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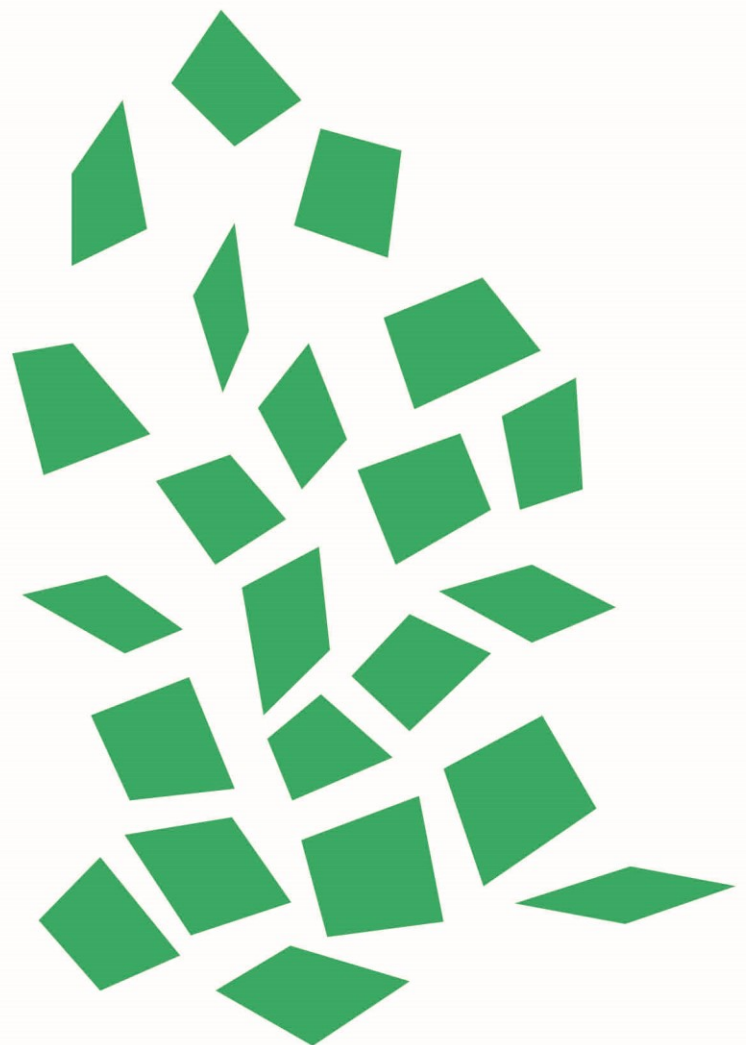
Country report

Non-discrimination

The former
Yugoslav
Republic of
Macedonia

2018

Including summaries in
English, French and
German



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Country report
Non-discrimination
The former Yugoslav
Republic of Macedonia

Biljana Kotevska

Reporting period 1 January 2017 – 31 December 2017

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EXECUTIVE SUMMARY

1. Introduction

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

The massive protests,⁸ the wire-tapping affair (illicit interception of communications of more than 20 000 people allegedly carried out by the state Counterintelligence Agency),⁹ the Pržino agreements and the EU Rule of Law mission,¹⁰ culminated with the resignation of Nikola Gruevski after almost 10 years of continuous tenure as Prime Minister, pre-term Parliamentary elections, and a hung parliament, which further extended the political crisis as no Government could be formed for a few months. The situation escalated with physical violence¹¹ on 27 April 2017 when, during the election and appointment of a new President of the Parliament, protestors were let into the parliament by MPs from Gruevski's party.¹² One month later a new Government led by the social democrats was formed. Local elections took place in the second half of 2017, which meant little work for the legislative body, thus making the year quite uneventful in terms of legal changes and overall developments of interest for this report.

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

² European Commission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report* https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf. All hyperlinks accessed: 18 March 2018.

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

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

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

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

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

⁸ Protestiram, 'About the Protests', Protestiram Website, http://protestiram.info/?page_id=40; DW (2016), 'Macedonia: "Colorful Revolution" paints raucous rainbow', DW Website, <http://www.dw.com/en/macedonia-colorful-revolution-paints-raucous-rainbow/a-19203365>.

⁹ Balkan Insight, (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09 February 2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

¹⁰ EU (2015), 'Recommendations of the Senior Experts Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015', https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

¹¹ Nova TV (2017), 'Half a year after the bloody Thursday only one prison sentence' (Пола година по крвавиот четврток само една затворска казна), <http://novatv.mk/pola-godina-po-krvaviot-chetvrtok-samo-edna-zatvorska-kazna/>.

¹² Security camera footage was released to the public in which one can clearly see the MPs opening the doors and greeting the crowd that stormed in.

The country's population is over two million.¹³ Ethnic affiliation is important, as sets of rights and positive action measures are tied to the numerical representation of an ethnic community in the total population. The ethnic composition¹⁴ is 64 % ethnic Macedonians, 25 % ethnic Albanians, 4 % ethnic Turks, 3 % ethnic Roma, 2 % ethnic Serbs, 1 % ethnic Bosniaks, 0.5 % ethnic Vlachs and 1 % 'others' (a term used in the Constitution). Numerous activities for the rights of Roma have been undertaken, including within the frame of the Decade of Roma Inclusion,¹⁵ which ended in 2015. However, except in relation to political participation,¹⁶ the results are contested.

On cooperation with civil society organisations (CSOs), the developments in the first half of 2017 were strikingly different from those in the second half of the year. Following the appointment of the new Government in June 2017, the climate rapidly changed from one of scapegoating and openly prosecuting CSOs, which was the case during the Gruevski Government, to one that is much more open to including CSOs in decision-making processes, working groups, and in stepping up to support CSO activities, including on equality and non-discrimination. Thus, for example, in the six months of 2017 of the new Government, the Minister of Culture opened the Pride weekend that had been organised by a group of CSOs, while the Prime Minister gave a key speech and opened a celebration of the fifth birthday of the LGBT centre – the CSO whose offices were repeatedly attacked in the previous years and for which no one has yet been prosecuted.¹⁷ On both occasions, the new Government showed both symbolically and declaratively that it plans to support equality for all, regardless of sexual orientation and gender identity.

2. Main legislation

The 'Constitution of the Republic of Macedonia',¹⁸ a written constitution, is the country's highest legal act. It accepts international law as part of domestic law, and as higher than the laws and bylaws. The Constitution provides for protection against discrimination. It upholds the equality of citizens before the Constitution and before law, stating that citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of gender, race, colour, national and social origin, political and religious conviction, property and social status. It provides a protection mechanism for all who find their human rights and freedoms breached, in front of the Constitutional Court. Upholding the monism principle on application of international law (the signed and ratified international documents), the Constitution provides for the domestic use of these documents, thus also for those providing for protection against discrimination and/or upholding the principle of equality.

Until 2010, anti-discrimination provisions were scattered in various laws. In April 2010, the Anti-Discrimination Law (ADL)¹⁹ – the first comprehensive equality law – was adopted as part of the EU *acquis* approximation process. The ADL does not comply with the directives regarding minimum protected grounds, definitions and forms of discrimination, effective, proportionate and dissuasive sanctions, use of statistical data, and dialogue with the CSO

¹³ Although not supported by official numbers, estimates show that 250 000 to 500 000 people have left the country in the past few years, to work abroad.

¹⁴ All numbers presented here are rounded percentages from the 2002 census. A new census was scheduled for 2011, but it was annulled due to lack of clarity in the implementation of the methodology. All statistics by the State Statistical Office can be found at: www.stat.gov.mk/.

¹⁵ The Decade of Roma Inclusion was a regional Government initiative for improving the situation of Roma in health, housing, education and employment, which ended in 2015.

¹⁶ There is a Roma minister in the Government, a Roma municipality (Shuto Orizari), Roma MPs, etc.

¹⁷ On the attacks and failure of the state to investigate, see flash report: 'Absence of Reaction to Series of Attacks on the LGBTI Support Centre' (2013) <https://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

¹⁸ English language version of the Constitution of the Republic of Macedonia: Constitution of the Republic of Macedonia <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>.

¹⁹ Law on prevention and protection against discrimination (Закон за спречување и заштита од дискриминација) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015, 31/2016, Const.Ct. Decision: Y.6p.82/2010 (15 September 2010).

sector. The equality body established by the act – the Commission for Protection against Discrimination (CPAD) – cannot be said to meet the requirements of Directive 2000/43.

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

The ex-post evaluation of the ADL implementation showed that the aims of the law²⁰ were only partly reached and identified many points where implementation could be improved, justifying the situation as resulting from a lack of allocated funds. Three recommendations for legislative changes were issued: amending the ADL to allow for the establishment of administrative support for the CPAD; explicit prescription of the 'shift of burden of proof' for the CPAD; and enhancing the CPAD accountability mechanisms. Following this, an all-encompassing harmonisation analysis was conducted, which focused on the harmonisation of the ADL with international standards and the harmonisation of other domestic laws and bylaws with the ADL. The analysis identifies many points for legislative changes, both on general issues (such as, for example, amending insensitive terminology on disability) and specific points (specific proposals for articles).²¹

At the time of writing this report, a draft for a new law, which is to replace the 2010 law, was being prepared. The draft-law has the same title as the current law – Law for Prevention and Protection against Discrimination (referred to hereinafter as the 2017 draft-ADL).²² The text was drafted by a working group comprised of persons from the competent ministries, representatives from international organisations and CSOs working with equality issues, including those providing legal aid in discrimination cases. The MLSP coordinated the process, with great support from the Organisation for Security and Cooperation in Europe – Mission to Skopje (OSCE). The working group worked on the text for almost two years. The text was presented on 20 October 2017 at a discussion in Skopje that was organised by the Ministry of Labour and Social Policy (MLSP) and the OSCE.²³ The above paragraph on the ADL would be applicable to the 2017 draft-ADL, with several changes in the discrimination grounds. Of relevance to this report are the addition of sexual orientation and the change from 'mental or physical disability' to 'disability' (Article 5, 2017 draft-ADL). These and other important changes proposed by the 2017 draft-ADL are further discussed in the relevant sections of the country report.

²⁰ As the Anti-Discrimination Law does not contain a provision on its aims, by analysing other documents, the ex-post evaluation team identified the aims to be prevention of and protection against discrimination.

²¹ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation* (OSCE and CPAD), available at:

https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equality_and_non-discrimination *Анализа на хармонизираноста на домашното законодавство за еднаквост и недискриминацијата*.

²² The text of the 2017 draft-ADL, as it stood at the cut-off date of this report, is not available online. The author used the version distributed for the purposes of the public debate (on the public debate see the following footnote). Source: Draft-Law on Prevention and Protection against Discrimination, 2017. Full reference: MLSP, Draft-Law on Prevention and Protection against Discrimination (*Предлог закон за спречување и заштита од дискриминација*) (2017) (distributed by MLSP representative via e-mail on 16 October 2017; on file with author).

²³ Akademik (2017), 'Public debate on the new Law on prevention and protection against discrimination' (Јавна дебата за новиот закон за спречување и заштита од дискриминација), 20 October 2017, akademik website: <http://www.akademik.mk/javna-debata-za-noviot-zakon-za-sprechuvane-i-zashtita-od-diskriminatsija/>.

3. Main principles and definitions

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

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

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

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

4. Material scope

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

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

- Affirmative measures (Article 13): Actions undertaken by natural or legal persons that will not be considered as discrimination if they are established as justified in the past, in the present, or in the future and may be undertaken until complete factual equality is achieved and factual inequalities are eliminated or reduced.
- Unequal treatment that will not be considered as discrimination (Article 14): different treatment of non-citizens; genuine occupational requirement; different treatment of

persons on the basis of religion, belief, sex or other characteristics in relation to education and training for the aims of the occupation related to the relevant religion; actions of members and bodies of churches and religious communities, citizens' organisations, political parties, unions and other organisations conducted in accordance with their doctrine, convictions or beliefs and/or the aims determined in their statutes, programmes and/or regulations; regulation of marriage; exercise of the constitutionally guaranteed principle of freedom of speech, public appearance, opinion and public information; and establishment of a minimum and maximum age in relation to entering a profession/granting privileges/retirement provided that there is a legitimate aim.

- Protective mechanisms for specific categories of persons (Article 15): protection of pregnant women and mothers; children without parents, juveniles, single parents and people with disability; equal participation of women and men; employment encouragement; training and education for persons with disabilities; anticipation of minimum and maximum ages for access to certain levels of training and education, provided that it is objectively justified for the achievement of the legitimate aim, and the extent of this differentiation does not exceed the one necessary in relation to the nature of the training or education, or the conditions in which they are delivered and the extent of this differentiation does not exceed the level necessary for the achievement of the aim; special measures beneficial to persons or groups who are placed in an unfavourable position as a result of any of the discriminatory grounds, for the purpose of equalising their opportunities, as long as those measures are necessary; measures for the protection of the specifics and identity of persons belonging to ethnic, religious or linguistic minorities and their right to cherish and develop their own identity individually or in a community with other group members and measures stimulating conditions for promotion of that identity; and measures in the field of education and training to ensure the participation of ethnic minorities, as those measures are necessary.

In the field of employment, aside from the Anti-Discrimination Law, there is also a Law on Labour Relations,²⁴ which prohibits discrimination in line with the standards of the directives. These laws apply both to the public and private sector.

5. Enforcing the law

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

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

Administrative procedure before the CPAD is free of charge. This body may give its opinion and recommendation. The procedure can last up to 90 days. If the recommendation is not acted upon, the CPAD can initiate a procedure with a competent body (the law does not specify this further).

²⁴ Law on Labour Relations (*Закон за работните односи*), Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016; Constitutional Court Decisions: U. no. 139/2005, U. no. 161/2005, U. no. 134/2005, U. no. 187/2005, U. no. 111/2006, U. no. 188/2006, U. no. 170/2006, U. no. 200/2008, U. no. 20/2009, U. no. 176/2009, U. no. 263/2009, U. no. 62/2013, U. no. 114/2014.

In 2017, the CPAD received 59 cases, which is almost the same number as in 2016 when it received 60 cases. Taken together, this is a continuation in the drop in the number of cases over previous years, including from 106 cases in 2014 to 70 cases in 2015. Unlike in 2016, the CPAD did not include a comment explaining the reasons for the decreased reporting of cases. In the previous year, the CPAD attributed the drop to a lack of financial resources and other issues,²⁵ without saying what those issues were or how it came to this finding. However, financial resources cannot explain why fewer people complained to the CPAD in 2016 than in 2015. A more plausible explanation was and still is that this is a further decline in trust, which started with the wire-tapping affair²⁶ (mentioned above) and continued with the second CPAD composition appointment.²⁷

The reporting per discrimination ground²⁸ has been as follows: sex and gender 19 %; ethnicity 18 %; political affiliation 17 %; health status 16 %; sexual orientation and gender identity 16 %; personal or other social status 16 %; age 8 %; social origin 7 %; and education 7 %. This is the first time that the CPAD has included sexual orientation and gender identity in its breakdown of cases by ground. The reported distribution per field is as follows: 41 % in employment and labour relations; 25 % in access to goods and services; 22 % in public information and media; 14 % in education, science and sport; and 10 % in social security, including social protection and pension and disability insurance, health insurance and health protection. Although 'judiciary and administration' featured more prominently in the previous years, it is not even reported in this year's CPAD report.

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

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

The Ombudsperson is another possible forum for public sector discrimination cases. In 2017, 70 cases were filed as non-discrimination and equitable representation cases, which represents 2.17 % of the total number of cases filed. This is the highest representation of this category of cases since the Ombudsperson started to report them separately (that is, higher than the 69 cases or 1.83 % reported in 2016, the 53 cases or 1.2 % reported in 2015, and 66 cases or 1.55 % reported in 2014). However, this percentage has to be read through the prism of the overall number of cases, which shows a substantial fall on previous years. In other words, the overall number of cases filed to the Ombudsperson continues to drop. In 2017, the institution reports having received 3 224 cases. This is a further drop from 2016 when it received 3 775 cases, which was already a drop from 4 403 cases in

²⁵ See: Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017) *Annual Report for 2016*; 'The drop is due, among other issues, also to lack of financial resources for the operation of the Commission'. [Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата.]

²⁶ The former President of the CPAD was also implicated in the affair, as reported in last year's report.

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

²⁸ Once again, the CPAD reported the distribution of cases by discrimination ground in percentages and did not provide a full list.

2015. Under the separate category of cases of 'persons and children with disabilities', the Ombudsperson reports having received 5 cases or 0.16 %, which is a substantial drop from 15 cases or 0.4 % in 2016. As was the case in the previous year, the Ombudsperson did not publish detailed statistics on the grounds and fields in which the cases were filed. However, it noted a continuing trend from previous years in that employment remained the dominant field. It also reports a much higher number of cases of harassment and three cases of hate crime.

The ADL is silent on situation testing. It is worth noting that Article 206 of the Law on Civil Procedure states that all facts that are important for reaching a decision can be used as evidence, but that it is up to the courts to decide which facts need to be proven and which do not. The Law on Civil Procedure goes on to mention examples of evidence, but situation testing is not one of those examples. Situation testing was initially used in practice only by CSOs, even before the adoption of the Anti-Discrimination Law. In 2014, the Macedonian Helsinki Committee (MHK) and the OSCE - Mission to Skopje conducted a joint project on situation testing which resulted in findings that they announced that they would raise as evidence in front of the courts. Further information has not been released. Although falling outside of the scope of this report, it is worth noting that in 2016, the Ombudsperson conducted a situation testing exercise in order to cross-check a submission it received from a CSO on discrimination on the ground of sex in the field of healthcare provision.²⁹

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

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

6. Equality bodies

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

The CPAD received 59 cases in 2017, which is almost the same as the 60 cases it received in 2016. However, taken together, this is a continuation in the drop in the number of cases in previous years,³⁰ including from 106 cases in 2014 to 70 cases in 2015. The reporting per discrimination ground³¹ has been as follows: sex and gender 19 %; ethnicity 18 %; political affiliation 17 %; health status 16 %; sexual orientation and gender identity 16 %;

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

³⁰ On reasons behind the drop, see section 5 'Enforcing the law'.

³¹ Once again, the CPAD reported the distribution of cases by discrimination ground in percentages and did not provide the full list.

personal or other social status 16 %; age 8 %; social origin 7 %; and education 7 %. This is the first time that the CPAD has included sexual orientation and gender identity in its breakdown of cases by ground. The reported distribution per field was: 41 % in employment and labour relations; 25 % in access to goods and services; 22 % in public information and media; 14 % in education, science and sport; and 10 % in social security, including social protection and pension and disability insurance, health insurance and health protection. Although 'judiciary and administration' featured more prominently in the previous years, it is not even reported in this year's CPAD report.

There was no equality body before the ADL's adoption. Public sector discrimination duties came under the mandate of the Ombudsperson. The ADL does not regulate the relationship between the Ombudsperson and the CPAD (it operates partly under a memorandum of understanding). According to the Ombudsperson's general mandate, it can accept individual claims, investigate, give recommendations and opinions, initiate procedures, and monitor and research specific issues, focusing protection on the grounds mentioned in the Constitution and covering violations made by public bodies. Amendments to the Ombudsperson's Act were made in 2016, and entered into force in April 2017, adding promotion to the institution's mandate.³²

7. Key issues

The key issues of concern in the national context include:

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

³² Law on Ombudsperson (*Закон за народниот правобранител*), Official Gazette of the Republic of Macedonia Nos. 60/2003, 114/2009, 181/2016, 189/2016, Constitutional Court Decisions: U. no. 111/2007.

RÉSUMÉ

1. Introduction

La Macédoine (ARYM),³³ pays multiethnique et enclavé du sud-est de l'Europe, a déclaré son indépendance en 1991 par suite de la dissolution de la Yougoslavie. Elle est devenue candidate à l'adhésion à l'Union européenne en 2005 avec recommandation d'ouvrir les négociations à partir de 2009, et a reçu en 2008 une invitation conditionnelle à rejoindre l'Organisation du traité de l'Atlantique Nord. Bien qu'ils soient considérés comme une priorité nationale en matière d'affaires étrangères, ces deux processus d'adhésion sont au point mort en raison au départ d'un litige sur le nom. Comme le signalent toutefois plusieurs rapports d'avancement consécutifs publiés par la Commission européenne³⁴ concernant les progrès réalisés par le pays sur la voie de l'adhésion, cette difficulté initiale s'est trouvée ultérieurement exacerbée par des questions d'État de droit fondamental et de captation de l'État.³⁵ Les priorités nationales officielles demeurent la mise en œuvre³⁶ de l'accord-cadre d'Ohrid,³⁷ la réduction des taux de chômage³⁸ et la lutte contre la pauvreté.³⁹

Les manifestations massives,⁴⁰ l'affaire des écoutes téléphoniques (interception illégale des communications de plus de 20 000 personnes par l'Agence de renseignement macédonienne),⁴¹ les accords de Pržino et la mission de l'UE en matière d'état de droit⁴² ont abouti à la démission de Nikola Gruevski après qu'il ait occupé le poste de Premier ministre sans interruption pendant près de dix ans; à des élections parlementaires anticipées; et à un parlement sans majorité, ce qui a prolongé la crise politique dans la mesure où aucun gouvernement n'a pu être formé durant plusieurs mois. La situation s'est

³³ La dénomination constitutionnelle du pays est «République de Macédoine». Mais en attendant que soit réglé le litige en cours avec la Grèce concernant cette dénomination, la résolution A/RES/47/225 des Nations unies prévoit que l'État est admis comme membre des Nations unies en étant provisoirement désigné sous le nom d'«ancienne République yougoslave de Macédoine». Cette dénomination temporaire est utilisée par la Commission européenne et, partant, dans le présent rapport également.

³⁴ Commission européenne (2016) «*The Former Yugoslav Republic of Macedonia – Progress Report*». https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf. Tous les hyperliens ont été consultés le 18 mars 2018.

³⁵ Le concept de «captation de l'État» s'entend ici au sens de la définition que lui donne Transparency International, à savoir: «une situation où des personnes physiques, des institutions, des entreprises ou des groupes puissants, qui peuvent être ou non des ressortissants du pays, recourent à la corruption pour peser sur les décisions politiques et l'environnement juridique du pays au profit de leurs propres intérêts». Telle est également la manière dont la Commission européenne décrit la situation du pays dans son rapport d'avancement 2016. Source: Commission européenne (2016), «*The Former Yugoslav Republic of Macedonia – Progress Report*».

³⁶ Même si ce n'est pas l'accord-cadre d'Ohrid proprement dit qui est mis en œuvre, mais des dispositions constitutionnelles et légales ainsi que des documents stratégiques découlant de sa signature, l'expression «mise en œuvre de l'accord-cadre d'Ohrid» est utilisée ici par souci de concision.

³⁷ Signé en vue de mettre fin au conflit armé de 2001, cet accord vise à améliorer la situation des communautés ethniques minoritaires ainsi qu'à préserver et refléter le caractère multiethnique du pays dans la vie publique, y compris au moyen d'actions pour la promotion de la non-discrimination et en faveur d'une représentation équitable.

³⁸ Selon l'Office national de statistique, le taux de chômage atteignait 23,4 % de la population active au dernier trimestre de 2016, et le taux d'emploi 43,4 %.

³⁹ L'indicateur de pauvreté de Laeken était de 22,1 % en 2014 (dernière statistique disponible).

⁴⁰ Protestiram, «About the Protests», site web de Protestiram, http://protestiram.info/?page_id=40; DW (2016), «Macedonia: "Colorful Revolution" paints raucous rainbow», DW Website, <http://www.dw.com/en/macedonia-colorful-revolution-paints-raucous-rainbow/a-19203365>.

⁴¹ Balkan Insight, (2015), «Macedonia PM Accused of Large-Scale Wire-Tapping» (Le Premier ministre macédonien accusé d'écoute téléphonique à grande échelle) (9 février 2015), site web de Balkan Insight, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

⁴² UE (2015), «Recommandations du groupe d'experts de haut niveau sur les problèmes systémiques de l'état de droit relativement à l'interception de communications révélée au printemps 2015», https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news-news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

encore aggravée avec les violences physiques⁴³ commises le 27 avril 2017 lorsque des manifestants ont été introduits dans le parlement par des députés du parti de Gruevski au moment de l'élection et de la nomination d'un nouveau président de cette assemblée.⁴⁴ Un nouveau gouvernement a été formé un mois plus tard sous la direction des sociaux-démocrates. Des élections locales ont eu lieu au second semestre de 2017, ce qui s'est traduit par une faible activité pour le corps législatif et, dès lors, par une année sans événement marquant en termes de modifications juridiques ou autres évolutions plus générales revêtant de l'intérêt dans le cadre du présent rapport.

La population du pays dépasse la barre des deux millions.⁴⁵ L'appartenance ethnique est importante car une série de droits et d'actions positives sont liés à la proportion numérique qu'une communauté ethnique représente dans l'ensemble de la population. La composition ethnique⁴⁶ s'établit comme suit: 64 % de Macédoniens de souche, 25 % d'Albanais de souche, 4 % de Turcs de souche, 3 % de Roms de souche, 2 % de Serbes de souche, 1 % de Bosniaques de souche, 0,5 % de Valaques de souche et 1 % «d'autres» (terme utilisé par la Constitution). Diverses activités en faveur des droits des Roms ont été initiées, y compris dans le cadre de la Décennie de l'intégration des Roms.⁴⁷ Ceci dit, hormis en ce qui concerne la participation politique,⁴⁸ les résultats sont contestés.

En ce qui concerne la coopération avec des organisations de la société civile (OSC), un tournant majeur s'est opéré en termes d'évolutions au cours de la seconde moitié de l'année par rapport à la première. Suite en effet à la formation du nouveau gouvernement en juin 2017, le climat qui faisait des OSC des boucs émissaires et l'objet de poursuites manifestes – ce qui fut le cas durant le gouvernement Gruevski – s'est rapidement transformé en faveur d'une beaucoup plus grande ouverture avec l'inclusion des OSC aux processus décisionnels, la création de groupes de travail et l'apport d'un soutien aux activités des OSC, y compris en matière d'égalité et de non-discrimination. Ainsi par exemple, au cours du semestre de 2017 écoulé depuis l'arrivée du nouveau gouvernement, le ministre de la culture a inauguré le week-end «Pride» organisé par un groupe d'OSC tandis que le Premier ministre prenait la parole lors de l'ouverture d'une célébration du cinquième anniversaire du centre LGBT – une OSC dont les locaux ont été régulièrement attaqués au cours des années précédentes sans que personne n'ait encore fait l'objet de poursuites.⁴⁹ Le nouveau gouvernement a montré à ces deux occasions, de façon à la fois symbolique et déclarative, son intention de soutenir l'égalité pour tous, indépendamment de l'orientation sexuelle et de l'identité de genre.

2. Législation principale

La Constitution de la République de Macédoine⁵⁰ est une constitution écrite qui représente la loi suprême du pays. Elle admet le droit international en tant que partie intégrante du

⁴³ Nova TV (2017), «Six mois après le jeudi sanglant, une seule peine d'emprisonnement prononcée» (*Пола година по крвавиот четврток само една затворска казна*), <http://novatv.mk/pola-godina-po-krvaviot-chetvrtok-samo-edna-zatvorska-kazna/>.

⁴⁴ Un enregistrement de caméra de surveillance a été rendu public: on y voit clairement les députés ouvrant les portes et accueillant la foule qui s'est engouffrée à l'intérieur.

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

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

⁴⁷ La Décennie de l'inclusion des Roms, initiative régionale pour l'amélioration de la situation des Roms en matière de santé, de logement, d'éducation et d'emploi, s'est achevée en 2015.

⁴⁸ Le pays compte un ministre rom au sein du gouvernement, une municipalité rom (Shuto Orizari), des députés roms, etc.

⁴⁹ À propos de ces attaques et de l'absence d'enquête de la part de l'État, voir le Flash report «*Absence of Reaction to Series of Attacks on the LGBTI Support Centre*» (2013): <https://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

⁵⁰ Le texte de la Constitution de la République de Macédoine (*Устав на Република Македонија*) peut être consulté en français sur: <http://www.sobranie.mk/constitution-de-la-r-publique-de-mac-doine.nspx>

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

Jusqu'en 2010, les dispositions antidiscrimination étaient dispersées entre plusieurs lois. En avril 2010, la loi antidiscrimination⁵¹ – première loi générale en matière d'égalité – a été adoptée dans le cadre du processus d'alignement sur l'acquis de l'UE. Cette loi n'est pas conforme aux directives pour ce qui concerne la liste minimale des motifs protégés; les définitions et les formes de discrimination; les sanctions efficaces, proportionnées et dissuasives; l'utilisation de données statistiques; et le dialogue avec le secteur des OSC. L'organisme pour l'égalité institué par cette loi – à savoir la Commission pour la protection contre la discrimination – ne saurait par ailleurs être considéré comme répondant aux exigences de la directive 2000/43.

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

L'évaluation ex post de la mise en œuvre de la loi antidiscrimination montre que les objectifs de la loi⁵² n'ont été que partiellement atteints et recense plusieurs points sur lesquels des améliorations pourraient être apportées, justifiant la situation comme le résultat du niveau insuffisant de fonds alloués. Trois recommandations en vue de changements législatifs ont été formulées: une modification de la loi antidiscrimination de façon à permettre l'instauration d'un soutien administratif à la Commission pour la protection contre la discrimination; l'obligation explicite du «renversement de la charge de la preuve» pour cette Commission; et le renforcement de ses mécanismes de responsabilisation. Une analyse globale a dès lors été menée dans une perspective d'harmonisation avec un accent particulier sur l'harmonisation de la loi antidiscrimination avec les normes internationales et l'harmonisation d'autres lois et réglementations nationales avec la loi antidiscrimination. L'analyse identifie de nombreux points requérant un amendement législatif, à caractère à la fois général (adaptation d'une terminologie insensible au handicap, par exemple) et plus spécifique (propositions d'articles particuliers).⁵³

⁵¹ Loi sur la prévention et la protection contre la discrimination (*Закон за спречување и заштита од дискриминација*) Journal officiel de la République de Macédoine, n° 50/10, 44/2014, 150/2015. Arrêt de la Cour constitutionnelle: У.бр.82/2010 (15 septembre 2010).

⁵² La loi antidiscrimination ne contenant aucune disposition relative à ses objectifs, l'équipe chargée de l'évaluation ex-post a considéré, sur base de l'analyse d'autres documents, qu'il s'agissait de la prévention de la discrimination et de la protection contre la discrimination.

⁵³ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation* (OSCE et Commission pour la protection contre la discrimination), disponible sur: https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equality_and_non-discrimination *Анализа на хармонизираноста на домашното законодавство за еднаквост и недискриминацијата*.

À l'heure de rédiger le présent rapport, un projet de nouvelle loi destinée à remplacer celle de 2010 est en cours d'élaboration. Il porte le même titre que la loi actuelle – à savoir Loi pour la prévention et la protection contre la discrimination (ci-après projet de loi antidiscrimination 2017).⁵⁴ Le texte a été rédigé par un groupe de travail composé de personnes appartenant aux ministères concernés, de représentants d'organisations internationales et d'OSC spécialisées en matière d'égalité, y compris celles qui apportent une aide juridique dans des dossiers de discrimination. Le ministère du travail et de la politique sociale a coordonné le processus en bénéficiant du soutien majeur de la Mission à Skopje de l'Organisation pour la sécurité et la coopération en Europe. Le groupe de travail s'est attelé à la préparation du texte pendant près de deux ans. Le texte a été présenté le 20 octobre 2017 lors d'une discussion organisée à Skopje par le ministère du travail et de la politique sociale et l'OSCE.⁵⁵ Le paragraphe ci-dessus consacré à la loi antidiscrimination s'appliquerait au projet de loi antidiscrimination 2017 moyennant plusieurs changements au niveau des motifs de discrimination. On notera dans la perspective plus particulière du présent rapport l'ajout de l'orientation sexuelle et le changement de «handicap mental ou physique» en «handicap» (article 5 du projet de loi antidiscrimination 2017). Ces amendements, de même que d'autres changements importants proposés dans le projet de loi antidiscrimination 2017, sont examinés plus en détail dans les chapitres pertinents du rapport national.

3. Principes généraux et définitions

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

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

Avant l'adoption de la loi antidiscrimination, plusieurs lois contenaient des définitions de la discrimination. Étant donné que la loi antidiscrimination ne prévoit – ni dans ses dispositions transitoires ni dans ses dispositions finales – d'harmonisation entre les dispositions pertinentes figurant dans différentes lois, on peut s'attendre à ce que les institutions censées appliquer la loi ne sachent pas quelle législation et/ou disposition appliquer à un cas d'espèce ni quelles sont les dispositions prévalant sur les autres. Bien

⁵⁴ Le texte du projet de loi antidiscrimination 2017 tel qu'il existait à la date limite fixée pour le présent rapport, n'est pas disponible en ligne. L'auteur a utilisé la version diffusée aux fins du débat public (voir la note de bas de page suivante à propos de ce débat). Source: Projet de loi sur la prévention et la protection contre la discrimination, 2017. Référence complète: Ministère du travail et de la politique sociale (*Предлог закон за спречување и заштита од дискриминација*) (2017) (diffusé par le représentant de ce ministère par courrier électronique le 16 octobre 2017; au dossier de l'auteur).

⁵⁵ Akademik (2017), «Débat public sur la nouvelle loi sur la prévention et la protection contre la discrimination» (Јавна дебата за новиот закон за спречување и заштита од дискриминација), 20 octobre 2017, site web d'Academik: <http://www.akademik.mk/javna-debata-za-noviot-zakon-za-sprechuvane-i-zashtita-od-diskriminatsija/>.

que, par tradition, les principes résumés dans les adages *lex specialis derogat legi generali* et *lex posterior derogat legi priori* fassent partie de la pratique judiciaire, les juges tendent à s'appuyer sur des dispositions existantes plutôt que sur des principes juridiques généraux, même lorsqu'ils confrontés à des dispositions apparemment contradictoires, les principes généraux du droit étant surtout utilisés en cas de lacune juridique (comme prévu au titre de la loi relative aux tribunaux).

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

4. Champ d'application matériel

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

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

- Les mesures positives (article 13): mesures qui, prises par des personnes physiques ou morales, ne sont pas considérées comme discriminatoires lorsqu'elles sont instaurées sur la base d'une justification passée, actuelle ou future, et qui peuvent être adoptées jusqu'à ce qu'une égalité de fait soit intégralement réalisée et jusqu'à ce que les inégalités de fait soient éliminées ou réduites.
- Le traitement différencié non considéré comme discriminatoire (article 14): traitement différencié des non-citoyens; exigence professionnelle essentielle; traitement différencié fondé sur la religion, les convictions, le sexe ou autres caractéristiques personnelles pour ce qui concerne l'éducation et la formation en vue de l'exercice d'une profession liée à une religion déterminée; activités menées par les membres et instances d'églises ou de communautés religieuses, d'organisations citoyennes, de partis politiques, de syndicats ou d'autres organisations conformément à leur doctrine ou leurs convictions et/ou aux objectifs définis par leurs statuts, leurs programmes et/ou leurs réglementations; réglementation du mariage; exercice du principe constitutionnel de la liberté de parole, d'intervention publique, de pensée et d'information publique; et fixation d'un âge minimum et maximum pour ce qui concerne l'accès à une profession/l'octroi de privilèges/la retraite pour autant qu'il existe un but légitime.
- Les mécanismes de protection destinés à des catégories particulières de personnes (article 15): mécanisme de protection des femmes enceintes et des mères; pour les enfants orphelins, les mineurs, les parents célibataires et les personnes handicapées; pour la participation égale des femmes et des hommes; pour l'incitation à l'emploi; pour l'instruction et la formation des personnes handicapées; pour l'avancement de l'âge minimum et de l'âge maximum permettant d'accéder à certains niveaux

d'éducation et de formation pour autant que ce traitement différencié soit objectivement justifié par un but légitime et qu'il n'aille pas au-delà de ce qui est nécessaire compte tenu de la nature de l'éducation et de la formation en cause ou des conditions dans lesquelles elles sont dispensées, et qu'il n'aille pas au-delà de ce qui est nécessaire pour atteindre le but recherché; des mesures spéciales en faveur de personnes ou de groupes se trouvant en situation défavorisée en raison d'un quelconque motif de discrimination, afin de leur accorder une égalité de chances, pour autant que les mesures en question soient nécessaires; des mesures destinées à protéger les spécificités et l'identité de personnes appartenant à des minorités ethniques, religieuses ou linguistiques ainsi que leur droit de tenir à leur propre identité et de la développer individuellement ou au sein d'une communauté avec d'autres membres du groupe, et mesures destinées à favoriser l'instauration de conditions propices à la promotion de cette identité; et, le cas échéant, des mesures dans le domaine de l'éducation et de la formation en vue de garantir la participation des minorités ethniques.

Il existe dans le domaine de l'emploi, outre la loi antidiscrimination, une loi sur les relations de travail⁵⁶ qui interdit toute discrimination conformément aux normes fixées par les directives. Les deux lois s'appliquent tant au secteur public qu'au secteur privé.

5. Mise en application de la loi

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

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

Une procédure administrative engagée auprès de la Commission pour la protection contre la discrimination est gratuite. Cette instance peut formuler des avis et des recommandations. La procédure a une durée maximale de 90 jours. Si la recommandation n'est pas suivie d'effet, la Commission en question peut engager une procédure auprès de l'instance compétente (la loi ne fournissant aucune autre précision).

