instead charge them regular prices, following which the ticket prices were changed.

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

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

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

e) Legal standing of the designated body/bodies

Under the Anti-discrimination Law, the CPAD does not have the legal authority to bring discrimination complaints or to intervene in legal cases concerning discrimination in court. It can only bring to 'competent authorities' cases of persons to whom a recommendation was directed but who have not acted upon it (Articles 39, 41). However, in 2013, the CPAD made a request to one of the courts and was allowed to intervene³⁵⁹ in a case of discrimination, which means that although such a competence is not explicitly granted in the Anti-discrimination Law, the CPAD can intervene in legal cases concerning discrimination.

The Ombudsperson can act on a request from an individual or *ex officio*, however it cannot intervene in court cases (Article 13). When the Ombudsperson concludes that violations are made, s/he may make recommendations, suggestions, opinions and indications on how to act upon detected violations; propose a retrial (reopening of the case); initiate disciplinary proceedings against officials or responsible persons; and apply to the competent public prosecutor for initiating criminal procedures.

f) Quasi-judicial competences

In Macedonia, the bodies are quasi-judicial institutions.

The CPAD has elements of a quasi-judicial institution, however it does not impose sanctions, but only delivers opinions and recommendations. It can receive a case on any of the grounds in the public and private sphere in order to protect complainants. Complaints are filed free of charge, but need to contain facts and proof to support the claims.

Once the CPAD receives a complaint, it forwards it to the respondent within 15 days of receipt. The respondent has 15 days to reply to the complaint. Altogether, the CPAD must deliver an opinion in 90 days from the day of receipt of the complaint. The respondent to whom a recommendation has been directed needs to act in accordance with it within 30 days of the notification it has received from the CPAD. The CPAD has no powers to push for enforcement of its opinion; it is not legally binding and there is no appeal procedure. So, if a person does not act upon the recommendation, the only thing that the CPAD can do further is to initiate a procedure in front of a 'competent authority'.

The Ombudsperson also has elements of a quasi-judicial institution. Under law, state organs should implement its recommendations (Article 32). However, as with the CPAD,

³⁵⁹ Court of First Instance Štip, *Sonja Šijakov v SOU Gimnazija Slavčo Stojmenski*, Po.6p. 766/11.

the Ombudsperson's opinions are not legally binding and there is no forced compliance mechanism which can be activated. However, if state bodies do not respond, the Ombudsperson has the right to inform the higher responsible body, the Parliament and the public through the media.

g) Registration by the bodies of complaints and decisions

In Macedonia, the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are not available to the public. However, they are made available in the annual reports. In addition, they could be made available throughout the year upon request. The CPAD has the software to generate such statistics, and it also grants access to anonymised documents from the complete case documentation. Although the software is capable of providing updated statistics on the website, this is not done and the statistics are made public only in the annual reports. Aside from the annual report, the Ombudsperson grants access only to the statistics upon request, but it does not give access to other case documentation. An issue in relation to the statistics coming from the Ombudsperson's office is that they mix the fields and the grounds of discrimination.

h) Roma and Travellers

Neither the Ombudsperson nor the CPAD has shown through their actions thus far that they consider the situation of Roma and Travellers as a priority issue. However, the Ombudsperson has been vocal on many occasions about the complexity and specificities of the problems Roma face, including problems related to discrimination and most recently on the issue of racial profiling of Roma at border crossings.³⁶⁰ Moreover, it is thanks to the instruction that the Ombudsperson issued to the CPAD that the CPAD finally resolved a case filed by the Helsinki Committee of the Republic of Macedonia in 2011 regarding the segregation of Roma children in schools in Bitola. As reported above (see section 6.1.b.), the Ombudsperson acted upon a case filed with it by the Network against Discrimination against the CPAD for violating the body's obligation to respond to a filed case within 90 days.

After breaching all possible procedural deadlines, the CPAD finally decided the Bitola case in September 2014, and the applicants received the decision only in December 2014. The CPAD did not find discrimination on grounds of ethnicity in the case, nor did it find segregation. As already explained above, the CPAD actually found the situation to be a result of the parents' choice to register their children in a specific primary school, however it failed to state on what it bases its argument and bluntly added that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.³⁶¹ Although having deliberated on this case for over three years, the CPAD adds a surprisingly short elaboration on its opinion, the largest portion of which consists of a bullet point list of 14 letters/requests that it has sent and received while processing the case, one of which is a rather vague explanation of proceedings which states, 'numerous phone calls on the case topic with relevant sides and numerous meetings on the case topic'. There is no further elaboration as to whom the CPAD talked to or with whom and when they met, and what was discussed and possibly decided. It also disregards reports on Roma children in education and on segregation in education, including a statement from the director of the primary

³⁶⁰ On the issue of Roma racial profiling and state's systematic violation of Roma's right to freedom of movement, see: European Policy Institute – Skopje and KHAM Delchevo (2016), *Right to Equality, Freedom of Movement and Legal Protection* [http://epi.org.mk/docs/Right%20of%20Free%20Movement%20Over%20Borders%20\(Case%20Study\)_EN.pdf](http://epi.org.mk/docs/Right%20of%20Free%20Movement%20Over%20Borders%20(Case%20Study)_EN.pdf).

³⁶¹ Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

school saying that the parents of children from other ethnicities, although living in the school's region, choose to register their children in other primary schools in order to avoid sending them to school with Roma children.³⁶²

³⁶² Commission for Protection against Discrimination (*Комисија за заштита од дискриминација*), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

8 IMPLEMENTATION ISSUES

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

Dissemination of information

The trend noted in the previous years continued in 2016. The main activities in relation to the dissemination of information, including capacity building of institutions, continued to be organised and implemented by CSOs (with the Network against Discrimination and its members leading most of the initiatives, and the Macedonian Young Lawyers Association also being active in bringing cases to courts) and by the OSCE - Mission to Skopje (OSCE). The activities regularly include the Ministry of Labour and Social Policy (MLSP) and the Commission for Protection against Discrimination (CPAD) as partners/co-implementers. In the last year, such activities have increasingly included the Academy for Judges and Public Prosecutors and the law schools from across the country.

However, as noted above, there is a noticeable drop in cooperation with the equality body after the appointment of the new composition,³⁶³ which was met by strong reactions from NGOs.³⁶⁴ Following this, it is noticeable that the only two persons without questionable biographies and direct links to the ruling party (both university professors), are the only people to have been invited by CSOs to speak at events, which was not previously the case.

