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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Montenegro

Ivana Jelic, updated by Simović-Zvicer

Reporting period 1 January 2017 – 31 December 2017

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1. Introduction

1.1 Basic structure of the national legal system

Montenegro is a constitutional parliamentary democracy, with a multi-party system. The constitution declares Montenegro to be an independent and sovereign state, with a republican form of government, as well as being a civil, democratic, ecological and social justice-based state, which adheres to the rule of law.¹

Until the 1990s, Montenegro was a federal unit of the Socialist Federal Republic of Yugoslavia (SFRY). Thereafter, it was one of the two republics of the Federal Republic of Yugoslavia (FRY) until 2003, when the State Union of Serbia and Montenegro was established as a result of the redefinition of the relationship between the Republic of Serbia and the Republic of Montenegro. Finally, Montenegro regained its independence after a referendum held on 21 May 2006 and the Parliament of Montenegro declared Montenegro to be an independent and sovereign state on 3 June 2006.² Its independence was recognised by the UN on 28 June 2006. Following independence, the official name became Montenegro (rather than the Republic of Montenegro, which is what it used to be called while it was a federal republic).

Ratified international legal instruments form an integral part of the Montenegrin internal legal system and they have supremacy over national legislation in the case of a difference in regulating relations, according to Article 9 of the Constitution.³ Montenegro has ratified all relevant international legal instruments concerning anti-discrimination and gender equality, which have become applicable in the state.

Montenegro is a candidate for accession to the EU⁴ and is in the process of harmonising its legal system with European standards. In 2017, Montenegro continued to work towards meeting the obligations stipulated in the Action Plan for EU accession. In the previous course of negotiations, 30 out of 33 negotiating chapters were opened including the Chapter 19 on Social Policy and Employment. In December 2017, Montenegro opened two new negotiation Chapters, 2 - Freedom of movement for workers and 3 - The right to establish a company and the freedom to provide services.

The court system is regulated by the Constitution and the Law on the Courts.⁵ According to the Law on the Courts, the court is a state organ with judicial competence.

Articles 14 and 15 of the Law on the Courts stipulates that the court system in Montenegro consists of 15 basic courts located in 15 municipalities (Ulcinj, Herceg Novi, Kotor, Plav, Rožaje, Cetinje, Bar, Bijelo Polje, Kolašin, Berane, Nikšić, Žabljak, Pljevlja, Podgorica and Danilovgrad), two High Courts located in Bijelo Polje (which has jurisdiction in the areas covered by the basic courts of Bijelo Polje, Berane, Žabljak, Kolašin, Plav, Pljevlja and

¹ Constitution of Montenegro 2007, Article 1 par. 2. Available at:

http://www.wipo.int/wipolex/en/text.jsp?file_id=187543,
<http://www.skupstina.me/images/dokumenti/ustav-crne-gore.pdf>.

² The referendum on the independence of Montenegro was held on 21 May 2006 and the results demonstrated that more than 55 % of the population wanted to live in an independent state. The Declaration of Independence was adopted by the Parliament of Montenegro on 3 June 2006. Montenegro became a member state of the United Nations on 28 June 2006. Montenegro is candidate state for membership of the European Union (see below, fn 4).

³ Article 9 of the 2007 Constitution: 'The ratified and published international agreements and generally accepted rules of international law shall form an integral part of the internal legal order, shall have supremacy over national legislation and shall apply directly when they regulate relations differently than the national legislation.'

⁴ In 2010, the European Commission issued a [favourable opinion on Montenegro's application](#). In December 2011, the European Council launched the accession process with a view to opening negotiations in June 2012. The accession negotiations with Montenegro started on 29 June 2012. More information can be found at: http://ec.europa.eu/enlargement/countries/detailed-country-information/montenegro/index_en.htm.

⁵ Law on the Courts, *Official Gazette of the Republic of Montenegro*, Nos. 5/2002, 49/2004, 22/2008, 39/2011, 46/2013 and 48/2013.

Rožaje) and Podgorica (which has jurisdiction over the areas covered by the basic courts of Podgorica, Bar, Danilovgrad, Kotor, Nikšić, Ulcinj, Herceg Novi and Cetinje), as well as the commercial courts of Montenegro which are located in Bijelo Polje and Podgorica, the Appellate Court of Montenegro located in Podgorica, the Administrative Court of Montenegro located in Podgorica, and the Supreme Court which sits in Podgorica.⁶

There is also the Constitutional Court of Montenegro,⁷ which protects constitutionality and legality (Constitution Articles 149-154 of the constitution).

The Judicial Council⁸ is an independent and autonomous judicial body which is constitutional (Articles 126, 127 and 128 of the constitution)⁹ Its responsibilities are to: 1) elect and dismiss judges, the president of a court and lay judges; 2) establish the cessation of judicial duties; 3) determine the number of judges and lay judges in a court; 4) deliberate on the activity report of the court, as well as applications and complaints regarding the work of the courts and to take a standpoint with regard thereto; 5) decide on the immunity of a judge; 6) propose to the Government the amount of funds for the work of the courts; 7) perform other duties stipulated by the law. The Judicial Council operates under the Law on the Judicial Council and Judges,¹⁰ which regulates the manner of appointing and dismissing members of the Judicial Council, the organisation and working methods of the Judicial Council, the procedure for the appointment of judges and lay judges, certain rights and duties, the means of determining that a judicial office should be terminated, the disciplinary liability and dismissal of judges and lay judges and other issues decided upon by the Judicial Council.

1.2 List of main legislation transposing and implementing Directives

The Law on Gender Equality (LGE)¹¹ was adopted and entered into force in July 2007. The LGE was last amended in July 2015. It stipulates equality between women and men in all areas of public and private life, as well as an equal opportunities policy. The law was amended by the Law on Amendments to the Law on Gender Equality (adopted by Parliament on 26 June 2015), which extended the scope of the sanctions concerning discrimination based on sex and violation of the principle of the equal treatment of men and women in certain spheres of life, including discrimination against women due to pregnancy.

The law has now been harmonised with the Law on the Prohibition of Discrimination, the Law on the Protector of Human Rights and Freedoms (hereinafter the Protector),¹² which is the Montenegrin Ombudsman, as well as the EU *acquis*. This primarily concerns the harmonisation of definitions of discrimination based on sex, such that the definitions of direct and indirect discrimination are now in line with EU standards.

The law complies with ratified international treaties and other documents adopted under the auspices of the UN, the EU and the Council of Europe and particularly with the following

⁶ <http://en.sudovi.me>.

⁷ Law on Constitutional Court, Official Gazette of Montenegro No. 11/2015.

⁸ <http://sudovi.me/sscg/sudski-savjet/propisi/>.

⁹ Article 126 of the Constitution reads: 'The Judicial Council shall be an autonomous and independent authority that ensures the autonomy and independence of the courts and the judges.'

¹⁰ Law on the Judicial Council and Judges, *Official Gazette of Montenegro*, No. 28/15. Available at: <http://sudovi.me/podaci/sscg/dokumenta/2437.pdf>.

¹¹ Law on Gender Equality, *Official Gazette of Montenegro*, Nos 46/07, 73/10, 40/11, 35/15.

¹² The Protector shall autonomously and independently, on the principles of justice and fairness, take measures to protect human rights and freedoms, when they are violated by an act, action or failure to act of state bodies, state administration bodies, bodies of local self-administration and local administration, public services and other holders of public powers (hereinafter referred to as: authorities) as well as measures to prevent torture and other forms of inhuman or degrading treatment or punishment and measures for protection from discrimination. The Protector does not have authority over the work of courts, except in cases determined by this Law. (See: Article 2 of the Law on the Protector of Human Rights and Freedoms of Montenegro ('Official Gazette of Montenegro', No. 42/11 and 34/12-)).

EU Directives: Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

The implementation of the law is still a challenge in practice, mainly because of the Montenegrin traditional patriarchal society and mentality, a need for improved knowledge of gender equality principles and a lack of trust in institutions, mainly the courts. The problem of underreporting of gender inequality cases is topical.

The Law on the Prohibition of Discrimination (LPD) was adopted on 27 July 2010, establishing comprehensive systemic legal protection from discrimination in Montenegro.¹³ It was amended on 26 March 2014,¹⁴ and is now applicable in the public and private sector (as emphasised in Article 3, paragraph 2).

The Law on Amendments to the Law on the Prohibition of Discrimination ('Official Gazette of Montenegro 42/2017'), adopted in the Parliament of Montenegro on 29 June 2017, realised full compliance with Recast Directive 2006/54/EC and Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10. 1.1979).¹⁵

In addition, this piece of legislation ensures compliance with the other non-discrimination directives: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.07.2000); and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 02.12.2000).

Among other grounds, the presently effective LPD prohibits discrimination based on gender identity, sexual orientation and/or intersexual characteristics (Article 19). Amendments to this Law introduced a new prohibited ground of discrimination: the change of gender and intersexual characteristics.¹⁶ This means that the protection against discrimination also covers persons with physical characteristics that do not correspond to the binary medical definition of a man or woman and who change the sex that was assigned to them and registered at birth.

The law stipulates that multiple discrimination is one of the aggravated forms of discrimination, based on two or more of the above-mentioned grounds of discrimination. Amendments to the Law also introduced novelties when it comes to the definition of the

¹³ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, No. 46/2010. Available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86176/97053/F1577504685/Zakon%20o%20zabrani%20diskriminacije.pdf>.

¹⁴ *The Official Gazette of Montenegro*, No. 18/2014. Available at: http://www.ombudsman.co.me/docs/izvjestaji/2014_Zakon_o_zabrani_diskriminacije.pdf.

¹⁵ Other EU gender equality directives on self-employment (Directive 2010/41/EU), pregnancy (92/85/EEC), access to goods and services (Directive 2004/113/EC), parental leave (2010/18/EU), and part-time work (97/81/EC) will be subject to harmonization with the Labour Law and Company Law, on which work is in progress.

¹⁶ The law on the prohibition of discrimination (among other things) mentions change of gender and gender identity as a ground of discrimination (See: Article 2, par 2). According to Article 19, Sat 4 of the Law on the Prohibition of Discrimination, gender identity implies one's own gender experience that does not have to depend on the sex that was established and registered at birth.

term 'discrimination': the previous Law defined discrimination as any 'unjustified, legal or factual, direct or indirect making of a difference'. The new amendments deleted the term 'unjustified' because direct discrimination cannot be justified by the existence of a legitimate aim and proportionate means. This served to point out that the facts raised in order to justify direct discrimination do not relieve the perpetrator of responsibility. They are legally relevant only in cases of indirect discrimination, in which differentiation measures must be objectively and reasonably justified by a legitimate aim and with the use of means that are appropriate and necessary for reaching the goal.

The right to protection from discrimination belongs to all natural and legal persons to whom the Montenegrin legislation applies. The law includes special forms of discrimination, such as: harassment and sexual harassment, segregation, hate speech, discrimination in the use of premises and spaces in public usage, discrimination in the provision of public services, discrimination in the spheres of labour, education and professional training, etc. Legislation regarding special forms of discrimination has been improved and more explicitly expressed, the terminology has been harmonized, and, among other things, discrimination against children has been included into special forms, as well as harassment through audio and video surveillance, mobile devices, social networks and the Internet.

Amendments to the Law on the Prohibition of Discrimination define actions that are not considered discrimination, which significantly facilitates the application of the Law by the Protector of Human Rights and Freedoms as well as by the judicial authorities. The new Article 2a foresees that behaviours that disadvantage or put in a more unfavourable position a person or a group of persons in relation to others will not be considered discriminatory in the following cases:

- 1) when such an action is prescribed by law in order to preserve health, peace, prevention of criminal offences and protection of the rights and freedoms of others, if the resources used are appropriate and necessary for achieving one of these objectives in a democratic society and proportionate to the goal of such measures;
- 2) when performing professional activities, that is, establishing a working relationship, membership in religious communities and other organizations, or activities of persons which are in accordance with religious teaching, rites and activities of the religious community, as well as other public or private organizations whose system of value is based on religious learning or belief and which acts in accordance with the Constitution and the law, if so required by religious teaching or belief, and due to the nature of those activities or the circumstances in which they are performed, if religious learning or belief is a true, lawful and justified requirement for the performance of a job;
- 3) based on age, when establishing insurance premiums and other insurance terms in accordance with generally accepted principles of risk assessment, relevant and accurate statistical data and rules of actuarial mathematics (mathematical method used in the field of insurance);
- 4) when accessing goods and services intended solely or principally to members of one sex or persons with disabilities, when such action is objectively and reasonably justified by a legitimate aim, and the resources used are appropriate and necessary to achieve that aim;
- 5) when determining the lowest or highest age limit, professional experience or the level of education as the conditions for establishing an employment relationship or as conditions for acquiring other rights arising from employment, in accordance with special regulations;
- 6) when determining the appropriate maximum age limit as a reason for termination of employment in accordance with the conditions for obtaining the right to old-age pension;
- 7) on the basis of citizenship in accordance with special regulations.

The LPD stipulates several procedural competences in the field of protection from discrimination that could be confusing to potential beneficiaries, which makes its implementation more difficult. Specifically, the LPD enables several different procedures in which it is possible to exercise the right to protection from discrimination. Thus, the LPD provides for dealing with complaints submitted to the Ombudsman, initiation of civil court proceedings, misdemeanour protection and inspection using all the powers and sanctions available to the inspection authorities. Finally, the Ombudsman is empowered to conduct a conciliation procedure between the person who filed a complaint of discrimination and the authority of the company, other legal entity, entrepreneur or natural person referred to in the complaint of discrimination, and it is also possible to initiate proceedings before the court, a process that is regulated by a separate law. The amended Law also introduced novelties in relation to the Protector's actions and work. His competences were extended to the possibility of filing a lawsuit in cases of individual violation of the principle of non-discrimination. In addition, the law also explicitly stipulates that the rule establishing the shift of the burden of proof also applies in anti-discrimination proceedings before the Protector, which was not previously the case. That said, it did not constitute a substantive impediment to its application. This is primarily so because the rule on the shift of the burden of proof is standardized by the European anti-discrimination directives and is applied in proceedings before the European Court of Human Rights, from which the Protector has drawn the basis for its consistent implementation. In addition to the above procedures, real and substantial protection against discrimination is carried out in the criminal proceedings and proceedings before the Constitutional Court, although it is still possible to obtain protection under the administrative dispute process.

