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Country report

Non-discrimination

Serbia

2018

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EUROPEAN COMMISSION

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

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Serbia

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Reporting period 1 January 2017 – 31 December 2017

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Luxembourg: Publications Office of the European Union, 2018

PDF ISBN 978-92-79-85257-2

doi: 10.2838/390312

DS-02-18-590-3A-N

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CONTENTS

EXECUTIVE SUMMARY	5
RÉSUMÉ	12
ZUSAMMENFASSUNG	21
INTRODUCTION	29
1 GENERAL LEGAL FRAMEWORK	33
2 THE DEFINITION OF DISCRIMINATION	34
2.1 Grounds of unlawful discrimination explicitly covered	34
2.1.1 Definition of the grounds of unlawful discrimination within the directives	35
2.1.2 Multiple discrimination	37
2.1.3 Assumed and associated discrimination	38
2.2 Direct discrimination (Article 2(2)(a))	39
2.2.1 Situation testing	40
2.3 Indirect discrimination (Article 2(2)(b))	41
2.3.1 Statistical evidence	41
2.4 Harassment (Article 2(3))	42
2.5 Instructions to discriminate (Article 2(4))	44
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	45
3 PERSONAL AND MATERIAL SCOPE	51
3.1 Personal scope	51
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)	51
3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)	51
3.1.3 Private and public sector including public bodies (Article 3(1))	51
3.2 Material scope	52
3.2.1 Employment, self-employment and occupation	52
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))	53
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	54
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))	54
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))	55
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	55
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	56
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	57
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)	61
3.2.10 Housing (Article 3(1)(h) Directive 2000/43)	63
4 EXCEPTIONS	66
4.1 Genuine and determining occupational requirements (Article 4)	66
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	66
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	68
4.4 Nationality discrimination (Article 3(2))	68
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	70

4.6	Health and safety (Article 7(2) Directive 2000/78)	71
4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	71
4.7.1	Direct discrimination	71
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	72
4.7.3	Minimum and maximum age requirements	73
4.7.4	Retirement	73
4.7.5	Redundancy	75
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)	75
4.9	Any other exceptions	76
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	77
6	REMEDIES AND ENFORCEMENT	80
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	80
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	86
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	88
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	89
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	89
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	92
8	IMPLEMENTATION ISSUES	98
8.1	Dissemination of information, dialogue with NGOs and between social partners	98
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	99
9	COORDINATION AT NATIONAL LEVEL	101
10	CURRENT BEST PRACTICES	102
11	SENSITIVE OR CONTROVERSIAL ISSUES	104
11.1	Potential breaches of the directives (if any)	104
11.2	Other issues of concern	105
12	LATEST DEVELOPMENTS IN 2017	107
12.1	Legislative amendments	107
12.2	Case law	108
	ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION...	110
	ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS	113

EXECUTIVE SUMMARY

1. Introduction

The Republic of Serbia is a constitutional, multi-party, parliamentary democracy. The multi-party National Assembly of the Republic of Serbia (NARS) was established in 1991. The 11th legislature commenced its work on 3 June 2016 and is notable for the fact that the leading party has a majority in the Parliament, which shapes and influences current parliamentary work in Serbia.

According to the census in 2011, the Republic of Serbia has 7 565 761 inhabitants. Serbs comprise 83.32 % of the population, Hungarians 3.53 %, Roma 2.05 %, Bosniaks 2.02 %, Croatians 0.81 %, Slovaks 0.73 %, Montenegrins 0.54 %, Vlachs 0.49 %, Romanians 0.41 %, Yugoslavs 0.32 %, Macedonians 0.32 %, Muslims 0.31 %, ¹ Bulgarians 0.26 %, Bunjevci 0.23 %, Rusyns 0.20 %, Gorani 0.11 %, Albanians 0.08 %, Ukrainians 0.07 %, Germans 0.06 %, Slovenes 0.06 %, and Others 0.24 %. According to the last census from 2016, the majority of the population of Serbia is of the Christian Orthodox faith (85 %), followed by Roman Catholics (10.4 %), Muslims (3.3 %) and Protestants (0.92 %). Other religions are also present in Serbia.

2. Main legislation

The Constitution of Serbia,² adopted in 2006, contains a broad catalogue of human rights and proclaims equality and prohibits discrimination (Article 21, para. 3).

Serbia introduced a set of anti-discrimination legislation, which is almost aligned with the two EU directives from 2000.³

In April 2006, the first anti-discrimination law was adopted: the Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD),⁴ supplemented by the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD).⁵ Some laws have also been adopted to further support the LPDPD, such as the Law on the Use of Guide Dogs⁶ and the Law on the Use of Sign Language.⁷

Serbia adopted its first comprehensive anti-discrimination law in March 2009. The Law on the Prohibition of Discrimination (LPD)⁸ was an important milestone in securing basic human rights in Serbia through the establishment of systematic law on anti-discrimination. It prohibits a wide range of discriminatory actions. In addition, all the grounds of discrimination provided in EU equality law are covered in the LPD and are

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

² Serbia, Constitution of Serbia (*Ustav Republike Srbije*), *Official Gazette of the Republic of Serbia*, no. 98/2006, 10 November 2006.

³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180*, 19 July 2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303*, 2 December 2000.

⁴ Serbia, Law on the Prevention of Discrimination against Persons with Disabilities (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 33/2006, 13/2016, 17 April 2006.

⁵ Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 32/2013, 17 April 2006.

⁶ Serbia, Law on the Use of Guide Dogs (*Zakon o kretanju uz pomoć psa vodiča*), *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015.

⁷ Serbia, Law on the Use of Sign Language (*Zakon o upotrebi znakovnog jezika*), *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015.

⁸ Serbia, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of the Republic of Serbia*, no. 22/2009, 13/2016, 26 March 2009.

significantly expanded.⁹ However, the European Commission notes that further amendments to Serbian anti-discrimination law are necessary to bring the law fully in line with the *acquis*,¹⁰ especially in relation to the following: the definition of direct discrimination to also cover detriment; the definition of indirect discrimination to contain the conditional wording ('would') and not to be limited to the actual occurrence of disadvantage; to include instruction to discriminate; to also mention access to goods, and not only to services; and to include provision on reasonable accommodation for people with disabilities. This process was initiated in 2016, but had not been completed by the end of 2017.

The LPD also applies to discrimination against asylum seekers and migrants. The Law on Asylum applies to asylum seekers, refugees and persons who are granted temporary protection.¹¹ It guarantees, among other things, the right to education, accommodation, social security, healthcare and legal aid.

The Law on the Protection of the Rights and Freedoms of National Minorities¹² regulates the way in which the rights of people belonging to national minorities are implemented. It enables people belonging to national minorities to exercise their constitutional rights in a democratic political milieu, individually or in community with other members of their ethnic group. The Law defines national minorities as citizens who are numerically sufficiently representative and belong to a group of residents with a long-term and firm bond with the territory of a state and who 'possess characteristics such as language, culture, national or ethnic affiliation, origin or confession, differentiating them from the majority of the population and whose members are distinguished by efforts to collectively nurture their common identity, including their culture, tradition, language or religion'. This definition excludes migrants from its application.

