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Non-discrimination

Montenegro

2018

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EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Montenegro

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Reporting period 1 January 2017 – 31 December 2017

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Luxembourg: Publications Office of the European Union, 2018

PDF ISBN 978-92-79-85265-7

doi:10.2838/77059

DS-02-18-591-3A-N

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EXECUTIVE SUMMARY

1. Introduction

Montenegro is one of the successor states of the former Socialist Federal Republic of Yugoslavia. It remained as a joint state with Serbia after Yugoslavia's violent break-up, but in 2006 the country regained independence and is now a moderately prepared candidate country for membership of the European Union and NATO membership.

The country is also undergoing an intensive process of urbanisation and migration from the poorer north to the central and southern regions.¹

According to the World Bank classification, Montenegro is an upper-middle-income economy. The 2011 census showed Montenegro as having a population of 620 029. Data from this census also showed that the main ethnic groups were Montenegrins, with 45% of the total population, followed by Serbs (29%), Bosniaks (9%), Albanians (5%), Muslims² (3%), Croats (0.97%) and Roma (1.01%). The main religions are Orthodox Christianity (Serbian and Montenegrin Orthodox Churches), Islam and Roman Catholicism. The average age in Montenegro is 37.7, although the process of demographic ageing is very rapid.³ Statistical information on people with disabilities is largely unavailable. However, according to estimates by the World Health Organisation, at least 10% of the Montenegrin population has some form of disability.⁴ The Constitution establishes Montenegrin as the official language, while Serbian, Bosniak, Albanian and Croatian are 'in official use'. No official data are available on sexual orientation.

Montenegro is frequently acknowledged as a multi-faith and multi-ethnic society. The Government's official position is that the affirmation of fundamental European values, including those of equality and non-discrimination, is the best way to realise individual and state interests and join the European Union. Nevertheless, discrimination is present and certain groups suffer from discrimination and social exclusion. There has been a process to harmonise Montenegrin anti-discrimination legislation in accordance with EU legislation, including both directives, but the implementation of anti-discrimination policy is still weak and remains a matter of concern, especially with regard to Roma people, people with disabilities and LGBT people.

There are only a few examples of case law in relation to discrimination which have been processed by the courts.

2. Main legislation

Montenegro is a democracy, defined in its Constitution as a 'civil, democratic, ecological state with social justice, based on the rule of law'. The Constitution also establishes a separation of legislative, executive and judicial powers. Montenegro is a civil law country with the Constitution as its supreme legal act. The law must be in conformity with the

¹ Montenegrin Academy of Arts and Science, *Crna Gora u XXI vijeku – u eri kompetitivnosti* [Montenegro in the 21st century - in the age of competitiveness], Working Document (available in Montenegrin), www.gov.me/files/1269953473.pdf, accessed 11 November 2015.

² 'Muslim' was one of the ethnic groups included in the Classification of National and Ethnic Belonging, used for the 2011 census. At the same time, 'Islam' was listed as one of the religions the respondents were able to say they practised.

³ Monstat, *Projekcije stanovništva Crne Gore do 2060. godine sa strukturnom analizom stanovništva Crne Gore* [Population projections of Montenegro by 2060 with a structural analysis of the population of Montenegro], p. 55 and 56. www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20%20mart.pdf, accessed 11 November 2015.

⁴ Government of Montenegro, Strategy for the Integration of Persons with Disabilities in Montenegro 2008-2016. www.mrs.gov.me/biblioteka/strategije, accessed 13 November 2015.

Constitution and ratified international agreements,⁵ and other regulations must be in conformity with the Constitution and the law (Article 145 of the Constitution).

Montenegro has ratified all the major international human rights treaties, including the European Convention on Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. It has also ratified the main Council of Europe minority rights instruments, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities and anti-discrimination conventions of the International Labour Organization, including the Discrimination (Employment and Occupation) Convention and the Equal Remuneration Convention. Montenegro has ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

Anti-discrimination legislation in Montenegro includes the constitutional framework and several laws.

- The Constitution contains a general prohibition of both direct and indirect discrimination 'on any grounds'.⁶ It explicitly guarantees protection to people with disabilities (Article 63) and equality between men and women (Article 18).
- The Law on the Prohibition of Discrimination prohibits discrimination on the grounds explicitly listed in Article 2,⁷ which include race, skin colour, national affiliation, social or ethnic origin, association with a minority people or minority national community, language, religion or belief, political or other opinion, sex, gender identity, sexual orientation, health, disability, age, property and membership of a group or assumed membership of a group.
- Article 5 of the Labour Law⁸ provides for the prohibition of discrimination against people seeking employment and employees, based on sex, birth, language, race, religion, skin colour, age, pregnancy, health or disability, ethnicity, marital status, family duties, sexual orientation, political or other affiliation, social background, material status, membership of political and trade union organisations or other personal characteristics.
- Article 39 of the Law on Minority Rights and Freedoms⁹ prohibits any direct or indirect discrimination on any basis, including on the basis of race, colour, sex, national origin, social origin, birth or similar status, religion, political or other beliefs, property status, culture, language, age, mental or physical disability.
- The Law on Professional Rehabilitation and Employment of Persons with Disabilities prohibits direct and indirect discrimination against people with disabilities in relation to vocational rehabilitation, admission to employment and employment.¹⁰
- The Criminal Code¹¹ provides for the criminal offence of violating the equality of citizens and explicitly lists as prohibited grounds national affiliation or affiliation to an ethnic group, race or religion or absence of such an affiliation, political or other opinion, sex, language, education, social status, social origin and property, while

⁵ International treaties are directly applicable in Montenegro and need not be incorporated by an act of Parliament, thus theoretically offering effective protection against discrimination in domestic law, although the courts seldom invoke international law as a basis for their decisions.

⁶ Constitution of Montenegro (*Ustav Crne Gore*) *Official Gazette of Montenegro*, no. 1/07. Article 8.

⁷ Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, nos. 46/10 and 18/2014.

⁸ Montenegro, Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, nos. 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012 and 31/2014.

⁹ Montenegro, Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), *Official Gazette of Montenegro*, nos. 31/06, 51/06 and 38/07, 02/11 and 08/11.

¹⁰ Montenegro, Law on Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), *Official Gazette of Montenegro*, nos. 49/08, 73/10, and 39/11, Article 5.

¹¹ Montenegro, Criminal Code (*Krivični zakonik*), *Official Gazette of Montenegro*, nos. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

allowing that 'other personal status' can be regarded as a prohibited ground (Article 159).

3. Main principles and definitions

The definition and prohibition of discrimination are contained in the Constitution and the Law on the Prohibition of Discrimination. Discrimination through harassment, instruction to discriminate and victimisation are defined and outlawed, but not discrimination by association. The duty to provide reasonable accommodation is not explicitly defined in the law. The Constitution guarantees special protection for people with disabilities (Article 68) but does not explicitly provide for the duty to provide reasonable accommodation. Nevertheless, Montenegro is also a state party to the United Nations Convention on the Rights of Persons with Disabilities, which establishes denial of reasonable accommodation as a form of discrimination and imposes a duty to provide reasonable accommodation. In line with Article 9 of the Constitution, the provisions of this Convention form an integral part of the national legal order, have supremacy over national legislation and are directly applicable if they provide differently from national legislation.

Prohibition of multiple discrimination is included in the Law on the Prohibition of Discrimination (Article 20, para. 1), which states that, 'A grave form of discrimination, on any ground referred to in Article 2, paragraph 2, of this Law shall be deemed to be discrimination 1) committed against the same person or group of persons on multiple grounds referred to in Article 2, paragraph 2, of this Law (multiple discrimination)' [...]. In Montenegro there is no case-law dealing with multiple discrimination.

The Law on the Prohibition of Discrimination was amended in July 2017¹² with regard to the definition of discrimination in different areas. Amendments define more clearly certain provisions pertaining to particular forms and areas of discrimination. New penal provisions have been established, since the current legal solutions did not cover all forms and areas of discrimination and did not produce the expected results.

4. Material scope

The material scope of the prohibition of discrimination regulated by the Law on the Prohibition of Discrimination is in line with the wider material scope of the Racial Equality Directive. In addition to employment and vocational training, it applies to the following areas: social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing. National legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive. Under the Constitution, everyone has the right to health protection and children, elderly people and people with disabilities, together with pregnant women, have the right to health protection from public revenues, if they do not exercise this right on any other grounds.

5. Enforcing the law

Discrimination can be dealt with in and out of court by the Protector of Human Rights and Freedoms. Anybody who claims that their human rights or freedoms have been violated by means of act of decision making, action or failure to act on the part of state authorities, local authorities, public services or other holders of public authority (i.e. healthcare facilities, schools, higher education institutions, public enterprises, etc.) may address their concerns to the Protector of Human Rights and Freedoms. When the Protector of Human Rights and Freedoms finds that a violation has occurred, he or she issues an opinion and makes a recommendation to the body concerned, specifying what needs to be done in

¹² Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, nos. 46/2010, 18/2014 and 42/17.

order to correct the violation. The Protector also sets a deadline for compliance with this recommendation. The body is then under a duty to provide the Protector of Human Rights and Freedoms with a report detailing the measures taken with a view to implementing the recommendations. If the body fails to comply with the recommendation from the Protector of Human Rights and Freedoms, the Protector can either refer the matter to an immediately superior authority or address the Parliament of Montenegro or the public. The Protector of Human Rights and Freedoms cannot issue binding decisions or award compensation for human rights violations.

The Law on the Prohibition of Discrimination provides for the right to bring an action before the court to seek: a) the establishment of the fact that the respondent has acted discriminatorily towards the claimant; b) prohibition of executing the action that carries a potential threat of discrimination, i.e. prohibition of a repetition of the discriminatory action; c) compensation for damages; and d) in cases where discrimination is perpetrated through the media, publication in the media of the judgment establishing discrimination, at the cost of the respondent (Article 23).

The burden of proof is regulated by Article 29 of the Law on the Prohibition of Discrimination: when the claimant submits evidence, which demonstrates the likelihood that the respondent committed an act of discrimination, it is for the respondent to prove that there was no breach of equal rights and equality before the law. This rule does not apply to petty offences (which are dealt with by ministries and special petty offence authorities) and criminal proceedings. It does, however, apply to administrative proceedings (conducted by state and administrative authorities), administrative dispute proceedings (conducted before the Administrative Court in relation to the lawfulness of administrative and other acts) and to civil proceedings. Generally speaking, all the enforcement mechanisms for protection against discrimination are very rarely used in practice. Victims are reluctant to pursue the enforcement of their equal rights and their level of confidence in their chances of obtaining redress remains low.

6. Equality bodies

The Protector of Human Rights and Freedoms is an independent institution which was set up on the basis of the Law on the Protector of Human Rights and Freedoms in 2003. Its position was further enhanced with the 2007 enactment of the new Montenegrin Constitution, the first to mention this institution and task it with taking measures for the protection of human rights and freedoms. Under Article 27, para. 1, the law establishes the Protector as an institutional mechanism for protection against discrimination.

Through the amendment of this law¹³ in 2014 it should be noted that the concept of discrimination was corrected and additional forms of discrimination, such as sexual discrimination and hate speech, as well as racial discrimination have been established by law.¹⁴ The law also provides the Protector of Human Rights and Freedoms with powers consistent with the requirements of Directive 2000/43/EC.

The actions taken by the inspection authorities in charge of implementing the decisions concerning protection against discrimination remain a matter of concern, as they have limited capacity and their actions tend to be weak. In 2011 the Government of Montenegro adopted a Decision on establishing a Council on the Prohibition of Discrimination as a national body for promoting non-discrimination and coordinating anti-discrimination activities at national level. The Council has been suspended in the meanwhile. The Protector of Human Rights and Freedoms acts independently as a national mechanism for individual protection against discrimination, while the Council on the Prohibition of Discrimination was

¹³ Montenegro, Law on the Protector of Human Rights and Freedoms (*Zakon o Zastitniku ljudskih prava i sloboda*), *Official Gazette*, no.18/14.

¹⁴ Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, nos. 46/10 and 18/2014, Article 17.

a governmental, advisory body with the role of promoting and conducting anti-discrimination activities at national level.

7. Key issues

1. In general, research and data are extremely limited, which makes it very difficult to ascertain the forms in which discrimination on the grounds of ethnic origin, religion and belief, age, disability and sexual orientation takes place, as well as the number of incidents of discrimination. In addition, with regard to all these grounds, numbers and general trends are difficult to determine, case-law is virtually non-existent and there is only one judgment from the ECHR.¹⁵
2. Various reports indicate that the Roma remain the most vulnerable and marginalised minority in Montenegro.¹⁶ Widespread illiteracy among this group and low levels of education are the main drivers in their social exclusion and marginalisation. In addition, discrimination against members of this community is present in employment, healthcare and social welfare.¹⁷
3. Cases of discrimination and intolerance on the grounds of religion and belief have been reported, but they are rare.
4. Discrimination on the ground of age is also prevalent. Anecdotal evidence suggests that discrimination on the ground of age occurs most frequently in employment.
5. The situation regarding discrimination on the ground of disability indicates that concerted efforts aimed at promoting equal treatment of people with disabilities are needed in almost all areas of life, including healthcare, social welfare, education, vocational training and employment and accessibility.¹⁸
6. It is noted that there has been a shift in the authorities' approach towards the human rights of LGBT people. In 2013 Montenegro adopted a Strategy for Improving the Quality of Life of LGBT People 2013-2018, with an accompanying action plan. Under the 2013 Strategy, the government committed itself to continuing to promote anti-discrimination policy and legislation and to creating an environment where the rights of LGBT people would be effectively protected. However, working group has started to prepare new Strategy 2018-2022 that should be adopted until the end of this year. In order to improve the implementation of the strategy at the local level, the Ministry for Human and Minority Rights initiated the preparation of memoranda of understanding with local authorities, aimed at improving the quality of life of LGBT people at local level. The situation in relation to sexual orientation suggests that LGBT people are the most invisible group in society and face strong prejudices.¹⁹ NGOs engaged in anti-discrimination work agree that LGBT people experience discrimination frequently with regard to their rights to privacy, freedom of assembly and expression, as well as in the field of employment.²⁰

¹⁵ Alković vs. Montenegro, 66895/10, December 2017.

¹⁶ Commissioner for Human Rights, Nils Muižnieks, Report on his visit to Montenegro, 12-20 March 2014, para. 69.

¹⁷ Concluding Observations of the Committee on the Elimination of Racial Discrimination, Montenegro (CERD/C/MNE/CO/1), paras. 16 and 17.

¹⁸ As evidenced by the Strategy for the Integration of Persons with Disabilities in Montenegro 2008-2016. The full text of the Strategy (in Montenegrin) is available at: www.mrs.gov.me/biblioteka/strategije, accessed 13 November 2015.

¹⁹ Conclusions of the National Conference, 'Montenegro – A Brighter Spot on the LGBT Map', available at <http://web.archive-me.com/page/939913/2012-12-12/http://www.montenegro-gay.me/component/content/article/26-crna-gora-svijetla-tacka-na-gej-mapi/301-zakljucci-nacionalne-konferencije-crna-gora-svijetlija-tacka-na-lgbt-mapi.html>, accessed 11 November 2015.

²⁰ A local NGO, Juventas, which has been implementing projects concerning LGBT rights, recently signed a memorandum of understanding with the Employment Agency of Montenegro aimed at promoting the rights of LGBT people in the area of employment.

7. There is a lack of case-law on discrimination and there is no database bringing together information about the fields, grounds and types of discrimination in practice.
8. The Law on the Prohibition of Discrimination of Persons with Disabilities recently adopted is a matter of concern because this law has not been harmonised with around 30 national laws and regulations.
9. Ensuring equal access to the rights of migrants: it can be concluded that it is necessary to continue with the improvement of regulations that stimulate the integration of migrants into Montenegrin society, the prevention of discrimination, intolerance and the overall social marginalisation of certain migration groups, all in line with best practice and EU standards. This also implies a more significant involvement of local self-government in the implementation of measures and activities in the area of the integration of migrants into local communities. Migrant integration is very important in achieving social and political stability and to maximise the contributions they can make to social communities, as well as in reducing cases of racism and xenophobia.
10. National regulations are not in line with relevant international standards and the EU acquis in the field of migration. Legal regulations concerning migration are still insufficient and incomplete. In this regard, this primarily concerns the Law on Foreigners, which should be fully aligned with the EU directives.
11. Training of employees who are involved in the process of integrated migration management must be provided on an ongoing basis. Timely information, adequate material and technical equipment for competent bodies, as well as adequate training of employees, are very important for migration management and have a significant impact on combating illegal migration.

RÉSUMÉ

1. Introduction

Le Monténégro est l'un des États issus de l'ex-République fédérative socialiste de Yougoslavie. Il a formé, au moment de l'éclatement violent de celle-ci, un État commun avec la Serbie; mais il a retrouvé son indépendance en 2006 et le pays est actuellement un candidat relativement préparé à une adhésion à l'Union européenne et à l'OTAN.

Le Monténégro connaît par ailleurs un processus intensif d'urbanisation et de migration au départ de sa partie septentrionale, plus pauvre, vers la partie centrale et méridionale de son territoire.²¹

Le Monténégro est, selon le classement de la Banque mondiale, une économie à revenu intermédiaire supérieur. Le recensement de 2011 fait état d'une population totale de 620 029 habitants principalement formée des groupes ethniques suivants: les Monténégrins (45 %), suivis des Serbes (29 %), des Bosniaques (9 %), des Albanais (5 %), des Musulmans²² (3 %), des Croates (0,97 %) et des Roms (1,01 %). Les religions principales sont le christianisme orthodoxe (Églises orthodoxes serbe et monténégrine), l'islam et le catholicisme romain. L'âge moyen s'établit à 37,7 ans, mais le pays connaît un processus de vieillissement particulièrement rapide.²³ Très peu de données statistiques sont disponibles en ce qui concerne les personnes handicapées, mais il ressort des estimations de l'Organisation mondiale de la santé que 10 % au moins de la population monténégrine souffre d'une forme ou d'une autre d'invalidité.²⁴ La Constitution instaure le monténégrin en tant que langue officielle – le serbe, le bosniaque, l'albanais et le croate ayant le statut de langue d'usage officiel. Il n'existe aucune donnée officielle concernant l'orientation sexuelle.

Le Monténégro est fréquemment considéré comme une société multiconfessionnelle et multiethnique. Le gouvernement a pour position officielle que l'affirmation des valeurs européennes fondamentales, en ce compris l'égalité et la non-discrimination, est le meilleur moyen de réaliser les intérêts individuels et nationaux, et d'adhérer à l'Union européenne. Il n'en reste pas moins qu'une discrimination existe et que certains groupes sont victimes de ce phénomène et d'une exclusion sociale. Un processus a été amorcé pour harmoniser la législation antidiscrimination du Monténégro avec la législation européenne, y compris les deux directives, mais la mise en œuvre de la politique dans ce domaine reste embryonnaire et préoccupante, en particulier pour ce qui concerne les Roms, les personnes handicapées et les personnes LGBT.

On ne compte que quelques cas de jurisprudence en matière de discrimination suite à des affaires traitées par des tribunaux.

²¹ Académie monténégrine des sciences et des arts, *Crna Gora u XXI vijeku – u eri kompetitivnosti* [Le Monténégro au 21^e siècle – à l'âge de la compétitivité], document de travail disponible (en monténégrin) sur www.gov.me/files/1269953473.pdf, consulté le 11 novembre 2015.

²² «Musulman» désignait l'un des groupes ethniques inclus dans la Classification de l'appartenance nationale et ethnique utilisée pour le recensement de 2011. Parallèlement, l'islam figurait parmi les religions que les répondants pouvaient déclarer pratiquer.

²³ Monstat, *Projekcije stanovništva Crne Gore do 2060. godine sa strukturnom analizom stanovništva Crne Gore* [Projections démographiques du Monténégro à l'horizon 2060 avec une analyse structurelle de la population monténégrine], p. 55 et 56. www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20-%20mart.pdf, consulté le 11 novembre 2015.

²⁴ Gouvernement du Monténégro, *Strategy for the Integration of Persons with Disabilities in Montenegro 2008-2016*, www.mrs.gov.me/biblioteka/strategije, consulté le 13 novembre 2015.

2. Législation principale

Le Monténégro est une démocratie que sa Constitution définit comme un État civil, démocratique et écologique fondé sur la justice sociale et l'état de droit. La Constitution institue également une séparation entre pouvoir législatif, pouvoir exécutif et pouvoir judiciaire. Le Monténégro est un pays de droit civil dont la Constitution est l'instrument juridique suprême. La législation doit être conforme à la Constitution et aux traités et accords internationaux ratifiés,²⁵ et les autres réglementations doivent être conformes à la Constitution et à la loi (article 145 de la Constitution).

Le Monténégro a ratifié l'ensemble des grands traités internationaux en matière de droits de l'homme: la Convention européenne des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention sur l'élimination de toute les formes de discrimination raciale et la Convention relative aux droits de l'enfant. Il a également ratifié les principaux instruments du Conseil de l'Europe concernant les droits des minorités, la Charte européenne des langues régionales ou minoritaires et la Convention-cadre pour la protection des minorités nationales, ainsi que les conventions de l'Organisation internationale du travail sur les discriminations, parmi lesquelles la convention concernant la discrimination en matière d'emploi et de profession et la convention sur l'égalité de rémunération. Le Monténégro a ratifié la Convention relative aux droits des personnes handicapées et son protocole facultatif.

La législation antidiscrimination monténégrine comprend le cadre constitutionnel et plusieurs lois:

- la Constitution contient une interdiction générale de discrimination, directe et indirecte, «pour quelque motif que ce soit».²⁶ Elle garantit expressément une protection aux personnes handicapées (article 63) et l'égalité entre les hommes et les femmes (article 18);
- la loi sur l'interdiction de la discrimination proscriit la discrimination fondée sur les motifs expressément énoncés à l'article 2,²⁷ qui comprennent la race, la couleur de peau, l'appartenance nationale, l'origine sociale ou ethnique, l'association à un peuple minoritaire ou une communauté nationale minoritaire, la langue, la religion ou les convictions, les opinions politiques ou autres, le sexe, l'identité de genre, l'orientation sexuelle, la santé, un handicap, l'âge, la fortune, l'appartenance à un groupe ou l'appartenance supposée à un groupe;
- l'article 5 de la loi sur le travail²⁸ prévoit l'interdiction de discrimination à l'égard des demandeurs d'emploi et des salariés, fondée sur le sexe, la naissance, la langue, la race, la religion, la couleur de peau, l'âge, la grossesse, la santé ou le handicap, l'origine ethnique, l'état matrimonial, les obligations familiales, l'orientation sexuelle, l'appartenance politique ou autre, l'origine sociale, la situation matérielle, l'affiliation à des organisations politiques et syndicales, ou toute autre caractéristique personnelle;
- l'article 39 de la loi sur les droits et les libertés des minorités²⁹ interdit toute discrimination directe ou indirecte, quel qu'en soit le fondement, y compris la race,

²⁵ Les traités internationaux sont directement applicables au Monténégro sans devoir être incorporés par une loi du Parlement: ils offrent donc théoriquement en droit interne une réelle protection contre les discriminations, même si les juridictions invoquent rarement le droit international comme fondement de leurs décisions.

²⁶ Constitution du Monténégro (*Ustav Crne Gore*), *Journal officiel du Monténégro* n° 1/07, article 8.

²⁷ Monténégro, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel du Monténégro* n° 46/10 et 18/2014.

²⁸ Monténégro, loi sur le travail (*Zakon o radu*), *Journal officiel du Monténégro* n° 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012 et 31/2014.

²⁹ Monténégro, loi sur les droits et les libertés des minorités (*Zakon o manjinskim pravima i slobodama*), *Journal officiel du Monténégro* n° 31/06, 51/06 et 38/07, 02/11 et 08/11.

- la couleur de peau, le sexe, l'origine nationale, l'origine sociale, la naissance ou statut analogue, la religion, les convictions politiques ou autres, la situation de fortune, la culture, la langue, l'âge, un handicap mental ou physique;
- la loi sur la réadaptation professionnelle et l'emploi des personnes handicapées interdit la discrimination directe et indirecte envers les personnes handicapées pour ce qui concerne la formation professionnelle, l'admission à l'emploi et l'emploi;³⁰
- le code pénal³¹ définit l'infraction que constitue le non-respect de l'égalité des citoyens et énumère explicitement en tant que motifs interdits l'appartenance nationale ou l'appartenance à un groupe ethnique, à une race ou à une religion, ou l'absence d'une telle appartenance, les convictions politiques ou autres, le sexe, la langue, l'éducation, la situation sociale, l'origine sociale et la fortune, tout en permettant de considérer «toute autre situation personnelle» comme un motif interdit (article 159).

3. Principes généraux et définitions

La définition et l'interdiction de la discrimination figurent dans la Constitution et dans la loi sur l'interdiction de la discrimination. Les discriminations pratiquées via un harcèlement, une injonction de discriminer et des rétorsions sont définies et proscrites, mais pas la discrimination par association. L'obligation de fournir un aménagement raisonnable n'est pas expressément stipulée dans la loi. La Constitution garantit pour sa part une protection spéciale aux personnes handicapées (article 68) sans prévoir explicitement d'obligation d'aménagement raisonnable. Le Monténégro est cependant un État partie à la Convention des Nations unies relative aux droits des personnes handicapées, qui fait du refus d'aménagement raisonnable une forme de discrimination et qui impose le devoir de prévoir cet aménagement. En vertu de l'article 9 de la Constitution, les dispositions de cette Convention font partie intégrante de l'ordre juridique interne, prévalent sur la législation nationale et sont directement applicables si elles divergent des dispositions législatives nationales.

L'interdiction de discrimination multiple est incluse dans la loi sur l'interdiction de la discrimination qui dispose en son article 20, paragraphe premier, que sera considérée comme une forme grave de discrimination 1) une discrimination commise à l'encontre de la même personne ou d'un même groupe de personnes sur la base de motifs multiples visés à l'article 2, paragraphe 2, de la présente loi (discrimination multiple) [...]. Il n'existe au Monténégro aucune jurisprudence concernant la discrimination multiple.

La loi sur l'interdiction de la discrimination a été modifiée en juillet 2017³² pour ce qui concerne la définition de la discrimination dans différents domaines. Les amendements précisent certaines dispositions relatives à des formes et des sphères particulières de discrimination. De nouvelles dispositions pénales ont été instaurées du fait que les solutions juridiques en vigueur ne couvraient pas toutes les formes et tous les domaines de discrimination, et ne produisaient pas les résultats escomptés.

4. Champ d'application matériel

Le champ d'application matériel de l'interdiction de discrimination régie par la loi sur l'interdiction de la discrimination est conforme au champ d'application matériel plus large de la directive sur l'égalité raciale. Il englobe, outre l'emploi et la formation professionnelle, les domaines suivants: la protection sociale, y compris la sécurité sociale et les soins de

³⁰ Monténégro, loi sur la réadaptation professionnelle et l'emploi des personnes handicapées (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), *Journal officiel du Monténégro* n° 49/08, 73/10 et 39/11, article 5.

³¹ Monténégro, code pénal (*Krivični zakonik*), *Journal officiel du Monténégro* n° 40/2008, 25/2010, 32/2011, 40/2013 et 56/2013.

³² Monténégro, loi sur l'interdiction de discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel du Monténégro* n° 46/2010, 18/2014 et 42/17.

santé; les avantages sociaux; l'éducation; et l'accès et la fourniture de biens et de services mis à la disposition du public, y compris le logement. La législation nationale couvre la protection sociale, en ce compris la sécurité sociale et les soins de santé comme le prévoit la directive sur l'égalité raciale. La Constitution dispose pour sa part que chacun a le droit de bénéficier d'une protection sociale et que les enfants, les personnes âgées et les personnes handicapées, de même que les femmes enceintes, ont le droit de bénéficier d'une protection de la santé financée par des recettes publiques pour autant qu'ils n'exercent pas ce droit au titre d'un autre motif.

5. Mise en application de la loi

Les cas de discrimination peuvent faire l'objet d'un règlement judiciaire et extrajudiciaire par le Défenseur des droits de l'homme et des libertés. Toute personne estimant que ses droits fondamentaux ou libertés fondamentales ont été lésés par une prise de décision, une action ou une inaction de la part d'une autorité de l'État, d'une autorité locale, d'un service public ou de tout autre titulaire d'une autorité publique (établissements de soins, écoles, établissements de l'enseignement supérieur, entreprises publiques, etc.) peut en faire part au Défenseur des droits de l'homme et des libertés. Lorsque celui-ci ou celle-ci constate qu'une infraction a été commise, il ou elle émet un avis et formule une recommandation à l'instance en cause en précisant ce qu'il convient de faire pour y remédier. Le Défenseur fixe également un délai pour la mise en conformité avec sa recommandation. L'instance concernée a l'obligation de fournir au Défenseur des droits de l'homme et des libertés un rapport précisant les mesures prises pour se conformer à la recommandation. Si elle ne se conforme pas à la recommandation émise par le Défenseur des droits de l'homme et des libertés, celui-ci ou celle-ci peut porter l'affaire devant une autorité immédiatement supérieure ou la faire connaître au Parlement du Monténégro ou au grand public. Le Défenseur des droits de l'homme et des libertés ne peut ni rendre de décisions contraignantes ni accorder d'indemnisation pour non-respect des droits fondamentaux.

La loi sur l'interdiction de la discrimination prévoit le droit de saisir un tribunal pour réclamer: a) l'établissement du fait que la partie défenderesse a agi de façon discriminatoire envers la partie plaignante; b) l'interdiction de l'action comportant une menace potentielle de discrimination, à savoir l'interdiction d'une répétition de l'acte discriminatoire; c) l'indemnisation du préjudice; et d) au cas où la discrimination est commise via les médias, la publication dans les médias, aux frais de la partie défenderesse, du jugement établissant la discrimination (article 23).

La charge de la preuve est régie par l'article 29 de la loi sur l'interdiction de la discrimination: lorsque la partie plaignante fournit un élément probant démontrant la probabilité d'un acte de discrimination commis par la partie défenderesse, il incombe à cette dernière de prouver l'absence de non-respect de l'égalité des droits et de l'égalité devant la loi. Cette règle ne s'applique pas aux infractions mineures (lesquelles sont traitées par des ministères et des instances spécialisées) ni aux procédures pénales. Elle s'applique néanmoins aux procédures administratives (menées par des organes de l'État et des autorités administratives), aux contentieux administratifs (portés devant le tribunal administratif en rapport avec la légalité d'actes administratifs et autres) et aux procédures civiles. Les différents mécanismes de mise en application de la protection contre la discrimination sont, de façon générale, très peu utilisés dans la pratique. Les victimes se montrent réticentes à faire valoir le respect de leurs droits à l'égalité, et leur degré de confiance quant à leur chance d'obtenir réparation reste faible.

6. Organismes de promotion de l'égalité de traitement

Le Défenseur des droits de l'homme et des libertés est une institution indépendante créée en 2003 sur la base de la loi sur le Défenseur des droits de l'homme et des libertés. Sa position a été renforcée par l'adoption de la nouvelle Constitution du Monténégro en 2007,

la première à mentionner cette institution en la chargeant de prendre des mesures pour protéger les droits de l'homme et les libertés. La loi institue, en son article 27, paragraphe 1, le Défenseur en tant que mécanisme de protection contre la discrimination. Un amendement apporté en 2014 à la dite loi³³ a rectifié le concept de discrimination et consacré en droit des formes supplémentaires de discrimination telles que la discrimination sexuelle et le discours de haine, ainsi que la discrimination raciale.³⁴ Cette loi dote également le Défenseur des droits de l'homme et des libertés de compétences répondant aux exigences de la directive 2000/43/CE.