According to the information that the Secretariat of the Judicial Council of Montenegro submitted to the Ombudsman, a total of nine lawsuits against discrimination were filed in 2017. However, it should be noted that the presentation of a case in relation to discrimination is not detailed: it only states that these are disputes concerning discrimination, but the basis and scope of discrimination are not shown.¹⁷

Also, the electronic database concerning submitted applications/charges, pending cases and decisions on the discrimination cases before the courts, public prosecutors, the public administration body in charge of police affairs and inspections has not been created. Creating such a database is a legal obligation according to Article 33 of the LPD and the Rulebook on the Content and Manner of Keeping Separate Records on Cases of Reported Discrimination.¹⁸ The Ombudsman stated that this fact makes their work more difficult as it is not possible to distil crucial indicators for following discrimination as a phenomenon.¹⁹

There is still a need for harmonisation of the judicial and quasi-judicial practice concerning discrimination, which is applied by the courts and other state bodies.²⁰ This process is of great importance, both in terms of individuals seeking protection from discrimination, and in terms of the efficient and effective functioning of state bodies where such practice is the basis of action. This is especially important for achieving gender equality, because the Ombudsman has the responsibility for the procedural mechanism implementing the gender provisions of the LPD and the LGE. This means that an alleged victim of discrimination has two options for protection – to submit a complaint to the Ombudsman for a quasi-judicial decision or to submit the case before a court for its judgment. The courts are overloaded by diverse cases and there is backlog, so it is commendable that the Ombudsman was given the responsibility for implementing the LPD, so that the protection from discrimination could be more efficient.²¹

¹⁷ Ombudsman of Montenegro (2018): Ombudsman's Report for 2017, Podgorica, p. 174.

¹⁸ 'Official Gazette of Montenegro', no. 50/14.

¹⁹ Ombudsman of Montenegro (2017), *Ombudsman's Report for 2016*, Podgorica, pp. 152 and 153.

²⁰ Namely, according to LPD and other laws concerned, there are several legal procedural possibilities on the protection against discrimination: criminal, civil, misdemeanour, constitutional and administrative with several options.

²¹ Although the Ombudsman is responsible for the protection from discrimination procedure, protection from discrimination by the courts has never been questioned or explicitly excluded.

The Labour Law²² was adopted in 2008, and was amended several times in 2009, 2011, 2012 and 2014. It includes the prohibition of discrimination, both direct and indirect, towards persons seeking employment and employees. It actually crystalizes the general anti-discrimination provisions stipulated in the LPD, and Article 7 includes the prohibition of discrimination with regard to: employment conditions and the selection of candidates for a specific job; working conditions and all rights arising from employment; education, training and development; promotion; and the termination of employment. Also, it is stipulated that the provisions of a labour contract that define discrimination in contradiction to the discriminatory grounds under the law (among which are gender, pregnancy, marital status, family obligations and sexual orientation) are null and void. Under Article 10, the Labour Law entitles persons seeking employment and employees to initiate a lawsuit based on the anti-discrimination provisions in the law. In addition, the law guarantees an equal salary for a man and a woman for the same work (Article 77(2)). The Labour Law has still not been harmonized with relevant EU directives, and therefore the Government of Montenegro has decided to adopt a new draft law before the end of 2018. The new Labour Law, which is supposed to be fully harmonized with the *acquis* with an emphasis on removing discrimination on the ground of sex in the labour market is still in process. Full harmonization of the Labour Law with the relevant EU directives has been assigned to the Working Group for drafting the new Labour Law. A positive novelty is that the member of the Working group for drafting the new law is a chief of the Department for Gender Equality of the Ministry for Human and Minority Rights, who is charged with following up on ensuring harmonization with the EU Directives concerned.²³

The Law on Social and Child Protection²⁴ was adopted in 2013 and was amended on several occasions in 2015 and 2016.²⁵ It prescribes the rights relating to social and child protection, as well as the conditions for their realization. It defines social and child protection as being activities in the public interest to be realized at the state and local level. The aims of the law relating to gender equality include the protection of: pregnant women and girls without family support and adequate living conditions; persons who are victims of neglect, abuse, exploitation and family violence or persons who are in danger thereof; victims of human trafficking; and single parents with a child without family support and adequate living conditions. Article 7 contains principles of social and child protection including the prohibition of discrimination against beneficiaries of social and child protection based, *inter alia*, on their sex or sexual orientation.

There were notable developments in 2017 in Montenegro regarding the provisions of the Law on Social and Child Protection, which, according to the amendments of a number of members of the Montenegrin Parliament, provided the right to lifetime monthly benefits for mothers with three or more children. The disputable provisions of Article 4 (54a and 54b) of the Law stipulated that a woman who gives birth to three children and accomplishes at least 25 years of employment or a woman who gives birth to four or more children and accomplishes at least 15 years of employment is entitled to a lifetime monthly benefit in the amount of 70 % of the average net salary in Montenegro. The right cannot be used during the employment relationship nor at the same time as exercising the right to a pension. A woman who gives birth to three or more children, and who is registered with the Employment Agency for at least 15 years, has the right, if she wishes, to receive a lifetime monthly benefit of 40 % of the average net salary in Montenegro. The right to lifetime benefits based on the above-mentioned disputed provisions of the Law was exercised by 22 051 women, as follows: 12 981 women based on the Employment Agency's register of unemployed persons; 4 309 women who terminated their employment

²² Labour Law, *Official Gazette of Montenegro*, Nos 49/2008, 26/2009, 59/2011, 66/2012 and 31/2014.

²³ Ministry for Human and Minority Rights (2017), Report for 2016 on the Implementation of the *Programme 2015-2016 for Implementation of the Government Activity Plan for the Realization of Gender Equality*, March 2017, p. 23, Action 3.1.1.

²⁴ Law on Social and Child Protection, *Official Gazette of Montenegro*, Nos 27/2013, 1/2015, 42/2015, 47/2015, 1/2017.

²⁵ The Parliament of Montenegro in its last session on 29 December 2016 adopted the Law on Changes and Amendments to the Law on Social and Child Protection (*Official Gazette* No. 1/2017).

relationship in order to exercise the right to this benefit; and 4 761 women who gave up their entitlement to a pension in order to exercise the right to this benefit.

Acting on the initiative to review the constitutionality of the above-mentioned provisions, the Constitutional Court on 19 April issued a decision abolishing the disputed provisions of the Law on Social and Child Protection. The provisions were deemed contrary to the Constitution and to Article 1 of Protocol No. 12 to the European Convention, which establishes the principle of non-discrimination, gender equality, protection of the family and the protection of mother and child. The court decision states, among other things, that the disputed provisions are discriminatory because the right to a lifetime monthly benefit on the basis of the birth of three or more children is not granted to all other women who are in a similar, comparable situation. Some women in fact might be excluded because they do not meet some of the legal requirements, for example in terms of the number of children born, or the years of service and the years spent in the status of unemployed persons registered at the Employment Agency. The operative part of the said decision stipulated that the enforcement of this decision also includes the regulation of the legal situation arising after the termination of the unconstitutional provisions concerned. It envisaged that the Government of Montenegro should, within three months from the publication of the decision in the 'Official Gazette of Montenegro', submit to the Parliament of Montenegro a proposal to harmonize the legal status of the recipients of the benefit that had become unconstitutional.

Acting on the Constitutional Court's decision, the Government of Montenegro has prepared a special law for this purpose, which was adopted by the Parliament of Montenegro on 29 June 2017.²⁶ This Law provides for the right to the benefit in a fixed amount for:

- recipients who have voluntarily terminated their employment relationship for an indefinite period of time in order to exercise their right to the lifetime benefit. Because the entitlement to the benefit depended on the recipients' age, the recipients who, at the date of entry into force of the new Law, had reached the age of 55 to 61, shall be entitled to the benefit until they meet the age requirement for acquiring the right to a pension;
- recipients who, at the date of entry into force of the new Law, reached the age of 45 to 55. They shall be entitled to the benefit for a period of five years from the date of entry into force of this Law;
- recipients who, at the date of entry into force of the new Law, had reached the age of 33 to 45. They shall be entitled to the benefit for a period of three years.

In addition, it is envisaged that recipients who have suspended their pension rights for the purpose of exercising the right to a lifetime benefit are entitled to continuation of their pension benefits, as well as recipients of unemployment benefits.

The new Law on Health Care²⁷ was adopted and amended at the beginning of 2016. The law regulates the healthcare system, as well as the implementation of health protection, healthcare services, the rights and obligations of patients and establishing a special centre for autism, etc. Article 3 stipulates that all terms in the law for natural persons using the masculine gender include the same terms in feminine gender. Article 5 stipulates that in accordance with law, all citizens are *equal*, regardless of their nationality, race, gender, gender identity, sexual orientation, age, disability, language, religion, education, social origin, property or other personal property, in exercise of the right to health care. *Equal conditions* for realising health care for all citizens, especially at the primary health care level, taking into account the physical, geographical and economic accessibility are emphasised in Article 10. Also, in the implementation of health care, each citizen has the *right to equality in overall treatment* when receiving health care according to Article 11. Article 16(7) stipulates that health care for women in relation to reproductive and sexual

²⁶ Law on Execution of the Decision of the Constitutional Court 'Official Gazette of Montenegro', No. 31/2017.

²⁷ Law on Health Care, *Official Gazette of Montenegro*, Nos 3/2016, and 39/2016.

health is one of the priority health care measures that the state provides, which aim to preserve and improve the health of citizens and are available to all citizens. Article 17(10) stipulates health protection of victims of domestic violence, in accordance with the special law, as one of the fields of health care for which funds are allocated from the budget of Montenegro.

The Law on Health Insurance²⁸ was adopted on 28 December 2015 and entered into force on 30 January 2016. This law regulates the conditions and manner of exercising the rights of health care insurance, the rights and obligations of insured persons and other entities, supplementary health insurance, financing and other issues relevant to the implementation of compulsory health insurance. In Article 2, compulsory health insurance is stipulated as a part of the social security system, which provides equal rights for all insured persons, in accordance with the law, on the basis of the principles of compulsoriness, mutuality and solidarity. The same provision introduces additional health insurance that is to be used in accordance with the law. Health insurance covers medical care and treatments for women during pregnancy, childbirth and one year after childbirth in several articles of the law (Articles 16(6), 19(2) and 20). Article 25(1) excludes compulsory health insurance for non-medical abortions. Wage compensation during temporary inability to work due to maintenance of pregnancy (treatment of threatened miscarriage) is reimbursed to the employer, from the first day of granting temporary inability to work, through the fund for health care (Article 38(3)) and amounts to 100 % of the base salary (Article 40). Health care at secondary and tertiary levels is provided in the amount of 80 % of the cost of health services - among other things - to change gender in accordance with the medical indications prescribed by the Ministry of Health (Article 18(9)).

In the reporting period, some strategic documents related to gender equality and the protection against domestic violence were adopted. Among them, the Action Plan for Achieving Gender Equality 2017-2021, the third development document of this kind in the area of gender equality policy in Montenegro, highlights the following areas: 1. promotion of gender equality and women's human rights, 2. gender-sensitive upbringing and education, 3. gender equality in the economy, 4. gender-sensitive healthcare, 5. gender-based violence, 6. gender equality in the media, culture and sports, 7. equality in the decision-making process in the political and public life, and 8. institutional mechanisms for the implementation of gender equality policies. In each area, a strategic goal is defined, as well as the activities, duty bearers, partners, timeframe, indicators, means of verification and the necessary funds for the implementation of the envisaged activities.

In the part on promoting gender equality, for example, the Ministry of Defence adopted the Human Resources Management Strategy of the Ministry of Defence and the Army of Montenegro, defining gender equality policy and certain strategic goals: increased representation of women in the Army, command duties and missions and the continuous implementation of national policies Gender Equality, Resolution 1325 and other applicable and accepted regulations. Through the cooperation of the Ministry of Defence and NGOs, a large number of employees in the Army have been educated about Resolution 1325, gender equality and violence against women.

²⁸ Law on Health Insurance, *Official Gazette of Montenegro*, No. 6/2016.

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes, implicitly. The Constitution of Montenegro²⁹ from 25 October 2007 refers in its preamble to respect for human rights and freedoms, as well as the equality of all citizens. Article 8(1) contains the general anti-discrimination clause prohibiting direct or indirect discrimination on any grounds.

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

Article 18 of the constitution guarantees gender equality, stipulating that 'the State shall guarantee the equality of women and men and develop the policy of equal opportunities.' Also, Article 71 of the constitution guarantees that a marriage can only be concluded with the free consent of a woman and a man, and that marriage is established with equality between the spouses. Implicitly, without mentioning the gender aspect, the constitution guarantees equality before the law regardless of any specific nature or personal feature (Article 17(2)), states that everyone has the right to the equal protection of their rights and freedoms (Article 19), and that the right to vote is equal (Article 45).

The constitution has not been drafted in accordance with gender-sensitive language.

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

No, the above-mentioned articles can only be invoked against the State and not between private parties.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Montenegro has the above-mentioned general anti-discrimination law (LPD) and the specific legislation on gender equality (LGE). There is also the Law on the Prohibition of Discrimination against Persons with Disabilities, which prohibits discrimination based on disability and promotes equality between disabled people and others.³⁰

Article 2(2) of the LPD covers the following discrimination grounds: race, skin colour, national affiliation, social or ethnic origin, links with some minority people or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and/or intersexual characteristics,³¹ health conditions, handicap, age, financial status, marital or family status, belonging to a group or the assumption of such belonging, belonging to a political party or another organisation, as well as other personal characteristics.

²⁹ The Constitution of Montenegro, *Official Gazette of Montenegro*, No. 01/2007.

³⁰ Law on the Prohibition of Discrimination against Persons with Disabilities, *Official Gazette of Montenegro*, No. 44/2015.

³¹ Intersexual characteristics are defined as physical features (which may be chromosomal, hormonal and/or anatomic) which do not correspond to the strict medical definitions of a man or woman and may be present in varying degrees. (See: Article 19, Paragraph 6 of Law on the Prohibition of Discrimination).

3. Implementation of central concepts

3.1 Sex/gender/transgender

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

Article 7 of the LGE contains a definition of both: 'gender' is the socially established roles of a woman and a man in public and private life which were developed on the basis of biologically belonging to a sex; 'sex' presents a biological feature according to which human beings are differentiated into males and females.

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

Article 4(3) of the LGE stipulates the following: 'any act leading to women, because of pregnancy or maternity, as well as another person because of gender reassignment, being put at a disadvantage compared to other persons during employment, self-employment, and the exercise of rights to social care and other benefits amounts to discrimination.'

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Direct sex discrimination is prohibited and defined by the LGE. Article 4(1) prohibits direct and indirect sex discrimination. Article 7(5) defines direct sex discrimination as follows: 'Discrimination on the ground of sex exists if a person or a group of persons of one sex, in the same or similar situation, are put or can be put - by an act, action or omission - in an unequal position in relation to another person or a group of persons of the other sex.'

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

Pregnancy and maternity discrimination are explicitly prohibited as a form of sex discrimination by Article 4(3) of the LGE, as mentioned above. It is not classified under direct sex discrimination, but from the spirit of the law it could be considered as such.