Many other laws also contain anti-discrimination provisions, such as the Law on Young People,¹³ the Law on Sports,¹⁴ the Law on Churches and Religious Organisations,¹⁵ etc.

In 2017, a set of educational laws was adopted. The Law on the Fundamentals of the Education System¹⁶ prohibits discrimination in education and states that equality and accessibility of the right to education are based on social justice and equal opportunities without discrimination. The Law on Preschool Education,¹⁷ prohibits discrimination and prescribes that, under certain conditions, education may be provided in a national

⁹ The LPD contains an open clause and explicitly mentions the following grounds: race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations.

¹⁰ *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, May 2017 - English version; *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, November 2017 - English version; available at www.mei.gov.rs/eng/documents/eu-documents/non-paper-on-the-state-of-play-regarding-chapters-23-and-24-for-serbia/, last accessed on 15 March 2018.

¹¹ Serbia, Law on Asylum (*Zakon o azilu*), *Official Gazette of the Republic of Serbia*, no. 109/2007, 28 November 2007.

¹² Serbia, Law on the Protection of the Rights and Freedoms of National Minorities (*Zakon o zaštiti prava i sloboda nacionalnih manjina*), *Official Gazette of the Republic of FRY*, no. 11/2002, *Official Gazette of SM*, no. 1/2003, *Official Gazette of the Republic of Serbia*, 172/2009, 27 February 2003.

¹³ Serbia, Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

¹⁴ Serbia, Law on Sports (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 10/2016, 16 February 2016.

¹⁵ Serbia, Law on Churches and Religious Organisations (*Zakon o crkvama i verskim zajednicama*), *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

¹⁶ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 88/2017, 7 October 2017.

¹⁷ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 101/2017, 18 November 2017.

minority language. The Law on Amendments to the Law on Primary Education¹⁸ introduces a programme of protection from violence, abuse and neglect. The Law on Amendments to the Law on Secondary Education¹⁹ emphasises the importance of the prevention of discrimination and introduces affirmative measures, namely that members of certain groups can enrol in secondary education under more favourable conditions in order to achieve full equality in education.

In 2017, the Law on Electronic Document, Electronic Identification and Trust Services for Electronic Transactions²⁰ was adopted which, among other things, stipulates in Article 6 that trust services and electronic identification services must be equally accessible for people with disabilities.

The Law on Public Servants²¹ recognises affirmative measures for the employment of members of national minorities when, in order to achieve appropriate representation, priority is given to equally qualified candidates.

In addition, criminal law protection against discrimination is regulated by the Criminal Code²² which provides for several criminal offences in connection with the prohibition of discrimination: Article 128 (violation of equality), Article 129 (violation of the right to use a language or alphabet) and Article 387 (prohibition of racial and other discrimination). The Law on Misdemeanours²³ regulates the procedure and conditions and implementation of misdemeanour charges.

In 2016, the Strategy [for the Social Inclusion of Roma in the Republic of Serbia for the period 2016-2025](#) was adopted,²⁴ while in June 2017, the Action plan for the implementation of the Strategy was adopted for the period 2017-2018.

3. Main principles and definitions

The LPD recognises seven forms of discrimination: direct and indirect discrimination, violation of the principle of equal rights and obligations, the prevention of calling to account,²⁵ association for the purpose of discriminating, hate speech, harassment and humiliating treatment and severe forms of discrimination.

The definition of direct discrimination is almost in line with the definition given in the EU directives, but is limited to less favourable treatment and does not cover detriment. The definition of indirect discrimination doesn't contain the conditional wording ('would') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they incur disadvantages for actual victims. It also fails to use the wording 'an apparently neutral provision, criterion or practice' which plausibly explains this phenomenon. It is not clear why the violation of the principle of equal rights is recognised as a special form of discrimination, as it is

¹⁸ Serbia, Amendments to the Law on Primary Education (*Zakon izmenama Zakona o osnovnom obrazovanju i vaspitanju*), Official Gazette of the Republic of Serbia, no. 101/2017, 18 November 2017.

¹⁹ Serbia, Law on Amendments to the Law on Secondary Education (*Zakon o izmenama Zakona o srednjem obrazovanju i vaspitanju*), Official Gazette of the Republic of Serbia, no. 101/2017, 18 November 2017.

²⁰ Serbia, Law on Electronic Document, Electronic Identification and Trust Services for Electronic Transactions (*Zakon o elektronskom dokumentu, elektronskoj dokumentaciji i uslugama od poverenja u elektronskoj komunikaciji*), Official Gazette of the Republic of Serbia, no. 94/2017, 27 October 2017.

²¹ Serbia, Law on Public Servants (*Zakon o zaposlenima u javnim službama*), Official Gazette of the Republic of Serbia, no. 113/2017, 1 January 2019.

²² Serbia, Criminal Code (*Krivični zakonik*), Official Gazette of the Republic of Serbia, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, October 6, 2005.

²³ Serbia, Law on Misdemeanours (*Zakon o prekršajima*), Official Gazette of the Republic of Serbia, no. 65/2013, 13/2016, 25 July 2013.

²⁴ Serbia, Strategy for the Social Inclusion of Roma for the period 2016-2025 (*Strategija za socijalno uključivanje Roma i Romkinja u Republici Srbiji za period od 2016. do 2025. godine*), Official Gazette of the Republic of Serbia, no. 26/16, 10 March 2016.

²⁵ Victimisation is known as 'calling to account' in Serbian law.

either direct or indirect discrimination and is used as a test of discrimination. The prohibition of 'calling to account' is, in other words, 'victimisation', but this provision must be aligned with the EU law, in order to include express protection from dismissal.

Hate speech is ambiguous, using the wording 'and in other ways' and is not recognised as a special form of discrimination in the Racial Equality and Employment Equality Directives. The LPD forbids association for the purpose of exercising discrimination for, among others, inciting nationally, racially, religiously or otherwise motivated hatred, divisions or enmity. Instruction to discriminate is mentioned in the LPD, but is not defined. Harassment is recognised as a special form of discrimination taken together with humiliating treatment. However, this article is confusing as humiliating treatment is a possible element of harassment, while the term 'harassment' itself is not defined.

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

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

In Serbia multiple discrimination is recognised as a severe form of discrimination, which means that more severe penalties should be imposed in cases of multiple or intersectional discrimination.²⁶

4. Material scope

The LPD applies in all areas of public and private life, as Article 2, para. 1, defines discrimination as 'any unwarranted discrimination or unequal treatment', which is based on personal characteristics. However, the LPD recognises some special cases of discrimination, such as discrimination in the course of proceedings conducted before public administration bodies, discrimination in the provision of public services and in the use of premises and spaces, discrimination in employment and in education. Thus, the material scope of the LPD goes beyond the areas covered by the two EU directives.

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

²⁶ Article 13 of the LPD.

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

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

5. Enforcing the law

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

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

Article 41 of the LPD provides that anyone who claims to be a victim of discriminatory treatment has the right to initiate a lawsuit. The complainant may request: 1) that a ban be imposed on an action that poses a threat of discrimination, a ban on proceeding with a discriminatory action or a ban on repeating a discriminatory action; 2) that the court should establish that the defendant has treated the complainant or another party in a discriminatory manner; 3) that steps be taken to redress the consequences of the discriminatory treatment; 4) compensation for pecuniary and non-pecuniary damage; and 5) that the judgment be published. Furthermore, Article 46 provides that a lawsuit may be initiated by the Commissioner and also by an organisation engaged in the protection of human rights or the rights of a certain group of people.