La Commission pour la protection contre la discrimination a été saisie de 59 dossiers en 2017, soit un chiffre pratiquement identique à celui de 2016 (60 dossiers). Il s'agit globalement d'une poursuite de la tendance à la baisse par rapport aux années précédentes, marquée notamment par un recul de 106 dossiers en 2014 à 70 dossiers en 2015. À l'inverse de 2016, la Commission pour la protection contre la discrimination n'a pas ajouté de commentaire expliquant les raisons de la diminution des signalements de cas, qu'elle avait attribuée les années précédentes à une insuffisance de ressources financières et à d'autres problèmes⁵⁷ sans toutefois en préciser la nature ni la manière dont

⁵⁶ Loi sur les relations de travail (*Закон за работните односи*), Journal officiel de la République de Macédoine n° 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014; arrêts de la Cour constitutionnelle : U. n° 139/2005, U. n° 161/2005, U. n° 134/2005, U. n° 187/2005, U. n° 111/2006, U. n° 188/2006, U. n° 170/2006, U. n° 200/2008, U. n° 20/2009, U. n° 176/2009, U. n° 263/2009, U. n° 62/2013, U. n° 114/2014.

⁵⁷ Voir: Commission pour la protection contre la discrimination (Комисија за заштита од дискриминација) (2017) *Rapport annuel 2016* : la baisse s'explique aussi, entre autres, par un manque de ressources financières pour faire fonctionner la Commission [*Овој пад на бројот на претставки се должи, покрај*

elle est parvenue à cette conclusion. Or les ressources financières ne peuvent expliquer pourquoi moins de personnes ont adressé une plainte à la Commission en 2016 qu'en 2015. Une explication davantage plausible aurait pu et pourrait encore être une perte supplémentaire de confiance dans l'institution, processus enclenché par l'affaire des écoutes téléphoniques⁵⁸ (évoquée plus haut) et alimenté ensuite par la désignation des membres à l'occasion de la deuxième composition de la Commission pour la protection contre la discrimination.⁵⁹

Les signalements par motif de discrimination se répartissent comme suit:⁶⁰ sexe et genre 19 %; origine ethnique 18 %; affiliation politique 17 %; état de santé 16 %; orientation sexuelle et identité de genre 16 %; situation personnelle ou autre situation sociale 16 %; âge 8 %; origine sociale 7 %; et éducation 7 %. C'est la première fois que ladite Commission inclut l'orientation sexuelle et l'identité de genre dans sa ventilation des dossiers par motif. La répartition par domaine est rapportée comme suit: 41 % dans l'emploi et les relations de travail; 25 % dans l'accès aux biens et aux services; 22 % dans l'information publique et les médias; 14 % dans l'éducation, les sciences et le sport; et 10 % dans le domaine de la sécurité sociale, y compris la protection sociale et l'assurance pension et invalidité, l'assurance maladie et la protection de la santé. Alors que «le judiciaire et l'administration» occupaient une plus grande place les années précédentes, ce domaine n'est même plus cité cette année dans le rapport de la Commission pour la protection contre la discrimination.

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

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

Le Médiateur est une autre instance à laquelle des allégations de discrimination dans le secteur public peuvent être adressées. En 2017, 70 dossiers ont été introduits en tant qu'affaires en matière de non-discrimination ou de représentation équitable, ce qui représente 2,17 % du nombre total de dossiers déposés. Il s'agit de la proportion la plus élevée pour cette catégorie de cas depuis que le Médiateur les signale séparément (supérieure en l'occurrence aux 69 dossiers ou 1,83 % signalés en 2016, aux 53 dossiers

другото и на немањето на финансиски услови за работата на Комисијата.] Disponible sur le site de la Commission pour la protection contre la discrimination:

http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.

⁵⁸ L'ancien président de la Commission pour la protection contre la discrimination était également impliqué dans l'affaire, comme signalé dans le rapport de l'année dernière.

⁵⁹ À propos de la deuxième composition, voir le Flash report «*Appointment of new members of the equality body*», <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

⁶⁰ Une fois encore, la Commission pour la protection contre la discrimination a communiqué la répartition des dossiers par motif de discrimination sous la forme de pourcentages sans en fournir la liste complète.

ou 1,2 % signalés en 2015 et aux 66 dossiers ou 1,55 % signalés en 2014). Il convient néanmoins de considérer cette proportion au travers du prisme du nombre total de cas, lequel fait état d'un recul substantiel par rapport aux années précédentes. Autrement dit, le nombre total de dossiers déposés auprès du Médiateur continue de diminuer. En 2017, l'institution signale avoir été saisie de 3 224 cas, ce qui représente une nouvelle baisse par rapport à 2016 : elle avait été saisie alors de 3 775 cas, ce qui constituait déjà une diminution par rapport aux 4 403 cas de 2015. En ce qui concerne la catégorie distincte des cas de «personnes et enfants handicapés», le Médiateur signale avoir reçu cinq dossiers (soit 0,16 %), ce qui représente un net recul par rapport aux quinze cas ou 0,4 % de 2016. Pas plus que l'année précédente le Médiateur n'a publié de statistiques détaillées concernant les motifs et les domaines dont relevaient les dossiers. Il constate cependant le maintien d'une tendance observée les années précédentes, à savoir la prédominance de l'emploi parmi les domaines considérés. Il signale également un nombre beaucoup plus élevé de cas de harcèlement et trois cas de crime haineux.

La loi antidiscrimination est muette quant au test de situation. Il convient de noter que l'article 206 de la loi sur la procédure civile dispose que tous les faits importants pour parvenir à une décision peuvent servir de preuves, mais qu'il appartient aux cours et tribunaux de décider quels faits doivent être démontrés et quels faits ne doivent pas l'être. La loi sur la procédure civile poursuit en citant des exemples de preuve, mais le test de situation n'y figure pas. Dans la pratique, ce test a été utilisé au départ, avant même l'adoption de la loi antidiscrimination, uniquement par des OSC. En 2014, le Comité d'Helsinki macédonien (MHC) et l'OSCE - Mission à Skopje ont mené un projet conjoint concernant le test de situation, et ont annoncé qu'ils se serviraient des conclusions de celui-ci comme preuves devant les tribunaux. Aucune autre information n'a été divulguée. Il convient de signaler, bien que l'information sorte du cadre du présent rapport, que le Médiateur a procédé en 2016 à un test de situation pour vérifier un recours que lui avait adressé une OSC pour discrimination fondée sur le sexe dans le domaine des soins de santé.⁶¹

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

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

6. Organismes de promotion de l'égalité de traitement

La loi antidiscrimination a créé le premier organisme de promotion de l'égalité de traitement du pays, en l'occurrence la Commission pour la protection contre la discrimination. Celle-ci est habilitée à donner des conseils et formuler des recommandations concernant des cas de discrimination; à fournir des informations et engager des procédures auprès des organismes publics compétents; à produire des rapports; à prêter des services éducatifs et de formation; à initier des changements législatifs; à coopérer avec des administrations locales, des OSC, d'autres organismes de promotion de l'égalité et des organisations internationales; à collecter des données

⁶¹ Comité d'Helsinki de la République de Macédoine (2016), «Fiche informative concernant la discrimination» (Информатор за дискриминација), mai 2016, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

statistiques, à créer des bases de données et à effectuer des recherches. La Commission traite de dossiers de discrimination fondée sur les motifs suivants: sexe, race, couleur de peau, genre, appartenance à un groupe marginalisé, origine ethnique, langue, citoyenneté, origine sociale, religion ou conviction religieuse, autres types de convictions, éducation, affiliation politique, situation personnelle ou sociale, handicap mental ou physique, âge, situation familiale ou état matrimonial, fortune, état de santé ou tout autre motif stipulé dans la législation ou dans un traité international ratifié.

La Commission pour la protection contre la discrimination a été saisie de 59 dossiers en 2017, soit un chiffre pratiquement identique à celui de 2016 (60 dossiers). Considéré globalement, il s'agit néanmoins d'une poursuite de la tendance à la baisse par rapport aux années précédentes,⁶² marquée notamment par un recul de 106 dossiers en 2014 à 70 dossiers en 2015. Les signalements par motif de discrimination se répartissent comme suit:⁶³ sexe et genre 19 %; origine ethnique 18 %; affiliation politique 17 %; état de santé 16 %; orientation sexuelle et identité de genre 16 %; situation personnelle ou autre situation sociale 16 %; âge 8 %; origine sociale 7 %; et éducation 7 %. C'est la première fois que ladite Commission inclut l'orientation sexuelle et l'identité de genre dans sa ventilation des dossiers par motif. La répartition par domaine est rapportée comme suit: 41 % dans l'emploi et les relations de travail; 25 % dans l'accès aux biens et aux services; 22 % dans l'information publique et les médias; 14 % dans l'éducation, les sciences et le sport; et 10 % dans le domaine de la sécurité sociale, y compris la protection sociale et l'assurance pension et invalidité, l'assurance maladie et la protection de la santé. Alors que «le judiciaire et l'administration» occupaient une plus grande place les années précédentes, ce domaine n'est même plus cité cette année dans le rapport de la Commission pour la protection contre la discrimination.

Aucun organisme national de promotion de l'égalité n'était en place avant l'adoption de la loi antidiscrimination. Les obligations en matière de discrimination dans le secteur public relevaient du mandat du Médiateur. La loi antidiscrimination ne régit pas les relations entre le Médiateur et la Commission pour la protection contre la discrimination (elles sont partiellement régies par un protocole d'accord). En vertu de son mandat général, le Médiateur peut être saisi de plaintes individuelles, les instruire, formuler des recommandations et des avis, engager des procédures, et assurer un suivi et effectuer des recherches sur des questions spécifiques, en se focalisant sur la protection par rapport aux motifs cités dans la Constitution et sur les infractions commises par des instances publiques. Des amendements ont été apportés à la loi sur le Médiateur en 2016 et sont entrés en vigueur en avril 2017; ils ajoutent la promotion au mandat de l'institution.⁶⁴

7. Points essentiels

Les aspects les plus préoccupants dans le contexte national sont:

- le fait que l'orientation sexuelle ne soit pas un motif expressément protégé dans la loi antidiscrimination;
- l'absence d'harmonisation de la législation nationale en droit interne et avec les normes internationales;
- le sous-financement qui empêche les institutions nationales en matière de droits de l'homme d'exercer pleinement leurs compétences;
- l'impunité des crimes de haine et des discours haineux, à l'égard de l'orientation sexuelle plus particulièrement;
- les problèmes d'État de droit et la captation de l'État qui érodent la confiance dans les institutions, y compris dans le système judiciaire;

⁶² Voir le point 5 «Mise en application de la loi» pour les raisons qui sous-tendent cette diminution.

⁶³ Une fois encore, la Commission pour la protection contre la discrimination a communiqué la répartition des dossiers par motif de discrimination sous la forme de pourcentages sans en fournir la liste complète.

⁶⁴ Loi sur le Médiateur (*Закон за народниот правобранител*), Journal officiel de la République de Macédoine n° 60/2003, 114/2009, 181/2016, 189/2016, arrêts de la Cour constitutionnelle: U. n° 111/2007.

- le manque d'indépendance de l'organisme pour l'égalité qui, dans son positionnement et son fonctionnement actuels, ne peut être considéré comme conforme aux directives ;
- la sévérité des représailles à l'encontre de la société civile et des activistes qui élèvent des voix critiques.

ZUSAMMENFASSUNG

1. Einleitung

Mazedonien (ehemalige jugoslawische Republik)⁶⁵ ist ein multiethnisches Binnenland im Südosten Europas und erklärte sich 1991, nach der Auflösung Jugoslawiens, für unabhängig. Das Land ist seit 2005 Bewerber um die Mitgliedschaft in der Europäischen Union mit einer Empfehlung, die Verhandlungen ab 2009 aufzunehmen, und wurde 2008 unter Vorbehalt eingeladen, dem Nordatlantikpakt beizutreten. Obwohl beide Prozesse für das Land außenpolitische Prioritäten darstellen, sind sie ins Stocken geraten, anfänglich aufgrund des Namensstreits. Wie in mehreren aufeinanderfolgenden Fortschrittsberichten der Europäischen Kommission erwähnt,⁶⁶ wurde diese Schwierigkeit später jedoch durch grundlegende Fragen der Rechtsstaatlichkeit und eine Vereinnahmung des Staates verschärft.⁶⁷ Offizielle innenpolitische Prioritäten sind nach wie vor die Umsetzung⁶⁸ des Rahmenabkommens von Ohrid,⁶⁹ die Verringerung der Arbeitslosenquote⁷⁰ und die Bekämpfung der Armut.⁷¹

Die massiven Proteste,⁷² die Abhöraffäre (mutmaßliche illegale Überwachung der Kommunikation von mehr als 20 000 Personen durch den staatlichen Geheimdienst),⁷³ das Pržino-Abkommen und die Rechtsstaatlichkeitsmission der EU⁷⁴ gipfelten in dem Rücktritt von Nikola Gruevski nach fast zehnjähriger, ununterbrochener Amtszeit als Ministerpräsident, vorgezogenen Parlamentswahlen und einer Pattsituation im Parlament, welche die politische Krise weiter verlängerte, da einige Monate lang keine Regierung gebildet werden konnte. Am 27. April 2017 eskalierte die Situation mit körperlicher

⁶⁵ Die amtliche Bezeichnung des Landes lautet „Republik Mazedonien“. Bis zur Beilegung des Namensstreits mit Griechenland wurde das Land im Rahmen der UN-Resolution A/RES/47/225 jedoch unter der provisorischen Bezeichnung „ehemalige jugoslawische Republik Mazedonien“ als Mitglied der Vereinten Nationen zugelassen. Diese provisorische Bezeichnung wird von der Europäischen Kommission und deshalb auch in diesem Bericht verwendet.

⁶⁶ Europäische Kommission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report* https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf (letzter Zugriff auf alle Hyperlinks am 18. März 2018).

⁶⁷ Der Begriff „Vereinnahmung des Staates“ bezeichnet der Definition von Transparency International zufolge: „eine Situation, in der mächtige Personen, Institutionen, Unternehmen oder Gruppen innerhalb oder außerhalb eines Landes sich der Korruption bedienen, um dessen Politik, rechtliches Umfeld und Wirtschaft zum Vorteil ihrer eigenen Interessen zu gestalten“. So hat auch die Europäische Kommission die Situation in Mazedonien in ihrem Bericht von 2016 beschrieben. Quelle: Europäische Kommission (2016), *The Former Yugoslav Republic of Macedonia – Progress Report*.

⁶⁸ Obwohl nicht das Rahmenabkommen von Ohrid selbst umgesetzt wird, sondern verfassungsrechtliche und gesetzliche Bestimmungen und strategische Dokumente, die sich aus der Unterzeichnung des Abkommens ergeben, wird hier der Kürze halber der Ausdruck „Umsetzung des Rahmenabkommens“ verwendet.

⁶⁹ Das Rahmenabkommen von Ohrid wurde Ende 2001 zur Beendigung des bewaffneten Konflikts unterzeichnet und hat das Ziel, die Lage ethnischer Minderheiten zu verbessern und den multiethnischen Charakter des Landes im öffentlichen Leben widerzuspiegeln, insbesondere durch Maßnahmen zur Förderung der Gleichbehandlung und gleichberechtigten Vertretung von Minderheiten.

⁷⁰ Nach Angaben des Staatlichen Amtes für Statistik belief sich die Arbeitslosenquote im letzten Quartal 2016 auf 23,4 % der Erwerbsbevölkerung, der Anteil der Erwerbstätigen dagegen auf 43,4 %.

⁷¹ Der Laeken-Indikator für Armut für 2014 (letzte verfügbare Statistik) ist 22,1 %.

⁷² Protestiram, „About the Protests“ (Über die Proteste), Protestiram-Webseite unter http://protestiram.info/?page_id=40; DW (2016), „Macedonia: ‘Colorful Revolution’ paints raucous rainbow“ (Mazedonien: „Bunte Revolution“ malt grölenden Regenbogen), DW-Webseite unter <http://www.dw.com/en/macedonia-colorful-revolution-paints-raucous-rainbow/a-19203365>.

⁷³ Balkan Insight, 9. Februar 2015, „Macedonia PM Accused of Large-Scale Wire-Tapping“ (Mazedonischer Premierminister großangelegter Telefonüberwachung beschuldigt), Webseite von Balkan Insight unter <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

⁷⁴ EU (2015), „Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015“ (Empfehlungen der hochrangigen Sachverständigengruppe zu systemischen Problemen im Bereich der Rechtsstaatlichkeit im Zusammenhang mit der im Frühjahr 2015 aufgedeckten Kommunikationsüberwachung), https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

Gewalt,⁷⁵ als Abgeordnete der Partei Gruevskis während der Wahl und Ernennung eines neuen Parlamentspräsidenten Demonstranten Zugang zum Parlament verschafften.⁷⁶ Einen Monat später wurde unter Führung der Sozialdemokraten eine neue Regierung gebildet. In der zweiten Jahreshälfte 2017 fanden Kommunalwahlen statt, was bedeutete, dass die gesetzgeberische Tätigkeit gering und das Jahr, was rechtliche Änderungen und allgemeine Entwicklungen im Sinne dieses Berichts betrifft, somit ziemlich ereignislos war.

Das Land hat eine Bevölkerung von mehr als zwei Millionen.⁷⁷ Die ethnische Zugehörigkeit ist wichtig, weil zahlreiche Rechte und Fördermaßnahmen an den zahlenmäßigen Anteil einer ethnischen Gemeinschaft innerhalb der Gesamtbevölkerung geknüpft sind. Die ethnische Zusammensetzung⁷⁸ ist wie folgt: 64 % ethnische Mazedonier, 25 % ethnische Albaner, 4 % ethnische Türken, 3 % ethnische Roma, 2 % ethnische Serben, 1 % ethnische Bosnier, 0,5 % ethnische Walachen und 1 % „sonstige“ (in der Verfassung verwendeter Begriff). Es wurden zahlreiche Aktivitäten für die Rechte der Roma durchgeführt, auch im Rahmen des „Jahrzehnts der Roma-Integration“.⁷⁹ Die Ergebnisse sind, außer was die politische Beteiligung betrifft,⁸⁰ jedoch umstritten

Was die Zusammenarbeit mit zivilgesellschaftlichen Organisationen (ZGOs) betraf, so unterschieden sich die Entwicklungen im ersten Halbjahr 2017 deutlich von denen im zweiten Halbjahr. Nach der Ernennung der neuen Regierung im Juni 2017 änderte sich das Klima rasch, von einem Klima, in dem ZGOs zu Sündenböcken gemacht und offen verfolgt wurden, wie es während der Gruevski-Regierung der Fall war, hin zu einem Klima, das viel offener ist für die Einbeziehung von ZGOs in Entscheidungsprozesse und Arbeitsgruppen und für eine verstärkte Unterstützung von ZGO-Aktivitäten, auch im Bereich Gleichstellung und Nichtdiskriminierung. In den sechs Monaten der neuen Regierung im Jahr 2017 eröffnete beispielsweise der Kulturminister das Pride-Wochenende, das von einer Gruppe von ZGOs organisiert worden war, während der Ministerpräsident zum fünften Jahrestag des LGBT-Zentrums – der ZGO, deren Büros in den Jahren davor wiederholt angegriffen worden waren, wofür bislang noch niemand zur Verantwortung gezogen wurde⁸¹ – eine Grundsatzrede hielt und eine Feier eröffnete. Bei beiden Gelegenheiten hat die neue Regierung sowohl symbolisch als auch deklaratorisch zum Ausdruck gebracht, dass sie vorhat, die Gleichstellung aller Menschen, unabhängig von ihrer sexuellen Orientierung und Geschlechtsidentität, zu unterstützen.

2. Wichtigste Rechtsvorschriften

Die Verfassung der Republik Mazedonien⁸² ist eine geschriebene Verfassung und oberstes Gesetz des Landes. Sie akzeptiert das internationale Recht als Bestandteil des nationalen Rechts und räumt ihm Vorrang vor den Gesetzen und Verordnungen ein. Die Verfassung

⁷⁵ Nova TV (2017), „Ein halbes Jahr nach dem blutigen Donnerstag lediglich eine Gefängnisstrafe“ (Пола година по крвавиот четврток само една затvorska kazna), <http://novatv.mk/pola-godina-po-krvaviot-chetvrtok-samo-edna-zatvorska-kazna/>.

⁷⁶ Auf dem Bildmaterial der Überwachungskameras, das der Öffentlichkeit zugänglich gemacht wurde, ist deutlich zu erkennen, wie die Abgeordneten die Türen öffnen und die hereinstürmende Menge begrüßen.

⁷⁷ Es liegen zwar keine offiziellen Zahlen vor, Schätzungen gehen aber davon aus, dass in den letzten Jahren zwischen 250 000 und 500 000 Menschen das Land verlassen haben, um im Ausland zu arbeiten.

⁷⁸ Alle Zahlen sind gerundete Prozentangaben aus der Volkszählung von 2002. Für 2011 war eine neue Volkszählung geplant; aufgrund von Unklarheiten bei der methodischen Umsetzung wurde sie jedoch abgesagt. Alle Statistiken des Staatlichen Amts für Statistik sind zu finden unter: www.stat.gov.mk/.

⁷⁹ Das „Jahrzehnt der Roma-Integration“ war eine regionale Initiative der Regierung, mit der die Situation der Roma-Bevölkerung in den Bereichen Gesundheit, Wohnungswesen, Bildung und Beschäftigung verbessert werden sollte und die 2015 endete.

⁸⁰ Es gibt einen Roma-Minister in der Regierung, eine Roma-Gemeinde (Shuto Orizari), Roma-Abgeordnete usw.

⁸¹ Zu den Angriffen und der fehlenden staatlichen Untersuchung siehe den Flash-Report „Absence of Reaction to Series of Attacks on the LGBTI Support Centre“ (Keine Reaktion auf die wiederholten Angriffe auf das LGBTI-Supportzentrum) (2013), abrufbar unter <https://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

⁸² Englische Fassung der Verfassung der Republik Mazedonien (Устав на Република Македонија): *Constitution of the Republic of Macedonia* <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>.

schützt vor Diskriminierung. Mit der Bestimmung, dass die Bürger der Republik Mazedonien die gleichen Freiheiten und Rechte besitzen, ungeachtet von Geschlecht, „Rasse“, Hautfarbe, nationaler oder sozialer Herkunft, politischer und religiöser Überzeugung, Grundeigentum und sozialem Status, betont sie die Gleichheit der Bürger vor der Verfassung und den Gesetzen. Jeder, der sich in seinen Menschenrechten und Grundfreiheiten verletzt fühlt, hat durch die Verfassung die Möglichkeit, vor dem Verfassungsgericht zu klagen. In Übereinstimmung mit einem monistischen Rechtsverständnis hat internationales Recht (die unterzeichneten und ratifizierten internationalen Abkommen) direkte Anwendung im nationalen Rechtssystem und bietet damit auch Schutz vor Diskriminierung bzw. Verstößen gegen den Gleichbehandlungsgrundsatz.

Bis 2010 waren die Antidiskriminierungsvorschriften über mehrere Gesetze verteilt. Im Rahmen des Prozesses der Annäherung an den Besitzstand der Union wurde im April 2010 das Antidiskriminierungsgesetz⁸³ (ADG) – das erste umfassende Gleichstellungsgesetz – beschlossen. Das Gesetz erfüllt in folgenden Punkten nicht die Anordnungen der Richtlinien: mindestens zu schützende Diskriminierungsgründe, Definitionen und Formen von Diskriminierung, wirksame, verhältnismäßige und abschreckende Sanktionen, Verwendung statistischer Daten und Dialog mit dem ZGO-Sektor. Die im Zuge des ADG eingerichtete Gleichbehandlungsstelle – die Kommission zum Schutz vor Diskriminierung (KSChD) – erfüllt ebenfalls nicht die Anforderungen der Richtlinie 2000/43.

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

Die Ex-post-Evaluierung der Umsetzung des ADG ergab, dass die Ziele des Gesetzes⁸⁴ nur zum Teil erreicht wurden, zählte viele Punkte auf, in denen die Umsetzung verbessert werden könnte, und begründete die Situation mit den zu geringen bereitgestellten Mitteln. Es wurden drei Empfehlungen für gesetzliche Änderungen formuliert: Änderung des ADG, um Voraussetzungen für eine administrative Unterstützung der KSChD zu schaffen; ausdrückliche Verpflichtung der KSChD zur Verlagerung der Beweislast; Verbesserung der Rechenschaftsmechanismen der KSChD. Im Anschluss daran wurde eine umfassende Harmonisierungsanalyse durchgeführt, die sowohl die Harmonisierung des ADG mit internationalen Standards als auch die Harmonisierung anderer nationaler Gesetze und Verordnungen mit dem ADG untersuchte. Die Analyse ergab zahlreiche Punkte für gesetzliche Änderungen, sowohl allgemeiner Art (z. B. Änderung der unsensiblen Terminologie im Bereich Behinderung) als auch zu konkreten Punkten (konkrete Vorschläge für einzelne Artikel).⁸⁵

⁸³ Gesetz zur Vermeidung von und zum Schutz vor Diskriminierung (*Закон за спречување и заштита од дискриминација*), Gesetzblatt der Republik Mazedonien Nr. 50/10, 44/2014, 150/2015, 31/2016; Beschluss des Verfassungsgerichts: Y.6p.82/2010 (15. September 2010).

⁸⁴ Da das Antidiskriminierungsgesetz selbst keine Bestimmung zu seinen Zielsetzungen enthält, kam das mit der Ex-post-Evaluierung betraute Team durch Auswertung anderer Dokumente zu dem Ergebnis, dass es sich bei den Zielen um die Verhütung von und den Schutz vor Diskriminierung handelt.

⁸⁵ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation* (OSZE und KSChD), abrufbar unter: https://www.academia.edu/29196559/Analysis_of_the_harmonization_of_the_national_legislation_on_equality_and_non-discrimination *Анализа на хармонизираноста на домашното законодавство за еднаквост и недискриминацијата*.

Zum Zeitpunkt der Erstellung dieses Berichts war ein Entwurf für ein neues Gesetz in Vorbereitung, das an die Stelle des Gesetzes von 2010 treten soll. Der Gesetzentwurf trägt denselben Titel wie das derzeitige Gesetz: Gesetz zur Vermeidung von und zum Schutz vor Diskriminierung (im Folgenden: ADG-Entwurf 2017).⁸⁶ Der Text wurde von einer Arbeitsgruppe erstellt, der Personen aus den zuständigen Ministerien, Vertreter internationaler Organisationen und zivilgesellschaftliche Organisationen angehören, die sich mit Gleichstellungsfragen befassen, einschließlich solcher, die Rechtshilfe in Diskriminierungsfällen leisten. Koordiniert wurde der Prozess vom Ministerium für Arbeit und Sozialpolitik (MASP), mit großer Unterstützung seitens der Organisation für Sicherheit und Zusammenarbeit in Europa - Mission in Skopje (OSZE). Die Arbeitsgruppe arbeitete fast zwei Jahre lang an dem Text. Dieser wurde am 20. Oktober 2017 im Rahmen einer vom MASP und der OSZE organisierten Diskussionsveranstaltung in Skopje vorgestellt.⁸⁷ Der obige Abschnitt über das ADG gilt auch für den ADG-Entwurf von 2017, jedoch mit mehreren Änderungen bei den Diskriminierungsgründen. Für den vorliegenden Bericht von Bedeutung sind die Hinzufügung von sexueller Orientierung und der Wechsel von „geistiger oder körperlicher Behinderung“ zu „Behinderung“ (Art. 5 ADG-Entwurf 2017). Auf diese und andere wichtige Änderungen, die der ADG-Entwurf 2017 enthält, wird in den entsprechenden Abschnitten des Länderberichts näher eingegangen.

3. Wichtigste Grundsätze und Begriffe

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

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

Vor der Verabschiedung des ADG waren die Definitionen von Diskriminierung auf mehrere Gesetze verteilt. Da das ADG in seinen Übergangs- und Schlussvorschriften keine Vereinheitlichung der Bestimmungen dieser unterschiedlichen Gesetze vorsieht, stehen die Institutionen, die das Gesetz umsetzen sollen, vor der Frage, welches Gesetz bzw. welche Bestimmung sie in einem bestimmten Fall anwenden sollen, d. h. welche Bestimmungen Vorrang haben. *Lex specialis derogat legi generali* und *lex posterior derogat legi priori* sind traditionelle juristische Grundsätze, aber Richter verlassen sich, selbst bei scheinbar widersprüchlichen Bestimmungen, in der Regel eher auf die bestehende Rechtsprechung

⁸⁶ Der Text des ADG-Entwurfs 2017 zum Stichtag dieses Berichts ist online nicht verfügbar. Die Verfasserin hat die zum Zweck der öffentlichen Diskussion verbreitete Fassung verwendet (zur öffentlichen Diskussion siehe folgende Fußnote). Quelle: Entwurf für ein Gesetz zur Vermeidung von und zum Schutz vor Diskriminierung, 2017. Vollständige Bezeichnung: MASP, Entwurf für ein Gesetz zur Vermeidung von und zum Schutz vor Diskriminierung (*Предлог закон за спречување и заштита од дискриминација*), 2017 (von einem Vertreter des MASP am 16. Oktober 2017 per E-Mail verbreitet; liegt der Verfasserin vor).

⁸⁷ Akademik (2017), „Öffentliche Diskussion über das neue Gesetz zur Vermeidung von und zum Schutz vor Diskriminierung“ (Јавна дебата за новиот закон за спречување и заштита од дискриминација), 20. Oktober 2017, Webseite von Akademik: <http://www.akademik.mk/javna-debata-za-noviot-zakon-za-sprechuvane-i-zashtita-od-diskriminatsija/>.

als auf allgemeine rechtliche Grundsätze. Allgemeine Rechtsgrundsätze werden nur dann angewendet, wenn eine Partei versucht, eine Gesetzeslücke auszunutzen (gemäß dem Gerichtsverfassungsgesetz).

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

4. Sachlicher Geltungsbereich

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

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

- Fördermaßnahmen (Art. 13): Maßnahmen natürlicher oder juristischer Personen, die keine Diskriminierung darstellen, wenn ihre Rechtmäßigkeit früher, jetzt oder künftig nachgewiesen wurde. Diese Maßnahmen dürfen aufrecht erhalten werden, bis eine völlige sachliche Gleichstellung erreicht und sachliche Ungleichheiten beseitigt oder gemindert wurden.
- Ungleichbehandlungen, die keine Diskriminierung darstellen (Art. 14): Ungleichbehandlung von Personen, die keine Staatsbürger sind, wesentliche berufliche Anforderungen, Ungleichbehandlung von Personen aufgrund von Religion, Weltanschauung, biologischem Geschlecht oder anderen Merkmalen bei der allgemeinen und beruflichen Bildung für eine Tätigkeit in Bezug auf die jeweilige Religion, Handlungen von Mitgliedern und Organen von Kirchen und religiösen Gemeinschaften, Vereinen, politischen Parteien, Gewerkschaften und anderen Organisationen gemäß einer Doktrin, Überzeugung oder eines Glaubens und/oder der in einer Satzung, einem Programm und/oder Vorschrift festgelegten Ziele, Ehevorschriften, Ausübung der durch die Verfassung garantierten Redefreiheit, Versammlungsfreiheit, Meinungs- und Informationsfreiheit, und Festlegung eines Mindest- und Höchstalters für den Eintritt in einen Beruf, die Gewährung von Vorrechten oder das Ausscheiden aus dem Beruf, sofern damit ein legitimes Ziel verfolgt wird.
- Schutzmechanismen für spezielle Gruppen (Art. 15): Schutz von Schwangeren und Müttern, elternlosen Kindern, Jugendlichen, Alleinerziehenden und Menschen mit Behinderung; Chancengleichheit von Frauen und Männern; Beschäftigungsförderung; allgemeine und berufliche Bildung für Menschen mit Behinderung; ein erwartetes Mindest- und Höchstalter für den Zugang zu bestimmten Stufen der allgemeinen und beruflichen Bildung, sofern dieses zur Erreichung eines rechtmäßigen Ziels objektiv gerechtfertigt ist, und das erforderliche Alter das Ausmaß dieser Ungleichbehandlung

im Hinblick auf die Natur der Fort- oder Ausbildung oder die Umstände ihrer Ausübung und das Ausmaß dieser Ungleichbehandlung nicht den Rahmen übersteigt, der für die Erreichung des rechtmäßigen Ziels notwendig ist; Fördermaßnahmen für bestimmte Personen oder Gruppen, die wegen eines Diskriminierungsgrundes benachteiligt sind, zum Zweck der Verbesserung der Chancengleichheit, solange diese Maßnahmen notwendig sind; Maßnahmen zum Schutz der Merkmale und der Identität von Personen, die einer ethnischen, religiösen oder sprachlichen Minderheit angehören, und deren Rechte zur Pflege und Entwicklung der eigenen Identität, allein oder gemeinsam mit anderen Mitgliedern der Gruppe, und Maßnahmen zur Schaffung günstiger Bedingungen für die Förderung dieser Identität und Maßnahmen im Bereich der Aus- und Weiterbildung, mit denen die Teilhabe ethnischer Minderheiten gewährleistet wird, sofern diese Maßnahmen notwendig sind.

Im Bereich Beschäftigung wird das Diskriminierungsverbot neben dem ADG auch vom Gesetz über Arbeitsverhältnisse⁸⁸ gewährleistet, das Diskriminierung gemäß den in den Richtlinien enthaltenen Vorgaben verbietet. Diese Gesetze gelten sowohl für den öffentlichen als auch für den privaten Sektor.

5. Rechtsdurchsetzung

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

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

Verwaltungsverfahren vor der KSchD sind kostenlos. Die Kommission kann Gutachten und Empfehlungen erstellen. Das Verfahren kann bis zu 90 Tage dauern. Wenn die Empfehlungen nicht befolgt werden, kann die KSchD ein Verfahren bei einer zuständigen Stelle anstrengen (das Gesetz führt dies nicht näher aus).

2017 gingen bei der KSchD 59 Beschwerden ein, fast genauso viele wie im Jahr 2016, als 60 Beschwerden eingingen. Insgesamt ist dies eine Fortsetzung des Rückgangs der Fallzahlen gegenüber den Vorjahren – darunter der Rückgang von 106 Fällen im Jahr 2014 auf 70 Fälle im Jahr 2015. Im Gegensatz zu 2016 machte die KSchD keine Angaben dazu, was die Gründe für den Rückgang der Fallzahlen sind. Im Vorjahr führte die KSchD den Rückgang auf mangelnde finanzielle Mittel und andere Gründe zurück,⁸⁹ ohne auszuführen, um was für Gründe es sich dabei handelte oder wie sie zu dieser Feststellung kam. Finanzielle Mittel können jedoch nicht erklären, warum sich 2016 weniger Menschen an die KSchD wandten als 2015. Eine plausiblere Erklärung war und bleibt, dass dies Ausdruck

⁸⁸ Gesetz über Arbeitsverhältnisse (*Закон за работните односи*), Gesetzblatt der Republik Mazedonien Nr. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016; Urteile des Verfassungsgerichts: U. Nr. 139/2005, U. Nr. 161/2005, U. Nr. 134/2005, U. Nr. 187/2005, U. Nr. 111/2006, U. Nr. 188/2006, U. Nr. 170/2006, U. Nr. 200/2008, U. Nr. 20/2009, U. Nr. 176/2009, U. Nr. 263/2009, U. Nr. 62/2013.

⁸⁹ Siehe: Kommission zum Schutz vor Diskriminierung (Комисија за заштита од дискриминација) (2017), *Jahresbericht 2016*; „Der Rückgang ist unter anderem auch auf mangelnde finanzielle Mittel für die Arbeit der Kommission zurückzuführen“ (*Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата*).

des anhaltenden Vertrauensverlustes ist, der mit der Abhöraffäre (siehe oben) begann⁹⁰ und sich mit der Bestellung der zweiten KSchD fortsetzte.⁹¹

Nach Diskriminierungsgründen⁹² verteilten sich die Beschwerden wie folgt: Geschlecht 19 %, ethnische Zugehörigkeit 18 %, politische Orientierung 17 %, Gesundheitszustand 16 %, sexuelle Orientierung und Geschlechtsidentität 16 %, persönlicher oder sonstiger sozialer Status 16 %, Alter 8 %, soziale Herkunft 7 % und Bildung 7 %. Es war das erste Mal, dass die KSchD sexuelle Orientierung und Geschlechtsidentität in ihre Aufschlüsselung der Beschwerdegründe mit einbezogen hat. Die Verteilung der Beschwerden nach Bereichen stellt sich wie folgt dar: 41 % im Bereich Beschäftigung und Arbeitsbeziehungen, 25 % beim Zugang zu Gütern und Dienstleistungen, 22 % im Bereich öffentliche Informationen und Medien, 14 % im Bereich Bildung, Wissenschaft und Sport sowie 10 % im Bereich soziale Sicherheit, einschließlich Sozialschutz und Renten, Invalidenversicherung, Krankenversicherung und Gesundheitsschutz. Obwohl der Bereich „Justiz und Verwaltung“ in den Vorjahren besonders hervorgehoben wurde, wird er im diesjährigen KSchD-Bericht nicht einmal erwähnt.