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

There are certain difficulties in applying the concept of direct sex discrimination in Montenegro, given that anti-discriminatory provisions are sometimes vague or unclear, and have not been followed by comprehensive and specific bylaws.

In Montenegro, the normative framework in the field of gender equality has been significantly improved through the compliance with international standards. However, in spite of the establishment of a satisfactory legislative and institutional framework, the position of women in Montenegro is still unsatisfactory, as indicated by the number of cases of gender-based violence, the overall reduced economic power of women, and their under-representation in governing posts, representative bodies and in other areas where law and policies are created and implemented. However, in the reporting period there has been no relevant case law before the Constitutional Court that can be analysed.

During the reporting year, the Protector dealt with 14 cases of direct sex discrimination. In 11 cases, the qualification of the act corresponded to gender-based violence, which, according to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, is regarded as a form of discrimination against

women. As regards the remaining three cases, hate speech based on sex was found in one case and a recommendation containing measures to be taken to eliminate discrimination was issued. In another case, discrimination in exercising the right to equal salary for work of equal value was found and a similar recommendation was issued, while in the third case no discrimination or other violation was found.³²

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Indirect sex discrimination is prohibited and defined by the LGE. The above-mentioned Article 4(1) prohibits direct and indirect sex discrimination. Article 7(6) defines indirect sex discrimination as follows: 'Indirect discrimination on grounds of sex exists if an apparently neutral provision, regulation or general act, criterion or practice puts or may put a person or a group of persons of one sex in an unequal position in relation to another person or a group of persons of the other sex, unless that provision, criterion or practice is objectively and reasonably justified by a legitimate aim, with means that are appropriate and necessary to achieve the objective, i.e. that are reasonable and proportionate in relation to the objective to be achieved.'

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

No, statistical evidence has not been used to establish a presumption of indirect sex discrimination.

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

Unfortunately, relevant case law is still lacking on the issue of the application of the objective justification test. From the interviews carried out with national court representatives as well as representatives of the Judicial Council, it became apparent that no cases were completed in 2017, so that it is not possible to assess the objective justification test.

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

There are difficulties in understanding and applying the concept of indirect sex discrimination due to the lack of reported cases on indirect sex discrimination, the low level of awareness, as well as a lack of relevant and detailed statistical data. Also, the LGE contains no proportionality test requirement, so it is up to the courts how they would apply it.

3.4 Multiple discrimination and intersectional discrimination

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

Article 20(1) of the LPD recognises the following as being an aggravated/more severe form of discrimination: 'discrimination towards the same individual or group of individuals based on more grounds from Article 2 paragraph 2 of the Law (multiple discrimination).'

³² See Ombudsman's Report for 2017, p. 186.

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

No multiple discrimination cases were decided in the reporting period either by the Ombudsman or by the national courts, according to available sources as well as interviews with relevant stakeholders.

Most of the cases before the civil courts concerning gender as a ground of discrimination are connected with mobbing (i.e. workplace bullying),³³ and domestic violence. None of them had finally been decided during the reporting period. In addition, considering the previous jurisprudence and the lack of reliable detailed statistics, it could be concluded that there is still no case law as material for an analysis of either the assessment of multiple discrimination and its recognition, or its influence so that harsher sanctions can be imposed.

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes, positive action is explicitly allowed in the constitution and in several laws.

Article 8 (2,3) of the Constitution of Montenegro recognises positive action as follows:

'Regulations and the introduction of special measures aimed at creating conditions for the exercise of national, gender and overall equality and the protection of persons who are in an unequal position on any grounds shall not be considered as discrimination.

Special measures may only be applied until the achievement of the aims for which they were undertaken.'

Positive action is also recognised as a special measure in the LPD, with Article 5 prescribing that

'Regulations and special measures that are aimed at creating conditions for national, gender and overall equality and the protection of persons in an unequal position on any grounds can be made or implemented and enforced, within their jurisdiction and powers, by state bodies, state administration bodies, local self-government, public enterprises and other legal entities with public authority (hereinafter: organs), as well as other legal entities and individuals.

The measures referred to in paragraph 1 of this Article shall apply in proportion to needs and opportunities and shall last until the objectives of these measures are attained.'

Article 5 of the LGE also recognises positive action as follows:

'General and special measures adopted or undertaken for the elimination or prevention of the unequal treatment of women and men, eliminating the consequences of the unequal treatment of men and women and promoting gender equality are not considered to amount to discrimination.'

Article 9 of the Labour Law stipulates that positive action is positive discrimination:

'Any distinction, exclusion or preference in respect of a particular job shall not be considered discrimination when the nature of the job or conditions in which it is performed

³³ Law on the Prohibition of Harassment at Work, *Official Gazette of Montenegro*, No. 30/2012, entered into force on 17 June 2012. Before the law was adopted, mobbing was contained in the LPD (Article 8), but did not result in any lawsuit in practice. The relevant provision of the LPD was repealed in the amended law.

are such that characteristics related to particular grounds referred to in Articles 5 and 6 of this Law constitute a genuine and determining requirement for a position and that the objective aimed at is legitimate.

Provisions of the law, collective agreement and contract of employment relating to special protection and assistance for specific categories of employees, and in particular those governing the protection of persons with disabilities, women during pregnancy and maternity leave and leave from work for the purpose of childcare, i.e. special childcare, as well as provisions relating to special rights for parents, adoptive parents, guardians or foster parents, shall not be considered as discrimination.'

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

Bearing in mind the small number of women participating in the legislative and executive authorities in Montenegro,³⁴ gender balancing should be strengthened. As an illustration, as of January 2016, 3 ministers out of 17 were women. The new Government, established at the end of 2016, has 4 women ministers out of 18, and the General Secretary. The Prime Minister and 3 Deputy Prime Ministers of the Government are all men.

The proportion of female members of the Parliament of Montenegro was only 23.46 % (although this is an increase compared to the 25th convocation that started in 2012, where there were 15 women, i.e. 18.5 %). Available data shows that only 8 % of women are property owners, while only 9.6 % of women have registered a business. According to the data from the Central Personnel Record on the representation of women in public administration, submitted by the Human Resources Management Authority of Montenegro for the needs of this report, on 31 December 2017, 7 169 men (57.80 %) and 5 234 women (42.20 %) were employed in the state bodies.³⁵ Even though a coordinator for gender equality was appointed in 21 municipalities in Montenegro, only the municipalities of Tivat, Bar, Budva, Berane, Herceg Novi and Pljevlja recognized the importance of gender budgeting and provided special funds for the implementation of local action plans, while at the state level only three ministries feature a developed system for gender-sensitive management of budget funds.³⁶

Bearing in mind that there is no relevant case law so far, as well as the gap between legislation and practice in respect of positive action in terms of realising gender equality there is a need to develop a culture of gender equality and diversity, as well as to improve the human rights culture in traditional Montenegro.

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

There is no explicit act to stimulate an improvement in the gender balance on company boards. However, there are strategic documents that aim to improve women's participation in decision-making processes, such as the Action Plan for Achieving Gender Equality (PAPRR) 2017-2021 with the Implementation Programme for 2017-2018.³⁷ In order to ensure gender equality in the economy, the following objectives are set:

³⁴ Ministry of Human and Minority Rights (2015), 'Information on the Participation of Women in the Legislative, Executive and Judicial Power in Montenegro', Podgorica.

³⁵ Ombudsman's Report for 2017, p. 187.

³⁶ Ombudsman's Report for 2017, p. 187.

³⁷ Ministry of Human and Minority Rights (2015), 'Guidelines for creating a favourable environment for female entrepreneurship', Podgorica.

- increase the employability of women, especially the categories that are difficult to employ (women who have been on the register of unemployed persons for more than five years);
- encourage women's entrepreneurship and self-employment;
- empower local institutions and support women's capacities to enable and encourage entry into entrepreneurship;
- enable a strong reconciliation of work and family responsibilities for women and men;
- ensure the effective implementation of laws and reduce gender-based discrimination on the labour market;
- reduce the pay gap between men and women.

Furthermore, the participation of women on company boards could be included within the concept of equal opportunities, which is promoted in anti-discriminatory legislation in Montenegro. In this regard, the relevant provision is Article 7(3) which reads: 'Equal opportunities means the absence of restrictions on grounds of sex for male and female participation in political, economic, social, cultural and other spheres of life which provides for the exercise of their rights and freedoms.'

There are no official statistical data in Montenegro on the participation of women and men in managerial positions (at different levels of management), positions of executive director and in managing bodies of companies, and nor are there any data on managerial structure depending on the size, sectoral affiliation and ownership structure of the company. In the course of 2017, the Montenegrin Employers Federation published new data in this area obtained through new research conducted with the support of the ILO (2017) following a standardised ILO questionnaire (enabling a comparative analysis of data gathered in the period 2013-2017). The results of the research were published on 21 July 2017 at the conference 'Women in Management in Montenegro - Support to Leadership and Professional Development of Women in Montenegro' held in Podgorica, which was organized by the Montenegrin Employers Federation and ILO, in cooperation with the Ministry of Labour and Social Welfare, the Ministry of Human and Minority Rights, the Directorate for Development of SMEs - the Ministry of Economy and the Association of Business Women of Montenegro. The results of the research were published in the report 'Women in Management in Montenegro' (2017). Some data for Montenegro for 2017 (from the survey of the Montenegrin Employers Federation) shows that women in Montenegro are most strongly present in middle management, where they represent 50.1 %. At the highest level of management (top management) female representation drops to only 36.6 % (against 63.4 % for men), while there are 42.9 % of women in senior management positions and 43.3 % in lower management positions. The comparative analysis of two surveys of Montenegrin Employers Federation, from 2017 and 2013, shows negative trends for female representation. In fact, their participation in top management positions had decreased in 2017 (36.3 %) compared to 2013 (42.4 %). In addition, the results of this research show the apparent dominance of men in relation to women at all levels of company management - except at the level of middle management. Only 26.4 % of enterprises in Montenegro are managed by a female CEO. Women are chairs of steering committees in only 6.1 % of Montenegrin enterprises.³⁸

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

The Law on the Election of Councillors and MPs³⁹ was amended in 2016. The amendments constituted a step further towards affirmation of women's representation in political and parliamentary life. It stipulates that the electoral list has to be composed of at least 30 %

³⁸ <http://poslodavci.org/aktivnosti/projekti/zene-u-menadzmentu-u-crnoj-gori-podrska-liderstvu-i-profesionalnom-razvoju-zena-u-crnoj-gori/>.

³⁹ Law on the Election of Councillors and MPs, *Official Gazette of Montenegro*, No. 46/11,014/14, 047/14, 012/16.

women. The proclamation and verification of candidate lists is determined by the quota of women's representation, where the lists consist of alternating groups of four candidates, one from the under-represented gender. In addition, it has been stipulated that in case of termination of the mandate of Councillors and MPs from the less represented gender, the next candidate on the list of candidates from the underrepresented sex should replace the previous one (Article 41). This encourages the actual participation of women in representative bodies at national and local level.

Article 39a, as amended, reads:

'In order to achieve the principle of gender equality in the electoral list will be at least 30 % of the less represented gender.

On the list every fourth candidate in the order listed (the first four places, four second places and so until the end of the list) must be a candidate of the under-represented sex.

Selection lists that do not meet the requirements of Paragraphs 1 and 2 shall be deemed to be deficient, and the applicant list shall be called to remedy the deficient list, according to the present law.

Regarding electoral lists that do not correct the deficiencies referred to in Paragraph 3 of this Article, the Election Commission will reject the proclamation of the electoral list, in accordance with this Law.'

In reality the situation is totally different, only 23.46 % of women are deputies in the Parliament of Montenegro (although this is an increase compared to the 25th call where there were 15 women, i.e. 18.5 %).⁴⁰

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Harassment is explicitly prohibited by Article 7(1) of the LPD. It constitutes a form of discrimination.

The same approach is taken by the LGE, which also contains a definition of harassment in Article 7(7a) as follows:

'harassment based on gender exists when unwanted conduct against a person or a group of persons of one sex has the purpose of or results in a violation of personal dignity, provoking fear, feelings of humiliation or offence or creating a hostile or humiliating environment for that person or group of persons, in accordance with specific law.'

Harassment at work and in connection with work is prohibited by Article 8 of the Labour Law.

According to the Law on the Prohibition of Harassment at Work, harassment is only dealt with in connection with work, i.e. mobbing.⁴¹ The Labour Law prohibits mobbing in Article 8a.

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

⁴⁰ Ombudsman's Report for 2017, p. 186.

⁴¹ Law on the Prohibition of Harassment at Work, *Official Gazette of Montenegro*, No. 30/2012.

The definition of harassment included in the anti-discrimination laws does not restrict its application only to the spheres of employment and access to goods and services, rather it is a general provision, which *also* covers employment and access to goods and services.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Sexual harassment is explicitly prohibited in the LPD by Article 7(2). It constitutes a form of discrimination.

The LGE stipulates that sexual harassment is also a form of discrimination. Article 7(8) provides a definition as follows:

'Sexual harassment is any unwanted physical, verbal or non-verbal conduct of a sexual nature, which aims at or represents a violation of personal dignity, or when creating a situation of fear or an unpleasant, hostile, humiliating or offensive situation, in accordance with the law.'

Sexual harassment at work and in connection with work is prohibited by Article 8 of the Labour Law.

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

Although the above definition does not cover employment and access to goods and services exclusively, sexual harassment in practice is generally seen in connection with work and access to goods and services.

In accordance with Article 8(3) of the Labour Law, sexual harassment includes any unwanted verbal, non-verbal or physical conduct in relation to the sphere of sexual life (i.e. any unwanted sexual contact, request for sexual service, any verbal or physical action or gesture of sexual nature) intended to undermine, or actually undermining, the dignity of a person seeking employment or an employed person, creating an intimidating, hostile, degrading, embarrassing or offensive environment.

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

National legislation does not specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination.

3.7 Instruction to discriminate

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

An instruction to discriminate is explicitly prohibited in Montenegrin national law. However, the term instruction is not defined as such by Montenegrin anti-discriminatory legislation.

Article 2(5) of the LPD states that giving instructions to discriminate is considered to be discrimination.

Article 4(2) of the LGE stipulates that 'discrimination based on sex is considered to be encouragement/incitement, helping and giving instructions to discriminate as well as announcing the intention thereof to a specific person or group of persons discriminated against on grounds of sex.'

Article 5 of the Labour Law stipulates that 'direct or indirect discrimination of a person seeking employment or of an employed person, on the grounds of gender, birth, language, race, religion, colour of skin, age, pregnancy, health condition, or disability, nationality, marital status, family responsibilities, sexual orientation, political or other belief, social background, financial status, membership in political and trade union organizations or any other personal feature shall be prohibited.'

a) Scope of liability for instructions to discriminate

A person who instructs discrimination to take place is liable, as is the discriminator, under the LPD (civil responsibility) and is criminally liable for the incitement of national, racial and religious hatred and intolerance under the Criminal Code.