Affirmative action measures are expressly allowed in the Serbian Constitution (Article 21, para. 4) and the LPD (Article 14) and are mainly applied in relation to women in politics, Roma in education and people with disabilities in employment.

6. Equality bodies

The institution of the Commissioner for Protection of Equality was established by the LPD as an independent, autonomous and specialised public body which has a wide mandate in the area of the promotion of equality and anti-discrimination in all spheres of society. It has two main responsibilities: the prevention of and protection from discrimination. The Commissioner's Office has a range of measures at its disposal, but from the position of the victim of discrimination the most relevant are to receive and consider complaints regarding discrimination, to initiate strategic litigation and to file offence and criminal charges.²⁷

²⁷ The Commissioner can also provide information to the person lodging a complaint and can recommend mediation; submits an annual and special reports to the National Assembly; warns the public about the most frequent, typical and severe cases of discrimination; monitors the implementation of laws and other regulations; initiates the passing or amending of regulations; provides opinions concerning the provisions of draft laws and other regulations; establishes and maintains cooperation with different bodies and

The procedure of applying to the Commissioner is regulated in Articles 35 to 40 and the general rule is that the provisions of the law regulating general administrative proceedings apply accordingly to procedures involving the Commissioner. A complaint must be forwarded within 15 days from its submission to the alleged violator who has 15 days to respond to it. The Commissioner can propose mediation if both parties agree to it. This obligation is in compliance with the Racial Equality Directive which, in Article 7, para. 1, obliges states to ensure the availability of judicial and/or administrative procedures, including, where appropriate, conciliation procedures. However, if the dispute is not subject to mediation, the Commissioner must give an opinion as to whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint and inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a violation, they issue a recommendation to the individual against whom the complaint was submitted, suggesting a way of redressing the violation in question. The individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of receipt of the recommendation. The individual must inform the Commissioner of measures taken. However, if the individual fails to redress the violation in question within 30 days, the Commissioner may inform the public in electronic and print media, but cannot punish the violator. Nevertheless, the Commissioner can initiate a notice for misdemeanour proceedings, a criminal charge or initiate a lawsuit if it finds that there is a strategic case for litigation.

In 2017 the Commissioner's office provided many awareness-raising activities on discrimination and mechanisms for protection against discrimination, and continued to encourage regional cooperation. The annual report was submitted on time (on 15 March 2018) demonstrating that in 2017 the Commissioner was very active and received 532 complaints, and issued opinions in 51 cases, provided 41 opinions on draft laws and general acts and initiated three strategic litigation lawsuits, three criminal charges, as well as one misdemeanour charge, 13 warnings and 20 announcements.²⁸

7. Key issues

1. Compliance with the two EU anti-discrimination directives

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

- discrimination by association is recognised in the LPD, but its application is limited only to 'members of families' and people close to those being discriminated against;
- the definition of direct discrimination is in line with the definition in the EU directives; however, it is limited to less favourable treatment and does not cover detriment;
- the definition of indirect discrimination doesn't contain the conditional wording ('would') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they incur disadvantages for actual victims;
- the instruction to discriminate is not defined in the LPD and should be included in the law;
- the LPD does not expressly state that situation testing can be used as evidence in court and many questions derive from unclear regulation (for example, who the tester is, whether they have a particular relationship with the individual who

organisations; and recommends measures to public administration bodies and other institutions aimed at ensuring equality.

²⁸ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for Protection of Equality for 2017*, Belgrade, p.216.

- reported the discrimination, whether they have been discriminated against previously, etc.);
- the LPD does not contain any specific rule in relation to statistics; the case-law is still developing and it is not clear how the courts will treat statistical evidence;
 - the LPD does not cover occupational pensions, social advantages and self-employment and it is unclear whether it covers social protection and housing; although certain other laws regulate some of these issues, such as self-employment or housing, these provisions should be included in the LPD;
 - the LPD mentions only access to services and not expressly access to goods;
 - the LPD should recognise segregation as an aggravated form of discrimination;
 - the LPD must include provisions on reasonable accommodation for people with disabilities;
 - national law does not provide for an exception for employers with an ethos based on religion or belief, but there is a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow;
 - the LPD does not explicitly provide an exception for direct discrimination on the ground of age and further judicial interpretation is required, especially on the application of the proportionality test;
 - although there is a range of different sanctions which can be imposed in discrimination cases, some problems which exist in practice, such as delays in the proceedings and mild sanctions, influence the effectiveness and proportionality of sanctions;
 - the LPD does not provide protection from victimisation, and the definition of victimisation in the LPD must be further aligned with EU law, as it does not expressly protect people from dismissal;
 - the LPD does not contain a provision on the reversal of the burden of proof;
 - class action is not permitted by national law in discrimination cases.

2. Implementation of the existing normative framework

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

- it is important to finalise process of adoption of amendments to the LPD in order to fully align it with EU *acquis*;
- some problems deserve urgent attention, such as the social inclusion of people with disabilities and accessibility of services and buildings, as well as combating hate speech and hate crimes against Roma and LGBTI people;
- it is important to establish a more efficient asylum procedure and to legalise a status of migrants with 'tolerated' leave to remain in Serbia in order to specify the scope of their rights; according to the Commissioner's practice, it is important to focus on the prevention of discrimination in the area of the provision of services;
- an aging population must have better access to health and social services in Serbia;
- the Republic of Serbia has not yet established a unified and centralised system for collecting data relevant to the functioning of the system of legal protection against discrimination and this fact represents a huge problem in assessing and monitoring discrimination;
- the number of cases processed before the Commissioner dropped in 2016 and 2017, and it is still insignificant in comparison to the widespread nature of discrimination in practice in all spheres of society; the reasons for this lie in insufficient awareness and knowledge about discrimination and the lack of determination of victims to seek help, despite many activities and increased visibility of the Commissioner's institution;
- although training on anti-discrimination law has been provided to police, labour inspectors, the media and judges of different jurisdictions, the State must continue with this training, which must be comprehensive and ongoing.

RÉSUMÉ

1. Introduction

La République de Serbie est une démocratie parlementaire constitutionnelle et pluripartite. Son Assemblée nationale a été instituée en 1991. La onzième législature, qui a entamé ses travaux le 3 juin 2016, a pour caractéristique que le parti chef de file détient une majorité au Parlement, ce qui façonne et influence le travail parlementaire actuel en Serbie.

Selon le dernier recensement, effectué en 2011, la République de Serbie a une population de 7 565 761 habitants. Les Serbes en représentent 83,32 %, les Hongrois 3,53 %, les Roms 2,05 %, les Bosniaques 2,02 %, les Croates 0,81 %, les Slovaques 0,73 %, les Monténégrins 0,54 %, les Vlachis 0,49 %, les Roumains 0,41 %, les Yougoslaves 0,32 %, les Macédoniens 0,32 %, les Musulmans 0,31 %, ²⁹ les Bulgares 0,26 %, les Bunjevci 0,23 %, les Ruthènes 0,20 %, les Goranis 0,11 %, les Albanais 0,08 %, les Ukrainiens 0,07 %, les Allemands 0,06 %, les Slovènes 0,06 % et les autres 0,24 %. Il ressort du dernier recensement (2016), que la majorité de la population serbe est de confession chrétienne orthodoxe (85 %), suivie des catholiques romains (10,4 %), des musulmans (3,3 %) et des protestants (0,92 %). D'autres religions sont également pratiquées en Serbie.