The 2015 analysis of the OSCE and CPAD on the harmonisation of the national equality and non-discrimination legislation with international standards and an analysis of the internal harmonisation of the laws was published in 2016.³⁶⁵ The OSCE, together with the Macedonian Helsinki Committee (MHK), published an analysis on the use of *actio popularis* in discrimination cases.³⁶⁶ In the period March-November 2016, the legal practitioners, academics, and everyone interested in discrimination in the legal arena, benefited from the 'Info-sheets on Discrimination', published by the OSCE and the MHK monthly, which presented key developments on discrimination in the country. They featured a number of discrimination cases pending before the courts, while adding information on the ground and field of the new claims. No new info-sheets have been published since November up to the date of writing of this report.³⁶⁷

The project which the civil society organisation H.E.R.A. implemented together with the CPAD in 2015 on increasing its capacities, visibility and activity in relation to discrimination on grounds of sexual orientation and gender identity, continued in 2016. In particular, as the campaign against discrimination, 'A Nation Without Discrimination', had only started to be promoted in November 2015, it was still running in the beginning of 2016. However, this is the last activity reported on the CPAD's website of cooperation with CSOs working on equality and non-discrimination issues. In fact, it is one of the last news items published on the CPAD's website in general. The last two are on the annual

³⁶³ Video recording from the parliamentary debate: <http://reporter.mk/nashi-faci/bogoev-vlasta-ne-smee-da-bide-pribezhish/>.

³⁶⁴ Macedonian Helsinki Committee (2016), 'Incompetent Composition of the Commission for Protection against Discrimination [Некомпетентен состав на Комисијата за заштита од дискриминација]', *Macedonian Helsinki Committee Website*, <http://www.mhc.org.mk/announcements/357#.Vssc28cj0wB>

³⁶⁵ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

³⁶⁶ Chubrikj, Slavica and Chalovska, Neda (2016), *Use of Actio Popularis in Discrimination Cases* [Користење на *actio popularis* во случаи на дискриминација], OSCE and MHK, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1921/_____.pdf.

³⁶⁷ The date of writing is: 15.03.2017.

report of the CPAD and on a report on the gender pay gap that the CPAD prepared with OSCE support in 2015.³⁶⁸

Dialogue with NGOs

The trend of building up negative sentiments and scapegoating of NGOs reported in the previous years has continued. Massive protests by university students, followed by protests of high-school students, honoraria workers, and unemployed persons did not change anything in the Government's approach to dialogue with NGOs and citizens. However, the situation escalated in 2016. The former PM called for a 'de-sorosisation'³⁶⁹ of the country, on his first rally after winning most parliament seats at the December 2016 pre-term parliamentary elections which took place on 11 December 2016. Less than one week after his call, a massive control action by the State Tax Agency started which covered over 20 NGOs, all of which have received an OSI grant or been supported by the OSI. The OSI office in Macedonia was also subject to the tax agency action.³⁷⁰

There has still been no proper investigation and prosecution of the attacks on the LGBTI Support Centre. Operating since 2012, the centre has been providing support to LGBTI persons and to their family and friends. It has been subject to attacks ever since it was opened. People working at the centre have been physically attacked, and its offices have been damaged several times. Following one of the attacks, the centre had to close down for renovation for a period of time.³⁷¹ No proper investigation and prosecution of the attackers on the LGBT centre has happened yet and no charges have been raised despite numerous calls by CSOs, protests organised demanding action, existing video recordings from which the attackers can be easily identified (available on YouTube), and calls by the European Commission itself.³⁷²

Dialogue between social partners

The mechanism for social dialogue between social partners is the Economic-social Council (ESC). It consists of representatives from the Government, the unions and the Associations of Employers.³⁷³ The MLSP reports that it, too, has been meeting regularly in 2016. It also reports that the ESC secretariat has undergone a number of training sessions in 2016, including non-discrimination training. The ESC seems to have focused on implementing actions set out in the Government strategic documents, which includes the setting up of an infrastructure for the peaceful resolution of disputes. The information provided does not go into more details on this.³⁷⁴

³⁶⁸ The author of this report notes the existence of two more new entries on the website. Namely, two photos of the CPAD's president, one at a meeting in Belgrade on cooperation of the SEE equality bodies and another at the EQUINET annual meeting. Both feature no text or information on the events, representation and participation of the CPAD at all, thus are herein not considered as news entries. Source: <http://www.kzd.mk/>.

³⁶⁹ The global trend of pinpointing George Soros and Open Society Foundation as meddling in the internal affairs of a country and as enemy number one has been present in Macedonia since VMRO DPMNE came in power. However it was the first time that a call for a 'desorosisation' has been issued.

³⁷⁰ Civil Media, The State Tax Agency in the NGOs: A 'Desorosisation' or a Regular Monitoring? (*УЈП во невладините: „Десоросоизација“ или редовна инспекција?*) (21 December 2016), <http://civilmedia.mk/up-vo-nvkladinit-dsorosoziazia-ili-rdovna-inspkzia/>.

³⁷¹ For more on this, please see flash Report: <http://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

³⁷² Network against Discrimination (2014), 'Absence of Reaction to Series of Attacks on the LGBTI Support Centre', <http://www.equalitylaw.eu/component/edocman/mk-29-lgbti-centre-attacks-no-reactions>.

³⁷³ Ministry of Labour and Social Policy (Министерство за труд и социјална политика) Economic-social Council http://www.mtsp.gov.mk/socijalno-partnerstvo-ns_article-ekonomsko-socijalen-sovet.nspix.

³⁷⁴ Ministry of Labour and Social Policy (Министерство за труд и социјална политика), 'Continuation of the Effective Social Dialogue for Adding Dynamics to Economic Growth and Creating Sustainable Jobs [Продолжување на ефективниот социјален дијалог за динамизирање на економскиот раст и креирање одржливи работни места]', http://www.mtsp.gov.mk/pocetna-ns_article-prodolzuvanje-na-efektivniot-socijalen-dijalog-za-dinamiziranje-na-ekonomskiot-rast-i-kreiranje-odrz.nspix.

Brief note on activities on Roma

The Government took part in the implementation of the activities under the Decade of Roma Inclusion (2005-2015).³⁷⁵ For the whole duration of the Decade, action plans were adopted for each year, and activities were implemented, including the establishment of the Roma Information Centres (RICs), which serve also as points of contact with the NGO sector. Sixteen NGOs ran a contact point as part of the Decade of Roma Inclusion. These monitored the implementation of the plans, carried out advocacy activities, issued recommendations and implemented joint activities. After the closing of the Decade, the Government continued to support the RICs. It also adopted a national 'Strategy on Roma 2014-2020'.³⁷⁶ In addition to this, the Government continues to have a Minister without Portfolio³⁷⁷ tasked to coordinate Government activities in relation to the Roma, although still without much visibility.

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

a) Mechanisms

No mechanisms exist that ensure all contracts, collective agreements, international rules of undertakings and rules governing independent occupations are not in conflict with (solely) the principle of equal treatment. However, general mechanisms for compliance with the Constitution and national laws, and with legal principles such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori* do exist.

Collective agreements, international rules of undertakings and rules governing independent occupations if challenged can be subject to a review of constitutionality and legality before the Constitutional Court. The Law on Obligations provides that a contract contrary to the Constitution, laws and good customs is null and void.³⁷⁸ Compliance of contracts, collective agreements, internal rules of undertakings and rules governing independent occupations can be challenged if brought before court, where parts or full documents can be deemed null and void.