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

Although recognised as discrimination in Montenegrin anti-discrimination legislation, an instruction to discriminate has not appeared in proceedings concerning discrimination. There is no relevant case law so far.

3.8 Other forms of discrimination

According to the LPD, the following are included under other forms of discrimination:

- the segregation of persons based on the discriminatory grounds listed in Article 2 (2) of the law; as stipulated in Article 9;
- hate speech, as 'any form of expression of ideas, statements, information and opinions which spread, incite, promote or justify discrimination, hatred or violence against individuals or groups because of their personal characteristics, xenophobia, racial hatred, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed in the form of nationalism, discrimination and hostility against minorities,' as stipulated in Article 9a.

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

4.1 Equal pay

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

The principle of equal pay for equal work or work of equal value is implemented in national legislation.

The Labour Law stipulates in Article 77(2) that employees, both men and women, shall be guaranteed equal earnings for the same work or work of equal value performed with an employer.

The LPD stipulates in Article 16(1) that unequal earnings for the same work or work of equal value for an individual or group of individuals, based on some of the grounds listed in Article 2(2) of the law, must be considered as discrimination.

It can be concluded that the stipulation regarding the principle of equal pay for equal work or work of equal value in Montenegrin legislation is generally in compliance with EU law (Recast Directive 2006/54/EC).

4.1.2 Is the concept of pay defined in national legislation?

According to Article 77(1) of the Labour Law, an employee has the right to adequate pay, which is established by the law, a collective agreement and a labour contract.

The Labour Law contains a definition of gross pay and increased pay in Article 78:

- 'Earnings received by an employee for work performed and the time spent at work, salaries and other benefits established in the collective agreement and labour contract are gross earnings in terms of this law;
- Earnings will be increased in accordance with the collective agreement and labour contract for working overtime hours, for night work, for previous work, for work during national and religious holidays defined by law as non-working days or for other cases stipulated by the collective agreement and labour contract.'

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

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

The national law of Montenegro does not explicitly implement Article 4 of Recast Directive 2006/54 in the provision guaranteeing equal pay for equal work. However, as mentioned, Article 77 of the Labour Law guarantees equal remuneration for the same work or work of equal value performed with an employer. However, Article 6 prohibits direct and indirect discrimination against persons seeking employment, as well as employees.

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

The relevant legislation does not mention a comparator as regards equal pay.

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

According to Article 77(3) of the Labour Law, work of equal value means work that requires the same level of:

- qualifications or educational level or professional qualifications;
- responsibility;
- skills;
- working conditions; and
- performance.

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

Montenegrin law has not so far addressed wage transparency.

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

In Montenegro, the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency has not yet been applied.

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

There is no justification for pay differences based on gender in Montenegrin legislation. The only such justification that could be lawful in accordance with the provisions of the Labour Law is the following: Articles 78 and 79 lay down increased pay (as mentioned and quoted above) for work performed and the time spent at work. According to Article 78(2) pay can be increased for work that is longer than full time, for night work, for previous work, for work during national and religious holidays defined by law as non-working days or for other stipulated cases in accordance with the collective agreement and labour contract.

According to Article 79 (1) of the Labour Law, 'earnings for work performed and time spent at work consist of basic salary, part of the salary for the performance of the work and increased earnings, in accordance with the collective agreement and the employment contract.'

Article 79 (3) reads: 'The performance of the work is determined by the quality and volume of the work performed, as well as the commitment and attitude of the employee towards work obligations, in accordance with the collective agreement.'

In addition, as mentioned above, according to Article 78(2) pay can be increased for work that is longer than full time, for night work, for previous work, for work during national and religious holidays defined by law as non-working days or for other cases stipulated in accordance with the collective agreement and labour contract.

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

Most of the evident difficulties related to the application of the principle of equal pay for equal work and work of equal value in Montenegro are connected with the non-transparent approaches of employers concerning salaries, as well as the factual situation of illegal employment.

In addition, there is a lack of relevant case law.

4.2 Access to work and working conditions

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

In Montenegrin legislation, the personal scope in relation to access to employment, vocational training, working conditions, etc., is partially defined in comparison with the definition from Article 14(1) of the directive. This means that in Montenegrin legislation the personal scope is more limited than in EU law.

Article 16 of the LPD prohibits discrimination in relation to the field of employment, without mentioning access to employment, vocational training, working conditions, etc. Actually, the LPD refers to the relevant provisions of the Labour Law.

Article 5 of the Labour Law prohibits any direct or indirect discrimination against persons seeking employment and employees with respect to sex, origin, language, race, creed, colour, age, pregnancy, health status or disability, nationality, marital status, family obligations, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or some other personal characteristic.

Article 13b of the LGE lays down an obligation in this regard. It states that

'organs are obliged, within the programmes on vocational training and the specialisation of employees or in any other manner prescribed by law or other act, to provide for the education of employees on achieving gender equality and the realisation of rights based on gender equality.'

The Law on the Prohibition of Discrimination against Persons with Disabilities includes discrimination in the field of vocational rehabilitation, labour and employment in a more explicit manner than the LGE Article 22 reads:

'The following shall be considered as discrimination on grounds of disability in the field of vocational rehabilitation, work and employment:

- 1) not hiring persons with disabilities who have the same or better qualifications, professional or working ability than a person without a disability, in compliance with laws regulating the area of operation and the area of vocational rehabilitation and the employment of persons with disabilities;
- 2) limiting the access of persons with disabilities to employment, self-employment or a profession, or membership of an organization of workers or employers;
- 3) prescribing restrictive rules relating to employment and working conditions, including dismissals and earnings for persons with disabilities;
- 4) a failure to implement measures to adapt the workplace and working conditions in accordance with special regulations, in accordance with the laws regulating the area of work and the field of vocational rehabilitation and the employment of persons with disabilities; and
- 5) prescribing different and unfavourable conditions for a person or a group of persons with disabilities to exercise other rights arising from employment, in accordance with the laws regulating the area of work and the field of vocational rehabilitation and the employment of persons with disabilities.'

Although the fact that the LGE as amended provides better protection from discrimination, the details thereof are still to be defined in accordance with Article 14(1) of Directive 2006/54, especially concerning Article 14(1)(d).

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

The material scope in relation to (access to) employment is defined in Montenegrin legislation.

Specifically, Article 7 of the Labour Law provides that discrimination is prohibited in relation to:

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

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

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

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

Article 16(3) of the LPD stipulates that

'different treatment, exclusion or giving preference due to the peculiarities of a particular job for which personal characteristics constitute a genuine and decisive precondition for performing the said job, if the objective to be achieved by this is justified, shall not be considered to constitute discrimination.'

The Labour Law in Article 9(1), entitled 'Positive Discrimination,' stipulates that a

'distinction, exclusion or preference in respect of a particular job when the nature of the work itself or the work is carried out in such conditions that the characteristics associated with any of the grounds referred to in Arts 5⁴² and 6⁴³ of this law are a real and decisive condition for doing the work and that the objective to be achieved by this is justified, shall not be considered to be discrimination.'

Furthermore, Article 9(2) stipulates that

'the provisions of the law, collective agreements and the labour contract relating to special protection and assistance to certain categories of employees, especially those on the protection of persons with disabilities, women during pregnancy and maternity leave and absence from work for childcare, or special childcare, as well as the provisions relating to special rights for parents, adoptive parents, guardians and foster parents, shall not be considered to be discrimination.'

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

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

⁴² The article on the prohibition of discrimination.

⁴³ The article on direct and indirect discrimination.

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

Article 64(4) of the Constitution of Montenegro states that women will enjoy special protection at work. Article 69(2) of the constitution guarantees pregnant women the right to health protection to be paid from public revenues, unless they are covered by another form of insurance.

In addition, Article 73(2) of the constitution stipulates that the state shall ensure conditions that encourage childbirth.

Article 108 of the Labour Law stipulates that an employed woman shall be entitled to special protection during the course of pregnancy and childbirth. In Article 108(1) the Labour Law provides that an employer cannot refuse to conclude an employment contract with a pregnant woman, or terminate her employment contract during her pregnancy or maternity leave.

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

In Montenegro, there are many difficulties in relation to women's access to work, vocational training, employment, working conditions, etc. In practice, especially in the private sector, women are very much discriminated against concerning access to work if they are planning a family and motherhood. According to interviews with NGOs and staff at the Ombudsman Institution, there have been several past and pending cases where women have been refused a particular job, much more so than men, with the explanation that a man is more suitable for that position, or due to their family status, their motherhood, or their age. No improvement was recorded in comparison to the previous reporting period.

Although there are cases of women being dismissed when they become pregnant or immediately after they start or have used their pregnancy leave, no such judicial cases have been reported. Again, such cases are often (almost always) in the private sector and especially in illegal employment. It is obvious that there is a need for education and awareness raising, especially in the context of work in the private sector.

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

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

There is no definition of a pregnant worker in Montenegrin legislation. However, there are provisions on special protection for pregnant woman.

Article 69(2) of the Constitution of Montenegro stipulates that 'a child, a pregnant woman, an elderly person and a person with a disability shall have the right to health protection from public revenues, if they do not exercise this right on some other grounds.'

Article 11(2) of the Labour Law states that an employed woman is entitled to special protection during the course of pregnancy and giving birth. This provision is not consistent with the definition in Article 2 of Directive 92/85, because there is no reference to a pregnant woman having to inform her employer of her pregnancy in order to receive special protection.

On the other hand, Article 117 of the Labour Law contains an obligation for an employee to inform her/his employer in writing, one month in advance, about her/his intention to make use of maternity or parental leave, as well as adoption leave.

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

In Montenegro, the protective measures mentioned in Articles 4-7 of Directive 92/85 are implemented to a certain extent.

The provision in Article 42(3) of the Labour Law could be interpreted as a measure of special protection for pregnant workers, as it states that an employed woman during her pregnancy cannot be assigned to work in another place outside the place of her residence or temporary residence. Along the same lines there is also the special protection stipulated in Article 108, mentioned above (4.2.4).

The Labour Law stipulates that pregnancy is one of the discriminatory grounds (Article 5), as well as that special protection for women during pregnancy and maternal leave from work shall not be considered to amount to discrimination (Article 10(2)).

Article 16(7) of the Law on Health Care stipulates the health care for women in relation to reproductive and sexual health as one of the priority health care measures that the state provides for, which aim to improve and preserve the health of citizens and that are available to all citizens.

Article 109 of the Labour Law provides that, based on the findings and recommendations of a competent medical practitioner, a woman during her pregnancy and while breastfeeding may be temporarily assigned to another job if this is in the interest of her health or the health of her child. In such a case, the woman is entitled to the same salary as before her deployment. If the employer is unable to provide another job for a pregnant or breastfeeding woman, the employee is entitled to leave that particular work with salary compensation in accordance with the collective agreement, which cannot be less than the remuneration the employee would have received at her workplace.

Article 110 of the Labour Law provides protection from having to work longer than full-time hours as well as from night work. In particular, a woman during her pregnancy and a woman who has a child under three years of age may not work longer than the full-time

hours or overnight. Exceptionally, an employed woman who has a child older than two years of age may work at night only if she consents to such work in writing. Also, a parent who has a child with severe disabilities, as well as a single parent who has a child under seven years of age, may work longer than the full-time hours or at night, but only with his/her written consent.

Under Article 111a(1) of the Labour Law an employed woman may start maternity leave 45 days before the date of confinement, and at the latest 28 days before the date of confinement. If an employed woman starts to work before the expiry of the legally prescribed parental leave, she is entitled to, in addition to a regular daily break, and in agreement with the employer, the benefit of an additional 90 minutes of absence from work due to breastfeeding (Article 111a(2)). This 90-minute period is a novelty of the latest amendment to the law, certainly compared to the previous less favourable period of 60 minutes. The provision states that the agreement of the employer is necessary, but it is unclear if that actually means that the right can only be made use of with the consent of the employer. In other words, it could be interpreted to mean the latter or that the right constitutes a duty for the employer to consent thereto. There is still no relevant case law in this respect.

During the reporting year, the Protector dealt with 11 cases based on maternity/pregnancy. Violations of rights were established in four cases and recommendations were given to end the discrimination. One case was completed by referring to other remedies (criminal complaint); one case was completed by referral (i.e. urging state authorities in writing to remove irregularities and making recommendations for their removal); in one case the proceedings were suspended because a similar case (factually and legally speaking) had already been decided in other court proceedings; in one case, no discrimination was found; one case was merged, while in the two last cases the applications were withdrawn.⁴⁴

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

Yes, in Montenegrin law, any dismissal is prohibited from the beginning of the pregnancy until the end of the maternity leave. This is valid for employees with the labour contract for an unlimited period.

Article 108 of the Labour Law provides protection due to pregnancy and childcare. It reads as follows:

- '(1) An employer cannot refuse to conclude an employment contract with a pregnant woman, or terminate her employment contract during her pregnancy or maternity leave.
- (2) An employer may not terminate the employment contract with a parent who works half-time because of caring for a child with severe disabilities, a single parent who has a child under seven years of age or a child with a severe disability, as well as with a person who uses any of the foregoing rights.
- (3) During an absence from work due to a childcare and the use of parental leave, the employer cannot terminate the employment contract of the employee.
- (4) An employed woman whose contract of employment for a specified period of time expires during her use of the right to maternity leave shall have her employment contract extended until the right to maternity leave expires.
- (5) The employee referred to in paragraph 2 of this Article may not be declared to be a person whose services are no longer required due to the introduction of technological, economic or restructuring changes in accordance with this Act.

⁴⁴ Ombudsman of Montenegro (2018), Ombudsman's Report for 2017, Podgorica, p. 186.

(6) The situations described in paragraph 2 of this article will not affect the termination of an employment contract of an employee who has concluded a labour contract for a limited/predetermined period.'

This provision is not as precise as it should be in order to be completely explicit in its interpretation. In practice this is problematic because there is still no explicit prohibition on the dismissal of a pregnant worker. In this context, in Article 108(1) the word 'cannot' should be replaced by 'must not' or 'shall not', because the existing formulation leaves a great deal of latitude for a margin of appreciation by the employer. Also, there is no explicit stipulation concerning exceptional cases that are not connected with a worker's pregnancy and that would be permitted under national legislation, with reference to the competent authority's consent in this regard.

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

According to Montenegrin legislation, the employer is not allowed to dismiss an employee from the beginning of her pregnancy until the end of the maternity leave as described above, except in cases which could fall under the above cited Article 108(6) concerning the termination of an employment contract of an employee who has concluded a labour contract for a limited/predetermined period. Also, there is no reference to the employer's obligation to cite duly substantiated grounds for such a dismissal in writing.