2. Législation principale

La Constitution de Serbie,³⁰ adoptée en 2006, contient un vaste catalogue de droits de l'homme; elle proclame l'égalité et interdit la discrimination (article 21, paragraphe 3).

La Serbie a introduit un ensemble de dispositions législatives antidiscrimination quasiment harmonisées avec les deux directives européennes³¹ de 2000.

La première loi antidiscrimination a été adoptée en avril 2006: il s'agit de la loi sur la prévention de la discrimination à l'égard des personnes handicapées,³² ultérieurement complétée de la loi sur la réadaptation professionnelle et l'emploi des personnes handicapées.³³ Plusieurs lois ont également été adoptées pour étayer davantage encore les dispositions de la loi sur la prévention de la discrimination à l'égard des personnes handicapées: on peut citer notamment la loi sur l'usage de chiens guides³⁴ et la loi sur l'usage de la langue des signes.³⁵

²⁹ Une personne peut, en Serbie, se déclarer «Musulman» en tant qu'identité ethnique, même si le terme s'applique également dans un contexte d'identité religieuse.

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

³¹ Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique, *Journal officiel L 180*, 19 juillet 2000; Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *Journal officiel L 303*, 2 décembre 2000.

³² Serbie, loi sur la prévention de la discrimination à l'égard des personnes handicapées (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Journal officiel de la République de Serbie*, n° 33/2006, 17 avril 2006.

³³ Serbie, loi sur la réadaptation professionnelle et l'emploi des personnes handicapées (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Journal officiel de la République de Serbie*, n° 36/2009, 32/2013, 17 avril 2006.

³⁴ Serbie, loi sur l'usage de chiens guides (*Zakon o kretanju uz pomoć psa vodiča*), *Journal officiel de la République de Serbie*, n° 29/2015, 31 mars 2015.

³⁵ Serbie, loi sur la langue des signes (*Zakon o upotrebi znakovnog jezika*), *Journal officiel de la République de Serbie*, n° 38/2015, 7 mai 2015.

La Serbie a adopté sa première loi antidiscrimination exhaustive en mars 2009. La loi sur l'interdiction de la discrimination³⁶ a marqué un tournant en garantissant le respect des droits de l'homme en Serbie au travers d'une loi antidiscrimination systématique. Elle interdit un large éventail d'actes discriminatoires et couvre en outre, en les élargissant considérablement, tous les motifs de discrimination visés par la législation de l'UE en matière d'égalité.³⁷ La Commission européenne constate cependant que des modifications supplémentaires de la législation antidiscrimination s'imposent en Serbie pour qu'elle soit totalement alignée sur l'acquis,³⁸ en particulier sur les points suivants: la définition de la discrimination directe doit également couvrir le préjudice; la définition de la discrimination indirecte doit contenir le libellé conditionnel («serait») et ne pas se limiter à la survenance effective d'un traitement défavorisé; il convient d'inclure également l'injonction de discriminer, de mentionner l'accès aux biens (et pas uniquement aux services) et d'inclure une disposition relative à l'aménagement raisonnable pour les personnes handicapées. Ce processus a été amorcé en 2016 mais n'était pas encore achevé fin 2017.

La loi sur l'interdiction de la discrimination s'applique aussi aux demandeurs d'asile et aux migrants. La loi relative à l'asile s'applique aux demandeurs d'asile, aux réfugiés et aux personnes bénéficiant d'une protection temporaire.³⁹ Elle garantit entre autres le droit à l'éducation, au logement, à la sécurité sociale, aux soins de santé et à l'aide juridique.

La loi sur la protection des droits et des libertés des minorités nationales⁴⁰ régit l'exercice de leurs droits par les personnes appartenant à ces minorités. Elle permet à celles-ci d'exercer leurs droits constitutionnels dans un environnement politique démocratique, à titre individuel ou conjointement avec d'autres membres de leur groupe ethnique. La loi définit les minorités nationales comme des citoyens qui sont suffisamment représentatifs en termes numériques, qui appartiennent à un groupe de résidents ayant un lien solide et de longue durée avec le territoire d'un État, qui «possèdent des caractéristiques telles que la langue, la culture, l'appartenance nationale ou ethnique, l'origine ou la confession les différenciant de la majorité de la population, et dont les membres se distinguent par une volonté de cultiver leur identité commune, y compris leur culture, leurs traditions, leur langue ou leur religion». Cette définition exclut les migrants de son champ d'application.

Plusieurs autres lois contiennent également des dispositions antidiscrimination: tel est notamment le cas de la loi sur la jeunesse,⁴¹ de la loi sur le sport,⁴² et de la loi sur les

³⁶ Serbie, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel de la République de Serbie*, n° 22/2009, 26 mars 2009.

³⁷ La loi sur l'interdiction de discrimination comporte une clause ouverte et mentionne explicitement les motifs suivants: la race, la couleur de peau, l'ascendance, la citoyenneté, l'appartenance nationale ou l'origine ethnique, la langue, les convictions religieuses ou politiques, le genre, l'identité de genre, l'orientation sexuelle, la situation financière, la naissance, les caractéristiques génétiques, l'état de santé, le handicap, l'état matrimonial ou familial, les convictions antérieures, l'âge, l'apparence, l'affiliation à une organisation politique, syndicale ou autre.

³⁸ *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, mai 2017 (en anglais); *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, novembre 2017 (en anglais), disponible sur www.mei.gov.rs/enq/documents/eu-documents/non-paper-on-the-state-of-play-regarding-chapters-23-and-24-for-serbia/, consulté en dernier lieu le 15 mars 2018.

³⁹ Serbie, loi sur l'asile (*Zakon o azilu*), *Journal officiel de la République de Serbie*, n° 109/2007, 28 novembre 2007.

⁴⁰ Serbie, loi sur la protection des droits et des libertés des minorités nationales (*Zakon o zaštiti prava i sloboda nacionalnih manjina*), *Journal officiel de la République fédérale de Yougoslavie* n° 11/2002, *Journal officiel de Serbie-Montenegro* n° 1/2003, *Journal officiel de la République de Serbie*, n° 172/2009, 27 février 2003.

⁴¹ Serbie, loi sur la jeunesse (*Zakon o mladima*), *Journal officiel de la République de Serbie*, n° 50/2011, 8 juillet 2011.

⁴² Serbie loi sur le sport (*Zakon o mladima*), *Journal officiel de la République de Serbie*, n° 10/2016, 16 février 2016.

églises et les communautés religieuses,⁴³ etc.