Les mesures prises par les autorités de contrôle en charge de la mise en œuvre des décisions relevant de la protection contre la discrimination continuent de susciter certaines préoccupations en raison des capacités limitées des autorités en question et de la nature assez faible des mesures adoptées. Le gouvernement du Monténégro a adopté en 2011 une décision visant à instaurer un Conseil pour l'interdiction de la discrimination en tant qu'organisme national chargé de promouvoir la non-discrimination et de coordonner à l'échelon national les activités de lutte contre la discrimination – lequel Conseil a été suspendu entre-temps. Le Défenseur des droits de l'homme et des libertés agit de façon indépendante en tant que mécanisme national pour la protection individuelle contre la discrimination, tandis que le Conseil pour l'interdiction de la discrimination était un organisme consultatif gouvernemental chargé de promouvoir et de diriger les activités antidiscrimination au niveau national.

7. Points essentiels

12. Les recherches et les données étant, de façon générale, extrêmement limitées, il s'avère très difficile de déterminer sous quelles formes se manifeste la discrimination fondée sur l'origine ethnique, la religion et les convictions, l'âge, un handicap et l'orientation sexuelle, ainsi que le nombre d'incidents de discrimination. Il s'avère difficile en outre d'établir des chiffres et des tendances générales en ce qui concerne ces différents motifs car la jurisprudence nationale est quasiment inexistante; un seul arrêt a été rendu par la CouEDH.³⁵
2. Divers rapports signalent que les Roms demeurent la minorité la plus vulnérable et la plus marginalisée au Monténégro.³⁶ L'analphabétisme est largement répandu parmi la communauté rom et le faible niveau d'instruction est l'une des causes principales d'exclusion sociale et de marginalisation. La discrimination envers les membres de cette communauté se manifeste dans les domaines de l'éducation, de l'emploi, des soins de santé et de la protection sociale.³⁷
3. Des cas de discrimination et d'intolérance fondées sur la religion et les convictions ont été signalés, mais ils sont rares.
4. La discrimination fondée sur l'âge est également très répandue, et il ressort de témoignages anecdotiques qu'elle se produit surtout dans le domaine de l'emploi.
5. La situation en matière de discrimination fondée sur le handicap montre que des efforts concertés s'imposent pour promouvoir l'égalité de traitement des personnes

³³ Monténégro, loi sur le Défenseur des droits de l'homme et des libertés (*Zakon o Zastitniku ljudskih prava i sloboda*) *Journal officiel du Monténégro* n° 18/14.

³⁴ Monténégro, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel du Monténégro* n° 46/10 et 18/2014, article 17.

³⁵ Alković c. Monténégro, requête 66895/10, décembre 2017.

³⁶ Commissaire aux droits de l'homme, Nils Muižnieks, Rapport de sa visite au Monténégro du 12 au 20 mars 2014, point 69.

³⁷ Observations finales du Comité pour l'élimination de la discrimination raciale, Monténégro (CERD/C/MNE/CO/1), points 16 et 17.

- handicapées dans tous les domaines de vie, y compris les soins de santé, la protection sociale, l'éducation, la formation professionnelle et l'emploi, et l'accessibilité.³⁸
6. On observe une réorientation de l'approche des autorités à l'égard des droits fondamentaux des personnes LGBT. Le Monténégro a adopté en 2013 une stratégie 2013-2018 en faveur de l'amélioration de la qualité de vie des personnes LGBT assortie d'un plan d'action. Le gouvernement s'est engagé au titre de cette stratégie à continuer de promouvoir une politique et une législation antidiscrimination et à créer un environnement dans lequel les droits des personnes LGBT seraient effectivement protégés. Un groupe de travail a néanmoins commencé d'élaborer une nouvelle stratégie 2018-2022 dont l'adoption est attendue avant la fin de cette année. Afin d'améliorer la mise en œuvre de la stratégie à l'échelon local, le ministère des Droits de l'homme et des minorités a entamé la préparation de protocoles d'accord avec les autorités locales visant à améliorer la qualité de vie des personnes LGBT à cet échelon. La situation en matière d'orientation sexuelle conduit à conclure que les personnes LGBT forment le groupe le plus invisible au sein de la société monténégrine et qu'elles se heurtent à de puissants préjugés.³⁹ Les ONG actives dans la lutte contre la discrimination conviennent que les personnes LGBT subissent fréquemment une discrimination en termes de droit à la vie privée, de liberté de rassemblement et d'expression, ainsi qu'en matière d'emploi.⁴⁰
 7. La jurisprudence relative à la discrimination est peu abondante et il n'existe aucune base de données regroupant des informations concernant les domaines, les motifs et les types de discrimination pratiquée.
 8. La loi relative à l'interdiction de discrimination à l'égard des personnes handicapées, récemment adoptée, suscite certaines préoccupations dans la mesure où elle n'a pas été harmonisée avec une trentaine d'actes législatifs et réglementaires nationaux.
 9. Garantir une égalité d'accès aux droits pour les migrants: il s'impose manifestement d'améliorer encore les réglementations afin qu'elles favorisent l'intégration des migrants dans la société monténégrine et qu'elles veillent à prévenir la discrimination, l'intolérance et la marginalisation sociale générale de certains groupes de migrants – le tout dans le droit fil des meilleures pratiques et des normes de l'UE. Cette démarche implique également d'associer plus étroitement les administrations autonomes locales à la mise en œuvre des mesures et actions en matière d'intégration des migrants dans les communautés locales. Cette intégration s'avère très importante pour parvenir à une stabilité sociale et politique, et pour optimiser la contribution potentielle des migrants aux communautés sociales tout en réduisant le nombre de cas de racisme et de xénophobie.
 10. Les réglementations nationales ne sont conformes ni aux normes internationales pertinentes ni à l'acquis de l'UE dans le domaine des migrations. Les réglementations légales en matière de migrations demeurent insuffisantes et incomplètes. Ce constat vise en premier lieu la loi sur les étrangers, qui devrait être entièrement alignée sur les directives européennes.
 11. Une formation permanente des effectifs participant au processus de gestion intégrée des migrations doit être assurée. Une information à jour, un matériel approprié et

³⁸ Comme en témoigne la stratégie d'intégration des personnes handicapées au Monténégro pour la période 2008-2016. Le texte intégral de la stratégie est disponible (en monténégrin) sur: www.mrs.gov.me/biblioteka/strategije, consulté le 13 novembre 2015.

³⁹ Conclusions de la conférence nationale «Monténégro – A Brighter Spot on the LGBT Map», disponible sur <http://web.archive-me.com/page/939913/2012-12-12/http://www.montenegro-gay.me/component/content/article/26-crna-gora-svijetla-tacka-na-gej-mapi/301-zakljucci-nacionalne-konferencije-crna-gora-svijetlija-tacka-na-lgbt-mapi.htm>, consulté le 11 novembre 2015.

⁴⁰ Une ONG locale, Juventas, qui a mis en œuvre des projets en faveur des droits des personnes LGBT, a récemment signé un protocole d'accord avec l'Agence pour l'emploi du Monténégro en vue de promouvoir les droits de ces personnes dans le domaine de l'emploi.

des équipements techniques destinés aux organismes compétents, de même qu'une formation adéquate du personnel, sont autant d'éléments qui revêtent une importance majeure pour la gestion des migrations et qui contribuent de manière significative à la lutte contre l'immigration clandestine.

ZUSAMMENFASSUNG

1. Einleitung

Montenegro ist einer der Nachfolgestaaten der ehemaligen sozialistischen föderativen Republik Jugoslawien. Nach dem gewaltsamen Zerfall Jugoslawiens blieb Montenegro zunächst ein Teil Serbiens; 2006 erlangte es jedoch seine Unabhängigkeit zurück und ist inzwischen ein mäßig vorbereitetes Kandidatenland für den Beitritt zur Europäischen Union und zur NATO.

Das Land erlebt derzeit eine Phase intensiver Urbanisierung und Migration vom armen Norden in die mittleren und südlichen Regionen des Landes.⁴¹

Gemäß der Klassifizierung der Weltbank ist Montenegro ein Land mit gehobenen mittleren Einkommen. Die Volkszählung von 2011 hat in Montenegro eine Bevölkerungszahl von 620 029 ergeben. Außerdem zeigen die Daten der Volkszählung, dass die wichtigsten ethnischen Gruppen des Landes die Montenegriner (45 % der Gesamtbevölkerung) sind, gefolgt von den Serben (29 %), Bosniern (9 %), Albanern (5 %), Muslimen⁴² (3 %), Kroaten (0,97 %) und Roma (1,01 %). Die wichtigsten Religionen sind das orthodoxe Christentum (serbisch-orthodoxe und montenegrinisch-orthodoxe Kirche), Islam und Katholizismus. Das Durchschnittsalter der Bevölkerung liegt bei 37,7 Jahren, es findet jedoch ein rasanter demographischer Alterungsprozess statt.⁴³ Statistische Daten über Menschen mit Behinderung liegen kaum vor. Nach einer Schätzung der Weltgesundheitsorganisation haben jedoch mindestens 10 % der montenegrinischen Bevölkerung eine Behinderung.⁴⁴ Die Verfassung erklärt Montenegrinisch zur Amtssprache des Landes, wobei Serbisch, Bosnisch, Albanisch und Kroatisch jedoch auch offiziellen Status haben. Offizielle Daten zu sexueller Orientierung sind nicht verfügbar.

Montenegro wird regelmäßig als multireligiöse und multiethnische Gesellschaft anerkannt. Nach der offiziellen Position der Regierung ist die Durchsetzung der europäischen Grundwerte, wie Gleichstellung und Nichtdiskriminierung, im besten Interesse der einzelnen Bürger und des Staates und der beste Weg zum Beitritt in die Europäische Union. Dennoch kommt Diskriminierung vor, wobei einzelne Gruppen besonders unter Diskriminierung und sozialer Ausgrenzung leiden. Es hat einen Prozess zur Harmonisierung der Antidiskriminierungsvorschriften Montenegros mit den EU-Vorschriften, einschließlich beider Richtlinien, gegeben, aber die Umsetzung der Antidiskriminierungspolitik ist nach wie vor schwach und gibt immer noch Anlass zu Besorgnis, vor allem im Hinblick auf Roma, Menschen mit Behinderungen und LGBT-Menschen.

Es gibt nur sehr wenig Fallrecht, also Verfahren, in denen vor Gericht gegen Diskriminierung geklagt wurde.

⁴¹ Montenegrinische Akademie der Künste und Wissenschaften, *Crna Gora u XXI vijeku – u eri kompetitivnosti* (Montenegro im 21. Jahrhundert – im Zeitalter des Wettbewerbs), Arbeitsdokument, abrufbar (in montenegrinischer Sprache) unter: www.gov.me/files/1269953473.pdf (letzter Zugriff am 11. November 2015).

⁴² „Muslim“ war eine der ethnischen Gruppen in der Kategorie nationale und ethnische Zugehörigkeit, die in der Volkszählung von 2011 vorgegeben waren. Gleichzeitig war „Islam“ als eine der Religionen aufgeführt, deren Ausübung die Befragten angeben konnten.

⁴³ Monstat, *Projekcije stanovništva Crne Gore do 2060. godine sa strukturnom analizom stanovništva Crne Gore* (Bevölkerungsentwicklung in Montenegro bis 2060, mit einer strukturellen Analyse der montenegrinischen Bevölkerung), S. 55 und 56; www.monstat.org/userfiles/file/publikacije/Demografiska%20analiza%20-%20za%20sajt%2028%20-%20mart.pdf (letzter Zugriff am 11. November 2015).

⁴⁴ Regierung von Montenegro, Strategie zur Eingliederung von Menschen mit Behinderungen in Montenegro 2008-2016; www.mrs.gov.me/biblioteka/strategije (letzter Zugriff am 13. November 2015).

2. Wichtigste Rechtsvorschriften

Montenegro ist eine Demokratie und gemäß der Verfassung ein „ziviler, demokratischer, ökologischer Staat mit sozialer Gerechtigkeit, der auf dem Prinzip der Rechtsstaatlichkeit beruht“. Die Verfassung verankert außerdem die Trennung von Gesetzgebung, Verwaltung und Rechtsprechung. Montenegro ist ein Rechtsstaat und die Verfassung ist sein höchstes Rechtsdokument. Alle Gesetze müssen mit der Verfassung und den ratifizierten internationalen Abkommen⁴⁵ übereinstimmen, und alle untergeordneten Rechtsvorschriften mit der Verfassung und den Gesetzen (Art. 145 der Verfassung).

Montenegro hat alle wichtigen internationalen Menschenrechtsabkommen ratifiziert, dazu gehören die Europäische Menschenrechtskonvention, der Pakt über bürgerliche und politische Rechte und der Pakt über wirtschaftliche, soziale und kulturelle Rechte, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung und das Übereinkommen über die Rechte des Kindes. Außerdem hat es die wichtigsten Minderheitenrechtsinstrumente des Europarats ratifiziert, die Europäische Charta der Regional- und Minderheitensprachen und das Rahmenübereinkommen zum Schutz nationaler Minderheiten sowie die Antidiskriminierungsübereinkommen der Internationalen Arbeitsorganisation, einschließlich des Übereinkommens über die Diskriminierung in Beschäftigung und Beruf und des Übereinkommens über die Gleichheit des Entgelts. Montenegro hat das Übereinkommen über die Rechte von Menschen mit Behinderungen und dessen Fakultativprotokoll ratifiziert.

Zum montenegrinischen Antidiskriminierungsrecht gehören die Verfassungsordnung und mehrere Gesetze.

- Die Verfassung enthält ein allgemeines Verbot von unmittelbarer und mittelbarer Diskriminierung „aus irgendeinem Grund“.⁴⁶ Sie garantiert ausdrücklich den Schutz von Menschen mit Behinderungen (Artikel 63) und die Gleichstellung von Männern und Frauen (Artikel 18).
- Das Gesetz über das Verbot von Diskriminierung verbietet Diskriminierung aufgrund der in Artikel 2 ausdrücklich aufgeführten Gründe,⁴⁷ zu denen „Rasse“, Hautfarbe, nationale Zugehörigkeit, soziale oder ethnische Herkunft, Zugehörigkeit zu einer ethnischen oder sprachlichen Minderheit, Sprache, Religion oder Weltanschauung, politische oder sonstige Überzeugung, Geschlecht, Geschlechtsidentität, sexuelle Orientierung, Gesundheit, Behinderung, Alter, Vermögen und tatsächliche oder mutmaßliche Mitgliedschaft in einer Gruppe gehören.
- Artikel 5 des Arbeitsgesetzes⁴⁸ verbietet die Diskriminierung von Arbeitssuchenden und Arbeitnehmern aufgrund von Geschlecht, Geburt, Sprache, „Rasse“, Religion, Hautfarbe, Alter, Schwangerschaft, Gesundheitszustand oder Behinderung, ethnischer Zugehörigkeit, Personenstand, familiären Verpflichtungen, sexueller Orientierung, politischer oder sonstiger Zugehörigkeit, sozialem Hintergrund, Vermögensstand, Mitgliedschaft in einer politischen Organisation oder Gewerkschaft oder sonstigen persönlichen Merkmalen.
- Artikel 39 des Gesetzes über die Rechte und Freiheiten von Minderheiten⁴⁹ verbietet jede unmittelbare und mittelbare Diskriminierung aus irgendeinem Grund,

⁴⁵ Internationale Abkommen sind in Montenegro direkt anwendbar und müssen nicht durch einen parlamentarischen Rechtsakt umgesetzt werden. Damit bieten sie theoretisch einen wirksamen Schutz gegen diskriminierende Bestimmungen im nationalen Recht, wobei die Gerichte ihre Urteile nur selten auf internationales Recht stützen.

⁴⁶ Verfassung von Montenegro (*Ustav Crne Gore*), *Amtsblatt von Montenegro*, Nr. 1/07, Art. 8.

⁴⁷ Montenegro, Gesetz über das Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), *Amtsblatt von Montenegro*, Nrn. 46/10 und 18/2014.

⁴⁸ Montenegro, Arbeitsgesetz (*Zakon o radu*), *Amtsblatt von Montenegro*, Nrn. 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012 und 31/2014.

⁴⁹ Montenegro, Gesetz über die Rechte und Freiheiten von Minderheiten (*Zakon o manjinskim pravima i slobodama*), *Amtsblatt von Montenegro*, Nrn. 31/06, 51/06 und 38/07, 02/11 und 08/11.

einschließlich von „Rasse“, Hautfarbe, Geschlecht, nationaler Herkunft, sozialer Herkunft, Geburt oder ähnlichem Status, Religion, politischen oder sonstigen Überzeugungen, Vermögensstand, Kultur, Sprache, Alter und geistiger oder körperlicher Behinderung.

- Das Gesetz über die berufliche Rehabilitation und Beschäftigung von Menschen mit Behinderungen verbietet unmittelbare und mittelbare Diskriminierung von Menschen mit Behinderungen bei der beruflichen Rehabilitation, beim Zugang zu Beschäftigung und im Arbeitsleben.⁵⁰
- Nach dem Strafgesetzbuch⁵¹ ist eine Verletzung der Gleichheit der Bürger strafbar, wobei ausdrücklich nationale Zugehörigkeit oder Zugehörigkeit zu einer ethnischen Gruppe, „Rasse“ oder Religion bzw. das Fehlen dieser Zugehörigkeit, politische oder sonstige Überzeugung, Geschlecht, Sprache, Bildung, sozialer Status, soziale Herkunft und Vermögen als verbotene Diskriminierungsgründe aufgezählt wird und „jeder sonstige persönliche Status“ ebenfalls als verbotener Diskriminierungsgrund ausgelegt werden kann (Art. 159).

3. Wichtigste Grundsätze und Begriffe

Eine Definition und ein Verbot von Diskriminierung sind in der Verfassung und im Gesetz über das Verbot von Diskriminierung enthalten. Diskriminierung durch Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind definiert und verboten, jedoch nicht Diskriminierung aufgrund von Assoziierung. Die Pflicht zur Bereitstellung angemessener Vorkehrungen ist nicht ausdrücklich in einem Gesetz definiert. Die Verfassung garantiert Menschen mit Behinderung einen besonderen Schutz (Art. 68), sieht aber nicht ausdrücklich eine Pflicht zu angemessenen Vorkehrungen vor. Allerdings hat Montenegro das Übereinkommen über die Rechte von Menschen mit Behinderungen der Vereinten Nationen ratifiziert, das die fehlende Bereitstellung angemessener Vorkehrungen als eine Form der Diskriminierung definiert und eine Pflicht zu angemessenen Vorkehrungen enthält. Nach Artikel 9 der Verfassung sind die Bestimmungen dieses Übereinkommens Teil des nationalen Rechtssystems, sie haben Vorrang vor nationalen Rechtsvorschriften und sind direkt anwendbar, wenn sie vom montenegrinischen Recht abweichen.

Der Schutz vor Mehrfachdiskriminierung ist im Gesetz über das Verbot von Diskriminierung (Art. 20 Abs. 1) mit dem folgenden Wortlaut enthalten: „Eine schwere Form der Diskriminierung aufgrund der in Artikel 2 Absatz 2 dieses Gesetzes genannten Gründe liegt vor, 1) wenn die Diskriminierung gegen dieselbe Person oder Gruppe aus mehreren der in Artikel 2 Absatz 2 dieses Gesetzes genannten Gründe begangen wird (Mehrfachdiskriminierung)...“. Fallrecht zum Thema Mehrfachdiskriminierung gibt es in Montenegro nicht.

Das Gesetz über das Verbot von Diskriminierung wurde im Juli 2017⁵² hinsichtlich der Definition von Diskriminierung in unterschiedlichen Bereichen geändert. Im Zuge der Änderungen wurden einige Bestimmungen für besondere Formen und Bereiche von Diskriminierung klarer gefasst. Es wurden neue Strafbestimmungen eingeführt, da die aktuellen rechtlichen Lösungen nicht alle Formen und Bereiche von Diskriminierung abgedeckt und nicht die erhofften Ergebnisse gezeitigt haben.

⁵⁰ Montenegro, Gesetz über die berufliche Rehabilitation und Beschäftigung von Menschen mit Behinderungen (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), Amtsblatt von Montenegro, Nrn. 49/08, 73/10 und 39/11, Art. 5.

⁵¹ Montenegro, Strafgesetzbuch (*Krivični zakonik*), Amtsblatt von Montenegro, Nrn. 40/2008, 25/2010, 32/2011, 40/2013 und 56/2013.

⁵² Montenegro, Gesetz über das Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), Amtsblatt von Montenegro, Nrn. 46/2010, 18/2014 und 42/17.

4. Sachlicher Geltungsbereich

Der sachliche Geltungsbereich des im Gesetz über das Verbot von Diskriminierung festgelegten Diskriminierungsverbots entspricht dem breiten Geltungsbereich der Richtlinie zur Gleichbehandlung ohne Unterschied der „Rasse“. Neben der Beschäftigung und beruflichen Bildung gilt es für die folgenden Bereiche: Sozialschutz, einschließlich der sozialen Sicherheit und der Gesundheitsdienste, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum. Unter das nationale Recht fallen außerdem die Bereiche Sozialschutz, einschließlich der sozialen Sicherheit und Gesundheit, nach den Vorgaben der Richtlinie zur Gleichbehandlung ohne Unterschied der „Rasse“. Gemäß der Verfassung hat jeder ein Anrecht auf Gesundheitsschutz. Kinder, Senioren und Menschen mit Behinderungen sowie schwangere Frauen haben Anspruch auf öffentlich finanzierten Gesundheitsschutz, sofern sie diesen Anspruch nicht aus anderen Gründen geltend machen.

5. Rechtsdurchsetzung

Diskriminierungsfälle können sowohl gerichtlich als auch außergerichtlich vom Anwalt für Menschenrechte und Freiheiten behandelt werden. Jeder, der seine Menschenrechte oder Freiheiten durch einen Akt der Entscheidungsfindung, eine Handlung oder eine Unterlassung von Seiten staatlicher oder kommunaler Behörden, öffentlicher Stellen oder anderer Träger öffentlicher Gewalt (Gesundheitseinrichtungen, Schulen, Universitäten, staatliche Unternehmen usw.) verletzt sieht, kann beim Anwalt für Menschenrechte und Freiheiten eine Beschwerde einreichen. Wenn der Anwalt für Menschenrechte und Freiheiten zu dem Urteil kommt, dass eine Rechtsverletzung vorliegt, erstellt er oder sie ein Gutachten und erteilt der betreffenden Stelle eine Empfehlung, in der die erforderlichen Abhilfemaßnahmen aufgezählt werden. Der Anwalt legt außerdem eine Frist für die Umsetzung der Maßnahmen fest. Die betreffende Stelle muss dem Anwalt für Menschenrechte und Freiheiten dann einen Bericht vorlegen, in dem die Umsetzung der in der Empfehlung enthaltenen Maßnahmen erläutert wird. Setzt die Stelle die Empfehlungen des Anwalts für Menschenrechte und Freiheiten nicht um, kann der Anwalt den Fall entweder an eine unmittelbar übergeordnete Behörde weiterleiten oder sich an das Parlament von Montenegro oder die Öffentlichkeit wenden. Der Anwalt für Menschenrechte und Freiheiten kann weder verbindliche Entscheidungen treffen noch Opfern von Menschenrechtsverletzungen eine Entschädigung zusprechen.

Nach dem Gesetz über das Verbot von Diskriminierung können Opfer vor Gericht klagen und Folgendes beantragen: a) Feststellung der Tatsache, dass der Beklagte den Kläger diskriminiert hat, b) Verbot von Handlungen, durch die eine mögliche Diskriminierung droht, d. h. Verbot der Wiederholung einer diskriminierenden Handlung, c) Schadensersatz oder Entschädigung und d) in Fällen, in denen Diskriminierung von den Medien begangen wird, Veröffentlichung des Urteils, in dem die Diskriminierung festgestellt wird, in den Medien und auf Kosten der Beklagten (Art. 23).

Die Beweislast ist in Artikel 29 des Gesetzes über ein Verbot von Diskriminierung geregelt: Wenn der Kläger Beweise vorlegt, die glaubhaft machen, dass der Beklagte eine diskriminierende Handlung begangen hat, muss der Beklagte beweisen, dass keine Verletzung des Gleichbehandlungsgebots und der Gleichheit vor dem Gesetz vorliegt. Diese Regel gilt nicht bei Ordnungswidrigkeiten (die von Ministerien und speziellen Ordnungsämtern verfolgt werden) und auch nicht in Strafverfahren. Allerdings gilt es in Verwaltungsverfahren (die vom Staat oder von Verwaltungsbehörden durchgeführt werden), die Verwaltung betreffende Rechtsverfahren (bei denen vor dem Verwaltungsgericht die Rechtmäßigkeit behördlicher und sonstiger Handlungen geprüft wird) und für Zivilverfahren. Insgesamt werden die Mechanismen zur Durchsetzung des Rechtsschutzes vor Diskriminierung in der Praxis jedoch nur sehr selten genutzt. Opfer

scheuen davor zurück, ihre Rechte durchzusetzen, und haben wenig Vertrauen in die Funktionsweise des Rechtssystems.

6. Gleichbehandlungsstellen

Der Anwalt für Menschenrechte und Freiheiten ist eine unabhängige Institution, die durch das Gesetz über den Anwalt für Menschenrechte und Freiheiten von 2003 eingerichtet wurde. Mit Inkrafttreten der neuen montenegrinischen Verfassung im Jahr 2007, in der diese Institution genannt und mit dem Schutz der Menschenrechte und Freiheiten beauftragt wird, wurde seine Stellung weiter gestärkt. Nach Artikel 27 Absatz 1 des Gesetzes ist der Anwalt auch ein institutioneller Mechanismus zum Schutz vor Diskriminierung.

Im Zuge der Novellierung dieses Gesetzes⁵³ im Jahr 2014 wurde der Begriff Diskriminierung überarbeitet und weitere Formen von Diskriminierung wie sexuelle Diskriminierung und Hassrede sowie Rassendiskriminierung in das Gesetz aufgenommen.⁵⁴ Das Gesetz erteilt dem Anwalt für Menschenrechte und Freiheiten ferner Befugnisse, die den Anforderungen der Richtlinie 2000/43/EG entsprechen.

Die Tätigkeit der Aufsichtsbehörden, die für die Umsetzung der Entscheidungen zum Schutz vor Diskriminierung zuständig sind, lässt weiterhin zu wünschen übrig, da deren Kapazität begrenzt ist und ihre Maßnahmen in der Regel schwach sind. 2011 beschloss die Regierung von Montenegro die Einrichtung eines Rates für den Schutz vor Diskriminierung als nationale Stelle zur Förderung der Gleichbehandlung und Koordination von Antidiskriminierungsmaßnahmen auf nationaler Ebene. Der Rat wurde inzwischen suspendiert. Der Anwalt für Menschenrechte und Freiheiten ist ein unabhängiger nationaler Mechanismus zum individuellen Schutz vor Diskriminierung, wohingegen der Rat für den Schutz vor Diskriminierung ein Beratungsorgan der Regierung war, dessen Aufgabe darin bestand, Antidiskriminierungsaktivitäten auf nationaler Ebene zu fördern und durchzuführen.

7. Zentrale Punkte

1. Weil ganz allgemein nur sehr wenige Studien und Daten vorliegen, lässt sich nur schwer einschätzen, in welcher Form und in welchem Umfang Diskriminierungen aufgrund von ethnischer Herkunft, Religion und Weltanschauung, Alter, Behinderung und sexueller Orientierung vorkommen. Außerdem sind in Bezug auf all diese Diskriminierungsgründe Zahlen und allgemeine Trends nur schwer zu ermitteln, existiert praktisch kein Fallrecht und gibt es nur ein Urteil des EGMR.⁵⁵
2. Verschiedene Berichte weisen darauf hin, dass die Roma nach wie vor die am stärksten benachteiligte und marginalisierte Minderheit in Montenegro sind.⁵⁶ Ihre soziale Ausgrenzung und Marginalisierung wird durch die hohe Analphabetenquote und den geringen Bildungsstand dieser Gruppen weiter verfestigt. Mitglieder dieser Gemeinschaften werden außerdem auf dem Arbeitsmarkt, im Gesundheitswesen und bei der sozialen Fürsorge diskriminiert.⁵⁷
3. Es gibt vereinzelte Beschwerden über Diskriminierung und Intoleranz aufgrund der Religion oder Weltanschauung, diese kommen aber nur selten vor.

⁵³ Montenegro, Gesetz über den Anwalt für Menschenrechte und Freiheiten (*Zakon o zaštiti ljudskih prava i sloboda*), *Amtsblatt von Montenegro*, Nr. 18/14.

⁵⁴ Montenegro, Gesetz über das Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), *Amtsblatt von Montenegro*, Nrn. 46/10 und 18/2014, Art. 17.

⁵⁵ Alković gg. Montenegro, 66895/10, Dezember 2017.

⁵⁶ Menschenrechtskommissar Nils Muižnieks, Bericht über seinen Besuch in Montenegro, 12.–20. März 2014, Pkt. 69.

⁵⁷ Schlussbemerkungen des Ausschusses zur Beseitigung der Rassendiskriminierung: Montenegro (CERD/C/MNE/CO/1), Pkt. 16 und 17.

4. Auch Diskriminierung wegen des Alters ist verbreitet. Einzelberichte deuten darauf hin, dass Diskriminierung aufgrund des Alters vor allem im Bereich Beschäftigung vorkommt.
5. In Bezug auf Diskriminierung aufgrund einer Behinderung deuten die vorhandenen Probleme darauf hin, dass in so gut wie allen Lebensbereichen, einschließlich Gesundheit, soziale Vergünstigungen, allgemeine und berufliche Bildung und Beschäftigung sowie Barrierefreiheit gemeinsame Anstrengungen notwendig sind, um die Gleichbehandlung von Menschen mit Behinderungen zu gewährleisten.⁵⁸
6. Was den Umgang mit den Menschenrechten von LGBT-Personen seitens der Behörden betrifft, hat eine Veränderung stattgefunden. 2013 verabschiedete Montenegro eine Strategie zur Verbesserung der Lebensqualität von LGBT-Personen 2013-2018 mit einem begleitenden Aktionsplan. Im Rahmen der Strategie von 2013 verpflichtete sich die Regierung, die Antidiskriminierungspolitik und -gesetzgebung weiter zu fördern und ein Umfeld zu schaffen, in dem die Rechte von LGBT-Personen wirksam geschützt werden. Eine Arbeitsgruppe hat indes damit begonnen, die neue Strategie 2018-2022 auszuarbeiten, die bis Ende dieses Jahres verabschiedet werden soll. Mit dem Ziel, die Umsetzung der Strategie auf lokaler Ebene zu verbessern, veranlasste das Ministerium für Menschen- und Minderheitenrechte die Ausarbeitung von Vereinbarungen mit lokalen Behörden zwecks Verbesserung der Lebensqualität von LGBT-Personen auf lokaler Ebene. Was sexuelle Orientierung betrifft, so sind LGBT-Personen wohl die am wenigsten sichtbare Gruppe in der Gesellschaft und starken Vorurteilen ausgesetzt.⁵⁹ NROs, die sich im Kampf gegen Diskriminierung engagieren, sind sich einig, dass LGBT-Personen häufig in ihrem Recht auf Privatsphäre, ihrer Versammlungsfreiheit und ihrer Meinungsfreiheit verletzt und insbesondere im Arbeitsleben diskriminiert werden.⁶⁰
7. Es gibt kaum Fallrecht im Bereich Diskriminierung und keine Datenbank, in denen Daten über die Lebensbereiche, in denen Diskriminierung in der Praxis erfolgt, sowie über die Gründe und Formen von Diskriminierung erfasst werden.
8. Das Gesetz über das Verbot von Diskriminierung von Menschen mit Behinderungen gibt Anlass zu Sorge, da es mit rund 30 nationalen Gesetzen und Verordnungen nicht abgestimmt wurde.
9. Gewährleistung gleichen Zugangs zu Rechten für Migrantinnen und Migranten: Es ist notwendig, Vorschriften, die die Integration von Migrantinnen und Migranten in die montenegrinische Gesellschaft fördern und zur Verhinderung von Diskriminierung, Intoleranz und allgemeiner sozialer Marginalisierung bestimmter Migrationsgruppen beitragen, weiter zu verbessern, und zwar im Einklang mit bewährten Praktiken und EU-Standards. Dies impliziert auch eine stärkere Beteiligung der lokalen Selbstverwaltung bei der Umsetzung von Maßnahmen und Aktivitäten im Bereich der Integration von Migranten in lokale Gemeinschaften. Die Integration von Migranten ist sehr wichtig, um soziale und politische Stabilität zu erreichen, den Beitrag, den Migranten zu sozialen Gemeinschaften leisten können, zu maximieren sowie Fälle von Rassismus und Fremdenfeindlichkeit zu reduzieren.