In addition, in Article 2(3) the LGE lays down the prohibition of discrimination which is any act that places women, because of pregnancy or maternity, in a less favourable position compared to other persons concerning employment, self-employment, the exercise of rights to social care and other benefits. Article 33(1) stipulates that a fine ranging from EUR 1 000 to 10 000 shall be imposed on a legal entity if a woman, due to pregnancy or motherhood, has been placed in a less favourable position compared to other persons concerning employment, self-employment, the exercise of rights to social care and other benefits.

5.2 Maternity leave

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

According to Article 111(2) of the Labour Code, parental leave, including maternity leave, can last for up to 365 days from the birth of a child.

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

According to Article 111a(1) of the Labour Law, an employed woman may start maternity leave 45 days before the date of confinement, and at the latest 28 days before the date of confinement.

According to Article 111(6) of the Labour Law, a mother who has recently given birth cannot cancel her maternity leave before the expiry of 45 days from the day of the birth.

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

General protection at work is provided by the Labour Law in Article 102, stipulating that an employee is entitled to protection at work in accordance with the law and a collective agreement, and an employee shall not be assigned to a different workplace or to work for

longer than the full-time hours or at night, if such work could be detrimental to his/her health according to the findings of the bodies which are responsible for assessing health. Employees may also not be assigned to workplaces where there is an increased risk of the emergence of a disability, occupational or other diseases; employees who (in addition to the conditions laid down by the systematisation act) fulfil the necessary conditions for work in terms of health, psychological and physical abilities and age, may be assigned to such a workplace.

There is special protection due to pregnancy and childcare in Article 108, as mentioned and quoted above.

Also, special protection from overtime and night work for a mother of a child younger than three years old is stipulated in Article 110 of the Labour Law (as described above).

Finally, according to Article 43f of the Labour Law, an employer is obliged to implement the regulations on the protection of health, protection at work and special protection for certain categories of employees.

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

Yes, the Labour Law prescribes in Article 111b(1) that during parental and maternity leave, a parent is entitled to the same salary as the salary he/she would have earned if he/she were still working, in conformity with the law and a collective agreement.

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

The pay/allowance during the pregnancy and maternity leave is 100 % of the basic wage, if the mother was employed continuously for at least 12 months by the employer concerned, according to Article 51 of the Law on Social and Child Protection, as explained below.

Concerning the pay/allowance during sick leave the situation differs depending on the type of illness.

Article 40 of the new Law on Health Insurance stipulates that the wage compensation during temporary inability to work is determined at least in the amount of 70 % of the basis for compensation.

This amount of compensation shall be provided by the employer from its own funds and can be established at a higher amount by a collective agreement, in accordance with the law.

The wage compensation during temporary inability to work due to occupational diseases and injuries (except for consequences that occurred as a result of occupational diseases and injuries at work), maintenance of pregnancy (treatment of threatened miscarriage), as well as donating blood, tissues and organs, is provided in the amount of 100 % of the basis for compensation.

The wage compensation during temporary inability to work in the amount of 100 % of the basis for compensation is provided to the insured person due to the basic treatment of severe diseases and conditions, according to the law.

For insured persons with congenital deficiency of the upper or lower limbs, blind and deaf-mute persons, wage compensation during temporary inability to work is provided in the

amount of 100 % of the basis for compensation, regardless of the basis on which temporary inability to work is established.

Article 82(1) of the Labour Law stipulates that an employee has the right to the same salary as that established by a collective agreement and the labour contract during his/her maternity or parental leave and childcare leave.

Article 51 of the Law on Social and Child Protection provides that the amount of maternity/parental pay is equal to the average basic salary paid in the past 12 months prior to the month in which maternity/parental leave was taken, if the employee was employed continuously for at least 12 months by the employer concerned (Article 51(1)), which means 100 % of the basis for salary. The amount paid can be up to a maximum of two average salaries in the country during the previous year, according to the administrative authority in charge of statistics. If an employee has continuously worked for between six and 12 months before the leave, the compensation is calculated at 70 % of the average monthly salary (Article 51(2)). If an employee has worked continuously for between three and six months before the leave, the compensation is calculated at 50 % of the average monthly salary (Article 51(3)). If an employee has worked continuously for up to three months before the leave, the compensation is calculated at 30 % of the average monthly salary (Article 51(4)). The amount paid under Article 51(2), (3) and (4)) can be up to a maximum amount of one average salary in the country during the previous year, according to the administrative authority in charge of statistics.

Thus, pregnancy and maternity pay is higher than that for sick leave in Montenegro.

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

The statutory maternity benefits are supplemented by employers up to the normal remuneration if the employee has worked for at least 12 months continuously, and the amount of the maternity pay is equal to the average salary.

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

In Montenegrin legislation, the conditions for eligibility for benefits are not stipulated.

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

Article 111b(2) of the Labour Law stipulates that an employer is obliged to provide that an employee, after the expiry of her/his maternity or parental leave, can return to her/his same job or to an appropriate workplace with at least the same salary.

According to Article 117(2) of the Labour Law, an employee may stop using the right to maternity or parental leave, and the employer is obliged to allow her/him to return to work, and assign her/him to appropriate tasks, within one month from the date when the employer was informed of the termination of the use of this right by the employee.

Furthermore, according to Article 117(3) of the Labour Law, an employee who has used the right to maternity or parental leave is entitled to additional professional training, if there have been technological, economic or other changes in the working methods of the employer during the employee's absence.

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes, the Labour Law provides for adoption leave in Article 116, which reads:

‘One of the adoptive parents of a child under eight years of age has the right to absence from work in order to take care of a child during one year continuously from the date of the adoption of the child with wage compensation, in accordance with the law.’

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

Montenegrin legislation does not explicitly provide for protection against the dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave. However, this can be challenged through general anti-discrimination provisions.

According to the Labour Law, there are some positive measures with regard to adoptive parents. Namely, the right to work for half of the working hours while a child is under three years of age, if that child needs additional care, is also applicable to adoptive parents (Article 113(2)). Also, the right to work for half of the working hours also applies to the adoptive parent of a child with disabilities (Article 114(1)). Such reduced working hours are considered to be full time in terms of the realisation of labour rights and rights based on labour (Article 114(2)).

5.4 Parental leave

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

Directive 2010/18 has not been explicitly implemented in Montenegro. According to the Government’s plan, it will be implemented in the new draft of the Labour Law to be adopted in 2018.

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

The Labour Law in its Article 111 recognises the right to parental leave as follows:

- ‘(1) Parental leave is the right of a parent to make use of a leave of absence from work due to caring for a child.
- (2) Parental leave may be used for up to 365 days after the birth.
- (3) A parent can start working before the expiry of the period of absence referred to in paragraph 2 of this article, but not before the expiry of 45 days from the date of birth.
- (4) In the case referred to in paragraph 3 of this Article, the parent has no right to continue to use parental leave.
- (5) If a parent interrupts using the parental leave in terms of paragraph 3 of this Article, the other parent is entitled to use the unused part of the parental leave referred to in paragraph 2 of this Article.
- (6) The mother of the child cannot cancel maternity leave before the expiry of 45 days from the date of birth.’

This applies to both the public and the private sector in Montenegro.

Considering the wording of the above provision, especially paragraph 6, it can be assumed that a father making use of parental leave can cancel the maternity leave before the expiry of 45 days from the date of birth, which is interpreted as such in practice. Article 111(3) leads to a certain confusion in this regard, however.

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

The scope of the Labour Law includes all these contracts.

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

According to the above-mentioned legislation, the total duration of parental leave lasts from 45 days after the birth of a baby until the expiry of 365 days from the day of commencing maternity leave in both the public and the private sector.

- 5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

The right to parental leave is recognised as an individual right of parents, but only one parent is entitled to use it for the child. Also, if one parent stops her/his parental leave, the other parent is entitled to use the unused part of the parental leave for up to 365 days.

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

The parental leave can be taken by a parent who works full time in order to care for his/her child. It cannot be taken in a piecemeal fashion.

Article 113 of the Labour Law lays down the possibility of working half time for a parent, an adoptive parent or a person to whom the competent guardianship authority has entrusted the care of a child with special care needs and until the child is three years old.

In addition, Article 114 of the Labour Law stipulates that part-time work is a right for a parent, an adoptive parent or a person to whom the competent guardianship authority has entrusted the care of a child with disabilities, or the person taking care of another person with severe disabilities in accordance with special regulations.

Also, according to Article 114(2) the working time referred to in both of the articles described above will be considered to be full time for exercising rights from work and on the basis of work.

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

The notification period for using the right to parental leave is one month, according to Article 117(1) of the Labour Law. A one-month period is also prescribed for an employer

to provide for an adequate return to work of a parent who is returning from this leave (Article 117(2)). In reality, however, there are problems, especially concerning the latter.

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

Montenegrin legislation recognises parental leave, paternity leave, adoption leave and leave to care for family members. Apart from the fact that adoptive parents are equal to parents when it comes to their rights and obligations, there are no special measures to address the specific needs of adoptive parents.

Bearing in mind that the adoption process is still complicated in Montenegro, as well as in the region as a whole, that social awareness in this regard has to be improved and an adoption culture has to be developed, it is important to address the issue of adoption in a positive manner. Thus, the promotion of adoption is needed. In contrast, the foster family concept has been well advertised in Montenegro through an intensive campaign,⁴⁵ although there are still no specific norms concerning the rights with regard to foster families, apart from a general norm in Article 9 of the Labour Law stipulating 'positive discrimination', which mentions foster parents in the context that special protection and assistance, as well as special rights for parents, adoptive parents and foster parents are not considered to be discrimination. The concept of a foster family is rather new in traditional Montenegro.

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

There is no work and/or length of service requirement in order to benefit from parental leave.

The Law on Social and Child Protection determines the amount of the monthly compensation in Article 51, as described in 5.2.5 below.

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

No, there are no such situations in Montenegrin legislation.

5.4.11 Are there special arrangements for small firms?

No, to date there are no special arrangements for small firms. However, there are requests from employers in this regard, explaining that the legislation has to be amended with regard to establishing special arrangements for small firms that would remove existing business barriers.

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

The Labour Law stipulates that a working parent has the right to work for half of the working hours if the child needs additional care, and this applies until the child reaches three years of age (Article 113(2)).

The parent has the right to work for half of the working hours if he/she has a child with disabilities (Article 114(1)).

⁴⁵ <http://crna.gora.me/tag/hraniteljstvo/>.

Both of the above are considered to be full-time workers in terms of the realisation of labour rights and rights based on labour (Article 114(2)).

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

Article 4(3) of the LGE (mentioned above) in connection with Article 33(1) mean that pregnancy and motherhood must not be a ground for less favourable treatment with respect to employment, self-employment, the realisation of rights from social protection as well as other rights.

In addition, the protection of workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave can be challenged through the general anti-discrimination provisions.

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

Yes, they do according to Montenegrin legislation. Specifically, Article 111b(2) of the Labour Law stipulates that an employer is obliged to provide that an employee, after the expiry of her/his maternity or parental leave, can return to the same job or to an appropriate workplace with at least the same salary.

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

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

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

The employment contract remains in force for the duration of the paternity leave and cannot be terminated (Article 108(3) of the Labour Law).

If an employed woman's fixed-term employment contract expires while she is on maternity leave, the term of employment shall be extended until the expiry of the maternity leave. During the period of parental leave, employees must not be declared redundant due to the introduction of technological, economic or restructuring changes in accordance with this Law (Article 108 (3 and 4) of the Labour Law).

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

Yes, there is general continuity concerning the entitlement to social security cover under the different schemes, in particular healthcare, during the period of parental leave. There is general synergy between the Law on Social and Child Protection, the Law on Health Care, the Labour Law and the Law on Health Insurance, as described above. Following amendments to the Law on Health Care and the Law on Health Insurance in the beginning of 2016, the situation is more harmonised. The Labour Law is also expected to be amended, especially in terms of self-employment, in order to be harmonised with the rest of the legislation concerned.

In addition, in the case of unpaid leave, Article 118 of the Labour Law states:

- '(1) One of the parents has the right to be absent from work until the child reaches the age of three years, and if the parent who has started using this right terminates it before the expiry of the said period, he/she shall not be further entitled to it.
- (2) During the absence from work, in terms of paragraph 1 of this Article, the employee is entitled to health, pension and disability insurance, and other rights and obligations are suspended.
- (3) Funds for healthcare, a pension and disability insurance under paragraph 2 of this Article shall be paid from the funds of the health, pension and disability insurance schemes.
- (4) During the absence from work under paragraph 1 of this Article, the employee is not entitled to the compensation of his/her remuneration/salary.'

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

According to the Labour Law, Article 82(1), in the course of paternity leave, a mother and/or father are entitled to compensation for earnings in order to take care of a child, in conformity with the law. The employer has the right to have the above compensation of earnings refunded (Article 82(2)). Parental leave is paid by the employer, who is refunded from the State budget.

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

Yes, the social security system in Montenegro provides for an allowance during parental leave, both in the public and the private sector.

According to Article 51 of the Law on Social and Child Protection, the amount of the allowance differs as follows:

'The amount of the funds to be refunded to the employer after payment to the employee, who before exercising this right was employed:

- 1) for at least 12 continuous months, the average salary of the employee during the 12 months preceding the month of exercising the right to maternity or parental leave;
- 2) from 6 to 12 continuous months, 70 % of the average salary of the employee during the work preceding the month of exercising the right to maternity or parental leave;
- 3) from 3 to 6 continuous months, 50 % of the average salary of the employee during the work preceding the month of exercising the right to maternity or parental leave;
- 4) up to 3 continuous months, 30 % of the average salary of the employee during the work preceding the exercise of the right to maternity or parental leave.

The amount of the funds referred to in paragraph 1, item 1 of this Article may be up to two average salaries in the country during the previous year, according to the administrative authority responsible for statistics.

The amount of the funds referred to in paragraph 1 points 2), 3) and 4) of this Article may be up to one average employee's salary in the country during the previous year, according to the administrative authority in charge of statistics.'

According to Article 52 of the Law on Social and Child Protection, for a person engaged in an entrepreneurial activity as a sole employee, the wage compensation for maternity or parental leave is paid by the Social Work Centre, and the amount thereof shall be calculated in accordance with Article 51.

The Law also provides compensation on the ground of childbirth, if one of the parents is registered at the Employment Service or is a student (Article 54). Such a parent may be entitled to a monthly fee based on the child's birth until the child reaches the age of one. The amount is EUR 63.50 per month.

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

In Montenegro, the respective legislation provides more favourable provisions in relation to the duration of maternity and paternity leave, unpaid leave in order to take care of a child until that child reaches the age of three, as well as leave to care for a child who needs special additional care and a child with a disability.

Also, special protection is also provided for single parents who have a child under the age of seven.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes, the Labour Law in Article 72 prescribes that an employee will have paid leave from work in the case of childbirth. The duration of the paid leave is regulated by the collective agreement and it is usually five working days. Also, bearing in mind that it is paid leave, this means that the salary is compensated in full during the leave.