Une série de lois en matière d'éducation ont été adoptées en 2017. La loi sur les principes de base du système d'enseignement⁴⁴ interdit la discrimination dans l'enseignement et dispose que l'égalité et l'accessibilité du droit à l'éducation se fondent sur la justice sociale et l'égalité des chances sans discrimination. La loi sur l'enseignement préscolaire⁴⁵ interdit la discrimination et prévoit que, sous certaines conditions, l'enseignement peut être dispensé dans une langue nationale minoritaire. La loi relative aux amendements à la loi sur l'enseignement primaire⁴⁶ instaure un programme de protection contre la violence, la maltraitance et la négligence. La loi relative aux amendements à la loi sur l'enseignement secondaire⁴⁷ souligne l'importance de la prévention de la discrimination et introduit des mesures positives, à savoir que les membres de certains groupes peuvent s'inscrire dans l'enseignement secondaire à des conditions plus favorables afin de parvenir à la pleine égalité dans l'éducation.

La loi sur les documents électroniques, l'identification électronique et les services de confiance pour les transactions électroniques⁴⁸ adoptée en 2017 dispose notamment, en son article 6, que les services de confiance et les services d'identification électronique doivent être accessibles en toute égalité aux personnes handicapées.

La loi sur les fonctionnaires⁴⁹ admet des mesures positives dans le cadre de l'emploi de membres des minorités nationales lorsque, aux fins de parvenir à une représentation adéquate, la priorité est donnée à des candidats ayant des qualifications égales.

De surcroît, la protection contre la discrimination au titre du droit pénal est régie par le code pénal,⁵⁰ qui énonce plusieurs infractions pénales en rapport avec l'interdiction de discrimination: le non-respect de l'égalité (article 128), le non-respect du droit d'usage d'une langue ou d'un alphabet (article 129) et l'interdiction de discrimination raciale et autre (article 387). La loi sur les délits⁵¹ régit pour sa part les procédures, les conditions et l'exécution des poursuites relatives aux infractions mineures.

La Stratégie pour l'inclusion sociale des Roms en République de Serbie (2016-2025) a été adoptée en 2016⁵² et le plan d'action pour sa mise en œuvre en 2017-2018 en juin 2017.

⁴³ Serbie, loi sur les églises et les communautés religieuses (*Zakon o crkvama i verskim zajednicama*), *Journal officiel de la République de Serbie*, n° 36/2006, 27 avril 2006.

⁴⁴ Serbie, loi sur les principes fondamentaux du système d'enseignement (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Journal officiel de la République de Serbie*, n° 88/2017, 7 octobre 2017.

⁴⁵ Serbie, loi sur l'enseignement préscolaire (*Zakon o predškolskom vaspitanju i obrazovanju*), *Journal officiel de la République de Serbie*, n° 101/2017, 18 novembre 2017.

⁴⁶ Serbie, amendements à la loi sur l'enseignement primaire (*Zakon izmenama Zakona o osnovnom obrazovanju i vaspitanju*), *Journal officiel de la République de Serbie*, n° 101/2017, 18 novembre 2017.

⁴⁷ Serbie, loi relative aux amendements à la loi sur l'enseignement secondaire (*Zakon o izmenama Zakona o srednjem obrazovanju i vaspitanju*), *Journal officiel de la République de Serbie*, n° 101/2017, 18 novembre 2017.

⁴⁸ Serbe, loi sur les documents électroniques, l'identification électronique et les services de confiance pour les transactions électroniques (*Zakon o elektronskom dokumentu, elektronskoj dokumentaciji i uslugama od poverenja u elektronskoj komunikaciji*), *Journal officiel de la République de Serbie*, n° 94/2017, 27 octobre 2017.

⁴⁹ Serbie, loi sur les fonctionnaires (*Zakon o zaposlenima u javnim službama*), *Journal officiel de la République de Serbie*, n° 113/2017, 1^{er} janvier 2019.

⁵⁰ Serbie, Code pénal (*Krivični zakonik*), *Journal officiel de la République de Serbie*, n° 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 6 octobre 2005.

⁵¹ Serbie, loi sur les délits (*Zakon o prekršajima*), *Journal officiel de la République de Serbie*, n° 65/2013, 13/2016, 25 juillet 2013.

⁵² Serbie, Stratégie pour l'inclusion sociale des Roms pour la période 2016-2025 (*Strategija za socijalno uključivanje Roma i Romkinja u Republici Srbiji za period od 2016. do 2025. godine*), *Journal officiel de la République de Serbie*, n° 26/16, 10 mars 2016.

3. Principes généraux et définitions

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

La définition de la discrimination directe est quasiment conforme à celle qui figure dans les directives de l'UE, mais elle se limite à un traitement moins favorable et ne couvre pas le préjudice. La définition de la discrimination indirecte n'utilise pas la formule conditionnelle «serait» et peut donc être interprétée comme se limitant à la survenance réelle d'un désavantage – ce qui ne permet pas de contester des dispositions neutres devant un tribunal avant qu'elles aient défavorisé des victimes réelles. La définition n'utilise pas non plus le libellé «une disposition, un critère ou une pratique apparemment neutre» qui explique de manière plausible ce phénomène. On ne voit pas clairement pourquoi la violation du principe de l'égalité des droits est reconnue en tant que forme spéciale de discrimination, étant donné qu'il s'agit soit d'une discrimination directe, soit d'une discrimination indirecte, et qu'elle sert de critère de discrimination. L'interdiction de «demander des comptes» est la façon de désigner les rétorsions, mais cette disposition doit être harmonisée avec le droit de l'UE afin d'inclure expressément la protection contre le licenciement. Le discours haineux est libellé de façon ambiguë en raison de l'usage de l'expression «et d'autres manières» et il n'est pas reconnu comme une forme spéciale de discrimination dans les directives sur l'égalité raciale et dans l'emploi. La loi sur l'interdiction de la discrimination interdit l'association aux fins de la pratique d'une discrimination visant, entre autres, à inciter à la haine nationale, raciale, religieuse ou autre, à la division ou à l'hostilité. La loi sur l'interdiction de la discrimination mentionne l'injonction de discriminer sans la définir. Le harcèlement y est défini comme une forme particulière de discrimination, et il est envisagé conjointement au traitement humiliant – l'article en question étant cependant confus dans la mesure où le traitement humiliant est une composante possible du harcèlement, mais où le terme «harcèlement» lui-même n'est pas défini.

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

L'une des dispositions de la directive sur l'égalité dans l'emploi ayant la portée la plus grande est son article 5, qui consacre l'obligation de prévoir un aménagement raisonnable pour les personnes handicapées. Cette exigence ne figure pas dans la loi sur l'interdiction de la discrimination et ne vise aucun autre motif que le handicap. Par

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

ailleurs, la loi sur la prévention de la discrimination à l'égard des personnes handicapées prévoit plusieurs justifications de discrimination, même si beaucoup d'entre elles sont reconnues en tant que mesures positives, définies à l'article 8. La justification la plus problématique figure néanmoins à l'article 19, paragraphe 2, de la loi sur la prévention de la discrimination à l'égard des personnes handicapées – cet article autorisant l'organisation de classes d'enseignement pour les enfants qui ne possèdent pas les capacités intellectuelles suffisantes pour suivre un enseignement ordinaire.