The Law on Courts provides that loopholes in laws are no justification for courts to refuse to act on upon a filed case — courts have an obligation to act based on the general principles of law, except when that is strictly forbidden by law.³⁷⁹ Also, respecting general legal principles is in the tradition and teaching of the legal system, and applies to national laws. These laws almost always include in the final provision section a notion of the *lex specialis derogat legi generali* including changes made on the principle *lex posterior derogat legi priori*.

b) Rules contrary to the principle of equality

Harmonisation of the legal framework with the Anti-discrimination Law was a general strategic goal in the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability' adopted in May 2012. The

³⁷⁵ For more information on the projects implemented in the context of the Decade of Roma Inclusion and MLSP activities on Roma rights and integration, please see: *Проекти произлезени од декадата на Ромите*, (Roma Decade Related Projects) Ministry of Labour and Social Policy Website, <http://www.mtsp.gov.mk/proekti-proizlezени-od-dekadata-na-romite.nspх>.

³⁷⁶ *Стратегија за Ромите 2014-2020* (Strategy on Roma 2014-2020), http://arhiva.vlada.mk/registar/files/Strategija_Romite_%202014-2020.pdf.

³⁷⁷ The website and profile of the Minister without Portfolio can be accessed at this link: www.mbr-ds.gov.mk/?q=node/2.

³⁷⁸ The former Yugoslav Republic of Macedonia, Law on Obligations (*Закон за облигациони односи*), 2001, Article 95, paragraph 1. Full title: The former Yugoslav Republic of Macedonia, Law on Obligations (*Закон за облигациони односи*), Official Gazette of the Republic of Macedonia No. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009, 116/2009, 123/2013.

³⁷⁹ The former Yugoslav Republic of Macedonia, Law on Courts, 2006.

action plan for the implementation of the strategy envisaged that this activity would be completed by the end of 2013.³⁸⁰ This was not completed, so the new strategy, 'National Strategy on Equality and Non-discrimination (2016-2020)' (see section 9, below), also set the same goal, this time for realisation in the period 2016-2020.³⁸¹

In 2014 and 2015, with OSCE support, the CPAD conducted an in-depth assessment of the harmonisation of the Anti-discrimination Law with international equality and non-discrimination standards, and of other laws/provisions pertaining to equality and non-discrimination with the Anti-discrimination Law and with international standards. The study identifies points for harmonisation, contains concrete proposals for amendments of legislative provisions from a range of laws, but also draws some general conclusions, including a need for urgent harmonisation of the Anti-discrimination Law with international standards followed by harmonisation of other laws with the Anti-discrimination Law, as well as reviews of the terminology on disability, criteria for access to public service and the position of LGBTIQ persons. The study also identifies a need for gender mainstreaming, equalisation of married and unmarried couples and a change in policy-making processes which will, in principle, result in the consideration of equality and non-discrimination when adopting laws and policies, including scrutinising them for possible indirect effects.³⁸²

³⁸⁰ Ministry of Labour and Social Policy (2013), *Action Plan - 2013 for implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender for 2012-2015*, p.5. www.mtsp.gov.mk/WBStorage/Files/akciski_1_eng.doc.

³⁸¹ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)*, http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf

³⁸² Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

9 COORDINATION AT NATIONAL LEVEL

The MLSP is tasked with coordinating issues on anti-discrimination on the grounds covered in this report, as well as on other grounds mentioned in national legislation.³⁸³ There is a department for equal opportunities, as well as a deputy-minister tasked with non-discrimination issues.³⁸⁴ Aside from this ministry, several other sections from the executive Government also have duties that touch upon anti-discrimination on the grounds covered in this report. The inter-ministerial body on human rights, based in the Ministry of Foreign Affairs, is tasked with, *inter alia*, strengthening coordination of all activities of the ministries and other bodies of the Government with competences in human rights. One of the ministers without portfolio is tasked with coordination of all Government activities pertaining to Roma (until 2015, the Decade of Roma Inclusion 2005-2015, and after that, the Strategy on Roma). There are also coordinating bodies tasked with monitoring the implementation of strategic documents related in part to the discrimination grounds that are the subject of this report, notably the ones on disability and age.

A new strategy, 'National Strategy on Equality and Non-discrimination (2016-2020)', was adopted in 2016.³⁸⁵ It has the same general goals as its predecessor, the 2012-2015 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender',³⁸⁶ which are: advancing the legal framework for equality and non-discrimination; strengthening the capacities and advancing the work and cooperation of the institutional mechanisms for the prevention and protection against discrimination and promotion of equal treatment; raising awareness in recognising forms of discrimination; and promoting the concepts of non-discrimination and equal opportunities. The introduction of the strategy states that it was prepared on the basis of an evaluation of the implementation of the previous strategy which, according to the text, found that the strategy had had a positive role in the development of discrimination policy in the country.³⁸⁷ This evaluation has not been published.

Unlike its predecessor, the new strategy focuses on fields, rather than grounds. Moreover, compared to the previous document, it includes a reference to 'LGBTI' persons in the mission of the strategy. Specifically, the strategy's mission is:

'Effective protection against discrimination and respect for the principle of equal opportunities and prohibition of discrimination on any person and/or groups of persons, on grounds of their personal characteristics, and especially of the vulnerable groups (ethnic communities, women, LGBTI persons, persons with mental and physical disability, elderly, children, refugees, persons with lower social status, internally displaced persons, and other vulnerable groups, members of

³⁸³ Ministry of Labour and Social Policy: www.mtsp.gov.mk/?ItemID=21E7AB9648BFC441AFD588BA0183B4A3.

³⁸⁴ Ministry of Labour and Social Policy: www.mtsp.gov.mk/?ItemID=380B6B1D444D5047B575F402122ED94A.

³⁸⁵ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

³⁸⁶ Ministry of Labour and Social Policy (2012), *National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender 2012-2015* (Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол 2012-2015), www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc.

³⁸⁷ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* [Национална стратегија за еднаквост и недискриминација 2016-2020], http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

religious communities and every person who has been treated differently without objective justification and a legitimate aim).³⁸⁸

³⁸⁸ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)*.

10 CURRENT BEST PRACTICES

The author of this report would like to single out and applaud the situation tests conducted by the Ombudsperson on their own initiative. As noted elsewhere in this report (section 2.2.1. and section 12.2), in 2016, the Macedonian Helsinki Committee (MHC) raised a claim to the Ombudsperson for direct discrimination on the ground of sex in the field of health care provision. It was reported to the MHK that fathers and men in general are not allowed as companions of hospitalised children in public health facilities. If a child is to be hospitalised, they must be accompanied by a female. In an effort to investigate the matter further, the Ombudsperson conducted situation tests via telephone. The allegations by the MHK were confirmed. Relying on its situation test as proof, the Ombudsperson concluded that there was *indirect*³⁸⁹ discrimination on the ground of sex in the public healthcare service provision.³⁹⁰

The author also would like to single out as a good practice a new publication 'Info-sheet on Discrimination' (*Информатор за дискриминација*), which is a monthly info-sheet published since March 2016 by the OSCE Mission to Skopje and the Macedonian Helsinki Committee. This is an excellent and much-needed resource that reinvigorated the climate for working on equality and non-discrimination issues in the country by providing fresh information on various issues in relation to discrimination. It contains information on pending cases, new cases, grounds and fields of discrimination, as well as examples from court practice and new resources on equality and non-discrimination. Although the information was brief and not conclusive, it provided a basic overview of what is happening before the courts, which was previously missing.³⁹¹ This cooperation between an NGO and an IGO produced something that, if published on a long-term basis, can be of invaluable assistance for everyone working on equality and non-discrimination issues.