⁵⁸ Dies geht aus der Strategie zur Eingliederung von Menschen mit Behinderungen in Montenegro 2008-2016 hervor. Der vollständige Text der Strategie (in montenegrinischer Sprache) ist verfügbar unter: <http://www.mrs.gov.me/biblioteka/strategije> (letzter Zugriff am 13. November 2015).

⁵⁹ Fazit der Nationalen Konferenz, „Montenegro – Ein heller Fleck auf der LGBT-Karte“, abrufbar unter <http://web.archive-me.com/page/939913/2012-12-12/http://www.montenegro-gay.me/component/content/article/26-crna-gora-svijetla-tacka-na-gej-mapi/301-zakljucci-nacionalne-konferencije-crna-gora-svijetlija-tacka-na-lgbt-mapi.html> (letzter Zugriff am 11. November 2015).

⁶⁰ Juventas, eine örtliche NRO, die Projekte zu den Rechten von LGBT-Personen durchführt, unterzeichnete vor kurzem eine Absichtserklärung mit der Arbeitsvermittlungsstelle von Montenegro, in der vereinbart wurde, die Rechte von LGBT-Personen im Arbeitsleben stärker zu unterstützen.

10. Die nationalen Vorschriften stehen nicht im Einklang mit den einschlägigen internationalen Standards und dem EU-Besitzstand im Bereich der Migration. Die gesetzlichen Regelungen bezüglich Migration sind nach wie vor unzureichend und unvollständig. In diesem Zusammenhang betrifft dies vor allem das Ausländergesetz, das vollständig an die EU-Richtlinien angepasst werden sollte.
11. Personal, das in den Prozess des integrierten Migrationsmanagements eingebunden ist, muss kontinuierlich geschult werden. Schnelle Information, angemessene materielle und technische Ausstattung der zuständigen Stellen sowie eine entsprechende Schulung des Personals sind für das Migrationsmanagement von großer Bedeutung und haben erhebliche Auswirkungen auf die Bekämpfung von illegaler Migration.

INTRODUCTION

The national legal system

Montenegro is a democracy, defined in its Constitution as a 'civil, democratic, ecological state with social justice, based on the rule of law'. The Constitution also establishes a separation of legislative, executive and judicial powers. Montenegro is a civil law country with the Constitution as its supreme legal act. The law must be in conformity with the Constitution and ratified international agreements, and other regulations must be in conformity with the Constitution and the law (Article 145 of the Constitution). All legislation in Montenegro may be subjected to review by the Constitutional Court.

Montenegro has ratified all the major international human rights treaties, including the European Convention on Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities and its Optional Protocol. It has also ratified the main Council of Europe minority rights instruments, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities and anti-discrimination conventions of the International Labour Organization, including the Discrimination (Employment and Occupation) Convention and the Equal Remuneration Convention.

International treaties are directly applicable in Montenegro and do not need to be incorporated by an act of Parliament, thus theoretically offering effective protection against discrimination in domestic law, although the courts seldom invoke international law as a basis for their decisions. Article 9 of the Constitution provides that, 'ratified and published international agreements and generally accepted rules of international law shall make an integral part of the national legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from domestic legislation'. Montenegro has committed itself to gradually approximating its legislation and policies with the *acquis*, in line with the Stabilisation and Association Agreement and the European Partnership priorities. Each piece of legislation submitted to the Parliament for adoption must be accompanied by an assessment of the level of harmonisation with *inter alia* primary and secondary sources of EU law. Montenegro has opened 24 out of 35 chapters, of which two have already been provisionally completed within the negotiation process with the EU. Two of the main chapters which have been opened are Chapter 23 (Judiciary reform and fundamental rights), which among other things covers non-discrimination of marginalised groups in employment, and Chapter 24 (Justice, freedom and security). Negotiations relating to these chapters will last until the end of the negotiation process. This is a new approach by the European Commission which is being implemented for the first time in the case of Montenegro.

List of main legislation transposing and implementing the directives

Title of the law:⁶¹ Law on the Prohibition of Discrimination, Official Gazette of Montenegro 46/10, 18/2014 and 42/17

Abbreviation: LPD

Date of adoption: 6 August 2010

Entry into force: 13 August 2010

Latest amendments: 30 June 2017

Grounds protected: race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political

⁶¹ Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), Official Gazette of Montenegro, nos. 46/2010, 18/2014 and 42/17.

or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics

Material scope: education, labour, provision of goods and services

Title of the law: Criminal Code,⁶² Official Gazette of Montenegro no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013

Abbreviation: CC

Date of adoption: 17 December 2003

Entry into force: 3 January 2004

Latest amendments: 30 July 2013

Grounds protected: national affiliation or affiliation to an ethnic group, race, religion, political or other opinion, sex, language, education, social status, social origin and property, and other personal status

Material scope: the scope of application is not limited to specific fields. However, Criminal Code, Article 443, para. 4, prescribes that an individual who commits an offence covered by Article 443, para. 1-3, by misusing their position will be sentenced to imprisonment (one to eight years). This offence may be committed in any of the relevant areas (education, employment, social services...)

Title of the law: Labour Law,⁶³ Official Gazette of Montenegro nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14

Abbreviation: LL

Date of adoption: 29 July 2008

Entry into force: 6 August 2008

Latest amendments: 16 July 2014

Grounds protected: sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or any other personal characteristic

Material scope: employment

Title of the law: Law on Minority Rights and Freedoms,⁶⁴ Official Gazette of Montenegro 31/06, 51/06 and 38/07, 02/11 and 08/11

Abbreviation: LMRF

Date of adoption: 10 May 2006

Entry into force: 20 May 2006

Latest amendments: 12 January 2011

Grounds protected: any ground including race, colour, sex, national origin, social origin, birth or similar status, religion, political or other beliefs, property status, culture, language, age, mental or physical disability

Material scope: it applies to all fields protected by the Law on Minority Rights and Freedoms (education and employment)

Title of the law: Law on Professional Rehabilitation and Employment of Persons with Disabilities,⁶⁵ Official Gazette, no. 49/08, 73/10, 39/11

Abbreviation: LPREPD

Date of adoption: 29 July 2008

⁶² Montenegro, Criminal Code (*Krivični zakonik*), Official Gazette of Montenegro, no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

⁶³ Montenegro, Labour Law (*Zakon o radu*), Official Gazette of Montenegro, nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/212 and 31/14.

⁶⁴ Montenegro, Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), Official Gazette of Montenegro, 31/06, 51/06 and 38/07, 02/11 and 08/11.

⁶⁵ Montenegro, Law on Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji zapošljavanju lica sa invaliditetom*), Official Gazette of Montenegro, no. 49/08, 73/10, and 39/11.

Entry into force: 23 August 2008
Latest amendments: 22 July 2016
Grounds protected: disability
Material scope: employment

Title of the Law: Law on the Prohibition of Harassment at Work,⁶⁶ Official Gazette no. 30/12
Abbreviation: LPHW
Date of adoption: 29 May 2012
Entry into force: 16 June 2012
Latest amendments: N/A
Grounds protected: not specified
Material scope: employment

Title of the law: Law on the Prohibition of Discrimination of Persons with Disabilities,⁶⁷
Official Gazette of Montenegro 35/15, 44/15
Abbreviation: LPDPD
Date of adoption: 26 June 2015
Entry into force: 15 July 2015
Latest amendments: 15 August 2015
Grounds protected: long-term physical, mental, intellectual or sensory disability
Material scope: it applies to all fields protected by the Law on the Prohibition of Discrimination (education, labour, provision of goods and services)

⁶⁶ Montenegro, Law on Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), *Official Gazette of Montenegro* no. 30/12.

⁶⁷ Montenegro, Law on Prohibition of Discrimination of Persons with Disabilities (*Zakon o zabrani diskriminacije lica sa invaliditetom*), *Official Gazette of Montenegro*, 35/15, 44/15.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution contains a general prohibition in Article 8 of both direct and indirect discrimination 'on any grounds'.⁶⁸ In addition, Article 7 of the Constitution states that 'infliction or encouragement of hatred or intolerance on any grounds shall be prohibited'. As can be concluded from this formulation, the constitutional protection from discrimination in Montenegro is wider than required by the directives, since it includes a potentially limitless list of grounds. An illustration of what might constitute these grounds can be found in Article 25 of the Constitution, which provides that:

'While the exercise of certain human rights and freedoms may be derogated in time of war or other public emergency to a necessary extent, the prohibition of discrimination cannot be derogated from nor can derogations be introduced on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial status or any other personal characteristics.'

The courts have not yet interpreted the issue of prohibited grounds. The Constitution explicitly guarantees broad special welfare-based protection for persons with disabilities (Article 68) and equality between men and women (Article 18). With regard to the latter, the Constitution also provides for the state's duty to develop equal opportunities policy (also Article 18). Other provisions of the Constitution contain guarantees of equality before the law (Article 17) and equal protection of rights and freedoms (Article 19) and prohibits 'infliction or encouragement of hatred or intolerance on any grounds' (Article 7) and 'operations of political and other organisations directed towards [...] instigating national, racial, and religious and other hatred and intolerance' (Article 55).

The Constitution permits positive action by providing that, 'regulations and introduction of special measures aimed at creating conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination'. Under the Constitution, special measures may only be applied until the achievement of the aims for which they have been undertaken (Article 8).

The anti-discrimination provisions of the Constitution are directly applicable. These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives. These provisions can (in theory) be enforced against private actors although no relevant case law is available.

⁶⁸ Montenegro, Constitution, Article 8, *Official Gazette of Montenegro* 1/07.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: disability, sex, nationality, race, religion, language, ethnic or social origin, sexual orientation, political or other beliefs, financial status as well as any other personal characteristics.

Criminal acts

The Criminal Code⁶⁹ provides for the criminal offence of violating the equality of citizens and explicitly lists as prohibited grounds national affiliation or affiliation to an ethnic group, race or religion or absence of such an affiliation, political or other opinion, sex, language, education, social status, social origin and property, while allowing that 'other personal status' can be regarded as a prohibited ground (Article 159). The concept of 'other personal status' has not been interpreted by courts, but age, sexual orientation and disability are likely to be covered.⁷⁰

Civil acts

The Labour Law⁷¹ provides for the prohibition of discrimination against employees and people seeking employment based on sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or any other personal characteristic. Therefore, here also there is an open-ended prohibition of discrimination and other grounds can be regarded as being incorporated in addition to those explicitly mentioned, which include all five grounds covered by the directives.

The Law on Minority Rights and Freedoms⁷² prohibits any direct or indirect discrimination on any basis, including on the basis of race, colour, sex, national origin, social origin, birth or similar status, religion, political or other beliefs, property status, culture, language, age, mental or physical disability.

Similarly, laws covering the areas of healthcare, social and child protection and education also include open-ended equality provisions. With regard to the five grounds, racial and ethnic origin and religion (but not beliefs) are explicitly covered by all these pieces of legislation, while age is explicitly listed only in the Law on Healthcare.⁷³

Specific aspects of discrimination on the ground of disability are covered by a separate law, namely, the Law on Professional Rehabilitation and Employment of Persons with Disabilities, which prohibits direct and indirect discrimination against people with disabilities in relation to vocational rehabilitation, admission to employment and employment.⁷⁴ The Law on the Prohibition of Discrimination of Persons with Disabilities prescribes that discrimination on the ground of disability is legal or factual, direct or

⁶⁹ Montenegro, Criminal Code (*Krivični zakonik*), *Official Gazette of Montenegro*, no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

⁷⁰ Particularly in view of the fact that Montenegro is a party to the European Convention on Human Rights, Article 14 of which has been interpreted by the European Court of Human Rights to include sexual orientation, disability and age as prohibited grounds.

⁷¹ Montenegro, Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14, Article 5.

⁷² Montenegro, Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), *Official Gazette of Montenegro*, 31/06, 51/06 and 38/07, 02/11 and 08/11, Article 39.

⁷³ Montenegro, Law on Healthcare (*Zakon o zdravstvenoj zaštiti*), *Official Gazette of Montenegro*, 39/2004 and 14/2010, Article 4.

⁷⁴ Montenegro, Law on Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), *Official Gazette of Montenegro*, no. 49/08, 73/10, and 39/11, Article 5.

indirect, intentional or unintentional distinctions or unequal treatment or omission of one person or group of persons with disabilities in relation to another person. In addition, in terms of this law, discrimination is defined as exclusion, restriction or giving priority to one individual vis-à-vis a person with a disability that impedes or denies the recognition, enjoyment or exercise of human rights and freedoms of the person with a disability in political, educational, economic, social, cultural, sport, civic and other areas of public and private life. Discrimination on the basis of disability also includes inviting, helping, encouraging, inciting or instructing someone to discriminate, as well as disturbance and the announced possibility that a particular person or group of persons with disabilities are exposed to discrimination.

Grounds of discrimination explicitly listed in the Law on the Prohibition of Discrimination (LPD)⁷⁵ include race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation. This provision also leaves open the possibility for other 'similar personal characteristics' to be interpreted as grounds of discrimination.

As can be concluded from the above, there is a tendency to cover a broad range of grounds, and in this respect national legislation goes beyond the requirements of the directives. This holds particularly true for the LPD with its extensive list of explicitly prohibited grounds. The Council of Europe's Commission for Democracy through Law (Venice Commission) stated in its Opinion on the Draft Law that, 'when defining discrimination, trying to cover as many grounds as possible cannot constitute either a practicable or a constructive approach', highlighting that, 'such an approach may entail the risk that the concept of discrimination may become diluted in a way which could weaken the protection against more serious discriminatory actions' and that 'providing an extensive list of non-discrimination grounds is unnecessary from a legal point of view, since the list is not exhaustive'.⁷⁶ This view is not shared by some local NGOs who welcome the explicit reference to some of the traditional grounds of discrimination such as sexual orientation.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Grounds of discrimination are largely undefined in national legislation. However, for a few grounds of discrimination there is a definition provided by anti-discrimination laws.

Racial or ethnic origin

In amending the Law on the Prohibition of Discrimination in 2014,⁷⁷ a definition of 'racial discrimination' was provided in accordance with the Recommendations of the European Commission against Racism and Intolerance:⁷⁸

'Racial discrimination is any distinction, unequal treatment or placing in an unequal position of a person in the belief that race, colour, language, nationality or national or ethnic origin justifies contempt for a person or group of persons, or justifies the notion of superiority of a person or group of persons in relation to those who are not members of that group.'

⁷⁵ Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 46/2010, 18/2014 and 42/17.

⁷⁶ Opinion no. 564 / 2009 on the Draft Law adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), CDL-AD(2010)011, available at: www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29011-e.

⁷⁷ Montenegro, Law on Amendments to the Law on Prohibition of Discrimination (*Zakon o izmjenama i dopunama Zakona o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 18/2014.

⁷⁸ ECRI Report on Montenegro, published on 21 February 2012, page 13 www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Montenegro/MNE-CbC-IV-2012-005-ENG.pdf.

In addition, with regard to 'crimes against humanity and other goods' protected by international law, the Criminal Code was amended (Article 443) and a criminal offence of racial and other discrimination was specified, sanctioning: 'anybody who spreads ideas of the superiority of one race over another or promotes hatred or intolerance on the basis of race, gender, disability, sexual orientation or other personal characteristic, or incitement to racial or other discrimination'.

Regarding ethnic origin, there is a wider definition of minorities under the Law on Minority Rights and Freedoms, where people from minorities and other minority communities are defined as 'any group of citizens of the Republic, numerically smaller than the rest of the predominant population, having common ethnic, religious or linguistic characteristics, different from those of the rest of the population, being historically tied to the Republic and motivated by the wish to express themselves and maintain their national, ethnic, cultural, linguistic and religious identity' (Article 2). No difference between a national and an ethnic minority is recognised by the law.

Numerically, the largest national/ethnic communities in Montenegro are Montenegrins, Serbs, Bosnians, Albanians and Muslims and the smallest are Roma, Egyptians, Croatians and others. According to public opinion research conducted by the NGO, Centre for Democracy and Human Rights,⁷⁹ ethnic distance (measuring the extent to which individuals or groups are removed from or excluded from participating in one another's lives based on their ethnic affiliation) in relation to the Roma population is a matter of concern. The data indicate that almost every second citizen of Montenegro exhibits considerable distance from the Roma population, which is a particularly vulnerable group. The issue of Roma inclusion remains a serious challenge for institutions and Montenegrin society as a whole.

Disability

According to the Law on the Prohibition of Discrimination of Persons with Disabilities, in Article 2 para. 2, 'a person with a disability is a person who has a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder the full and effective participation of this person in society on an equal basis with others'. Within the meaning of the Law on Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD), a person with a disability is an individual with permanent consequences of physical, sensory or mental disorders or diseases that cannot be cured by medical treatment or rehabilitation, and who faces social and other restrictions that may affect their ability to work and pursue employment, to enjoy the maintenance and advancement of employment and for whom it is not possible or for whom there are reduced opportunities for inclusion in the labour market on equal terms (Article 3). However, the definition of disability provided by LPREPD is not in line with the judgment in HK Danmark (Ring and Skouboe Werge) because it requires 'permanent consequences', although this is not an issue in practice, since the LPDPD also covers employment and has a broader definition of disability. The definition of disability provided by the LPDPD is broader than the CJEU case law definition as it refers to participation in society rather than professional life as prescribed by CJEU case law.

Sexual orientation

In amending the LPD in 2014, a definition of sexual orientation was provided. Sexual orientation refers to emotional and/or physical attraction or sympathy towards persons of the same and/or different sex.

Religion and belief

⁷⁹ *Etnička distanca u crnoj gori » Empirijsko istraživanje* « [Ethnic distance in Montenegro, empirical research], CEDEM, December 2013, page 19, www.cedem.me/publikacije/studije-i-javne-politike/download/69-studije-i-javne-politike/720-etnika-distanca-2013.

Amendments to the LPD adopted in 2014 regulate discrimination based on religion or belief. Article 17 of the LPD states that:

'Discrimination based on religion or belief is considered to be any act contrary to the principle of freedom of religion. That is, any unequal treatment, differentiation, or placing in an unequal position of a person on the basis of religion or personal beliefs, as well as affiliation or non-affiliation to a religious community.'

In this way the definition provided of discrimination based on religion or belief fulfils the need to ensure respect for the principle of freedom of religion, which requires freedom of choice and cannot be restricted in terms of the rights of members of these communities and individuals who share other beliefs. Membership of these organisations determines the rules of conduct of their members and these cannot be considered discriminatory. The community has the right to determine its internal rules as a fundamental human right, provided those rules do not exceed the level stipulated by international standards of human rights, which in each specific case is decided by the competent state authorities and, ultimately, the international bodies, including the European Court of Human Rights.

Age

Age as a ground of discrimination has not been defined in the Montenegrin legislative framework. However, the LPD prohibits discrimination based on age: 'Preventing or restricting the exercise of the rights or any other unjustified differentiation or unequal treatment of a person or a group of persons on the basis of age, shall be deemed to be discrimination.'

2.1.2 Multiple discrimination

In Montenegro, prohibition of multiple discrimination is included in the LPD, Article 20, para.1, item 1:

'A grave form of discrimination, on any ground referred to in Article 2, paragraph 2, of this Law shall be deemed to be discrimination:

1) committed against the same person or group of persons on multiple grounds referred to in Article 2, paragraph 2 of this Law (multiple discrimination).'

In Montenegro, there is no case law dealing with multiple discrimination. Although multiple discrimination is defined by law as a grave form of discrimination, specific criminal policy has not been developed in relation to this form of discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Montenegro, the Law on Civil Servants and Employees,⁸⁰ as well as the Law on the Prohibition of Discrimination,⁸¹ prohibits discrimination based on a perception or assumption of an individual's 'belonging to a group or assumed membership of a group, political party or other organisation'.

b) Discrimination by association

In Montenegro, discrimination by association is not explicitly regulated by national law.

⁸⁰ Montenegro, Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, 39/11, 50/11, 66/12 and 34/14, Article 7.

⁸¹ Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, nos. 46/2010, 18/2014 and 42/17, Article 2, para. 2.

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

a) Prohibition and definition of direct discrimination

In Montenegro, direct discrimination is prohibited in national law and is defined. As noted above, the Montenegrin Constitution contains an explicit prohibition of direct discrimination, although it does not define the concept itself.

The Labour Law defines direct discrimination as any treatment which puts an individual seeking employment or an employee in a less favourable position compared with other people in the same or similar situation, on grounds of sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or any other personal characteristic (Article 6, para. 1). This definition does not cover hypothetical discrimination or discrimination which occurred in the past. Thus, it is not in line with the definition in the directive.

Article 5 of the Labour Law prohibits 'any direct or indirect discrimination of persons seeking employment as well as employees with respect to sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or any other personal characteristic'. This provision applies to conditions for access to employment and selection of candidates, working conditions and all employment-based rights, education, vocational training and advanced vocational training, promotions and dismissals (Article 7).

Article 2 para. 1 of the LPD prohibits direct discrimination and Article 2 para. 3 defines it. The LPD provides that direct discrimination exists if a person or a group of persons, in the same or similar situation in respect to another person or group of persons, is/are placed, was/were placed, or may be placed in an unequal position by an act, action or failure to act, on any ground proposed by law.⁸² The previous Law defined discrimination as any, 'unjustified, legal or factual, direct or indirect distinction'. The new amendments to the LPD adopted in 2017 deleted the term 'unjustified' because direct discrimination cannot be justified. Although the list of grounds of discrimination is prescribed as open, two new personal characteristics have been added (sex change and intersex characteristics) by which the explicit provision has reduced the space for the flexible interpretation of personal characteristics arising from the different sexual and gender experience of each individual. This definition of direct discrimination is in line with the directive.

The LPDPD does not provide a clear definition of direct and indirect discrimination on the ground of disability in Article 4:

'Discrimination based on disability is any legal or factual, direct or indirect, intentional or unintentional discrimination or unequal treatment or failure to act towards a person or group of persons with disabilities compared to other persons, as well as exclusion, restriction or preference of a person compared to a person with disabilities, as a result of which the person with a disability is hindered in or denied the recognition, enjoyment or exercise of human rights and freedoms in political, educational, economic, social, cultural, sports, civil and other areas of public and private life. Discrimination on grounds of disability is considered to be the incitement, aiding or abetting, instructing or instigating of harassment or discrimination or the expectation of discrimination being perpetrated against a particular person or groups of persons with disabilities.'

⁸² Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, nos. 46/2010, 18/2014 and 42/17, Article 2, para. 3.

The Law on the Prohibition of Discrimination was amended in June 2017 and one of the key changes is that putting a person or group of persons in a disadvantageous position in relation to other persons shall not be considered as discrimination:

- 1) when such treatment is prescribed by law to protect the health and safety of citizens, maintaining peace and public order, preventing criminal offences and protecting the rights and freedoms of others, if the means used are appropriate and necessary to achieve one of these goals in a democratic society and proportionate to the goal that should be achieved by using such measures;
- 2) when age is used as the basis for setting insurance premiums or other conditions of insurance in accordance with generally accepted risk assessment principles, relevant and accurate statistical data and rules of actuarial mathematics (mathematical method used in the field of insurance);
- 3) in access to goods and services if access to goods and services is intended exclusively or primarily for one group of persons (such as disabled people or people of the same sex), when such conduct is objectively and reasonably justified by a legitimate aim and the funds used are appropriate and necessary to achieve that goal;
- 4) when establishing the most junior or senior person in terms of professional experience, i.e. level of education as a precondition for employment or as a condition for obtaining other employment rights, in accordance with special regulations;
- 5) when determining the appropriate age limit as a reason for termination of the working relationship in accordance with the conditions for obtaining the right to an old-age pension;
- 6) on the basis of nationality in accordance with special regulations. Special regulation is considered to be regulation on citizenship that has not yet been harmonised with the amended LPD with regard to this exception.
- 7) when religious learning or belief is a true, legitimate and justified condition for doing business and shall not be considered as discrimination when conducting professional activities: establishing employment relationships; membership of a religious community; membership of other organisations and activities that are inconsistent with religious teaching, rituals and religious affairs; membership of public or private organisations whose value system is based on religious learning or belief, acting in accordance with the Constitution and the law, if so required by religious learning or belief.

The Law on Professional Rehabilitation and Employment of Persons with Disabilities does not provide a definition of direct and indirect discrimination, but covers the prohibition of discrimination against people with disabilities in Article 5.

b) Justification of direct discrimination

National law does not include articles that permit justification of direct discrimination.

2.2.1 Situation testing

a) Legal framework

In Montenegro, situation testing is clearly permitted in the Law on the Prohibition of Discrimination. Article 30, para. 3, stipulates that an anti-discriminatory lawsuit, which enables court protection for anyone who considers they have been damaged by discriminatory treatment, may also be filed by a person who, with the intention of directly verifying the application of the rules on non-discrimination, introduces themselves as a person or puts themselves in the position of a person who may be discriminated against on the grounds covered by the law.

Evidence from situation testing can be submitted to the court, but the admissibility of such evidence is at the discretion of the judge on a case-by-case basis. Judicial practice in

Montenegro is not uniform. Each judge makes a judgment on the basis of the evidence they receive, but it often happens that in similar cases two judges decide differently. According to Article 9 of the Law on Civil Procedure,⁸³ 'the court will make a decision based on the judge's conviction, conscientious and careful assessment of each piece of evidence separately and all the evidence together'.

b) Practice

In Montenegro, situation testing is used in practice. The Protector of Human Rights and Freedoms has used the legal provision contained in the LPD to conduct situation testing in several cases.

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

a) Prohibition and definition of indirect discrimination

In Montenegro, indirect discrimination is prohibited by the LPD, through the general clause prohibiting any form of discrimination in all fields on any ground provided under Article 2, para. 1. A definition of indirect discrimination is provided by the same Law, in Article 2, para. 4:

'Indirect discrimination exists if an apparently neutral provision of a regulation or general act, criterion or practice is bringing or can bring a person or a group of persons into an unequal position in respect of another person or group of persons, on any ground referred to in paragraph 2 of this Article, unless the provision, criterion or practice are objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and if they are acceptable and proportionate in relation to the purpose to be achieved.'

The Labour Law provides that indirect discrimination is taken to occur where a specific provision, criterion or practice puts or would put an individual seeking employment or an employee in a less favourable position compared with other people because of a particular characteristic, status, orientation or belief (Article 6).

According to Article 4 of the Law on the Prohibition of Discrimination of Persons with Disabilities, discrimination based on disability is any legal or factual, direct or indirect, intentional or unintentional unequal treatment or failure to act towards a person or group of persons with disabilities compared to other persons, as well as exclusion, restriction or preference of a person compared to a person with disabilities, as a result of which the person with a disability is hindered in or denied the recognition, enjoyment or exercise of human rights and freedoms in political, educational, economic, social, cultural, sports, civil and other areas of public and private life.

b) Justification test for indirect discrimination

National law does not include articles that permit justification of indirect discrimination. With regard to the justification test for indirect discrimination, there is no available case law on testing proportionate means of achieving a legitimate aim in this respect. Furthermore, there is no data on court decisions on justification of discrimination.

⁸³ Montenegro, Law on Civil Procedure (*Zakon o parničnom postupku*) Official Gazette of Montenegro, nos. 22/04, 28/05 and 76/06.

c) Comparison in relation to age discrimination

National law does not specify how a comparison is to be made when age discrimination is determined. Discrimination based on age is determined separately in each case on the basis of the discriminatory nature of age-related treatment as a determining factor, if this treatment is not sufficiently reasonably justified and adapted to the achievement of a legitimate aim.

Discrimination based on age (over 60 years) is reported⁸⁴ by the Protector of Human Rights and Freedoms in the field of employment and social protection for people who live in rural areas, especially women. The Protector of Human Rights and Freedoms, among other responsibilities, keeps separate records of complaints submitted with regard to discrimination and collects and analyses data on cases of discrimination. In the period from 1 January to 31 December 2017, 135 cases of possible discrimination were initiated by Protector, of which five were transferred from 2016. The proceedings were completed in 128 cases and seven were transferred to 2018, since they were mostly submitted in December 2017.

The number of complaints filed cannot be a true reflection of the level of infringement of the rights of older people, especially considering that Montenegro is one of the European countries with a high index of aging because the number of people over the age of 60 compared to the total population has been increasing continuously for many years. Elderly people face a range of challenges, including poverty, access to healthcare and social services and insufficient integration into local communities.

2.3.1 Statistical evidence

a) Legal framework

In Montenegro, there are national rules permitting data collection. Statistical evidence is not covered by national law in order to establish indirect discrimination, but in theory such evidence would be permissible. Data collection is governed by the Personal Data Protection Law.⁸⁵ Personal data means any information relating to an identified or identifiable natural person (Article 9, para. 1). Under this Law, personal data may be processed only for a purpose established by law or with the prior consent of the person concerned. In addition, the Law provides that personal data may not be processed more than necessary to achieve the purpose of processing nor in a way incompatible with this purpose.⁸⁶

The Law defines personal data concerning racial or ethnic origin, political, religious or other beliefs, social origin, trade union membership, health, sexual life or sexual orientation, biometric data and the data from offences and criminal records as special categories of personal data.⁸⁷ The data belonging to any of these categories may be processed where:

- 1) the data subject has given their consent to the processing of the data;
- 2) the processing of personal data is necessary for employment in accordance with the law governing labour relations, with the need to prescribe adequate protection measures;
- 3) processing is necessary for the purpose of detecting, preventing or diagnosing an illness in the data subject or carrying out their medical treatment, as well as for the

⁸⁴ Report by the Protector of Human Rights and Freedoms, 2016.

⁸⁵ Montenegro, Personal Data Protection Law (*Zakon o zaštiti podataka o ličnosti*), *Official Gazette of Montenegro*, no. 79/08, no. 70/09 and no. 44/12.

⁸⁶ The Law defines processing of personal data as, 'any operation which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction or any other operation performed upon personal data' (Article 9).

⁸⁷ Montenegro, Personal Data Protection Law, Article 9, para. 7.