La discrimination multiple est reconnue en Serbie comme une forme grave de discrimination, ce qui signifie qu'elle peut donner lieu, tout comme la discrimination intersectionnelle, à des pénalités plus lourdes.⁵⁴

4. Champ d'application matériel

La loi sur l'interdiction de la discrimination s'applique à tous les domaines de la vie publique et de la vie privée, étant donné que son article 2, paragraphe 1, définit la discrimination comme «toute discrimination ou inégalité de traitement injustifiée» fondée sur des caractéristiques personnelles. La dite loi précise néanmoins quelques cas particuliers de discrimination, tels que la discrimination dans le cadre de procédures se déroulant devant des instances de l'administration publique; la discrimination dans la prestation de services publics et dans l'utilisation des locaux et des espaces; et la discrimination dans l'emploi et dans l'éducation. Le champ d'application matériel de la loi sur l'interdiction de la discrimination dépasse donc les domaines couverts par les deux directives européennes.

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

La loi sur l'interdiction de la discrimination ne couvre pas les pensions de retraite professionnelles, les avantages sociaux et l'emploi indépendant, et il n'est pas certain qu'elle couvre la protection sociale et le logement. Même si d'autres lois réglementent certains de ces aspects, des dispositions pertinentes devraient figurer dans la loi interdisant la discrimination.

La loi sur l'interdiction de la discrimination mentionne uniquement l'accès aux services et ne mentionne pas expressément l'accès aux biens.

5. Mise en application de la loi

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

La loi sur la prévention de la discrimination à l'égard des personnes handicapées contient des dispositions procédurales spécifiques pour renforcer les procédures judiciaires lors d'affaires portant sur une discrimination à l'encontre de personnes handicapées. La loi sur l'interdiction de discrimination fixe la procédure à suivre pour initier une affaire au civil en cas de discrimination – cette démarche pouvant être accomplie par toute personne victime d'un traitement discriminatoire. L'une des dispositions porte sur la compétence de la juridiction saisie en ce qui concerne les victimes de discrimination. La

⁵⁴ Article 13 de la loi sur l'interdiction de la discrimination.

loi sur l'interdiction de la discrimination admet les mesures temporaires et il appartient au tribunal de statuer dans un délai de trois jours sur les demandes en ce sens. La loi prévoit que les procédures doivent être menées d'urgence (article 41, paragraphe 3). L'article 45 de cette même loi fait passer en outre la charge de la preuve de la partie plaignante à la partie défenderesse.

L'article 41 de la loi sur l'interdiction de la discrimination dispose que toute personne se déclarant victime d'un traitement discriminatoire est en droit d'intenter une action en justice. La partie requérante peut demander: 1) que soit interdite une action constituant une menace de discrimination, la poursuite d'une action discriminatoire ou la répétition d'une action discriminatoire; 2) que la juridiction saisie établisse que la partie défenderesse a traité la partie plaignante ou une autre partie de façon discriminatoire; 3) que des mesures soient prises pour remédier aux conséquences du traitement discriminatoire; 4) une indemnisation pour préjudice matériel et moral; et 5) la publication de l'arrêt. L'article 46 prévoit en outre qu'une action en justice peut être intentée par le Commissaire ainsi que par une organisation de défense des droits de l'homme ou des droits d'un groupe particulier de personnes.

Des mesures d'action positive sont expressément autorisées par la Constitution serbe (article 21, paragraphe 4) et la loi sur l'interdiction de la discrimination (article 14). Elles visent plus spécifiquement à une plus grande participation des femmes en politique, des Roms dans l'éducation et des personnes handicapées dans l'emploi.

6. Organismes de promotion de l'égalité de traitement

Le Commissaire à la protection de l'égalité a été institué par la loi sur l'interdiction de la discrimination en tant qu'organisme public indépendant, autonome et spécialisé doté d'un vaste mandat en matière de promotion de l'égalité et de lutte contre la discrimination dans toutes les sphères de la société. Il assume deux responsabilités principales: la prévention de la discrimination et la protection contre la discrimination. Le Bureau du Commissaire a toute une série de mesures à sa disposition, dont les plus pertinentes du point de vue des victimes de discrimination consistent à recevoir et instruire des plaintes et à engager des litiges stratégiques ainsi que des poursuites pour délits mineurs ou infractions pénales.⁵⁵

La procédure de requête auprès du Commissaire est régie par les articles 35 à 40 et la règle générale veut que les dispositions de la loi régissant les procédures administratives générales s'appliquent de la même manière aux procédures impliquant le Commissaire. Le Commissaire doit transmettre la plainte dans un délai de 15 jours, à compter de la date à laquelle il l'a lui-même reçue, à l'auteur présumé des faits, lequel dispose de 15 jours pour y répondre. Le Commissaire peut proposer une médiation si les deux parties y consentent. Cette obligation est conforme à la directive sur l'égalité raciale qui exige en son article 7, paragraphe 1, que les États membres veillent à ce que des procédures judiciaires et/ou administratives soient accessibles, y compris, lorsqu'ils l'estiment approprié, des procédures de conciliation. Cependant, lorsque le conflit ne fait pas l'objet d'une médiation, le Commissaire est tenu, dans un délai de 90 jours à dater de la réception de la plainte, de formuler un avis sur le point de savoir s'il y a eu ou non violation de l'interdiction de discrimination, et d'en informer le plaignant ainsi que la personne à l'encontre de laquelle la plainte a été déposée. Si le Commissaire constate une violation, il adresse une recommandation à la personne visée par la plainte en lui

⁵⁵ Le Commissaire peut également fournir des informations à la personne qui dépose plainte, et recommander la médiation; il soumet des rapports annuels et spéciaux à l'Assemblée nationale; il avertit le public des cas les plus fréquents, les plus typiques et les plus graves de discrimination; il contrôle la mise en œuvre des lois et autres réglementations; il initie le vote ou la modification de réglementations; il émet des avis concernant les dispositions de projets de lois et autres réglementations; il instaure et entretient la coopération avec différents organes et organismes; et il recommande aux organes de l'administration publique et autres institutions des mesures destinées à assurer l'égalité.

suggérant une manière de réparer la violation en question. Le destinataire de cette recommandation est tenu d'y donner suite et de remédier à la violation constatée dans un délai de 30 jours à compter de la date de réception de la dite recommandation. La personne doit informer le Commissaire des mesures prises. Si toutefois la personne ne remédie pas à la violation constatée dans le délai imparti de 30 jours, le Commissaire peut en informer le public en utilisant des médias électroniques et écrits, mais ne peut sanctionner le contrevenant. Il peut cependant introduire une notification en vue de l'engagement de procédures pour délits mineurs ou pour infractions pénales, ou de l'initiation d'une action en justice s'il estime qu'il y a matière à engager un litige stratégique.