The implementation of the principle of equitable and just representation of all ethnicities in the public administration (see section 5 above) remains a good practice worthy of highlighting. In lieu of an encompassing report on the results of the implementation of this principle, we can rely on other sources of information for understanding the outcomes. A report on the overall implementation of the agreement was published, however it does not say more than what was already known from the annual reports of the Ombudsperson, which provide statistics on the implementation. It does not say anything on one of the main objectives of this principle, which was to act as a confidence building measure after the conflict. According to the annual reports, the number of people from the minorities who are employed in the administration is constantly rising. The European Policy Institute – a think-tank based in Skopje – agrees with the Ombudsperson's finding. In a study of the integration of ethnic communities in public administration related to the implementation of the OFA, it found that the biggest achievement of the equitable representation principle is the numerical increase of the non-majority employees in the public administration. However, it notes two potential obstacles: the overwhelming 'politicisation' of the administration, and the perception among public servants³⁹² of a monopolisation of the process by the two biggest ethnic communities, thus leaving out the so-called 'smaller ethnic communities' from the

³⁸⁹ However, the applicant (the MHC) claimed direct discrimination. Having no access to the files of the case prevents any understanding the decision of the Ombudsperson as to the form of discrimination that it had established.

³⁹⁰ Helsinki Committee of the Republic of Macedonia (2016), 'Info-sheet on Discrimination' (*Информатор за дискриминација* (May 2016), http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

³⁹¹ One such info-sheet can be accessed on the following link (all other issues are on the www.mhc.org.mk website): Helsinki Committee of the Republic of Macedonia (2016), 'Info-sheet on Discrimination' (*Информатор за дискриминација* (May 2016), http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

³⁹² European Policy Institute – Skopje (2016), *Equitable representation: perceptions*, available at: http://epi.org.mk/docs/infographic_en.pdf.

process.³⁹³ This was also the conclusion reached on earlier occasions by the state body responsible for monitoring the rights of the smaller ethnic communities - the Agency for the Realization of the Rights of Communities – in its 2015 shadow report on the rights of the smaller communities,³⁹⁴ as well as by earlier studies.³⁹⁵

³⁹³ Ristevska – Jordanova, M. et al (2016), *Life and Numbers: Equitable Ethnic Representation and Integration in the Workplace* (Skopje: European Policy Institute – Skopje, 2016). Available at: http://epi.org.mk/docs/Life%20and%20numbers_ENG_Final%20version.pdf.

³⁹⁴ Kacarska, S. (2015), *Shadow Report on the Realisation of the Rights of the Smaller Communities Pursuant to the Framework Convention on Protection of National Minorities by the Associations Participating in the Participatory Forum* [Извештај во сенка за остварување на правата на помалобројните заедниците согласно Рамковната конвенција за заштита на националните малцинства од здруженијата на заедниците кои учествуваат во Партиципативниот форум” (Agencija za ostvaruvanje na pravata na zaednicite, 2015), Available at: http://aopz.gov.mk/wp-content/uploads/2016/01/Izvestaj_vo_senka_Participativen_forum_Nov2015.pdf.

³⁹⁵ See, for example: Kotevska, B. (2011), *Effective Political Participation of Small(er) Ethnic Communities in Local Self-Government in Macedonia: Impact of the Ohrid Framework Agreement. Background Study* (Skopje: Centre for Regional Policy Research and Cooperation ‘Studiorum’, 2011).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Considering that almost no relevant legislative changes took place in 2016,³⁹⁶ the situation remains unchanged to the previous year. Thus, the national anti-discrimination legislation is in breach of the directives in several areas outlined below. Breaches of the text and the spirit of the directives are as follows:

- In general:
 - o The Constitution and the laws are not consistent in the terminology that they use on discrimination and grounds of discrimination, thus generating legal uncertainty.
 - o The Constitution and the laws prescribe various different procedures (it could be said that this allows forum shopping to take place) and rather vague sanctions.
 - o Insensitive terms in relation to disability continue to exist under law,³⁹⁷ in clear violation of the spirit of the directives and of the spirit of the CRPD.
 - o The continued absence of sexual orientation from the scope of state protection and state public policy making.
- The Constitution:
 - o The principle of equality is stated only for citizens of the country.
 - o It contains a closed list of grounds for protection against discrimination, and disability, age and sexual orientation are not part of this list. Belief is part of this provision, however only political and religious belief.³⁹⁸
 - o Terminology used in the Constitution for people with disabilities cannot be considered as in compliance with the spirit of the directives, nor with the ratified CRPD.
- Anti-discrimination Law:

Essential weaknesses:

 - o The object of the law is not precisely defined. This resulted in the adoption of an anti-discrimination law that does not aim to contribute to the upholding of the principle of equality, which lies at the heart of the directives.
 - o The area of implementation of the law is not precisely defined.
 - o Although the act contains a list of grounds in an open-ended provision, it does not explicitly include all standard EU grounds of discrimination. Namely, sexual orientation is not listed as a protected ground in this law.³⁹⁹

³⁹⁶ Due to the political crisis – see section 11.2.

³⁹⁷ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

³⁹⁸ Out of the other grounds protected on EU level, gender is also not part of this provision, although sex is.