- improvement of health services, in so far as the processing is done by a health worker or another person subject to the professional duties of maintaining confidentiality;
- 4) processing is necessary to protect the life, health or interests of the data subject or of another person where the data subject is incapable of giving their consent personally, as well as in other cases provided for by law;
 - 5) the data subject has manifestly made personal data available to the public or the processing is necessary for the establishment or protection of legal interests;
 - 6) processing is carried out in the course of the activities of an association or any other non-profit-seeking body with political, religious or other aims, provided that the data relates solely to the association or other organisation and that the data are not disclosed without the consent of the data subjects.⁸⁸

General data on population are collected through the census. The last census in Montenegro was carried out in 2011 and offers *inter alia* data on national and ethnic affiliation (based on self-determination), age, sex, religion and language.

The 2011 census in Montenegro collected information on people with disabilities for the first time. As a result of efforts by NGOs, the Government Strategy for the Integration of Persons with Disabilities in Montenegro proposed the creation of a central database on people with disabilities (to be managed by the Ministry of Labour and Social Welfare) but, unfortunately, this measure has not yet been implemented.

Under the Law on State Administration, the Human Resources Management Authority is charged with monitoring the implementation of measures aimed at achieving proportional representation of national and ethnic minorities within state authorities. Thus, when applying in response to an internal announcement or an open advertisement or open competition, candidates may state national or ethnic origin in their job applications.

b) Practice

According to Article 17 of the Law on Criminal Procedure,⁸⁹ 'courts and state prosecutors shall appraise the existence or non-existence of facts on which to base their decisions at their discretion'. Evidence collected in an unlawful way is not admissible in the courts. In addition, according to Article 9 of the Law on Civil Procedure, 'the court shall decide which facts shall be considered as proved, on the basis of free evaluation of evidence. The court shall conscientiously and meticulously evaluate each individual piece of evidence and all evidence in their entirety'. In Montenegro, statistical evidence in order to establish indirect discrimination is not used in practice. Statistical evidence has not yet been used to prove discrimination; therefore, it is not possible to ascertain whether there would be any reluctance to use such evidence on the part of the courts.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Montenegro, harassment is prohibited and defined in national law. The definition of harassment is slightly more restrictive than that contained in the directives. The Labour Law and the Law on the Prohibition of Harassment at Work⁹⁰ include articles which prohibit harassment 'at work and in relation to work'.

The Labour Law differentiates between harassment as a general notion and sexual harassment and gives definitions of both. Harassment is defined as any unwanted conduct

⁸⁸ Montenegro, Personal Data Protection Law, Article 13.

⁸⁹ Montenegro, Law on Criminal Procedure (*Zakon o krivičnom postupku*), *Official Gazette of Montenegro*, nos. 57/09, 49/10, 47/14 and 02/15.

⁹⁰ Montenegro, Law on the Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), *Official Gazette of Montenegro*, no. 30/12.

related to any of the prohibited grounds, including harassment via audio and video surveillance, which takes place with the aim or effect of violating the dignity of an individual seeking employment or an employee and which creates an intimidating, hostile, degrading or offensive environment (Article 8 para 2, 3). This definition was clearly drawn up taking account of the provisions of Article 2 (3) from the two directives.

Under the Labour Law sexual harassment is understood to mean any unwanted verbal, non-verbal or physical conduct which has the aim or effect of violating the dignity of an individual seeking employment or an employee in the sphere of sexual life and which creates an intimidating, hostile, degrading, unpleasant, aggressive or offensive environment (Article 8).

The Law on the Prohibition of Discrimination purports to give wider scope to the prohibition of harassment, as it applies to areas outside employment. Under Article 7 of the Law, harassment on any of the prohibited grounds represents unwanted conduct or treatment, which has the aim or effect of violating someone's dignity, causing fear, feelings of humiliation or offence or creating a hostile or humiliating environment. Harassment is prohibited explicitly only in the field of employment. By amending the Law on the Prohibition of Discrimination in June 2017⁹¹, the definition of harassment has been improved and changed:

'Harassment of a person or group of persons on any of the grounds referred to in Article 2, paragraph 2, of this law is any unwanted conduct, including harassment through audio and video surveillance, mobile devices, social networks and the Internet, which is intended as or results from a violation of personal dignity, causing fear, a feeling of humiliation or offense, or creating a hostile, humiliating or offensive environment and is considered to be discrimination.'

Article 1 of the Law on the Prohibition of Harassment at Work specifies:

'The rights, obligations and responsibilities of employers and employees in terms of preventing abuse at work and in connection with work (hereafter: mobbing), as well as other issues of importance for the prevention of and protection against mobbing are regulated by this law.'

Article 2 of the Law on the Prohibition of Harassment at Work provides a definition of harassment as:

'any active or passive conduct at work or in relation to work towards an employee or group of employees that is repeated, which is aimed at or constitutes a violation of the dignity, reputation, personal and professional integrity of the employee and which causes fear or creates a hostile, degrading or offensive environment, worsens working conditions or leads to the isolation of employees or compels them to cancel a labour contract or other contract on their own initiative.'

It also includes encouraging or inciting others to conduct within the meaning of paragraph 1 of this article.

Article 4 of the Law on the Prohibition of Harassment at Work stipulates that any form of bullying (or 'mobbing' as it is termed in the available English translation of the law), as well as misuse of the right to protection from bullying, is forbidden.

⁹¹ Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 46/2010, 18/2014 and 42/17, Article 7.

In Montenegro, according to Article 7 of the Law on the Prohibition of Discrimination and Article 4 of the LPDPD, harassment does explicitly constitute a form of discrimination. The LPDPD does not cover prohibition of harassment.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Montenegro the employee is liable. The Law on the Prohibition of Harassment at Work⁹² prescribes that the following may be considered to be perpetrators of bullying: 'an employer in the capacity of a natural person, a responsible person engaged by the employer in the capacity of a legal entity, an employee or group of employees engaged by the employer or a third person with whom the employee or the employer have contact during the performance of tasks at the workplace' (Article 2, para. 3).

According to Article 10 of the Law, 'an employer shall be liable for the damage that a responsible person, an employee or group of employees causes to another employee through bullying, in accordance with the Law hereof. An employer who has remunerated the damage caused by persons referred to in Paragraph 1 of this Article shall be entitled to require a remuneration of paid damages from those persons'. The employer is responsible for the damage caused to another employee by a senior member of staff, employee or group of employees responsible for perpetrating bullying. The employer is responsible for paying/compensating for damages to aggrieved persons from their own resources on behalf of the responsible person or persons/employees and then requiring fee paid damage (indemnity) from those responsible for the damage incurred (senior staff member, employee or group of employees who perpetrated the bullying).⁹³

This law applies to employers and employees, as well as to people who are not employed but are engaged in professional training, students who attend practical training, volunteers, people who are engaged in certain tasks while serving a prison sentence or corrective measure, people engaged in voluntary and public works, works organised in the general interest, working promotions and competitions and any other person who is involved in work activities with an employer (Article 3, para. 1).

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Montenegro, instructions to discriminate are prohibited in national law. Instruction to discriminate is a criminal offence according to Montenegrin legislation. Article 24, para. 1, of the Criminal Code stipulates that: 'Anyone who with intent incites another to commit a criminal offence, shall be punished as if s/he had committed it himself/herself'; and in para. 2, 'Anyone who with intent incites another to commit a criminal offence which is punishable by law with a prison sentence of five years or more shall be punished for an attempted criminal offence even if the offence has not been attempted at all'.

Article 370, para. 1, of the Criminal Code establishes the prohibition of instructions to discriminate in all areas of life, while the Law on the Prohibition of Discrimination provides a definition of instructions to discriminate. The Criminal Code does not provide a definition of instructions to discriminate. Article 2 of the LPD prohibits instruction to discriminate. According to Article 2, para. 5, of this Law, 'the incitement or giving instruction to discriminate against a certain person or a group of persons on any ground referred to in paragraph 1 of this Article shall be deemed to be discrimination'. By referring to 'incitement' Montenegrin legislation goes beyond what is required by the Equality Directive, since the

⁹² According to the Law, bullying (or mobbing) is harassment at work. In addition to harassment and harassment at work, the law also mentions sexual harassment.

⁹³ Fee paid damage represents a certain amount of money demanded by the employer from those responsible for the damage incurred by the aggrieved person.

concept of 'incitement' is understood as being wider than the concept of 'instruction'. In Montenegro, according to Article 2 of the LPD and Article 4 of the LPDPD, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Montenegro, the instructor and the discriminator are liable. However, the Criminal Code, which *inter alia* criminalises racial and other discrimination, violation of the equality of citizens and violation of equality in employment, contains a general provision to the effect that anybody who incites another to commit a criminal offence is liable to the same punishment as the offender. Anyone who publicly incites violence or hatred against a group or member of a group determined on the basis of race, colour, religion, descent, national or ethnic affiliation shall be punished with imprisonment of between six months and five years (Article 370, para. 1). According to Article 2, para. 5, of the LPD, 'the incitement or giving instruction to discriminate against a certain person or a group of persons on any ground referred to in paragraph 1 of this Article shall be deemed to be discrimination'. In Montenegro, instructions explicitly constitute a form of discrimination.

There are no additional civil law provisions on instructions to discriminate in the other fields.

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

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

In Montenegro, the duty to provide reasonable accommodation in the field of employment, in accordance with Article 5 of Directive 2000/78/EC and the UNCRPD, is not provided by national law. However, the Law on Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD) provides an obligation to adapt workplaces and working operations to the needs of people with disabilities. Nevertheless, an individualised tailoring of the reasonable accommodation duty for every specific case is not provided. This obligation only applies to people with disabilities who are already employed. However, the reasonable accommodation duty in areas beyond employment has not been covered by national legislation in accordance with the UNCRPD. There are no available data when it comes to the implementation of these measures in practice, so it may be said these measures are not effective.

The Constitution guarantees special protection for people with disabilities (Article 68) but does not explicitly establish a duty to provide reasonable accommodation. Article 15, para. 1, of the LPREPD ensures that disabled people are employed under general or special conditions, in accordance with the law. The definition of 'special conditions' refers to the measures to adapt workplaces and jobs to the needs of people with disabilities, but the problem is that these measures are not individualised for each specific situation and specific person. The employment of people with disabilities under special conditions is considered to be employment with adaptations made to the job or workplace, according to the needs of the people with disabilities, as well as employment in special working organisations. Adapting a job is considered to be making adjustments to working operations, working processes and tasks in accordance with the needs of people with disabilities. Adapting workplaces means the technical and technological equipment of the workplace, capital equipment, premises and equipment, in accordance with the needs of people with disabilities. The LPDPD prescribes that, 'failure to implement measures to adapt the workplace and ensure working conditions in accordance with special regulations as well as in accordance with the laws regulating the area of labour and professional rehabilitation and employment of persons with disabilities' represents an act of discrimination against those persons.

b) Practice

Employers who employ people with disabilities, as well as people with disabilities who are self-employed, employed in a family agricultural enterprise or owners of commercial enterprises are entitled to subsidies from the state. These subsidies can be used for the purpose of reasonable accommodation and include grants for adaptations to be made to the work and working conditions of people with disabilities, loans under favourable conditions for the purchase of equipment and tools required in order to employ a person with a disability and partial coverage of the costs of personal assistants.

The Law on Mobility of Persons with Disabilities with the Assistance of Guide Dogs *inter alia* provides that people with disabilities are entitled to be accompanied by guide dogs in their workplaces.⁹⁴ According to a report by the National Employment Agency, on 31 December 2014, there were 2 193 people with disabilities, of whom 1 358 were disabled workers and 578 were categorised persons.⁹⁵ Of the total number of women, 12% had problems with performing daily activities, while this percentage for men was 10%.

If an employee with a disability cannot be assigned to such a post, the employer has a duty to provide them with other rights,⁹⁶ in accordance with the collective agreement and the law governing vocational training for people with disabilities (see below).

If an employee with a disability cannot be assigned to a suitable post nor provided with these other rights, the employer may declare them redundant, in which case the employee with a disability is entitled to severance pay equivalent to a minimum of 24 average monthly wages, if the disability resulted from injury outside work or from illness, or a minimum of 36 average monthly wages, if the disability resulted from an injury at work or an occupational disease. By way of comparison, the minimum amount of severance pay for other redundant workers is six average monthly wages (Article 94).

c) Definition of disability and non-discrimination protection

In Montenegro, national law does not provide for an individualised duty to provide reasonable accommodation. For all relevant purposes, however, the definition of disability is the same. According to Article 3 of the LPREPD, a person with a disability is someone with permanent consequences of physical, sensory or mental disorders or diseases which cannot be cured by medical treatment or rehabilitation and who faces social and other restrictions which may affect their ability to work and pursue employment, to enjoy the maintenance and advancement of employment and for whom it is not possible or for whom there are reduced opportunities for inclusion in the labour market on equal terms.

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

There are no duties to provide reasonable accommodation outside the field of employment. However, there is a general clause on the obligation for public institutions to provide special measures to ensure equality for people with disabilities, defined by Article 5 of the Law on the Prohibition of Discrimination of Persons with Disabilities (LPDPD). According to this Law, state institutions, government bodies, bodies of local self-government, public companies and other legal public authorities, as well as other legal and natural persons

⁹⁴ Montenegro, Law on Mobility of Persons with Disabilities with the Assistance of Guide Dogs (*Zakon o kretanju lica sa invaliditetom uz pomoć psa pomagača*), *Official Gazette of Montenegro*, no. 76/09.

⁹⁵ A person with a disability is someone who has been assigned the status of disabled worker according to the regulations on pension and disability insurance. A categorised person is someone with a disability who is classified in a particular category and with a particular degree of disability, in accordance with the Law on the Education of Children with Special Needs.

⁹⁶ 'Other rights' mean that the employer should accommodate the employee with disabilities in a position which corresponds with his/her capacity or provide the possibility of vocational training for another type of employment within the same enterprise.

within their jurisdiction and authority, are obliged to prepare and enforce regulations and special measures aimed at creating conditions for the realisation of equality and protection for people with disabilities who are in any way in an unequal position in relation to other people. Regulations and special measures are taken in the areas of spatial planning and construction of facilities, information, transport, education, employment, labour, health, social protection, culture, public and political activity, as well as in other areas of social life where reasons exist for their adoption or implementation in terms of the protection of people with disabilities. However, these measures are general, and the law does not explicitly prescribe the duty of reasonable accommodation outside the field of employment.

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

In Montenegro, the duty of reasonable accommodation has not been implemented in practice so far.

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

There are no duties to provide reasonable accommodation in respect of other grounds.

g) Accessibility of services, buildings and infrastructure

Article 8 of the LPDPD says that: 1) unavailability of facilities and areas in public use; and 2) denial of access to, movement within, stay and work in buildings for public use will be considered discrimination against people with disabilities in the use of facilities and areas in public use. Use of parking spaces for the parking of vehicles displaying an accessibility symbol (for persons with disabilities) by a driver whose vehicle does not display that symbol is also considered as discrimination based on disability. In addition, occupying, using or destroying furniture or accessible toilets designed for people with disabilities in public buildings and spaces and areas for public use by a person who has no disability is considered as discrimination. Although the prohibition of discrimination in the field of accessibility of services, buildings and infrastructure is strictly defined by law, the implementation of these rules is very weak in the practice.

The right to use facilities and areas in public use may be limited in accordance with the law. The 2008 Law on Spatial Planning and Construction of Buildings⁹⁷ introduced duties requiring public buildings to be constructed so as to ensure accessibility for people with disabilities (see further Section 3.2.9)

h) Accessibility of public documents

The accessibility of public documents for people with disabilities is regulated by the Law on Free Access to Information,⁹⁸ Article 23 of which provides that, 'public bodies are responsible for enabling free access to information for people with disabilities in a manner and form that corresponds to their capabilities and needs'.

However, according to Article 97, para. 3, of the Law on State Administration,⁹⁹ the Government of Montenegro adopted a Decree¹⁰⁰ on the procedure for conducting public hearings in the preparation of laws. Article 10 of this Decree prescribes that, when organising public hearings,¹⁰¹ the relevant authority (ministry) must make sure that the

⁹⁷ Montenegro, Law on Spatial Planning and Construction of Buildings (*Zakon o uređenju prostora i izgradnji objekata*), *Official Gazette of Montenegro*, no. 51/08.

⁹⁸ Montenegro, Law on Free Access to Information (*Zakon o slobodnom pristupu informacijama*), *Official Gazette of Montenegro*, no. 44/2012.

⁹⁹ Montenegro, Law on State Administration (*Zakon o državnoj upravi*), *Official Gazette of Montenegro*, no. 38/03, 22/08 and 42/11.

¹⁰⁰ This Decree was adopted by law by the Government on 2 February 2012.

¹⁰¹ Public hearings are organised for the purpose of discussing proposed legislation before its adoption in the Parliament.

venue for the hearing is accessible to people with disabilities. However, when it comes to people with hearing, speech and visual impairments, the relevant ministry must make the public discussion available in audio format or in Braille only if the draft law, which is the subject of the debate, directly concerns the rights of people with hearing, speech and visual impairments. It can be concluded that this regulation is discriminatory and not in accordance with the LPDPD, Article 12, which provides an obligation for all public institutions to enable access to information for people with disabilities in a manner and form that corresponds to their needs.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Montenegro, the following citizenship requirements must be fulfilled in order to be entitled to protection under the relevant national laws transposing the directives.

The Law on the Armed Forces of Montenegro, general conditions of admission, Article 33, paragraph 1:

'In order to be admitted to the service, a person shall fulfil the following general and special conditions. A person must be a Montenegrin citizen and may not be a citizen of any other state'.¹⁰²

The Law on Civil Servants and Employees, general terms and conditions, Article 32:

'A state authority¹⁰³ may establish an employment relationship with a person who is a Montenegrin citizen'.¹⁰⁴

A foreign national or a stateless person may establish an employment relationship with a state body as an employee, under conditions stipulated by a special law and international conventions.¹⁰⁵

The Law on the National Security Agency,¹⁰⁶ Article 27a:

'Employment with the Agency may be attained by a person who, in addition to the general requirements for employment in a state body, meets the following requirements: 1) does not have citizenship of another state.'

The conditions referred to in paragraph 1 lines 1, 2 and 3 of this Article must also be fulfilled by a person employed by the Agency as a trainee.

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

a) Protection against discrimination

In Montenegro, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination. All natural and legal persons to which Montenegrin legislation is applicable have the right to protection from discrimination, if they are discriminated against on any ground covered by Article 2, para. 2, of the LPD.

¹⁰² Montenegro, Law on the Armed Forces of Montenegro (*Zakon o Vojsci Crne Gore*), *Official Gazette of Montenegro*, nos. 88/09 of 31 December 2009, 75/10 of 21 December 2010, 40/11 of 8 August 2011, 32/14 of 30 July 2014.

¹⁰³ A state authority, in terms of this law, includes: the Office of the President of Montenegro, the Parliament of Montenegro, the Government of Montenegro, the Constitutional Court of Montenegro, the Court and State Prosecutor's Office (hereafter: state body). This law applies to employees of the Pension and Disability Fund of Montenegro, the Health Insurance Fund of Montenegro, the Employment Bureau of Montenegro, the Labour Fund and the Agency for Peaceful Settlement of Labour Disputes. This law also applies to employees in other agencies, regulatory and independent bodies, if prescribed by a special law.

¹⁰⁴ Montenegro, Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, nos. 39/11, 50/11, 66/12 and 34/14.

¹⁰⁵ Montenegro, Foreigners Law (*Zakon o strancima*), *Official Gazette of Montenegro*, no. 56/14, Articles 61-81, regulates the employment of foreign nationals and stateless persons.

¹⁰⁶ Montenegro, Law on the National Security Agency (*Zakon o Agenciji za nacionalnu bezbjednost*), *Official Gazette of Montenegro*, nos. 28/05, 86/09, 20/11, 8/15.

The provisions of the Montenegrin Constitution which govern human rights and freedoms, including the prohibition of discrimination,¹⁰⁷ do not distinguish between natural and legal persons and employ neutral terms to offer protection. Both categories are entitled to protection from discrimination. As the ultimate guardian of the human rights and freedoms set out in the Constitution, the Constitutional Court of Montenegro has made it clear that both natural and legal persons can seek protection of these rights.¹⁰⁸

The Law on the Prohibition of Discrimination explicitly provides that both natural and legal persons may seek protection from discrimination on the basis of its provisions if they feel they have been discriminated against on any of the prohibited grounds¹⁰⁹ (Article 3).

Due to its nature, the provisions of the Labour Law (Article 5) offer protection only to natural persons who are either seeking employment or are already employed.¹¹⁰

b) Liability for discrimination

In Montenegro, the personal scope of anti-discrimination law covers both natural and legal persons for the purpose of liability for discrimination.

With regard to criminal liability for discrimination, the regimes for natural and legal persons differ. Criminal liability in relation to natural persons is governed by the Criminal Code, Article 443, while liability in relation to legal persons is governed by a separate law. Under the Law on the Liability of Legal Persons for Criminal Offences,¹¹¹ a legal person can be held liable for criminal offences committed by persons acting on its behalf within the boundaries of their powers with the intention of obtaining benefits for the legal person. Liability of legal persons also exists where the action of the responsible person was in contravention of the business policy and orders of the legal person. Pursuant to Article 2 of the Law, the State of Montenegro, state and local authorities cannot be held liable for criminal offences, nor can a legal entity vested with public powers be held liable for a criminal offence committed in the performance of such powers.

With regard to civil-law liability, national law does not distinguish between natural and legal persons.

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

a) Protection against discrimination

In Montenegro, the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.

The LPD, protection from discrimination, Article 3:

'The right to protection from discrimination belongs to all natural and legal persons to which the Montenegrin legislation is applicable, if they are discriminated against on any ground referred to in Article 2, paragraph 2, of this Law. This Law shall apply to the public and private sectors.'

¹⁰⁷ Article 8 of the Constitution, *Official Gazette of the Republic of Montenegro*, 02/07.

¹⁰⁸ The Court's Instruction for Completing a Constitutional Complaint Template offers this clarification.

¹⁰⁹ Prohibited grounds are set out in Article 2, para. 2, of the Law on the Prohibition of Discrimination.

¹¹⁰ Montenegro, Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14.

¹¹¹ Montenegro, Law on the Liability of Legal Persons for Criminal Offences (*Zakon o odgovornosti pravnih lica za krivična djela*), *Official Gazette of the Republic of Montenegro*, nos. 02/07 and 13/07.

b) Liability for discrimination

In Montenegro, the personal scope of anti-discrimination law covers the private sector for the purpose of liability for discrimination.

The Law on the Liability of Legal Persons for Criminal Offences:

‘Exclusion and limitation of liability, Article 2

(1) The Republic of Montenegro (hereafter: Montenegro), state bodies and local authorities cannot be responsible for a crime.

(2) Legal entities which are legally entrusted with public authority are not responsible for criminal actions perpetrated in the exercise of these powers.’

‘The crimes for which legal entities are liable, Article 3:

Legal persons may be held liable for criminal offences from the special section of the Criminal Code and for other criminal offences prescribed by a special law, if the conditions for liability of legal persons are prescribed by this Law.’

Article 10 of the Labour Law prescribes that employees can initiate legal proceedings against employers (natural and legal persons, including the public sector) before the relevant court in cases of discrimination. This means that the public sector as employer can be liable in terms of misdemeanour liability. It covers civil and administrative procedures regarding liability for discrimination in the workplace and employment in general. The public sector bears no criminal liability for the discrimination according to the Criminal Code.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Montenegro, national legislation covering discrimination applies to all sectors of private and public employment, including contract work, self-employment, and military service and holding statutory office, in relation to the five grounds.

The Labour Law, which contains anti-discrimination provisions (Articles 5, 6, 7, 8 and 9) described above, applies to the private sector, but also to employment within state authorities, state administration and local authorities and public services, if otherwise not provided for by separate laws. The key law which governs employment-related issues in the public sector is the Law on Civil Servants and Employees.¹¹² This legislation contains only a prohibition of discrimination without further elaboration. It can therefore be concluded that anti-discrimination provisions contained in the general labour legislation also apply to this type of employment. In line with the two laws, appointed, but not elected, officeholders are also covered by these provisions. In addition, general labour legislation also covers contract work but does not cover self-employment, as it applies only to people working for employers (Article 3).

Article 22 of the LPDPD establishes that discrimination in the field of professional rehabilitation, labour and employment shall be considered as:

- 1) unemployment of persons with disabilities who have equal or better qualifications, professional or working abilities than persons without disabilities, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities;
- 2) limiting access by persons with disabilities to employment, self-employment or occupation or membership of an organisation of workers or employers;

¹¹² Montenegro, Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, nos. 39/11, 50/11, 66/12 and 34/14.

- 3) laying down more restrictive rules relating to work and working conditions, including dismissals and wages, for persons with disabilities;
- 4) non-implementation of measures for adjusting the workplace and conditions for work in accordance with special regulations, and in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities; and
- 5) prescribing different and unfavourable conditions for a person or group of persons with disabilities to exercise other rights arising from employment, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities.

The LPDPD prescribes penalty measures and a fine of EUR 10,000 to EUR 20,000 for a legal entity for a misdemeanour and violation of Article 22 of this Law. For a misdemeanour and violation of Article 22 of this Law, a responsible person in a legal entity, a responsible person in a state body, a state administration body or local self-government shall also be fined between EUR 1,500 and EUR 2,000.

The Law on the Armed Forces guarantees equal rights to people who apply to the military services, without discrimination on grounds of sex, race, language, religion, political or other opinion, ethnic or social origin, property or other status.¹¹³

The Criminal Code establishes the violation of equality in admission to employment as a criminal offence punishable by a fine or imprisonment of up to one year. This criminal offence is committed when someone knowingly violates regulations or in any other unlawful way denies or restricts a citizen's right to free admission to employment on the territory of Montenegro under equal conditions (Article 225).

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

In Montenegro, national legislation prohibits discrimination in the following areas: conditions for access to employment including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both the private and public sectors, as described in the directives.

Article 22 of the LPDPD defines that discrimination in the field of professional rehabilitation, labour and employment shall be considered as:

- 1) unemployment of persons with disabilities who have equal or better qualifications, professional or working abilities than persons without disabilities, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities;
- 2) limiting access by persons with disabilities to employment, self-employment or occupation, or membership of an organisation of workers or employers;
- 3) laying down more restrictive rules relating to work and working conditions, including dismissals and wages, for persons with disabilities;
- 4) non-implementation of measures for adjusting the workplace and conditions for work in accordance with special regulations, and in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities; and
- 5) prescribing different and unfavourable conditions for a person or group of persons with disabilities to exercise other rights arising from employment, in accordance with

¹¹³ Montenegro, Law on the Armed Forces of Montenegro (*Zakon o Vojsci Crne Gore*), *Official Gazette of Montenegro*, nos. 27/04 and 31/05, Article 52.

the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities.

The LPDPD prescribes penalty measures and a fine of EUR 10,000 to EUR 20,000 for a legal entity for a misdemeanour and violation of Article 22 of this Law. For a misdemeanour and violation of Article 22 of this Law, a responsible person in a legal entity, a responsible person in a state body, a state administration body or local self-government shall also be fined between EUR 1,500 and EUR 2,000.

The Labour Law, which provides general labour-related regulations, applies to both the public and private sectors. It defines direct and indirect discrimination and harassment as prohibited forms of conduct. Under Article 7 of this Law, direct and indirect discrimination are prohibited in relation to the requirements for access to employment and selection of candidates for the performance of a specific job.

The Law on Civil Servants and Employees governs the issues of the status of civil servants and clerical staff with regard to access to employment, work titles, rights and duties, responsibilities, assignment to posts, performance evaluation, promotion and determination of capabilities, advanced vocational training, termination of employment, protection of rights and human resources management. It serves as a *lex specialis* to the Labour Law in respect of the rights and duties of civil servants and employees.

Article 10 of this Law guarantees to all candidates, equal access to all posts, while Article 13 prohibits favouring or disfavouring civil servants and employees in relation to their rights on the basis of political, national or religious affiliation, sex or other reasons in contravention of the provisions of the Constitution and laws governing rights and freedoms. In addition, pursuant to Article 11, promotion must depend solely on professional and working abilities, quality of work and work results.

This Law defines civil servants and clerical staff as people employed by state authorities and provides that the heads of state authorities and appointed office-holders are considered to be civil servants in the exercise of specific rights (Article 2). State authorities include public administration authorities, services of the President, Parliament, Government and Constitutional Court and other state authorities. Members of Parliament and persons appointed and elected by the Parliament (government ministers, the Prime Minister, the President of the Supreme Court, the President and judges of the Constitutional Court, the Supreme State Prosecutor and state prosecutors, the Protector of Human Rights and Freedoms etc.) are not considered to be civil servants and are therefore not covered by the provisions of this Law. However, the Law on the Prohibition of Discrimination purports to offer protection from discrimination to 'all natural and legal persons to whom Montenegrin legislation applies' if they are discriminated against. This Law provides that, in addition to the forms of discrimination prohibited by the Labour Law, discrimination in employment also includes unequal pay or other type of remuneration on prohibited grounds. It goes on to say that people engaged in temporary or seasonal work or contract work, interns and other people participating on any ground in work for an employer are also entitled to protection from pay discrimination (Article 16).

Self-employment and occupation are not covered by the existing legislation. In defining employment discrimination, the Law also fails to extend this protection.

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

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

The anti-discrimination provisions of the Labour Law apply to working conditions, all employment-based rights (the right to pay is considered to be one of these rights) and dismissals (Articles 5, 6, 8, 9, 10 and 16). The Law also provides that provisions of an employment contract which constitute discrimination are considered null and void (Article 7).

The LPD provides that, in addition to the forms of discrimination prohibited by the Labour Law, discrimination in employment also includes unequal pay or other type of remuneration on prohibited grounds. It goes on to say that people engaged in temporary or seasonal work or contract work, interns and other people participating on any ground in work for an employer are also entitled to protection from pay discrimination (Article 16). Article 22 of LPDPD defines that it shall be considered to be discrimination in the field of professional rehabilitation, labour and employment if more restrictive rules relating to work and working conditions, including dismissals and wages, are laid down for persons with disabilities. However, the LPDPD refers to special laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities when it comes to the prohibition of discrimination on the ground of disability.

3.2.3.1 Occupational pensions constituting part of pay

There are no provisions in national law which explicitly prohibit discrimination in the provision of occupational pensions for workers by their employers (whether in the public or private sector). There is no regulation or case law regarding the payment of occupational pensions amounting to pay in the sense of the CJEU case law.

The Government of Montenegro adopted a Regulation on the terms and conditions and levels of wages of people serving in the Armed Forces of Montenegro.¹¹⁴ A Decree on defining jobs in the state administration in which pension insurance is calculated at an accelerated rate was adopted on 23 December 2010.¹¹⁵

There are professions which allow an earlier retirement age. Pensions calculated at an accelerated rate are provided for soldiers, police officers, miners, employees of the armed forces, the National Security Agency, the police and some other employees who, after reaching a certain age, can no longer adequately carry out their professional activity. Depending on the occupation, the increased length of service ranges from two to six months, so that the 'value' of one working year increases to 14, 16 or 18 months.

With regard to mandatory pension insurance based on individual capitalised savings, there is no normative framework for its implementation.

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

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

The Labour Law (Article 15) explicitly provides that the prohibition of direct and indirect discrimination applies to 'education, vocational training and advanced vocational training'.

¹¹⁴ Montenegro, Regulation on the terms and conditions and levels of wages of persons serving in the armed forces of Montenegro (*Uredba o bližim uslovima, načinu ostvarivanja i visini zarade i drugih primanja lica u službi u Vojsci Crne Gore*), *Official Gazette of Montenegro*, no. 66/2010, adopted 19 November 2010, entered into force 27 November 2010.