Le bureau du Commissaire a déployé en 2017 de nombreuses actions de sensibilisation à l'égard de la discrimination et des mécanismes permettant de s'en protéger, et continué d'encourager une coopération régionale. Le rapport annuel a été présenté à temps (le 15 mars 2018) et atteste de la grande activité du Commissaire en 2017: il a été saisi de 532 plaintes et a émis un avis dans 51 cas; il a formulé 41 avis concernant des projets de loi et des actes généraux; il a engagé trois procédures stratégiques, trois procédures pour infraction pénale ainsi qu'une procédure pour délit mineur; et il a lancé 13 avertissements et publié 20 communiqués.⁵⁶

7. Points essentiels

1. Conformité aux deux directives antidiscrimination de l'UE

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

- la discrimination par association est reconnue par la loi sur l'interdiction de la discrimination, mais son application se limite aux «membres de la famille» et aux personnes proches des victimes de la discrimination;
- la définition de la discrimination directe est conforme à celle figurant dans les directives européennes; elle se limite toutefois au traitement moins favorable et ne couvre pas le préjudice;
- la définition de la discrimination indirecte ne contient pas la formule conditionnelle «serait» et peut donc être interprétée comme se limitant à la survenance réelle d'un désavantage – ce qui ne permet pas de contester des dispositions neutres devant un tribunal avant qu'elles aient défavorisé des victimes réelles;
- l'injonction de discriminer n'est pas définie dans la loi sur l'interdiction de la discrimination, et devrait y être incluse;
- la loi sur l'interdiction de la discrimination ne stipule pas expressément que le test de situation peut servir de preuve en justice et la réglementation peu claire en la matière engendre de nombreuses questions (qui procède au test, cette personne a-t-elle un lien particulier avec celle qui signale la discrimination, y a-t-il eu des précédents, etc.);
- la loi sur l'interdiction de la discrimination ne contient aucune règle spécifique par rapport aux statistiques; la jurisprudence est encore embryonnaire et on ne voit pas encore clairement quel traitement les cours et tribunaux vont réserver aux preuves statistiques;
- la loi sur l'interdiction de discrimination ne couvre pas les pensions de retraite professionnelles, les avantages sociaux et le travail indépendant, et il n'est pas certain qu'elle couvre la sécurité sociale et le logement; même si d'autres lois

⁵⁶ Commissaire à la protection de l'égalité (2086), *Rapport régulier annuel 2017 du Commissaire à la protection de l'égalité*, Belgrade, p. 216.

- réglementent certains de ces aspects, des dispositions pertinentes devraient figurer dans la loi sur l'interdiction de la discrimination;
- la loi sur l'interdiction de la discrimination mentionne uniquement l'accès aux services, et ne mentionne pas expressément l'accès aux biens;
 - la loi sur l'interdiction de la discrimination devrait reconnaître la ségrégation en tant que forme aggravée de discrimination;
 - la loi sur l'interdiction de la discrimination doit comporter des dispositions relatives aux aménagements raisonnables en faveur des personnes handicapées;
 - le droit national ne prévoit pas d'exception pour les employeurs dont l'éthique se fonde sur la religion ou les convictions, mais il existe une dispense générale pour les responsables religieux qui peuvent pratiquer une discrimination lorsque celle-ci est exigée ou admise par leur doctrine religieuse;
 - la loi sur l'interdiction de la discrimination ne prévoit pas expressément d'exception en ce qui concerne une discrimination directe fondée sur l'âge et une interprétation judiciaire plus poussée s'impose, en rapport plus particulièrement avec l'application du test de proportionnalité;
 - en dépit de l'arsenal de sanctions prévues en cas de discrimination, des problèmes constatés dans la pratique, tels que des retards de procédure et des sanctions clémentes, se répercutent sur l'efficacité et la proportionnalité des sanctions;
 - la loi sur la prévention de la discrimination à l'égard des personnes handicapées ne prévoit pas de protection contre les rétorsions, et la définition des rétorsions figurant dans la loi sur l'interdiction de la discrimination doit être davantage alignée sur le droit de l'UE car elle ne prévoit pas expressément de protection contre le licenciement;
 - la loi sur la prévention de la discrimination à l'égard des personnes handicapées ne contient pas de disposition concernant le renversement de la charge de la preuve;
 - le droit national n'autorise pas l'action collective en cas de discrimination.

2. Mise en œuvre du cadre normatif existant

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

- il est important de parachever le processus d'adoption des amendements à la loi sur l'interdiction de la discrimination afin qu'elle soit pleinement alignée sur l'acquis de l'UE;
- plusieurs problèmes demandent une attention urgente: on songe notamment ici à l'amélioration de l'inclusion sociale des personnes handicapées et à l'accessibilité des services et des bâtiments ainsi qu'à la lutte contre le discours haineux envers les Roms et les personnes LGBTI;
- il est important de mettre en place une procédure d'asile plus efficace et d'instaurer un statut légal de migrants en séjour «toléré» en Serbie, afin de préciser l'étendue de leurs droits; il ressort de la pratique du Commissaire qu'une attention particulière doit être accordée à la prévention de la discrimination en matière de prestation de services;
- une population vieillissante doit bénéficier d'un meilleur accès aux services sociaux et de santé en Serbie;
- la République de Serbie n'a pas encore mis en place de système unifié et centralisé pour la collecte des données relatives au fonctionnement du régime de protection juridique contre la discrimination, ce qui pose un énorme problème au niveau de l'évaluation et du suivi;
- le nombre d'affaires traitées par le Commissaire a chuté en 2016 et 2017, et reste mineur par rapport à un phénomène discriminatoire largement répandu dans toutes les sphères de la société; cette situation s'explique par un manque de sensibilisation et de connaissance concernant la discrimination, et par le manque de

détermination des victimes de demander de l'aide en dépit des multiples activités déployées par le Commissaire et sa visibilité grandissante;

- une formation au droit antidiscrimination a été dispensée aux policiers, aux inspecteurs du travail, aux médias et aux magistrats de différentes juridictions, mais il convient que l'État poursuive cette formation, qui doit être exhaustive et permanente.

ZUSAMMENFASSUNG

1. Einleitung

Die Republik Serbien ist eine parlamentarische Demokratie mit einem Mehrparteiensystem und einer geschriebenen Verfassung. Die aus vielen Parteien bestehende Nationalversammlung der Republik Serbien wurde im Jahr 1991 eingerichtet. Die 11. gesetzgebende Versammlung nahm am 3. Juni 2016 ihre Arbeit auf und zeichnet sich dadurch aus, dass die führende Partei eine Mehrheit im Parlament besitzt. Dies prägt und beeinflusst die derzeitige parlamentarische Arbeit in Serbien.

Nach der Volkszählung von 2011 hat die Republik Serbien 7 565 761 Einwohner. Serben machen 83,32 % der Bevölkerung aus, Ungarn 3,53 %, Roma 2,05 %, Bosniaken 2,02 %, Kroaten 0,81 %, Slowaken 0,73 %, Montenegriner 0,54 %, Walachen 0,49 %, Rumänen 0,41 %, Jugoslawen 0,32 %, Mazedonier 0,32 %, Muslime 0,31 %, ⁵⁷ Bulgaren 0,26 %, Bunjewatzen 0,23 %, Russinen 0,20 %, Goranen 0,11 %, Albaner 0,08 %, Ukrainer 0,07 %, Deutsche 0,06 %, Slowenen 0,06 % und andere 0,24 %. Nach der letzten Volkszählung von 2016 sind die meisten Einwohner Serbiens orthodoxe Christen (85 %), gefolgt von Katholiken (10,4 %), Muslimen (3,3 %) und Protestanten (0,92 %). Auch andere Religionen sind in Serbien vertreten.