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

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

Die Ombudsperson ist ein weiteres mögliches Forum für Beschwerden über Diskriminierung im öffentlichen Sektor. 2017 wurden 70 Beschwerden eingereicht, in denen es um Nichtdiskriminierung und gleichberechtigte Vertretung ging, was 2,17 % der Gesamtzahl der eingereichten Beschwerden entsprach. Dies ist der höchste Anteil dieser Kategorie von Beschwerden, seit die Ombudsperson sie getrennt erfasst (höher als die 69 Beschwerden bzw. 1,83 % im Jahr 2016, die 53 Beschwerden bzw. 1,2 % im Jahr 2015 und die 66 Beschwerden bzw. 1,55 % im Jahr 2014). Dieser Prozentsatz muss jedoch vor dem Hintergrund der Gesamtzahl der Beschwerden gesehen werden, die einen deutlichen Rückgang gegenüber den Vorjahren verzeichnet hat. Die Gesamtzahl der an die Ombudsperson gerichteten Beschwerden nimmt also weiter ab. Nach Angaben der Ombudsperson gingen 2017 insgesamt 3224 Beschwerden ein. Dies ist ein weiterer Rückgang gegenüber 2016, als 3775 Beschwerden eingingen, was im Vergleich zu den 4403 Beschwerden im Jahr 2015 bereits einen Rückgang darstellte. In der gesonderten

⁹⁰ Der frühere Vorsitzende der KSchD war, wie bereits im letztjährigen Bericht gemeldet, ebenfalls in die Affäre verstrickt.

⁹¹ Zur Zusammensetzung der zweiten KSchD siehe: Flash-Report „Appointment of new members of the equality body“, <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

⁹² Ahermals hat die KSchD die Verteilung nach Diskriminierungsgründen in Prozentzahlen präsentiert und keine vollständige Liste vorgelegt.

Beschwerdekategorie „Personen und Kinder mit Behinderungen“ gingen fünf Beschwerden ein, was einem Anteil von 0,16 % entspricht; im Vergleich zu 15 Beschwerden bzw. 0,4 % im Jahr 2016 stellt dies einen erheblichen Rückgang dar. Wie schon im Vorjahr veröffentlichte die Ombudsperson keine detaillierten Statistiken zu den Gründen und Bereichen, auf die sich die eingereichten Beschwerden bezogen. Sie stellte jedoch fest, dass sich der Trend der Vorjahre insofern fortsetzte, als Beschäftigung nach wie vor der vorherrschende Bereich war. Sie vermeldete desweiteren eine deutlich höhere Zahl von Belästigungsfällen sowie drei Fälle von Hassverbrechen.

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

Auch wenn es nicht Gegenstand dieses Berichts ist, sollte erwähnt werden, dass die Ombudsperson 2016 einen Situationstest durchführte, um eine Beschwerde wegen geschlechtsbezogener Diskriminierung im Gesundheitsbereich zu prüfen, die ihr von einer ZGO vorgelegt worden war.⁹³

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

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

6. Gleichbehandlungsstellen

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

⁹³ Helsinki-Komitee der Republik Mazedonien (2016), „Infoblatt Diskriminierung“ (Информатор за дискриминација), Mai 2016, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

Grundeigentum, Gesundheitszustand oder jedes andere, in einem Gesetz oder einem ratifizierten internationalen Abkommen genannte Merkmal.

2017 gingen bei der KSChD 59 Beschwerden ein, fast genauso viel wie die 60 Beschwerden, die 2016 eingingen. Insgesamt ist dies jedoch eine Fortsetzung des in den Vorjahren beobachteten Rückgangs der Beschwerdezahlen,⁹⁴ einschließlich des Rückgangs von 106 Beschwerden im Jahr 2014 auf 70 Beschwerden im Jahr 2015. Nach Diskriminierungsgründen⁹⁵ verteilten sich die Beschwerden wie folgt: Geschlecht 19 %, ethnische Zugehörigkeit 18 %, politische Orientierung 17 %, Gesundheitszustand 16 %, sexuelle Orientierung und Geschlechtsidentität 16 %, persönlicher oder sonstiger sozialer Status 16 %, Alter 8 %, soziale Herkunft 7 % und Bildung 7 %. Es ist das erste Mal, dass die KSChD sexuelle Orientierung und Geschlechtsidentität in ihre Aufschlüsselung der Beschwerdegründe einbezogen hat. Nach Bereichen war die Verteilung wie folgt: 41 % im Bereich Beschäftigung und Arbeitsbeziehungen, 25 % beim Zugang zu Gütern und Dienstleistungen, 22 % im Bereich öffentliche Informationen und Medien, 14 % im Bereich Bildung, Wissenschaft und Sport sowie 10 % im Bereich soziale Sicherheit, einschließlich Sozialschutz und Renten, Invalidenversicherung, Krankenversicherung und Gesundheitsschutz. Obwohl „Justiz und Verwaltung“ in den Vorjahren besonders hervorgehoben wurde, wird er im diesjährigen KSChD-Bericht nicht einmal erwähnt.

Vor Verabschiedung des ADG gab es keine Gleichbehandlungsstelle. Die Antidiskriminierungspflichten des öffentlichen Sektors fielen in den Aufgabenbereich der Ombudsperson. Die Beziehung zwischen der Ombudsperson und der KSChD wird im ADG nicht geregelt (letztere arbeitet zum Teil auf der Grundlage einer gemeinsamen Absichtserklärung). Dem allgemeinen Mandat der Ombudsstelle zufolge kann diese Einzelbeschwerden entgegennehmen und untersuchen, Empfehlungen aussprechen und Gutachten erstellen, Verfahren einleiten sowie spezielle Themen beobachten und untersuchen, mit Schwerpunkt auf den in der Verfassung geschützten Diskriminierungsgründen und auf Verstößen, die von staatlichen Stellen begangen werden. Im Zuge der 2016 beschlossenen Änderungen des Gesetzes über die Ombudsperson, die im April 2017 in Kraft getreten sind, wurde das Mandat der Einrichtung gefördert.⁹⁶

7. Zentrale Punkte

Zu den wichtigsten Problemen in Mazedonien gehören folgende:

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

⁹⁴ Zu den Gründen für diesen Rückgang siehe Abschnitt 5 „Rechtsdurchsetzung“.

⁹⁵ Abermals präsentierte die KSChD die Verteilung der Beschwerden nach Diskriminierungsgrund in Prozentzahlen und legte keine vollständige Liste vor.

⁹⁶ Gesetz über die Ombudsperson (*Закон за народниот правобранител*), Gesetzblatt der Republik Mazedonien Nrn. 60/2003, 114/2009, 181/2016, 189/2016, Entscheidungen des Verfassungsgerichts: U. Nr. 111/2007.

INTRODUCTION

The national legal system

The former⁹⁷ Yugoslav Republic of Macedonia⁹⁸ is a unitary, semi-parliamentarian, civil law country, which adopts the monism principle regarding the relationship between international and municipal law, the former being considered part of the latter, and superior to domestic laws and bylaws,⁹⁹ and where, if it is deemed fit and appropriate, courts can use the final judgments of the European Court for Human Rights (ECtHR), International Criminal Court (ICC), or any other international court with jurisdiction over the country.¹⁰⁰ Although in theory directly applicable, references to international law in the jurisprudence of the domestic courts are still very rare and, in practice, the courts do not seem to treat it as higher in the national legal hierarchy than the national laws.

The Constitution prescribes the principle of the separation of powers. The three branches of power are: legislative, executive and judicial.¹⁰¹

Legislative power is vested in the Assembly of the Republic (the Parliament). The members are elected on what the Constitution and the laws set out as general, direct and free elections, and by secret ballot.¹⁰² The Parliament has the power to adopt and amend the Constitution, ratify international treaties as well as to adopt and amend laws. There are special procedures in place that aim to ensure that no law touching upon issues of relevance for the non-majority ethnic communities in the country will be adopted without them. This voting mechanism is called the Badinter principle and it requires that a law gain two-thirds of the votes of the members with an affiliation to one of the non-majority ethnic communities. The Parliament has a Standing Inquiry Committee on Human Rights, tasked to follow and alert the Parliament on developments related to human rights. The Parliament also elects and appoints the members of the two national human rights institutions – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson.

The executive branch is represented by the President (who holds a rather ceremonial role) and the Government, which has 15 ministries, five Deputy Prime Ministers and six ministers without portfolio. The President is directly elected, whereas the Government is appointed by the Parliament. Within the Government, several ministries share human rights competences. The Ministry of Foreign Affairs hosts the inter-ministerial body on human rights, established with the aim of improving coordination and communication among the Government departments on key human rights issues. Aside from this body — and of

⁹⁷ As per the UN Resolution A/RES/47/225 (see footnote below), 'the former' is spelled with small letters to signal that this is a provisional description. The 'f' is not to be capitalised under any circumstance, whereas the 't' can be capitalised only in the following three exceptional cases: (1) beginning of sentence, (2) in a 'stand-alone' entry within a table or other graphic, and (3) in a vertical list of country names. Small letters should also be used in running text.

Source:

https://untermportal.un.org/UNTERM/Display/Record/UNHQ/the_former_Yugoslav_Republic_of_Macedonia/1c98d616-3b6a-4d15-a7cb-f88c7f988b83. All hyperlinks were accessed on 18 March 2018.

⁹⁸ The constitutional name of the country is 'Republic of Macedonia'. However, pending settlement with Greece on the (on-going) name dispute, under the UN Resolution A/RES/47/225, the country was admitted as a UN member under the temporary reference 'the former Yugoslav Republic of Macedonia'. The temporary reference is used for the purposes of this report because it is the reference that the European Commission uses to refer to the country.

⁹⁹ Article 118 of the Constitution states: 'International agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law'. Source: Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia, www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspix.

¹⁰⁰ The former Yugoslav Republic of Macedonia, Law on Courts, 2006. Article 18(5). Full title: The former Yugoslav Republic of Macedonia, Law on Courts (*Закон за судовите*), Official Gazette of the Republic of Macedonia No. 58/2006, 62/2006, 35/2008, 150/2010; Constitutional Court Decisions: U.no.256/2007 (16.04.2008), U.no.74/2008 (10.09.2008), U.no.124/2008 (14.01.2009), U.no.12/2011 (29.02.2012).

¹⁰¹ Please see section 11 below for information on the wire-tapping affair, which cast doubt on the respect for the separation of powers and the rule of law in the country in general.

¹⁰² The wire-tapping affair also raises issues in relation to elections.

relevance to this report, an important division of the executive Government is the Ministry of Labour and Social Policy (MLSP), which is tasked with coordination and development of non-discrimination activities. The Representative for Equal Opportunities of Women and Men is based in the MLSP; each state administrative body has a legal obligation to appoint a coordinator for equal opportunities.¹⁰³

The judiciary consists of the courts.¹⁰⁴ There are 27 courts of first instance (14 with basic competences, and 13 with expanded competences), four courts of appeal, and one Supreme Court. There is also an Administrative Court (court of first instance), and a Higher Administrative Court (court of second instance) with competence in processing administrative cases. Aside from the ordinary courts, there is the Constitutional Court, the primary duty of which is to decide on the constitutionality of laws and bylaws.¹⁰⁵

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

Local governance in the country is organised through decentralisation of local self-government units. These units are made up of 80 municipalities¹⁰⁶ and the City of Skopje (as a separate local self-government unit).

Protection in discrimination cases, depending on the personal and material scope of the case, can be sought under several procedures: criminal procedure,¹⁰⁷ civil procedure,¹⁰⁸ administrative procedure,¹⁰⁹ quasi-judicial procedure,¹¹⁰ and a procedure before the Constitutional Court.¹¹¹

List of main legislation transposing and implementing the directives

The Law on Prevention and Protection against Discrimination¹¹² (the Anti-Discrimination Law, ADL) was adopted on 8 April 2010, and entered into force on 21 April 2010 (implementation began on 1 January 2011). It was last amended on 22 February 2016.

¹⁰³ The former Yugoslav Republic of Macedonia, Law on Equal Opportunities of Women and Men, 2013. Full title: The former Yugoslav Republic of Macedonia, Law on Equal Opportunities of Women and Men (*Закон за еднакви можности на жените и мажите*), Official Gazette of the Republic of Macedonia No.06/2012, 30/2013, 166/2014, 150/2015.

¹⁰⁴ The Judicial Council is the body established to secure and guard the autonomy and independence of the courts. Under the Law on the Academy of Judges and Public Prosecutors a public institution was established for vocational training of candidates for judges and public prosecutors.

¹⁰⁵ Please see section 11 below on the allegations of the complete control of the ruling party over the judiciary as well as on the way in which the appointment of judges has been operating.

¹⁰⁶ The former Yugoslav Republic of Macedonia, Law on Territorial Organisation of Local Self-government, 2004, Article 16. Full title: The former Yugoslav Republic of Macedonia, Law on Territorial Organisation of Local Self-government (*Закон за територијална организација на локалната самоуправа*), Official Gazette of the Republic of Macedonia, No.55/2004, 12/2005, 98/2008, 149-2014; Constitutional Court Decision: U.no. 40/2005 (26.10.2005).

¹⁰⁷ Criminal procedure is an option for discrimination cases that amount to a criminal offence.

¹⁰⁸ Under various laws, in civil proceedings (more details follow in the report below).

¹⁰⁹ Including for misdemeanours.

¹¹⁰ Procedures before the CPAD and the Ombudsperson.

¹¹¹ Citizens have the right to lodge 'Requests for protection of human rights and freedoms' to the Constitutional Court when they believe that they have been discriminated against on the grounds stipulated in the Constitution. This is a procedure based on urgency, and is envisaged as a mechanism to safeguard the set of rights laid out in the Constitution from unconstitutional acts (laws and bylaws). However, the effectiveness of this mechanism is still under question (according to the ECtHR, a legal remedy needs to be effective not just in theory but also in practice) because of the very low success rate of applicants. In the more than 20 years that it has been in operation, the Constitutional Court has only once decided in favour of applicants seeking protection under such a request, and has discarded almost all of the filed cases.

¹¹² The former Yugoslav Republic of Macedonia, Anti-Discrimination Law, 2010. Full title: Law on Prevention and Protection against Discrimination (*Закон за спречување и заштита од дискриминација*) Official Gazette of the Republic of Macedonia No.50/10, 44/2014, 150/2015, 31/2016, Constitutional Court Decision: U.no.82/2010.

Under Article 3, an open-ended clause, the following discrimination grounds are explicitly protected: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, other forms of belief, education, political affiliation, personal or social status, 'mental' or physical disability, age, family or marital status, property status, health condition. Article 4 on fields of implementation of the law lists several fields, but states that the law also applies to any other field specified under law. The Anti-Discrimination Law applies to both public and private sector and to natural and legal persons.

At the time of writing of this report, a draft for a new law, which is to replace the 2010 law, was being prepared. The draft law has the same title as the current law – Law for Prevention and Protection against Discrimination (it will be referred to hereinafter as the 2017 draft-ADL).¹¹³ The text was drafted by a working group comprised of persons from the competent ministries, representatives from international organisations, and NGOs working with equality issues, including those providing legal aid in discrimination cases. The MLSP coordinated the process, with great support from the OSCE – Mission to Skopje. The working group worked on the text for almost two years. The text was presented on 20 October 2017 at a discussion in Skopje that was organised by the MLSP and the OSCE – Mission to Skopje.¹¹⁴ The above paragraph on the ADL would apply to the 2017 draft-ADL, although there are several changes in the discrimination grounds; of relevance to this report are the addition of sexual orientation and the change from 'mental or physical disability' to 'disability' (Article 5, 2017 draft-ADL). These and other important changes proposed by the 2017 draft-ADL are further discussed in the relevant sections of the report. Where no comment on the draft-ADL is added, it means the situation remains the same as under the current ADL.

The Law on Labour Relations¹¹⁵ (Labour Law) was adopted on 28 July 2005, entered into force on 5 August 2005 and was last amended on 15 February 2016. Under Article 6(1), an open-ended clause, the following grounds are covered by the law: racial or ethnic origin, colour, gender, age, health condition (i.e. disability), religious, political or other belief, membership of trade unions, national or social origin, family status, property and financial situation, sexual orientation or other personal circumstances. The Labour Law applies to labour relations among employers and employees established by conclusion of employment contracts (Article 1), which is understood as any contractual relationship between the employee and the employer where the employee takes part in the employer's organised working process voluntarily, for salary and other remunerations, personally and continuously carries out the work according to the instructions and under the supervision of the employer (Article 5(1)1).

Please note that these are only the two main pieces of legislation transposing the two directives, and the ones that, at the time of adoption were explicitly referred to as being adopted for the purposes of transposition of EU law. As the Anti-Discrimination Law was

¹¹³ The text of the 2017 draft-ADL, as it stood at the cut-off date of this report, is not available online. The author used the version distributed for the purposes of the public debate (on the public debate see next footnote). Source: Draft-Law on Prevention and Protection against Discrimination, 2017. Full reference: MLSP, Draft-Law on Prevention and Protection against Discrimination (*Предлог закон за спречување и заштита од дискриминација*) (2017) (distributed by MLSP representative via e-mail on 16.10.2017; on file with author).

¹¹⁴ Akademik (2017), 'Public debate on the new Law on prevention and protection against discrimination' (*Јавна дебата за новиот закон за спречување и заштита од дискриминација*), 20 October 2017, akademik website: <http://www.akademik.mk/javna-debata-za-noviot-zakon-za-sprechuvane-i-zashtita-od-diskriminatsija/>.

¹¹⁵ The former Yugoslav Republic of Macedonia, Labour Law, 2005. Full title: Law on Labour Relations (*Закон за работните односи*) Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016; Constitutional Court Decisions: U.no. 139/2005, U.no. 161/2005, U.no. 134/2005, U.no. 187/2005, U.no. 111/2006, U.no. 188/2006, U.no. 170/2006, U.no. 200/2008, U.no. 20/2009, U.no. 176/2009, U.no. 263/2009, U.no. 62/2013, U.no.114/2014.

adopted only in 2010, there are provisions on equality and non-discrimination scattered through many laws, including those on primary, secondary and higher education, adult education, various aspects of social protection (including the pension system and health security), and in the field of employment.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

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

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

In theory, these provisions are directly applicable, but this is not so in practice.¹¹⁶ Under the Constitution, every citizen may invoke the protection of freedoms and rights prescribed in the Constitution before the ordinary courts and before the Constitutional Court, through a procedure based upon the principles of priority and urgency. However, the ordinary courts have a practice of rejecting Constitution-based human rights claims. The Constitution also guarantees judicial protection of the legality of individual acts of the state administration and of other public institutions (Article 50). So, the letter of the law says that the constitutional provisions are directly applicable, but the practice says otherwise. The mechanisms enabling ordinary courts to directly apply the constitutional anti-discrimination provision have not been used.¹¹⁷ In practice, regardless of the procedure invoked, courts insist that a lawsuit is brought invoking provisions of specific laws, and tend not to implement the Constitution directly. On the other hand, the Constitutional Court's positioning and practice is such that it does not enter into revisions of ordinary courts' verdicts and decisions.¹¹⁸ As a result, there are no requests for interpretation of constitutional provisions from the ordinary courts to the Constitutional Court and there is no practice of referencing the Constitutional Court by the ordinary courts.

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

¹¹⁶ See section 1(b) of the 2013 Report: <http://www.equalitylaw.eu/downloads/4174-fyr-macedonia-country-report-non-discrimination-2013-1-11-mb>.

¹¹⁷ This does not mean that ordinary courts do not mention provisions from the Constitution.

¹¹⁸ See, for example, Constitutional Court cases: U.No.55/2015 (para.4) [24.06.2015]; U.No.152/2012-0-0 (para.4) [14.11.2012]; U.No.172/2002 (para.4) [25.12.2002]; U.No.37/1997 (para.3) [19.03.1997].

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The *Analysis of the Harmonization of National Equality and Non-discrimination Legislation*, published in 2016, emphasises the need for harmonisation of the discrimination grounds in two phases. The first phase should be a harmonisation of the Anti-Discrimination Law with the country's obligations under international law (including the EU directives, in terms of the explicit inclusion of sexual orientation) and the second one should be a harmonisation of all domestic laws with the Anti-Discrimination Law.¹¹⁹

The following grounds of discrimination are explicitly prohibited in national law,¹²⁰ including under specific anti-discrimination law and the Constitution, as laid out below.

- The Constitution: sex, race, colour of skin, national or social origin, political and religious belief, property and social status (closed list of grounds) (Article 9); sex, race, colour, language, religion, national or social origin, property or social status (Article 54).
- Law on Prevention and Protection against Discrimination: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, other forms of belief, education, political affiliation, personal or social status, 'mental or physical disability'¹²¹, age, family or marital status, property status, health condition (open-ended clause) (Article 3).
- 2017 draft-ADL:¹²² race, colour, national or ethnic origin, sex, gender, sexual orientation, belonging to a marginalised group, language, citizenship, social origin, education, religion or religious belief, political conviction, other beliefs, disability, age, family or marital status, property status, health condition, personal capacity and social status, or any other grounds (open-ended clause) (Article 5).¹²³
- Law on Courts: article on aims and functions of courts states that courts aim to secure equality, equal rights and non-discrimination on any ground (Article 3 (1) to (3)); everybody has equal access to the courts (Article 6(1)); during the election of judges and lay judges, there should be no discrimination on the basis of sex, race, colour of skin, national and social background, political and religious beliefs, or property or social status (Article 43(1)).
- Criminal Code:¹²⁴ article on breach of equality among citizens covers sex, race, colour, national or social origin, political and religious belief, property and social position, language or any other personal quality or occurrence (Article 137(1)); article on incitement of national, racial or religious hatred, divisions and intolerance

¹¹⁹ Kotevska B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹²⁰ Other laws which include provisions with discrimination grounds are the following: Law on Media (Article 4), Law on Audio and Audio-visual Media Services (Articles 45, 53, 61), Law on Culture (Article 4(1)), Law on Agencies for Temporary Employment (Article 3b(3)), Law on Insurance in Case of Unemployment (Article 1a(2)), Law on Employment and Work of Foreigners (Article 4(8)), Law on Public Prosecutors (Article 5(2)), Law on Border Control (Article 8(3)), Law on Customs Administration (Article 13(1)).

¹²¹ As the term 'mental disability', used in the ADL (and other national laws), is generally considered unacceptable, the author has placed this term and the phrase 'mental or physical disability' in inverted commas throughout the report, although it should be noted that there is no such punctuation in any of the original legislation quoted in this report. See section 2.1.1 of this report for further discussion on the use of insensitive terminology and the proposed changes.

¹²² Draft-Law on Prevention and Protection against Discrimination, 2017.

¹²³ An earlier draft of the text contained 'gender identity' among the discrimination grounds. However, this ground was deleted from the version that was distributed for public discussion. At the public debate, it was recommended that gender identity should be added back to the provision.

¹²⁴ The former Yugoslav Republic of Macedonia, Criminal Code, 1996. Full title: Criminal Code (Кривичен законик), Official Gazette of Republic of Macedonia, No. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015; 97/2017, Constitutional Court Decisions: U.no. 220/200, U.no. 210/2001, U.no. 206/2003, U.no. 228/2005, U.no. 169/2016, Arts. 39(5), 137(1), 144(4), 319, 386, 394r(1), 417(1).

- covers national belonging, race and religious belief (Article 319(1)); article on spread of racist and xenophobic materials through computer systems covers racial, colour, national or ethnic origin, or religious belief (Article 394-r); article on racial and other discrimination covers race, colour, national or ethnic origin (Article 417(1)).
- Law on Execution of the Sanctions:¹²⁵ race, colour, sex, language, religion, political or other beliefs, national or social origin, kindred, property and social status or other status. Grounds refer to the person whose sanction is being executed. Special mention is made of the religious feelings, personal convictions and moral norms of the persons against whom the sanctions are enforced and which must be respected (Article 4(2) and (3)).
 - Law on Labour Relations: race or ethnic origin, colour, sex, age, health condition i.e. disability, religious, political or other belief, membership of a trade union, national or social origin, family status, property status, sexual orientation, or other personal circumstances (Article 6(1)).
 - Law on Volunteering:¹²⁶ race, colour, sex, age, health status or disability, religious or other conviction, national or social origin, family status, property status, sexual orientation, and other personal circumstances (Article 9).
 - Law on Voluntary Financed Pension Insurance:¹²⁷ sex, race, colour, language, faith and religion, political or other position, national or social origin, belonging to a national or ethnic minority, or on grounds of property, family, health condition and age (Article 3).
 - Law on Primary Education:¹²⁸ sex, race, colour, national, social, political, religious, property and social background (Article 2(2))
 - Law on Secondary Education:¹²⁹ sex, race, colour, national and social origin, religion, political beliefs, property and social position (Article 3(3)).
 - Law on Higher Education:¹³⁰ selection criteria for enrolment will guarantee equality of all candidates on grounds of race, colour, sex, language, religion, political or other belief, ethnic, national or social origin, property, birth, social position, disability, sexual orientation and age (Article 108(5)).

¹²⁵ The former Yugoslav Republic of Macedonia, Law on Execution of the Sanctions, 2006. Full title: Law on Execution of the Sanctions (Закон за вработување на инвалидни лица), Official Gazette of Republic of Macedonia, No. 2/2006, 57/2010, 170/2013, 43/2014, 166/2014, 33/2015, 98/2015, 11/2016; Constitutional Court Decisions: U.no. 9/2006, 65/2006, 179/2011, 226/2015.

¹²⁶ The former Yugoslav Republic of Macedonia, Law on Volunteering, 2007. Full title: Law on the Volunteering (Закон за волонтерство), Official Gazette of Republic of Macedonia, No. 85/2007, 161/2008, 147/2015.

¹²⁷ The former Yugoslav Republic of Macedonia, Law on Voluntary Financed Pension Insurance, 2008. Full title: Law on Voluntary Financed Pension Insurance (Закон за доброволно капитално финансирано пензиско осигурување), Official Gazette of Republic of Macedonia, No. 7/2008, 124/2010, 17/2011, 13/2013, Constitutional Court Decisions: U.no. 117/2008, U.no. 162/2008.

¹²⁸ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008. Full title: Law on Primary Education (Закон за основното образование), Official Gazette of Republic of Macedonia, No. 103/2008, 33/2010, 116/2010, 156/2010, 18/2011, 51/2011, 100/2012, 24/2013, 41/2014, 116/2014, 135/2014, 10/2015, 98/2015, 145/2015, 30/2016, 127/2016, 67/2017; Constitutional Court Decisions: U.no. 212/2008 (01.04.2009), U.no. 202/2008 (15.04.2009), U.no.234/2008 (24.06.2009), U.no.226/2008 (01.07.2009).

¹²⁹ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995. Full title: Law on Secondary Education (Закон за средното образование), Official Gazette of Republic of Macedonia, No. 44/1995, 24/1996, 34/1996, 35/1997, 82/1999, 29/2002, 40/2003, 42/2003, 67/2004, 55/2005, 113/2005, 35/2006, 30/2007, 49/2007, 81/2008, 92/2008, 33/2010, 116/2010, 156/2010, 18/2011, 42/2011, 51/2011, 6/2012, 100/2012, 24/2013, 41/2014, 116/2014, 135/2014, 10/2015, 98/2015, 145/2015, 30/2016, 127/2016, 67/2017; Constitutional Court Decisions: U.no. 355/1995, U.no. 210/2000, U.no. 83/2003, U.no. 31/2005, U.no. 102/2005, U.no. 226/2008.

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

- Law on the Protection of Children:¹³¹ race, colour, sex, language, religious conviction, political and other belief, national, ethnic or social origin, cultural and other affiliation, property status, disability, birth, or other status (Article 12(1)).
- Law on Social Protection:¹³² sex, race, colour, national, ethnic social, political, religious, cultural, language, property and social belonging, disability and origin (Article 20(1)).
- Law on Patients' Rights:¹³³ sex, race, colour, language, religion, political or any other belief, national or social origin, belonging to a national minority, material position, birth origin, sexual orientation or any other status (Article 5(2)).
- Law on Public Health:¹³⁴ race, sex, national or social origin, property status, religious belief, sexual orientation, or status of a person with disability (Article 16(5)).
- Law on Health Protection:¹³⁵ race, sex, age, national belonging, social origin, religious conviction, political or other belief, property status, culture, language, type of illness, psychosocial¹³⁶ and physical disability (Article 9).
- Law on Mental Health:¹³⁷ sex, language, religion, political or other belief, national or social origin, kindred, property and social position or other status (Article 20(4)).
- Law on Equal Opportunities of Women and Men: race, colour, gender, belonging to a marginalised group, ethnic belonging, language, citizenship, social origin, religion or a religious belief, education, political belonging, personal or social status, 'mental'¹³⁸ or physical disability, age, family or marital status, property status, health condition or any other ground (Article 4(3)).

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

¹³¹ The former Yugoslav Republic of Macedonia, Law on the Protection of Children, 2013. Full title: Law on the Protection of Children (*Закон за заштита на децата*), Official Gazette of Republic of Macedonia, No. 23/2013, 12/2014, 44/2014, 144/2014, 10/2015, 25/2015, 150/2015, 192/2015, 27/2016, 163/2017.

¹³² The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009. Full title: Law on Social Protection (*Закон за социјалната заштита*), Official Gazette of Republic of Macedonia No. 79/2009, 36/2011, 51/2011, 166/2012, 15/2013, 79/2013, 187/2013, 38/2014, 44/2014, 116/2014, 180/2014, 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015 33/2015, 72/2015, 104/2015, 150/2015, 173/2015, 192/2015, 30/2016; 163/2017, Constitutional Court Decision: U.no.165/2009.

¹³³ The former Yugoslav Republic of Macedonia, Law on Patients' Rights, 2009. Full title: Law on Patients' Rights (*Закон за заштита на правата на пациентите*), Official Gazette of Republic of Macedonia No. 82/2008, 12/2009, 53/2011, 150/2015.

¹³⁴ The former Yugoslav Republic of Macedonia, Law on Public Health, 2010. Full title: Law on Public Health (*Закон за јавно здравје*), Official Gazette of Republic of Macedonia No. 22/2010, 136/2011, 144/2014, 149/2015, 37/2016.

¹³⁵ The former Yugoslav Republic of Macedonia, Law on Health Protection, 2012. Full title: Law on Health Protection (*Закон за здравствена заштита*), Official Gazette of Republic of Macedonia, No. 43/2012, 145/2012, 87/2013, 164/2013, 39/2014, 43/2014, 132/2014, 188/2014, 10/2015, 61/2015, 154/2015, 192/2015, 17/2016, 37/2016. Constitutional Court Decisions: U.no. 59/2012, U.no. 69/2012, U.no. 101/2014.

¹³⁶ Literal translation would be 'psychological invalidity' (*психички инвалидитет*).

¹³⁷ The former Yugoslav Republic of Macedonia, Law on Mental Health, 2006. Full title: Law on Mental Health (*Закон за менталното здравје*), Official Gazette of Republic of Macedonia, No. 71/2006, 150/2015.

¹³⁸ This would include intellectual disability, but probably not psychosocial disability.

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

The 2017 draft-ADL adds to this a definition of 'person with a disability'. Under Article 4, paragraph 1, point 5,

'Person with disability shall mean any person having a long-term physical, intellectual, 'mental' or sensory impairment, which in interaction with various social barriers may prevent the person's full and effective participation in society on an equal basis with others'.

A 2013 research study highlighted the fact that two elements of the definition in the Anti-Discrimination Law - 'specific position in the society' and 'certain types of violence' - stand out as being unclear. The former refers to an easily identifiable characteristic or group (such as, geographic position or smaller religious community) matched with unequal access to resources or to opportunities (for example infrastructure, education, employment), whereas the latter is to be interpreted in accordance with the criminal law.¹³⁹ Also, it can be argued that 'persons that are protected under this ground are persons who are likely to be discriminated against on several grounds'¹⁴⁰ and that:

'For some of these persons, the claim for protection against unjustified unequal treatment on grounds of belonging to a marginalised group would best reflect the status that these persons have and which needs to be protected (for example sex workers), while for other groups this ground should be applied if in the circumstances of the specific case it can be concluded that the determining conditions will be the conditions of specific position in society and susceptibility to violence.'¹⁴¹

In addition, although it does not define disability, the ADL refers to 'physical and mental disability', out of which 'mental' disability could be interpreted to include psychosocial disability and intellectual disability. In addition to this, several other laws include various terms to refer to disability and various types of disability. A 2015 analysis of the harmonisation of the national legislation found insensitive disability terminology to be a cross-cutting issue. The analysis was conducted on 139 laws, out of which 40 laws referred to disability; in all of these 40 laws the terminology used could not be considered to be in line either with the spirit of the directives, or with the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the country is a party.¹⁴²

The 2017 draft-ADL reflects the findings of the harmonisation analysis. In addition to defining disability (as above), the list of discrimination grounds was also changed to read 'disability', rather than 'physical and mental disability', in order to avoid any narrow readings of the scope of the ground.

There are no equivalent terms of the directive grounds defined elsewhere in national law, although references can be found in bylaws. This can be aggravating for the design and implementation of public policies and related actions. For example, in relation to ethnicity, a complex set of measures is activated in relation to ethnicity and the implementation of

¹³⁹ Kotevska, B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: www.osce.org/skopje/116789?download=true pp. 51-52.

¹⁴⁰ Najcevska, M. and Kadriu, B. (2008), *Terminology glossary for discrimination*, Skopje, OSCE and MCIC. p. 61.

¹⁴¹ Kotevska, B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: www.osce.org/skopje/116789?download=true pp. 51-52.

¹⁴² The analysis was conducted on 139 laws. Table 2 includes all provisions that contain disability terminology that needs revising. Source: Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

the Ohrid Framework Agreement. However, the legislative changes and strategic documents do not define what ethnicity, or ethnic origin/belonging/affiliation is.

It is important to note, however, that ratified international treaties stand higher than laws in the national legal hierarchy. As reported in Annex 2, the country has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women, the CRPD and the Convention on the Rights of the Child, so interpretation of the discrimination grounds ensuing from these treaties should be considered as valid at the national level. The same applies to the European Convention on Human Rights and to the Framework Convention on National Minorities, to which the country is also a party. The resourcefulness and absolute necessity of turning to international law for the definitions of the discrimination grounds is made clear in the *Guide on Discrimination Grounds*, published by the Commission for Protection against Discrimination (the national equality body) in cooperation with the OSCE. In particular, the guide relies heavily on international law sources (including practice from the human rights bodies and courts) in order to carve out the definitions of the discrimination grounds prescribed under the national law.¹⁴³

In conclusion, national law, as it stands, does not provide definitions for age, ethnicity, race, sexual orientation and disability,¹⁴⁴ and neither does the court case law. No compliance-related problems arising from this have been reported so far.

2.1.2 Multiple discrimination

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

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

The 2017 draft-ADL kept the title of 'severe form of discrimination' for the article where it outlaws multiple discrimination (Article 11 in the draft-ADL). It provides the following definition of multiple discrimination (Article 4 (12) of the draft-ADL): 'discrimination of a person or a group of persons on multiple discrimination grounds'. The wording of the article could have been clearer and might signal a problem in terms of establishing what 'multiple' means; an example of a better formulation might be: 'more than one discrimination ground'.¹⁴⁵

In Macedonia, there is no court case law dealing with multiple discrimination. As in previous years, the only¹⁴⁶ institution reporting multiple discrimination cases is the CPAD. In 2016, the CPAD received 20 cases (33 % of its annual case load) where applicants claimed discrimination on several grounds.¹⁴⁷ One case of multiple discrimination was reported separately in 2017. In March 2017, a hotel in Skopje published a vacancy advert, stating that it was looking for a woman between 30 and 45 years of age for kitchen work – serving

¹⁴³ Kotevska, B. (2013), *Guide on Discrimination Grounds*, Skopje, OSCE and CPAD, available at: www.osce.org/skopje/116789?download=true.

¹⁴⁴ For disability it notes two types – 'mental' disability and physical disability. On this matter, please see section 2.1.1 above.

¹⁴⁵ The public debate yielded the recommendation to add 'intersectional discrimination' explicitly in the law.

¹⁴⁶ Please note that at the time of writing of this report, the annual report for 2016 of the Constitutional Court had not yet been published.

¹⁴⁷ Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017) *2016 Annual Report*, CPAD Website http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf. At the time of writing of this report, the 2017 report of the CPAD was not yet available.

breakfast. The Helsinki Committee filed a claim to the CPAD, alleging multiple discrimination. CPAD agreed and found that there had been direct multiple discrimination in access to employment on grounds of sex, as well as discrimination against women younger than 30 and older than 45 years of age. The CPAD did not ask the hotel to reply as it found that the text of the advertisement was sufficient fact and proof of discrimination and, because of the nature of the advertised working position, the discriminatory action could not be subject to any of the exceptions from discrimination, and so could not be justified. The CPAD requested that the hotel withdraw the original advert and re-publish it without the discriminatory criteria.¹⁴⁸

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

Article 4 of the 2017 draft-ADL, on definitions of the key terms used in the law, defines 'discrimination by perception', as 'any distinction, exclusion or restriction of an individual or a group based on an assumed discrimination ground' (Article 4(11)).

b) Discrimination by association

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

Article 4 of the 2017 draft-ADL, on definitions of the key terms used in the law, defines 'discrimination by association', as 'any distinction, exclusion or restriction of a person based on their relationship with another person or group on grounds of any discriminatory ground' (Article 4(10)).