¹¹⁵ Montenegro, Decree on defining jobs in the state administration in which pension insurance is calculated at an accelerated rate (*Uredba o određivanju radnih mjesta, odnosno poslova u organima državne uprave na kojima se staz osiguranja racuna sa uvećanim trajanjem*), *Official Gazette of Montenegro*, no. 1/2011 adopted 11 January 2011, entered into force 19 November 2011.

The LPD establishes discrimination in the area of education and vocational training as a form of discrimination. Namely, Article 15 provides that discrimination in the field of education and vocational training is taken to occur if, based on the prohibited grounds, enrolment in an educational institution or university is impaired or prevented; the choice of educational programme, regardless of the level of education, is impaired or prevented; a student is expelled from an institution; attendance of classes and participation in other educational activities is impaired or denied; classification of children and students into categories is undertaken; and abuse or any other unjustified differentiation or unequal treatment takes place.

Article 21 of the LPDPD prescribes that discrimination on the ground of disability at all levels of education, shall be considered as:

- 1) preventing, restricting or impeding a person with a disability in choosing an educational programme and enrolling in, accessing and staying in an educational institution, in accordance with his or her abilities;
- 2) preventing, restricting or impeding a person with a disability in teaching and knowledge testing, as well as participation in other educational activities, including participation in extra-curricular activities and competitions;
- 3) non-implementation of special measures for the establishment and provision of individualised support for the unhindered monitoring of teaching and assessment of knowledge, as well as participation in other educational activities, including participation in extra-curricular activities and competitions, in accordance with the regulations in the field of education and upbringing;
- 4) exclusion of persons with disabilities from the educational institution when, in the same or similar situation, their peers are not excluded.

According to the Law on Vocational Education¹¹⁶, vocational education is accessible to all persons and cannot be directly or indirectly restricted on grounds of: sex, race, colour, language, religion, marital status, political or other opinion, national, ethnic or other origin, property, disability, or another similar ground, position or circumstances, in accordance with a special law (Law on the Prohibition of Discrimination).

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

In Montenegro, national legislation does not prohibit discrimination in the following areas: membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment, although national law prohibits discrimination in general with regard to membership of groups or organisations.

Montenegrin national law does not recognise membership of professional workers' organisations as a ground of potential discrimination, although in Article 2 of the LPD, 'belonging to the other organisation' can be considered as a ground of discrimination. Article 14 of the Law on the Prohibition of Discrimination, which was changed in 2017, establishes that, 'discrimination of persons or groups of persons compared to other persons is prohibited on grounds of political conviction or affiliation or non-affiliation to a political, trade union or other organisation'

Article 22 of the LPDPD states that discrimination in the field of professional rehabilitation, labour and employment shall be considered as limiting access for people with disabilities

¹¹⁶ Montenegro, Law on Vocational Education (*Zakon o strucnom obrazovanju*), *Official Gazette*, nos.064/02, 049/07, 045/10, 039/13, 047/17, Article 2b.

to employment, self-employment or occupation or membership of an organisation of workers or employers.

The Labour Law (Article 5) explicitly lists membership of political and trade union organisations as one of the prohibited grounds of discrimination. The Law also provides that the employer is prohibited from putting an employee in a more or less favourable position due to their membership of a trade union or their trade union activities.

When defining the scope of its anti-discrimination provisions, the Labour Law fails to extend protection in relation to membership of and involvement in organisations of workers or employers and organisations whose members carry on a particular profession, including the benefits provided for by such organisations. No other laws contain provisions to the effect of Article 3 (1) (d) of the Employment Equality Directive. Article 2 of the Law on the Prohibition of Discrimination provides a general prohibition of discrimination with regard to membership of groups or organisations, while Article 14 prescribes prohibition of discrimination on grounds of political conviction, or affiliation or non-affiliation to a political, trade union or other organisation.

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

In Montenegro, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare, as formulated in the Racial Equality Directive. Article 2 of the Law on the Prohibition of Discrimination prohibits any form of discrimination, on any ground. Article 3 of this Law provides that all natural and legal persons to whom Montenegrin legislation is applicable have the right to protection from discrimination, if they are discriminated against on any ground referred to in Article 2, para. 2.

The Constitution defines Montenegro as a social justice state, provides that social insurance for employees is mandatory and that the state is under a duty to provide social security to people who are unable to work and cannot support themselves (Article 67). The Constitution also provides that everyone is entitled to healthcare, and children, pregnant women, elderly people and people with disabilities are entitled to healthcare financed from public revenues, if they do not exercise this right on any other grounds (Article 69).

The Law on Prohibition of Discrimination of Persons with Disabilities sets out in Article 24 a definition of discrimination in the area of social and child protection and adequate living standards. Discrimination based on disability in the field of social and child protection and adequate living standards is considered to be:

- 1) refusal, restriction or hindrance of the provision of social and child protection to a child or adult with disabilities;
- 2) setting of unfavourable conditions for the provision of social and child protection to a child or adult with disabilities compared with the conditions under which social and child protection is provided to other users; and
- 3) preventing, limiting or complicating the exercise of the right to social housing in a local community by choice for a person or group of persons with disabilities.

Discrimination based on disability is considered to be a limitation on the right to independent living and community life according to Article 17 of the LPDPD:

- 1) by restricting the choice of place of residence for a person with disabilities as well as support for life in the community, in accordance with the regulations governing social and child protection;
- 2) non-implementation of special measures for establishing and providing support for life in the community for persons with disabilities, and

- 3) denying support for living in the community for persons with disabilities when it is objectively determined that support is necessary for independent living by persons with disabilities.

The rights regarding social and child protection are governed by the Law on Social and Child Protection.¹¹⁷ Article 2 of this Law provides that all Montenegrin citizens who are domiciled in the country are entitled to these rights and that, among others, people with disabilities and elderly people enjoy special protection. Pursuant to Article 5 of this Law, citizens are equal in their exercise of social and child protection rights, regardless of ethnicity, race, sex, language, religion, social origin and other similar characteristics. The Law also provides that one of the criteria for the establishment of the network of social and child protection institutions is the creation of equal conditions for all beneficiaries (Article 68).

The Law on Social and Child Protection envisages basic principles of social and child protection, such as:

'2) prohibition of discrimination of users of social protection or welfare based on race, gender, age, ethnicity, social background, sexual orientation, religion, political, trade union or other affiliation, economic status, culture, language, disability, nature of social exclusion, membership of a particular social group or other personal characteristics.'

The Law on Healthcare¹¹⁸ lists among its aims the creation of conditions to ensure availability of healthcare for all citizens of Montenegro (Article 2). It also provides that citizens are equal in their exercise of health protection rights, regardless of ethnicity, race, sex, language, religion, education, social origin, property and personal characteristics (Article 4). The principle of equality is further underlined in Article 18, which provides that citizens are entitled to equal treatment in healthcare and equal content thereof. Article 23 of the LPDPD prescribes that discrimination based on disability in the field of healthcare in terms of the regulations governing healthcare and health insurance is considered to be:

- 1) non-implementation of healthcare measures for early detection, treatment, habilitation and rehabilitation of developmental disabilities in order to reduce the degree of disability;
- 2) non-implementation of healthcare measures for early detection of a disease that can cause disability and timely treatment in order to prevent disability or reduce the degree of disability;
- 3) refusal to provide healthcare and rehabilitation to a person or group of persons with disabilities;
- 4) preventing, limiting or impeding the provision of healthcare and rehabilitation to a person or group of persons with disabilities;
- 5) establishing special conditions for people with disabilities in terms of years of life when providing healthcare and rehabilitation;
- 6) providing healthcare and rehabilitation to a person or group of persons with disabilities under conditions not required for other persons;
- 7) untimely provision of healthcare and rehabilitation to a person with disabilities, even though the person requested and fulfilled the conditions for timely provision of healthcare, as well as giving priority in providing healthcare and rehabilitation to other persons in relation to persons with disabilities;
- 8) denial, restriction and untimely provision of information on the established health condition, undertaken or intended measures of treatment and rehabilitation of persons with disabilities;

¹¹⁷ Montenegro, Law on Social and Child Protection (*Zakon o socijalnoj i dječjoj zaštiti*), *Official Gazette of Montenegro*, nos. 78/05, 27/13 and 01/15.

¹¹⁸ Montenegro, Law on Healthcare (*Zakon o zdravstvenoj zaštiti*), *Official Gazette of the Republic of Montenegro*, nos. 39/2004 and 14/2010.

- 9) performing surgery or other medical treatment without the written consent of a patient with a disability;
- 10) denying or restricting the right to health and life insurance to a person or group of persons with disabilities if these rights are not denied or are not restricted to other persons.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

Montenegrin law does not rely on the exception in Article 3.3 of the Employment Equality Directive 2000/78/EC.

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

In Montenegro, national legislation prohibits discrimination in relation to social and child protection on the following grounds: race, gender, age, national affiliation, social origin, sexual orientation, religion, political, trade union or other affiliation, property, culture, language, disability, the nature of social exclusion, belonging to a particular social group or other personal characteristic (Article 7, para. 2, of the Law on Social and Child Protection).

The Law on Social and Child Protection covers both social protection and social advantages. Articles 21 and 32-42 cover social advantages. According to Article 39 a municipality may, depending on material resources, provide material benefits in the area of social protection, such as: one-off assistance; subsidies for the payment of utility services provided by public companies established by municipalities; and other material benefits in the area of social protection.

According to Article 24 of the LPDPD, discrimination based on disability in the field of social and child protection and adequate living standards in terms of the regulations governing social and child protection is considered to be:

- 1) refusal, restriction or hindrance of the provision of social and child protection to a child or adult with disabilities;
- 2) setting of unfavourable conditions for social and child protection to a child or adult with disabilities compared with the conditions under which social and child protection is provided to other users;
- 3) preventing, limiting or complicating the exercise of the right to social housing in a local community by choice for a person or group of persons with disabilities.

According to Article 14 of the LPDPD, discrimination based on disability in the area of the provision of public and private goods and services shall be considered to be:

- 1) refusing, preventing, limiting or impeding the provision of goods and services;
- 2) preventing, limiting or impeding the provision of goods and services by not respecting the principles of universal design, unless the provision of goods and services would endanger the life or health of a person with disabilities or another person;
- 3) providing of goods and services under different and less favourable conditions than those under which the goods and services are provided to other users, unless the provision of goods and services would endanger the life or health of a person with disabilities or another person; and
- 4) intentionally delaying or postponing provision of goods and services, although the person or group of persons with disabilities applied for and met the requirements for timely provision of goods and services before other persons; and
- 5) increasing the price of public and private goods and services due to incremental costs directly arising from the provision of public and private goods and services to a person or group of persons with disabilities.

Specific benefits for people with disabilities are provided for by the Law on Travel Benefits for Persons with Disabilities.¹¹⁹ Under Article 7 of this Law, people with disabilities, people in receipt of carers' allowance and children in receipt of assistance for children and young people with special needs, as well as people accompanying these individuals, are entitled to a refund of the costs of 12 journeys by train or road each year. According to Article 4 of this Law, this right is enjoyed by Montenegrin citizens and foreign nationals with temporary or permanent residence in Montenegro. Misdemeanour liability is provided for by this Law (Article 25) for public bodies which approve travel benefits contrary to the law. Indirectly, this provision refers to potential discrimination that might occur if a public body acts contrary to the law.

Benefits provided by private actors fall outside the scope of the above provisions. Such benefits are not prohibited, which means that they are permitted.¹²⁰ In practice they are mainly granted as the result of agreements between the commercial sector and organisations representing the interests of specific groups (for instance, agreements between private companies and organisations of people with disabilities regarding access to leisure facilities). The Law on the Prohibition of Discrimination is silent on this issue but, given the fact that: a) its scope is not limited and b) it offers protection against discriminatory treatment by authorities and private persons (legal and natural), discrimination in this area is likely to be unlawful under its provisions.

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

In Montenegro, national legislation prohibits discrimination in the field of education. However, faith schools are not considered part of the education system of Montenegro and are therefore not covered by this legislation. The Law on the Prohibition of Discrimination explicitly prohibits discrimination in education but fails to mention that it applies to this type of school. Relations between faith-based and state institutions, including educational ones, have not been regulated appropriately and harmonised with international law and standards, including the Racial Equality Directive.

The Constitution of Montenegro guarantees the right to schooling under equal conditions (Article 75). The field of education is regulated by a set of laws, which includes the General Law on Education, the Law on Preschool Education, the Law on Primary Education, the Law on Grammar and High Schools, the Law on Vocational Education and the Law on Higher Education, as well as the Law on the Education of Children with Special Needs.¹²¹ The Law on the Prohibition of Discrimination prohibits discrimination in the field of education and vocational training (Article 15).

Article 21 of the LPDPD prescribes that discrimination on the ground of disability at all levels of education, shall be considered to be:

¹¹⁹ Law on Travel Benefits for Persons with Disabilities (*Zakon o povlastici na putovanje za lica sa invaliditetom*), *Official Gazette of Montenegro*, nos. 80/08, 40/11 and 03/15.

¹²⁰ Under Article 10 of the Constitution, anything which is not prohibited by the Constitution or law is permitted.

¹²¹ Montenegro, General Law on Education (*Opšti zakon o obrazovanju i vaspitanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 31/05, 49/07, 4/08, 21/09, 45/10, 40/11, 45/11, 36/13, 39/13 and 44/13; Montenegro, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02 and 49/07, 80/10 and 40/11; Montenegro, Law on Primary Education (*Zakon o osnovnom obrazovanju i vaspitanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 49/07, 45/10 and 39/13; Law on Grammar and High Schools (*Zakon o gimnaziji*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 49/07, 45/10 and 39/13; Law on Vocational Education (*Zakon o stručnom obrazovanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 49/07, 45/10 and 39/13; Law on Higher Education (*Zakon o visokom obrazovanju*), *Official Gazette of the Republic of Montenegro*, nos. 44/14 and 52/14; Law on Education of Children with Special Needs (*Zakon o obrazovanju djece sa posebnim obrazovnim potrebama*), *Official Gazette of the Republic of Montenegro*, nos. 80/04 and 45/10.

- 1) preventing, restricting or impeding a person with a disability in choosing an educational programme and enrolling in, accessing and staying in an educational institution, in accordance with his or her abilities;
- 2) preventing, restricting or impeding a person with a disability in teaching and knowledge testing, as well as participation in other educational activities, including participation in extra-curricular activities and competitions;
- 3) non-implementation of special measures for the establishment and provision of individualised support for unhindered monitoring of teaching and assessment of knowledge, as well as participation in other educational activities, including participation in extra-curricular activities and competitions, in accordance with the regulations in the field of education; and
- 4) exclusion of persons with disabilities from the educational institution when, in a same or similar situation, their peers are not excluded.

The General Law on Education provides that Montenegrin citizens are equal in the exercise of the right to education regardless of their ethnic origin, race, sex, language, religion, social origin or other personal characteristics (Article 2). It also provides that one of the tasks of the principals of educational institutions is to ensure equality among students in the exercise of their right to education. The only other law in the area of education which contains an explicit prohibition of discrimination is the Law on Higher Education. Under Article 7 of this Law, discrimination in the exercise of the right to higher education is prohibited. The list of explicitly mentioned grounds of discrimination includes sex, race, marital status, colour, language, religion, political or other opinion, ethnic origin, membership of a national community, property and disability. However, this is an open-ended provision which also prohibits discrimination on other similar grounds, positions or circumstances.

The Constitution of Montenegro guarantees schooling for minorities in their native languages in state-run establishments. It also provides that school curricula include history and culture of minority communities and other ethnic communities. The Law on Minority Rights and Freedoms also provides for this right. However, to date, only Albanians have been able to benefit from education in their native language. Children belonging to the Croatian minority attend classes in the Croatian language in schools in Tivat and Kotor, organised on the basis of an agreement between the Ministry of Education of Croatia and the Ministry of Education and Sports of Montenegro.

With regard to the education of Roma, all levels of the education system, from pre-school to university, are formally accessible to the Roma,¹²² Ashkali and Egyptian (RAE) populations. However, the lack of implementation of legally binding instruments, such as the Framework Convention for the Protection of National Minorities¹²³ and the European Charter for Regional or Minority Languages,¹²⁴ especially regarding education in the mother tongue, remains the main cause of social exclusion of Roma.

The Ministry of Education and civil society organisations (CSOs) have continuously undertaken significant efforts to prevent school drop-out by employing educational mediators. In the 2017/18 school year, 190 preschool Roma and Egyptian children were enrolled. The number of Roma and Egyptian pupils in regular primary education during the 2017/2018 school year was 1 860 which makes up 2.74% of the total number of enrolled children in primary schools in Montenegro. Of this number, 263 students were enrolled in the first grade of primary school.

When it comes to resource centres for children with special needs, the data are as follows: six students are involved in primary education, and 10 students in secondary education.

¹²² 'Roma' includes all the members of ethnic groups which fled from Kosovo, including Ashkali and Egyptians (RAE).

¹²³ Montenegro ratified the Framework Convention for the Protection of National Minorities in 2006.

¹²⁴ Montenegro ratified the European Charter for Regional or Minority Languages in 2005.

Drop-out rates have significantly decreased, although the educational achievements of the children are still poor. In the 2017/18 school year, 142 Roma / Egyptian students were enrolled in secondary schools (30 students more than school year 2016/17), which represents 0.51% of the total number of children enrolled in secondary schools in Montenegro. Of these, 66 students were enrolled in the first grade of high school. The situation is the worst with regard to high school education. The reasons for this are manifold and include lack of knowledge of the official language, lack of Roma teachers, low level of awareness among Roma about the importance of education and their inability to cover education-related expenses. At the faculties in Montenegro, in the 2017/18 academic year 27 Roma and Egyptian were studying, of whom seven students were enrolled at the beginning of the academic year.¹²⁵

Private schools are covered by education legislation. However, faith schools are not considered part of the education system of Montenegro and are therefore not covered by this legislation. Consequently, faith schools are not funded from public resources. Relations between faith-based and state institutions, including educational ones, have not been regulated appropriately and harmonised with international law and standards, including the Racial Equality Directive. The Law on the Prohibition of Discrimination explicitly prohibits discrimination in education but fails to mention that it applies to this type of school.¹²⁶

The Government of Montenegro and the Ministry of Education have not developed any programmes for the acceptance and validation of educational qualifications of migrants or for their continuing education. The rules of procedure within the Ministry of Education for the validation of qualifications are the same for all foreigners and citizens who have completed their education abroad.

During the initial period of the migration flows affecting Montenegro, the functionality of the asylum system was put at risk by a lack of specialised human resources and technical capacities, as well as by the absence of special mechanisms for the local integration of people with refugee status. According to the legal framework, migrants are equally entitled to protection from discrimination as Montenegrin citizens. In Montenegro, national legislation includes education as formulated in the Racial Equality Directive.

The Refugee Management Bureau provides assistance to asylum seekers and migrants in exercising the right to social protection, healthcare, education, humanitarian aid, legal aid, work and other legally prescribed rights. The Bureau supervises the Centre for Asylum Seekers where accommodation for women, families and unaccompanied minors is provided. Additional care is provided by the employees of the Centre (psycho-social and educational), as well as organised occupational therapy: jewellery-making workshop, classes in the Montenegrin language and state structures, history and culture, and sessions on combating substance and alcohol misuse in co-operation with the NGO sector. In addition, the Centre has a well-equipped playroom for preschool children, sports facilities and a library.

There is no special law regulating access by migrants to the education system in Montenegro, but the General Law on Education, as well as a range of other laws on preschool, school and adult education, sets out the possibilities for accessing education for this population. The National Strategy for Integrated Migration Management 2017-2020 with the Action Plan for 2017 is the key instrument for implementing measures to facilitate access by migrants to their economic, social and education rights. However, there are no data on the enrolment of migrant children in state schools in Montenegro.

¹²⁵ Montenegro, Report on implementing Strategy for Social Inclusion of Roma and Egyptians, 2017 (*Izvjestaj o sprovođenju Strategije za socijalnu inkluziju Roma i Egipćana, 2017*), Ministry for Human and Minority Rights, Government of Montenegro, available at: www.mmp.gov.me/biblioteka/izvjestaji.

¹²⁶ No data are available on the numbers of students in these schools.

a) Pupils with disabilities

In Montenegro, the general approach to education for pupils with disabilities is problematic. The implementation of the legal framework regarding education for pupils with disabilities is not satisfactory, although the framework for inclusive education has improved over the last three years. During 2014 and 2015, a legal framework was established to cover the work of teaching assistants for people with disabilities. Through a public works programme, 270 teaching assistants were hired by the National Employment Agency for the 2017 school year, to support inclusive education for children with disabilities. At the same time 217 personal assistants¹²⁷ were employed to provide social support in institutions, day care centres and people's homes.

Previously, teaching assistants for pupils with disabilities were recruited through the National Employment Agency through a public work programme. However, starting from January 2018, the role of teaching assistant has been systemised and approved by the Ministry of Education so a person interested in becoming a teaching assistant must have the lowest level of secondary education, the fourth degree and a certificate obtained after completing a programme of training for teaching assistants. The teaching assistant's duties are to help children with movement and spatial orientation, and they must know how to use didactic techniques. Assistance is also expected for the provision of support to a child with special educational needs on the basis of instruction from the teacher in relation to writing, counting, handling of tools, writing a response and turning pages.

The General Law on Education, the Law on Primary Education and the Law on Grammar and High Schools contain provisions on inclusive education for pupils with disabilities. However, the stereotypes and prejudices of other children's parents often mean that additional effort is required on the part of teachers and other staff in schools.

Inclusive education for children with disabilities is a relatively new concept in Montenegro. Its implementation was initiated during the 2003/04 school year by the then Ministry of Education and Science with the support of UNICEF and Save the Children. In 2004, the Law on the Education of Children with Special Needs¹²⁸ was passed to replace the 1992 Law on Special Education. Under the latter law, children with disabilities were educated exclusively in special institutions, schools and classes. The Law on the Education of Children with Special Needs created a legal basis for the inclusion of children with disabilities in the mainstream system.

The Law defines children with special needs as children with physical, sensory or mental impairments; behavioural problems; severe chronic illnesses; emotional disorders; combined disabilities; children with long-term illnesses and other children with learning disabilities (Article 4). Under this Law, the education of these children is carried out either in: a) mainstream pre-school establishments and schools, with the use of technical aids and additional professional assistance, if required; b) special groups or classes within mainstream schools with joint classes for some subjects or extracurricular activities with other students or in special institutions with joint classes for some subjects with peers from neighbouring schools; c) special institutions, if children cannot be educated in school because of the assistance they require and the fact that their education and rehabilitation are closely intertwined; and d) at home.

Regardless of the type of education, schools and institutions have a duty to develop an individual education plan for each child with special needs, in cooperation with their parents. The decision on the referral of a child to a specific type of education is made by municipal bodies in charge of education issues on the basis of a proposal by a Children's

¹²⁷ National Employment Agency, Decision on reallocation of funds for engaging personal assistants in 2017, www.zzzcg.me/wp-content/uploads/2017/08/Odluka-Personalni-asistent.pdf.

¹²⁸ Montenegro, Law on Education of Children with Special Needs (*Zakon o obrazovanju djece sa posebnim obrazovnim potrebama*), *Official Gazette of the Republic of Montenegro*, nos. 80/04 and 45/10.

Orientation Commission, made up of a paediatrician, doctors specialising in the relevant area, a psychologist, a pedagogue, a disability specialist and a social worker. Parents and teachers are allowed to take part in the work of the commission. The commission performs an assessment of children's abilities and refers them to the appropriate educational institutions which then develop an individual education programme for each child. The schooling of children with special needs is financed from the state budget and the policy framework was enhanced in 2008 with the adoption of the Government Strategy on Inclusive Education.

Nevertheless, the exclusion of children with learning disabilities from mainstream education continues to be a problem. According to some estimates, the proportion of children with learning disabilities who are included in the regular school system is 2-5%. There are no official data, however, as the Ministry of Education and Sports keeps records only on children who are included in either mainstream or special education, but not on children who receive neither type of education (according to the Strategy for the Integration of Persons with Disabilities, p. 27).¹²⁹

Inter-sectoral cooperation is insufficiently developed to eliminate and neutralise secondary sources of deprivation and create equal opportunities for each child (early diagnosis, intervention, psychological and social support for the family, stable socio-economic situation, etc.). There are only a few centres for children with special needs and with specialised experts. Cooperation and information-sharing by kindergartens, primary schools and resource centres is inadequate to enhance children's progress.

The Ministry of Education should update the database on children with special educational needs based on the decision on orientation.¹³⁰ At the same time, data collection is performed by the Montenegrin Education Information System, based on several criteria: disability, preparing individually tailored educational programmes (IROP)¹³¹ and the decision on orientation. Comparison data indicate that a number of children have not gone through the orientation process. Potential reasons for the poor flow of information on the level of early detection and intervention by the education system are: lack of information, resistance from parents, lack of proper recording in schools and lack of support for parents when they need to choose an orientation for their children. Educational institutions develop individually tailored educational programmes (IROP) for every child with special educational needs, using the recommendations of the Children's Orientation Commission.

Teachers respond differently to their work tasks. Some teachers perceive it as imperative to fulfil standards and expected knowledge outcomes. They do not have sufficient confidence in the development and implementation of the IROP, which forms the backbone of working with children with special educational needs. They perceive their work as an administrative duty, without understanding their mandate and the possibilities for developments and improvements. Their position gives them autonomy to work on improving the programmes to adapt them to the capabilities and needs of the children. However, this possibility is not used to full capacity. There is a need to ensure better teamwork at the school level, primarily among teachers and professional services (psychologists, teachers and special education teachers), in order to competently respond to the needs of these children. It is essential that teachers are trained to have specific knowledge of certain disabilities.

¹²⁹ Strategy for the Integration of Persons with Disabilities 2008-2016, (*Strategija za integraciju osoba sa invaliditetom 2008-2016*).

¹³⁰ On the basis of a Commission proposal, the local government body in charge of educational affairs makes a decision on the placement of children with special educational needs in the appropriate educational programme. This decision on orientation includes a period (which may not be longer than one year), during which the general educational institutions monitor the achievements and progress of the child to check that they have the appropriate learning pathways, inputs, additional help and support, and that the objectives for individual development and educational programmes are being realised.

¹³¹ Individually tailored educational programme (*Individualno Razvojno Obrazovni Program, IROP*).

There are a number of professional programmes for teachers' professional development, but only a small number of training courses have taken place recently. Schools show insufficient initiative and are not autonomous in the application of inclusive school policies. Generally speaking, architectural barriers are not removed and other adjustments in terms of accessibility are not undertaken.

It is important to improve the capacities of schools with special classes. Resource centres should have technical and advisory support and implement employee training courses. The services of mobile teams in schools should be more comprehensive, more accurately defined, with a record of work and types of support for children and teachers.

Teachers in secondary schools require additional knowledge (in particular in relation to practical classes) and support in their work. There should be cooperation between secondary schools and the labour market, in order to establish continuous monitoring of students with special educational needs and their professional orientation. Teachers are not developing sufficient qualifications to meet the needs of these students. There is a lack of clarity in relation to educational modules (packages of knowledge, skills and competences), ways of reorganising school programmes (reducing the number of subjects in schools, for example) and adjustments to practical training, evaluation and verification.

Support for pupils in the form of assistance in teaching is not fully defined and standardised. A more active role must be taken by stakeholders (especially teachers) in school organisation and monitoring the implementation of this support. Furthermore, a sustainable model of financing is needed. The system of social and child protection should promote the education of children with special educational needs within the regular system.

b) Trends and patterns regarding Roma pupils

In Montenegro, no specific patterns exist regarding Roma pupils in education, such as segregation. There was a trend in Podgorica from 1999 to enrol children from Konik Camp into the local segregated¹³² Božidar Vuković Podgoričanin branch school. That was the only case of a segregated school in Montenegro. Although the UNESCO Convention against Discrimination in Education and the Convention on the Rights of the Child have been ratified, this has not helped to improve the situation, a fact due to ignorance on the part of the authorities which should implement them.

The Ministry of Education continuously implements activities aimed at dealing with specific issues in education regarding Roma pupils, such as segregation in Podgorica. As part of the desegregation activities at Božidar Vuković Podgoričanin school, from 2012 Roma parents have not enrolled their children in the part of the town where they live, but at city schools. The aim is to close the segregated Božidar Vuković Podgoričanin branch school, which is located at the Konik settlement. Thus, at the beginning of each school year, there are four classes fewer in the segregated branch school than in the previous school year.

Thanks to a programme of the Ministry of Education, the activities of the project Support for the Integration and Voluntary Return of I/DPs, the residents of Konik Camp, and the work of the drop-out prevention commission, the 2016/17 school year saw a new school involved in the project. There are now seven city schools that support the process of desegregation in Podgorica: Božidar Vuković Podgoričanin, Marko Miljanov, 21st of May, Savo Pejanović, Vladimir Nazor, Vuk Karadžić and Oktoih. In total 319 Roma children were enrolled in Podgorica in the 2016/17 school year. All these children are aged between 5½ and 10 years, i.e. they are not able to travel to school unaccompanied. Children attend classes either in the morning or afternoon shifts, regularly attending classes and

¹³² Segregation is any action, activity or failure to perform an activity, whereby forced or systemic separation or differentiation of people is carried out on any of the grounds contained in paragraph 2 of Article 2 of this Law (Article 9, Law on the Prohibition of Discrimination).

participating in after-school activities together with their siblings. The segregated school was finally closed in June 2016.

With regard to higher and university education, students are entitled (through the Roma educational programme) to select a mentor to help them to achieve better results in class and in their exams.

The Government of Montenegro and the Ministry of Education generally pay insufficient attention to the area of early years and primary education. Only 53% of children go to kindergarten, which triggers other social issues such as a high rate of unemployment among women who have to look after children and lower educational achievement in primary schools among the children who do not attend kindergarten.

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

In Montenegro, national legislation does not prohibit discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

The Law on Consumer Protection provides that the consumer's right to public services includes the right to use such services under equal conditions, 'if technically feasible, without discrimination' (Article 28).

Public services include the sale of electric power, gas, heat and water, as well as telecommunications, postal and similar services. The Law on Consumer Protection stipulates the conditions for providing public services (Article 29), as well as the standard and quality of public service provision (Article 30).

The Law on the Prohibition of Discrimination prohibits discrimination in public buildings and spaces as well as with regard to the provision of goods and services available both privately and publicly (Article 10). Article 11 of the LPD prohibits discrimination in the area of the supply of public and private goods and services on any ground referred to in Article 2, para. 2, of the Law. The definition of this type of discrimination covers preventing the supply of public and private goods and services or making it difficult, refusal to supply public and private goods and services, making the supply of goods and services conditional on requirements not applied to other people and intentional delay or deferral with regard to the supply of goods and services (Article 11). The LPD does not prohibit discrimination in the area of access to public and private goods and services.

According to Article 14 of the LPDPD, discrimination on the ground of disability in the provision of public and private goods and services shall be considered to be:

- 1) refusing, preventing, limiting or aggravating the provision of goods and services;
- 2) preventing, limiting or impeding the provision of goods and services by disregarding the principles of universal design, unless the provision of goods and services would endanger the life or health of persons with disabilities or other persons;
- 3) the provision of goods and services under different and unfavourable conditions compared to those under which goods and services are provided to other users, unless the provision of goods and services would endanger the life or health of persons with disabilities or other persons;
- 4) deliberately delaying or delaying the provision of goods and services, although a person or group of persons with disabilities has requested and fulfilled the conditions for timely provision of goods and services to other persons; and
- 5) increasing the price of public and private goods and services due to increased costs directly resulting from the provision of public and private goods and services to a person or group of persons with disabilities.