³⁹⁹ However, the practice of the CPAD shows that it does consider sexual orientation as a protected ground, as it has processed several cases pertaining to this ground, using the open-ended character of this provision. In addition, in December 2015, as a result of a project implemented by CPAD together with H.E.R.A. (a civil society organisation), the CPAD adopted a protocol for handling discrimination cases on grounds of sexual orientation and gender identity. The biggest achievement of this action is probably not the protocol itself, as it largely reiterates rules of procedure already established under other (legal and internal) acts, but is instead the annex to the protocol, which is an amended form for filing a complaint to the CPAD. The form that CPAD had used previously included a special section where all protected grounds from Article 3 of the ADL were numbered and the claimant had to circle one of them. This section did not contain sexual orientation and gender identity, whereas in the amended form, an additional option is included where the claimant can circle 'sexual orientation and gender identity'. Although somewhat symbolic, it is reasonable to expect that it will encourage people who want to claim discrimination on such grounds. Moreover, it shows an effort by the current equality body members to leave some legacy for their successors. For more on this,

- According to the directives, persons who consider themselves wronged because the principle of equal treatment has not been applied to them need only establish facts from which it may be presumed that there has been discrimination. The Anti-discrimination Law places a huge part of the burden in proving discrimination on the complainant, asking for submission of '*facts and proofs* from which the act or action of discrimination can be *established*',⁴⁰⁰ unlike the directives, which set a requirement for *facts* from which the discrimination may be *presumed* (emphasis added). This means that although the law claims that it is not for the complainant to prove the facts but for the respondent, we cannot say that it provides for a reversed burden of proof, as per the directives, because, as a step towards proving the facts, a burden is placed on the complainant by asking for proof aside from laying out of all the known facts in relation to the case and leaving the respondent to show these facts to be non-existent (i.e. it makes a step from *onus proferendi* to *onus probandi*).
- Unlike the EU directives, which state that 'Member States shall encourage dialogue with non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds foreseen in the Directives, with a view to promoting the principle of equal treatment', the national legislation does not mention cooperation with NGOs.
- The forms of discrimination as well as their definitions are not fully harmonised with European ones. The definition of direct discrimination is unnecessarily complicated.
- The law contains a wide, imprecise list of exceptions from discrimination. Such a list opens space for legal uncertainty. Moreover, some of these exceptions can be considered to be in breach of the EU directives. For example, it will not constitute discrimination if members of duly registered religions (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)). This would mean that this excuses these members even if, in doing so, they are discriminating on the grounds mentioned in Article 3 of the Anti-discrimination Law.
- The mechanism for protection provided in the law is not precisely defined. Selection of members of the equality body is prone to political influence. Moreover, the competence of the members cannot be secured, as the law does not strictly require them to have education and practice related to 'human rights' but to social sciences in general. The implementation so far clearly shows the realisation of these worries in practice with the appointment of both the first and the second composition of the equality body.⁴⁰¹ Also, although the CPAD is financed under the state budget, the allocated amount is not enough for this body to exercise its full mandate, thus bringing its effectiveness under question.
- The provisions on the sanctions provided in the law cannot be considered to be good grounds for making effective, dissuasive and proportionate sanctions.

please see: <http://www.equalitylaw.eu/downloads/2963-equality-body-and-civil-society-organizations-join-to-make-sure-that-sexual-orientation-and-gender-identity-is-regarded-as-a-protected-ground-in-macedonia-pdf-86-kb> and the text of the protocol (in Macedonian): <http://hera.org.mk/wp-content/uploads/2015/11/Protokol-Zastita-od-diskriminacija-MK.pdf>.

⁴⁰⁰ The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010, Articles 25(2) and 38.

⁴⁰¹ On the first composition see Non-Discrimination Country Report for 2013, <http://www.equalitylaw.eu/downloads/4174-fyr-macedonia-country-report-non-discrimination-2013-1-11-mb%20>, p. 86 and on the second, see flash report 'Appointment of new members of the equality body' (26.02.2016), <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

Technical weaknesses:

- The law contains an article with definitions of terms used in the law that added to the terminological confusion that already existed before its adoption, instead of contributing to the resolution of such confusion. This list also contained terms not used in the law at all. Furthermore, legal terms and key concepts were unnecessarily redefined (for example the term 'family').
- The law did not provide for any transitional provisions, preparatory activities for commencement of the implementation of the law, or for any deadlines for initiation and completion of these activities.
- The law did not provide procedures for the unification of provisions, notably nulling or amending provisions in other laws that are not in line with this law as a *lex specialis*.

Ex-post evaluation of the implementation of the law:

- In 2013, the Ministry of Labour and Social Policy (MLSP) conducted an ex-post evaluation of the implementation of the Anti-discrimination Law, evaluating the process and the results from the implementation of this law, focusing on the prevention of discrimination and protection against discrimination. The results show that the aims of the law were only partly reached, which, according to the evaluation report, is justified given the amount of state-budget funds allocated for the law's implementation. Although noting numerous points where implementation can be improved, the report explicitly spelled out only three recommendations for legislative changes for improving the implementation: amending the Anti-discrimination Law to allow for the establishment of administrative support for the CPAD; explicit prescription of the 'shift of burden of proof' for the CPAD; and enhancing the CPAD accountability mechanisms.

- Other laws:

- Other laws are not fully in line with the Anti-discrimination Law, nor with the directives (in their terminology, listing protected grounds, definitions of direct discrimination, omitting victimisation, social dialogue, etc.). The harmonisation of the legal framework with the ADL has been identified as a general strategic goal of both the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability 2012-2015' and of its successor, the 'National Strategy on Equality and Non-discrimination (2016-2020)'.⁴⁰² Under the flagship of the OSCE and the CPAD, an analysis of the harmonisation of the national equality and non-discrimination legislation against international standards and of the harmonisation at the national level with the comprehensive Anti-discrimination Law was conducted in 2015, which identifies many issues individually singled out in the relevant sections of the report – see above.⁴⁰³
- An exception to this would be the Law on Labour Relations, which needs very few amendments to be in line with the directives. These necessary steps would be to amend the definition of harassment, which is not completely in accordance with the directives,⁴⁰⁴ to add provisions on instruction to discriminate, as well as clarifying the potential for positive actions and reasonable accommodation for people with disability.⁴⁰⁵

⁴⁰² Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

⁴⁰³ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

⁴⁰⁴ The Law on Labour Relations definition refers to establishing behaviour, instead of creating an offensive environment. Source: The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

⁴⁰⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 9.

11.2 Other issues of concern

The last European Commission's progress report assesses the situation in the country as a 'state capture'.⁴⁰⁶ This, of course, ties into a backsliding in terms of fulfilment of political criteria for membership, especially with regards to independence of the judiciary already reported in several successive years. The same trend also applies to advancing the protection of human rights in general, and equality and non-discrimination more specifically. Retrogression of protection of rights in law and in practice continued. In times of general failure of the system to administer justice, vast politisation of society and partisanship of state institutions, the problems are very general and very serious. These also affect the practical implementation of the national legislation. This was confirmed by the 2015 recommendations of the special EC Rule of Law mission led by Pribe.⁴⁰⁷

Specifically, the country entered a period of unrest at the end of 2014, with massive protests by university and high-school students, honoraria workers, independent trade unions, workers fired in the transition and transformation processes, etc. The unrest increased in February 2015 with the wire-tapping affair which revealed an even more serious domestic situation. The largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20,000 people that are alleged to have been carried out by the state Counterintelligence Agency.⁴⁰⁸ The content of the published recordings removed doubts about the already existing claims of a state capture and extreme concentration of power in the ruling party, including the complete exercise of party control not only over the judiciary, but over *all* aspects of society including in relation to equality and non-discrimination.⁴⁰⁹ Soon after, the Ombudsperson opened two cases in relation to the wire-tapping affair, as gross and large-scale violations of the right to private and family life were observed, and faced lack of response from other state institutions.⁴¹⁰ On 5 May 2015, recordings related to the murder of Martin Neshkovski⁴¹¹ caused spontaneous massive protests in a matter of

⁴⁰⁶ The concept of 'state capture' is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'. This is also how the European Commission has used it in its report on the country's progress.