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

a) Prohibition and definition of direct discrimination

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

¹⁴⁸ The case *Helsinki Committee vs Hotel Glam* (19.05.2017) was reported on the Helsinki Committee's website: <http://mhc.org.mk/announcements/594#.WrgmULaZPox>.

The 2017 draft-ADL follows the text of the directives more closely. It states that 'direct discrimination occurs when a person or group of persons is treated, was treated or would be treated less favourably compared to another person or group in a similar or comparable situation, on a discriminatory ground' (Article 6(1)).

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

b) Justification of direct discrimination

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

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

The 2017 draft-ADL does not include articles that mirror the long, ambiguous lists of exceptions in the current Articles 14 and 15. Article 13 is on affirmative action and Article 12 contains a general exception which includes the genuine and determining occupational requirement (in line with the directives), different treatment of citizens to others (mirroring the nationality exception in the directives), and one problematic exception of 'different treatment under provisions in other laws' (discussed below, in section 4 of this report).

2.2.1 Situation testing

a) Legal framework

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

The 2017 draft-ADL does mention situation testing. First, it defines situation testing in Article 4(14) as a 'method of proving discrimination via organised testers that are placed in a comparable situation in order to investigate the discrimination in various cases,

processes and areas on various grounds.’ Secondly, it explicitly includes situation testing under evidence that can be used before the court (Article 38).

b) Practice

In Macedonia, situation testing was initially used in practice only by civil society organisations (CSOs). Even before the adoption of the Anti-Discrimination Law in 2010, CSOs were carrying out training and practicing situation testing.¹⁴⁹ In 2014, the Macedonian Helsinki Committee (MHK) and the OSCE - Mission to Skopje conducted a joint project on situation testing which resulted in findings that they announced they will raise as evidence before the courts. Further information has not been released. The situation testing concerned the exercise of the right to freedom of movement of Roma people, and the tests were conducted at border crossings throughout the country.

In 2016, the Ombudsperson conducted a situation testing in order to cross-check a submission it received from a CSO. Namely, the Macedonian Helsinki Committee (MHK) raised a claim for direct discrimination on grounds of sex in the field of healthcare provision, as it found that fathers and men in general are not allowed as companions of hospitalised children in public health facilities. If a child is to be hospitalised, they have to be accompanied by a female. The Ombudsperson conducted a situation test via telephone and found that this really was the case. Relying on its situation testing as proof, the Ombudsperson concluded that there was *indirect*¹⁵⁰ discrimination on the ground of sex in the public healthcare service provision.¹⁵¹

The MHK reports that it has carried out situation testing twice in 2017; one in relation to physical accessibility of polling places and one on sensory accessibility for people who do not know the Braille alphabet, during the last elections. In the first case, the MHK tested access for people who use a wheelchair. Two people using wheelchairs went to vote alongside two people who did not use wheelchairs. The people using a wheelchair were faced with infrastructural barriers. Polling places were often on higher floors, in buildings with no elevators. In order to reach the actual polling place, they had to be carried by the people accompanying them. The hallways and doors were also reported to be largely inaccessible, as was the curtain behind which people go to vote. They conducted a similar process with people with a sensory impairment and established issues of inaccessibility for those who do not read the Braille alphabet, and issues of privacy, as the ballot sheets are given to the assistant of the visually-impaired person, rather than to the person voting, and because the assistant must accompany the person behind the curtain in the voting booth. The MHK reported both cases to the CPAD; the cases are still pending.¹⁵²

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

a) Prohibition and definition of indirect discrimination

In Macedonia, indirect discrimination is prohibited in national law. It is defined. The Anti-Discrimination Law fully replicates the definition of indirect discrimination from the directives. Indirect discrimination on any protected ground is taken to occur when an

¹⁴⁹ The situation testing training was on the ground of ethnicity in access to goods and services. (Information and source known to the author of the report).

¹⁵⁰ However, the applicant (the MHK) claimed direct discrimination. Having no access to the files of the case prevents an understanding of the decision of the Ombudsperson as to the form of discrimination that it had established.

¹⁵¹ Helsinki Committee of the Republic of Macedonia (2016), ‘Info-sheet on Discrimination’ (Информатор за дискриминација, (May 2016), available at: http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

¹⁵² It has to be noted, however, that the need to approach the issue via situation testing remains unclear to the author of this report. Situation testing is better fitted for uncovering discrimination where the evidence is sparse and the transparency over discriminatory criteria low, which does not seem to be case here. Situation testing also requires a great deal of funds and organisation, but physical inaccessibility can be easily established with other less costly and sensitive methods.

apparently¹⁵³ neutral provision, criterion or practice would put a person or a group at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 6(2)).

The 2017 draft-ADL amended this definition only by adding 'proportionate', so that it reads: 'the means of achieving that aim are proportionate, that is, appropriate and necessary' (Article 6(2)).

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

b) Justification test for indirect discrimination

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

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

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

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

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Macedonia, there are national rules permitting data collection. The main legislation in this area is the Law on State Statistics. Data are collected covering all five grounds except for sexual orientation. The data are anonymous and therefore the collection of such data does not conflict with the Law on Protection of Personal Data.¹⁵⁴

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

¹⁵³ Please note that a literal translation of the term used for 'apparently' in the Macedonian language version of the law would be 'obviously'. However, this is a clear language error, as the term in the Albanian version of the law (also an official version of the law) is 'të dukshme' ('apparently'). Thus, the intent of the legislature seems clear.

¹⁵⁴ The former Yugoslav Republic of Macedonia, Law on Protection of Personal Data (2005), Full title: Law on Protection of Personal Data (*Закон за заштита на лични податоци*) Official Gazette of the Republic of Macedonia No. 7/2005, 103/2008, 124/2010, 135/2011, 43/2014, 153/2015, 99/2016.

The Ministry of Information Society and Administration collects data on administrative servants in the form of a Register of Public Sector Employees.¹⁵⁵ The data to be collected and the access to the register are specified in a bylaw. The data are not publicly available, and only persons specified in the rulebook can have access to the register. The data are not anonymous and include the following grounds covered by the directives: ethnic origin, disability, sex and age.

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

Statistics are not used in litigation. However, they are widely used for designing strategic policy documents and action plans (including those on positive action). The ministerial cabinet uses statistics extensively in national strategies and positive action measures. With regard to issues of ethnicity, use of data includes planning employment of under-represented non-majority communities (national minorities) and the priorities in relation to the now-closed Decade of the Roma¹⁵⁶ and the 'National Strategy on Roma 2014-2020'.¹⁵⁷

On disability, statistics were used for the 'National Strategy on Equalisation of the Rights of Persons with Disabilities'¹⁵⁸ and on age, they were used for the 'National Strategy on the Elderly'.¹⁵⁹ Statistics were also used in the 2016-2020 'National Strategy on Equality and Non-discrimination'¹⁶⁰ and for its predecessor - the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability',¹⁶¹ as well as for the 2015-2020 'National Action Plan for the Implementation of the Law on Prevention and Protection against Discrimination'.¹⁶²

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

The 2017 draft-ADL mirrors this competence of the CPAD but also adds statistical data as one of the types of evidence that can be admissible in processing discrimination claims in

¹⁵⁵ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Full title: Law on Administrative Servants (*Закон за административни службеници*) Official Gazette of the Republic of Macedonia, No. 27/2014, 199/2014, 48/2015, 154/2015, 5/2016, 142/2016, Constitutional Court Decisions: U.no. 163/2014 (27.12.2016), U.br.121/2015 (01.02.2017). Article 7(1)-(9).

¹⁵⁶ For more information on the projects implemented within the frame of the Decade of the Roma and MLSP activities on Roma rights and integration, please see: *Проекти произлезени од декадата на Ромите* (Roma Decade Related Projects), Ministry of Labour and Social Policy Website, <http://www.mtsp.gov.mk/proekti-proizlezени-od-dekadata-na-romite.nsp.x>.

¹⁵⁷ Strategy on Roma 2014-2020 (*Стратегија за Ромите 2014-2020*), http://arhiva.vlada.mk/registar/files/Strategija_Romite_%202014-2020.pdf.

¹⁵⁸ National Strategy on Equalisation of the Rights of Persons with Disabilities (*Национална стратегија за изедначување на правата на лицата со инвалидност 2010-2018 - ревидирана*) <http://mtsp.gov.mk/WBStorage/Files/FINALNA%20Revidirana%20Nacionalna%20Strategija.pdf>.

¹⁵⁹ National Strategy on the Elderly (*Национална стратегија за стари лица 2010-2020*) <http://mtsp.gov.mk/WBStorage/Files/Strategija%20za%20stari%20lica%20juni.pdf>.

¹⁶⁰ National Strategy on Equality and Non-discrimination (*Национална стратегија за еднаквост и недискриминација 2016-2020*) http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

¹⁶¹ National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability (*Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол*) http://mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc.

¹⁶² National Action Plan for the Implementation of the Law on Prevention and Protection against Discrimination (*Национален акциски план за спроведување на Законот за заштита и спречување од дискриминација 2015-2020*) http://www.mtsp.gov.mk/content/word/NAP%20for%20ADL%202015-2020_MK.doc.

court (Article 38). Considering that, thus far, the courts have referred to the chapter of the ADL on court procedure and treated it as a special law compared to the general Civil Procedure Law, if this text of the draft law is adopted, there should be no question of the admissibility of statistical evidence to courts.

Statistical evidence as such is not mentioned elsewhere in national law. The Law on State Statistics¹⁶³ does not discuss the use of statistical data as evidence in general, meaning it also does not mention such a possibility in the context of indirect discrimination. Thus, no procedures or conditions for admissibility of such statistical evidence exist, making a breakthrough and usage of such data a distant possibility.

b) Practice

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Harassment does not constitute a criminal offence. It is part of the provisions of the Law on Labour Relations, which deal with harassment, sexual harassment and mobbing. The definition of harassment is in line with the directives (Article 9, 9-a). This definition states that harassment is an unwanted conduct related to the protected grounds with the purpose or effect of violating the dignity of the applicant for employment or the worker, and of creating an intimidating, hostile, humiliating or offensive environment (Article 9(3)). Sexual harassment is every verbal, non-verbal or physical conduct of a sexual character with the purpose or effect of violating the dignity of the job applicant or worker, or of creating an intimidating, hostile, humiliating or offensive environment (Article 9(4)). The law defines psychological harassment or so-called 'mobbing' as every negative and repetitive (for at least a six-month period) conduct with the purpose or effect of violating the dignity of the job applicant or worker, or of creating an intimidating, hostile, humiliating or offensive environment and which has the final objective of ending the working relationship or forcing victims to leave their working positions (Article 9-a(2)).

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

¹⁶³ The former Yugoslav Republic of Macedonia, Law on State Statistics (1997), Full title: Law on State Statistics (*Закон за државната статистика*) Official Gazette of the Republic of Macedonia No. 54/1997; 21/2007; 51/2011; 104/2013; 42/2014, 192/2015, 27/2016.

It is important to note that in 2013 a special Law on Protection against Harassment in the Workplace¹⁶⁴ was adopted. In terms of the elements constituting harassment, the definitions of the different types of harassment — psychological and sexual — are in line with the ones in the directives. This legislation also outlaws instruction or incitement to harass. The law is silent as to the grounds it covers for psychological harassment. For sexual harassment, the ground – sex — is contained in the title of the type of harassment, although without any clear guidance as to whether multiple grounds could also be considered. An important note here is that the legislature obviously intended to create a distinction between harassment in the workplace and other activities that would not be considered as such, including 'any unjustified distinction during unequal treatment towards the employee on any ground of discrimination which is prohibited and for which protection is provided for under a law'.¹⁶⁵

b) Scope of liability for harassment

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

The Law on Protection against Harassment in the Workplace applies to the field of employment. The liability scope is the same as the one under the Law on Labour Relations. An important note here is that the legislator obviously intended to create a distinction between harassment at the workplace and other activities that would not be considered as such, including 'any unjustified distinction during unequal treatment towards the employee on any ground of discrimination which is prohibited and for which protection is provided for under a law'.¹⁶⁶

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

The 2017 draft-ADL does not propose any changes in relation to instructions to discriminate (Article 7).

¹⁶⁴ The former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Full title: Law on Protection against Harassment in the Workplace (*Закон за заштита од вознемирување на работно место*) Official Gazette of the Republic of Macedonia No.79/2013.

¹⁶⁵ The former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Article 8(3).

¹⁶⁶ The former Yugoslav Republic of Macedonia, Law on Protection against Harassment in the Workplace (2013), Article 8(3).

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

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

An older case, reported to the equality body in 2013 by Sumnal (a CSO dealing with Roma rights) remains of relevance in relation to instructions to discriminate.¹⁶⁷ A company that was contracted by a big (now closed) supermarket located in one of the largest malls in the country, instructed its sub-contracted company to 'remove' all employees of Roma ethnic origin who worked in the food department. Although the instruction to discriminate was evident, the case was found to be one of direct discrimination by the contracted company and there was no deliberation on the element of instruction.

In Macedonia, instructions do explicitly constitute a form of discrimination.¹⁶⁸

b) Scope of liability for instructions to discriminate

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

The case of the contracted company being held responsible for direct discrimination (mentioned above, under section 2.5.a), did not involve a deliberation on the instruction. Thus, although showing that the instructor was held liable for discrimination, formally speaking, the case was not classified under the category of instruction to discriminate.

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

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

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

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

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

¹⁶⁷ Commission for Protection against Discrimination (*Комисија за заштита од дискриминација*) No.07-633/4 *Association for Development of the Roma Community Sumnal vs Marcem DOO Skopje*, 23.05.2013.

¹⁶⁸ The former Yugoslav Republic of Macedonia, Anti-Discrimination Law, 2010. Article 9.

The Anti-Discrimination Law, which also applies in the field of employment, tackles the issue of reasonable accommodation in two ways, by first defining adjustment of infrastructure and services and second by defining discrimination against people with disability – both considered to be forms of discrimination. It defines adjustment of infrastructure and services as an act of undertaking appropriate measures, where needed in a particular case, to enable a person with ‘mental’¹⁶⁹ or physical disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer (Article 5(12)). This definition is similar in wording to Article 5 of Directive 2000/78, although it is limited to infrastructure and service. It also does not define what would be a disproportionate burden for employers or whether the availability of financial assistance from the state is to be taken into account in assessing whether there is a disproportionate burden. The second point is the definition of discrimination against people with disability. Notably, the law deems the lack of measures undertaken for the removal of obstacles and limitations, or the absence of measures for the adjustment of infrastructure, space, usage of publicly available resources or participation in public and social life for people with ‘mental’ disability and physical disability to amount to discrimination (Article 8(2)). However, the law does not go into this issue in any more detail.

The 2017 draft-ADL changes this approach. First, it adds a definition of reasonable¹⁷⁰ accommodation as:

‘necessary and appropriate modification and adjustment required in a particular case, which is not a disproportionate or undue burden, aimed at ensuring the exercise or enjoyment of all human rights and freedoms of persons with disabilities on an equal basis with others.’ (Article 4(2))

Secondly, the 2017 draft-ADL expands the definition of adjustment of infrastructure and services to include goods and takes the emphasis away from employment, widening the scope of the provision:

‘taking appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical surroundings, transportation, information and communication, including information and communication technologies and systems, other public facilities and services in both urban and rural areas, as well as uninterrupted enjoyment of their right to participation in social and public life on an equal basis with others.’ (Article 4(5))

Thirdly, it does not include a special provision on ‘discrimination against persons with disabilities’, which changes nothing in relation to the scope of protection of the ground, but is a welcome change in technical terms.¹⁷¹

The Law on Labour Relations does not specifically mention reasonable accommodation for people with disabilities. The Law on Employment of People with Disabilities¹⁷² also does not contain a definition of reasonable accommodation, but it contains references to accommodation-related measures for improving employment conditions and the conditions for the execution of work duties of people with disabilities. The law establishes a duty on the employer to provide for working space, equipment, and other relevant conditions for work and for the adaptation of the working environment (Article 7(2)). Employers’ measures undertaken to accommodate people with disability are subject to inspection and

¹⁶⁹ Mental disability could be understood to include psychosocial disability and intellectual disability.

¹⁷⁰ The term used in the law might be better translated as ‘adequate accommodation’ rather than ‘reasonable accommodation’.

¹⁷¹ This provision was a residue from an older draft-version of the law. It was not intended to signal heightened protection of the ground of disability, nor did it provide for a higher degree of protection (it was merely a repetition of what was already stated in other provisions).

¹⁷² The former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities, 2000.

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

b) Practice

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

c) Definition of disability and non-discrimination protection

In the Anti-Discrimination Law, disability is understood as 'mental' and physical disability,¹⁷³ however this law does not go into more details than this in defining disability. Thus, in the context of reasonable accommodation, disability is to be understood in the same way.

The 2017 draft-ADL adds to this a definition of 'person with a disability'. Under Article 4 (5):

'Person with disability shall mean any person having a long-term physical, intellectual, 'mental' or sensory impairment, which in interaction with various social barriers may prevent the person's full and effective participation in society on an equal basis with others'.

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

In Macedonia, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. The Anti-Discrimination Law deems lack of measures undertaken for the removal of obstacles and limitations, or for the adjustment of infrastructure, space, usage of publicly available resources or participation in public and social life, including in education and training (Article 15(3)), for people with 'mental' disability or physical disability to amount to discrimination (Article 8(2)).¹⁷⁴ The article uses the same formulation as is used in the field of employment.

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

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

The Anti-Discrimination Law classifies the lack of reasonable accommodation for people with 'mental' or physical disabilities as discrimination (Article 8(2)).¹⁷⁵ However, the Law on Employment of People with Disabilities and the Law on Construction do not include specific sanctions if proper adaptation is not carried out. This failure is not considered to be discrimination. In addition, the misdemeanour provisions in the Anti-Discrimination Law

¹⁷³ Psychosocial disability is not explicitly covered thus suggesting a gap in the scope of disability protected under the law. The analysis of the harmonisation of the national legislation identified this gap and recommended that a general term 'disability' remains in the law, in order to prevent limiting disability to intellectual disability or physical disability. Source: Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹⁷⁴ Psychosocial disability is not explicitly covered thus suggesting a gap in the scope of disability protected under the law. The analysis of the harmonisation of the national legislation identified this gap and recommended that a general term 'disability' remains in the law, in order to prevent limiting disability to intellectual disability or physical disability. Source: Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

¹⁷⁵ Please see above footnote on psychosocial disability – same explanation applies.

do not contain a special provision on fines regarding lack of reasonable accommodation as per Article 8(2).

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

Although the 2017 draft-ADL does not include a provision mirroring Article 8(2) of the current law, given that the draft-ADL includes a definition of reasonable accommodation in Article 4(2), and of adjustments to infrastructure, goods and services in Article 4(5), it should be understood that the failure to meet the duty of reasonable accommodation would still count as discrimination.

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

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

Limited accommodation in respect of ethnicity can be found in the Law on Holidays of the Republic of Macedonia.¹⁷⁶ Under this law, vacation days are to be granted for the specific celebrations of some ethnic communities (Articles 1 and 2).

Limited accommodation in respect of religion is mentioned in the Law on Holidays of the Republic of Macedonia. Under this law, vacation days are to be granted for religious celebrations on the basis of the faith of the employee (Articles 1 and 2).¹⁷⁷

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

g) Accessibility of services, buildings and infrastructure

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

The 2017 draft-ADL expands the definition of adjustment of infrastructure and services to include goods. It takes the emphasis away from employment and widens the scope of the provision:

‘taking appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical surroundings, transportation, information and communication, including information and communication technologies and systems, other public facilities and services in both urban and rural areas, as well as uninterrupted enjoyment of their right to participation in social and public life on an equal basis with others.’ (Article 4(5))

The Law on Construction creates the potential to reduce the standard basic requirements governing re-construction and adaptation of buildings if such reconstruction and adaptation

¹⁷⁶ The former Yugoslav Republic of Macedonia, Law on Holidays (1998), Full title: Law on Holidays of the Republic of Macedonia (*Закон за празниците во Република Македонија*) Official Gazette of the Republic of Macedonia, No. 21/98, 18/2007.

¹⁷⁷ The former Yugoslav Republic of Macedonia, Law on Holidays (1998).

is intended to provide for the free access, movement, stay and work of people with disability (Article 10). According to Article 3(2) of the law, the basic requirements for the construction include:

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

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

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

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

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

The Law on Construction also states that:

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

The same law states that there is no need for approval to build structures that allow and facilitate the movement of people with disability in the building.¹⁷⁸ Furthermore, public and business facilities

'must ensure unimpeded access to persons with a disability as prescribed by this Law within four years of the date of entry into force of this law, and adapt outside staircases for public use within two years of the date of the entry into force of this Law' (the law entered into force on 5 November 2009).¹⁷⁹

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

'are little or not applied at all, both in adapting existing buildings and in the construction of new buildings. This includes inadequate public areas with high kerbs, inconvenient pedestrian crossings, sidewalks, parking spots, access to bus stations, adapted toilets for persons in wheelchairs, etc.'¹⁸⁰

¹⁷⁸ The former Yugoslav Republic of Macedonia, Law on Construction (2009). Full title: Law on Construction (Закон за градење) Official Gazette, No. 130/2009, 124/2010, 18/2011, 36/2011, 54/2011, 13/2012, 144/2012, 25/13, 79/13, 137/13, 163/2013, 27/2014, 28/2014, 42/2014, 115/2014, 149/2014, 187/2014, 44/2015, 129/2015, 217/2015, 226/2015, 30/2016; 31/2016; 39/2016; 71/2016; 132/2016; Constitutional Court Decisions: U.no. 262/2009 (02.02.2011), U.no. 212/2010 (30.03.2011), U.no. 114/2015 (11.05.2016).

¹⁷⁹ The former Yugoslav Republic of Macedonia, Law on Construction (2009), Article 170.

¹⁸⁰ Ministry of Labour and Social Policy (2014), *Initial report of the Republic of Macedonia pursuant to article 35, paragraph 1 of the Convention on the Rights of Persons with Disabilities*, available at:

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

h) Accessibility of public documents

National law does not require public services to translate some or all of their documents in Braille (i.e. tax declarations, general information). An earlier example of good practice from 2014 was the publication in Braille of an advertisement for the employment of people with disabilities, by the Government.¹⁸¹ This was not a general recruitment advert - only people with disabilities could apply for the positions.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMKD%2f1&Lang=en.

¹⁸¹ Press24 (2014), 'People with visual impairments hailed vacancy ad for employment of 300 persons with disability', (Слепите лица го поздравија огласот за вработување 300 лица со инвалидност), www.press24.mk/slepите-lica-go-pozdravija-oglasot-za-vrabotuvanje-300-lica-so-invalidnost.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Macedonia, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. On provisions of relevance for non-discrimination, the Constitution sets a requirement of citizenship in order for a person to enjoy the protection of rights under the Constitution, including protection against discrimination. Stricter conditions also apply to residents without Macedonian citizenship with regards to employment and acquiring social protection.¹⁸² In other areas, including self-employment, access to training and membership in workers' organisations, there is no legal inhibition and there are no reports of less favourable treatment. With regard to the Constitution, the approach implemented in practice gives foreign citizens the opportunity to participate in the social and economic life of the country. No such requirement exists under the Anti-Discrimination Law.

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

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

a and b) Protection against discrimination and liability for discrimination

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

As the law uses the term 'person' throughout for both protection against discrimination and liability for discrimination, it is clear that such a distinction is not made. Many of the cases brought to the CPAD are by legal persons, and more often than not the alleged discriminator is a legal person. In addition, there has been no interpretation so far which would exclude groups from the protection.¹⁸³ However, there is a distinction when speaking of the sanctions, as fines for misdemeanours are divided between fines for natural and for legal persons and vary in amount (Articles 42 to 45). Furthermore, it should be noted that under the Constitution, only citizens are included in the general equality clause, and also that the Constitutional Court's practice is clear that human rights protection, which also includes protection against discrimination, can be sought by natural persons only.

¹⁸² The former Yugoslav Republic of Macedonia, Law on Social Protection (2009), Article 15.

¹⁸³ Cases which do not carry initials in the front are brought by legal persons: Commission for Protection against Discrimination, Opinions, <http://kzd.mk/?q=node/116>.

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

a) Protection against discrimination

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

On a side note, the 2017 draft-ADL can be read as limiting the personal or corporate scope when it comes to positive action. Namely, the definition of positive action seems to suggest that these measures can be undertaken by 'competent bodies', which in the national language means limiting the ability to undertake such actions to public entities and possibly considering positive action by a private entity as discrimination. This would be lowering the protection and promotion scope of the current law, under which there is no limitation on affirmative measures undertaken by private parties.

b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

The anti-discrimination law applies to all sectors of public and private employment and occupation (Article 4). Articles 6 to 11 of the Law on Labour Relations¹⁸⁴ prohibit various aspects of discrimination in labour relations and, in general, do not distinguish between different types of actors (public or private, secular or religious). It states that it regulates the labour relations of workers employed by the state, local government, public institutions, public enterprises, institutes, foundations, organisations and other legal and individual employers, unless another law determines otherwise.¹⁸⁵

Having agreed with the general approach, it should be noted that practically all major areas of public employment are covered also by the Law on Administrative Servants,¹⁸⁶ the Law on the Police,¹⁸⁷ the Law on Defence and the Law on Foreign Affairs for labour relations of the employees in the respective ministries.

¹⁸⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Full title: Law on Labour Relations (Закон за работните односи) Official Gazette of the Republic of Macedonia Nos. 62/2005, 106/2008, 161/2008, 114/2009, 130/2009, 149/2009, 50/2010, 52/2010, 124/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015; Constitutional Court Decisions: U.no. 139/2005, U.no. 161/2005, U.no. 134/2005, U.no. 187/2005, U.no. 111/2006, U.no. 188/2006, U.no. 170/2006, U.no. 200/2008, U.no. 20/2009, U.no. 176/2009, U.no. 263/2009, U.no. 62/2013. Articles 6 to 11.

¹⁸⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 3.

¹⁸⁶ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014).

¹⁸⁷ The former Yugoslav Republic of Macedonia, Law on the Police (2006), Full title: Law on the Police (Закон за полицијата), Official Gazette of the Republic of Macedonia No. 114/2006, 06/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016, 120/2016. Article 96 and The former Yugoslav Republic of Macedonia, Law on Internal Affairs (2014), Full title: Law on Internal Affairs (Закон за внатрешни работи) Official Gazette of the Republic of Macedonia No. 42/2014, 116/2014, 33/2015, 5/2016, 120/2016, 127/2016, 142/2016, 190/2016.

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

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

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

The general non-discrimination article in the Law on Labour Relations¹⁸⁸ encompasses selection criteria, recruitment conditions, treatment at work, promotion, professional training and other benefits, as well as ending employment. A specific ban on discrimination in vacancy announcements is prescribed in the Law on Labour Relations.¹⁸⁹ However, in relation to access, both in that provision and the law overall, the protection against discrimination for people with disabilities can be considered as being very weak because, although the applicant is not obliged to submit a health certificate when concluding an employment contract, the employer can send her or him for a medical examination.¹⁹⁰ The only legal limitation is that the examination should be strictly and necessarily linked to the specific post.

None of the provisions in the non-discrimination articles should be interpreted as restrictions on the employer's right to refuse to hire a person who does not meet the occupational requirements in that particular field, as long as the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.¹⁹¹

Conditions for access to employment and criteria for various professional activities in the public sector are mostly determined by specialised laws. However, no equivalent and consistent approach or scope of protection is contained in these laws. Health status is mentioned as a condition for employment in the Law on the Police and the Law on Army Service, and in the Law on Administrative Servants.¹⁹² The Law on Administrative Servants sets out general conditions for employment as an administrative servant, which aside from general health capability, also include citizenship, active knowledge of the Macedonian language, being at least 18 years of age, and having no criminal conviction in relation to conducting a profession or duty (Article 31(1)).¹⁹³ The Anti-Discrimination Law does not distinguish between persons who hold citizenship of Macedonia and others for the purposes of protection against discrimination. However, the above-stated citizenship criteria mean that migrants cannot access public jobs on an equal footing. Given that one of the current exceptions under the ADL is that special rights only for citizens are not deemed discriminatory, a national body is very unlikely to find this distinction on grounds of citizenship to be discrimination. No research exists that could supplement this finding with information as to how these conditions operate in practice.

There is an established system of state inspection that conducts supervision of the implementation of the Law on Labour Relations, and of other laws and regulations for labour relations, collective agreements and job contracts that regulate the rights and

¹⁸⁸ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 6.

¹⁸⁹ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 24.

¹⁹⁰ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 25.

¹⁹¹ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 8.

¹⁹² The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014).

¹⁹³ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Article 31(1).

obligations of the employee and the employer. Such inspections are carried out by the state body responsible for labour inspection.¹⁹⁴

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

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

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

Aside from this law, the Law on Labour Relations contains a provision stating that for equal work, workers should be equally paid. The only category explicitly mentioned is women,¹⁹⁵ however in the general provisions section, in Article 7(4), it explicitly states that discrimination is prohibited on all grounds mentioned in Article 6 (which include all the directives grounds) in relation to, inter alia, 'working conditions, all rights from a labour relation and in relation to such a relation, including equality of pay'.

The Law on Administrative Servants devotes a chapter – Chapter XIV – to salaries, without mentioning equality of pay. It establishes the following as the main elements on which salary is based: education level, level of working position, and years of experience.¹⁹⁶ No case law on this new law exists.

3.2.3.1 Occupational pensions constituting part of pay

There are three laws dealing with pensions.¹⁹⁷ However, only one of these contains a prohibition of discrimination: the Law on Voluntary Fully Funded Pension Insurance (Article 3).¹⁹⁸ It states that voluntary, fully funded pension insurance schemes are prohibited from discriminating against members on the grounds of sex, race, colour, language, faith and religion, political or other orientation, national or social origin, belonging to a national or ethnic minority, or on the basis of property, family, health and age.

However, in the same law it states that a company cannot refuse membership of the Voluntary Pension Fund to any employee if the person is at least 15 years old and not more than 70 years of age.¹⁹⁹ This means that disability is not a ground for refusal, although if it is treated as a health condition it falls under anti-discrimination protection. The Law on Voluntary Fully Funded Pension Insurance does not include any sanction equivalent to the prohibition of discrimination for voluntary pension schemes. There are no articles on

¹⁹⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 256.

¹⁹⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations (2005), Article 108.

¹⁹⁶ The former Yugoslav Republic of Macedonia, Law on Administrative Servants (2014), Articles 85 to 97.

¹⁹⁷ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance (2012), Full title: Law on Pension and Disability Insurance (*Закон за пензиско и инвалидско осигурување*), Official Gazette of the Republic of Macedonia No.98/2012, 166/2012, 15/2013, 170/2013, 43/2014, 44/2014, 97/2014, 113/2014, 160/2014, 188/2014, 20/2015, 61/2015, 97/2015, 129/2015, 147/2015, 154/2015, 173/2015, 217/2015, 27/2016, 120/2016, 132/2016; The former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008; The former Yugoslav Republic of Macedonia, Law on Mandatory Fully Funded Pension Insurance (*Закон за задолжително капитално пензиско осигурување*), 2002, Official Gazette of the Republic of Macedonia No.29/2002, 85/2003, 40/2004, 113/2005, 29/2007, 88/2008, 48/2009, 50/2010, 171/2011, 36/2011, 98/2012, 13/2013, 164/2013, 44/2014, 192/2015, 30/2016; Constitutional Court Decision: U.no.163/2002 (02.04.2003), U.no.165/2008 (11.03.2009).

¹⁹⁸ The former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008.

¹⁹⁹ The former Yugoslav Republic of Macedonia, Law on Voluntary Fully Funded Pension Insurance, 2008, Article 94.

discrimination or equality in the framework Law on Pensions and Disability Insurance²⁰⁰ and in the Law on Mandatory Fully Funded Pension Insurance.

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

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

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

Though not expressly using the wording of Article 3(1)(b) of Directive 2000/43, the prohibitions against discrimination in access to vocational guidance, professional training, continuing professional training and practical work experience are stipulated in the general prohibition on discrimination in the Law on Labour Relations²⁰¹ and in laws on different stages of education. National legislation gives everyone equal rights to acquire higher education and to be educated throughout their lives, and equal rights to lifelong learning.²⁰²

According to the Law on Higher Education,²⁰³ citizens of the country are equally entitled to education in higher educational institutions in the country. The approach to nationality is different, and foreign nationals can use the principle of reciprocity (meaning that if Macedonian students are given national treatment in a certain country, nationals of that country may study in Macedonia as if they were Macedonian citizens). The right to education of stateless persons has still to be determined in law and under ratified international agreements.

The selection of candidates by the university cannot be discriminatory on the grounds of race, colour of skin, sex, language, religion, political or other beliefs, ethnic, national or social origin, property, birth, social position, disability, sexual orientation or age.²⁰⁴

The Law on Adult Education states that the aim of adult education is to provide an opportunity for everyone in all adult groups to achieve their appropriate educational level and enable them to acquire knowledge, skills and attitudes that will comply with the requirements of society and the labour market (Article 4).²⁰⁵

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

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

²⁰⁰ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

²⁰¹ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 7.

²⁰² The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 3.

²⁰³ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 7.

²⁰⁴ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 108.

²⁰⁵ The former Yugoslav Republic of Macedonia, Law on Adult Education, 2008. Full title: The former Yugoslav Republic of Macedonia, Law on Adult Education (*Закон за образование на возрасните*), Official Gazette of the Republic of Macedonia No.07/2008, 17/2011, 51/2011, 74/2012, 41/2014, 144/2014, 146/2015, 30/2016; Constitutional Court Decision: U.no. 46/2008.

The Law on Labour Relations only provides for the freedom of workers and employers to establish and participate or not in the work of such an association.²⁰⁶ There are no anti-discrimination provisions related to the grounds of the directives. Having said that, it should be also noted that *mutatis mutandi* the general anti-discrimination provision in the Law on Labour Relations should be applicable to these situations as well. Following the same line of reasoning, the provisions in the Anti-Discrimination Law would also be applicable.

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

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

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

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

The general and specific provisions on prohibition of discrimination in social services are also listed in the Law on Social Protection;²⁰⁷ racial and ethnic origin and disability are protected as grounds, while belief, age and sexual orientation are not. According to the Law on Social Protection, the ban is related to both public institutions for social care and private institutions.²⁰⁸ Protection in cases of discrimination in the field of social care is covered by the potential for the 'applicant or user of social protection to seek protection from the competent authority'.²⁰⁹ In cases of discrimination, there is a shift of the burden of proof²¹⁰ and financial sanctions of EUR 3 000-5 000 (to be paid in national currency) are envisaged.²¹¹

The Law on Health Protection defines, as one of the basic principles of the provision of healthcare, the principle of equity, which it defines through the prohibition of discrimination. Notably, in Article 9, the law states that the healthcare is realised through prohibition of discrimination in provision of healthcare protection on grounds of race, sex, age, nationality, social origin, religion, political or other belief, property status, culture, language, type of illness, 'mental'²¹² or physical disability.²¹³ It does not include sexual orientation as one of the protected grounds, but it could be included pending judicial interpretation. Article 2 of the Law on Health Insurance states that health insurance is mandatory for all citizens on the principles of 'comprehensiveness, solidarity, equality and effective use of resources under conditions determined by Law'.²¹⁴

²⁰⁶ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Articles 183, 184, 185, 198.

²⁰⁷ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 21.

²⁰⁸ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 20.

²⁰⁹ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 22.

²¹⁰ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 23.

²¹¹ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 254.

²¹² Includes intellectual and psychosocial disability.

²¹³ The former Yugoslav Republic of Macedonia, Law on Health Protection (*Закон за здравствената заштита*), 2012.

²¹⁴ The former Yugoslav Republic of Macedonia, Law on Health Insurance (*Закон за здравственото осигурување*), 2000. Full title: The former Yugoslav Republic of Macedonia, Law on Health Insurance (*Закон за здравственото осигурување*), Official Gazette of the Republic of Macedonia No. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008, 98/2008, 6/2009, 67/2009, 50/2010, 156/2010, 53/2011, 26/2012, 16/2013, 91/2013, 187/2013, 43/2014, 44/2014, 97/2014, 112/2014, 113/2014, 188/2014, 20/2015, 61/2015, 98/2015, 129/2015, 150/2015,

The Law on the Protection of Children has articles on discrimination.²¹⁵ In addition to definitions of direct and indirect discrimination, specific measures are included for the protection of children and their parents or guardians when applying for social care. However, the procedure is so complicated that it is very unlikely that these articles will be used in practice (especially because the whole procedure should be carried out by the potential victims without any institutional help).