According to Article 26 of the LPDPD, the inaccessibility of cultural goods and activities for a person or group of persons with disabilities, denying, limiting or impeding a person or group of persons with disabilities from performing cultural and artistic work, failing to implement regulations or failing to take special measures by bodies referred to in Article 5, paragraph 1, of this Law for encouraging the development and use of the cultural, artistic and intellectual potential of persons or groups of persons with disabilities, in accordance with the regulations governing the area of culture, shall be considered to be discrimination based on disability. Discrimination as referred to in paragraph 1 of this Article shall also be considered to be the non-recognition of cultural and linguistic identity by general or individual legal act for a person or group of persons with disabilities or failing to take and failing to implement measures to attain such identity, within the meaning of regulations governing the area of culture. Article 27 of the LPDPD prescribes that discrimination based on disability in the area of sports, recreation and leisure activities shall be considered to be:

- 1) preventing, limiting or impeding participation in sports and recreational activities as well as other leisure activities for a person or group of persons with disabilities;
- 2) failing to implement regulations and failing to take special measures referred to in Article 5, paragraph 1, of this Law to secure access to sports and recreational as well as other leisure activities for a person or group of persons with disabilities;
- 3) failing to implement regulations and failing to take special measures to provide accessibility of conditions for participation in play for a child or group of children with disabilities, as well as denying and limiting that right, unless participation in these activities would endanger the life or health of a child with disabilities or another person.

Key measures in relation to the social inclusion of people with disabilities as defined by laws and strategies are related to the removal of barriers that hinder access to spaces in public use, buildings, transportation and other infrastructural facilities. Unfortunately, the current situation in terms of accessibility for this population is very far from satisfactory. Although Article 8 of the LPDPD strictly defines the prohibition of discrimination in the field of accessibility of services, buildings and infrastructure, the implementation of these rules is very weak in practice.

The availability of services and information, access to public goods, public transport and other services provided equally to all users is a crucial condition in protecting the rights of persons with disabilities. There are some examples of good practice when it comes to access to public buildings for people with disabilities. In March 2016, after an intensive public campaign lasting several years and conducted by the Association of Youth with Disabilities, the Parliament of Montenegro finally installed the first ramp for people with disabilities. Although there were doubts that the Law on Spatial Planning and Construction of Buildings, which was enacted in 2008 and which precisely defines this area, would ever come into effect, the installation of the ramp in the Parliament building laid this concern to rest. Access ramps must still be completed for the remaining 12 facilities involved in the government project. Moreover, deadlines for adapting these facilities have not been respected; only one facility in public use – Berane Health Centre – has now been adapted for people with disabilities.

On 16 October 2017, the Parliament of Montenegro adopted the Services Act.¹³³ The Act prohibits discrimination in the issuing of permits for the provision of services (Article 12) and the selection of candidates (Article 15). The Law regulates the right to carry out economic activities and the freedom to provide services in Montenegro. The Law would apply from the day of Montenegro's accession to membership of the EU, coinciding with the planned delayed implementation of certain provisions for accession to the European Union (Article 8, paras. 2, 3 and 4; Article 9, paras. 2, 3, 4 and 5; Article 10; Article 13,

¹³³ Montenegro, Services Act (*Zakon o uslugama*), *Official Gazette of Montenegro*, no. 071/17.

paras. 1 and 2; Article 14, paras. 2, 3 and 4; Article 16, paras. 1, 2, 4, 5 and 6; Article 17; Article 18; Article 19; Article 20; Article 21; Article 22; Article 24; Article 25; Article 26, paras. 3 and 4; Article 27; Article 28; Article 29, paras. 1 and 4; Article 30; Article 31; Article 32; Article 33; Article 34; Article 35; Article 36; and Article 38, para. 1, point b and c). In order to ensure the full application of the Services Act, the competent authorities are obliged to amend about 60 domestic legal acts as set out in the Action Plan for the transposition of the Services Directive adopted in June 2015 for the period 2015-2018.

3.2.9.1 Distinction between goods and services available publicly or privately

Montenegro does not distinguish between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association).

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

In Montenegro, national legislation does not prohibit discrimination as formulated in the Racial Equality Directive. It does not prohibit discrimination in housing in the sense of equal access to housing. There is no major anti-discrimination case-law in the field of housing, where migrants are involved. However, the law recognises segregation as a special form of discrimination and prohibits it in the Law on the Prohibition of Discrimination. Article 9 of the LPD prohibits segregation on several grounds. Segregation shall also be considered as discrimination in the sense of Article 2 of this Law:

‘Discrimination is any legal or actual, direct or indirect distinction or unequal treatment, or failure to treat a person or a group of persons in comparison to other persons, as well as exclusion, restriction or preferential treatment of a person in comparison to other persons...’

Segregation is any action, activity or failure to perform an activity, whereby forced or systemic separation or differentiation of people is carried out on any of the grounds contained in Article 2, para. 2, of this Law.¹³⁴

Article 10 of the LPD recognises discrimination in the use of buildings and areas in public use as ‘restricting or preventing the use of facilities/buildings and areas in public use by a person or group of persons, on one of the grounds referred to in Article 2, paragraph 2 of this Law. The right to use facilities/buildings and areas in public use may be restricted only in accordance with the law.’

Article 18 of the LPD stipulates that inability to access buildings and areas in public use and limiting or aggravating the use of these facilities for people with reduced mobility or a disability is discrimination within the meaning of paragraph 1 of this Article, as is restricting, making difficult or impossible the use of such facilities in a way that is not a disproportionate burden for a legal or physical person.

Discrimination based on disability is considered to be a limitation on the right to independent life and community life, according to Article 17 of the LPDPD, as follows:

- 1) by restricting the choice of place of residence for a person with disabilities as well as support for community life, in accordance with the regulations governing social and child protection;
- 2) non-implementation of special measures for establishing and providing support for life in the community to persons with disabilities; and

¹³⁴ Montenegro, Law on Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette*, nos. 46/10, 18/14 and 42/17, Article 9.

- 3) denying support for living in the community for persons with disabilities to the extent that it is objectively determined that support is necessary for independent living by persons with disabilities.

In 2013 Parliament adopted a Law on Social Housing, Article 4 of which stipulates:

'The following groups, in particular, have priority in exercising their right to social housing, in accordance with this law: single parents, or guardians, persons with disabilities, persons over 67 years of age, young people who were children without parental care, families with children with disabilities, members of the Roma and Egyptian communities (RE population), IDPs, internally displaced persons from Kosovo residing in Montenegro,¹³⁵ foreign nationals with permanent or temporary residence awarded the status of displaced person or IDP and victims of domestic violence.'¹³⁶

There are no major policies which aim to address discrimination against migrants in the field of housing.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Montenegro, there are no patterns of housing segregation and discrimination against the Roma. After the Kosovo conflict, the number of Roma in Montenegro increased significantly and they settled in suburban areas. Most of the settled, domiciled Roma are living in private houses and are connected to the infrastructure. In contrast, most of the Roma IDPs live in substandard housing, lacking basic infrastructure, often in spatially segregated neighbourhoods and suburbs and with no legal permits for building. Since the adoption of the first Strategy for Roma Inclusion in 2008, followed by the Strategy 2012-2016 and Strategy 2016-2020, a number of measures in the area of housing have been implemented. In 2016 the following projects were undertaken:

- construction of 12 buildings with 120 apartments within the Regional Housing Programme in Konik, Podgorica;
- construction of 1 building with 8 apartments for 54 inhabitants in Tivat;
- construction of prefab houses for 6 families in Herceg Novi;
- construction of apartments for 10 Roma families in Niksic.

Most of the Roma in Montenegro (over 1 400 of them) live in Konik Camp in Podgorica. They are mainly internally displaced persons from Kosovo who fled to Montenegro in 1999. The gradual closure of Konik Camp was identified as one of the key priorities in the European Commission's 2010 Opinion on Montenegro's application for EU membership. By the summer of 2015, the building of five residential buildings with 10 flats of different sizes in each of them, all compliant with the relevant social housing standards, was completed. Around 120 additional apartments for internally displaced families are to be built on this site in the course of 2015-2018, within the framework of the Regional Housing Programme.

The issue of segregation within the above-mentioned housing programmes has been raised by different international organisations (such as the European Roma Rights Centre (ERRC) and Amnesty International). It should be noted that the entire process, from the development study for the social inclusion of Roma IDPs at Konik, prepared in 2011, to recent activities, has involved Roma inhabitants at every stage. The residents of the Konik Camp have been asked several times if they want to live in the same location as other inhabitants of the camp or whether they wish to be provided with special housing solutions for their families. All the Roma families interviewed expressed the wish to live in the same neighbourhood as members of their community and not in another location.

¹³⁵ According to the newly adopted law on foreigners these groups have the same legal status.

¹³⁶ Montenegro, Law on Social Housing (*Zakon o socijalnom stanovanju*), *Official Gazette of Montenegro*, no. 35/2013, 23 July 2013.

On the other hand, according to estimates by the NGO Yung Roma, 170 Roma families still do not have adequate accommodation; many of them continue to live in unsanitary conditions, often without electricity and water (mainly in dilapidated barracks, located in places out of public view). In terms of employment, there has been no sign of progress in the Roma community, with rates of employment falling in recent years. Roma mostly work in the municipal sector, in communal services, collecting second-hand materials and performing hard physical labour. These are low-paying jobs which others tend to avoid, which further encourages prejudice. There are no Roma employed in local government bodies. According to data from the National Employment Agency, Roma and people with disabilities are the two most vulnerable categories when it comes to employment. The principle of affirmative action is inconsistently applied in relation to Roma.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Montenegro, national legislation provides for an exception for genuine and determining occupational requirements. Although inappropriately titled ('positive discrimination'), Article 9 of the Labour Law provides an exception for genuine and determining occupational requirements. Namely, pursuant to its paragraph 1, difference, exclusion or giving priority with regard to a specific job is not considered discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, characteristics related to grounds such as sex, birth, language, race, religion, skin colour, age, pregnancy, health state, that is, disability, national origin, marital status, family duties, sexual orientation, political or other affiliation, social background, material status and membership of political and trade union organisations constitute a genuine and determining occupational requirement, provided that the purpose to be achieved is justified. The provision is drawn up in line with Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC.

The Law on the Prohibition of Discrimination does not include a provision on genuine and determining occupational requirements. However, Article 1 of this Law states that provisions of other laws which deal with the prohibition of and protection from discrimination on specific grounds and in relation to the exercise of specific rights continue to apply unless they are in contravention of the provisions of this Law.

According to Article 4 of the LPDPD, regulations and the introduction of special measures aimed at creating conditions for equal recognition, enjoyment and exercise of human rights and freedoms and achievement of actual equality of persons with disabilities with other persons, as well as promotion of the respect of their inherent dignity, shall not be considered to be discrimination based on disability if such regulations, or the introduction of special measures, are objectively justified by a legitimate aim, using means that are appropriate and necessary.

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

In Montenegro, national law provides for an exception for employers with an ethos based on religion or belief. According to the amended LPD, conducting professional activities, i.e. establishing employment relationships, membership of a religious community and other organisations, i.e. the activities of a person who is inconsistent with religious teaching, rituals and religious affairs shall not be considered as discrimination. In relation to the mentioned, membership in other public or private organisations whose value system is based on religious learning or belief if it is required by religious learning or belief shall not be considered as discrimination. This exception could be covered by Article 9 of the Labour Law which provides an exception for genuine and determining occupational requirements, as described above under Section 4.1, but no relevant case law is available.

In practice, individual statements by representatives of the Serbian Orthodox Church and some parliamentary parties against freedom of sexual orientation have been publicly disseminated. During a public statement made on the occasion of the 2016 New Year celebrations at the end of December 2015, according to the Julian calendar, a priest of the Serbian Orthodox Church, Jovan Plamenac, spread hate speech against the LGBT community. The NGO, Queer Montenegro, submitted a complaint to the Protector of Human Rights and Freedoms. According to the recommendation issued by the Protector, the priest was obliged to apologise publicly within two weeks to the LGBT community for the hate speech. The recommendation was not followed.

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

In Montenegro, national legislation does not provide for an explicit exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC). However, national legislation prescribes some strict conditions that must be fulfilled by candidates for admission to the armed forces which may exclude certain categories of persons with disabilities. Under the Law on the Armed Forces of Montenegro, one of the general conditions for admission to the armed forces is that the candidate's state of health must allow them to perform military service (Article 33). According to Article 115 of this Law, military personnel must cease work in the armed forces if an inability to work in accordance with the regulations on pension and disability insurance is determined. The individual's ability in health terms to serve in the military must be assessed by a special medical commission established separately for each case. There are no specific exceptions regarding discrimination in the armed forces and other specific occupations. In order to be admitted to the armed forces for the first time as a soldier, individuals must be under the age of 25 (Article 35, para. 4). The Law prescribes that, regarding the reception of candidates into the armed forces, proportional representation of minority nations and other minority communities will be ensured, in accordance with the Constitution and the Law on Minority Rights and Freedoms.¹³⁷

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Montenegro, national law does not include exceptions relating to difference of treatment based on nationality. Nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law and cannot be understood as one of the 'other personal characteristics' referred to in the Law on the Prohibition of Discrimination, Article 2, para. 2. However, the amended LPD includes an exception on nationality discrimination, so there is a need for a special Law on citizenship and for the amended LPD to be harmonised with it.

The Labour Law does not list Montenegrin nationality as a condition for employment, although some separate laws do. The Law on the Armed Forces provides that only Montenegrin nationals (who do not hold another nationality) may serve in the armed forces. While the Law on Civil Servants and Employees (Article 16) lists Montenegrin nationality as a condition for employment by state authorities, it also allows employment of foreign nationals and stateless persons under the provisions of a separate law (Law on Employment and Work of Foreigners) and international conventions. The rights covered by the Law on Social and Child Protection refer to Montenegrin citizens residing in Montenegro, as well as to foreign nationals with temporary or permanent residence in Montenegro, in accordance with the Law on Foreigners (Article 5).¹³⁸ Both the Law on Foreigners (applies to the entry, movement and residence of foreigners in Montenegro) and the Law on Employment and Work of Foreigners¹³⁹ define the term 'foreigner' as meaning a person who either has nationality of another country or is stateless.

¹³⁷ Proportional representation ensures minority groups a measure of representation proportionate to their percentage share of the population. Employment of minorities in public state and local institutions is ensured according to the rule of proportional representation.

¹³⁸ Montenegro, Foreigners Law (*Zakon o strancima*), *Official Gazette of Montenegro*, no. 56/14.

¹³⁹ Montenegro, Foreigners Law (*Zakon o strancima*), *Official Gazette of Montenegro*, no. 56/14 and Montenegro, Law on Employment and Work of Foreigners (*Zakon o zaposljavanju i radu stranaca*), *Official Gazette of Montenegro*, nos. 22/08 and 32/11, respectively.

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

Until December 2014, when the new Law on Foreigners was adopted, there was uneven regulation and practice in Montenegro in the treatment of refugees, displaced persons, foreign nationals with temporary or permanent residence and stateless people. This relates to nationality in combination with ethnic origin and there were a number of incidents at the time, where victims were refugees of Croatian or Bosniak ethnicity and with Bosnian or Croatian citizenship, Roma IDPs from Kosovo and Albanian IDPs from Kosovo.¹⁴⁰ The new law created the legal prerequisites for these groups to enjoy equal rights with nationals of Montenegro, with the exception of the right to vote.

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

a) Benefits for married employees

In Montenegro, it does not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married. Montenegrin national law provides benefits to those employees who are married, as well as those who are parents (married or non-married) and this does not constitute unlawful discrimination. There is a possibility for employers to provide benefits to any employee on the basis of his/her productivity, effectiveness or work results, and those benefits do not constitute indirect discrimination. However, private owners of companies are not monitored in the same way as companies in the ownership or co-ownership of the state or local government. Therefore situations of indirect discrimination do occur. Given that there is no legal possibility for the registration of same-sex marriages in Montenegro or for the adoption of children by same-sex couples, receipt of benefits for married couples and parents by these couples is not possible. However, the implementation of government LGBT policy is constantly developing, and the legislation has recently been improved on this issue. In collaboration with the LGBT community, reputable international experts and the European Commission, a model for a registered partnership for same-sex unions has been prepared and promoted so it is expected that a law on registered partnership will be adopted soon. This law has been drafted and there will be public debate on it before the law is adopted by Parliament. There was pressure from NGOs who called for the law to be adopted by 2017, but government representatives have stated that the government is planning adoption for 2019.

b) Benefits for employees with opposite-sex partners

In Montenegro, it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. The Labour Law provides that legal provisions, collective agreements and work contracts relating to special protection and assistance for certain categories of employees, especially those concerning the protection of people with disabilities, women during pregnancy, maternity leave and special childcare, as well as provisions relating to special rights for parents, adoptive parents, guardians and foster parents, are not considered to be discrimination (Article 9). Female employees, employees under the age of 18 and employees with disabilities are entitled to special protection, in accordance with this law (Article 103).

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

In Montenegro, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). Article 9, para. 2, of the Labour Law provides that provisions of the law, collective agreements and labour contracts regarding special protection and assistance for certain categories of employed people, and especially those regarding the

¹⁴⁰ Case Kaludjerski laz, in 1999 soldiers from the Yugoslav army killed six Albanian IDPs from Kosovo.

protection of people with disabilities, women during pregnancy and maternity leave and special leave in order to care for a child, are not to be considered discrimination. Under this law, where needed to ensure health and safety, the employer has a duty to assign employees with disabilities to posts which correspond to their work capacity and qualifications (Article 107).

The Law on Safety at Work¹⁴¹ does not contain specific provisions relating either to disability and health and safety or exceptions in relation to other grounds. However, Article 32 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities establishes a duty of the employer to organise a special protective workshop (type of sheltered employment) for people with disabilities in cases where work is done under onerous conditions (such as under water, underground, in open spaces or at high altitudes). Article 32 of the Law on Social and Child Protection and Article 9 (2) of the Labour Law provide exceptions for health and safety in relation to disability.

'The provisions of the law, collective agreement and labour contract relating to special protection and assistance to certain categories of employees, in particular those concerning the protection of persons with disabilities, women during pregnancy and maternity leave and absence from work for the care of the child, or special childcare, as well as provisions relating to the special rights of parents, adopters, guardians and foster parents, are not considered discrimination.'

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

4.7.1 Direct discrimination

In Montenegro, national law does not provide an exception for direct discrimination on the ground of age.

a) Justification of direct discrimination on the ground of age

An example of justification of direct discrimination on age-related grounds can be found in the case law of the High Court of Podgorica. In the case of SA v GB,¹⁴² the claimant applied for a position as an engineer, but a younger candidate was chosen. The court held that this choice could be justified by reference to the interest of the company in employing an expert who could continue his/her work and professional development in the company on a long-term basis.

b) Permitted differences of treatment based on age

There are no permitted differences of treatment based on age except affirmative measures for young employees, in accordance with the Labour law.

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

The insured person is entitled to an old-age pension once he/she reaches the age of 65/60. According to the applicable Law on Pension and Disability Insurance, women workers are also credited with six months' extra pensionable service for each of their children.

¹⁴¹ Montenegro, Law on Safety at Work (*Zakon o bezbjednosti na radu*) Official Gazette of Montenegro, no. 79/04.

¹⁴² High Court of Podgorica, No. 2786-13/12 2014.

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

In Montenegro, there are no special conditions set by law for older or younger workers in order to promote their vocational integration or for people with caring responsibilities to ensure their protection.

Article 11 of the Labour Law, which deals with the rights of employees, specifies that, together with people under the age of 18 (the age of majority in Montenegro), people with disabilities are entitled to special protection.¹⁴³ The same provision is contained in Article 103 of this Law, which extends this right to employed women. Article 107 gives content to the concept of 'special protection', imposing a duty on employers to assign employees with disabilities to work which is suitable for their working capacity and qualifications.

4.7.3 Minimum and maximum age requirements

In Montenegro, there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector). The Labour Law lists age as one of the explicitly prohibited grounds of discrimination but does not mention any specific exception related to discrimination on the ground of age other than setting minimum age requirements and the pension age. Under this Law, the minimum age for access to employment is 15 years, while under the Law on Civil Servants the minimum age for employment in the civil service is 18 years. Neither law contains exceptions permitting age requirements in relation to training. The Law on the Police provides that the maximum age for recruitment of police officers is 28. No explanatory memorandum for this law is available and it is therefore not currently possible to say what the justification for this is and whether it is in compliance with the Employment Equality Directive.

The Law on the Prohibition of Discrimination establishes discrimination on the grounds of age as a special type of discrimination but does not provide for any explicit exceptions (Article 13).

4.7.4 Retirement

a) State pension age

In Montenegro, there is no state pension age at which individuals must begin to collect their state pensions. A person can still work while fulfilling the retirement conditions for collecting their pension, the pension cannot be deferred. Employment contracts can only impose retirement at an age at which the employee is entitled to a state pension.

An individual can collect a pension and still work. An individual/beneficiary of the state pension may enter into a contract of employment for additional work, without limitation. However, under such a contract of employment, the pensioner receives only their salary and not the social protection insurance. The Law on Pension and Disability Insurance provides for the right and duty to begin to collect old-age pensions. Under the provisions of this Law, men acquire this right when they reach the age of 65 and women when they reach 60.¹⁴⁴ In both cases they must have at least 15 years of pensionable service. In addition, at the age of 55 men can start collecting their pensions if they have 40 years of pension insurance, as can women if they have 35 years of pension insurance.

¹⁴³ Special protection for people with disabilities as well as for women and young people is guaranteed by the Constitution and national law and cannot be considered as positive action but as broad special welfare measures.

¹⁴⁴ The age of retirement for each employee is regulated according to the law on pensions and social insurance which was in force at the time when these employees started work for the first time. Therefore, some workers become eligible for the pension at 65 (men) and 60 (women), while others are only eligible at 67 (men) and 65 (women).

In addition to these general rules, this Law also provides that people holding specific posts in the police and Ministry of Internal Affairs, the National Security Agency, defence, enforcement of criminal sanctions, as well as professional military personnel, acquire the right to an old-age pension at the age of 50, provided they have 20 years' pensionable service, including 10 in posts for which pensionable service is calculated at a higher rate. Earlier retirement at the age of 50 is also possible for other particularly onerous, dangerous and health-threatening occupations (for instance those which involve work under water or underground or in open spaces at high altitudes), for which pensionable service is also calculated at a higher rate (on the basis that each year of service counts as two years), if the person in question has spent at least 20 years in such posts.

b) Occupational pension schemes

In Montenegro, there is a normal age (65/67) when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wish to work longer, payments from such occupational pension schemes cannot be deferred. An individual can collect a pension and still work. Occupational pension funds are financial institutions which manage collective retirement schemes for employers, in order to provide retirement benefits to their employees (the scheme members and beneficiaries). In Montenegro, this kind of retirement scheme does not work in practice, due to the fact that most employers do not pay contributions for retirement. Employers do not even pay state-based social security contributions for pensions or provide retirement benefits to their employees, in accordance with the collective retirement schemes.

c) State imposed mandatory retirement ages

In Montenegro, there is a state-imposed mandatory retirement age.

Under the Labour Law, employment is terminated by law when the employee reaches 67 years of age (65 for women) and has a minimum of 15 years of pensionable service (the same requirements apply to men and women), unless the employer and the employee agree otherwise (Article 141). This provision can be deferred on the basis of an agreement between the two sides, but also leaves room for the employer to impose retirement at the age of 65/67. Article 142 of the same law provides that an employee with less than 15 years of pensionable service may continue to work beyond 65/67 years of age until such time as they meet the minimum years of service requirement. This article also provides that, based on a decision by the employer, teachers and university professors may continue to work until the end of the academic year and other employees may remain employed for a period necessary to finish specific work.

d) Retirement ages imposed by employers

Employment contracts can only impose retirement at an age at which the employee is entitled to a state pension. In Montenegro, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment on attaining pensionable age.

Article 7 of the Labour Law establishes a guarantee that employment rights are applicable to all workers, including equal conditions in access to employment and the selection of candidates, working conditions and all employment-based rights, education, vocational training and advanced vocational training, promotions and dismissals

f) Compliance of national law with CJEU case law

In Montenegro, national law is not subject to CJEU case law. Since Montenegro has not yet become a member of the EU, its national law has not yet been fully harmonised with EU legislation and CJEU case law. At the moment, it can be said that the practice of national courts does not rely on CJEU case law and judges don't take CJEU case law into account during trials. Only international conventions and agreements signed and ratified by the Montenegrin Parliament have supremacy over national legislation. The case law of international courts, including the case law of the CJEU, represents a part of national legislation but does not have such supremacy.

Professional pensions are not aligned with Directive 2003/41/EC on the activities and supervision of insurance institutions for occupational retirement provision. The applicable legislation prescribes some of the conditions for performance pension insurance activities, requirements for custodians and investment fund managers, some for information disclosure and fund reporting, as well as some of the permissible investment requirements. The Montenegrin Government has stated that it will complete compliance with the law by adopting the new act on professional and voluntary pension funds by the date of accession.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Montenegro, national law permits age or seniority to be taken into account in selecting workers for redundancy.

Under Article 93 of the Labour Law, employers are responsible for defining the criteria to be taken into account when selecting workers for redundancy. They are under a duty to cover this aspect as part of an overall programme for resolving redundancy issues, after having previously informed and sought an opinion from the trade union and the employment bureau. This programme must contain information on inter alia the age of the workers selected for redundancy. The criteria for selecting workers for redundancy must not be in contravention of the provisions of the Labour Law prohibiting discrimination, which explicitly list age as a prohibited ground of discrimination (Article 93, para.3).

b) Age taken into account for redundancy compensation

In Montenegro, national law provides compensation for redundancy. Such compensation is affected by the age of the worker.

The employer is obliged to adopt a plan of measures to deal with proposed redundancies. The plan must include the number of workers to be made redundant, the qualification structure, the tasks they performed and their ages and number of years of service (Article 93, para. 2) Thus, age is taken into account during the adoption and implementation of the programme of redundancy compensation measures.

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

In Montenegro, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

Neither the existing legislation nor the Law on the Prohibition of Discrimination provide explicitly for exceptions that seek to rely on Article 2(5).

4.9 Any other exceptions

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

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

a) Scope for positive action measures

In Montenegro, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted in national law.

The 2007 Constitution of Montenegro provides that regulations and the introduction of special measures aimed at creating conditions for the realisation of ethnic, gender and overall equality and protection of people who are in an unequal position on any grounds is not considered discrimination, provided that the special measures last only until the achievement of the aims for which they were undertaken (Article 8). The Constitution also provides for special minority rights, which include the right to authentic representation of national and ethnic minorities in the Parliament of Montenegro and in the local government assemblies, in which they represent a significant share of the population, according to the principle of affirmative action, as well as the right to proportional representation in public services, state authorities and local government bodies.

Article 79, para. 10, of the Constitution establishes the right for ethnic minorities to proportional representation in public services, state authorities and local self-government bodies. Article 25 of the Law on Minority Rights and Freedoms (which deals with the rights of ethnic minorities) states that members of minorities have the right to proportional representation in public services, state bodies and local government. Competent bodies in charge of human resources, in cooperation with councils for minorities, shall ensure the representation of members of minorities in terms of paragraph 1 of this article. However, in practice, these provisions are not implemented, especially for Roma and Croats, in relation to whom ethnic distance is greater in comparison with other ethnic minorities.

The Law on the Prohibition of Discrimination, Article 5, para. 2, provides that:

'Regulations and special measures aimed at creating conditions for the realisation of national, gender and overall equality and protection of persons in an unequal position on any ground may be adopted by authorised state and local authorities, authorities of the state administration, public enterprises and other legal persons performing public powers, as well as other legal and natural persons.'

The measures referred to in Article 5 must be applied in proportion to what is required and possible and should last until the goals established by those measures are achieved. The first paragraph, in fact, provides an exception for genuine and determining occupational requirements, while the wording of the second paragraph suggests the intention to cover both the concept of reasonable accommodation and that of positive action.

b) Main positive action measures in place on national level

In recent years a range of policy documents have been adopted by the Government of Montenegro with a view to achieving full and effective *de facto* equality for members of disadvantaged groups. These include the Strategy for Improving the Position of Roma and Egyptians in Montenegro 2012-2016, the Strategy on Minorities Policy (2008), the Strategy for the Social Inclusion of Roma 2016-2020 and the Strategy for the Integration of Persons with Disabilities 2012-2016. All of these documents promote the concept of positive action for the respective groups.

The Law on Professional Rehabilitation and Employment of Persons with Disabilities provides that people with disabilities can be employed under special conditions by special organisations (sheltered employment) if they are not able to find employment on the open labour market and under general conditions on the basis of their working and health capacity. Positive action measures are being taken in the area of professional rehabilitation

for people with disabilities. On 15 December 2015, the Management Board of the Employment Agency adopted a decision on the allocation of a EUR 2 million grant to support 53 projects covering professional rehabilitation, active labour market policy and employment of people with disabilities. Within the partnership between the private, public and civil sectors, it is planned that activities for 311 people with disabilities will be implemented through the programme and 204 of the participants (65 %) will be employed for a 3-12-month period, thus fully achieving the objectives of the call for proposals on the employment of people with disabilities.

All measures of professional rehabilitation (except for measure 14) cover people with disabilities and other hard-to-employ people from the records of all regional units. Since the beginning of 2016, 161 people have been included in professional rehabilitation measures (156 people with disabilities and five other hard-to-employ people), according to the records of the regional units. These measures have been delivered by two contractors (ZOPT - 80 people, Pamark - 81 people). Of the total number involved, 89 are women (55.27 %). The number of people involved by municipality is as follows:

- Podgorica - 51 people (26 women or 50.98 %);
- Pljevlja - 13 people (8 women or 61.53 %);
- Herceg Novi - 2 people (1 woman);
- Kotor - 1 person;
- Tivat - 15 people (8 women or 53.33 %);
- Bar - 22 people (13 women or 59.09 %);
- Bijelo Polje - 28 people (19 women or 67.85 %);
- Mojkovac - 4 people (3 women);
- Niksic - 23 people (10 women or 43.47 %);
- Berane - 2 people (1 woman).

According to the Law on Professional Rehabilitation and Employment of Persons with Disabilities, employers who do not hire people with disabilities must pay a special contribution for each person they do not hire to the Fund for the Professional Rehabilitation and Employment of Persons with Disabilities (hereafter referred to as the special contribution).

An employer who has between 20 and 50 employees is obliged to employ at least one person with a disability. Employers with more than 50 employees are obliged to employ at least 5 % of people with disabilities in relation to the total number of employees. Mostly, people with disabilities have been engaged by employers through the programme of public works implemented by the National Employment Agency, as the Agency has a duty to provide special support to people with disabilities with regard to their employment and professional rehabilitation.

The rate of the special contribution is 20 % of the average monthly wage in Montenegro in the year preceding the payment of the contribution. In addition, employers who have more than 10 but fewer than 20 employees, and no employees with disabilities, are obliged to pay a special contribution each month. The rate of the special contribution is 5 % of the average monthly salary in Montenegro earned in the year preceding the payment of the contribution. A legal person who does not employ anyone with a disability and does not pay the special contribution is liable for a fine of between EUR 500 and EUR 20 000.

The implementation of this law has failed. Most employers pay not to employ people with disabilities and the money collected from this taxation has gone to the rehabilitation fund. However, the Ministry of Social Welfare, which manages this fund, has used money from the fund for other purposes.