⁴⁰⁷ European Commission (08 June 2015), 'The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015', https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

⁴⁰⁸ Balkan Insight, (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

⁴⁰⁹ One of the publicly broadcasted conversations features what seems to be the voice of the (then) president of the equality body, Dushko Minovski; the recording suggests he was working for the ruling party on the ground during the election campaign and to be (ab)using his position in the Ministry of Labour and Social Policy by instructing people who have been awarded social assistance what party to vote for. In addition to this, what seems to be the voice of the then Minister of Interior Gordana Jankulovska was featured in a conversation that clearly shows the pressure the Roma community has been under to go out on election day and vote as instructed. Following the release of this recording, Roma organisations protested against the Government, demanding Jankulovska's resignation (which came on 12.05.2015), after which she published what was intended to be an apology to the Roma community. However, the letter was a mere reiteration of all actions undertaken in the country to improve the position of Roma, rather than an apology (the letter is not available anymore online). Sources: A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gipsy by Gipsy, we'll drag them"' (*СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме*) <http://a1on.mk/wordpress/archives/465799>. Please note that in the national context 'Gipsy' (*Циган*) is a derogatory word for Roma; 24 Vesti - National TV Broadcaster, 'Roma request resignation from the Minister Jankulovska' [*Ромите бараат оставка од министерката Јанкуловска*], <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

⁴¹⁰ Ombudsperson of the Republic of Macedonia (2016), *Annual Report of the Ombudsperson for 2015*. The annual report for 2016 is still not available at the time of writing of this report.

⁴¹¹ Martin Neshkovski was a young man in his twenties, a supporter of the ruling party who attended the victory rally of the ruling party on the night of another electoral victory for the ruling party - June 06, 2011. Rumours of murder on the main square spread on social media the same night, but the day after, the MoI spokesperson denied Neshkovski's murder until the public voices got so loud that they could not keep it a

hours from the broadcasting of the conversation which, although peaceful, were broken up by a violent and over-proportionate reaction by the police who made arrests of protesters that night.⁴¹² That day proved to be crucial in building and keeping a momentum for the protests, which culminated in the Pržino Agreement under which a Special Public Prosecutor's Office was established to prosecute crimes arising from the wiretapped conversations. However, in April 2016, as the first criminal charges reached the courts, the President of the country (who was elected as a candidate on the ruling party ticket) gave amnesty to more than 50 politicians, including the highest people in the ruling party and all for several criminal charges. This was followed by massive protests that grew into the 'colourful revolution' (*Шарена револуција*),⁴¹³ leading to further agreements among the political parties and elections held in December 2016. The small difference in votes, resulting in a hung Parliament, further continued the political crisis.

As noted above, a new study on harmonisation of the national equality and non-discrimination legislation called for urgent revision of the Anti-discrimination Law.⁴¹⁴ In view of the seriousness of the state situation, as described above, it is not expected that this will be a priority in 2017, although some changes might be expected in the second half of 2017. The CPAD continued to receive training and support from the OSCE - Mission to Skopje and to be included in projects coordinated and led by CSOs. However, with the appointment of the new composition⁴¹⁵ the cooperation with NGOs has severely dropped, while the OSCE – the biggest partner of the CPAD – has already announced its phasing out strategy from the CPAD (the reasons as to why have not been reported).⁴¹⁶ The problem of not having administrative support for its work is on-going, despite the announcement of a Government decision to resolve this issue being made two years ago.

The problem of misrepresentation and misunderstanding of the notion and scope of grounds remains, the main ones being:

- Disability is still a cause for stigma. Policies regarding accommodation and positive actions for people with disability are formally adopted, but are not implemented. However, a positive move in this direction was the ratification of the Convention on Rights of People with Disability and its accompanying Optional Protocol. Multiple provisions using insensitive terminology still persist in laws, as already mentioned several times above.
- Sexual orientation continues to be stigmatised, or, 'at best', ignored. The multitude of problems facing LGBTIQ persons have been identified in the first baseline study by Andonovski et al published in 2016, and include discrimination.⁴¹⁷ Hate speech is

secret anymore (which was over 24 hours after the murder). It was clear back then that there was an attempt to conceal the death, causing protests of size and duration unseen in the country in over a decade. Four years later the wiretapped conversation were taken as a proof that the protestors were right that the MoI wanted to hide the murder and that the Minister should for that reason resign. It revealed what seem to be the voices of the then minister Jankulovska, the former Prime Minister Nikola Gruveski and the spokesperson, all discussing how to hide the murder.

⁴¹² Reuters, 'Macedonian protesters demand resignation of cabinet, clash with police'

<http://www.reuters.com/article/us-macedonia-government-protests-idUSKBN0NQ2BH20150505>.

⁴¹³ Deutsche Welle, 'Protesters hit Macedonia's capital with paint balls and soap suds in a "Colorful Revolution"', <http://www.dw.com/en/protesters-hit-macedonias-capital-with-paint-balls-and-soap-suds-in-a-colorful-revolution/a-19201617>.

⁴¹⁴ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

⁴¹⁵ On issues in relation to the second composition, see: <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

⁴¹⁶ CPAD annual report

⁴¹⁷ Full name of the original study (not available online at the time of writing): Andonovski, K. et al (2016), *Analysis of the problems and needs of LGBT persons in Republic of Macedonia in the area of social protection, legal services and police conduct* [Анализа проблемите и потребите на ЛГБТИ луѓето во Република Македонија во областа на социјалната заштита, правните услуги и полициското постапување] (2016 LGBT Center and MHK). Source: Flash report, 'Study on Problems and Needs of LGBTI

still vastly tolerated. Debates around the Anti-discrimination Law were filled with hate speech directed towards homosexuals, and to people who publicly advocated for and supported inserting sexual orientation as a protected ground. The most staggering examples are examples of hate speech by journalists who are known to be close to the ruling party, including the only two journalists on whose shows the former Prime Minister appeared as a guest until 2016, one of whom accompanied the Prime Minister on a 2014 Government visit to a foreign country. Such hate speech features homophobic statements and spreads ethnic hatred, as well as degradation on grounds of sex. Following one such example of hate speech by the same journalist mentioned above, the full image of the practice of the equality body came to the fore. The Agency for Audio-Visual Media (the Agency) – the state body with responsibility, among other things, for monitoring the media and reacting against discriminatory speech, hate crime and hate speech, published a report and submitted a claim to the Commission for Protection against Discrimination (CPAD), for discriminatory speech on grounds of sexual orientation against the TV host. However, in December 2016, it received what seemed to be a letter from the President of the CPAD Dashtevski instead of a proper answer from the CPAD. When the Agency published the letter on its website, Dr Kadriu – another member of the CPAD – wrote a public letter explaining that President Dashtevski had abused his position, bypassed the CPAD and sent an invalid response to a legally submitted discrimination claim by a competent state body.⁴¹⁸

Persons in the Fields of Social Protection, Legal Services and Police Conduct' (15 March 2016) <http://www.equalitylaw.eu/downloads/3754-macedonia-study-on-problems-and-needs-of-lgbti-persons-in-the-fields-of-social-protection-legal-services-and-police-conduct-pdf-82-kb>.