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

Not explicitly. However, general anti-discrimination protection in the respective legislation applies with regard to protection against dismissal for workers who take paternity leave and the enjoyment of their rights after the end of paternity leave.

5.6 Time off/care leave

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

According to Article 72 of the Labour Law, an employee has the right to paid leave for urgent family reasons, such as a case of sickness or an accident, as well as a death.

Consequently, an employee is entitled to leave from work with pay (paid leave) in the case of the serious illness of a close family member, and the duration of such paid leave is determined by the collective agreement and the employment contract.

Furthermore, an employee is entitled to paid leave of seven working days for the death of an immediate family member. For the purpose of the interpretation of Article 72, members of the immediate family are considered to be a spouse, children (legitimate, illegitimate, adopted and stepchildren), brothers, sisters, parents, adoptive parents or guardians.

In addition, Article 112 of the Labour Law stipulates protection in the case of a stillbirth: if an employed woman delivers a dead baby or if the child dies before the expiry of the maternity leave, she is entitled to extend the maternity leave for as long as is necessary, according to the findings of a certified medical specialist, to recover from childbirth and the psychological effects of the loss of a child, and this will be at least 45 days, during which time she is entitled to all the rights arising from maternity leave.

5.7 Leave in relation to surrogacy

5.7.1 Is parental leave available in case of surrogacy?

In Montenegrin legislation, surrogacy is still not defined and recognised. Thus, parental leave is not available in the case of surrogacy in Montenegro.

5.8 Leave sharing arrangements

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

In Montenegrin legislation, maternity leave cannot be shared. Also, maternity leave cannot be taken on a part-time basis.

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

In Montenegrin legislation, there is a possibility for one parent to transfer part of the parental leave to the other parent in accordance with Article 111(5), as explained above (5.4.2).

5.9 Flexible working time arrangements

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

Article 113 of the Labour Law provides the possibility for a working parent or working adoptive parent to work on a basis of half-time working hours, due to the need to provide additional care, but only until the child reaches the age of three.

Article 114 of the Labour Law also refers to the right to work reduced (half-time) working hours due to a child's disabilities where that child has to be taken care of by a parent or an adoptive parent. The same applies to a person who takes care of another person with a serious disability.

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

There is no provision that explicitly provides a legal right to adjust working time patterns (temporarily or otherwise) on request.

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

The right to work from home or remotely (temporarily or otherwise) on request depends on an agreement with the employer. Given the situation in practice—based on conversation with relevant stakeholders—it seems that this right really depends on the employer and that women rarely dare to request it. No cases have been recorded in this regard.

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

There are no other legal rights to flexible working arrangements in Montenegrin legislation.

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

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

In Montenegro there are neither occupational pension insurance schemes, nor discrimination on grounds of sex in occupational social security schemes.

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

N/A.

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

N/A.

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

No.

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

No.

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

No.

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

N/A.

7. Statutory schemes of social security (Directive 79/7)

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

Yes, the principle of equal treatment for men and women in matters of social security is implemented in national legislation.

The Law on Social and Child Protection stipulates the prohibition of discriminating against a beneficiary of social protection, with sex as one of the main principles of social protection.

Article 4(1) of the LGE defines gender-based discrimination as any legal or factual, direct and indirect unjustified differentiation or unequal treatment or a failure to deal with it (exclusion, restriction or prioritizing) aimed at hindering, jeopardising, preventing or denying the exercise or enjoyment of human rights and freedoms for a person or a group of persons in the social area, among others. Article 21 stipulates that gender-based equality has to be planned by the Government in relation to labour, social and health protection, in particular.

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

The personal scope of the Montenegrin law on statutory social security schemes is broader. Article 4 of the Law on Social and Child Protection contains a long list of individuals who enjoy special protection under the Law.

Specifically, to achieve the objectives of social and child protection, the law especially protects:

1) a minor:

- without parental care;
- whose parent is unable to care for him/her;
- who is experiencing difficulties in his/her development;
- who is in conflict with the law;
- who misuses alcohol, drugs or other intoxicating substances;
- who is a victim of abuse, neglect, violence and exploitation, or is at risk of becoming such a victim;
- who is a victim of trafficking;
- whose parents do not agree on ways to exercise their parental rights;
- who has found a place of residence without the consent of their parents, adoptive parents or guardians;
- who is pregnant without family support and appropriate living conditions;
- who is a single parent with a child without family support and appropriate living conditions;
- who, due to special circumstances and social risks, requires social protection.

2) an adult or elderly person:

- with disabilities;
- who abuses alcohol, drugs or other intoxicating substances;
- who is a victim of neglect, abuse, exploitation and violence in the family or is at risk of becoming such a victim;
- who is a victim of people trafficking;
- who is homeless;
- who is pregnant without family support and appropriate living conditions;
- who is a single parent with a child without family support and appropriate living conditions;
- who, due to special circumstances and social risk, requires an appropriate form of

social protection.

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

The material scope of Montenegrin law relating to statutory social security schemes is broader than specified in Article 3 (1-2) of Directive 79/9. According to Article 2 of the Law on Social and Child Protection, the scheme provides for an individual or a family with disadvantaged personal and family circumstances, and includes prevention, assistance in the realisation of basic living needs and support.

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

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

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

No, sex is not used as an actuarial factor in statutory social security schemes.

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

Occupational social security schemes have not yet been recognised in Montenegro.

According to the *Screening Report Montenegro, Chapter 19 – Social policy and employment*, further legal adjustments are, however, necessary, e.g. aligning several definitions with those of the LPD and further bringing the legislation into line with the EU *acquis*, notably concerning questions relating to occupational social security schemes (Directive 2006/54/EC) and statutory social security schemes (Directive 79/7/EEC).⁴⁶

⁴⁶ European Union External Action (2014), *Screening Report Montenegro, Chapter 19 – Social policy and employment*, Brussels, p. 13, available at: http://ec.europa.eu/enlargement/pdf/montenegro/screening_reports/screening_report_montenegro_ch19.pdf.

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

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

Directive 2010/41/EU has not been explicitly implemented in the law of Montenegro.

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

Montenegrin legislation does not define self-employment. According to a labour law expert, who is involved in the process of drafting the new Labour Law, self-employment is going to be included.

The LGE mentions self-employment as one of the situations in which a person who is pregnant or a mother, as well as person who changed sex, could be discriminated against (Article 4(3)). Also, a fine can be imposed in the case of such discrimination (Article 33(1)).

The Labour Law and the LPD do not regulate self-employment. Some laws use the word 'entrepreneur' instead of the term 'self-employer' (under the Labour Law in the context of sanctions), without defining it.

The Law on Social and Child Protection mentions an entrepreneur in the context of salary compensation for an employee who is engaged in an entrepreneurial activity when on maternity or parental leave (Article 52) and compensation for salary with half-time working hours in the case of an employee who is engaged in an entrepreneurial activity (Article 56).

The Law on Contributions for Compulsory Social Insurance⁴⁷ defines 'entrepreneurial activity' as a commercial activity performed by an entrepreneur, and the 'entrepreneur' as a natural person who performs economic activities for the purpose of making a profit in accordance with the law (Article 4 (11) and (13)). According to this law, entrepreneurs are compulsory payers of contributions towards pension and disability insurance (Article 5 (12)), and additional contributions towards pension and disability insurance (Article 8 (2)) and health insurance (Article 6 (12)). Furthermore, entrepreneurs are obliged to contribute to insurance against unemployment (Article 7(9)).

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

All self-employed workers are considered to be part of the same category. Montenegrin legislation does not recognise life partners.

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

Article 4 of Directive 2010/41/EU has not been explicitly implemented in the context of self-employment in Montenegro.

⁴⁷ Law on Contributions for Compulsory Social Insurance, *Official Gazette of Montenegro*, Nos 13/07, 79/08, 86/09, 78/10, 40/11, 14/12.

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

Montenegro has taken advantage of the power to take positive action with a view to ensuring full equality in practice between men and women in working life.

Article 4(5) of the LGE stipulates that the right of women to maternity protection, as well as the right to be given special protection at work for biological characteristics must not be considered to be sex discrimination.

Article 5 of the LGE stipulates that general and special measures, adopted or undertaken for the elimination or prevention of the unequal treatment of women and men, for eliminating the consequences of inequality in treatment between women and men and for the promotion of gender equality, must not be considered to be sex discrimination.

In addition, the Government of Montenegro has adopted guidelines for creating a favourable environment for female entrepreneurship in local communities,⁴⁸ as it supports women's entrepreneurship. Apart from the constant need to raise self-awareness and to promote a culture of human rights, the main problems are connected to the difficulty in obtaining funds for entrepreneurship, disadvantageous traditional lending models, the lack of knowledge and skills for entrepreneurship, the traditional way of living in villages with a focus on the husband (in general, property is in husband's name), etc.

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

Montenegro has a single system for social protection in which self-employed workers / entrepreneurs are also covered.

A self-employed woman has a right to maternity leave and parental leave of up to 365 days, as well as the right to leave for nursing a child, and the equal provisions in the Labour Law apply to all employed or self-employed women (Article 111 and 111a of the Labour Law explained above).

During maternity and paternity leave a self-employed person has a right to compensation, as stipulated in the Law on Social and Child Protection in Articles 52 and 56 discussed above (8.2).

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

In Montenegrin law, Article 8 of Directive 2010/41/EU regarding maternity benefits for the self-employed has been implemented.

Just like other employed women, a self-employed woman has a right to maternity leave and parental leave for up to 365 days, and the right to a break (for up to 90 minutes) for nursing a child, as described above (5.1.2).

According to the Law on Social and Child Protection, during maternity and paternity leave a self-employed woman has a right to compensation, which is prescribed in Article 52, as follows:

'A person engaged in entrepreneurial activity as a sole employee, has a right to wage compensation for maternity or parental leave to be paid for by the Centre for Social

⁴⁸ Ministry of Human and Minority Rights (2015), Guidelines for creating a favourable environment for female entrepreneurship in local communities, Government of Montenegro, Podgorica.

Work.

The pay rate referred to in paragraph 1 of this Article shall be determined in accordance with Article 51 of this Law.⁴⁹

The maternity allowance for employed and self-employed women is provided on a mandatory basis.

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

In Montenegro, occupational social security is not recognised and Montenegrin law does not implement the provisions regarding occupational social security for self-employed persons.

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

N/A.

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

Article 14(1)(a) of Recast Directive 2006/54 has not been explicitly implemented in Montenegrin law as regards self-employment.

According to the *Screening Report Montenegro, Chapter 19 – Social policy and employment*, further legal adjustments are, however, necessary, e.g. aligning several definitions with those in the LPD and further bringing the legislation into line with the EU *acquis*, notably concerning questions relating to equal pay and occupational social security schemes (Directive 2006/54/EC), self-employed activities (Directive 2010/41/EU) and statutory social security schemes (Directive 79/7/EEC).⁵⁰

⁴⁹ Article 51 is explained in 5.2.5 above.

⁵⁰ European Union External Action (2014), *Screening Report Montenegro, Chapter 19 – Social policy and employment*, Brussels, p.13, available at: http://ec.europa.eu/enlargement/pdf/montenegro/screening_reports/screening_report_montenegro_ch19.pdf.

9. Goods and services (Directive 2004/113)

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

The LGE does not contain provisions on the prohibition of direct and indirect discrimination on the grounds of sex in access to goods and services.

The LPD regulates discrimination on grounds such as sex in the provision of public and private services and goods. Article 11 reads:

'Discrimination in the provision of public and private goods and services, on the grounds of Article 2, paragraph 2,⁵¹ shall amount to:

- 1) hindering or preventing the provision of goods and services;
- 2) a refusal to provide goods and services;
- 3) making the goods and services conditional upon certain terms which are not required of other persons or groups;
- 4) intentionally delaying or postponing the provision of goods and services, although the person or group of persons has requested and fulfilled the requirements for the timely provision of the goods and services before other persons or groups have done so.'

The Law on the Prohibition of Discrimination against Persons with Disabilities (Article 14) prohibits discrimination in the provision of public and private goods and services, without mentioning sex, which could be considered to be included in this context because of the connection with other anti-discriminatory norms and due to the spirit of the law.

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

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

There was no relevant case law in 2016.

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

In Montenegro, there are no explicit exceptions from the material scope regarding the content of media, advertising and education.

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

In Montenegrin law, differences in treatment in the provision of goods and services are not justified, except in the case of indirect discrimination when the different provision, criterion or practice is justified by a lawful objective and the means of achieving that objective are appropriate/proportionate and necessary (Article 2(4) of the LPD).

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial

⁵¹ Sex is one of the grounds in Article 2.

services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Montenegrin law does not explicitly ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurances and related financial services must not result in differences in individuals' premiums and benefits. However, from the anti-discriminatory legislation, gender discrimination is forbidden in all life spheres. Therefore, it can be concluded that no discrimination occurs in this regard in Montenegro and that the law does not allow for an exception in this regard.

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

In Montenegro, there is no interpretation of this exception.

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

Montenegro has not adopted positive action measures explicitly in relation to access to and the supply of goods and services. However, there is a general provision in the LGE in Article 5, which states that if some general and special measures are adopted or undertaken in order to eliminate and prevent unequal treatment between women and men, to eliminate the consequences of unequal treatment between women and men and to promote gender equality, they shall not be considered to be discrimination.

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

Montenegrin legislation (LGE Article 4(3)) makes a specific reference to pregnancy and maternity in relation to the enjoyment of labour rights, rights from social protection and other rights. There is no explicit mention of the right to access to and the supply of goods and services in relation to gender discrimination. According to available reports and statistics, there are no reported cases of discrimination on the ground of pregnancy, maternity or parenthood.

When it comes to exceptions to discrimination, the previous Law broadly determined that measures of affirmative action, i.e. regulations and special measures aimed at creating the conditions for achieving national, gender and overall equality and aiming at protecting persons who on any ground are in an unequal position, will not be considered discrimination. Such a provision created a lack of clarity in relation to which measures could not be regarded as discriminatory, although the restrictive measures were obviously subject to reasonable and objective justification. Amendments to the Law have now precisely listed the factual and legal circumstances under which distinctions on different grounds will not be considered discrimination. Exceptions include setting conditions (1) for performing certain professional⁵² and religious activities, (2) for establishing the employment relationship,⁵³ (3) for acquiring other work-related rights, (4) for contracting insurance premiums, (5) and in the access to goods and services, etc. These exceptions must be strictly applied and interpreted in proportion to the objective and purpose for which they are determined, when it is stated in the directives of the European Union in order to avoid potential unlawful justifications of discrimination.

⁵² For example, for certain particularly difficult jobs, an age requirement (e.g. over 18) may be set.

⁵³ For example, a male or female person might be explicitly sought for a role in a movie or a theatre performance.