Pursuant to Article 38, para. 1, item 4, of Law on Employment and Insurance in the Case of Unemployment,¹⁴⁵ Decree on subsidies for the employment of certain categories of unemployed persons was adopted in January 2012.¹⁴⁶ The Decree entered into force the same year and was time-limited to one year. Its implementation was extended in 2013 and every year after that for the period of one year with changes. Each year the government, on the basis of data from the National Employment Agency, decides which groups are most vulnerable and the benefits these groups will derive from the Decree. The latest Decree entered into force on 1 January 2016 and will be applied until 31 December 2018.

According to Article 4 of the Decree, the employer is released from contributions for:

- pension and disability insurance at a rate of 15 %;
- health insurance at a rate of 8.5 %; and
- unemployment insurance at a rate of 0.5 %.

The vulnerable groups who are beneficiaries of the Decree are:

- people over the age of 50 who have one or more dependants;
- unemployed Roma, Ashkali and Egyptians;
- people who have not been employed in the last six months
- people who have not completed secondary education or a professional qualification
- people who completed their regular education and by two years after that did not have a work contract;
- people employed in public works.

Article 19 of the Law on Minority Rights and Freedoms provides that, for the purpose of ensuring the full exercise of minority rights, the University of Montenegro, upon a proposal from the Council for minorities, can enrol a certain number of students belonging to minorities at the beginning of each academic year, in accordance with the Statute of the University. When submitting their documentation for enrolment at the University, prospective students submit an application form in which they state their affiliation to a specific minority group.

According to the Law on Professional Rehabilitation and Employment of Persons with Disabilities (Article 25), in order to enable employment, work and therapeutic activities for the habilitation and rehabilitation of people with disabilities, especially those with severe disabilities who cannot be employed or maintain employment under general or specific conditions, special work centres for such people can be set up. Work centres can be established by local governments, the National Employment Agency and the Centre for Social Work, as well as by legal entities and individuals. Work centres can employ people with disabilities who have a working capacity of 50 % or lower compared to people of the same age, qualifications and under the same conditions. Work centres must have at least 80 % of employees with disabilities in relation to the total number of employees. A person with disabilities who works in the centre has the position of a service user.

In addition, in order to ensure employment of people with disabilities, sheltered workshops can be established. Sheltered workshops can be set up as a form of business organisation, if they ensure employment for people with disabilities as a share of at least 51 % of the total number of employees. Sheltered workshop may be established by local government, companies, entrepreneurs, the National Employment Agency, disability NGOs, employers' associations, trade unions and other legal and natural persons. If sheltered workshops are

¹⁴⁵ Montenegro, Law on Employment and Insurance in the Case of Unemployment (*Zakon o zaposljavanju*), *Official Gazette of Montenegro*, no. 14/10.

¹⁴⁶ Montenegro, Decree on subsidies for the employment of certain categories of unemployed persons (*Uredba o subvencijama za zapošljavanje određenih kategorija nezaposlenih osoba*), *Official Gazette of Montenegro*, no. 80/2015, Article 7.

established by two or more founders, their mutual rights and obligations are provided for by special agreement. Work centres, sheltered workshops and facilities have a privileged status in accordance with special regulations.

The privileged status, within the meaning of paragraph 1 of Article 35, implies:

- 1) exemption from payment of customs duties on imports of special equipment, appliances, spare parts, instruments and supplies for persons with disabilities, provided that they are not produced in the country;
- 2) release from payment of income tax, in line with the number of people with disabilities as a proportion of the total number of employees.

The privileged status referred to in paragraph 2 of this Article shall also apply to people with disabilities referred to in Article 36 paragraph 2 of this law. If during the performance of their operations the work centre, sheltered workshop or facility ceases to fulfil the conditions prescribed for their organisation, they will lose this privileged status.

Organisations referred to in paragraph 1 and people referred to in paragraph 3 of this Article must keep records of the use of tax and other privileges.

There are no specific positive action measures in place for migrants. The Law on Foreigners¹⁴⁷ stipulates that the annual number of temporary and working permits for foreigners shall be determined by the Government of Montenegro in accordance with the migration policy, status and movement in the labour market in Montenegro, no later than 30 November of the current year, for the following year. The annual quota determines the activities and occupations where foreigners can hire or provide contracted services. For 2017, the annual quota was determined at 13 185 work permits based on an estimation of occupations and fields of work where foreigners can be hired.

Within the annual quota, the annual quotas for employment, seasonal employment and the provision of contracted services are set separately. The annual quota is determined on the basis of a proposal from the Ministry of Labour and Social Welfare, with opinions obtained in advance from the Employment Office and state administration bodies competent in relation to certain activities for which the annual quota is determined.

¹⁴⁷ Montenegro, Foreigners Law (*Zakon o strancima*), *Official Gazette of Montenegro*, nos. 56/14, 28/15 and 16/16.

6 REMEDIES AND ENFORCEMENT

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

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

In Montenegro, the following procedures exist for enforcing the principle of equal treatment.

The Protector of Human Rights and Freedoms represents a national mechanism for protection against discrimination. Anybody who claims that their human rights or freedoms have been violated by means of a decision making, action or failure to act on the part of state authorities, local authorities, public services or other holders of public authority (i.e. healthcare facilities, schools, higher education institutions, public enterprises, etc.) may address their concerns to the Protector of Human Rights and Freedoms. The Law on the Prohibition of Discrimination provides the Protector of Human Rights and Freedoms with powers consistent with the requirements of Directive 2000/43/EC. These powers include provision of assistance to victims, conducting surveys on discrimination and publishing reports and making recommendations for the elimination of discrimination (Articles 20 and 22).

When the Protector of Human Rights and Freedoms finds that a violation has occurred, it issues an opinion and makes a recommendation to the body concerned, specifying what should be done in order to correct the violation. The Protector also sets a deadline for compliance with this recommendation. The body is then under a duty to provide the Protector of Human Rights and Freedoms with a report detailing the measures taken with a view to implementing the recommendations. If the body fails to comply with the recommendation from the Protector of Human Rights and Freedoms, the Protector can either refer the matter to an immediately superior authority or address the Parliament of Montenegro or the public. The Protector of Human Rights and Freedoms cannot issue binding decisions or award compensation for human rights violations. The Protector can initiate administrative procedures regarding labour, consumer and school inspections at relevant institutions in order to investigate the reported case of discrimination.

Article 119 of the Labour Law provides that the employer decides on the rights and responsibilities of the employees arising from and in relation to their work, in accordance with the law, collective agreements and the employment contract. An employee who believes that a right arising from or in relation to their work has been violated by the employer may submit a request to the employer to enable them to exercise that right. The decision on this request is final and enforceable, unless regulated otherwise by the law. The decision in paragraph 3 of this article is submitted to the employee in writing, with an explanatory note and a note on the legal remedy.

Employees who are not satisfied with the decision or who have not received a decision within the set time limit are entitled to initiate proceedings before the competent court in order to protect their rights, within 15 days of the date of the decision being issued.¹⁴⁸ The employer is obliged to execute a final court decision within 15 days of the date of the decision being issued, unless a different time limit is set by the court decision.

A victim of discrimination in the field of labour and social security can also address a complaint to the Ministry of Labour, whose scope of work includes labour inspection. Article 39 of the Law on Labour Inspection¹⁴⁹ lays down that, on completion of their investigation,

¹⁴⁸ In Montenegro, there are no special labour courts and discrimination cases are therefore dealt with by the civil courts.

¹⁴⁹ Law on Labour Inspection (*Zakon o radnoj inspekciji*), *Official Gazette of Montenegro*, nos. 079/08 and 040/11.

the inspector issues a decision on measures, actions and deadlines for the elimination of irregularities. An appeal against the inspector's decision can be made within eight days of the day the written decision is delivered. The Minister is competent to decide on appeals. A dissatisfied party may initiate an administrative dispute before the court against the Ministry's decision.

However, the Law on the Peaceful Resolution of Labour Disputes¹⁵⁰ offers procedures for the resolution of collective and individual labour disputes without going to court. Within the meaning of this Law, collective disputes are those which arise: a) during the process of concluding or amending collective agreements; b) in the case that specific provisions of a collective agreement are not equally applied to all employees; c) in relation to the exercise of the right to establish a trade union; and d) in the exercise of the right to strike. Individual labour disputes are those which arise in the exercise of the employee's employment-related rights. Peaceful resolution of these disputes is entirely voluntary, and the procedure is carried out by mediators (who place themselves at the disposal of the parties with a view to securing an amicable settlement of the matter) and arbiters (who decide on the matter). The Agency for the Peaceful Resolution of Labour Disputes was the first institutional service for the out-of-court resolution of collective and individual labour disputes. It was established by a decision of the Government of Montenegro (*Official Gazette of Montenegro* No. 69/08), pursuant to the provisions of the Law on the Peaceful Resolution of Labour Disputes (*Official Gazette of Montenegro*, nos. 16/07 and 53/11 and 11/15) established in accordance with this Law.

If discrimination occurs in the field of healthcare, an individual who is prevented from exercising their rights can address a complaint to the Ministry of Health, i.e. the Health Inspectorate established within the Ministry of Health. An appeal against a decision by the Health Inspectorate may be made to the Minister of Health. An administrative dispute may be initiated before the Administrative Court of Montenegro against a second instance decision.

If discrimination occurs in the field of education, a pupil, student, parent or guardian who believes that an education-related right has been violated has the right to contact the Education Inspectorate which will undertake an investigation. An education inspector issues a decision on the measures, actions and time limits for the elimination of irregularities. An appeal against the inspector's decision can be lodged within eight days of the day the written decision is delivered. The Minister of Education and Sports is competent to decide on appeals. A dissatisfied party may initiate an administrative dispute before the Administrative Court against a second instance decision.

Article 3 of the Law on Administrative Disputes¹⁵¹ stipulates that any natural or legal person who believes that any of their rights or interests based on a law have been violated by an administrative or other act has the right to institute an administrative dispute. A state authority, organisation, settlement (small community, village or similar), group of people or others who do not have the status of legal person, may institute an administrative dispute, if they are entitled to be holders of rights and obligations decided on in an administrative or other procedure. If the law has been violated by an administrative or other act to the advantage of a natural person, legal person or other party, an administrative dispute may be instituted by the state prosecutor or other competent body.

The Law on the Prohibition of Discrimination provides for the right to bring an action before the court to seek: a) the establishment of the fact that the respondent has acted discriminatorily towards the claimant; b) prohibition of executing the action that carries a potential threat of discrimination, i.e. prohibition of a repetition of the discriminatory

¹⁵⁰ Montenegro, Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rješavanju radnih sporova*), *Official Gazette of Montenegro*, no. 16/07.

¹⁵¹ Law on Administrative Disputes (*Zakon o upravnom sporu*), *Official Gazette of the Republic of Montenegro*, no. 60/03.

action; c) compensation for damages; and d) in cases where the discrimination is perpetrated through the media, publication in the media of the judgment establishing discrimination, at the cost of the respondent (Article 23).

Anyone who believes they have been discriminated against may bring an action in civil proceedings, in which the court examines and decides on *inter alia* disputes arising from employment, property-related disputes and disputes arising from other civil-law relationships between natural and legal persons, unless any of these falls within the competence of another state body. These are, however, general proceedings and judgments made in these proceedings do not establish whether discrimination has occurred or not. At the moment, therefore, no specific civil claim exists against discrimination and compensation can be sought only for damages (material and non-material) but not for discrimination as such.

Discrimination-related criminal offences are prosecuted ex officio by the competent state prosecutor. At the moment, this is the only discrimination-specific remedy. In all these cases, an alleged victim of discrimination has the status of an injured party whose personal or property right is put at risk or impaired by a criminal offence being committed. The injured party has the right to report a criminal offence to the competent state prosecutor. The right to file a report with the competent state prosecutor is provided for in Article 229 of the Criminal Procedure Code. If the report is filed with the court, the police authority or a state prosecutor lacking jurisdiction, they have a duty to accept it and must forward it immediately to the state prosecutor who does have jurisdiction.

Moreover, pursuant to Article 59 of the Criminal Procedure Code, the injured party is entitled to initiate or resume prosecution in clearly designated cases (where the state prosecutor finds that there are no grounds to undertake prosecution of a criminal offence which is prosecuted ex officio or if they find that there are no grounds to prosecute any of the accomplices reported to the authorities, and in the case that the court renders a ruling to discontinue the proceedings because the state prosecutor has withdrawn from prosecution). When the state prosecutor or the court notifies the injured party that they may proceed with their complaint, the injured party must also be provided with instructions as to which actions they may undertake in order to exercise that right. Article 62 of the Criminal Procedure Code provides that the injured party as a prosecutor has the same rights as the state prosecutor, except for those that are vested in the state prosecutor as a state body.

After all effective legal remedies before other authorities have been exhausted in relation to a violation of human rights and freedoms, the Constitutional Court may be addressed by natural and legal persons (both nationals of Montenegro and nationals of other countries) after any procedure (such as criminal, civil, administrative, etc.). The protection of human rights and freedoms is governed by Article 149 of the Constitution of Montenegro, which provides that the Constitutional Court decides on constitutional appeals in relation to violations of human rights and freedoms guaranteed by the Constitution of Montenegro after all other legal remedies have been exhausted.

The decision of the Constitutional Court is final and when such a decision is issued, it means that all national legal remedies have been exhausted. Upon completion of proceedings before national judicial authorities, i.e. when all legal remedies have been exhausted, both in administrative and judicial proceedings, a dissatisfied party has the right to bring proceedings before the European Court of Human Rights of the Council of Europe. The right of a citizen of Montenegro to submit an application to the European Court of Human Rights arises from the fact that Montenegro ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.

b) Barriers and other deterrents faced by litigants seeking redress

Anti-discrimination provisions form part of a series of laws governing various aspects of social life. These laws do not offer special procedures for enforcing their anti-discrimination provisions, but deal with enforcement in general terms. Generally speaking, all the enforcement mechanisms are very rarely used in practice, due to a weak legal framework which does not work in favour of victims. Victims are reluctant to pursue enforcement of their equal rights and their level of confidence in their chances of obtaining redress remains low. Given the fact that administrative proceedings are less expensive and burdensome, victims are more likely to use these than court proceedings.

Participants in proceedings, primarily people seeking protection against discrimination, make several key observations that are important for efficient and effective judicial intervention in this area. Specifically, parties to proceedings express dissatisfaction with the time required to undertake certain procedural actions (period of time between submission of complaints and receiving a response, scheduling hearings) although, according to the Law on the Prohibition of Discrimination (Article 24, paragraph 4), this procedure is deemed to be urgent. Furthermore, there is dissatisfaction with regard to the merits of court decisions when it comes to the amount of non-pecuniary damages.¹⁵²

c) Number of discrimination cases brought to justice

In Montenegro, there are no available statistics on the number of cases related to discrimination brought to justice.

According to the data collected on the website of the Montenegrin courts for 2016, at the Supreme Court there were 10 decisions on reviews of cases related to discrimination, at the Administrative Court there were four decisions, at the High Court in Podgorica eight decisions, at the High Court in Bijelo Polje 10 decisions, at the Appellate Court of Montenegro three decisions and at the Basic Court in Bar there was one decision.

d) Registration of discrimination cases by national courts

In Montenegro, discrimination cases are not recorded as such by national courts. However, all court decisions are published on the website of the courts and could be accessed by searching the database of court decisions. Court decisions are public and classified by year. They are not classified by ground.

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

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

In Montenegro, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

Montenegrin national law allows organisations to act on behalf of victims of discrimination and initiate judicial proceedings within the meaning of Article 7(2) of Directive 2000/43/EC and Article 9(2) of Directive 2000/78/EC).

Under the Law on the Prohibition of Discrimination, anyone who considers that they have been discriminated against by an act, action or failure to act by an authority or other legal or natural persons may submit a complaint to the Protector of Human Rights and Freedoms. A complaint can also be submitted to the Protector by organisations or individuals dealing with the protection of human rights, with the consent of the person or the group of persons

¹⁵² Report by the Protector of Human Rights and Freedoms for 2016.

who have experienced discrimination (Article 22).

The LPD provides that 'an anti-discriminatory lawsuit may also be filed, on behalf of a person or group of persons who have experienced discrimination, by organisations or individuals who deal with the protection of human rights'. The lawsuit may be filed only with the written consent of a person or a group of persons who have experienced discrimination (Article 30).

b) Engaging in support of victims of discrimination

In Montenegro, associations, organisations and trade unions are entitled to act in support of victims of discrimination.

According to the Law on Civil Procedure, Article 205, a person who has a legal interest in the litigation can join the procedure and stand to act in support of that party. The intervener may take part in the litigation throughout the entire proceedings until a legally binding judgment on the complaint is issued, as well as during the proceedings upon submission of an extraordinary remedy. There are no specific rules regulating organisations' standing to act in support of victims of discrimination.

c) *Actio popularis*

In Montenegro, national law allows associations, organisations and trade unions to submit *actio popularis* and act in the public interest on their own behalf, without a specific victim to support or represent.

There is a possibility for *actio popularis* before the national court (Constitutional Court), since anybody can request an 'assessment of constitutionality and legality' and initiate proceedings for the protection of the public interest (Article 150, Constitution).

In addition, Montenegro signed the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on 25 September 2012 in Geneva. According to Article 2 of the Law on the Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, anyone within the jurisdiction of Montenegro can seek protection of their economic, social and cultural rights from the United Nations Committee on Economic, Social and Cultural Rights, through individual or collective petitions, having exhausted the remedies in the country. International protection is particularly valuable in view of the limited jurisdiction of the Constitutional Court, which can only repeal enactments of state bodies, but not directly decide on law and order to ensure, for example, access to water, food, housing, etc.

d) Class action

In Montenegro, national law allows associations and organisations to act in the interest of more than one individual victim for claims arising from the same event (class action). According to Article 30 of the Law on the Prohibition of Discrimination, a claim on behalf of a person or group of persons who have experienced discrimination may be submitted by organisations or individuals who deal with protection of human rights. The complaint may be filed only with the written consent of the persons or groups of persons concerned.

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

In Montenegro, national law permits a shift of the burden of proof from the complainant to the respondent.

Article 29 of the Law on the Prohibition of Discrimination provides that when the claimant demonstrates the likelihood that the respondent committed an act of discrimination, it is

for the respondent to prove that there was no breach of equal rights and equality before the law. This rule does not apply to petty offences (which are dealt with by ministries and special petty offence authorities) and criminal proceedings. It does, however, apply to administrative proceedings (conducted by state and administrative authorities), administrative dispute proceedings (conducted before the Administrative Court in relation to the lawfulness of administrative and other acts) and to civil proceedings.

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

In Montenegro, there are legal measures of protection against victimisation.

The Labour Law provides that no employee may suffer harmful consequences if they report or testify about harassment and sexual harassment at work and in relation to work (also prohibited under the Labour Law, Article 8, and para. 4). As can be concluded from this provision, protection is not confined to the complainant, but also covers employees who report harassment or provide testimony about it. However, this would mean that people who e.g. provide help or support are not covered. Furthermore, the provision does not cover other forms of discrimination other than harassment and sexual harassment nor does it apply to fields outside employment.

The Law on the Prohibition of Discrimination provides that 'no-one shall suffer adverse consequences for reporting a case of discrimination, giving evidence before a competent authority or offering evidence in the proceedings investigating a case of discrimination' (Article 4). People are protected from any adverse treatment or effect as a result of reporting or of proceedings conducted in relation to the violation of the principle of non-discrimination. The only sanctions foreseen by the Law are sanctions for a limited number of discrimination-related petty offences and they do not include sanctions for victimisation.

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

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

Criminal sanctions in relation to these issues are provided for in the Criminal Code of Montenegro, in Title Fifteen – criminal offences against freedoms and human and citizen's rights.

Article 159 of the Criminal Code provides for the criminal offence of infringement of equality of citizens, punishable by imprisonment of up to three years, which is to be imposed on anyone who, due to national affiliation or affiliation to an ethnic group or religion, or due to the absence of such an affiliation or due to differences in political or other beliefs, sex, language, education, social status, social origin, property or other personal status (including sexual orientation, disability and age) denies or restricts the human and citizen's rights prescribed by the Constitution, laws or other regulations or general enactments or ratified international treaties or, on the grounds of such differences, grants privileges or exemptions. Should the act be committed by an official in the performance of their duties, such a person is liable to imprisonment for a term of three months to five years.

The infringement of the right to expression of national or ethnic affiliation is established as a criminal offence by Article 160 of the Criminal Code which prescribes a fine or imprisonment of up to one year for anyone who prevents other people from expressing their national or ethnic affiliation or culture. The same sentence is also to be imposed on anyone who coerces another individual to declare their national or ethnic affiliation. Should the act be committed by an official in the performance of their duties, such a person is liable to imprisonment for a term of up to three years.

Article 161 criminalises the infringement of freedom of confession of religion and performance of religious rites. The said article provides that anyone who prevents or restricts freedom of confession or performance of religion is liable to a fine or imprisonment for a term of up to two years. The prescribed sentence is also to be imposed on anyone who prevents or disturbs the performance of religious rites. Anyone who coerces others to declare their religious beliefs is liable to a fine or imprisonment for a term of up to one year. If the act referred to in this article is committed by an official in the performance of their duties, such a person is liable to imprisonment for a term of up to three years.

Article 20 of the Criminal Code deals with criminal offences for the violation of labour rights. Article 225 establishes violation of equality in the area of employment as a criminal offence. This criminal offence carries a fine or imprisonment of up to one year.

Racial and other discrimination is criminalised by Article 443 of the Criminal Code, which lays down that anyone who, on grounds of difference in race, skin colour, national or ethnic origin, or some other individual characteristic, violates fundamental human rights and freedoms guaranteed by generally recognised principles of international law and ratified international treaties is liable to imprisonment for a term of six months to five years. The same punishment is to be imposed on people who persecute organisations or individuals for their efforts to ensure equality. Furthermore, anyone who spreads ideas about the superiority of one race over another, or promotes racial hatred, or incites racial discrimination, is liable to imprisonment for a term of three months to three years.

Sanctions are available in civil cases, including restitution, compensation of material damage and award of damages. Sanctions which can be imposed in administrative proceedings include fines and the performance of monetary and non-monetary obligations.

b) Ceiling and amount of compensation

Under the Law on Contracts and Torts, which governs the awarding of compensation, there is no ceiling on the maximum amount of compensation that can be awarded. No information is available on whether compensation has ever been awarded and, if so, the amount imposed.

c) Assessment of the sanctions

Sanctions which can be imposed on legal persons include fines and the dissolution of the legal person. Generally speaking, the fine depends on the damage caused or illegal material benefit acquired and cannot be smaller than twice the amount of damage caused, or illegal material benefit acquired or larger than one hundred times these amounts. Given the fact that discrimination-related criminal offences are punishable by imprisonment of up to five years, the fines which could potentially be imposed range from ten to 15 times the amount of damage caused or illegal material benefit acquired or between EUR 20 000 and EUR 50 000.

In addition to fines, legal persons can also be dissolved in cases where their operations were either entirely or predominantly in the function of committing a criminal offence. On the other hand, penal policy implementation is weak, and sanctions can be estimated as not sufficiently effective. Lack of political will and corruption can be considered as key reasons for inefficient courts and weak implementation of penalty measures. The current practice of the courts in Montenegro is mainly focused on cases in which the discriminatory basis has been noticeable and the discriminatory act obvious. In such cases, the final court judgment concerns only the amount of damages arising from discriminatory behaviour and this is often not proportional to the damage incurred. Such examples can be found among cases concerning discrimination against people with disabilities regarding denial of access to buildings in public use. Court practice is not for each case to be considered for itself with regard to the specific circumstances, the conduct of the parties against whom the complaint

was lodged and the consequences for the person or people who submitted the claim arising from discriminatory treatment. The large number of repeat offenders among perpetrators of acts of discrimination indicates that the sanctions served cannot be considered as adequate and dissuasive.

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

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

Bearing in mind that Montenegro is not an EU Member State, Directive 2000/43/EC has not been transposed and nobody has therefore been officially designated according to Article 13.

The Protector of Human Rights and Freedoms is an independent institution which was set up on the basis of the Law on the Protector of Human Rights and Freedoms in 2003. Its position was further enhanced with the 2007 enactment of the new Montenegrin Constitution, the first to mention this institution and task it with taking measures for the protection of human rights and freedoms. Under Article 27, para. 1, the law establishes the Protector as an institutional mechanism for protection against discrimination through the amendment of this law,¹⁵³ it should be noted that the concept of discrimination was extended and specific forms of discrimination such as sexual discrimination and hate speech, as well as the Institute of Racial Discrimination,¹⁵⁴ were enshrined in law. The Protector provides protection in relation to the following grounds of discrimination: race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health condition, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics.

The actions taken by inspection authorities in charge of implementing the decisions of the Protector concerning protection against discrimination remain a matter of concern. In particular, there are difficulties in applying the standards of anti-discrimination at this stage of development to the legal framework and enforcing them.

The Protector of Human Rights and Freedoms acts independently as a national mechanism for individual protection against discrimination, while the now discontinued Council on the Prohibition of Discrimination was a governmental, advisory body with the role of promoting and conducting anti-discrimination activities at national level.

In 2011 the Government of Montenegro adopted a Decision on establishing a Council on the Prohibition of Discrimination as a national body for promoting non-discrimination and coordinating anti-discrimination activities at national level. It consisted of government and NGO representatives. The main tasks of the Council on the Prohibition of Discrimination were to:

1. Monitor and coordinate the activities of state bodies, state authorities and other competent institutions in the application of statutory mechanisms for protection against all forms of discrimination;
2. Analyse the regulations in terms of their compliance with international standards on protection against all forms of discrimination and, if necessary, initiate amendments;
3. Analyse the implementation of administrative measures taken by the competent authorities in relation to the provision of protection against all forms of discrimination and the problems which arise in practice in the process of discrimination prevention, and propose measures for their elimination;

¹⁵³ Montenegro, Law on the Protector of Human Rights and Freedoms (*Zakon o Zastitniku/ci ljudskih prava i sloboda*), *Official Gazette of Montenegro*, nos. 41/03, 42/11 and 32/14.

¹⁵⁴ Montenegro, Law on the Protector of Human Rights and Freedoms (*Zakon o Zastitniku/ci ljudskih prava i sloboda*), *Official Gazette of Montenegro*, nos. 41/03, 42/11 and 32/14, Article 17.

4. Propose and undertake appropriate measures to promote non-discrimination, as one of the basic and general principles of human rights;
5. Establish the necessary cooperation with national and international bodies and organisations dealing with the protection of human rights and freedoms;
6. Propose other measures relevant for the protection of human rights and freedoms.

The Council on the Prohibition of Discrimination was not an equality body. However it contributed significantly to improving the legislation and monitoring the implementation of the anti-discrimination legal framework, as well as monitoring spending by the Fund for the Professional Rehabilitation and Employment of Persons with Disabilities. On 25 February 2016, the Government of Montenegro decided to halt the work of the Council, suspending the Decision which had established the Council.¹⁵⁵

The role of the governmental Fund for the Professional Rehabilitation and Employment of Persons with Disabilities is to allocate financial resources to foster employment policy programmes for participation by people with disabilities. In order to monitor the implementation of measures and activities to improve vocational rehabilitation and employment of people with disabilities, as well as the designated use of financial resources from the Fund, the Employment Agency formed the Fund Council. The funds are provided from: special contributions paid by employers; the national budget of Montenegro; the budget of the local authority in whose territory a person with disabilities is resident; donations and assistance from local and foreign legal entities and individuals; and other sources in accordance with the law.

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

According to the 2007 amendments to the Constitution, the Protector of Human Rights and Freedoms is elected as an independent body by the Montenegrin Parliament by a majority vote of all members of the Parliament. The Protector's term of office is six years and is renewable. Under the Law on the Protector of Human Rights and Freedoms, the Protector has at least one deputy and one of the deputies deals with protection against discrimination. The Parliament decides on the number of deputies by means of a special decision. At the moment, there are three deputies, who were also elected by a majority vote of all members of the Parliament on the proposal of the Protector of Human Rights and Freedoms.

In relation to administrative capacity, five counsellors were employed in 2015 and, during 2016 four additional workers were to be employed in the Protector's Office. According to the internal regulations, a total of 33 civil servants and public employees should be provided. In this way, provision has been made for continuity with regard to the obligations contained in the Action Plan for Chapter 23 - Judiciary and fundamental rights, in relation to the obligation to strengthen the human resources capacity of the Protector. However, the exact number of civil servants and public employees dealing with discrimination is not publicly known. The Protector's request in 2014 to the Ministry of Finance for the provision of additional workspace for the functioning of the Protector's office was fulfilled and the workspace in the Protector's office is fully utilised. The requirement has been met for the Protector, as the national mechanism for the prevention of torture, to have a physically separate workspace within the office. The Ministry of Finance released the amount planned in the budget for the Protector's work in 2016.

c) Grounds covered by the designated body/bodies

According to Article 27, para. 1 of the Law on the Prohibition of the Discrimination, the Protector of Human Rights and Freedoms is a national mechanism for protection against

¹⁵⁵ Decision on the termination of the decision on the formation of the Council on the Protection of Discrimination, 25 February 2016. Available at www.cdm.me/politika/vlada-odlucila-savjet-za-zastitu-od-diskriminacije-prestaje-sa-radom/.

discrimination. According to Article 27, para. 2 and Article 2 of the Law on the Prohibition of the Discrimination, it has an explicit mandate to deal with protection against discrimination based on race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics.

The Council on the Prohibition of Discrimination had a general mandate to deal with protection against discrimination until it was abolished on 25 February 2016. The Protector of Human Rights and Freedoms, according to its competences, deals with complaints from victims of human rights violations and conducts situation testing when necessary. There are cases of situation testing being conducted by the Protector in relation to violations of the rights of migrants in Montenegro. For example, in November 2014, the Protector conducted situation testing in Café Banja in Podgorica,¹⁵⁶ as a group of migrants had claimed they were discriminated against in the café based on their national affiliation. However, the results of the testing indicated there was no discrimination in this specific case.

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

As explained above, the key aspect of the work of the Protector of Human Rights and Freedoms involves dealing with complaints from victims of human rights violations and, to that end, the Protector of Human Rights and Freedoms is entitled to carry out independent enquiries. The Protector of Human Rights and Freedoms is authorised: 1. to provide information to complainants who believe they have been discriminated against by a public authority, business entity, other legal person, entrepreneur or natural person about their rights and duties, as well as about the possibilities of court and other protection; 2. to keep separate records of complaints submitted with regard to discrimination; and 3. to collect and analyse data on cases of discrimination.

The Protector's power to deal with general issues that are important for the protection and promotion of human rights and freedoms include the conducting of independent surveys on *inter alia* discrimination issues. However, there are no specific legal provisions that explicitly mandate the Protector to conduct independent surveys. In practice, the Protector uses the results of surveys on discrimination conducted by civil society organisations in its reports.

Under the current Law on the Protector of Human Rights, the Protector must submit an annual report to the Parliament by 31 March each year. The annual report must provide a general statistical overview of all cases dealt with, a general evaluation of the status of human rights and freedoms in Montenegro and the Protector's recommendations and suggested measures to remedy the observed failures. The annual report must be made available to the public. The Protector may submit a special report if it considers that such action is necessary for exceptionally important reasons. If it is decided to submit a special report, the Protector must also make it available to the public. In addition to this, the Law on the Prohibition of Discrimination provides for a duty of the Protector to dedicate a separate part of its annual report to discrimination issues and the promotion of equal treatment (Article 21). The Law also explicitly gives the Protector the right to submit a special report on discrimination issues. With regard to providing independent assistance to victims, the Protector's exercising of its competences in this area remains a matter of concern in practice.