⁴¹⁸ Flash report, 'Allegations of abuse of competences by the equality body President', (23 January 2017) <http://www.equalitylaw.eu/downloads/4017-fyr-macedonia-allegations-of-abuse-of-competences-by-the-equality-body-president-pdf-164-kb>.

12 LATEST DEVELOPMENTS IN 2016

12.1 Legislative amendments

- Changes to the Law on the Ombudsperson are the key development. One of the key contributions made by the amendments is the expansion of the institution's mandate to include a promotional mandate, which was an express requirement in order for the institution to acquire A status accreditation by the International Coordinating Committee on National Human Rights Institutions, meaning full compliance with the Paris Principles. The Ombudsperson can now also stand as a friend of the court and follow proceedings at all stages.

However, the Ombudsperson complained that the amendment proposals that it had issued on the basis of the Priebe report were not accepted. Specifically, following the wire-tapping affair, an expert Rule of Law mission led by Priebe identified an urgent need for reforms and points where the interventions were necessary. These included strengthening the independence of the Ombudsperson, including by strengthening its financial independence and positioning within the national system. The Ombudsperson complained that it is still dependent on the authorisations of the Ministry of Finance, including on new job openings and that its employees still have 'public servant' status. Also, the Parliament did not adopt the proposed amendment that would have allowed the Ombudsperson to request the Parliament establish an inquiry committee on burning issues where institutions have not acted in line with the Ombudsperson's recommendation.⁴¹⁹

12.2 Case law

Name of the body: Commission for Protection against Discrimination

Date of decision: 08.11.2016

Name of the parties: *S.X., H.X., and S.X. v Pool "Biser"*

Reference number: Case No. 08/1744

Address of the webpage:

http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2016/boja_koza/1744_SH_Ae_rodrom.pdf

Brief summary: Applicants S.X., R.X. and S.X. applied to the CPAD claiming discrimination on grounds of skin colour (Article 3, ADL) in access to services (Article 4, ADL) because they were not allowed to enter a pool in Skopje. In their application to the equality body, S.X. stated that the first time they came to the pool, none of them was allowed to go in. Two days later, his wife and daughter (in his application, he claims they have fair skin) went first and were let in after they bought a ticket. When S.X. and his son, (who has darker skin according to S.X.'s claim) came to enter, they were not allowed to do so. They were also told that they needed to have a special pass (in Macedonian, 'пропустница') in addition to a ticket. S.X. brought the case to the equality body submitting only his claim and a video from which, the CPAD concludes, it could be clearly seen that they were not allowed to enter. On that basis, the CPAD shifted the burden of proof, and asked the legal person managing the pool on behalf of the Municipality Aerodrom (a municipality falling under the city of Skopje), to respond. The delivery of the CPAD communication failed twice although it was established that the legal person and potential discriminator was contacted at the correct address. The CPAD then said: 'In line with Article 38 [of the ADL], the burden to prove that there was no discrimination falls on the [...] [potential discriminator], who failed to respond to the claim. On grounds of this, [the equality body], in line with Article 24(1) and Articles 28 and 29 of the [ADL] gives

⁴¹⁹ The statement of the Ombudsperson pursuant to the adoption of the amendments was published in the media. Source: Sakam da kazham (Сакам да кажам), 'Under the new law the Ministry of Finance will still decide the budget of the Ombudsperson' (И со новиот закон министерот за финансии ќе одлучува колку пари ќе има народниот правобранител) <http://sdk.mk/index.php/makedonija/i-so-noviot-zakon-ministerot-za-finansii-ke-odluchuva-kolku-pari-ke-ima-narodniot-pravobranitel/#more>.

the following opinion' and goes on to find direct discrimination on grounds of colour of skin in relation to access to services, (in this case access to the pool). No claims for liability on part of the Municipality were considered.⁴²⁰

Name of the court: Court of First Instance Skopje

Date of decision: not known

Name of the parties: *NGO KHAM, FOOM, MHK, IHR and ERRC v Government of the Republic of Macedonia*

Reference number: not available

Address of the webpage: not available

Brief summary: Five CSOs, supported by the OSCE - Mission to Skopje, submitted an actio popularis claim on Roma segregation in education against the Government. They claimed interest on the grounds of long-term work in the area and findings from studies that they have published, all of which they claim show beyond doubt the segregation of Roma children in education. The first instance court accepted that they have a legitimate interest to represent such a case, but went on to dismiss the case on the ground that it did not have express authorisation of the person that finds him/herself discriminated against. That is a criterion in the ADL under Article 41(4), for class action, and not for actio popularis. The court also said that such authorisation should be provided in writing without calling upon any legal provision to support this claim. The CSOs appealed to the second instance court.⁴²¹

Name of the body: Ombudsperson

Date of decision: not known⁴²²

Name of the parties: *MHK v Government of the Republic of Macedonia*

Reference number: not available

Address of the webpage: not available (reported in a CSO report on discrimination)

Brief summary: The Macedonian Helsinki Committee (MHK) raised a claim to the Ombudsperson for direct discrimination on the ground of sex in the field of healthcare provision. It was reported to the MHK that fathers and men in general are not allowed as companions of hospitalised children in public health facilities. If a child is to be hospitalised, they must be accompanied by a female. In an effort to investigate the matter further, the Ombudsperson conducted situation testing via telephone. The allegations by the MHK were confirmed. Relying on its situation test as proof, the Ombudsperson concluded that there was *indirect*⁴²³ discrimination on the ground of sex in the public healthcare service provision.⁴²⁴

Roma cases trends in 2016

The Roma cases reported in various sections of the report above point to a continuation of the trends of: (1) segregation in education, (2) breach of the freedom of movement, (3) breach of the human right to housing, coupled in places with a breach of the right to safe and drinkable water, (4) obstacles to access to goods and services.

The biggest trend of submitting cases in relation to the breach of the right to freedom of movement of the Roma, which brought the first case finding discrimination in front of a

⁴²⁰ CPAD, Case No. 08/1744 - S.X., H.X., and S.X. v Pool "Biser", (08.11.2016), available at (in Macedonian only) http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2016/boja_koza/1744_SH_Aerodrom.pdf.

⁴²¹ The case is still not publically available. Information was acquired by the report's author from persons involved in the preparation of the legal documents related to the process.

⁴²² This information should become known once the Ombudsperson publishes its annual report.

⁴²³ However, the applicant (the MHC) claimed direct discrimination. Having no access to the files of the case prevents an understanding of the decision of the Ombudsperson as to the form of discrimination that it had established.