If a discrimination case were raised, migrants should receive the same treatment as any citizen of the country or any other person, because the Anti-Discrimination Law does not distinguish between persons who hold citizenship of Macedonia and others. This applies across all fields of application of the law, including the field of social protection. There is no related case law on this matter from the equality body. However, one should bear in mind that the equalisation of migrants with citizens for the purposes of protection against discrimination under the ADL does not prevent the legislature from prescribing some rights exclusively to nationals. As the discussion on the exceptions shows, both the current ADL and the new draft-ADL provide for exceptions that might provide grounds for distinguishing between citizens and others. In such an event, the authorities might be found to be covered by the exception and, thus, to have engaged in lawful unequal treatment. There are differences under the national law as to who is a migrant and who is a refugee that should be taken into consideration when processing a case (the definition does not rest on the legality of residence). Having said that, no policy is being implemented to address discrimination against migrants.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

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

The Constitution states that the Republic provides for social protection and social security of citizens in accordance with the principle of social justice. It guarantees the right to assistance to those who are infirm or unfit for work. It also provides for particular protection for people with disability and ensures that their involvement in social life is possible.²¹⁶

Social advantages are stipulated by law. For instance, the Law on Social Protection envisages that due to age and disability, beneficiaries of social financial assistance are relieved from the obligation to conduct public service duties in a duration of up to 90 days.²¹⁷ This law also contains a general anti-discrimination provision (Article 20) and an article defining direct and indirect discrimination (Article 21). Although not explicitly addressed, discrimination in the area of social advantages is likely to be unlawful also under the Anti-Discrimination Law (Article 4(1), line 3). Albeit not containing a special anti-discrimination provision specifically concerning social advantages, it is safe to conclude that the legal framework implicitly upholds the concept of non-discrimination with regard to the social advantages.

154/2015, 192/2015, 217/2015; Constitutional Court Decision: U.no.85/2000, U.no.173/2000, U.no.37/2001, U.no.60/2006, U.no.40/2007, U.no.167/2006, U.no.45/2006, U.no. 199/2008, U.no.109/2009, U.no.185/2009, U.no.112/2011.

²¹⁵ The former Yugoslav Republic of Macedonia, Law on the Protection of Children (*Закон за заштита на децата*), 2013, Articles 12, 13, 14, 15.

²¹⁶ Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Article 35. Official Website of the Assembly of the Republic of Macedonia, <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>.

²¹⁷ The former Yugoslav Republic of Macedonia, Law on Social Protection, 2009, Article 55.

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

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

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

Under the Anti-Discrimination Law, discrimination is prohibited in the educational process, at all levels and in all forms, both private and public. All directive grounds are explicitly listed in the provision on protected grounds, apart from sexual orientation. Aside from the Anti-Discrimination Law (Article 4(2)), laws that regulate primary²¹⁸ and secondary²¹⁹ education also prohibit discrimination. Primary and secondary education is compulsory in the country. The legislation covers the directives' grounds of race or ethnic origin and belief (political and religious), while disability, age, sexual orientation and belief (other aspects) are missing.

Macedonia has a negative net migration rate of -0.5 per 1 000 population.²²⁰ In the 2015 'migrant crisis' the country served as a transit point on the so-called Balkan Route, rather than a destination country. Thus, no case law has been developed on enforcement and no implementation issues have been raised in general, including in education. If a discrimination case were raised, migrants should receive the same treatment as any citizen of the country or any other person, because the Anti-Discrimination Law does not distinguish between persons who hold citizenship of Macedonia and others. This applies across all fields of application of the law, including the field of education. There is no related case law on this matter from the equality body. However, one should bear in mind that the equalisation of migrants with citizens for the purposes of protection against discrimination under the ADL does not prevent the legislature from prescribing some rights exclusively to nationals. As the discussion on the exceptions shows, both the current ADL and the new draft-ADL provide for exceptions that might provide grounds for distinguishing between citizens and others. In such an event, the authorities might be found to be covered by the exception and, thus, to have engaged in lawful unequal treatment. There are differences under the national law as to who is a migrant and who is a refugee that should be taken into consideration when processing a case (the definition does not rest on the legality of residence). Having said that, no policy is being implemented to address discrimination against migrants.

a) Pupils with disabilities

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

The laws that regulate primary²²¹ and secondary²²² education prohibit discrimination, and although they do not cover disability as a ground for discrimination, they include specific articles dealing with the education of children with disabilities. In this sense, a parent of a child with 'special educational needs' has the right to enrol the child at primary school, except in cases where the 'special educational needs' of the child are such that the child should be taught in a specialised primary school. Also, students with special educational needs are to be provided with appropriate conditions for acquiring basic education and life

²¹⁸ Article 2 of the Law on Primary Education states: 'Every child has the right to primary education. (2) Discrimination on the grounds of sex, race, colour, national, social, political, religious, property and social background in realisation of the rights of education and primary education, as defined by this Law are prohibited.' Source: The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008.

²¹⁹ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 3.

²²⁰ International Organisation for Migration – Macedonia profile, *IOM Website*, <https://www.iom.int/countries/former-yugoslav-republic-macedonia>.

²²¹ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 2.

²²² The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 3.

skills in regular and special primary schools and are entitled to individual assistance for the acquisition of primary education.²²³

The manner and conditions for the enrolment of students with special educational needs in primary schools is determined by the Minister of Education, on a proposal of the Bureau for Development of Education (an independent body within the ministry).²²⁴ According to Macedonian legislation there is specialised primary education for children with disabilities and specialised schools are considered equivalent to state schools.²²⁵ In general, children are enrolled in these specialised schools instead of being enrolled in mainstream schools (as discussed below). The Law on Higher Education²²⁶ does not explicitly prohibit discrimination on the ground of disability; however, there are articles on the special benefits for students with disabilities (exemption from payment of tuition fees,²²⁷ selection of students,²²⁸ and special benefits provided by the university).²²⁹ It also lists special conditions for enrolment of students with a citizenship other than Macedonian. Special curricula for students with disabilities are developed by the Department for Development of Education.²³⁰

At present, the dominant practice seems to be segregated education of children with disabilities, rather than their inclusion in mainstream schools. This can be confirmed by the practice of children being taken out of primary education at the request of parents among other things, because of resistance on the part of teaching staff to teaching children with disabilities and because of bullying by other children.²³¹ According to the Law on Primary Education, children with disabilities are entitled to shorter class time, a lower number of children per class and the engagement of specialists. However, both the *Holistic Report on Persons with Disabilities in Macedonia*,²³² produced by the Open the Windows project and the 2013 Ombudsperson's information report on the inclusion of children with disabilities in education²³³ (which followed the 2006 special report)²³⁴ confirm that the implementation of the standards prescribed in the law is problematic. The holistic report underlines that the practical application of legal provisions entails a lot of problems and obstacles that do not allow for the provision of adequate and equal access to education for children with disabilities, thus practising this right often results in discrimination.²³⁵

²²³ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 6.

²²⁴ The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 51.

²²⁵ Currently there are: four primary schools for students with moderate intellectual disabilities; one elementary school for children with more severe intellectual disabilities; a primary school for blind and visually impaired children; a primary school for deaf and hearing impaired children; a primary school for students with serious physical disabilities; two secondary schools for students with moderate intellectual disabilities; a school for blind and partially blind students; a school for deaf and hard of hearing students; 80 special classes for pupils in regular primary schools; and two day care centres for young people with moderate or severe combined disabilities. These schools enrol in total about 1 700 students. Please see: The former Yugoslav Republic of Macedonia, Law on Primary Education, 2008, Article 186.

²²⁶ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 7.

²²⁷ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 87.

²²⁸ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 108.

²²⁹ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 150.

²³⁰ The former Yugoslav Republic of Macedonia, Law on Higher Education, 2008, Article 30.

²³¹ Open the Windows (2015), *Holistic Report on Persons with Disabilities in Macedonia* (Холистички извештај за лицата со попреченост во Македонија) (Otvorete gi prozorcite, 2015), p.22.

²³² Open the Windows (2015), *Holistic Report on Persons with Disabilities in Macedonia* (Холистички извештај за лицата со попреченост во Македонија) (Otvorete gi prozorcite, 2015).

²³³ Ombudsperson of the Republic of Macedonia (2013), *Информација за состојбата со вклученоста на децата со посебни потреби во основните и средните посебни училишта* (Information of the Ombudsperson on the Inclusion of Children with Disabilities in Primary and Secondary Special Schools), available at: <http://ombudsman.mk/upload/documents/2013/Izvestaj-Posebni%20ucilista-2014.pdf>.

²³⁴ Ombudsperson of the Republic of Macedonia (2006), *Посебен извештај на народниот правобранител за вклученоста на децата со посебни потреби во образованието* (Special Report of the Ombudsperson on the Inclusion of Children with Disabilities in Education), available at: <http://ombudsman.mk/upload/documents/Posebni%20potrebi%20na%20decata1%20-mak.pdf>.

²³⁵ There are cases of non-admittance of children with disabilities into regular primary education, or in some other cases these children were admitted at first, but after a certain period they were expelled, thus leaving their parents to cope with the children on their own. Teachers themselves have problems dealing with these

There are separate secondary schools for children with 'special needs'.²³⁶ Secondary school students with 'special educational needs' are educated under adjusted programmes for job training.²³⁷ Open the Windows aims to promote assistance technology for children with disabilities from primary school.²³⁸ There are no specific articles that regulate the education of children with disabilities in ordinary secondary schools; these are out of the reach of children with disabilities.

b) Trends and patterns regarding Roma pupils

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

According to the most recent, albeit older, data from the State Statistical Office, one in 10 Roma children had completed primary education (note that 95 % of the children on the streets were found to be Roma children),²³⁹ in spite of the fact that primary (as well as secondary) education is compulsory in the country. According to the United Nations Children's Fund (UNICEF), Roma children have the lowest level of educational achievement: 39 % of Roma do not attend primary school and the lowest proportion of children attending primary school is observed in the poorest wealth quintile (86.3 %), and among the Roma (61.1 %).²⁴⁰

The 'Strategy on Roma 2014-2020' (the successor to the 2005 Roma strategy), was adopted in 2014.²⁴¹ Like its predecessor, this strategy also has education for Roma as a priority. The strategy highlighted the following concerns with regard to the situation of the Roma population (of relevance for education): the poor economic and social position of a significant number of Roma families; the high percentage of children not attending preschool education; the small number of children attending elementary education; lack of adequate conditions in the homes; economic exploitation of children; lack of sufficient knowledge of Macedonian language; high number of children dropping out of education; and a lack of awareness for the need of education.²⁴² Eight Roma information centres were established to support the implementation of the strategy and to monitor, inter alia, the situation on the ground.²⁴³

Segregation of Roma pupils continues to be a burning issue. According to the strategy, some parents of Roma origin intentionally enrol their non-disabled children in special schools for children with moderate intellectual disabilities where they can learn crafts. The reasons for this include the fact that it is much easier for the children to complete these schools and find employment.²⁴⁴ Segregation often occurs in the process of education.

children because they are not trained adequately to work with them and to find the most appropriate methods for including children with special needs in school activities.

²³⁶ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 43.

²³⁷ The former Yugoslav Republic of Macedonia, Law on Secondary Education, 1995, Article 50.

²³⁸ Open the Windows website: <http://openthewindows.org>.

²³⁹ Institute on Human Rights (2013), *Breaking the Wall of Silence*, https://www.ihr.org.mk/uploads/publications_pdf/diskriminacijaromi.pdf.

²⁴⁰ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfyr-macedonia/MK_SITAN_ENG.pdf.

²⁴¹ There are also several policy documents targeting Roma women. For more, please see MLSP website at: <http://mtsp.gov.mk/?ItemID=6FC822BBA79A61429117F41943673AE4>.

²⁴² Ministry of Labour and Social Policy (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020) <http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

²⁴³ For more information on the Roma Information Centres, please see Ministry of Labour and Social Policy website: <http://mtsp.gov.mk/?ItemID=16963527D912DC41B48380E0B6034274>.

²⁴⁴ Ministry of Labour and Social Policy, (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020) <http://mtsp.gov.mk/content/word/Roma%20Strategy%20in%20Macedonia%202014-2020.docx>.

However, in spite of numerous inspections and public statements, no sanctions have been imposed in relation to segregation in schools.²⁴⁵

However, the many studies published on the issue of Roma education in the country, and on segregation in particular, paint a more nuanced picture. Studies available so far, such as the Open Society Institute (OSI) report,²⁴⁶ Roma Education Fund reports,²⁴⁷ Macedonian Helsinki Committee and the ERRC report,²⁴⁸ a UNICEF 2008 situation analysis²⁴⁹ and a 2009 segregation in education analysis,²⁵⁰ a CPAD 2014 report,²⁵¹ an Institute of Human Rights REF-supported 2013 study²⁵² and a Foundation Open Society Macedonia 2015 analysis,²⁵³ have all reached very similar conclusions on segregation and enrolment barriers. They find that the most significant problems in Roma education are similar to those faced by Roma throughout the Western Balkans. Critical²⁵⁴ issues include low enrolment, poor performance, and a high drop-out rate for Roma children, combined with in-school segregation and discrimination, referral to special schools, restricted access to preschool, and a lack of support for further education.²⁵⁵

A case was filed with the CPAD by the Helsinki Committee of the Republic of Macedonia in 2011 regarding the segregation of Roma children in schools in Bitola. After breaching all possible procedural deadlines, the CPAD finally decided this case in September 2014, and the applicants received the decision in December 2014. CPAD did not find discrimination on grounds of ethnicity in the case, nor did it find segregation. The CPAD actually found the situation to be a result of the parents' choice to register their children in a specific primary school, however it failed to state on what it bases its argument, and bluntly added that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.²⁵⁶ Although having deliberated on this case for over three years, the CPAD added a surprisingly short elaboration on its opinion, the largest portion of which consists of a bullet point list of 14 letters/requests that it has sent and received while processing this case, one of which is a rather vague explanation of proceedings which states, 'numerous phone calls on the case topic with relevant sides and numerous meetings on the case topic'. There is no further elaboration as to whom the CPAD talked to or with whom and when they met, and what was discussed and possibly decided. It also disregards reports on Roma children in

²⁴⁵ Ministry of Labour and Social Policy, (Министерство за труд и социјална политика), 'Strategy on Roma 2014-2020' (Стратегија за Ромите 2014-2020)

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

²⁴⁶ Open Society Institute (2007), *Equal Access to Quality Education for Roma, Volume 2: Croatia, Macedonia, Montenegro and Slovakia*, www.opensocietyfoundations.org/sites/default/files/equal_20071218.pdf.

²⁴⁷ Roma Education Fund (2007), *Advancing Education of Roma in Macedonia*, www.romaeducationfund.hu/sites/default/files/publications/macedonia_report.pdf.

²⁴⁸ Referenced in this report:

http://insoc.org.mk/files/MC_civil%20society%20monitoring%20report_MC_web.pdf.

²⁴⁹ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²⁵⁰ UNICEF (2009), *Multiculturalism and interethnic relations in education* (Мултикултурализмот и меѓуетничките односи во образованието), [www.unicef.org/tfymacedonia/New_MKVersionsm2\(3\).pdf](http://www.unicef.org/tfymacedonia/New_MKVersionsm2(3).pdf).

²⁵¹ CPAD (2014), *Segregation of Roma Children in Education* http://eprints.ugd.edu.mk/16407/1/Reserach%20on%20Roma%20segregation_MK%20BAL.pdf.

²⁵² Institute of Human Rights (2013), *Breaking the Wall of Silence*, https://www.ihr.org.mk/uploads/publications_pdf/diskriminacijaromi.pdf.

²⁵³ Foundation Open Society Macedonia (FOOM) (2015), *Segregation of Roma in Education in Macedonia* (Skopje).

²⁵⁴ Other important issues range from general living conditions, to discrimination, up to clear examples of segregation (including making Roma children sit in the last rows in classes, complaints by parents from other ethnicities that they do not want their children to study with Roma children, even reporting getting lower grades with explicit comments by the teacher that the grade is lower because the student is of Roma ethnic origin). Source: Institute on Human Rights (2013), *Breaking the Wall of Silence*, https://www.ihr.org.mk/uploads/publications_pdf/diskriminacijaromi.pdf.

²⁵⁵ Roma Education Fund (2007), *Advancing Education of Roma in Macedonia*, www.romaeducationfund.hu/sites/default/files/publications/macedonia_report.pdf.

²⁵⁶ Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

education and on segregation in education, including a statement from the director of the primary school saying that the parents of children from other ethnicities, although living in the school's region, choose to register their children in other primary schools in order to avoid sending them to school with Roma children.²⁵⁷ Interestingly enough, at the same time that CPAD adopted this opinion, it was working on a study on segregation of Roma pupils, which was published in November 2014 and found the following: 'In the period from 2010 to 2014, a high portion of segregation of Roma children is noticeable in both regular and in special schools, and in regular and special classes, which represents *an indirect systemic and long-lasting discrimination*' (emphasis added).²⁵⁸

In January 2017, graffiti containing racist slurs were written over the walls of a primary school in Bitola (town in the south of the country), where 80 % of the pupils are Roma (the same school as referred to above). The school was fast in removing the graffiti which (luckily) were written over the weekend, so that pupils were not be exposed to the text when they came to classes on the Monday morning. The Macedonian Helsinki Committee (MHK) raised a criminal claim against an unknown perpetrator for the case; as yet no progress on the case has been reported.²⁵⁹

The MHK, together with a Roma NGO, IRIZ, raised another case with the Ombudsperson of possible segregation in relation to a high school in Skopje. They have noted that the number of students in the Arseni Jovkov high school of Roma origin were frequently concentrated in one or two classes, and were seldom placed in a mixed class. In addition, the numbers of Roma students in this mixed school were dropping after the high school Shaip Jusuf was opened in the Roma municipality of Shuto Orizari. The Ombudsperson did not find segregation, as there were mixed classes in the first school and as students were free to choose where they wanted to enrol (and to move from one class to another), and some chose to enrol or move to a school close to where they live (the second school). It did, however, state that should the trend continue it might indicate hidden discrimination.²⁶⁰

In 2016, five CSOs,²⁶¹ supported by the OSCE - Mission to Skopje, submitted an actio popularis claim on Roma segregation in education against the Government. They claimed interest on grounds of long-term work in the area and findings from studies which they have published, all of which they claim show beyond doubt the segregation of Roma children in education. The first instance court accepted that they have a legitimate interest to represent such a case, but the court went on to dismiss the case on that ground that it lacked express authorisation by the person that finds him/herself discriminated against. As discussed below in this report, that is a criterion in the ADL under Article 41(4), for class action, and not for actio popularis. As discussed elsewhere, requesting such authorisation defies the very purpose of actio popularis. The court also requested that such authorisation is provided in writing without calling upon any legal provision to support this claim. The CSOs complained to the higher instance court.²⁶²

²⁵⁷ Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

²⁵⁸ CPAD (2014), *Segregation of Roma Children in Education* http://eprints.ugd.edu.mk/16407/1/Reserach%20on%20Roma%20segregation_MK%20BAL.pdf.

²⁵⁹ Macedonian Helsinki Committee (2017), 'Hate Speech in the Primary School Gjorgji Sugarev in Bitola' (Говор на омраза во основното училиште Ѓорѓи Сугарев во Битола), MHK Website, <http://www.mhc.org.mk/announcements/521#.WwSd5C-ZO8o>.

²⁶⁰ IRIZ (2017), 'IRIZ and the Helsinki Committee Filed a Case to the Ombudsperson on Segregation of Roma Students' (ИРИЗ и Хелсиншки комитет со претставка до Народниот правобранител за сегрегација на ученици Роми), IRIZ website, <https://iriz.org.mk/ириз-и-хелсиншки-комитет-со-претставка/>.

²⁶¹ NGO KHAM Delcevo, Open Society Foundation Macedonia (FOOM), Macedonian Helsinki Committee (MHK), Institute for Human Rights (IHR) and European Roma Rights Centre (ERRC).

²⁶² The case is still not publicly available. Information was acquired by the author of this report from persons involved in the preparation of the legal documents related to the process. No new information was released to the public in 2017.

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

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

3.2.9.1 Distinction between goods and services available publicly or privately

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

The Law on Consumer Protection²⁶³ notes that a merchant providing public services through a distribution network must allow users to join and use the network and e-services under non-discriminatory, previously known and agreed conditions.²⁶⁴ There are no specific grounds for discrimination mentioned.

The equality body continues to deal with this field, as it did in the previous years.²⁶⁵ In 2016, three persons (applicants S.X., R.X., and S.X.) applied to the CPAD claiming discrimination on the ground of skin colour (Article 3, ADL) in access to services (Article 4, ADL) because they were not allowed to enter a pool in Skopje. In their application to the equality body, S.X. stated that the first time they came to the pool, none of them was allowed to go in. Two days later, his wife and daughter (which he, in his application, claims have a fair skin) went first and were let in after they bought a ticket. When S.X. and his son, (who has darker skin, according to his claim) came to enter, they were not allowed to do so. They were also told that they needed to have a special pass (in Macedonian, 'пропустница') in addition to a ticket. S.X. brought the case to the equality body submitting only his claim and a video from which, the CPAD concludes, it could be clearly seen that they were not allowed to enter. On that basis, the CPAD shifted the burden of proof, and asked the legal person managing the pool on behalf of the Municipality Aerodrom (a municipality falling under the city of Skopje), to respond. The delivery of the CPAD communication failed twice, although it was established that the legal person and potential discriminator was contacted at the correct address. The CPAD then said: 'In line with Article 38 [of the ADL], the burden to prove that there was no discrimination falls on the [...] [potential discriminator], who failed to respond to the claim. On grounds of this, [the equality body], in line with Article 24(1) and Articles 28 and 29 of the [ADL] gives the following opinion' and goes on to find direct discrimination on grounds of skin colour in

²⁶³ The former Yugoslav Republic of Macedonia, Law on Consumer Protection (*Закон за заштита на потрошувачите*), 2004. Full text: The former Yugoslav Republic of Macedonia, Law on Consumer Protection (*Закон за заштита на потрошувачите*), Official Gazette of the Republic of Macedonia No. 38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015, 152/2015.

²⁶⁴ The former Yugoslav Republic of Macedonia, Law on Consumer Protection, 2004, Article 119.

²⁶⁵ One of the cases initially processed by the equality body, and later (March 2015), taken to court, concerned accessibility of pavements for persons with disability in the town of Delcevo. Both the equality body and the Delcevo court of first instance found discrimination. Commission for Protection Against Discrimination (*Комисија за заштита од дискриминација*) (2015), *2014 Annual Report of the Commission for Protection Against Discrimination*, p.14, www.sobranie.mk/materialdetails.nsp?materialId=d93111d8-975d-471e-be2c-e07a2df372f3; Primary Court Delcevo (*Основен суд Делчево*), Judgment P-4. no. 14/2014 (20.03.2015).

relation to access to services (in this case, access to the pool). No claims for liability on part of the municipality were considered.²⁶⁶

A similar case was reported in 2017, but this time in relation to disability. When calling to ask for time slots and logistics for taking her child with a disability to a pool in Skopje, the mother was told that people with disabilities are not allowed in the pool. She reported this on social media. Following public outrage about prohibiting the disabled child's entrance to the pool, the director of the pool gave a statement saying that the entrance of the pool and all of its facilities are not accessible, so they cannot guarantee safety for the person with a disability. No adjustments have been made to make the pool physically accessible. This case has been taken to court and is still pending at the time of writing of this report.²⁶⁷

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

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

Under Article 104 of the Law on Housing,²⁶⁸ a regulatory commission was established with a mandate, *inter alia*, to prevent discrimination in the field of housing,²⁶⁹ however the provision does not contain any further explanations as to protective mechanisms, nor does it mention grounds of discrimination. Disability is only mentioned insofar as the manager of the building should know the standards and norms for accessibility for persons with disabilities in a residential facility (Article 19(12)) (under the same article, this can also be taken as imposing an obligation on her/him to initiate court procedures against the constructors for improper and incomplete execution of the appropriate actions).

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

In relation to discrimination against migrants, the same general note made for the field of education applies to housing issues. Macedonia has a negative net migration rate of 0.5 per 1 000 population.²⁷⁰ In the 2015 'migrant crisis', the country served as a transit point on the so-called Balkan Route, rather than a destination country. Thus, no case law has

²⁶⁶ Case No. 08/1744 - S.X., H.X., and S.X. v Pool "Biser", CPAD (08.11.2016), available at (in Macedonian only) http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2016/boja_koza/1744_SH_Aerodrom.pdf.

²⁶⁷ Information provided in personal correspondence to the author of this report.

²⁶⁸ The former Yugoslav Republic of Macedonia, Law on Housing (Закон за домување), 2009. Full title: The former Yugoslav Republic of Macedonia, Law on Housing (Закон за домување), Official Gazette of the Republic of Macedonia No. 99/2009, 57/2010, 36/2011, 54/2011, 13/2012, 55/2013, 163/2013, 42/2014, 199/2014, 146/2015, 31/2016; Constitutional Court Decisions: U.no. 246/2009 (14.07.2010), U.no.14/2010 (15.09.2010).

²⁶⁹ The former Yugoslav Republic of Macedonia, Law on Housing, 2009, Article 104.

²⁷⁰ International Organisation for Migration – Macedonia profile, IOM Website, <https://www.iom.int/countries/former-yugoslav-republic-macedonia>.

been developed on enforcement and no implementation issues have been raised in general. If a discrimination case is raised, migrants should be given the same treatment as any citizen of the country or any other person, because the Anti-Discrimination Law does not distinguish between Macedonian citizens and citizens of other countries. This holds across all fields of application of the law, thus including housing.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Macedonia, there are patterns of housing segregation and discrimination against the Roma. In 2008, according to the most recent data available, Roma were primarily concentrated in 10 municipalities, and the Roma population was usually concentrated in one part of the town,²⁷¹ with 95 % of Roma living in towns, while only 5 % live in villages.²⁷² About 70 % of Roma do not have any proof of ownership over their property.

Roma were found to generally live in informal settlements on the outskirts of urban centres, which further obstructs their access to basic social services. In general, while many Macedonians were found to live in privately-owned apartments (former state-owned public housing that was made available for sale), some 15 to 25 % of the population lived in about 100 informal urban settlements.²⁷³ According to the same source, '95 % (or 47 408) of Roma live in informal settlements located on the peripheries of Macedonia's cities. These settlements are typified by higher levels of unemployment, crime, illiteracy, juvenile delinquency, drug abuse and other social problems, all of which can negatively affect children's social development.'²⁷⁴

There are no official statistics on racist incidents and discrimination in housing against Roma. However, the media and NGOs report cases of institutional violence and assault against Roma,²⁷⁵ particularly police raids and evictions (after the Roma are accused of residing in unlawfully built buildings), that deprive the Roma of their housing, and do not provide them with alternative accommodation.²⁷⁶

An older (2008) report on the conditions of housing and health in the Roma community, which is to date the one with most robust and primary data, states that Roma families often live in badly built, sub-standard houses, without in-house water supplies and sanitation. Data show that 7.25 % of the families live in improvised houses built from non-construction materials (cardboard, nylon, tin, plastic, etc.), 29.5 % in dilapidated and montage houses, and only 63 % in solid-construction houses.²⁷⁷ More than 10 % of the families don't have access to any kind of water supply. The sewerage conditions are

²⁷¹ CRPRC Studiorum and Mesecina (ЦРПС Студиорум и Месечина) (2008), *Report on the condition of housing and health among the Roma Community in Macedonia*, www.studiorum.org.mk/?p=41.

²⁷² Samet Skenderi (2014) *Домување на ромите и социјална интеграција во Република Македонија* (Housing of Roma and Social Integration in the Republic of Macedonia). p.7.

²⁷³ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²⁷⁴ UNICEF (2008), *Children in FYR Macedonia – A Situation Analysis*, www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²⁷⁵ National Roma Centrum (Национален ромски центар) *Report to the Committee on Economic, Social and Cultural Rights of the United Nations* (Извештај до комитетот за економски, социјални и културни права на Обединетите нации), www.nationalromacentrum.org.mk/publikacii/istrazuvanja/izvestaj-do-komiteto-za-ekonomski/; Kanal 5, 'Discoteque Kalipso Prohibits Entrance to Roma' (Во дискотеката Калипсо во Берово е забранет влезот за Ромите) [Cache]; A1, 'Entrance Banned for Roma at the New Aqua Park' (Забранет влез за Роми во новиот Аква парк) [31.07.2013].

²⁷⁶ Helsinki Committee for Human Rights of the Republic of Macedonia (2014), *Assessment of the Progress of the Roma Decade* (Проценка на напредокот на декадата на ромите), www.mhc.org.mk/?ItemID=3DE4E8C7F50F194281021DB76FAD9E1E.

²⁷⁷ Roma houses are small, planned to serve only elementary needs, with housing space of less than 5 m² per member for more than 50 % of the families. About 40 % of the families live in shared houses. Only 16 % of the houses have a toilet and bathroom in the house; 77 % of the families use a toilet in the yard and 58 % use a tap in the yard.

extremely bad, with an estimate of 50 % of families having no access to proper solution for the discharge of the sewage and communal water.²⁷⁸

In 2016, the European Roma Rights Centre (ERRC) initiated a case against the country in front of the ECtHR on Article 3, Article 8, Article 14 in conjunction with Articles 3, 8 and 10, and Article 13 in conjunction with Articles 3 and 8.²⁷⁹ This case²⁸⁰ concerns the eviction of over 120 Roma from the Poligon settlement in Skopje. They are very poor people, living in an informal settlement and some of them have been there for many years. Their houses have been torn down many times before being repeatedly rebuilt. The Government destroyed their houses and the local water pump. In a month that was full of storms and floods, these people were left in the open air without a roof over the heads. The ERRC reports that the people have been offered accommodation in a shelter centre, but that it does not have enough space in it (and is already notorious for its cramped, degrading conditions and inter-ethnic violence). The ERRC did not succeed in securing interim measures but the case is pending.²⁸¹

²⁷⁸ CRPRC Studiorum and Mesecina (ЦПИС Студиорум и Месечина), *Report on the condition of housing and health among the Roma Community in Macedonia*, www.studiorum.org.mk/?p=41.

²⁷⁹ ERRC in the case of *Bekir and others v. Macedonia* (08.11.2016) <http://www.errc.org/cms/upload/file/application-eviction-bekir-and-others-v-macedonia-november-2016.pdf>.

²⁸⁰ No progress with the processing of the case has been reported yet: *Bekir and Others v Macedonia*, HUDOC, <http://hudoc.echr.coe.int/eng?i=001-167970>.

²⁸¹ ERRC in the case of *Bekir and others v. Macedonia* (08.11.2016) <http://www.errc.org/cms/upload/file/application-eviction-bekir-and-others-v-macedonia-november-2016.pdf>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

The 2017 draft-ADL amends the overall approach to the exceptions to the non-discrimination norm. It introduces a 'general exception from discrimination'. The wording of this provision is as follows:

'Measures and actions undertaken by state administration bodies, local government units, other bodies and organizations exercising public authority, public institutions or natural or legal persons will not be considered to constitute discrimination while they are being implemented to reach equality of all persons or groups if they aim to eliminate or reduce actual inequalities and the distinction is justified and proportionate to the aim sought, and if they aim to secure their natural development and realisation of rights and freedoms on an equal ground with others legitimate aim,²⁸² and the means to achieve that aim are proportionate, that is appropriate and necessary.' (Article 12 (1))

In the second paragraph, it prescribes as exceptions the different treatment of Macedonian citizens compared to others, the genuine and determining occupational requirement (which replicates the current Article 14(2)), and 'difference in treatment of persons on ground of provisions under other laws'.

There are three problematic points in relation to the draft Article 12. First, the title of the article states that this is a 'general exception'. This is odd wording, considering that the law purports to introduce a complete ban on discrimination. Secondly, it includes an unusual reference to 'natural development' of all persons or groups, which might be widely open to interpretation in a way that might ultimately defeat the purpose of the law altogether. Thirdly, the provision providing for an exception from the non-discrimination requirement for the 'difference in treatment of persons on ground of provisions under other laws' is problematic since it might mean excluding the possibility of challenging other legal provisions as a source of discrimination. Considering that many discriminatory provisions were found to exist under national law,²⁸³ this exception is worrying. In addition, it seems to be contrary to the aim of the draft-ADL itself.

Article 8 of the Law on Labour Relations²⁸⁴ uses wording on exemptions from occupational requirements in the context of access to labour, which corresponds to the language of Article 4 of Directive 2000/43/EC. Notably, the law states that

'it will not be considered discrimination making a difference, exclusion or giving priority in terms of a certain thing, when the nature of the work is such or the work is performed in such conditions that the characteristics associated with some of the

²⁸² The 'legitimate aim' here is not an error in translation, but an error in the text of the 2017 draft-ADL.

²⁸³ Kotevska B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

²⁸⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

cases Article 6 of this law are essential and decisive conditions for performing the work, providing that the objective to be achieved is justified and the requirement has been carefully considered.²⁸⁵

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

The grounds covered by the Law on Labour Relations are broader than the protected grounds of the two directives, and the differences in treatment in cases of determining occupational requirements need not only be based on the five grounds mentioned in the directives, but can cover all protected grounds.²⁸⁶

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

In Macedonia, national law provides for an exception for employers with an ethos based on religion or belief. The Anti-Discrimination Law includes such an exception fully in compliance with Article 4(2) of Directive 2000/78 (Article 14(3-4)). However, under this same law it does not constitute discrimination if members of legally registered²⁸⁷ churches and religious communities (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)), which goes beyond religion and into the realm of any belief which they might have in their founding and internal acts, programmes or statutes.

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and affirmative measures in Article 13. Should this law be adopted, the current exception for employers with an ethos based on religion or belief will no longer be part of the law.

The Law on the Legal Position of Churches, Religious Communities and Religious Groups²⁸⁸ contains no specific articles on employment and labour relations. Other laws also do not include specific provisions on exemptions for employers with an ethos based on religion or belief. However, in the exemptions from prohibition of discrimination in the Law on Labour Relations there is sufficient space for churches, religious communities and groups to be exempt in accordance with Article 4(2) of Directive 2000/78 (Article 8).

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

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

²⁸⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 8.

²⁸⁶ The directives' grounds of race, belief, disability, age and sexual orientation are all covered, and the Law on Labour Relations goes beyond them in an open-ended list: sex, health condition, membership of a trade union, social origin, position of the family, property, or other personal circumstances.

²⁸⁷ There have been issues with registration; these were grounded in inter-religious disputes rather than in discrimination by one religion against another. The most notable cases in this regard would be the cases of Vraniškovski and of the Bektaši community. For more on religious freedom in Macedonia, see: <https://www.state.gov/documents/organization/256427.pdf>.

²⁸⁸ The former Yugoslav Republic of Macedonia, Law on the Legal Position of the Church, Communities of Faith and Religious Groups (*Закон за правна положба на црква, верска задница и религиозна група*), 2007. Official Gazette of the Republic of Macedonia No. 113/07.

However, these provisions are not in the Anti-Discrimination Law. The laws that regulate the founding and eligible activities of associations (civil society organisations, foundations,²⁸⁹ as well as religious communities and religious groups) regulate this issue, stating that an association will cease to exist if it engages in such actions contrary to the Constitution and laws, and violates other people's rights, which includes the right to non-discrimination. The Anti-Discrimination Law contains no such anti-conflict provision. It should be noted, however, that it would not constitute discrimination if members of religions registered under law (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)). This would mean that it excuses these members even if, in doing so, they are discriminating on the grounds mentioned in Article 3, however there is no case law on this provision yet. It also declares that it will not constitute discrimination when a marriage, out-of-wedlock union and family are regulated exclusively as unions of opposite sexes i.e. of one man and one woman (Article 14(6) of the Anti-Discrimination Law).

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and affirmative measures in Article 13. Should this law be adopted, the above noted issue caused by the current exception will no longer be present under the law.

In the Law on the Legal Position of Churches, Religious Communities and Religious Groups, there are no specific articles related to such conflicts. So far there is no case law on the issue. However, the Macedonian Orthodox Church and the Islamic Religious Community have very clearly expressed their opinions that sexual orientation should not be mentioned in the anti-discrimination legislation.²⁹⁰ Also, the end of 2010 saw an initiative on their behalf to open a cycle of constitutional changes that should, in their words, strengthen the traditional form of the family, but which are clearly intended to target homosexuals. Notably, these changes state that a marriage is a union of one woman and one man, as well as to insert provisions that will limit the possibility for homosexuals to adopt children. The draft amendments to the Constitution, which entered parliamentary procedure and proposed a definition of marriage as a union of one man and one woman, as well as mandatory registration of unmarried couples ('out-of-wedlock communities') defined in the same manner, were not adopted by the Parliament. Thus, this issue is, for now, closed.

- Religious institutions affecting employment in state funded entities

In Macedonia, religious institutions are not permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the state. However, there was an attempt in that direction with the introduction of religious education into state elementary schools. Without any legal basis, the two main religious groups – the Macedonian Orthodox Church and Islamic Religious Community – selected the teachers. However, the Constitutional Court, acting upon a petition by NGOs, declared the introduction of religious education null and void.²⁹¹

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

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

²⁸⁹ The former Yugoslav Republic of Macedonia, Law on Associations and Foundations (*Закон за здруженија и фондации*), 2010, Article 4. Official Gazette of the Republic of Macedonia No.52/2010, 135/2011.

²⁹⁰ Dnevnik Newspaper, 'Oriented Towards Sexual Discrimination' (*Ориентирани кон сексуална* (only in print)).

²⁹¹ Constitutional Court, Decision U.No. 202/2008, (15.04.2009).