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

10.1 Has your country ratified the Istanbul Convention?

Yes. Montenegro signed the Istanbul Convention on 11 May 2011, ratified it on 22 April 2013 and it entered into force on 1 August 2014.⁵⁴ No reservations or declarations were made.

The pre-existing legal framework in Montenegro was centred on the Law on Protection from Domestic Violence, which came into force in August 2010.⁵⁵ However, there is still no reference to violence against women, but only to domestic violence (violence in the family) in the Criminal Code,⁵⁶ which has relevant provisions in Articles 77a, 77b, 142(31) and 220.

Article 77a of the Criminal Code stipulates that a restraining order will be imposed on the perpetrator of domestic violence, and Article 77b stipulates that the perpetrator of domestic violence will be removed from the apartment or other dwelling.

Article 142(31) of the Criminal Code provides scope within the meaning of a 'family member' so that this expression would also mean former spouses, blood relatives and relatives from full adoption in the direct line without limitation and in the collateral line to the fourth degree, relatives by incomplete adoption, relatives by marriage to the second degree, persons living in the same family household and persons who have a common child or a child about to be born, although they have never lived in the same household.

Article 220 of the Criminal Code contains a definition of domestic violence that covers physical violence and violence against mental integrity, but does not cover psychological, economic or sexual violence, which is not in line with the Istanbul Convention. Furthermore, according to the Criminal Code, the circle of family members is narrower than the standards of the convention, so the code also needs to be amended in that regard.

In July 2017, the Parliament of Montenegro adopted an amendment to the Law on Amendments to the Criminal Code⁵⁷ regarding the alignment of the definition of rape with the Istanbul Convention, which was introduced by the Women's Political Network that combines representatives of 12 majority and opposition parties. The Law, inter alia, in Article 42a provides that the court will consider as an aggravating circumstance the fact that the offence is motivated by grounds of sexual orientation or gender identity, unless it is prescribed as a characteristic of a basic or more serious form of criminal offence. It is also envisaged that the court will consider it as an aggravating circumstance if the offence is committed against a person belonging to a particularly vulnerable category⁵⁸ (including children and pregnant women). In addition, some new types of offences have been envisaged, such as female genital mutilation (Article 151a), for which a sentence of imprisonment of one to eight years is envisaged, and forced sterilization committed through the use of force or threat in order to prevent the reproduction of a person (Article 151b), for which a sentence of imprisonment of three months to five years is envisaged.

⁵⁴ Law on Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, *Official Gazette of Montenegro - International Treaties*, No. 4/2013.

⁵⁵ Law on Protection from Domestic Violence, *Official Gazette of Montenegro*, Nos 46/2010, 40/2011-1.

⁵⁶ Criminal Code, *Official Gazette of Republic of Montenegro*, Nos 70/2003, 13/2004, 47/2006, 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

⁵⁷ Law on Amendments to the Criminal Code ('Official Gazette of Montenegro', No. 44/2017.

⁵⁸ Article 42a, Paragraph 2 of the Criminal Code enumerates the following vulnerable categories: people with disabilities, pregnant women, children, old people, and refugees.

In July 2017, the Law on Misdemeanours⁵⁹ was, among other things, amended in relation to the execution of a court decision before it becomes final.⁶⁰ Article 229, *inter alia*, stipulates that a decision on a misdemeanour may be executed even before it becomes final, if the defendant is punished for a serious offence in the field of domestic violence and there is a reasonable suspicion that he/she will continue to commit a violation or repeat the violation. In addition, the Protocol on the behaviour of institutions in cases of domestic violence was signed on 25 November 2011. Since then, every November, 16 days of activism against violence against women and domestic violence have been organised by the Government of Montenegro, international organisations representations in Montenegro and NGOs in order to make the activities of multidisciplinary teams more visible and to have a greater influence on the public. In addition, a campaign on raising public awareness in Montenegro has been in place since 2007.

The Law on Protection from Domestic Violence makes no reference to violence against women and provides only a general definition of domestic violence (Article 8). The same applies in the Criminal Code.⁶¹ The protocol also does not contain an authentic definition of violence against women, but refers only to the valid legislation, which contains a gender-neutral definition of violence. Bearing in mind that women are much more often the victims of violence than men, this should be made explicit, which would bring the law in line with the convention.

There is a problem with the overlapping of the provisions of the above-mentioned two legal instruments, which results in a problem in practice concerning the qualification of domestic violence. In practice, there is often the dilemma as to whether an act of violence should be prosecuted as a transgression (under the Law on Protection from Domestic Violence) or as a criminal offence (under the Criminal Code). A clarification concerning the legal norms and their harmonisation is needed. Criminal proceedings in relation to violence against women were monitored by the NGO sector in Montenegro, and the results show that there is no uniform practice in the qualification of such acts, and that the decision depends on the level of the violence and the training of the competent police officers and prosecutors.⁶² This situation should be changed in both respects - legislation on clarification and harmonisation should be enacted and the persons in charge of such decisions should be properly trained.

Furthermore, the introduction of the civil liability of civil servants for a breach of the provisions of the Law on Protection from Domestic Violence should be introduced.

In order for the Montenegrin legislation concerned to be in compliance with the convention, a body in charge of coordinating implementation and evaluating policies and measures in accordance with the convention should be established.

Bearing in mind that the above-mentioned aspects form just a part of the explanation and illustration of the need to harmonise current Montenegrin legislation with the Istanbul Convention, it must be emphasised that there must be a systemic approach to amending criminal legislation, as well as family law, free legal aid and by-laws.

Additionally, the awareness of society and the self-awareness of women should be strengthened. Traditional lifestyles and a patriarchal mentality in Montenegro, which are still dominant in rural areas, but are also present in urban areas, do not support an

⁵⁹ The Law on Amendments to the Law on Misdemeanours 'Official Gazette of Montenegro', No. 51/2017.

⁶⁰ This means that the decision of the misdemeanour court may be executed even though an appeal has been filed to that decision.

⁶¹ Criminal Code, *Official Gazette of Republic of Montenegro*, Nos 70/2003, 13/2004, 47/2006 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

⁶² Women's Safe House (Sigurna ženska kuća) (2015), Analysis of the compliance of the legislative and strategic framework of Montenegro with the Council of Europe Convention on the prevention and elimination of violence against women and domestic violence, Podgorica, p. 7.

approach where a man's behaviour towards his wife or daughter can be considered to be violence.

The prominent NGO *Sigurna ženska kuća* (Women's Safe House) reported that in 2017, 450 women had turned to them for help, and 139 people had been accommodated in the shelter, of which 70 women and 69 children.⁶³

The campaign "Sixteen days of activism against violence against women" was organized from 25 November to 10 December 2017 by the Government of Montenegro and the non-governmental sector, with the support of the EU mission in Montenegro, the OSCE Mission to Montenegro and the UN system in Montenegro. In this campaign important roles were played by the NGOs Center for Women's Rights, Women's Safe House, SOS helplines for women and children victims of violence Podgorica, Berane and Ulcinj. Support and funding of the EU Delegation to Montenegro has been very significant.

Throughout Montenegro, various events were organized promoting the fight against domestic violence, awareness raising, etc.⁶⁴

At the beginning of the campaign, a conference marking the International Day for the Elimination of Violence against Women was organized in Podgorica by the OSCE Mission to Montenegro and the Ministry of Human and Minority Rights, where the EU Ambassador in Montenegro took part emphasizing the importance of the gender equality principle in the EU.

In 2017, a survey on domestic violence and violence against women was conducted. The study was carried out within the Programme 'Support to anti-discrimination and gender equality policies', financed by the Delegation of the European Union to Montenegro, and implemented by the United Nations Development Programme (UNDP) in Montenegro in cooperation with the Ministry of Human and Minority Rights. The results of the survey showed that almost two thirds of the citizens (61 %) consider that domestic violence is an important problem, but that it is not among the priorities, and that the gender component plays a significant role in the perception of victims and perpetrators. 79 % of the Montenegrin citizens think that women are the most frequent victims of violence, and 77 % perceive male family members or spouses as the most common violators within the family. The same study confirmed the high tolerance of Montenegrin society for domestic violence: one in four citizens declared that violence was justified, while in only 36 % of cases, other family members would be willing to provide support and protection to the victim of violence.⁶⁵

The Ministry of Human and Minority Rights supported the campaign 'Unwanted', an initiative focused exclusively on the problem of selective abortions of female children, considered a drastic example of gender discrimination, which began in November 2017 and demands full respect for reproductive, legally guaranteed women's rights. The campaign was launched by the NGO 'Center for Women's Rights' in cooperation with the McCann Agency, and it is urging citizens and relevant institutions to react to such a serious problem, change patriarchal attitudes about women and men in Montenegro and sign a petition aimed at preventing the abuse of early prenatal tests for the purpose of selective termination of pregnancy.

⁶³ <http://szk.org.me/>.

⁶⁴ <http://www.delmne.ec.europa.eu/code/navigate.php?Id=3741;>
<http://www.delmne.ec.europa.eu/code/navigate.php?Id=3747;>
<http://www.stopnasilju.me/vijesti/442-16-dana-aktivizma-protiv-nasilja-nad-zenama;>
[http://www.womensrightscenter.org/me/obuka-za-predstavnike-cb-podgorica/;](http://www.womensrightscenter.org/me/obuka-za-predstavnike-cb-podgorica/)
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[http://volimpodgoricu.me/2016/11/25/pocela-kampanja-16-dana-aktivizma-protiv-nasilja-nad-zenama/.](http://volimpodgoricu.me/2016/11/25/pocela-kampanja-16-dana-aktivizma-protiv-nasilja-nad-zenama/)

⁶⁵ Ombudsman's Report for 2017. pp. 191-192.

The Government of Montenegro has adopted the *Strategy for Protection against Domestic Violence 2016-2020*,⁶⁶ with an action plan for the period specified. In addition, better protection from domestic violence was planned and reported in the medium-term report on the implementation of recommendations of the second cycle universal periodic review for 2015, carried out by the Government of Montenegro, the NGO sector and the UN System in Montenegro.⁶⁷

Due to serious problems in regard to domestic violence and violence against women in Montenegro, a free national hotline for victims of domestic violence was established in September 2015 where victims can anonymously, non-stop and free of charge report the violence. The hotline is open 24 hours a day, all week.⁶⁸

Also, the Strategy on Protection from family violence for the period 2016-2020 was adopted by the Government.⁶⁹

In the reporting year, the Protector handled 11 cases of gender-based violence. In comparison with the previous year, where there were four cases, there was an increase in the number of reported cases. Apart from the implication that acts of violence are on the rise, this information may also be an indication of the fact that the victims are more empowered and legally educated to report violence to the competent authorities, including the institution of the Protector, which is an important part of the system. In seven cases a violation of the right was found and recommendations were given to the guardianship authorities, the courts for misdemeanours and the basic courts that dealt with specific cases of gender-based violence, one case was solved through other legal remedies (criminal complaint), two cases were suspended because the damages were removed during the procedure⁷⁰ and one case was resolved in a different way.⁷¹ The Ombudsman also issued a general recommendation to all the institutions responsible for dealing with cases of protection against domestic violence to pay attention to the efficiency principles of protection and preventive action in future.

According to data from the Judicial Council, in 2017, the courts in Montenegro heard 210 cases of the criminal offence of violence in the family or household (stipulated in Article 220 of Criminal Code). Of those, 157 cases have been completed, with 145 convictions. Termination or suspension was recorded in 4 cases, 6 cases ended in acquittal.⁷² Of the convictions there were 140, 1 case the lawsuit was dismissed, and 4 cases ended in acquittal. The misdemeanour courts handled 1790 cases concerning family violence,⁷³ The courts issued 443 fines, 103 prison sentences, 179 suspended sentences, 95 warnings, and 8 educational measures.⁷⁴

Although there was certain progress in addressing the issue of gender and family violence in 2016, there is serious concern about the lack of cooperation among stakeholders which caused the Ombudsman to state that there had been no adequate response from the State during the reporting period.⁷⁵ Although the Protocol on acting, preventing and protection against family violence was signed in November 2011 by the Ministry of Justice, the Supreme Court, the Supreme State Prosecutor, the Ministry of Education and Sport, the Ministry of Health, the Ministry of Labour and Social Care, the Directorate of Police and

⁶⁶ The Government of Montenegro adopted the *Strategy for Protection Against Domestic Violence 2016-2020*, (Ministry of Labour and Social Care), in December 2015.

⁶⁷ <http://gamn.org/upr/files/upr-srednjerocni-izvjestaj.pdf>.

⁶⁸ <http://www.me.undp.org/content/montenegro/sr/home/presscenter/articles/2015/09/08/montenegro-introduces-national-toll-free-anonymous-sos-helpline-for-victims-of-violence-of-family.html>.

⁶⁹ Ombudsman's Report for 2016, p. 170.

⁷⁰ In this particular case, the omissions on the part of the state authority in charge of the protection against domestic violence were corrected.

⁷¹ The application was withdrawn.

⁷² Ombudsman's Report for 2017, p. 6.

⁷³ Ombudsman's Report for 2017, p. 6.

⁷⁴ Ombudsman's Report for 2017, p. 6.

⁷⁵ Ombudsman's Report for 2017, p. 7.

Misdemeanour Council of Montenegro, cooperation in facing the problem of family violence has not been satisfactory. Due to late, inadequate and random reaction by the officers in charge in the institutions mentioned, the three NGOs *Safe Women's House*, *SOS telephone Niksic* and *Center for Woman's Rights* submitted ten criminal charges against public officers who failed to act in accordance with their legal competences and responsibilities.⁷⁶

Finally, NGOs are involved in cooperation with the Ombudsman and relevant public administration bodies in combating such violence. An example of good practice in the representation of victims by an NGO in proceedings before the Ombudsman is the case in which the victim was represented by the NGO, Centre for Women's Rights (*Centar za ženska prava*) from Podgorica

⁷⁶ <http://szk.org.me/wp-content/uploads/2017/03/SZK-izvjestaj-2017-4Prt-.pdf>.

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

11.1 Victimisation

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

The provisions on victimisation have been implemented in Montenegrin legislation. Although the term 'victimisation' is not used either in the LPD or in the LGE, both legal acts contain the relevant provision.

The LPD, Article 4 reads:

'No person may suffer detrimental consequences as a result of reporting cases of discrimination, testifying before the competent authorities or offering evidence in the proceedings in an examined case of discrimination.

Those persons are protected from any detrimental treatment or consequences as a reaction to a complaint or proceedings conducted because of a violation of the principle of non-discrimination.'

The LGE, Article 6 stipulates the following:

'No person may suffer detrimental consequences as a result of filing a complaint of discrimination or providing testimony thereof, alerting the public to discrimination based on sex or providing any other form of support to the proceedings conducted on discrimination on that basis.'