⁴²⁴ Helsinki Committee of the Republic of Macedonia (2016), 'Info-sheet on Discrimination' (Информатор за дискриминација (May 2016), http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

court,⁴²⁵ continued in 2016. This human rights breach, which is happening under the veil of protection of the visa free regime with the EU, continued. It is now documented in detail in a legal analysis of the legal aid provided by one of the NGOs most active in such provision – NGO KHAM Delchevo.⁴²⁶ This was part of a larger project run by the European Policy Institute in partnership with NGO KHAM Delchevo, which also produced a media analysis report,⁴²⁷ baseline study,⁴²⁸ policy report,⁴²⁹ and a visualisation of the issue for awareness raising purposes⁴³⁰ as part of the efforts to stop the discrimination against Roma in relation to their practicing of the right of freedom of movement.

⁴²⁵ See flash report: 'Discrimination in relation to free movement of Roma by border officers' (29.05.2014) <http://www.equalitylaw.eu/downloads/2180-mk-32-courtcase-roma>

⁴²⁶ European Policy Institute and KHAM, *Right to equality and freedom of movement at the borders – Experiences from the provision of legal aid* (Право на еднаквост и слобода на движење на границите - искуства од давање правна помош), http://epi.org.mk/docs/Sloboda%20na%20dvizenje%20-%20iskustva%20od%20pravna%20pomosh_MK.pdf.

⁴²⁷ European Policy Institute and KHAM, *Life up to the border – Reporting on Roma and Visa Liberalisation by the media in Macedonia* (Живот до граница - Известувањето на македонските медиуми за Ромите и визната либерализација), http://epi.org.mk/docs/Zivot%20do%20granica%20-%20Izvestuvanieto%20na%20mediumite%20za%20Romite%20i%20vizna%20lib_MK.pdf.

⁴²⁸ European Policy Institute and KHAM, *Roma at the Macedonian borders – baseline study* (Ромите на македонските граници - основна студија), http://epi.org.mk/docs/Osnovna%20studija_Romite%20na%20makedonskite%20granici.pdf.

⁴²⁹ European Policy Institute and KHAM, *Roma in visa Free Regime – Policy Paper*, http://epi.org.mk/docs/Roma%20in%20the%20Visa%20-%20Free%20Regime_policy%20paper.pdf.

⁴³⁰ European Policy Institute YouTube Channel, 'What happens with Roma at Macedonian border crossings?' (Што се случува со Ромите на македонските гранични премини?) <https://www.youtube.com/watch?v=ZxWkkhEBPyA>.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Former Yugoslav Republic of Macedonia
Date: 1 January 2017

Title of legislation (including amending legislation)	<p>Title of the Law: Law on Prevention and Protection against Discrimination Abbreviation: Anti-discrimination Law Date of adoption: 08.04.2010 Latest amendments: 22.02.2016 Entry into force: 21.04.2010 Webpage: www.slvesnik.com.mk/Issues/1654343CD9A0E24998781907DC19A99F.pdf Grounds covered: Sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property, health condition, or any other ground or stipulated by law or ratified national treaty.</p>
	Civil law
	<p>Material scope: All areas (draws specific attention to: public employment, private employment, access to goods and services, social protection, education).</p>
	<p>Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate, reasonable accommodation, creation of a specialised body.</p>
Title of legislation (including amending legislation)	<p>Title of the Law: Law on Labour Relations Abbreviation: Labour Law Date of adoption: 28.07.2005 Entry into force: 05.08.2005 Latest amendments: 15.02.2016 Webpage: www.slvesnik.com.mk/Issues/ABCBBB808C582943B4A3287BD0629357.pdf Grounds covered: Race, colour, sex, age, health condition, disability, religious, political or other belief, membership of trade union, national or social origin, position of the family, property, sexual orientation or other personal issue.</p>
	Civil law
	<p>Material scope: Public employment, private employment.</p>

	Principal content: Regulation of labour relations. Of relevance here: prohibition of direct and indirect discrimination, harassment.
Title of legislation (including amending legislation)	<p>Title of the law: Law on Social Protection</p> <p>Abbreviation: LSP</p> <p>Date of adoption: 24.06.2009</p> <p>Entry into force: 02.07.2009</p> <p>Latest amendments: 19.02.2016</p> <p>Webpages: Text of the law (2009), as in Official Gazette: www.slvesnik.com.mk/Issues/7CEA639634D1054DB351E7FB985665DC.pdf</p> <p>Grounds covered: Sex, race, colour, nationality, ethnicity, social status, political, religious, cultural, language, property and social background, disability and origin.</p> <p>Civil law</p> <p>Material scope: Social protection, social advantages.</p> <p>Principal content: Social protection. Of relevance here: prohibition of direct and indirect discrimination.</p>
Title of legislation (including amending legislation)	<p>Title of the law: Law on Employment of Persons with disability</p> <p>Abbreviation: LEPD</p> <p>Date of adoption: 02.06.2000</p> <p>Latest amendments: 15.02.2016</p> <p>Entry into force: 10.06.2000</p> <p>Web link: www.slvesnik.com.mk/Issues/CE827065C11B4A1ABA5546F974EFDA94.pdf</p> <p>Grounds covered: Disability</p> <p>Civil law</p> <p>Material scope: Public employment, private employment</p> <p>Principal content: Employment of persons with disability, including shelter companies.</p>

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Former Yugoslav Republic of Macedonia

Date: 1 January 2017

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)	09.11.1995	10.04.1997	No	Yes	Yes
Protocol 12, ECHR	04.11.2000	13.07.2004	No	Yes	Yes
Revised European Social Charter	27.05.2009	21.10.2011	No	No	Yes
International Covenant on Civil and Political Rights	(succession) ⁴³¹	18.01.1994	No	Yes	Yes
Framework Convention for the Protection of National Minorities	25.07.1996	10.04.1997	No	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	(succession)	18.01.1994	No	Yes	Yes
Convention on the Elimination of All Forms of Racial Discrimination	(succession)	18.01.1994	No	Yes	Yes

⁴³¹ Under the Constitutional Law adopted for implementing the Constitution of the Republic of Macedonia, as one of the republics to succeed from the Socialist Federative Republic of Yugoslavia (SFRY), the country assumes all obligations from SFRY membership in international organisations and with other countries, as provided by common principles of international law. This Law also calls upon the Vienna conventions for succession (1978 and 1982) for guidance on regulating the succession. Source: Constitutional Law adopted for implementing the Constitution of the Republic of Macedonia (*Уставен закон за спроведување на Уставот на Република Македонија*), Official Gazette of the Republic of Macedonia No.52/91.

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of Discrimination Against Women	(succession)	18.01.1994	No	Yes	Yes
ILO Convention No. 111 on Discrimination	n/a	17.11.1991	No	Yes	Yes
Convention on the Rights of the Child	(succession)	02.12.1993	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	14.12.2011	No	Yes	Yes

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