The Law on Army Service establishes different age limitations, and disability is a ground for losing military status. Professional soldiers must not be older than 26 years of age²⁹² at the day of the closing of the recruitment advert. The contract is renewable every three years up to a maximum age of 45.²⁹³ Junior officers must not be older than 25 years of age (or 33 years of age, depending on experience, qualifications, as well as previous status in the armed forces, if any),²⁹⁴ or senior officers older than 30 years of age when entering the Army (or 35 years of age if coming to the senior officer position from a junior officer position).²⁹⁵ The upper limit for civilian personnel is 40 years of age. The retirement age for active military and civilian personnel is 25 years of pension insurance, out of which 15 have been spent in army service (if this has not been fulfilled, and army service has ended, the Ministry of Defence must provide for further employment or education to allow the person to accumulate the years necessary to reach retirement age).²⁹⁶

According to the 2014 amendments to this law, after 45 years of age, professional soldiers will be transferred to an appropriate position in the central state or municipal administration, under a contract with an unlimited duration. There is a retroactive application for this provision, according to which it also applies to professional soldiers whose army service ceased under the law previously due to reaching the maximum age limit of 35 or 38 years of age, if they have an unemployed person status up to 31 December 2013.²⁹⁷

As noted above, there is no specific disability exception, but there is a general health and physical condition requirement. As they stand, the Army's specific requirements in relation to health and good physical condition are substantial barriers for persons with disability to enter the Army.²⁹⁸ As noted in the 2015 analysis on the harmonisation of the national equality legislation, the medical check-up that is mandatory for issuing a certificate for fulfilling these criteria includes checking the nervous system and 'mental condition', 'mental disorders' in the family (including epilepsy), sight and hearing senses, personal habits and physical injuries – one of the rulebooks even includes notes on tattoos as part of this assessment. This is documented in detail in the above-mentioned 2015 analysis, which identifies a number of provisions that include a general health condition as a discriminatory criterion, meaning that this criterion is a cross-cutting discriminatory issue, preventing access to public service.²⁹⁹

Even if the disability is a result of army service it would still lead to loss of military status. The best scenario is that the person could remain as civilian personnel retaining the salary received and rank held prior to the health degradation (or would drop one rank down, if the same rank could not be awarded).³⁰⁰ An extra three days of vacation are provided for personnel with a disability or a person taking care of a disabled child.³⁰¹

Ethnicity is dealt with in law in several respects, all of which rest on the constitutional principle of equitable and just representation which, bluntly put, means that the representation of each ethnic group needs to be equal to the percentage of the population found in the census. Persons belonging to minorities should be adequately and fairly

²⁹² The former Yugoslav Republic of Macedonia, Law on Army Service (*Закон за служба во армијата*), 2010, Article 36. Full title: The former Yugoslav Republic of Macedonia, Law on Army Service (*Закон за служба во армијата*), Official Gazette of the Republic of Macedonia No. 36/2010, 23/2011, 47/2011, 148/2011, 55/2012, 29/2014, 33/2015, 193/2015, 71/2016; Constitutional Court, Decision: U.no.60/2010, (22.09.2010).

²⁹³ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 40, 42, 43.

²⁹⁴ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 34 and 35.

²⁹⁵ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 32.

²⁹⁶ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 220 (paragraph 2).

²⁹⁷ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 40-a, 40-6.

²⁹⁸ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Articles 31 and 202-210.

²⁹⁹ See Table 3 in: Kotevska B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

³⁰⁰ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 78.

³⁰¹ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 98 (para.2).

represented in the Army providing that they are duly trained and competent.³⁰² Public vacancy ads need to be published in, *inter alia*, at least one newspaper printed in a language used by at least 20 % of the population in the country.³⁰³ With regard to the oath, the document to be signed is both in Macedonian and in the language of that person.³⁰⁴

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

'citizens of the Republic of Macedonia have citizenship of the Republic of Macedonia [and it declares] the free expression of national identity [as] a fundamental value'.³⁰⁵

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

In Macedonia, nationality (as in citizenship) is explicitly mentioned as a protected ground in national Anti-Discrimination Law. Nationality understood as origin from another country is not covered by the Anti-Discrimination Law. However, citizenship, understood as the legal link of a person with a certain country, is part of the grounds covered by the Anti-Discrimination Law (Article 3).³⁰⁶ Although not explicitly referred to, the same would be true for stateless persons.

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

Nationality understood as origin from another country is not covered by the Anti-Discrimination Law. However, citizenship, understood as the legal link of a person with a certain country, is part of the grounds covered by the Anti-Discrimination Law (Article 3).³⁰⁷ Although not explicitly referred to, the same would be true for stateless persons.

The lack of clarity deepens in some laws that refer to nationality and ethnicity as different grounds for discrimination.³⁰⁸ No definition is provided, which also adds to the confusion of the terms, since in some laws the term 'national belonging' is used.³⁰⁹ The courts consistently use the terms 'foreigner' and 'foreign' when referring to nationals of another country.

³⁰² The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 30 (para.5).

³⁰³ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 39 (para.2).

³⁰⁴ The former Yugoslav Republic of Macedonia, Law on Army Service, 2010, Article 7 (para.2).

³⁰⁵ Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia, www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp?x. Articles 4 and 6.

³⁰⁶ However, please see the exceptions in relation to nationality mentioned in section 4.4.b.

³⁰⁷ However, please see the exceptions in relation to nationality mentioned below.

³⁰⁸ For example, Article 3 of the Law on Voluntary Fully Funded Pension Insurance and Article 20 of the Law on Social Protection.

³⁰⁹ Article 6 of the Law on Primary Education and Article 6 of the Law on Labour Relations.

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

a) Benefits for married employees

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

Macedonian legislation does not mention the right of employers to provide benefits solely to a certain category of employees (such as those married or with children). However, the constitutional provision under which the Republic provides particular care and protection for the family³¹⁰ could be interpreted as opening space for, *inter alia*, such privileges.³¹¹ An addition to this argumentation is the provision that is part of an article on unequal treatment that will not be considered as discrimination, in the Anti-Discrimination Law, which includes the regulation of the family, marriage, and out of wedlock partnerships as limited to opposite sex partners (Article 15(6)).

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and affirmative measures in Article 13. Should this law be adopted, the above noted issue caused by the current exception will no longer be present under the law.

b) Benefits for employees with opposite-sex partners

In Macedonia, it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. Same-sex partnership is not recognised under Macedonian legislation, while the Law on Family and Marriage clearly states that marriage is a union between a man and a woman, and the same applies for unmarried couples recognised under this law. There has not been a case on these issues. Moreover, the Anti-Discrimination Law provides as part of the article on unequal treatment that will not be considered as discrimination, the regulation of the family, marriage, and out of wedlock partnerships as limited to opposite sex partners (Article 15(6)). A 2015 analysis of the harmonisation of the national equality and non-discrimination legislation against international standards and of the harmonisation at the national level with the comprehensive Anti-Discrimination Law raises the issue of inequalities in relation to out-of-wedlock partnerships as well as to partnerships and marriages of same sex couples. It notes that limiting partnerships solely to opposite-sex couples is discriminatory and not in line with the ECHR and the practice of the ECtHR.³¹²

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and affirmative measures in Article 13. Should this law be adopted, the above noted issue caused by the current exception will no longer be present under the law.

³¹⁰ Constitution of the Republic of Macedonia (*Устав на Република Македонија*). Official Website of the Assembly of the Republic of Macedonia www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx. Article 40.

³¹¹ One needs to bear in mind here that although family is not defined in the Constitution, it is defined in the Law on Family as a community of parents and children and/or other relatives, provided that they live in the same household (Article 2(1); Law on Family).

³¹² Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

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

a) Exceptions in relation to disability and health/safety

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

This article states that

'it will not be considered discrimination making a difference, exclusion or giving priority in terms of a certain thing, when the nature of the work is such or work is performed in such conditions that the characteristics associated with some of the cases in Article 6 of this law are an essential and decisive condition for performing the work, providing that the objective to be achieved is justified and the requirement is carefully considered.'³¹³

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

The Law on Labour Relations does not specify exceptions in relation to health and safety on any other ground, thus the legitimacy and proportionality test indicated in the Law on Labour Relations would be applicable for exceptions based on dress codes or religious tenets (Article 8). However, the law does provide for other health and safety related special protective measures in relation to employees under 18 years of age, as well as for older employees³¹⁴ (over 57 years of age for women and 59 years of age for men). The protection encompasses hours of work, night work, work in special conditions and supplementary vacation (for workers under 18) and prohibition of overtime work and night shifts (for older workers), as well as other special measures provided in this and other laws.³¹⁵ There are also exceptions for protective measures related to pregnancy and parenting.³¹⁶

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

4.7.1 Direct discrimination

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

³¹³ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 8.

³¹⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XV.

³¹⁵ See The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII: Protection of Workers under 18 Years, and Chapter XV: Special protection of older workers.

³¹⁶ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 161.

a) Justification of direct discrimination on the ground of age

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

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

b) Permitted differences of treatment based on age

In Macedonia, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78. The Anti-Discrimination Law contains a clause that is in line with the test required in Article 6 of Directive 2000/78 (Article 14(9)). The Law on Labour Relations provides for specific protective measures in relation to employees younger than 18, as well as for older employees (over 57 years of age for women and 59 years of age for men). The protection encompasses hours of work, night work, work in special conditions and supplementary vacation (for workers under 18) and prohibition of overtime work and night shifts (for older workers), as well as other special measures provided by this and other laws.³¹⁷

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It only contains the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

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

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

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

The pension system is composed of three pillars established by three laws: the Law on Voluntary Fully Funded Pension Insurance, the Law on Pension and Disability Insurance, and the Law on Mandatory Fully Funded Pension Insurance. The Law on Pension and Disability Insurance³¹⁸ establishes the general age of retirement, which is 64 years of age for men and 62 years of age for women. At least 15 years of pension contributions (i.e. working years covered by pension insurance) is also required (Article 18).

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

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

³¹⁷ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII: Protection of Workers under 18 Years, and Chapter XV: Special protection of older workers.

³¹⁸ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

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

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It only contains the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

The Law on Labour Relations provides for specific protective measures in relation to employees younger than 18 years of age.³¹⁹ The protection encompasses hours of work, night work, work in special conditions and supplementary vacation. It allows for providing special protection for older workers (Article 179). The same law restricts overtime and night work for older workers (Article 180). The same restrictions apply to persons with caring responsibilities for children not older than seven years of age.³²⁰

4.7.3 Minimum and maximum age requirements

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

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

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

Law on Labour Relations establishes 15 years of age as the minimum age for employment (Article 250). There is a general prohibition on the employment of children under 15 years of age, except for recording films, preparing and performing arts, stage and other similar works (cultural, artistic, sports and advertising activities). A special procedure and approval is required for this. There are also special provisions for the work of students (as practical work experience) and for apprentices.³²¹

4.7.4 Retirement

a) State pension age

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

The Law on Pension and Disability Insurance³²² establishes the general pension age as 64 years of age (for men) or 62 years of age (for women) with at least 15 years of pension contributions accrued.³²³ If someone chooses to continue working, they are not entitled to receive a pension; pension payments can only start after a person ceases working. The

³¹⁹ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Chapter XIII.

³²⁰ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 164.

³²¹ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 251.

³²² The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

³²³ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

Law on Pension and Disability Insurance provides for different criteria for the calculation of pensions in special cases.³²⁴ According to this law, pension and disability insurance rights depend on wages earned and the total length of contributions. The amount of the awarded age pension depends on the monthly average wage, which determines the pension base, while the percentage of the pension is determined according to the length of pension contributions.

b) Occupational pension schemes

In Macedonia, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wish to work longer, payments from such occupational pension schemes can be deferred, and the individual can continue to work if their employer agrees, but not after the age of 67.³²⁵ An individual cannot collect a pension and still work.

c) State imposed mandatory retirement ages

In Macedonia, there is a state-imposed mandatory retirement age. The state-imposed retirement age is mandatory. Under the Law on Labour Relations, Article 104, when an employee reaches the age of 64, but wants to work longer, s/he can continue to do so, but only until the age of 67.³²⁶ The employer needs to consent to this, too. There are no sanctions in the Law on Labour Relations tied to a breach of this provision. Under the Law on Pension and Disability Insurance, the age set for acquiring the right to a pension by age remains as 62 for women and 64 for men.³²⁷

d) Retirement ages imposed by employers

In Macedonia, national law does not permit employers to set retirement ages by contract, collective bargaining or unilaterally. The retirement ages are as set in the national legislation (the Law on Labour Relations and the Law on Pension and Disability Insurance). However, according to the Law on Labour Relations, individual employment contracts or collective agreements may determine rights for workers that are more favourable than those determined by law (Article 12).³²⁸ The same article stipulates that employers cannot include clauses introducing fewer rights than those established in the Constitution and law. National collective agreements for the public sector and the economy do not mention reductions or expansions of the pensionable age in any sector.

e) Employment rights applicable to all workers irrespective of age

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

³²⁴ The standard calculation system is given in Articles 18 and 18-a of the Law on Pension and Disability Insurance; The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012.

³²⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104.

³²⁶ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 104. Please note that the article used to set different limits for men (67) and women (65). However, on the basis of a CSO-led initiative, in 2016 the Constitutional Court decision annulled this part, and equalised the limit for men and women. Source: Constitutional Court Decision No. 114/2014-0-1 (29.06.2016), available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/475a0c0c3291f1e6c1257ff10041c84d?OpenDocument>. Later, an almost identical case was filed and was successful in challenging Article 98(5-6) of the Law on Administrative Servants (a provision mirroring the annulled provision from the Law on Labour Relations).

³²⁷ The former Yugoslav Republic of Macedonia, Law on Pension and Disability Insurance, 2012, Article 18.

³²⁸ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

f) Compliance of national law with CJEU case law

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

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

b) Age taken into account for redundancy compensation

In Macedonia, national law does provide compensation for redundancy. Article 97 of the Law on Labour Relations provides the criteria applied to calculate the compensation. Although the number of years an employee has spent working for an employer is one of the criteria for establishing the amount of compensation, this is not tied to the age of the worker.

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

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

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

4.9 Any other exceptions

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

'the following shall not be deemed to be discrimination: the measures provided for in the Law on Employment Promotion (Article 15(2)), the measures for protection of the specifics and identity of the persons belonging to ethnic, religious or linguistic minorities and their right to maintain and develop their own identity individually or in a community with other members of their group as well as to stimulate conditions for promotion of that identity (Article 15(8)); and the special measures to benefit the persons or groups placed in a less favourable position as a result of any of the discriminatory grounds, for the purpose of equalising their opportunities, as long as those measures are necessary (Article 15(6))'.³²⁹

³²⁹ The former Yugoslav Republic of Macedonia, Anti-Discrimination Law, 2010.

The 2017 draft-ADL does not retain the problematic long lists of exceptions contained in Articles 14 and 15 of the Anti-Discrimination Law currently in force. It contains only the general exception in Article 12 (discussed above, in section 4.1.) and provision for affirmative measures in Article 13.

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

a) Scope for positive action measures

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

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

Within the chapter 'Measures and actions not deemed as discrimination', in Article 13, the 2017 draft-ADL contains a definition of affirmative action. The scope remains largely as it was. However, there is some discrepancy between Article 13 and Article 4(7) of the 2017 draft-ADL. Under Article 13, both private and public entities can undertake affirmative action. However, Article 4(7) can be read as limiting the personal scope when it comes to positive action. Namely, the definition of positive action seems to suggest that these measures can be undertaken by 'competent bodies', which in the national language means limiting the ability to undertake such actions to public entities and possibly considering positive action by a private entity to be discrimination. This could be read as a lowering of the protection and promotion scope of the current law, under which there is no limitation on affirmative measures to be undertaken by private parties.

Ethnic origin seems to be the dominant ground for undertaking positive action and has its basis in the 2001 amendments to the Constitution, which were tailored according to the Ohrid Framework Agreement (a political agreement ending the 2001 conflict). It is also reflected in the exceptions section of the ADL, in Article 15(8), as a protective mechanism which will not be considered to constitute discrimination.³³⁰ Several institutions are tasked to ensure the proper implementation of these measures, the main ones being the Secretariat for Implementation of the Ohrid Framework Agreement, the Committee for Inter-Community Relations and the Agency for Realisation of the Rights of the Communities. The Committee for Inter-Community Relations considers issues of inter-community relations in the Republic and makes appraisals and proposals for their solution, and can propose positive action measures to Parliament, which decides in plenary on such issues. The Parliament is obliged to take into consideration the appraisals and proposals of the committee and to make decisions regarding them. In the event of a dispute among members of the Parliament regarding the application of the voting procedure specified in Article 69(2), the committee will decide by majority vote whether the procedure applies. The Committee for Inter-Community Relations consists of seven members from each of the ranks of the ethnic Macedonians and ethnic Albanians within the Parliament, and five members from among the ethnic Turks, Serbs, Vlachs, Roma and Bosniaks. The members of the Committee are elected by the Parliament.

On disability, the main instrument for positive action measures related to persons with disabilities is the Law on Employment of People with Disabilities.³³¹ Its main goals are the integration of people with disability in the working environment and their safety in the

³³⁰ The same is done in Article 15(5) for equality between men and women.

³³¹ The former Yugoslav Republic of Macedonia, Law on Employment of Persons with Disabilities, 2000, Article 2.

workplace.³³² A new draft law was initiated by the Ministry of Labour and Social Policy almost four years ago, but it has still not entered parliamentary procedure, although the Government's policies in relation to the employment of people with disabilities continued.

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

The 'National Strategy on Equality and Non-discrimination (2016-2020)' was adopted in 2016.³³³ It has the same general goals as its predecessor – the 2012-2015 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender'.³³⁴ These goals are: advancing the legal framework for equality and non-discrimination; strengthening capacity and advancing the work and cooperation of the institutional mechanisms for the prevention and protection against discrimination and promotion of equal treatment; raising awareness in recognising forms of discrimination; and promoting the concepts of non-discrimination and equal opportunities. The introduction of the strategy states that it was prepared on the basis of an evaluation of the implementation of the previous strategy, which, according to the text, found that the strategy had had a positive role in the development of discrimination policy in the country.³³⁵ This evaluation has not been published.

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

'effective protection against discrimination and respect for the principle of equal opportunities and prohibition of discrimination on any person and/or groups of persons, on grounds of their personal characteristics, and especially of the vulnerable groups (ethnic communities, women, LGBTI persons, persons with 'mental' and physical disability, elderly, children, refugees, persons with lower social status, internally displaced persons, and other vulnerable groups, members of religious communities and every person who has been treated differently without objective justification and a legitimate aim).'³³⁶

b) Main positive action measures in place on national level

Quotas (ethnicity, including Roma)

³³² In relation to the implementation of this law, in a recent statement, the director of the State Agency for Employment said that, from the start of the implementation of this law until the end of 2016, almost EUR 34 million (MKD 2 088 660 754) was spent on the 'employment of persons with disabilities, adaptations of working places, purchase of equipment, training of persons with disabilities as well as construction and expansion of working space.' Source: Ministry of Labour and Social Policy – news archive (in Macedonian language only), http://www.mtsp.gov.mk/fevruari-2017-ns_article-zapocnuva-proektot-centar-za-vrabetuvanje-na-lica-so-hendikep.nspix.

³³³ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

³³⁴ Ministry of Labour and Social Policy (2012), *National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender 2012-2015* (Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол 2012-2015), www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc.

³³⁵ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* [Национална стратегија за еднаквост и недискриминација 2016-2020], http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

³³⁶ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)*.

There is a special secretariat within the Government charged with the implementation of the Ohrid Framework Agreement.³³⁷ Although no quotas exist on paper, they do exist in practice due to the implementation of the principle of equitable representation, which is used when implementing positive actions. This principle operates on the basis of self-identification and aims to bring about representation of the communities in the institutions to reflect the representation and composition of the ethnic communities in society according to the latest census results (for example, a target percentage for the Albanian population would be a representation of 25 %, as this is the percentage of the Albanian community from the total population of the country, according to the 2002 census). The implementation outcomes are covered in the annual reports of the Ombudsperson.

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

Problematic aspects in relation to the implementation of the quotas rose to the surface in 2017. The new Government released online many documents related to the work of the executive, which were thus far had either been kept from the public or marked as confidential for reasons not in line with the laws regulating classification of documents. This was part of the new efforts in increased transparency, visibility and participation. Part of the information released included the number of people employed pursuant to the OFA quotas. Although the Ombudsperson regularly publishes annual reports monitoring the progress of the implementation of the OFA quotas, these numbers are not complete, as not all institutions report back to the Ombudsperson. The information that was released showed that 1 688 people are being employed within the OFA quotas and receive a salary, but do not perform any work at all. Instead, to paraphrase the Minister of Information Society and Public Administration, they sit at home (which could be in Macedonia or abroad) and receive a salary from the state budget. Monthly, this costs the state budget EUR 784 000 (MKD 48 242 111). Developing such an anomaly in the implementation of the quotas was possible because of the way the employment relationship arising from the quotas is being established. Namely, the people who are employed as part of the quotas are officially employed by the Government Secretariat for Implementation of the Ohrid Framework Agreement (SIOFA) and are then deployed by internal transfer to the public institution or body where they will work. So, as the State Audit Office reported in 2009,³³⁸ SIOFA was employing people, but these people were never transferred/deployed to another position; thus, they were receiving salaries but did not actually work. The Minister announced that the Government is working on a plan to put all these people to work, but no additional information has yet been provided.³³⁹

Nevertheless, even with the obvious political abuse, the OFA quotas have diversified the public administration and pushed for more education and training opportunities for people from all ethnicities. Thus, they have been predominantly a positive development and remain a positive step towards equality for all in the country.

Political participation of Roma improved greatly as a result of the Ohrid Framework Agreement and partly because of the Decade of Roma Inclusion. There is a Roma minister in the Government, a Roma municipality (the direct result of the arrangements within the

³³⁷ Although it is not OFA itself that is being implemented, but constitutional, legal and policy documents resulting from its signing, the expression 'implementation of OFA' is used here to avoid long explication pretexts for the wave of reforms after 2001 resulting from it being signed.

³³⁸ The State Audit Office reported this issue in 2009, however, the Government did nothing to rectify the situation, most probably because these positions were used for employing persons close to the Democratic Union for Integration (DUI) – the key Albanian partner in the Government.

³³⁹ Telma TV (2018), '784 000 euros for the OFA employments' (*784 000 евра за рамковните вработувања*), 8 March 2018: <http://telma.com.mk/784-000-evra-mesechno-za-ramkovnite-vrabotuvana/>.

Ohrid agreement) and the Roma language is legally a language in official use in the Shuto Orizari municipality.

Additional social and other measures (Roma)

One of the ministerial positions in the Government is the Minister without Portfolio on Implementation of the National Strategy on Improving the Status of Roma.³⁴⁰ The position was initially introduced in relation to the implementation of the Decade of Roma Inclusion 2005-2015. Following the end of the decade, the position was transformed into one with a focus on the 'Strategy for the Roma in Republic of Macedonia 2014 – 2020' – the main national document that superseded the strategic policy documents previously adopted within the context of the Decade of Roma Inclusion. This minister is tasked with the inter-ministerial coordination on Roma issues. National strategic documents on Roma rights and integration, which take the EU Framework for National Roma Integration Strategies up to 2020 into account, are regularly adopted and updated.

As mentioned above, following the recent change of Government, many documents related to the work of the Government were released online. Some of the released documents show that within the previous Government, the Minister without Portfolio reported to the Government quarterly on the progress of the implementation of the Decade of Roma Inclusion. According to the documents that were released, such reporting seems to have stopped with the end of the decade, although, as noted above, the position was converted into a new position with a focus on Roma issues and still operates.

Preferential treatment (disability)

Preferential treatment of people with disabilities is provided for in the 'National Strategy for Equalisation of the Rights of People with Disabilities 2010-2018' (and its predecessor). The strategy acts as an operational framework for the UN Convention on the Rights of Persons with Disabilities.³⁴¹ This convention was ratified in November 2011. The country submitted the initial report to the UN Committee on the Rights of Persons with Disabilities in 2014. However, according to the report, implementation has been limited to training activities with interpreters and pharmacists reported as undertaken pursuant to Article 21 of the CRPD (Freedom of Expression and Opinion, and Access to Information).³⁴²

In 2016, the Government published a special call for 'self-employment' of persons with disabilities, which will run as part of the operational plan on increasing employment in the country in general. Under this plan, implemented by the Ministry of Labour and Social Policy (MLSP) and supported by the United Nations Development Programme (UNDP), almost EUR 10 000 can be awarded to a person with a disability in order to set up a company, buy the necessary equipment, and also, by choice, employ two more people, for which the grant covers the national minimum wage.³⁴³ In the first phase, this programme resulted in the self-employment of 120 people with disabilities.³⁴⁴

³⁴⁰ Please note that the mismatch between the title of the strategy itself, as cited in other places in this report, and the title of the strategy as included in the title of the Ministry is not an error; the title of the strategy is 'Strategy for the Roma in Republic of Macedonia 2014 – 2020'.

³⁴¹ Ministry of Labour and Social Policy (2010), National Strategy for Equalisation of the Rights of Persons with Disabilities, <http://mtsp.gov.mk/WBStorage/Files/FINALNA%20Revidirana%20Nacionalna%20Strategija.pdf>.

³⁴² The initial report can be accessed at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/275/23/PDF/G1527523.pdf?OpenElement>.

³⁴³ Ministry of Labour and Social Policy – news archive (in Macedonian language only), http://www.mtsp.gov.mk/fevruari-2017-ns_article-zapocnuva-proektot-centar-za-vrabotuvanje-na-lica-so-hendikep.nspix.

³⁴⁴ Ortakovski, Tomislav (2017), *Analysis Assessing the Employment Measures for Persons with Disabilities* (Анализа за проценка на националните програми и мерки за вработување на лицата со попреченост), (OSCE, 2017), p.38.

In the same year, the Government announced a project supporting the purchase of automobiles for persons with disabilities. The following is a quote (translated into English) from the Government announcement:

'persons with at least 80 % "invalidity" in the lower extremities, completely "blind persons" and "deaf persons", and persons with moderate, medium and severe intellectual disability will be refunded up to MKD 180 000 [EUR 3 000] for paid custom taxes, value added tax and excise related to the purchase of the automobile.'³⁴⁵

Other measures have been reported as being implemented within the framework of the national strategy. In a 2017 analysis conducted for the OSCE, Tomislav Ortakovski notes that the implementation of the strategy is seriously deficient. However, Ortakovski also observes that there is a rise in awareness and in 'competence among stakeholders directly involved in the creating and adopting of employment policies',³⁴⁶ which he concludes on grounds of the publication of the advert for employing people with disabilities in the public administration, and the MLSP-UNDP joint programme for self-employment of people with disabilities (noted elsewhere in this report), which during its first phase resulted in the self-employment of 120 people with disabilities.³⁴⁷

At the beginning of 2017, the Ombudsperson published a report from 2016 on the outcome of the 2013 vacancy advertisement for the employment of 300 people with disability.³⁴⁸ According to the report, out of 300 vacant positions, 70 remain unfilled. The people were employed in various bodies and institutions of the public sector – courts, the Government and the ministries, government agencies, universities, units of local self-government, etc. The Ombudsperson found that, from the time of notification of selection, some of the successful candidates had to wait for a year, and some even two years and more, before they started working. It also found that the advert was published with the aim of recruiting a large number of people, but without an established real need to fill a large number of vacancies. Thus, people were being employed even where there was no such need. According to the Ombudsperson, this approach can backfire, as instead of creating inclusion and opening up the work place, it can result in friction between those who are already employed and the newcomers.³⁴⁹

Broad social policy (age)

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

³⁴⁵ Ministry of Labour and Social Policy – news archive (in Macedonian language only), 'Government support for purchase of automobiles' (Владина поддршка за лицата со инвалидност за набавка на автомобил) http://www.mtsp.gov.mk/juli-2016-ns_article-vladina-poddrshka-za-licata-so-invalidnost-za-nabavka-na-avtomobil.nsp.x.

³⁴⁶ Ortakovski, Tomislav (2017), *Analysis Assessing the Employment Measures for Persons with Disabilities*, (OSCE, 2017), p.38.

³⁴⁷ Ortakovski, Tomislav (2017), *Analysis Assessing the Employment Measures for Persons with Disabilities*, (OSCE, 2017), p.38.

³⁴⁸ The vacancy advert was put up in October 2013. It has been referred to in previous versions of this report, and is referenced, though in another context, in section 2.6.(h) of this report.

³⁴⁹ Ombudsperson of the Republic of Macedonia (2016), *Special report on the research findings on realization of the right to work for persons with disabilities* (Посебен извештај по спроведеното истражување за остварување на правото на вработување на лицата со попреченост, по објавен оглас на ЈП "Македонски шуми"-Скопје) (October 2016).

There is a 'National Strategy for Elderly People 2010-2020'.³⁵⁰ However results from its implementation are not yet expected, as the coordinating body tasked to follow its implementation was only recently established. However, special programmes for recreation (free ski trips and use of thermal baths facilities) and transport (free use of public transport in the capital on selected week days, and use of train transportation in the whole territory of the country on selected week days) have been implemented. There are also housing facilities and newly built housing for elderly persons.

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

³⁵⁰ Ministry of Labour and Social Policy (2010), *Национална стратегија за стари лица 2010-2020* (National Strategy for Elderly People 2010-2020), <http://mtsp.gov.mk/WBStorage/Files/Strategija%20za%20stari%20lica%20juni.pdf>.

6 REMEDIES AND ENFORCEMENT

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

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

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

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

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

The 2017 draft-ADL makes three important changes to this. First, it shortens the duration to 45 days (Article 27(1)). Secondly, it has a provision regulating cases where a person has not acted in line with the recommendation of the CPAD (discussed further, below). Thirdly, should the CPAD not act in accordance with the deadline of resolving the case within 45 days of receiving the claim, the applicant can file a claim to the State Administrative Inspectorate (Article 27(5)).

Litigation proceedings can be initiated before ordinary courts, based on the provisions of the Anti-Discrimination Law (Chapter VI, Articles 34-41). The law does not resolve the priority of the procedures, in case of simultaneous procedures. It states that if a procedure is raised before a court, no procedure can be raised before the CPAD. However, it does not say what one does if a procedure is raised before the CPAD, and after that another procedure is started in front of a court before the procedure before the CPAD has ended. Also, the law does not regulate the relations between the procedures in front of the Ombudsperson and the CPAD, in cases of overlap. This issue has been resolved by a memorandum of understanding between the two institutions.³⁵¹

Under the Anti-Discrimination Law, the outcome of a claim depends on the procedure that one chooses to pursue. The CPAD registered 59 cases in 2017. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation could lead to an award of regular compensation; while the misdemeanour procedure envisages fines in the range of EUR 400 to 1 000 (to be paid in national currency).

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

The procedures for employment in the private and public sectors are different. In the public sector, the Law on State Administration elaborates a detailed procedure, which must be conducted in accordance with the law and under very strict criteria, while in the private sector, according to Law on Labour Relations, employers are free to choose their own

³⁵¹ A memorandum for cooperation between these two institutions and the Commission for Equal Opportunities of Women and Men of the Assembly of Republic of Macedonia and the Macedonian Women Lobby was signed in December 2011.

methods to find adequate candidates for employment. A worker who believes that they have been discriminated against, can inform the employer within eight days, giving the employer a chance to resolve the issue (Article 181). If this is not done within the next eight days, the worker can lodge a lawsuit against the employer (within the next 15 days). This last deadline is directly applicable in cases of dismissal and rejection in the recruitment process due to discrimination. This is rather costly procedure, as hiring a lawyer is an obligation and the claimant must pay the court costs in advance. Moreover, if a claimant loses a lawsuit against a state employer, he or she has to pay the costs of the State Defender.³⁵² As it is a judicial litigation, there are strict time limits for all procedural actions.

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

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

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

The 2017 draft-ADL changes this, by introducing an obligation for the CPAD to file a claim to the Administrative Court (Article 27(4)). The 2017 draft-ADL expands the potential actions of the CPAD by adding a competence to issue a 'general recommendation'. Namely, the draft provides that 'the Commission can on its own initiative issue a general recommendation in cases where a larger number of persons have been discriminated' (Article 28). Although this is a greatly welcome expansion of competence, the wording of the article raises concerns on at least three points. First, it does not state whether the general recommendation can be issued in cases filed by individual claimants, those pursued by the CAPD itself, or both. Secondly, if such recommendations can arise from individual cases, it is not clear what kind of relationship the individual case will have with the 'general recommendation'. Several questions arise, such as whether the individual case will be pursued and, following resolution, a general recommendation be issued, or whether the two will run separately or in parallel, and if so, what the implications are. Thirdly, it is not clear how these general recommendations are actually meant to be followed through – how they will be communicated and to whom, how they will be monitored and what the implications are, if any, for those who do not follow them. At present, this provision is not tied to any of the sanctions prescribed under the law, in the final chapter of the 2017 draft-ADL. Furthermore, there is the question of what will happen to cases that are filed with the CPAD after such a general recommendation has been issued, if they fall within the realm of the recommendation; whether such cases will be accepted, and the general recommendation merely reiterated and whether the case will be escalated in any way and how. The current draft law does not seem to offer an answer to these questions.

b) Barriers and other deterrents faced by litigants seeking redress

The procedure before the Commission for Protection against Discrimination (CPAD) is free of charge. No legal representative is needed for this procedure. However, it should be noted that there are some obstacles in filing a case at the commission. The offices of the commission are in the building where the Ministry of Interior has some of its offices. Taken

³⁵² The State Defender is a state budget financed institution. However, it has a practice of requesting litigation costs as private solicitors. When combined with court costs, this is a serious burden on the claimant.

alongside the politicised procedure of the appointment of the first members of the commission, one can say that there is a psychological barrier to accessing the commission. There is also a physical barrier as the offices are on the 20th floor and the elevator only goes up to the 19th floor.

Watchdog CSOs have reported a substantial backlog in the CPAD's handling of cases.³⁵³ The Network against Discrimination (a network of CSOs working on equality and non-discrimination issues) reported that in 2014 it submitted seven cases to the CPAD, four cases to the Ombudsperson, as well as other cases, responses, requests and so on to other institutions. Of these, the CPAD resolved four out of the seven cases, not finding discrimination in any of them, and the Ombudsperson resolved all four cases submitted to it. Three of the four cases were discrimination cases, and the Ombudsperson found discrimination in all three. The fourth case is a case that the Network against Discrimination brought against the CPAD.

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

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

The 2017 draft-ADL brings a much-welcomed change in relation to administrative taxes. Article 39 provides that the court procedure for those pursuing discrimination cases will be free of charge and that the burden for the expenses of these procedures will fall on the state budget.

c) Number of discrimination cases brought to justice

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

In 2017, the CPAD received 59 cases, which is almost the same as in 2016 when it received 60 cases. Taken together, this is a continuation in the drop in the number of cases over previous years, from 106 cases in 2014 to 70 cases in 2015. Unlike in 2016, the CPAD did not include a comment explaining the reasons for the decreased reporting of cases. In the previous year, the CPAD attributed the drop to a lack of financial resources and other issues,³⁵⁴ without saying what those issues were or how it came to this finding. However,

³⁵³ See: <http://www.equalitylaw.eu/downloads/2864-fyr-macedonia-cso-network-annual-report-pdf-72-kb>.

³⁵⁴ See: Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) (2017) *Annual Report for 2016*; 'The drop is due, among other issues, also to lack of financial resources for the

financial resources cannot explain why fewer people complained to the CPAD in 2016 than in 2015. A more plausible explanation was and still is that this is a further decline in trust, which started with the wire-tapping affair³⁵⁵ (mentioned in section 7.b. of this report) and continued with the second CPAD composition appointment.³⁵⁶

The reporting per discrimination ground³⁵⁷ has been as follows: sex and gender 19 %; ethnicity 18 %; political affiliation 17 %; health status 16 %; sexual orientation and gender identity 16 %; personal or other social status 16 %; age 8 %; social origin 7 %; and education 7 %. This is the first time that the CPAD has included sexual orientation and gender identity in the breakdown of cases by ground. The reported distribution per field is as follows: 41 % in employment and labour relations; 25 % in access to goods and services; 22 % in public information and media; 14 % in education, science and sport; and 10 % in social security, including social protection and pension and disability insurance, health insurance and health protection. Although 'judiciary and administration' featured more prominently in the previous years, it is not even reported in this year's CPAD report.

In 2017, 70 cases were filed with the Ombudsperson as non-discrimination and equitable representation cases, representing 2.17 % of the total number of cases filed. This is the highest representation of this category of cases since the Ombudsperson started to report them separately (that is, higher than the 69 cases or 1.83 % reported in 2016, the 53 cases or 1.2 % reported in 2015, and the 66 cases or 1.55 % reported in 2014). However, this percentage has to be read through the prism of the overall number of cases, which shows a substantial fall on previous years. In other words, the overall number of cases filed to the Ombudsperson continues to drop. In 2017, the institution reports having received 3 224 cases. This is a further drop from 2016 when it received 3 775 cases, which was already a drop from 4 403 cases in 2015. Under the separate category of 'persons and children with disabilities', the Ombudsperson reports having received 5 cases or 0.16 %, which is a substantial drop from 15 cases or 0.4 % in 2016. As was the case in the previous year, the Ombudsperson did not publish detailed statistics on the grounds and fields in which the cases were filed. However, it noted a continuing trend from previous years in that employment remained the dominant field. It also reports a much higher number of cases of harassment and three cases of hate crime.

In 2016, the Constitutional Court³⁵⁸ received eight cases in relation to the protection of human rights and fundamental freedoms (protection against discrimination falls within this category and seven of the cases were cases for protection against discrimination). This is a drop from 13 cases in both 2015 and 2014, which was already a substantial drop in reporting compared to previous years: there were 22 cases in 2013, 25 cases in 2012 and 23 cases in 2011. The Constitutional Court reported that it closed 11 cases (two cases from 2015 and one from 2014). Out of these, eight were on protection against discrimination, while three were on protection of property. Only one case was admitted for consideration, whereas the others were rejected either on the ground of lack of admissibility or on another procedural ground. The only considered case³⁵⁹ was a case alleging discrimination on the ground of social status; the Constitutional Court did not find discrimination.³⁶⁰

operation of the Commission'. [Овој пад на бројот на претставки се должи, покрај другото и на немањето на финансиски услови за работата на Комисијата.]