So far, those provisions have not been interpreted in any relevant case law. Unfortunately, there are a certain number of law enforcement officers who are ignorant of the notion of victimisation.⁷⁷

11.2 Burden of proof

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

A shift of the burden of proof in sex discrimination cases is provided in the legislation of Montenegro. Actually, the LGE does not regulate this, but the general anti-discrimination legislation will apply.

In Article 29(1), the LPD lays down a shift of the burden of proof in discrimination cases, as follows:

'If the plaintiff proves in all probability that the defendant has committed an act of discrimination, the burden of proving that no violation of equality rights and equality before the law has taken place, as a result of such an act, shifts to the defendant.'

However, the article mentioned above is only valid in the process before the civil courts and implicitly in the procedure at the Ombudsman's Office, given that it is stipulated in Article 29(2) that 'the provision of paragraph 1 of the Article shall not apply to misdemeanours and criminal proceedings.'

11.3 Remedies and Sanctions

⁷⁷ Research interviews undertaken in the first three months of 2016 by the author of this report.

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

In Montenegro, the applicable sanctions in sex discrimination cases are laid down in the LGE in Articles 33 and 33a.

Article 33 reads:

'A fine to the amount of EUR 1 000 to 10 000 shall be imposed on a legal entity if a woman due to pregnancy or maternity, or a person because of gender reassignment, has been placed in a less favourable position compared to other persons, during employment, self-employment, the exercise of rights to social protection and other rights.

For the offence referred to in paragraph 1 of this Article, the responsible person in the legal entity, state body, state administration and local self-government authority shall be fined to the amount of EUR 150 to 2 000.

For the offence referred to in paragraph 1 of this Article, an entrepreneur shall be fined to the amount of EUR 150 to 3 000.'

Article 33a reads:

'A fine ranging from EUR 500 to 5 000 shall be imposed on a legal entity if:

- 1) in its work it does not use gender-sensitive language, or in laws on employment or a contract of employment, acts on the election or appointment of persons, as well as in acts on the election of academic titles, acts on deployment and other acts deciding on the rights and obligations of employees and other public documents and records, it does not express the titles of all jobs, occupations, titles and functions, in the natural gender (Article 13a);
- 2) it does not provide for training to employees in achieving gender equality (Article 13b);
- 3) statistical data and information collected, recorded and processed are not expressed/aggregated by gender (Article 14 paragraph 1);
- 4) it does not submit to the Ministry, within the prescribed period, a report on achieving gender equality within its jurisdiction (Article 22, paragraph 1, item 4);
- 5) it does not specify the officer who will perform a coordinating activity in gender equality issues, or who participates in the preparation and implementation of the Action Plans (Article 23).

For the offence referred to in paragraph 1 of this Article, the responsible person in the legal entity, state authority, state administration and local government bodies shall be fined to amount of EUR 150 to 1 000 euros.

For the offence referred to in paragraph 1 of this Article, the entrepreneur shall be fined to amount of EUR 150 to 1 500.'

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

In practice, cases of discrimination are not treated as urgently as they should be. However, there has been certain progress in treating such cases, as demonstrated by the Ombudsman's report on non-pending cases and the effectiveness of courts reported by the Judicial Council above. However, the reaction of state bodies or other respondents remains slow, there is massive amounts of bureaucracy and psychological barriers to access to

justice and so on. Sanctions need to be higher in order to meet the purpose, which was suggested to the drafters of the amendments to the LPD. The fines remain inappropriately low compared to the fact that proceedings are long, uncertain and often ineffective.

11.4 Access to courts

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

In Montenegro, access to the courts is safeguarded for alleged victims of sex discrimination. The LGE does not contain any relevant provisions bearing in mind that the provisions of the LPD are valid here as well.

The LPD in Articles 24-30 provides judicial protection against discrimination.

Accordingly, anyone who believes that a violation has taken place in the form of discriminatory treatment by an authority, a company, another legal person, an entrepreneur or a natural person has the right to the protection of the court, in accordance with the law.

The procedure is initiated by means of a complaint. The judicial procedure is civil proceedings, unless the LPD provides otherwise, and the procedure must be urgent. Revision is always permitted in the dispute for protection against discrimination.

In the judicial procedure for protection against discrimination, the territorial jurisdiction, apart from the court with general territorial jurisdiction, belongs to the court on whose territory the claimant resides.

In practice, cases have not been treated as being urgent and the proceedings last for a long time, sometimes resulting in victims being in an even worse position, because their anguish lasts for longer, their position in society is difficult due to the still dominant traditional mentality and victims are often left in the position of having to await any satisfaction. Also, there are problems concerning the small number of the cases that are reported, due to an unwillingness on the part of victims to resort to the courts, the lack of knowledge about the existing legal anti-discrimination framework, traditional stereotypes that consider discriminatory behaviour to be normal and consequently a greater degree of tolerance, a lack of family support in some cases, a lack of understanding in the community, lack of prevention,⁷⁸ etc.

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

Access to the courts is safeguarded in cases of anti-discrimination, but not especially for gender equality interest groups and other legal entities in Montenegrin law. The relevant provisions of the LPD also apply to gender discrimination, due to the lack of such provisions in the LGE.

Only with the consent of the person discriminated against can a civil lawsuit be initiated, on his/her behalf, by an organisation engaged in the protection of human rights (Article 30 of the LPD).

⁷⁸ <http://www.kurir.rs/region/crna-gora/krvavi-pir-u-pljevljima-ubio-bivsu-zenu-i-njenog-muza-pa-pobegao-u-srbiju-clanak-2231767>.

In the opinion of the author, there should be more detailed provisions, in addition to those that are directed specifically towards gender discrimination, in order for access to the courts to be adequately safeguarded for anti-discrimination/gender equality interest groups or other legal entities. The problem is usually linked to the traditional mentality and a lack of awareness concerning the possibility of judicial protection, as well as a lack of confidence in the courts, mainly due to lengthy proceedings. As a result, there is no relevant case law as yet.

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

The Law on Free Legal Aid⁷⁹ applies to alleged victims of gender discrimination as well as to others whose financial situation means that they cannot afford to pay for legal services.

In addition, victims of gender discrimination usually receive free legal aid from NGOs specialising in gender equality protection. Such aid takes the form of information, legal advice and representation. Free legal assistance is given through the Ombudsman, NGOs, and a free SOS telephone line, as mentioned above.

11.5 Equality body

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

In Montenegro, the Protector of Human Rights and Freedoms of Montenegro, (the Institution of the Human Rights and Freedoms of Montenegro Ombudsman)⁸⁰ is in charge of the implementation of Montenegrin anti-discriminatory gender legislation, as well as the requirements of EU gender equality law. There are two main responsibilities with regard to discrimination: to prevent and to protect from discrimination.

The Institution of the Human Rights and Freedoms of Montenegro (the Ombudsman) was established by a law, which was passed by the Assembly of Montenegro on 10 July 2003. The Ombudsman performs their duties on the basis of the constitution and the laws and adheres to the principles of justice and fairness in the course of their work.

The Ombudsman has competence to deal with all grounds of discrimination enshrined in the LPD and LGE. One of four Deputy Ombudsmen is in charge of discrimination cases.

The Ombudsman is an independent, autonomous state body elected by Parliament, which has a wide mandate in the area of the promotion of equality and anti-discrimination in all areas of social life. The institution is entrusted with protecting and promoting human rights and freedoms when these have been violated by means of an enactment, an act or a failure to act on the part of the state authorities, local self-government authorities, public services and other holders of public authority. In addition to this function, the mission of the Ombudsman also includes awareness raising regarding the importance of the rule of law and the consistent protection of human rights and freedoms and, in general terms, bringing about legal certainty, and the lawful and impartial work of the state authorities before which citizens exercise their rights, freedoms, duties and legal interests.

The Ombudsman has a range of measures, out of which the most relevant are receiving and considering claims regarding discrimination, providing an opinion and recommendations in specific cases as a sort of pre-trial arrangement/solution, providing information to a complainant on his/her rights and the potential for initiating a court procedure or other type of protection measure, and filing complaints for protection from discrimination on behalf of, but with the approval of, the victim of discrimination.

⁷⁹ Law on Free Legal Aid, *Official Gazette of Montenegro*, No. 20/2011.

⁸⁰ <http://www.ombudsman.co.me>.

Besides shortcomings in human and financial resources, the Ombudsman reported that its work was made more difficult due to the lack of relevant evidence books on cases and records in respect of discrimination. In law, the Ombudsman has been given the role of monitoring the situation in relation to discrimination cases processed before various enforcement bodies. Although the provision of the Law on Prohibition of Discrimination is clear and imperative, the bylaws and regulations to this act are vague and ambiguous, (as already reported by the Ombudsman in its reports of 2014, 2015 and 2016). The notion of a discriminatory criminal offence or misdemeanour is significantly broader than the list of crimes and offences that include a personal attribute as a discriminatory ground, as previously reported.⁸¹ The Ombudsman again pointed out the lack of an electronic database, and the lack of implementation of the 'Rulebook on the Content and Manner of Keeping Separate Records on Cases of Reported Discrimination', which is supposed to provide for the establishment of special records in the form of an electronic database, enabling the Ombudsman to gain immediate access to data.⁸²

To give some figures: In 2017, the Ombudsman received 14 applications concerning discrimination based on gender and 11 based on maternity. The novelty is also that two applications relating to discrimination based on sexual orientation and gender identity were filed in 2017, two of which were completed by urging the state authorities to remove existing irregularities and by making recommendations for their removal, while the decision in relation to another one was postponed to 2018.⁸³

11.6 Social partners

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

The social partners in Montenegro play an important role in ensuring compliance with and the enforcement of gender equality law. The Department for Gender Equality of the Ministry for Human and Minority Rights of the Government of Montenegro has been very active during the reporting period. It organises seminars and round-table discussions, publishes brochures, and cooperates with governmental bodies, NGOs and international organizations on different matters. The NGO sector is also very active and vocal.

There are no relevant legislative provisions.

11.7 Collective agreements

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

According to Article 4 of the Labour Law, the provisions of all collective agreements cannot be contrary to the law. Relevant acts in this context are the Labour Law specifying the minimum rights of employees and the General Collective Agreement,⁸⁴ which is not designed to implement gender equality law. In addition, special collective agreements could be used to provide more extensive rights for employees, but not to provide fewer rights than are in the Labour Law.

⁸¹ Ombudsman's Report for 2015, p. 133.

⁸² Ombudsman's Report for 2016, Podgorica, pp. 152 and 153.

⁸³ Ombudsman of Montenegro (2018), Ombudsman's Report for 2017, Podgorica, p. 172. Available at: http://www.ombudsman.co.me/docs/1522665383_final-izvjestaj-za-2017.pdf.

⁸⁴ General Collective Agreement 2014, *Official Gazette of Montenegro*, No. 04/2014.

12. Overall assessment

In 2017, the anti-discrimination legislative framework of Montenegro is very much in accordance with the EU gender equality *acquis*. However, there are still aspects that need to be fully harmonized with the *acquis* and improved.

Positive measures are defined very extensively in many laws, as explained above. Some legislative solutions are more favourable for female workers, such as the duration of maternity and paternity leave and leave for childcare and caring for a child with a disability. On the other hand, the living standard and salaries are low, so fewer and fewer women use the full legal duration of their maternity leave. Also, it is not possible to use the maternity leave in a piecemeal fashion or part time.

Although Montenegro has demonstrated a degree of success in harmonising its law with the EU standards, there are still some gaps in the existing legislation. For example, there are no relevant provisions on some important areas, such as self-employment, occupational social security, etc. Also, surrogacy is still not defined or allowed in Montenegro.

The aforementioned documents, together with the Law on Gender Equality, supported the significant improvement of the normative framework in the field of gender equality, as well as its harmonization with international standards. However, in spite of the establishment of an acceptable legislative and institutional framework, the position of women in Montenegro is still unsatisfactory, as indicated by the number of cases of gender-based violence, the overall economic power of women, and their under-representation in governing posts, representative bodies and other areas where policies are created and implemented.

On the other hand, there is a gap between the legislative framework and the implementation of the existing legislation. Bearing in mind the modest number of cases reported to the Ombudsman concerning gender equality rights, as well as the fact that no single case on multiple discrimination or indirect discrimination has been reported or ruled on so far, it is to be concluded that there is a lot to be done to bring actual progress in gender equality in Montenegro. Furthermore, only cases of gender violence and, rarely, mobbing are subject to court rulings, most of them in connection with misdemeanours. Given that the institution of the shifting of the burden of proof has not been adequately and equally conducted in civil proceedings, as well as the fact that the notion of victimisation is still new, even for law enforcement officers, it can be concluded that gender equality awareness must be improved and a culture of human rights be established, in order to comprehensively combat sex discrimination and gender stereotypes.

In addition, the implementation of existing legislation must be strengthened in practice and the necessary amendments must be made to existing laws in order to meet a higher level of gender equality protection, as well as raising assertiveness and awareness.

In the reporting year, concluding observations on the Second Periodic Report of Montenegro were made on the implementation of the UN Convention on the Elimination of Discrimination against Women (2012-2017). These concluding observations were adopted by the monitoring body, the Committee for the Elimination of Discrimination against Women, and were published on 21 July 2017. The Committee emphasizes the key role of the legislative power in securing the full application of the Convention and invites the Parliament of Montenegro, in accordance with its mandate, to 'take the necessary steps in relation to the implementation of these final observations'. Also, it is recommended to improve educational training for judges, prosecutors, lawyers, as well as the Protector of Human Rights and Freedoms of Montenegro, on the subject of the Convention, in order to

'directly apply or invoke its provisions in judicial or administrative proceedings and to interpret domestic law in compliance with it'.⁸⁵

Given the current situation with regard to gender equality in Montenegro, it would be advisable for the institutional framework to be strengthened (if not in the sense of establishing a specialised commissioner for gender equality issues, then at least by providing for more staff and training with regard to the existing institution of the Ombudsman). It is important in the future to introduce additional measures aimed at ensuring and promoting gender equality in certain areas of social life, where the unequal representation of women and men is a burden and an obstacle to realising equality. In addition, it is necessary to improve the promotion of gender-sensitive politics and to educate both genders in relevant matters. Finally, in order to develop a culture of human rights and gender equality in Montenegro, it would be necessary to educate the youth. The Ministry for Human and Minority Rights pays attention to this target group, organising events aimed at them and in their premises, such as schools and educational centres. In addition, bearing in mind that schools and universities have no relevant courses to cover the issue of gender equality, the role of the NGO sector is more important. In Montenegro, the sector is doing a very good job in promoting gender equality and providing assistance and protection to women in need, such as the NGOs *Women's Safe House* and the *Women's Rights Centre*, as previously reported.

⁸⁵ http://www.ombudsman.co.me/docs/1522665383_final-izvjestaj-za-2017.pdf, p. 162.

Annexes

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