¹⁵⁶ Report 2014, Protector of Human Rights and Freedoms, Montenegro, www.ombudsman.co.me/docs/Izvjestaj_za_2014.pdf.

e) Legal standing of the designated body/bodies

In Montenegro, the designated body has legal standing to bring discrimination complaints on behalf of identified victim(s) and to take part as a party in civil, criminal and labour legal proceedings concerning discrimination cases. According to Article 21 of the Law on the Prohibition of Discrimination, the Protector can initiate proceedings for protection against discrimination in court or appear in the proceedings as a party if the claimant provides evidence proving the likelihood that discrimination took place, and the Protector assesses that the respondent committed an act of discrimination against a group of people with the same personal characteristics.

f) Quasi-judicial competences

There are no quasi-judicial institutions for discrimination cases in Montenegro. The Law on the Prohibition of Discrimination does not provide for powers for the Protector of Human Rights and Freedoms to issue binding decisions or impose sanctions in discrimination cases. It does, however, vest this institution with the power to carry out conciliation procedures between the victim and the alleged discriminator. As out-of-court settlement can be concluded on the basis of the conciliation procedure, this power may be interpreted as quasi-judicial.

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

In Montenegro, the equality body records the number of complaints and decisions as a total number, although not as a number by ground and type of discrimination. These data are available to the public.

In 2017, a total of 128 cases came before the Protector and were completed. In 32 cases 97 recommendations were given to a range of subjects; in 13 cases applicants were referred to other bodies, as it was considered that this was a more effective means of protection; in 12 cases the procedure was terminated by command of Protector; in 23 cases it was decided there was no discrimination or violation of other rights; in eight cases, the procedure was suspended because the violation was eliminated during the procedure; in eight cases the proceedings were suspended due to the initiation of court proceedings; four cases were completed by merging them; and eight were resolved by other means.

Out of a total of 97 recommendations given in 32 cases, 56 recommendations were observed, 13 were not respected, 18 were partially respected and 10 recommendations were put into practice.

Classified by ground of discrimination, i.e. personal characteristics, the Protector received 50 complaints in the field of employment, 11 related to gender-based violence, 17 in the field of social protection, 17 in the field of administrative and court procedures, six related to health protection, four in the field of education, five in relation to access to goods and services, three based on hate speech and three in the field of media and information.

According to the information provided by the Protector in its 2018 report, a total of nine instances of litigation for protection against discrimination were launched before the basic courts as first instance authorities in 2017, all in the field of labour and employment.

h) Roma and Travellers

In the reporting year, the Protector dealt with the question of late and unpaid scholarships for Roma high school students and students who were eligible for funds for the implementation of the affirmative action measures envisaged in the Strategy for Improving the Position of Roma and Egyptians in Montenegro 2012-2016. Funds for this purpose were provided by the Ministry of Human and Minority Rights and were redirected to a non-

governmental organisation for the realisation of a programme which made individual scholarship contracts with users.

Since unpaid scholarships could not be linked to discriminatory treatment because the measure had the purpose of carrying out affirmative action on the basis of membership of the Roma and Egyptian population, the Protector treated it as a matter of protection and monitoring of the exercise of minority rights through mediation. The Protector suggested the problem was caused by slow and delayed responses from the responsible institutions. The applicants were referred to other legal remedies because the violation of rights was the subject of a private, legal contractual relationship (scholarship contracts). The Protector suggested taking measures and actions to determine the factual situation and the payment of funds to the affected beneficiaries through a mediation process with the Ministry for Human and Minority Rights.

As part of the new Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020¹⁵⁷ inclusive education was introduced through the establishment of a quota for enrolment in four-year high schools and higher education institutions. This is a measure from the previous strategic document. All priorities set out in the Strategy, such as those in education (quotas for the enrolment of students and granting of scholarships to enhance student standards) will contribute to strengthening the educational capacities of Roma and Egyptians and ultimately their involvement in the process of developing public policy.¹⁵⁸

¹⁵⁷ The Strategy is part of over a decade of prioritising the issue of social inclusion for the Roma which began with the adoption of a first document in 2005 – the Action Plan on the Roma Decade – and has been followed by three government strategies.

¹⁵⁸ Report by the Protector of Human Rights and Freedoms for 2016.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Law on the Prohibition of Discrimination was established as an institutional framework for protection from discrimination. However, in addition to the judicial and other institutions, the role of civil society must be emphasised regarding the dissemination of information about legal protection against discrimination. The Federation of Employers disseminates a handbook and other promotional materials on prevention of discrimination in the workplace through its network of employers. The handbook includes the national anti-discrimination legal framework, legally binding instruments, bylaws and guidelines for employers in order to prevent discrimination and harassment in the workplace.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

The government cooperates with NGOs in the development of the policy framework on equal opportunities, while joint commissions monitor their implementation. The development of new anti-discrimination legislation has been accompanied by an ongoing dialogue with NGOs. In addition, the government provides some funding for NGO projects promoting the principle of equal treatment.

Despite the above-mentioned cooperation with NGOs, on 25 February 2016 the Government of Montenegro adopted a Decision on the suspension of the Decision on establishing a Council on the Prohibition of Discrimination. The government explained that the conditions for the suspension of this body had been fulfilled because the legal framework providing for the smooth implementation of policies and activities in the field of human rights and protection against discrimination had been established.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

In Montenegro, trade unions promote social dialogue around the principle of equal treatment within workplace practices. The Confederation of Trade Unions of Montenegro, the umbrella organisation under Montenegrin law, comprises 1 200 trade unions spread throughout the country and over 40 000 members (data from 2006).¹⁵⁹ Another umbrella organisation, the Federation of Free Trade Unions of Montenegro, with close to 24 000 members, was established in 2008. The political and societal weight of trade unions is considerable, as they are involved in decision-making processes relating to employment and social policy and have significant membership. However, the trade unions' work on anti-discrimination is very limited at present. Trade unions represent only their members, who must pay a trade union membership fee in order to be able to exercise their trade union rights. Together with the government, trade unions and employers' organisations are social partners who negotiate employment-related issues and sign collective agreements.

In December 2006, the three social partners signed Tripartite Agreements and a year later the Law on Social Councils¹⁶⁰ was adopted. The main task of the Social Councils is to serve

¹⁵⁹ Simovic, V. (2009), *Annual overview of employees' rights and social dialogue in Central and Eastern Europe and the Western Balkans, Report for Montenegro*, Friedrich Ebert Stiftung, courtesy of the author.

¹⁶⁰ Montenegro, Law on Social Councils (*Zakon o Socijalnom savjetu*), *Official Gazette of Montenegro*, nos. 16/07 and 20/11.

as a forum for discussion and joint initiatives relating to various aspects of economic and social policy. A Social Council, comprising 11 representatives of each social partner, was established at the national level and in almost all municipalities. Generally speaking, trade unions need to 'do more' in terms of their overall involvement in the promotion of equal treatment. They should develop an understanding of the importance of strategic anti-discrimination work and the key role they can and should play in fighting employment discrimination. Their capacities must be strengthened, and appropriate strategies and programmes put in place.

d) Addressing the situation of Roma and Travellers

Within the Ministry for Human and Minority Rights there is a Directorate for Minority Rights. Within this Directorate there is a special department dedicated to issues affecting Roma, Ashkali and Egyptians. As a governmental body, this department is competent to give advisory support and implement anti-discriminatory policies concerning the social inclusion of Roma.

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

a) Mechanisms

The existing mechanisms are not sufficient to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment.

Anti-discrimination provisions form part of a series of laws governing various aspects of social life. Generally speaking, all the enforcement mechanisms are very rarely used in practice. Victims are reluctant to pursue the enforcement of their equal rights and their level of confidence in their chances of obtaining redress remains low. Given the fact that administrative proceedings are less expensive and burdensome, victims are more likely to use these than court proceedings.

The National Employment Agency implements measures on improving the employability of marginalised groups in accordance with anti-discriminatory legislation: the Law on the Professional Rehabilitation and Employment of Persons with Disabilities, the Decree on subsidies for the employment of certain categories of unemployed people, as well as other, short-term measures. These measures are not sufficient to ensure viable employment for members of hard-to-employ groups.

b) Rules contrary to the principle of equality

There is no comprehensive analysis of potential violations of the principle of equality in individual or collective contracts or agreements, the internal rules of businesses, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations.

9 COORDINATION AT NATIONAL LEVEL

Several ministries are responsible for coordinating and dealing with anti-discrimination and equal opportunities, including the Ministry for Human and Minority Rights, the Ministry of Labour and Social Welfare, the Ministry of Education, the Ministry of Health and the Ministry of Culture. The original portfolio of the Ministry for Human and Minority Rights was minority rights, with responsibility for dealing with human rights issues which do not fall under the competence of any other ministry being vested in it in 2006. As a result, this Ministry primarily deals with the protection of the rights of minorities and the promotion of inter-ethnic tolerance. Its tasks also include improving the position of Roma, as well as gender equality. In this context, two independent departments - the Department for Gender Equality and the Department for the Improvement and Protection of Roma and Egyptian Population Rights - have been established within the Ministry. This ministry also coordinates the development of anti-discrimination legislation.

The Ministry of Labour and Social Welfare is responsible for the protection of people with disabilities, elderly people and child protection, as well as for the areas of employment, social and child protection. The other ministries mentioned above generally have responsibilities in relation to areas of social life, rather than grounds of discrimination. Each ministry is the policy maker and coordinator of intersectional cooperation in respect of the specific discrimination issues which fall within its remit. There seem to be no contradictions among the ministries with regard to decisions or political lines.

In 2011 the Government of Montenegro adopted a Decision on establishing a Council on the Prohibition of Discrimination as a national body for promoting non-discrimination and coordinating anti-discrimination activities at national level. Its main tasks were to:

- Monitor and coordinate the activities of state bodies, state authorities and other competent institutions in the application of statutory mechanisms for protection against all forms of discrimination;
- Analyse the regulations in terms of their compliance with international standards on protection against all forms of discrimination and, if necessary, initiate amendments;
- Analyse the implementation of administrative measures taken by the competent authorities in relation to the provision of protection against all forms of discrimination and the problems which arise in practice in the process of discrimination prevention, and propose measures for their elimination;
- Propose and undertake appropriate measures to promote non-discrimination, as one of the basic and general principles of human rights;
- Establish the necessary cooperation with national and international bodies and organisations dealing with the protection of human rights and freedoms;
- Propose other measures relevant for the protection of human rights and freedoms.

The Council consisted of the president, secretary and 11 members. The President of the Council was the Prime Minister of Montenegro. Members of the Council were: the Minister for Human and Minority Rights, the Minister of Justice, the Minister of Labour and Social Welfare, the Minister of Health, the Minister of Education, the Advisor to the Prime Minister of Montenegro for human rights and protection from discrimination, and representatives of four non-governmental organisations active in the fields of protection from and promotion of human rights; protection against discrimination in the field of education and vocational training; protection and promotion of women's rights; and protection from discrimination based on gender identity and sexual orientation, as well as one representative of the trade unions. On 25 February 2016, the Government of Montenegro adopted a Decision on the suspension of the Decision on establishing a Council on the Prohibition of Discrimination. The government explained that the conditions for the suspension of this body had been fulfilled because the legal framework providing for the smooth implementation of policies and activities in the field of human rights and protection against discrimination had been established.

10 CURRENT BEST PRACTICES

The government has developed a range of strategies and policies promoting social inclusion and equality, including the Strategy for the Integration of Persons with Disabilities (2016–2020), the Strategy for Improving the Position of Roma and Egyptians in Montenegro (2016-2020), and the Strategy for Improving Quality of Life for LGBT Persons (2013-2018).

The Strategy for the Integration of Persons with Disabilities contains a wide range of interventions to promote the social inclusion of this highly disadvantaged group. Developed as the result of a partnership between government institutions and the NGO sector, the Strategy covers the areas of healthcare, social security and pensions and disability insurance, education, professional training and employment, accessibility, culture, sport and recreation, as well as the position of disability organisations within civil society. Action plans for the implementation of the Strategy are adopted every two years and a Working Group, comprising representatives from all relevant ministries, state institutions and national NGOs which deal with the rights of people with disabilities, has been tasked with monitoring the implementation.

The main intention behind the adoption of the new Law on the Prohibition of Discrimination of Persons with Disabilities was to make this law comply with the UN Convention on the Rights of Persons with Disabilities. Article 22 of this law prescribes that, 'failing to take and failing to implement measures for adapting the workplace and working conditions in accordance with special regulations, in accordance with the laws regulating the area of labour and the area of professional rehabilitation and employment of persons with disabilities' represents an act of discrimination against those people. However, according to the UNCRPD, 'reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms', and this duty applies to many other fields beyond employment. In spite of this, the LPDPD did not extend the reasonable accommodation duty to areas beyond employment.

Penalties for failure by employers to implement measures and provide workplace adaptations for people with disabilities have not been provided for by this Law.

Professional rehabilitation and employment of people with disabilities is regulated by the Law on Professional Rehabilitation and Employment of Persons with Disabilities. This Act regulates the procedures for people with disabilities to exercise their rights in this respect, measures and incentives for their employment, financing and other related issues of importance.

Professional rehabilitation, in terms of this law, includes the following measures and activities: 1) Career information, counselling and evaluation of professional opportunities; 2) implementation of procedures and methods for determining working abilities and skills; 3) psychosocial and motivational support to direct people to appropriate rehabilitation programmes; 4) the implementation of training programmes for people with disabilities, equipping them for certain occupations and for entering the labour market and maintaining employment; 5) adapting the workplace for people with disabilities; 6) technical assistance and monitoring of people with disabilities in order for them to effectively participate in the work environment, maintain their employment and make progress at work; 7) analysis of the labour market, employment opportunities and inclusion in the working environment of people with disabilities; 8) evaluation of the implementation, development and improvement of professional rehabilitation; 9) vocational training, additional training, retraining and programmes for maintaining and improving working and social skills and abilities in order to prepare people with disabilities for employment; 10) information and

advice on the application of different technologies and techniques in learning and work; 11) information and support on sources of funding; and 12) technical assistance, support, monitoring and evaluation of the effectiveness of employment for people with disabilities.

The Strategy on Minorities Policy focuses on the integration of ethnic minorities into society and the protection of their linguistic, ethnic and religious identity. It covers a range of areas, including education, culture, language, information and political participation.

The Strategy for Improving the Position of Roma and Egyptians in Montenegro 2016-2020 emphasises the goal of reducing the long-endured discrimination and inequality experienced by the Roma and Egyptian populations. A commission on the implementation of the Strategy was set up to monitor the activities carried out within the framework of this document, but it held only a few meetings.

The implementation of the Strategy for Improving Quality of Life for LGBT People (2013-2018) has not been satisfactorily realised. LGBT organisations emphasise that all the reasons for the weak coordination and monitoring of the Strategy for Improving Quality of Life for LGBT People must be eliminated and a new model of coordination and monitoring must be set up which would consider individual agreements with the LGBT community as well as with all relevant state institutions charged with LGBT inclusion.

A working group for drafting a new Strategy for Improving Quality of Life for LGBT People has been established and it is expected that the Strategy will be adopted by the end of 2018. Montenegro should also adopt the Law on Life Partnership, which will allow same-sex couples to enjoy rights they have not had until now. According to this text, registration would confer on same-sex couples some of the rights enjoyed by married couples, but this does not include the right to adopt children.

This draft contains articles on the protection of basic social and economic rights, including property rights, social rights and health insurance rights which must be conferred on people who live together and have a family. This model of life partnership has not been recognised as a family, but only as a community of two persons of the same sex. They will not be able to be foster parents and generally the extent of their rights in relation to children will be minimal.

The development and implementation of the above-mentioned policy documents were not accompanied by awareness-raising campaigns. Such campaigns are mainly organised by NGOs, with support from international donors, and tackle specific grounds and issues such as disability, gender equality and inclusive education. Training and assistance for victims are also provided mainly by NGOs (who also seek opportunities for their own capacity development), which receive mostly international funding for their activities. No measures of institutionalised training or assistance for victims are provided by the government.¹⁶¹ Access to legal aid, provided both by the state and by NGOs, is very limited at present. Montenegro is only now developing legislation on free legal aid.

The above-mentioned government strategies are very ambitious and contain many activities and measures. While some progress has been achieved as a result of their implementation, it seems that more concentrated efforts need to be invested in order to achieve the goals set. Visible improvement in the lives of the targeted groups is yet to be seen. Implementation mechanisms are weak, a results-based approach is missing, and performance is not measured against defined indicators. Another issue is lack of transparency, as comprehensive reports remain unavailable to the wider public, although the strategies themselves contain a duty to this effect. The sense of ownership by the target groups should also be strengthened in order to achieve greater effectiveness.

¹⁶¹ Some limited ad hoc training opportunities are organised with the assistance of international donors.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Montenegrin legislation is partially aligned with the *acquis* in the field of social policy and employment. Work on the legislation is currently underway in this area in terms of alignment with the *acquis*. Determined action is required to make progress in legislative harmonisation and to do something about the critical situation in the labour market. Efforts must be stepped up to reduce poverty and to improve the inclusion of the Roma and Egyptian population, people with disabilities and other vulnerable groups. The proper functioning and transparency of social dialogue must be ensured.

Generally speaking, legislation covering areas outside employment contains only declarations on the prohibition of discrimination and lacks effective provisions.

Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations and access to housing are not covered by the anti-discrimination provisions in national laws.

The test to justify genuine occupational requirements is less rigorous than in the directives, as proportionality is not required.

There is no general duty to provide reasonable accommodation in line with Articles 2.2.b and 5 of the Employment Equality Directive. Employers are obliged to take measures in this context only in relation to people with disabilities who are already employed.

The duties of dissemination of information and social dialogue on equal treatment are not included in the existing proposed legislation.

The provisions on the 'silence of the administration' (Article 129 of the Administrative Procedures Act) must be amended in order to enforce effective protection before the courts. However, there is no peremptory norm for how to proceed in a situation when the first instance public law body remains 'silent' and does not resolve this administrative matter in due course. This should therefore be considered as justification for another peremptory norm which would oblige the appellate body to resolve this administrative matter.

Faith schools are not considered part of the education system of Montenegro and are therefore not covered by this legislation. The Law on the Prohibition of Discrimination explicitly prohibits discrimination in education but fails to mention that it applies to this type of school. Relations between faith-based and state institutions, including in education, have not been regulated appropriately and harmonised with international law and standards, including the Racial Equality Directive.

11.2 Other issues of concern

Low employment rate among marginalised groups

There was a total of 49 487 unemployed people (of whom 25 842 were women) registered at the National Employment Agency on 31 December 2016. Compared to the previous month (47 754) this was a rise of 1 733 people or 5.48% and compared to the previous year (an increase in the number of unemployed women of 866 or 3.47%) in the same month in 2015. According to MONSTAT data (Monthly Statistical Review no. 12/2016) 42 331 people were looking for work in December 2016. There were 21 993 women who were jobless and 15 677 young people looking for work for the first time.

Non-existent legal framework for social entrepreneurship.

Montenegrin legislation doesn't make provisions for social entrepreneurship, which would be of benefit for vulnerable groups. There was an initiative in 2012 and a draft law was prepared by the Ministry of Labour, but it was not adopted, and the procedure was stopped. The most marginalised group is the Roma community, which is socially excluded, living in poverty and unable to make the necessary changes. Civil society organisations engaged in promoting the rights of these groups are trying to develop employment opportunities for them (mainly in the production of souvenirs and other items) but it is not economically viable.

Weak implementation of active measures for the employment of people with disabilities

Employers prefer to pay the prescribed amounts to the Fund for the Professional Rehabilitation and Employment of Persons with Disabilities instead of employing people with disabilities. In addition, there are many public objections to the manner in which the funds raised from these sources are used and the purpose for which they are used. Certain budget funds should be used in a more transparent way in order to improve the situation for people with disabilities seeking employment.

Furthermore, the Law on the Prohibition of Discrimination of Persons with Disabilities recently adopted is a matter of concern because this law has not been harmonised with around 30 national laws and regulations. A working group of experts, comprising representatives of relevant governmental institutions and NGOs, prepared a detailed analysis of the regulations in all areas where protection against and prohibition of discrimination on the ground of disability is guaranteed by this Law, which should provide specific guidance for the revision of the relevant regulations. NGOs participating in the working group are not satisfied with how this analysis has been adopted and consider that the process was not transparent enough.

In addition, issues which are having a negative effect on the efficient implementation of anti-discrimination measures include lack of institutional and administrative capacity to enforce anti-discrimination legislation, insufficient practical support for entrepreneurship in general,¹⁶² weak public debates with civil society and lack of cooperation between state institutions and civil society organisations.

The government should develop forward planning when it comes to work in the field of social policy and employment, as well as Montenegro's capacity for implementation. In addition, implementation will require constant attention, as administrative capacity needs to be strengthened in all sectors to ensure the *acquis* is properly applied. The government must provide sufficient financial resources, especially in the area of health and safety at work.

Government strategies are very ambitious and contain many activities and measures. While some progress has been achieved as a result of their implementation, it seems that more concentrated efforts need to be invested in order to achieve the goals set. Visible improvement in the lives of the targeted groups is yet to be seen. Implementation mechanisms are weak, a results-based approach is missing, and performance is not measured against defined indicators. Another issue is lack of transparency, as comprehensive reports remain unavailable to the wider public, although the strategies themselves contain a duty to this effect.

¹⁶² Agency for Local Development Niksic (2014), *Perspektive za primjenu modela socijalne ekonomije [Study: Perspectives for the implementation of a social economy model in Montenegro]*, available at: www.aldnk.me/images/Studija_Perspektive_za_primjenu_modela_socijalne_ekonomije_u_Crnoj_Gori.pdf.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

The systemic Law on the Prohibition of Discrimination, through the recent amendments of 2017, has been significantly improved and harmonised with EU legislation. The disadvantages of the previous law pointed to the need for its amendment, especially in establishing the definition, grounds and areas of discrimination, the meaning of certain terminology, specific forms of discrimination and cases that would not be considered as discrimination. Finally, the Law has been amended in relation to criminal measures. The previous Law defined discrimination as any 'unjustified, legal or factual, direct or indirect distinction', and the new amendments deleted the term 'unjustified' because direct discrimination cannot be justified. Although the list of grounds of discrimination is prescribed as open, two new personal characteristics (sex change and intersex characteristics) have been added by which the explicit provision has reduced the space for flexible interpretation of personal characteristics arising from the different sexual and gender experience of each individual.

Regarding exemptions from discrimination, amendments to the Law prescribe the list of given situations where distinctions on different bases will not be considered as discrimination, including the conditions for performing certain professional and activities of religious communities; the establishment of employment or the acquisition of other rights based on work; contracting various insurance premiums; access to goods and services, and others. The above exceptions must be interpreted extremely restrictively, in proportion to the purpose for which they are prescribed.

Specific forms of discrimination have been complemented and more precisely defined, terminology has been harmonised and, among other things, specific forms of discrimination against children have been included, as well as harassment through audio and video surveillance, mobile devices, social networks and the internet. The concept of political discrimination has been extended to discrimination on the grounds of belonging to trade union organisations, racial discrimination is separate from religious discrimination, and discrimination based on gender identity and sexual orientation has been extended to include discrimination based on intersex characteristics.

12.2 Case law

Equality body: European Court of Human Rights

Date of decision: 5 December 2017

Name of the parties: Alković vs. Montenegro

Reference number: 66895/10

Address of the webpage: -

Brief summary: The applicant, Rizo Alković, is a Montenegrin national who was born in 1960. He currently lives in Belgium. The case concerned a series of apparently ethnically and/or religiously motivated attacks against Mr Alković, who is a Roma and a Muslim, by his neighbours in 2009 when he was living in Podgorica (Montenegro). He alleged in particular that, on 26 May 2009, he saw one of his neighbours go to his car, take out a gun and, pointing it in the direction of his apartment's terrace, fire nine to ten gunshots. In another incident, on 22 September 2009 when Mr Alković was celebrating Ramadan Bayram, a religious holiday, with his family, a large cross was drawn on his apartment door, with a message written on the wall: 'Move out or you'll bitterly regret it.'

The case file was transmitted to the prosecuting authorities who concluded a few months later that only the incident involving the cross could be considered as jeopardising security and asked the police to take steps to find the perpetrator. It was decided that all the other incidents referred to by Mr Alković could not be considered a threat.

The domestic courts subsequently dismissed Mr Alković's request for an investigation into the incident involving the cross for lack of evidence.

In the present case, relying in particular on Article 8 (right to respect for private and family life and the home), taken in conjunction with Article 14 (prohibition of discrimination), of the European Convention on Human Rights, Mr Alković complained about the authorities' failure to effectively investigate the series of attacks against him by his neighbours. The Court concluded:

- Violation of Article 8, right to respect for private and family life, in conjunction with Article 14, prohibition of discrimination on the ground of religion and belief;
- Just satisfaction: EUR 6 000 for non-pecuniary damages and EUR 5 000 in costs and expenses.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Montenegro
Date: 1 January 2018

Title of legislation (including amending legislation)	<p>Law on the Prohibition of Discrimination, Official Gazette of Montenegro 46/10, 18/2014, 42/17 Abbreviation: LPD Date of adoption: 6 August 2010 Entry into force: 13 August 2010 Latest amendments: 30 June 2017 Web link: http://www.mmp.gov.me/biblioteka/zakoni Grounds covered: race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics. Material scope: education, labour, goods and service delivery</p>
	Civil law
	Material scope: education and vocational training, labour, goods and service delivery, use of facilities/buildings and areas in public use, social protection, including social security and healthcare
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Title of legislation (including amending legislation)	<p>Title of the law: Criminal Code, Official Gazette of Montenegro no. 40 /2008, 25/2010, 32/2011, 40/2013 and 56/2013 Abbreviation: CC Date of adoption: 17.12.2003 Entry into force: 03.01.2004 Latest amendments: 30.07.2013 Weblink: http://www.pravda.gov.me/ResourceManager/FileDownload.aspx?rid=49322&rType=2&file=1230044658.doc Grounds covered: national affiliation or affiliation to an ethnic group, race, religion, political or other opinion, sex, language, education, social status, social origin and property, other personal status.</p>
	Criminal Code
	Material scope: Scope of application is not limited to the specific fields. However, Criminal Code Article 443 para. 4, prescribes that person who commits the offence from Article 443, para. 1-3 by misusing his/her position will be sentenced by prison. (1-8 years). This offence can be committed in any of relevant areas (education, employment, social service...)
	Principal content: prohibition of all forms of discrimination

Title of legislation (including amending legislation)	<p>Title of the law: Labour Law, Official Gazette of Montenegro nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14</p> <p>Abbreviation: LL</p> <p>Date of adoption: 29.07.2008</p> <p>Entry into force: 06.08.2008</p> <p>Latest amendments: 16.07.2014</p> <p>Web link: http://www.paragraf.me/propisi-crnegore/zakon-o-radu.html</p> <p>Grounds covered: sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or any other personal characteristic.</p>
	Civil law
	Material scope: employment
	Principal content: prohibition of discrimination in the field of employment
Title of legislation (including amending legislation)	<p>Title of the law: Law on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette, no. 49/08, 73/10, 39/11</p> <p>Abbreviation: LSW</p> <p>Date of adoption: 29.07.2008</p> <p>Entry into force: 23.08.2008</p> <p>Latest amendments: 17.8.2016</p> <p>Web link: http://www.zzzcg.me/wp-content/uploads/2015/05/Zakon-o-profesionalnoj-rehabilitaciji-i-zaposljavanju-lica-sa-invaliditetom.pdf</p> <p>Grounds covered: employment</p>
	Civil law
	Material scope: protection of persons with disabilities in the field of employment
	Principal content: prohibition of discrimination of persons with disabilities
Title of legislation (including amending legislation)	<p>Title of the law: Law on Minority Rights and Freedoms, Official Gazette of Montenegro 31/06, 51/06 and 38/07, 02/11 and 08/11.</p> <p>Abbreviation: LMRF</p> <p>Date of adoption: 10.05.2006</p> <p>Entry into force: 20.05.2006</p> <p>Latest amendments:</p> <p>Web link: http://media.cgo-cce.org/2013/06/7-Zakon-o-manjinskim-pravima-i-slobodama.pdf</p> <p>Grounds covered: race, colour, sex, national origin, social origin, birth or similar status, religion, political or other beliefs, property status, culture, language, age, mental or physical disability.</p>
	Civil law
	Material scope: minority rights protection
	Principal content: prohibition of discrimination of minority groups
Title of legislation (including amending legislation)	<p>Title of the law: Law on Prohibition of Discrimination of Persons with Disabilities, Official Gazette of Montenegro 35/15, 44/15.</p> <p>Abbreviation: LPDPD</p> <p>Date of adoption: 26 June 2015</p> <p>Entry into force: 15 July 2015</p> <p>Latest amendments: 15 August 2015</p> <p>Weblink: http://www.skolskiportal.edu.me/Inkluzivno%20obrazovanje/Zakon%20o%20zabrani%20diskriminacije%20lica%20sa%20invaliditetom.pdf</p>

	Grounds covered: long-term physical, mental, intellectual or sensory disability. Material scope: it applies to all fields protected by the Law on Prohibition of Discrimination (education, labour, provision of goods and service).
	Civil law
	Material scope: education, labour, goods and service delivery
	Principal content: Disabilities of discrimination of persons with disabilities

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Montenegro
Date: 1 January 2018

Instrument	Date of signature (if not signed please indicate) Dd/mm/YYYY	Date of ratification (if not ratified please indicate) Dd/mm/YYYY	Derogations/ reservations relevant to equality and non-discrimination¹⁶³	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?¹⁶⁴
European Convention on Human Rights (ECHR)	26.12.2003	06.06.2006	No	Yes	Yes
Protocol 12, ECHR	26.12.2003	06.06.2006	No	Yes	Yes
Revised European Social Charter	22.03.2005	03.03.2010	No	Ratified collective complaints protocol? No	Yes
International Covenant on Civil and Political Rights	2001	23.10.2006	No ¹⁶⁵	Yes	Yes
Framework Convention for the Protection of National Minorities	06.06.2006	06.06.2006	No	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	2001	23.10.2006	No	Yes	Yes
Convention on the Elimination of All Forms	23.10.2006	23.10.2006	No	Yes	Yes

¹⁶³ The derogations on the basis of gender, ethnicity, race, religion, language, ethnic or social origin, political or other opinion, financial status or any other personal characteristics are forbidden" (Article 25, Montenegrin Constitution).

¹⁶⁴ Anyone, whose right was violated by individual legal act that does not comply with Constitution and ratified international treaties according to the opinion of Constitutional Court, can request amendment of that act and initiate the procedure before the Constitutional Court, after exhausting all remedies. (Law on Constitutional Court, Article 47, *Official Gazette of Montenegro*, no. 64/2008, 46/2013 and 51/2013).

¹⁶⁵ Prohibition of derogation with regard to prohibition of slavery, prohibition of debt slavery, and abolition of the right to be recognised as a person before the law have not been incorporated in Montenegrin Constitution.

of Racial Discrimination					
Convention on the Elimination of Discrimination Against Women	23.10.2006	23.10.2006	No	Yes	Yes
ILO Convention No. 111 on Discrimination	14.07.2006	14.07.2006	No	Yes	Yes
Convention on the Rights of the Child	23.10.2006	23.10.2006	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	13.12.2006	2.11.2009	No	Yes	Yes

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