³⁵⁵ The former President of the CPAD was also implicated in the affair, as reported in last year's report.

³⁵⁶ On the second composition, see: Flash report 'Appointment of new members of the equality body', <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

³⁵⁷ Once again, the CPAD reported the distribution of cases by discrimination ground in percentages and did not provide the full list.

³⁵⁸ At the time of writing of this report, the 2017 report has still not been published.

³⁵⁹ The case is added to section '12.2. Case Law' of this report.

³⁶⁰ Constitutional Court (2017), *Overview of the Work of the Constitutional Court in 2016* (Преглед на работата на Уставниот Суд за 2016 година) (June 2017) [http://www.ustavensud.mk/domino/WEBSUD.nsf/5c166321711d7484c1257361002e29e9/f125a33f2d0f2194c12581550046881f/\\$FILE/Преглед%20за%20работа%20на%20Уставниот%20суд%20на%20РМ%20-%202016%20година.pdf](http://www.ustavensud.mk/domino/WEBSUD.nsf/5c166321711d7484c1257361002e29e9/f125a33f2d0f2194c12581550046881f/$FILE/Преглед%20за%20работа%20на%20Уставниот%20суд%20на%20РМ%20-%202016%20година.pdf).

- d) Registration of discrimination cases by national courts

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

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

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

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

- b) Engaging in support of victims of discrimination

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

- c) Actio popularis

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

However, the actio popularis practice before the courts recently came to light through a 2016 court case and paints a picture that is different from the quasi-judicial practice (reported above) and from the Constitutional Court practice (also reported above). In this case, five CSOs,³⁶¹ supported by the OSCE - Mission to Skopje, submitted an actio popularis claim on Roma segregation in education against the Government. They claimed an interest on the grounds of long-term work in the area and findings from studies that they have published, all of which they claim show beyond doubt the segregation of Roma children in education. The first instance court accepted that they have a legitimate interest to present such a case, but the court went on to dismiss the case on the basis that the CSOs did not have the express authorisation of the person that finds him/herself discriminated against. As discussed below in this report, that is a criterion in the ADL under Article 41(4), for class action, and not for actio popularis. As discussed elsewhere, requesting such authorisation defies the very purpose of actio popularis. The court also requested that such authorisation be provided in writing without calling upon any legal provision to support this claim. The CSOs complained to the higher instance court.³⁶²

³⁶¹ The five CSOs were: NGO KHAM Delcevo, FOOM, MHK, IHR and ERRC.

³⁶² The case is still not publicly available. Information has been acquired by the author of this report from persons involved in the preparation of the legal documents related to the process.

The 2017 draft-ADL explicitly permits *actio popularis*. Article 35, entitled 'Lawsuit for protection against discrimination of public interest (*actio popularis*)', establishes as follows:

'associations, foundations or other organizations from the civil society that have justified interest in protecting the interests of a particular group or that work on protection against discrimination may file a lawsuit if they demonstrate that the defendant's actions have discriminated against a larger number of people.' (Article 35 (1))

d) Class action

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

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

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

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

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

The 2017 draft-ADL rectifies this, and prescribes only facts, leaving proofs out in both an article on shifting the burden of proof in the procedure in front of CPAD (Article 26) and in court proceedings (Article 37(1)). Regrettably, the proposal also leaves misdemeanor procedures outside of the realm of the obligation for reversing the burden of proof; as per Article 37(2), the rule for shifting of the burden of proof does not apply to misdemeanor and criminal proceedings.

The Law on Labour Relations and the Law on Social Protection also include provisions on the shift of burden of proof (Articles 11(1) and (2) and Article 23 respectively). The Law on Psychological and Sexual Harassment also provides for a shift of the burden of proof (Article 33). Since these provisions differ from the provision in the Anti-Discrimination Law, it remains subject to judicial interpretation which provision will be applied to a labour case.

The Law on the Protection of Children prescribes that the procedure for protection against discrimination shall be conducted as prescribed by the Anti-Discrimination Law, thus one can conclude that the same rules for shifting the burden of proof will apply.

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

In Macedonia, there are legal measures of protection against victimisation. The Anti-Discrimination Law declares victimisation to be a form of discrimination. Victimisation is extended beyond the person who reports discrimination, to the person who files the complaint and to any witnesses (Article 10). So far, this has not been interpreted as to exclude groups from the protection. The Constitution also provides for protection against victimisation, as it states that a citizen cannot be called to account or suffer adverse consequences for attitudes expressed in petitions, unless they entail the committing of a criminal offence (Article 24). The Law on Labour Relations provides for protection against victimisation³⁶³ in a procedure related to psychological harassment (referred to in the law as mobbing). This protection also extends to cover witnesses. Protection against victimisation is also granted under the new Law on Psychological and Sexual Harassment (Article 30).

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

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

Under the Anti-Discrimination Law, sanctions vary according to the procedure. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation could lead to regular compensation awards; and the misdemeanour procedure envisages fines in the range of EUR 70³⁶⁴ to 1 000, to be paid in national currency (Articles 42 to 45(6)). Alignment with the new Law on Misdemeanours (adopted 23 July 2015), resulted in amendments to Chapter VII-Misdemeanours, of the Anti-Discrimination Law. Following the amendments, paragraphs one in Articles 42-45 are now on legal persons, paragraphs two on responsible persons from the legal person, and paragraphs three for responsible persons at the public bodies, while new fourth paragraphs are added for natural persons. The charges for legal persons are raised, the fines for responsible persons with public duties and natural persons are lowered, whereas the fines for the responsible person in the legal person are set on a strict scale, which is the mid-value from the amount that was prescribed thus far. Before the amendments, paragraph one prescribed fines for 'anyone' who conducts the above noted actions, paragraph two set out fines for the responsible person from the legal person (be it private or public) and paragraph three set out fines for the legal person itself.

The 2017 draft-ADL prescribes higher fines, moving from EUR 100 to 5 000, to be paid in the national currency (Articles 41-43).

In labour cases as well as other civil court litigation, only compensation for pecuniary and non-pecuniary damages can be claimed.³⁶⁵ In cases of child and social protection, sanctions are fines imposed in a misdemeanour procedure. These can amount to EUR 500 to 1 000 (to be paid in national currency) in child protection cases and EUR 3 000 to 5 000 (to be paid in national currency) in cases concerning social protection.³⁶⁶

³⁶³ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 11(3).

³⁶⁴ The lowest fine dropped from EUR 100 to EUR 70 with the 2015 amendments of the ADL.

³⁶⁵ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Articles 264-266.

³⁶⁶ Please bear in mind that the average gross monthly salary in the country is approximately EUR 400.

b) Ceiling and amount of compensation

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

c) Assessment of the sanctions

At present no conclusions can be drawn as to whether the available sanctions are likely to be effective, proportionate and dissuasive, as required by the directives. When compared to the available sanctions provided for other misdemeanours³⁶⁷ and so on, the anti-discrimination sanctions cannot be seen as dissuasive, effective or proportionate. This is also the finding of the analysis of the harmonisation of the equality and non-discrimination legislation.³⁶⁸

As noted above, the 2017 draft-ADL prescribes higher fines, moving from EUR 100 to 5 000, to be paid in the national currency (Articles 41-43). Thus, this could be seen as a step towards more effective, proportionate and dissuasive sanctions.

³⁶⁷ For example, the value of the fine in some discrimination cases is equal to the value of a fine for throwing a cigarette butt on the street.

³⁶⁸ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

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

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

The Anti-Discrimination Law, adopted in the course of harmonising the national legislation with the *acquis*, provided for the establishment of an equality body – the Commission for Protection against Discrimination (CPAD).³⁶⁹ This commission is tasked to deal with both the public and the private sector. It is the first specialised body for equal treatment. According to the preparation materials of the Anti-Discrimination Law, the CPAD is the body established and tasked with equality according to the transposition process.

Before this, the Ombudsperson was the only institution that had duties for the protection of the principles of non-discrimination and equality as part of its broader mandate for the protection of human rights in the public sector.³⁷⁰ It has a special unit focused on non-discrimination and equitable and just representation.

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

According to the Anti-Discrimination Law,³⁷¹ the CPAD is established as an autonomous and independent body. The CPAD is composed of seven members appointed by the Parliament with five-year mandates. Macedonian citizens with regular residence in the country, university degrees and experience in human rights are eligible for membership. Applications are collected through a public call for applications.

The commission is financed through the state budget, but its activities can also be funded through other sources. The members of the commission receive honorarium of two average monthly salaries³⁷² (around EUR 800 gross per month). However, its annually allocated budget in the state budget remains very small, creating a barrier to the CPAD fully exercising its duties. The CPAD has been a beneficiary of several projects conducted by CSOs, and has been one of the main institutions in the focus of the OSCE Mission in Skopje anti-discrimination project for the past four years. The CPAD's annual report for 2016 demonstrates a drop-in cooperation with the body; most of the activities recorded as such cooperative efforts were from activities that had spilled over from projects in 2015. In addition, the OSCE had already announced its exit strategy from the CPAD, under which it is to completely stop providing support to the body by 2020.

This reflects the escalating concern over the independence of the body following the appointment of its second composition. The mandate of the first composition of the Commission for Protection against Discrimination (the equality body) expired in December 2015. The appointment of that composition raised serious concerns for civil society organisations and the parliamentary opposition. These concerns run along three main lines: failure to fulfil the prescribed criteria for membership, failure to select far better qualified candidates, and failure to meet the Paris Principles (appointment of persons from the executive branch in a decision-making role and composition which does not reflect the society at large). On 11 January 2016, the Assembly appointed the seven new members (with one reappointment).³⁷³ Among the newly appointed members there are persons who,

³⁶⁹ The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2014, Articles 16 to 33.

³⁷⁰ The former Yugoslav Republic of Macedonia, Law on the Ombudsperson, 2003, Articles 6, 11.

³⁷¹ The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010.

³⁷² The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010, Article 21.

³⁷³ Parliament website, 'Proposal for a decision for appointment of the members of the Commission for protection against discrimination [Предлог-одлука за именување на членови на Комисијата за заштита од дискриминација]', <http://www.sobranie.mk/materialdetails.nsp?materialId=631e99a8-f038-41d6-ae48-1589f8985e41>.

aside from being publicly known as supporters of the ruling party, have publicly voiced homophobic statements and have relativized discrimination, hate crime and hate speech. Opposition members of Parliament voiced strong objections to the appointment of two of the now-appointed members, due to their open support for the Government.³⁷⁴ This also raised concerns among human rights activists and civil society organisations. The largest network of organisations working on equality and non-discrimination, the Network for Protection against Discrimination, published a public reaction to the new composition, calling into question the competence of the members and stating that people who are discriminated against cannot get justice from Government supporters.³⁷⁵

The first public appearance of the newly appointed president of the equality body on a debate on hate speech and hate crime did not alleviate these concerns. Aside from showing a lack of understanding and sensitivity to equality and non-discrimination issues, and among other things, the president highly relativized the grave position of the LGBT community in the country and praised the Government's efforts in relation to the position of Roma and other minorities. He expressed no critical stance towards the human rights situation in general and equality and non-discrimination in the country whatsoever.³⁷⁶

Concerns about the CPAD's independence have existed from its very inception, and not without reason. These started with the issues surrounding the first composition of the body,³⁷⁷ but escalated with the new composition of the body, as discussed above. The way the members of the CPAD are connected to the ruling party seems to be well illustrated by the content of the conversations published during the wire-tapping affair. In February 2015, the largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20 000 people that are alleged to have been carried out by the state Counterintelligence Agency.³⁷⁸ The content of the published recordings removed doubts about the already existing claims of a state capture³⁷⁹ and extreme concentration of power in the ruling party, including the complete exercise of party control over not only the judiciary, but *all* aspects of society. It is raised here as of interest for this report because, aside from pillar rule of law issues, it had direct implications for the CPAD. In particular, what seems to be the voice of the (then) president of the equality body, Dushko Minovski, also featured in the publicly broadcasted conversations; he can be heard to be a person working for the ruling party on the ground during the election campaign, and, even more seriously, to be (ab)using his position as someone in the employment of the Ministry of Labour and Social Policy by instructing people who have been awarded social assistance what party to vote for.³⁸⁰

The 2017 draft-ADL brings some much-welcomed changes as well as points of concern. First, it ends the part-time status of the members and introduces the position as a full-time appointed position (Article 19(1)). The status of the commissioners will now mirror that of the Ombudsperson. The 2017 draft-ADL keeps the number of members to seven members for a five-year mandate, with the exception of the first composition of the CPAD

³⁷⁴ Video recording from the parliamentary debate: <http://reporter.mk/nashi-faci/bogoev-vlasta-ne-smee-da-bide-pribezhish/>.

³⁷⁵ Macedonian Helsinki Committee Website, 'Incompetent Composition of the Commission for Protection against Discrimination [Некомпетентен состав на Комисијата за заштита од дискриминација]', <http://www.mhc.org.mk/announcements/357#.Vssc28cj0wB>.

³⁷⁶ TV Debate 'Open Hate Speech in Public Discourse [Отворено: Говор на омраза во јавниот дискурс]' <https://www.youtube.com/watch?v=YNQXh4MOQ08>.

³⁷⁷ Country Report 2013 <http://www.equalitylaw.eu/downloads/4174-fyr-macedonia-country-report-non-discrimination-2013-1-11-mb> p.86.

³⁷⁸ Balkan Insight (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

³⁷⁹ The concept of state capture is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'.

³⁸⁰ A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gipsy by Gipsy, we'll drag them"' [СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме] <http://a1on.mk/wordpress/archives/465799>. Please note that in the national context 'Gipsy' (Циган) is a derogatory word for Roma.

following the entry of the law in force. Namely, as per the transitory provisions, the mandate of the current commissioners will cease when the law enters into force and new commissioners will be elected under the new law (Article 44). In the first composition, four members will be elected with a five-year mandate, whereas three will be elected with a three-year mandate (Article 16(3)).

The execution of the transition from the current CPAD composition to the new one under the 2017 draft-ADL (if the text is adopted as it stands at the time of writing), causes several concerns. First, from a legal point of view, the pre-term end of the mandate of the current composition of the CPAD is problematic in terms of the potential for independence of the CPAD in the future, as it sets a precedent of acceptability of adopting legal changes that discontinue a CPAD composition when the legislature is not happy with the way the CPAD operates, as a way of bypassing the procedures for the dismissal of individual members and having to account for its actions. The background of this provision, which stands at odds to similar provisions in other laws when such transitions have occurred, is tied to the politicised current composition and the lack of relevant competence of the majority of the current members, reported in the previous reports. Thus, the adoption of the new law is most probably seen as a way of dealing with the current composition, which can be considered to be in line with the law. However, this does not alleviate the worries raised above. Secondly, it is not clear who will determine which member will be elected for five and which for three years and on which grounds. It is also not clear whether people themselves will apply for a three-year or a five-year mandate and whether these will be advertised as two different positions or as one. The 2017 draft-ADL is silent on this issue. Thirdly, no appeal procedure is tied to the appointment procedure and no further details are prescribed as to the procedure for selection for a second mandate.

The 2017 draft-ADL also foresees that the CPAD will have its administrative service (Article 22). This will be a much-welcomed change compared to the current law which provided that the commissioners would conduct administrative matters themselves. In addition, the CPAD is to be allowed to submit its own budget proposal on which the Parliament will vote separately from the overall budget, and is to be allowed to use the funds independently (Article 15).

The other relevant body is the Ombudsperson – the oldest national Human Rights institution in the country. The Ombudsperson is tasked to protect the constitutional and legal rights of citizens when violated by state bodies and other authorities and organisations with public powers. This quasi-judicial institution has a mandate to safeguard *inter alia* principles of non-discrimination, and adequate and equitable representation of communities in the organs of state power, bodies of local government and public institutions and services (Article 77).³⁸¹

The Ombudsperson is elected by the Parliament under the Badinter principle (i.e. majority vote of the total number of parliamentarians, which must include a majority of the total number of MPs who belong to ethnic communities that are not the ethnic majority). The Ombudsperson is elected for a term of eight years, with the possibility for one re-election. The Ombudsperson has deputies who are elected under the same procedure as the Ombudsperson, one of whom is tasked to focus on non-discrimination and equitable representation.

Any Macedonian citizen can be appointed Ombudsperson if they meet the general conditions specified in law for employment, and if they are a graduate lawyer with over nine years' experience in legal affairs, whose activity is proven in the field of protection of citizens' rights and who enjoys a suitable reputation for performing the function of

³⁸¹ Constitution of the Republic of Macedonia (Устав на Република Македонија). Official Website of the Assembly of the Republic of Macedonia www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp?x, Article 77.

Ombudsperson.³⁸² The Ombudsperson and the Deputy Ombudsperson cannot be held responsible for actions, measures and activities undertaken in exercising their function. The independence and autonomy of the office is guaranteed by the Constitution and by law.

In practice, the election of the Ombudsperson very much depends on the votes of the governing political parties. Also, given that its funding comes from the state budget, the Ombudsperson could also be seen as financially dependent (as no law prescribed percentages of its budget). The institution has a working unit for protection against discrimination.

A study on national human rights institutions in Macedonia looked at both these institutions, aiming to assess them against the international framework of standards, including the EU *acquis*. For the CPAD, on the part of the legal framework, related to issues raised in this question of the report, it recommended that: a guarantee for pluralism of the CPAD beyond ethnicity should be entered in the law in order to enable the composition of CPAD to mirror the society as a whole; the law should include an obligation for the Parliament to debate the CPAD annual report, accompanied with an obligation for representatives from the Government to be present at the session where this report will be discussed; and that the general reference to social sciences should be excluded from the provision, so as to allow only people with specific equality and non-discrimination or human rights education and experience to be able to stand as candidates for members of the CPAD.³⁸³ Also, it reiterated previous findings that 'the discussions at the parliamentary session devoted to the appointment on members, prove the whole process of the establishment of the first composition of the first equality body in the country as a highly politicised one.'³⁸⁴ On the resources of the CPAD, it made the following recommendations: allow under law the creation of a secretariat, or any form of administrative support for the CPAD; give due consideration to the possibility for professionalisation of the members of the CPAD by making this their full-time job and position; for the CPAD to be in a position, similar to the Ombudsperson, to agree upon its annual budget with the Government for funds that should be sufficient for CPAD to be able to exercise its full mandate; consider establishing formal links with the regional offices of the Ombudsperson, in order to expand the reach of the CPAD.³⁸⁵

The study's recommendations on independence for the Ombudsperson, which has non-discrimination duties, suggested appointing the Ombudsperson for a single non-renewable term, as a way to reduce susceptibility to political pressure, while in relation to resources it recommended the allocation of sufficient funds for the Ombudsperson to exercise its full mandate.³⁸⁶

c) Grounds covered by the designated body/bodies

The Commission on Protection Against Discrimination deals with the following grounds: sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political belonging, personal or social status, 'mental or physical impairment', age, family or marital status, property status, health condition, any other ground prescribed by law or ratified

³⁸² The former Yugoslav Republic of Macedonia, Law on the Ombudsperson, 2003, Article 6 (as amended and as will enter into force on 07.04.2017).

³⁸³ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf, pp. 48-49.

³⁸⁴ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, p. 45.

³⁸⁵ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, p. 50.

³⁸⁶ Kotevska, Biljana (2012), *National Human Rights Institutions in Macedonia: Normative Models and Challenges*. CRPRC Studiorum, Skopje, pp. 39-40.

international treaty. The Ombudsperson can also deal with the following grounds: sex, race, colour, national, ethnic, social, political, religious, cultural, language, property and social background, disability, origin and any other ground.

The 2017 draft-ADL proposes explicitly adding sexual orientation to the protected grounds (Article 5).

As far as the protection against discrimination of migrants is concerned, migration is not considered a priority issue because of the national context. Specifically, as already stated above in respect of education and housing, Macedonia has a negative net migration rate of -0.5 per 1 000 population,³⁸⁷ and serves as a transit point, rather than a destination country. Thus, no case law has been developed on the enforcement of the law and no implementation issues have been raised. The current rules state that migrants should receive the same treatment as any citizen of the country or any other person; the Anti-Discrimination Law does not distinguish between persons who hold citizenship of Macedonia and others. This applies across all fields of application of the law. Migrants should also have access to the two NHRIs which have an equality mandate: the Ombudsperson is concerned that equal treatment should be provided in the public sector, and the CPAD is concerned with equal treatment in both the public and the private sector. The fact that no cases on discrimination against migrants have been reported are, in the opinion of the author of this report, a result of two main factors. First, as mentioned above, Macedonia is a transit country. Secondly, during the first half of the 2015 'migrant crisis', and the largest wave of refugees, the country considered the refugees to be illegal immigrants because they were entering on illegal crossing points. The fact that they are fleeing from persecution was not taken into consideration, and many were deprived of their liberty by being kept in a transit centre for migrants.³⁸⁸ Thus one can hardly imagine migrants reaching out to state institutions to be protected against discrimination.

However, if migrants were to stay in Macedonia, it is to be expected that, in practice, they would be exposed to wide discrimination, not only in the private but also in the public sector, as can be seen in the example of the train ticket prices. The railway transport public enterprise raised the prices of train tickets for the trains going from the southern border crossing (entrance from Greece) to the north one (exit towards Serbia) for migrants several times. The equality body (the CPAD), did not intervene, although the Ombudsperson did. It demanded that the railway transport public enterprise stop charging migrants expensive tickets and instead charge them regular prices, following which the ticket prices were changed.³⁸⁹

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

The Commission on Protection Against Discrimination can receive individual complaints, investigate, provide independent assistance to victims, make recommendations and initiate procedures to establish the responsibility of people who will not obey its recommendations. It has the competence to collect statistics and other data, and to conduct surveys and research on discrimination.

The Ombudsperson can receive individual complaints, investigate, provide independent assistance to victims, make recommendations and submit independent reports to the media and the Parliament. The Ombudsperson is empowered to conduct special research and investigations on specific issues.

³⁸⁷ International Organisation for Migration – Macedonia profile, *IOM Website*, <https://www.iom.int/countries/former-yugoslav-republic-macedonia>.

³⁸⁸ The Ombudsperson spoke out and reacted to the inhuman conditions in the centres on several occasions.

³⁸⁹ The Ombudsperson, Recommendation to Macedonian Railways, *Ombudsperson Website*, <http://ombudsman.mk/upload/documents/2015/Preporaka-bileti%20migranti-MZ-mk.pdf>.

e) Legal standing of the designated body/bodies

Under the Anti-Discrimination Law, the CPAD does not have the legal authority to bring discrimination complaints or to intervene in legal cases concerning discrimination in court. It can only bring to 'competent authorities' cases of persons to whom a recommendation was directed but who have not acted upon it (Articles 39, 41). However, in 2013, the CPAD made a request to one of the courts and was allowed to intervene³⁹⁰ in a case of discrimination, which means that although such a competence is not explicitly granted in the Anti-Discrimination Law, the CPAD can intervene in legal cases concerning discrimination.

Under the 2017 draft-ADL, the CPAD is explicitly allowed to intervene, and to bring cases to court. Moreover, it is obliged to bring a case to court if a discriminator does not act in accordance with its opinion and or recommendation (Article 27(4)).

The Ombudsperson can act on a request from an individual or *ex officio*, however it cannot intervene in court cases (Article 13). When the Ombudsperson concludes that violations are made, s/he may make recommendations, suggestions, opinions and indications on how to act upon detected violations; propose a retrial (reopening of the case); initiate disciplinary proceedings against officials or responsible persons; and apply to the competent public prosecutor for initiating criminal procedures.

f) Quasi-judicial competences

In Macedonia, the bodies are quasi-judicial institutions.

The CPAD has elements of a quasi-judicial institution, however it does not impose sanctions, but only delivers opinions and recommendations. It can receive a case on any of the grounds in the public and private sphere in order to protect complainants. Complaints are filed free of charge, but need to contain facts and proof to support the claims.

Once the CPAD receives a complaint, it forwards it to the respondent within 15 days of receipt. The respondent has 15 days to reply to the complaint. Altogether, the CPAD must deliver an opinion in 90 days from the day of receipt of the complaint. The respondent to whom a recommendation has been directed needs to act in accordance with it within 30 days of the notification it has received from the CPAD. The CPAD has no powers to push for enforcement of its opinion; it is not legally binding and there is no appeal procedure. So, if a person does not act upon the recommendation, the only thing that the CPAD can do further is to initiate a procedure in front of a 'competent authority'.

Under the 2017 draft-ADL, the CPAD will need to resolve a claim within 45 days (Article 27 (1)).

The Ombudsperson also has elements of a quasi-judicial institution. Under law, state organs should implement its recommendations (Article 32). However, as with the CPAD, the Ombudsperson's opinions are not legally binding and there is no forced compliance mechanism which can be activated. However, if state bodies do not respond, the Ombudsperson has the right to inform the higher responsible body, the Parliament and the public through the media.

g) Registration by the bodies of complaints and decisions

In Macedonia, the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are not available to the public. However, they are made available in the annual reports. In addition, they could be made available

³⁹⁰ Court of First Instance Štip, *Sonja Šijakov v SOU Gimnazija Slavčo Stojmenski*, Po.6p. 766/11.

throughout the year upon request. The CPAD has the software to generate such statistics, and it also grants access to anonymised documents from the complete case documentation. Although the software is capable of providing updated statistics on the website, this is not done, and the statistics are made public only in the annual reports. Aside from the annual report, the Ombudsperson grants access only to the statistics upon request, but it does not give access to other case documentation. An issue in relation to the statistics coming from the Ombudsperson's office is that they mix the fields and the grounds of discrimination.

h) Roma and Travellers

Neither the Ombudsperson nor the CPAD has shown through their actions thus far that they consider the situation of Roma and Travellers as a priority issue. However, the Ombudsperson has been vocal on many occasions about the complexity and specificities of the problems Roma face, including problems related to discrimination and most recently on the issue of racial profiling of Roma at border crossings.³⁹¹ Moreover, it is thanks to the instruction that the Ombudsperson issued to the CPAD that the CPAD finally resolved a case filed by the Helsinki Committee of the Republic of Macedonia in 2011 regarding the segregation of Roma children in schools in Bitola. As reported above (see section 6.1.b.), the Ombudsperson acted upon a case filed with it by the Network against Discrimination against the CPAD for violating the body's obligation to respond to a filed case within 90 days.

After breaching all possible procedural deadlines, the CPAD finally decided the Bitola case in September 2014, and the applicants received the decision only in December 2014. The CPAD did not find discrimination on grounds of ethnicity in the case, nor did it find segregation. As already explained above, the CPAD actually found the situation to be a result of the parents' choice to register their children in a specific primary school, however it failed to state on what it bases its argument and bluntly added that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.³⁹² Although having deliberated on this case for over three years, the CPAD adds a surprisingly short elaboration on its opinion, the largest portion of which consists of a bullet point list of 14 letters/requests that it has sent and received while processing the case, one of which is a rather vague explanation of proceedings which states, 'numerous phone calls on the case topic with relevant sides and numerous meetings on the case topic'. There is no further elaboration as to whom the CPAD talked to or with whom and when they met, and what was discussed and possibly decided. It also disregards reports on Roma children in education and on segregation in education, including a statement from the director of the primary school saying that the parents of children from other ethnicities, although living in the school's region, choose to register their children in other primary schools in order to avoid sending them to school with Roma children.³⁹³

³⁹¹ On the issue of Roma racial profiling and state's systematic violation of Roma's right to freedom of movement, see: European Policy Institute – Skopje and KHAM Delchevo (2016), *Right to Equality, Freedom of Movement and Legal Protection* [http://epi.org.mk/docs/Right%20of%20Free%20Movement%20Over%20Borders%20\(Case%20Study\)_EN.pdf](http://epi.org.mk/docs/Right%20of%20Free%20Movement%20Over%20Borders%20(Case%20Study)_EN.pdf).

³⁹² Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

³⁹³ Commission for Protection against Discrimination (Комисија за заштита од дискриминација), Opinion of the Commission for Protection against Discrimination, 05.09.2014, http://www.kzd.mk/sites/default/files/dokumenti/mislenja/2014/etn_pripadnost/07-80.%2005.09.2014.pdf.

8 IMPLEMENTATION ISSUES

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

Dissemination of information

The trend noted in the previous years continued in 2017. The main activities in relation to the dissemination of information, including capacity building of institutions, continued to be organised and implemented by CSOs (with the Network against Discrimination and its members leading most of the initiatives, and the Macedonian Young Lawyers Association also being active in bringing cases to courts) and by the OSCE - Mission to Skopje (OSCE). The activities regularly include the Ministry of Labour and Social Policy (MLSP) and the Commission for Protection against Discrimination (CPAD) as partners/co-implementers. In the last year, such activities have increasingly included the Academy for Judges and Public Prosecutors and the law schools from across the country.

However, as noted above, there is a noticeable drop in cooperation with the equality body after the appointment of the new composition,³⁹⁴ which was met by strong reactions from NGOs.³⁹⁵ Following this, it is noticeable that the only two persons without questionable biographies and direct links to the ruling party (both university professors), are the only people to have been invited by CSOs to speak at events, which was not previously the case.

The 2015 analysis of the OSCE and CPAD on the harmonisation of the national equality and non-discrimination legislation with international standards and an analysis of the internal harmonisation of the laws was published in 2016.³⁹⁶ The OSCE, together with the Macedonian Helsinki Committee (MHK), published an analysis on the use of *actio popularis* in discrimination cases.³⁹⁷ In the period March-November 2016, the legal practitioners, academics, and everyone interested in discrimination in the legal arena, benefited from the 'Info-sheets on Discrimination', published by the OSCE and the MHK monthly, which presented key developments on discrimination in the country.³⁹⁸ They featured a number of discrimination cases pending before the courts, while adding information on the ground and field of the new claims.

The project which the civil society organisation H.E.R.A. implemented together with the CPAD in 2015 on increasing its capacities, visibility and activity in relation to discrimination on grounds of sexual orientation and gender identity, continued in 2016. In particular, as the campaign against discrimination, 'A Nation Without Discrimination', had only started to be promoted in November 2015, it was still running in the beginning of 2016. However, this is the last activity reported on the CPAD's website of cooperation with CSOs working on equality and non-discrimination issues. In fact, it is one of the last news items published on the CPAD's website in general. The last two are on the annual report of the CPAD and on a report on the gender pay gap that the CPAD prepared with OSCE support in 2015.³⁹⁹

³⁹⁴ Video recording from the parliamentary debate: <http://reporter.mk/nashi-faci/bogoev-vlasta-ne-smee-da-bide-pribezhish/>.

³⁹⁵ Macedonian Helsinki Committee (2016), 'Incompetent Composition of the Commission for Protection against Discrimination' (*Некомпетентен состав на Комисијата за заштита од дискриминација*), Macedonian Helsinki Committee Website, <http://www.mhc.org.mk/announcements/357#.Vssc28cj0wB>.

³⁹⁶ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

³⁹⁷ Chubrikj, Slavica and Chalovska, Neda (2016), *Use of Actio Popularis in Discrimination Cases* [Користење на *actio popularis* во случаи на дискриминација], OSCE and MHK, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1921/_____.pdf.

³⁹⁸ All info-sheets can be found on the website of the Macedonian Helsinki Committee: <http://mhc.org.mk/pages/publications?locale=mk#.Wyevvi-ZO8o>.

³⁹⁹ The author of this report notes the existence of two more new entries on the website. Namely, two photos of the CPAD's president, one at a meeting in Belgrade on cooperation of the SEE equality bodies and another at the EQUINET annual meeting. Both feature no text or information on the events, representation

Dialogue with NGOs

The developments in the first half of 2017 were strikingly different from those in the second half. Namely, the political turmoil reported in the previous years continued and climaxed with physical violence in the Parliament in April 2017, during the process of transfer from the VMRO-DPMNE-led Government, which had been in power for 11 consecutive years, to a new Government led by SDSM, which had been the largest opposition party. Following the appointment of the new Government, in June 2017, the climate rapidly changed. The new Government has already put up several adverts for expressions of interest by CSOs to take part in working groups. It has included CSOs and experts in working groups. In addition, some of the CSO representatives now hold high government positions, as part of the coalition 'with citizens,' which SDSM pursued at the 2016 parliamentary elections. Although it is too soon to come to any firm conclusions, some of the steps that have already been undertaken show how much the climate has changed. For example, in the six months of 2017 that the new Government has been in power, the Minister of Culture opened the Pride weekend, organised by a group of NGOs, while the Prime Minister gave a key speech and opened a celebration of the fifth birthday of the LGBT centre – the NGO whose offices were repeatedly attacked in the previous years and for which no one has yet been prosecuted.⁴⁰⁰ On both occasions, the new Government showed both symbolically and declaratively that it plans to support equality for all, regardless of sexual orientation and gender identity.

The 2017 draft-ADL, mentioned several times in this report, was drafted by a working group that included representatives from the most active CSOs working on equality issues, including those that provide free legal aid in discrimination cases. This working group was established in 2016, when, under a transitional political arrangement, a representative from the Opposition ran the MLSP. The draft was presented to a debate where many CSOs working on equality issues were invited, although it has to be noted that this was again an 'invitation only' event, and there was no public announcement so that all interested parties could join the discussion. Such an approach, according to the organisers (the MLSP and the OSCE – Mission to Skopje), was chosen on the grounds of keeping the debate at an expert level.

Nevertheless, no positive change has happened in terms of some of the legacies of the previous Government. In particular, although the Government changed the composition of many state bodies that were evaluated for years as politicised and non-independent, it did not change the composition of the CPAD in spite of cases of evident incompetence and political affiliation of some of the current members. In addition, there has still been no proper investigation and prosecution of the attacks on the LGBTI Support Centre. In operation since 2012, the centre has provided support to LGBTI persons and to their family and friends. It has been subject to attacks ever since it opened. People working at the centre have been physically attacked and its offices have been damaged several times. Following one of the attacks, the centre had to close down for renovation for a period of time.⁴⁰¹ No proper investigation and prosecution of the attackers on the LGBTI centre has happened yet and no charges have been raised, despite numerous calls by CSOs, organised protests demanding action, the existence of video recordings in which the attackers can be easily identified (available on YouTube), and calls by the European Commission itself.⁴⁰²

and participation of the CPAD at all, thus are herein not considered as news entries. Source: <http://www.kzd.mk/>.

⁴⁰⁰ On the attacks and failure of the state to investigate, see flash report: 'Absence of Reaction to Series of Attacks on the LGBTI Support Centre' (2013) <https://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

⁴⁰¹ For more on this, please see flash Report: <http://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

⁴⁰² Network against Discrimination (2014), 'Absence of Reaction to Series of Attacks on the LGBTI Support Centre', <http://www.equalitylaw.eu/component/edocman/mk-29-lgbti-centre-attacks-no-reactions>.

Dialogue between social partners

The mechanism for social dialogue between social partners is the Economic-social Council (ESC). It consists of representatives from the Government, the unions and the Associations of Employers.⁴⁰³ The MLSP reports that it, too, has been meeting regularly in 2016. It also reports that the ESC secretariat has undergone a number of training sessions in 2016, including non-discrimination training. The ESC seems to have focused on implementing actions set out in the Government strategic documents, which includes the setting up of an infrastructure for the peaceful resolution of disputes. The information provided does not go into more details on this.⁴⁰⁴

Brief note on activities on Roma

The country was part of the Decade of Roma Inclusion (2005-2015).⁴⁰⁵ For the whole duration of the Decade, action plans were adopted for each year, and activities were implemented, including the establishment of the Roma Information Centres (RICs), which serve also as points of contact with the NGO sector. Sixteen NGOs ran a contact point as part of the Decade of Roma Inclusion. These monitored the implementation of the plans, carried out advocacy activities, issued recommendations and implemented joint activities. After the closing of the Decade, the Government continued to support the RICs. It also adopted a national 'Strategy on Roma 2014-2020'.⁴⁰⁶

In addition to this, the Government continues to have a Minister without Portfolio⁴⁰⁷ tasked to coordinate Government activities in relation to the Roma. Under the new Government, the new Minister is a person from one of the most active Roma NGOs – KHAM Delchevo. He was a legal advisor to many of the Roma who brought cases to the courts claiming violation of the freedom of movement and racial profiling. However, he has been appointed for a few months only, thus it is too early to draw any conclusions about his work.

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

a) Mechanisms

No mechanisms exist that ensure all contracts, collective agreements, international rules of undertakings and rules governing independent occupations are not in conflict with (solely) the principle of equal treatment. However, general mechanisms for compliance with the Constitution and national laws, and with legal principles such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori* do exist.

Collective agreements, international rules of undertakings and rules governing independent occupations if challenged can be subject to a review of constitutionality and legality before the Constitutional Court. The Law on Obligations provides that a contract

⁴⁰³ Ministry of Labour and Social Policy (Министерство за труд и социјална политика) Economic-social Council http://www.mtsp.gov.mk/socijalno-partnerstvo-ns_article-ekonomsko-socijalen-sovet.nspix.

⁴⁰⁴ Ministry of Labour and Social Policy (Министерство за труд и социјална политика), 'Continuation of the Effective Social Dialogue for Adding Dynamics to Economic Growth and Creating Sustainable Jobs (Продолжување на ефективниот социјален дијалог за динамизирање на економскиот раст и креирање одржливи работни места)', http://www.mtsp.gov.mk/pocetna-ns_article-prodolzuvanje-na-efektivniot-socijalen-dijalog-za-dinamiziranje-na-ekonomskiot-rast-i-kreiranje-odrz.nspix.

⁴⁰⁵ For more information on the projects implemented in the context of the Decade of Roma Inclusion and MLSP activities on Roma rights and integration, please see: *Проекти произлезени од декадата на Ромите*, (Roma Decade Related Projects) Ministry of Labour and Social Policy Website, <http://www.mtsp.gov.mk/proekti-proizlezени-od-dekadata-na-romite.nspix>.

⁴⁰⁶ *Стратегија за Ромите 2014-2020* (Strategy on Roma 2014-2020), http://arhiva.vlada.mk/registar/files/Strategija_Romite_%202014-2020.pdf.

⁴⁰⁷ The website and profile of the Minister without Portfolio can be accessed at this link: <http://www.mbr-ds.gov.mk>.

contrary to the Constitution, laws and good customs is null and void.⁴⁰⁸ Compliance of contracts, collective agreements, internal rules of undertakings and rules governing independent occupations can be challenged if brought before court, where parts or full documents can be deemed null and void.

The Law on Courts provides that loopholes in laws are no justification for courts to refuse to act on upon a filed case — courts have an obligation to act based on the general principles of law, except when that is strictly forbidden by law.⁴⁰⁹ Also, respecting general legal principles is in the tradition and teaching of the legal system, and applies to national laws. These laws almost always include in the final provision section a notion of the *lex specialis derogat legi generali* including changes made on the principle *lex posterior derogat legi priori*.

b) Rules contrary to the principle of equality

Harmonisation of the legal framework with the Anti-Discrimination Law was a general strategic goal in the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability' adopted in May 2012. The action plan for the implementation of the strategy envisaged that this activity would be completed by the end of 2013.⁴¹⁰ This was not completed, so the new strategy, 'National Strategy on Equality and Non-discrimination (2016-2020)' (see section 9, below), also set the same goal, this time for realisation in the period 2016-2020.⁴¹¹

In 2014 and 2015, with OSCE support, the CPAD conducted an in-depth assessment of the harmonisation of the Anti-Discrimination Law with international equality and non-discrimination standards, and of other laws/provisions pertaining to equality and non-discrimination with the Anti-Discrimination Law and with international standards. The study identifies points for harmonisation, contains concrete proposals for amendments of legislative provisions from a range of laws, but also draws some general conclusions, including a need for urgent harmonisation of the Anti-Discrimination Law with international standards followed by harmonisation of other laws with the Anti-Discrimination Law, as well as reviews of the terminology on disability, criteria for access to public service and the position of LGBTIQ persons. The study also identifies a need for gender mainstreaming, equalisation of married and unmarried couples and a change in policy-making processes which will, in principle, result in the consideration of equality and non-discrimination when adopting laws and policies, including scrutinising them for possible indirect effects.⁴¹²

⁴⁰⁸ The former Yugoslav Republic of Macedonia, Law on Obligations (*Закон за облигациони односи*), 2001, Article 95, paragraph 1. Full title: The former Yugoslav Republic of Macedonia, Law on Obligations (*Закон за облигациони односи*), Official Gazette of the Republic of Macedonia No. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009, 116/2009, 123/2013.

⁴⁰⁹ The former Yugoslav Republic of Macedonia, Law on Courts, 2006.

⁴¹⁰ Ministry of Labour and Social Policy (2013), *Action Plan - 2013 for implementation of the National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender for 2012-2015*, p.5. www.mtsp.gov.mk/WBStorage/Files/akciski_1_eng.doc.

⁴¹¹ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)*, http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

⁴¹² Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

9 COORDINATION AT NATIONAL LEVEL

The MLSP is tasked with coordinating issues on anti-discrimination on the grounds covered in this report, as well as on other grounds mentioned in national legislation.⁴¹³ There is a department for equal opportunities, as well as a deputy-minister tasked with non-discrimination issues.⁴¹⁴ Aside from this ministry, several other sections from the executive Government also have duties that touch upon anti-discrimination on the grounds covered in this report. The inter-ministerial body on human rights, based in the Ministry of Foreign Affairs, is tasked with, *inter alia*, strengthening coordination of all activities of the ministries and other bodies of the Government with competences in human rights. One of the ministers without portfolio is tasked with coordination of all Government activities pertaining to Roma (until 2015, the Decade of Roma Inclusion 2005-2015, and after that, the Strategy on Roma). There are also coordinating bodies tasked with monitoring the implementation of strategic documents related in part to the discrimination grounds that are the subject of this report, notably the ones on disability and age.

A new strategy, 'National Strategy on Equality and Non-discrimination (2016-2020)', was adopted in 2016.⁴¹⁵ It has the same general goals as its predecessor, the 2012-2015 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender',⁴¹⁶ which are: advancing the legal framework for equality and non-discrimination; strengthening the capacities and advancing the work and cooperation of the institutional mechanisms for the prevention and protection against discrimination and promotion of equal treatment; raising awareness in recognising forms of discrimination; and promoting the concepts of non-discrimination and equal opportunities. The introduction of the strategy states that it was prepared on the basis of an evaluation of the implementation of the previous strategy which, according to the text, found that the strategy had had a positive role in the development of discrimination policy in the country.⁴¹⁷ This evaluation has not been published.

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

'Effective protection against discrimination and respect for the principle of equal opportunities and prohibition of discrimination on any person and/or groups of persons, on grounds of their personal characteristics, and especially of the vulnerable groups (ethnic communities, women, LGBTI persons, persons with mental and physical disability, elderly, children, refugees, persons with lower social status, internally displaced persons, and other vulnerable groups, members of religious communities and every person who has been treated differently without objective justification and a legitimate aim).'⁴¹⁸

⁴¹³ Ministry of Labour and Social Policy: www.mtsp.gov.mk/?ItemID=21E7AB9648BFC441AFD588BA0183B4A3.

⁴¹⁴ Ministry of Labour and Social Policy: www.mtsp.gov.mk/?ItemID=380B6B1D444D5047B575F402122ED94A.

⁴¹⁵ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

⁴¹⁶ Ministry of Labour and Social Policy (2012), *National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability, and Gender 2012-2015* (Национална стратегија за еднаквост и недискриминација по основ на етничка припадност, возраст, ментална и телесна попреченост и пол 2012-2015), www.mtsp.gov.mk/WBStorage/Files/strategija_ednakvost.doc.

⁴¹⁷ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

⁴¹⁸ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)*.

10 CURRENT BEST PRACTICES

Two practices reported in the last report are worth repeating in this one too. The continuous publication of the 'Info-sheet on Discrimination' (*Информатор за дискриминација*), a monthly info-sheet published since March 2016 by the OSCE Mission to Skopje and the Macedonian Helsinki Committee, is an excellent and much-needed resource that has reinvigorated the climate for working on equality and non-discrimination issues in the country. It provides fresh information on various issues in relation to discrimination, contains information on pending cases, new cases, grounds and fields of discrimination, as well as examples from court practice and new resources on equality and non-discrimination. Although the information is brief and not conclusive, it provides a basic overview of what is happening before the courts, which was previously missing.⁴¹⁹ This cooperation between an NGO and an IGO, running for almost two years now, has produced something that, if published on a long-term basis, can be of invaluable assistance for everyone working on equality and non-discrimination issues.

As in the previous years, the implementation of the principle of equitable and just representation of all ethnicities in the public administration (see section 5 above) remains a good practice worthy of highlighting. Even with the issue of problematic implementation of the OFA quotas,⁴²⁰ discussed in section 5(b), which signal obvious political abuse, the OFA quotas have diversified the public administration and pushed for more education and training opportunities for people from all ethnicities. Thus, they have been a predominantly positive development and remain a positive step towards equality for all in the country. According to the annual reports of the Ombudsperson, the number of people from the minorities who are employed in the administration is constantly rising. The European Policy Institute – a think-tank based in Skopje – agrees with the Ombudsperson's finding. In a study of the integration of ethnic communities in public administration related to the implementation of the OFA, it found that the biggest achievement of the equitable representation principle is the numerical increase of the non-majority employees in the public administration. However, it notes two potential obstacles: the overwhelming 'politicisation' of the administration, and the perception among public servants⁴²¹ of a monopolisation of the process by the two biggest ethnic communities, thus leaving out the so-called 'smaller ethnic communities' from the process.⁴²² This was also the conclusion reached on earlier occasions by the state body responsible for monitoring the rights of the smaller ethnic communities – the Agency for the Realization of the Rights of Communities – in its 2015 shadow report on the rights of the smaller communities,⁴²³ as well as by earlier studies.⁴²⁴

⁴¹⁹ One such info-sheet can be accessed on the following link (all other issues are on the www.mhc.org.mk website): Helsinki Committee of the Republic of Macedonia (2016), 'Info-sheet on Discrimination' (*Информатор за дискриминација* (May 2016), http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1587/DISCRIMINATION_III_2_.pdf.

⁴²⁰ Telma TV (2018), '784 000 euros for the OFA employments' (*784 000 евра за рамковните вработувања*), 8 March 2018, <http://telma.com.mk/784-000-evra-mesechno-za-ramkovnite-vrabotuvana/>.

⁴²¹ European Policy Institute – Skopje (2016), *Equitable representation: perceptions*, available at: http://epi.org.mk/docs/infographic_en.pdf.

⁴²² Ristevska – Jordanova, M. et al (2016), *Life and Numbers: Equitable Ethnic Representation and Integration in the Workplace* (Skopje: European Policy Institute – Skopje, 2016). Available at: http://epi.org.mk/docs/Life%20and%20numbers_ENG_Final%20version.pdf.

⁴²³ Kacarska, S. (2015), *Shadow Report on the Realisation of the Rights of the Smaller Communities Pursuant to the Framework Convention on Protection of National Minorities by the Associations Participating in the Participatory Forum* (Извештај во сенка за остварување на правата на помалобројните заедниците согласно Рамковната конвенција за заштита на националните малцинства од здруженијата на заедниците кои учествуваат во Партиципативниот форум), Agencija za ostvaruvanje na pravata na zaednicite, 2015, Available at: http://aopz.gov.mk/wp-content/uploads/2016/01/Izvestaj_vo_senka_Participativen_forum_Nov2015.pdf.

⁴²⁴ See, for example: Kotevska, B. (2011), *Effective Political Participation of Small(er) Ethnic Communities in Local Self-Government in Macedonia: Impact of the Ohrid Framework Agreement. Background Study* (Skopje: Centre for Regional Policy Research and Cooperation 'Studiorum', 2011).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

In 2017, the Parliament was largely not in session.⁴²⁵ As can also be noted from the text of the report, the number of changes to relevant laws adopted in 2017 was very low. Thus, the situation remains unchanged to the previous year and the national anti-discrimination legislation remains in breach of the directives in several areas outlined below. Please note that, if adopted, the 2017 draft-ADL will rectify some of these points (these changes are flagged below).

Breaches of the text and the spirit of the directives are as follows:

- In general:
 - o The Constitution and the laws are not consistent in the terminology that they use on discrimination and grounds of discrimination, thus generating legal uncertainty.
 - o The Constitution and the laws prescribe various different procedures (it could be said that this allows forum shopping to take place) and rather vague sanctions.
 - o Insensitive terms in relation to disability continue to exist under law,⁴²⁶ in clear violation of the spirit of the directives and of the spirit of the CRPD.
 - o The continued absence of sexual orientation from the scope of state protection and state public policy making.
 - Note: the 2017 draft-ADL includes sexual orientation as an explicitly protected ground (Article 5).
- The Constitution:
 - o The principle of equality is stated only for citizens of the country.
 - o It contains a closed list of grounds for protection against discrimination, and disability, age and sexual orientation are not part of this list. Belief is part of this provision, however only political and religious belief.⁴²⁷
 - o Terminology used in the Constitution for people with disabilities cannot be considered as in compliance with the spirit of the directives, nor with the ratified CRPD.
- Anti-Discrimination Law:

Essential weaknesses:

 - o The object of the law is not precisely defined. This resulted in the adoption of an Anti-Discrimination Law that does not aim to contribute to the upholding of the principle of equality, which lies at the heart of the directives.
 - Note: the 2017 draft-ADL prescribes an object in line with this (Article 2).
 - o The area of implementation of the law is not precisely defined.
 - o Although the act contains a list of grounds in an open-ended provision, it does not explicitly include all standard EU grounds of discrimination. Namely, sexual orientation is not listed as a protected ground in this law.⁴²⁸

⁴²⁵ Due to the political crisis – see section 11.2.

⁴²⁶ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

⁴²⁷ Out of the other grounds protected on EU level, gender is also not part of this provision, although sex is.

⁴²⁸ However, the practice of the CPAD shows that it does consider sexual orientation as a protected ground, as it has processed several cases pertaining to this ground, using the open-ended character of this provision. In addition, in December 2015, as a result of a project implemented by CPAD together with H.E.R.A. (a civil society organisation), the CPAD adopted a protocol for handling discrimination cases on grounds of sexual orientation and gender identity. The biggest achievement of this action is probably not the protocol itself, as

- Note: the 2017 draft-ADL includes sexual orientation as an explicitly protected ground (Article 5).
- According to the directives, persons who consider themselves wronged because the principle of equal treatment has not been applied to them need only establish facts from which it may be presumed that there has been discrimination. The Anti-Discrimination Law places a huge part of the burden in proving discrimination on the complainant, asking for submission of '*facts and proofs*' from which the act or action of discrimination can be *established*',⁴²⁹ unlike the directives, which set a requirement for *facts* from which the discrimination may be *presumed* (emphasis added). This means that although the law claims that it is not for the complainant to prove the facts but for the respondent, we cannot say that it provides for a reversed burden of proof, as per the directives, because, as a step towards proving the facts, a burden is placed on the complainant by asking for proof aside from laying out of all the known facts in relation to the case and leaving the respondent to show these facts to be non-existent (i.e. it makes a step from *onus proferendi* to *onus probandi*).
 - Note: the 2017 draft-ADL prescribes that only facts will be needed to shift the burden of proof (Articles 26 and 37).
- Unlike the EU directives, which state that 'Member States shall encourage dialogue with non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds foreseen in the Directives, with a view to promoting the principle of equal treatment', the national legislation does not mention cooperation with NGOs.
 - Note: the 2017 draft-ADL includes this under the competences of the CPAD (Article 21(12)).
- The forms of discrimination as well as their definitions are not fully harmonised with European ones. The definition of direct discrimination is unnecessarily complicated.
 - Note: the 2017 draft-ADL contains definitions mirroring those of the directives, including by replicating the definition of direct discrimination (Article 6).
- The law contains a wide, imprecise list of exceptions from discrimination. Such a list opens space for legal uncertainty. Moreover, some of these exceptions can be considered to be in breach of the EU directives. For example, it will not constitute discrimination if members of duly registered religions (this also applies to NGOs, political parties, trade unions and other organisations) act in accordance with their belief (Article 14(5)). This would mean that this excuses these members even if, in doing so, they are discriminating on the grounds mentioned in Article 3 of the Anti-Discrimination Law.
 - Note: the 2017 draft-ADL does not include the problematic lists of exceptions contained in the current law as Articles 14 and 15. It contains in Article 13 (affirmative action) and Article 12 a general exception, which includes the genuine occupational requirement, different treatment of

it largely reiterates rules of procedure already established under other (legal and internal) acts, but is instead the annex to the protocol, which is an amended form for filing a complaint to the CPAD. The form that CPAD had used previously included a special section where all protected grounds from Article 3 of the ADL were numbered and the claimant had to circle one of them. This section did not contain sexual orientation and gender identity, whereas in the amended form, an additional option is included where the claimant can circle 'sexual orientation and gender identity'. Although somewhat symbolic, it is reasonable to expect that it will encourage people who want to claim discrimination on such grounds. Moreover, it shows an effort by the current equality body members to leave some legacy for their successors. For more on this, please see: <http://www.equalitylaw.eu/downloads/2963-equality-body-and-civil-society-organizations-join-to-make-sure-that-sexual-orientation-and-gender-identity-is-regarded-as-a-protected-ground-in-macedonia-pdf-86-kb> and the text of the protocol (in Macedonian): <http://hera.org.mk/wp-content/uploads/2015/11/Protokol-Zastita-od-diskriminacija-MK.pdf>.

⁴²⁹ The former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, 2010, Articles 25(2) and 38.

- citizens to others, and the problematic exception of 'different treatment under provisions in other laws'. These were discussed in the report above.
- The mechanism for protection provided in the law is not precisely defined. Selection of members of the equality body is prone to political influence. Moreover, the competence of the members cannot be secured, as the law does not strictly require them to have education and practice related to 'human rights' but to social sciences in general. The implementation so far clearly shows the realisation of these worries in practice with the appointment of both the first and the second composition of the equality body.⁴³⁰ Also, although the CPAD is financed under the state budget, the allocated amount is not enough for this body to exercise its full mandate, thus bringing its effectiveness under question.
 - Note: the 2017 draft-ADL will set a requirement for specific experience in human rights matters for seven years out of which five have to be in equality and non-discrimination matters (Article 17(3)). It also sets out that the CPAD will submit its own budget proposal, which will be voted upon in Parliament separately from the overall state budget. The CPAD will be able to manage the allocated funds independently (Article 15).
 - The provisions on the sanctions provided in the law cannot be considered to be good grounds for making effective, dissuasive and proportionate sanctions.
 - Note: the 2017 draft-ADL raises the fines from EUR 70 - 1 000 to EUR 100 - 5 000 (Article 41-43).

Technical weaknesses:

- The law contains an article with definitions of terms used in the law that added to the terminological confusion that already existed before its adoption, instead of contributing to the resolution of such confusion. This list also contained terms not used in the law at all. Furthermore, legal terms and key concepts were unnecessarily redefined (for example the term 'family').
 - Note: the 2017 draft-ADL removes these definitions.
- The law did not provide for any transitional provisions, preparatory activities for commencement of the implementation of the law, or for any deadlines for initiation and completion of these activities.
 - Note: the 2017 draft-ADL contains some such provisions, albeit making part of the transition from the current CPAD composition to the new one slightly problematic. There is no *vacatio legis*, which, considering the changes in the law (such as in relation to the administrative service of the CPAD and the changes in relation to the court procedure), seems to be much needed.
- The law did not provide procedures for the unification of provisions, notably nulling or amending provisions in other laws that are not in line with this law as a *lex specialis*.
 - Note: the 2017 draft-ADL also does not prescribe an obligation of the Parliament to align other national laws with this law. This is quite worrying considering that the text includes within the general exception, under Article 12(2-3), that the difference in treatment under provisions in others laws is not to be considered as discriminatory.

Ex-post evaluation of the implementation of the law:

- In 2013, the Ministry of Labour and Social Policy (MLSP) conducted an ex-post evaluation of the implementation of the Anti-Discrimination Law, evaluating the process and the results from the implementation of this law, focusing on the

⁴³⁰ On the first composition see Non-Discrimination Country Report for 2013, <http://www.equalitylaw.eu/downloads/4174-fyr-macedonia-country-report-non-discrimination-2013-1-11-mb%20>, p. 86 and on the second, see flash report 'Appointment of new members of the equality body' (26.02.2016), <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

prevention of discrimination and protection against discrimination. The results show that the aims of the law were only partly reached, which, according to the evaluation report, is justified given the amount of state-budget funds allocated for the law's implementation. Although noting numerous points where implementation can be improved, the report explicitly spelled out only three recommendations for legislative changes for improving the implementation: amending the Anti-Discrimination Law to allow for the establishment of administrative support for the CPAD; explicit prescription of the 'shift of burden of proof' for the CPAD; and enhancing the CPAD accountability mechanisms.

- Other laws:

- Other laws are not fully in line with the Anti-Discrimination Law, nor with the directives (in their terminology, listing protected grounds, definitions of direct discrimination, omitting victimisation, social dialogue, etc.). The harmonisation of the legal framework with the ADL has been identified as a general strategic goal of both the 'National Strategy on Equal Opportunities and Non-Discrimination on Grounds of Ethnicity, Age, Mental and Physical Disability 2012-2015' and of its successor, the 'National Strategy on Equality and Non-discrimination (2016-2020)'.⁴³¹ Under the flagship of the OSCE and the CPAD, an analysis of the harmonisation of the national equality and non-discrimination legislation against international standards and of the harmonisation at the national level with the comprehensive Anti-Discrimination Law was conducted in 2015, which identifies many issues individually singled out in the relevant sections of the report – see above.⁴³²
- An exception to this would be the Law on Labour Relations, which needs very few amendments to be in line with the directives. These necessary steps would be to amend the definition of harassment, which is not completely in accordance with the directives,⁴³³ to add provisions on instruction to discriminate, as well as clarifying the potential for positive actions and reasonable accommodation for people with disability.⁴³⁴

11.2 Other issues of concern

The last European Commission's progress report assesses the situation in the country as a 'state capture'.⁴³⁵ This, of course, ties into a backsliding in terms of fulfilment of political criteria for membership, especially with regards to independence of the judiciary already reported in several successive years. The same trend also applies to advancing the protection of human rights in general, and equality and non-discrimination more specifically. Retrogression of protection of rights in law and in practice continued. In times of general failure of the system to administer justice, vast politisation of society and partisanship of state institutions, the problems are very general and very serious. These also

⁴³¹ Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf.

⁴³² Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

⁴³³ The Law on Labour Relations definition refers to establishing behaviour, instead of creating an offensive environment. Source: The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005.

⁴³⁴ The former Yugoslav Republic of Macedonia, Law on Labour Relations, 2005, Article 9.

⁴³⁵ The concept of 'state capture' is mentioned here in terms of the understanding by Transparency International, that is: 'a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests'. This is also how the European Commission has used it in its report on the country's progress. Please note that at the time of writing of this report the new progress report is still not out.

affect the practical implementation of the national legislation. This was confirmed by the 2015 recommendations of the special EC Rule of Law mission led by Priebe.⁴³⁶

Specifically, the country entered a period of unrest at the end of 2014, with massive protests by university and high-school students, honoraria workers, independent trade unions, workers fired in the transition and transformation processes, etc. The unrest increased in February 2015 with the wire-tapping affair which revealed an even more serious domestic situation. The largest opposition party started to publicly release what are allegedly recordings from the illicit interception of communications of more than 20,000 people that are alleged to have been carried out by the state Counterintelligence Agency.⁴³⁷ The content of the published recordings removed doubts about the already existing claims of a state capture and extreme concentration of power in the ruling party, including the complete exercise of party control not only over the judiciary, but over *all* aspects of society including in relation to equality and non-discrimination.⁴³⁸ Soon after, the Ombudsperson opened two cases in relation to the wire-tapping affair, as gross and large-scale violations of the right to private and family life were observed, and faced lack of response from other state institutions.⁴³⁹ On 5 May 2015, recordings related to the murder of Martin Neshkovski⁴⁴⁰ caused spontaneous massive protests in a matter of hours from the broadcasting of the conversation which, although peaceful, were broken up by a violent and over-proportionate reaction by the police who made arrests of protesters that night.⁴⁴¹ That day proved to be crucial in building and keeping a momentum for the protests, which culminated in the Pržino Agreement under which a Special Public Prosecutor's Office was established to prosecute crimes arising from the wiretapped conversations. However, in April 2016, as the first criminal charges reached the courts, the President of the country (who was elected as a candidate on the ruling party ticket) gave amnesty to more than 50 politicians, including the highest people in the ruling party and all for several criminal

⁴³⁶ European Commission (08 June 2015), 'The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015', https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

⁴³⁷ Balkan Insight, (2015), 'Macedonia PM Accused of Large-Scale Wire-Tapping' (09.02.2015), Balkan Insight Website, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

⁴³⁸ One of the publicly broadcasted conversations features what seems to be the voice of the (then) president of the equality body, Dushko Minovski; the recording suggests he was working for the ruling party on the ground during the election campaign and to be (ab)using his position in the Ministry of Labour and Social Policy by instructing people who have been awarded social assistance what party to vote for. In addition to this, what seems to be the voice of the then Minister of Interior Gordana Jankulovska was featured in a conversation that clearly shows the pressure the Roma community has been under to go out on election day and vote as instructed. Following the release of this recording, Roma organisations protested against the Government, demanding Jankulovska's resignation (which came on 12.05.2015), after which she published what was intended to be an apology to the Roma community. However, the letter was a mere reiteration of all actions undertaken in the country to improve the position of Roma, rather than an apology (the letter is not available anymore online). Sources: A1On online media portal, 'SDSM: Jankulovska says "By the ears, Gypsy by Gypsy, we'll drag them"' (*СДСМ: Јанкуловска вели – За уши, циган по циган ќе вадиме*) <http://a1on.mk/wordpress/archives/465799>. Please note that in the national context 'Gipsy' (*Циган*) is a derogatory word for Roma; 24 Vesti - National TV Broadcaster, 'Roma request resignation from the Minister Jankulovska' (Ромите бараат оставка од министерката Јанкуловска), <http://24vesti.mk/romite-baraat-ostavka-od-ministerkata-jankulovska>.

⁴³⁹ Ombudsperson of the Republic of Macedonia (2016), *Annual Report of the Ombudsperson for 2015*. The annual report for 2016 is still not available at the time of writing of this report.

⁴⁴⁰ Martin Neshkovski was a young man in his twenties, a supporter of the ruling party who attended the victory rally of the ruling party on the night of another electoral victory for the ruling party - June 06, 2011. Rumours of murder on the main square spread on social media the same night, but the day after, the MoI spokesperson denied Neshkovski's murder until the public voices got so loud that they could not keep it a secret anymore (which was over 24 hours after the murder). It was clear back then that there was an attempt to conceal the death, causing protests of size and duration unseen in the country in over a decade. Four years later the wiretapped conversation were taken as a proof that the protestors were right that the MoI wanted to hide the murder and that the Minister should for that reason resign. It revealed what seem to be the voices of the then minister Jankulovska, the former Prime Minister Nikola Gruveski and the spokesperson, all discussing how to hide the murder.

⁴⁴¹ Reuters, 'Macedonian protesters demand resignation of cabinet, clash with police' <http://www.reuters.com/article/us-macedonia-government-protests-idUSKBN0N02BH20150505>.

charges. This was followed by massive protests that grew into the 'colourful revolution' (*Шарена револуција*),⁴⁴² leading to further agreements among the political parties and elections held in December 2016. The small difference in votes, resulting in a hung Parliament, further continued the political crisis as no Government could be formed for a few months. The situation escalated in April 2017, during the voting for a new President of the Parliament. When Talat Xhaferi from the DUI (coalition partner of the VMRO-DPMNE in the previous governments) was appointed President, the citizens who had gathered in front of the Parliament in protest stormed into the Parliament building after what seems to have been deliberate opening of the doors by VMRO-DPMNE MPs.⁴⁴³ Physical violence escalated with many MPs suffering serious physical injuries.⁴⁴⁴ One month after this violent event a new Government was formed by social democrats SDSM, marking the end of close to 11 years of continuous rule by the VMRO-DPMNE. Local elections took place in the second half of 2017, thus making the year quite uneventful in terms of legal changes and overall developments of interest for this report.

As noted above, the study on harmonisation of the national equality and non-discrimination legislation called for urgent revision of the Anti-Discrimination Law.⁴⁴⁵ The CPAD continued to receive training and support from the OSCE - Mission to Skopje and to be included in projects coordinated and led by CSOs. However, with the appointment of the new composition⁴⁴⁶ the cooperation with NGOs has severely dropped, while the OSCE – the biggest partner of the CPAD – has already announced its phasing out strategy from the CPAD (the reasons as to why have not been reported).⁴⁴⁷ The problem of not having administrative support for its work is on-going, despite the announcement of a Government decision to resolve this issue being made two years ago.

The problem of misrepresentation and misunderstanding of the notion and scope of grounds remains, the main ones being:

- Disability is still a cause for stigma. Policies regarding accommodation and positive actions for people with disability are formally adopted, but are not implemented. However, a positive move in this direction was the ratification of the Convention on Rights of People with Disability and its accompanying Optional Protocol. Multiple provisions using insensitive terminology still persist in laws, as already mentioned several times above.
- Sexual orientation continues to be stigmatised, or, 'at best', ignored. The multitude of problems facing LGBTIQ persons have been identified in the first baseline study by Andonovski et al published in 2016, and include discrimination.⁴⁴⁸ Hate speech is still vastly tolerated. Debates around the Anti-Discrimination Law were filled with hate

⁴⁴² Deutsche Welle, 'Protesters hit Macedonia's capital with paint balls and soap suds in a "Colorful Revolution"', <http://www.dw.com/en/protesters-hit-macedonias-capital-with-paint-balls-and-soap-suds-in-a-colorful-revolution/a-19201617>.

⁴⁴³ Security camera footages were released to the public on which one can clearly see the MPs opening the doors and greeting the crowd that stormed in.

⁴⁴⁴ Nova TV (2017), 'Half a year after the bloody Thursday only one prison sentence' (Пола година по крвавиот четврток само една затворска казна), <http://novatv.mk/pola-godina-po-krvaviot-chetvrtok-samo-edna-zatvorska-kazna/>.

⁴⁴⁵ Kotevska, B. (2016), *Analysis of the harmonization of national equality and non-discrimination legislation*, Skopje, OSCE and CPAD.

⁴⁴⁶ On issues in relation to the second composition, see: <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equality-body-pdf-123-kb>.

⁴⁴⁷ CPAD annual report

⁴⁴⁸ Full name of the original study (not available online at the time of writing): Andonovski, K. et al (2016), *Analysis of the problems and needs of LGBT persons in Republic of Macedonia in the area of social protection, legal services and police conduct* (Анализа проблемите и потребите на ЛГБТИ луѓето во Република Македонија во областа на социјалната заштита, правните услуги и полициското постапување), LGBT Centre and МНК. Source: Flash report, 'Study on Problems and Needs of LGBTI Persons in the Fields of Social Protection, Legal Services and Police Conduct' (15 March 2016) <http://www.equalitylaw.eu/downloads/3754-macedonia-study-on-problems-and-needs-of-lgbti-persons-in-the-fields-of-social-protection-legal-services-and-police-conduct-pdf-82-kb>.

speech directed towards homosexuals and to people who publicly advocated for and supported inserting sexual orientation as a protected ground. However, the second half of 2017 brought some positive changes in this respect. As noted elsewhere in this report, after the new Government was formed in 2017, the Minister of Culture opened the Pride weekend that had been organised by a group of NGOs, while the Prime Minister gave a key speech and opened a celebration of the fifth birthday of the LGBT centre – the NGO whose offices were repeatedly attacked in the previous years and for which no one has yet been prosecuted.⁴⁴⁹ On both occasions, the new Government showed both symbolically and declaratively that it plans to support equality for all, regardless of sexual orientation and gender identity.

⁴⁴⁹ On the attacks and failure of the state to investigate, see flash report: 'Absence of Reaction to Series of Attacks on the LGBTI Support Centre' (2013) <https://www.equalitylaw.eu/downloads/2177-mk-29-lgbti-centre-attacks-no-reactions>.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

As noted above, 2017 was a very uneventful year in terms of legislative changes. Due to the political turmoil and the local elections, the law-making activities of the Parliament were low. Thus, there has been no big legislative change in 2017. There is, however, a big promise of a legislative change, which is the 2017 draft-ADL. As can be seen from the notes throughout this report on the draft text, if the 2017 draft-ADL is adopted it will bring the letter of the national law further in line with the directives.

12.2 Case law

Name of the body: Commission for Protection against Discrimination

Date of decision: 19.05.2017

Name of the parties: *Helsinki Committee vs Hotel Glam*

Reference number: Not available

Address of the webpage: <http://mhc.org.mk/announcements/594#.WrgmULaZPox>

Brief summary: In March 2017, a hotel in Skopje published a vacancy advertisement, stating that the hotel was looking for a woman between 30 and 45 years of age for kitchen work – serving breakfast. The Helsinki Committee filed a claim to the CPAD, alleging multiple discrimination. CPAD agreed and found that there was direct multiple discrimination in access to employment on grounds of sex, as well as discrimination against women younger than 30 and older than 45 years of age. The CPAD did not ask the hotel to reply as it found that the text of the advert was sufficient fact and proof of discrimination and, because of the nature of the advertised working position, the discriminatory action could not be subject to any of the exceptions from discrimination, that is, it could not be justified. The CPAD requested that the hotel withdraw the original advert and re-publish it without the discriminatory criteria.

Roma cases trends in 2017

There are no differences in the trend in relation to Roma cases in 2017. It remains as until now: (1) segregation in education, (2) breach of the freedom of movement, (3) breach of the human right to housing, coupled in places with a breach of the right to safe and drinkable water, (4) obstacles to access to goods and services.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

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

Country: Former Yugoslav Republic of Macedonia
Date: 1 January 2018

Title of legislation (including amending legislation)	<p>Title of the Law: Law on Prevention and Protection against Discrimination Abbreviation: Anti-Discrimination Law Date of adoption: 08.04.2010 Latest amendments: 22.02.2016 Entry into force: 21.04.2010 Weblink: www.slvesnik.com.mk/Issues/1654343CD9A0E24998781907DC19A99F.pdf Grounds covered: Sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, 'mental or physical disability', age, family or marital status, property, health condition, or any other ground or stipulated by law or ratified national treaty.</p>
	Civil law
	<p>Material scope: All areas (draws specific attention to: public employment, private employment, access to goods and services, social protection, education).</p>
	<p>Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate, reasonable accommodation, creation of a specialised body.</p>
Title of legislation (including amending legislation)	<p>Title of the Law: Law on Labour Relations Abbreviation: Labour Law Date of adoption: 28.07.2005 Entry into force: 05.08.2005 Latest amendments: 15.02.2016 Weblink: www.slvesnik.com.mk/Issues/ABCBBB808C582943B4A3287BD0629357.pdf Grounds covered: Race, colour, sex, age, health condition, disability, religious, political or other belief, membership of trade union, national or social origin, position of the family, property, sexual orientation or other personal issue.</p>
	Civil law
	Material scope:

	Public employment, private employment.
	Principal content: Regulation of labour relations. Of relevance here: prohibition of direct and indirect discrimination, harassment.
Title of legislation (including amending legislation)	<p>Title of the law: Law on Social Protection</p> <p>Abbreviation: LSP</p> <p>Date of adoption: 24.06.2009</p> <p>Entry into force: 02.07.2009</p> <p>Latest amendments: 14.11.2017</p> <p>Weblink: Text of the law (2009), as in Official Gazette: www.slvesnik.com.mk/Issues/7CEA639634D1054DB351E7FB985665DC.pdf</p> <p>Grounds covered: Sex, race, colour, nationality, ethnicity, social status, political, religious, cultural, language, property and social background, disability and origin.</p> <p>Civil law</p> <p>Material scope: Social protection, social advantages.</p> <p>Principal content: Social protection. Of relevance here: prohibition of direct and indirect discrimination.</p>
Title of legislation (including amending legislation)	<p>Title of the law: Law on Employment of Persons with disability</p> <p>Abbreviation: LEPD</p> <p>Date of adoption: 02.06.2000</p> <p>Latest amendments: 15.02.2016</p> <p>Entry into force: 10.06.2000</p> <p>Weblink: www.slvesnik.com.mk/Issues/CE827065C11B4A1ABA5546F974EFDA94.pdf</p> <p>Grounds covered: Disability</p> <p>Civil law</p> <p>Material scope: Public employment, private employment</p> <p>Principal content: Employment of persons with disability, including shelter companies.</p>

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**Country: Former Yugoslav Republic of Macedonia****Date: 1 January 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- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	09.11.1995	10.04.1997	No	Yes	Yes
Protocol 12, ECHR	04.11.2000	13.07.2004	No	Yes	Yes
Revised European Social Charter	27.05.2009	21.10.2011	No	No	Yes
International Covenant on Civil and Political Rights	(succession) ⁴⁵⁰	18.01.1994	No	Yes	Yes
Framework Convention for the Protection of National Minorities	25.07.1996	10.04.1997	No	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	(succession)	18.01.1994	No	Yes	Yes
Convention on the Elimination of All Forms of Racial	(succession)	18.01.1994	No	Yes	Yes

⁴⁵⁰ Under the Constitutional Law adopted for implementing the Constitution of the Republic of Macedonia, as one of the republics to succeed from the Socialist Federative Republic of Yugoslavia (SFRY), the country assumes all obligations from SFRY membership in international organisations and with other countries, as provided by common principles of international law. This Law also calls upon the Vienna conventions for succession (1978 and 1982) for guidance on regulating the succession. Source: Constitutional Law adopted for implementing the Constitution of the Republic of Macedonia (*Уставен закон за спроведување на Уставот на Република Македонија*), Official Gazette of the Republic of Macedonia No.52/91.

Instrument	Date of signature (if not signed please indicate) Dd/mm/ yyyy	Date of ratification (if not ratified please indicate) Dd/mm / yyyy	Derogations / reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Discrimination					
Convention on the Elimination of Discrimination Against Women	(succession)	18.01.1994	No	Yes	Yes
ILO Convention No. 111 on Discrimination	n/a	17.11.1991	No	Yes	Yes
Convention on the Rights of the Child	(succession)	02.12.1993	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	14.12.2011	No	Yes	Yes

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