2. Wichtigste Rechtsvorschriften

Die Verfassung Serbiens⁵⁸ aus dem Jahr 2006 enthält einen umfassenden Katalog von Menschenrechten (Art. 21 Abs. 3).

Serbien hat eine Reihe von Antidiskriminierungsvorschriften erlassen, die den beiden EU-Richtlinien von 2000 nahezu vollständig entsprechen.⁵⁹

Im April 2006 wurde das erste Antidiskriminierungsgesetz verabschiedet, das Gesetz zur Verhinderung der Diskriminierung von Menschen mit Behinderungen (GVDMB),⁶⁰ ergänzt durch das Gesetz zur beruflichen Rehabilitierung und Beschäftigung von Menschen mit Behinderungen (GbRBMB).⁶¹ Es wurden auch einige Gesetze erlassen, um das GVDMB weiter zu stärken, etwa das Gesetz über den Einsatz von Blindenführhunden⁶² und das Gesetz über die Verwendung der Gebärdensprache.⁶³

Im März 2009 wurde in Serbien das erste umfassende Antidiskriminierungsgesetz verabschiedet. Das Gesetz über das Verbot von Diskriminierung (im Folgenden abgekürzt „GVD“),⁶⁴ mit dem ein systematisches Antidiskriminierungsrecht eingeführt wurde, ist ein wichtiger Meilenstein für den Schutz der grundlegenden Menschenrechte in Serbien. Es

⁵⁷ In Serbien kann als ethnische Identität „Muslim“ angegeben werden; derselbe Begriff kann aber auch in Bezug auf die religiöse Identität verwendet werden.

⁵⁸ Serbien, Verfassung der Republik Serbien (*Ustav Republike Srbije*), Amtsblatt der Republik Serbien, Nr. 98/2006, 10. November 2006.

⁵⁹ Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, ABl. L 180/22, 19. Juli 2000; Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303, 2. Dezember 2000.

⁶⁰ Serbien, Gesetz zur Verhinderung der Diskriminierung von Menschen mit Behinderungen (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), Amtsblatt der Republik Serbien, Nr. 33/2006, 17. April 2006.

⁶¹ Serbien, Gesetz zur beruflichen Rehabilitierung und Beschäftigung von Menschen mit Behinderungen (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), Amtsblatt der Republik Serbien, Nr. 36/2009, 32/2013, 17. April 2006.

⁶² Serbien, Gesetz über den Einsatz von Blindenführhunden (*Zakon o kretanju uz pomoć psa vodiča*), Amtsblatt der Republik Serbien, Nr. 29/2015, 31. März 2015.

⁶³ Serbien, Gesetz über die Verwendung der Gebärdensprache (*Zakon o kretanju uz pomoć psa vodiča*), Amtsblatt der Republik Serbien, Nr. 38/2015, 7. Mai 2015.

⁶⁴ Serbien, Gesetz über das Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), Amtsblatt der Republik Serbien, Nr. 22/2009, 13/2009, 26. März 2009.

verbietet zahlreiche diskriminierende Handlungen. Überdies deckt das GVD sämtliche im Gleichbehandlungsrecht der EU vorgegebenen Diskriminierungsgründe ab und weitet diese erheblich aus.⁶⁵ Die Europäische Kommission hat jedoch festgestellt, dass weitere Änderungen des serbischen Antidiskriminierungsrechts erforderlich sind, um es vollständig mit dem Besitzstand der Union in Einklang zu bringen,⁶⁶ insbesondere in Bezug auf folgende Aspekte: die Definition von unmittelbarer Diskriminierung sollte auch Benachteiligung mit einbeziehen; die Definition von mittelbarer Diskriminierung sollte konditional formuliert sein („würde“) und sich nicht auf das tatsächliche Vorliegen von Nachteilen beschränken; Anweisung zur Diskriminierung sollte einbezogen werden; auch der Zugang zu Gütern, und nicht nur der zu Dienstleistungen, sollte erwähnt werden; eine Vorschrift über angemessene Vorkehrungen für Menschen mit Behinderungen sollte einbezogen werden. Dieser Prozess wurde 2016 eingeleitet, war Ende 2017 jedoch noch nicht abgeschlossen.

Das GVD erstreckt sich auch auf die Diskriminierung von Asylsuchenden und Migranten. Das Asylgesetz gilt für Asylsuchende, Flüchtlinge und Personen, denen vorübergehend Schutz gewährt wird.⁶⁷ Es garantiert unter anderem das Recht auf Bildung, Unterbringung, soziale Sicherheit, Gesundheitsversorgung und rechtliche Unterstützung.

Das Gesetz zum Schutz der Rechte und Freiheiten nationaler Minderheiten⁶⁸ regelt die Durchsetzung der Rechte von Menschen, die nationalen Minderheiten angehören. Es ermöglicht diesen Angehörigen nationaler Minderheiten, einzeln oder gemeinsam mit anderen Mitgliedern ihrer ethnischen Gruppe, ihre verfassungsmäßigen Rechte in demokratischer Weise auszuüben. Nationale Minderheiten werden in dem Gesetz als Personen definiert, die zahlenmäßig hinreichend repräsentativ sind und einer Bevölkerungsgruppe angehören, die eine langjährige, feste Bindung zum Hoheitsgebiet eines Staates hat, „Eigenschaften wie Sprache, Kultur, nationale oder ethnische Zugehörigkeit, Herkunft oder Konfession besitzt, die sie von der Mehrheitsbevölkerung unterscheidet, und deren Mitglieder sich dafür einsetzen, ihre gemeinsame Identität (Kultur, Tradition, Sprache, Religion usw.) kollektiv zu pflegen“. Diese Definition schließt Migrantinnen und Migranten von ihrer Anwendung aus.

Viele andere Gesetze – das Jugendgesetz,⁶⁹ das Sportgesetz,⁷⁰ das Gesetz über Kirchen und religiöse Vereinigungen⁷¹ usw. – enthalten ebenfalls Antidiskriminierungsbestimmungen.

2017 wurde eine Reihe von Bildungsgesetzen verabschiedet. Das Gesetz über die Grundlagen des Bildungssystems⁷² verbietet Diskriminierung im Bildungsbereich und stellt fest, dass Gleichheit beim und Zugang zum Recht auf Bildung auf sozialer Gerechtigkeit und Chancengleichheit ohne Diskriminierung beruhen. Das Gesetz über die

⁶⁵ Das GVD enthält eine offene Klausel und erwähnt explizit die folgenden Gründe: Rasse, Hautfarbe, Abstammung, Staatsbürgerschaft, nationale Zugehörigkeit oder ethnische Herkunft, Sprache, religiöse oder politische Überzeugungen, Geschlecht, Geschlechtsidentität, sexuelle Orientierung, Vermögenslage, Geburt, genetische Merkmale, Gesundheit, Behinderung, Ehe- und Familienstand, frühere Überzeugungen, Alter, Aussehen, Mitgliedschaft in politischen, gewerkschaftlichen und sonstigen Organisationen.

⁶⁶ *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, Mai 2017 (auf Englisch); *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, November 2017 (auf Englisch); abrufbar unter www.mei.gov.rs/enq/documents/eu-documents/non-paper-on-the-state-of-play-regarding-chapters-23-and-24-for-serbia/ (letzter Zugriff am 15. März 2018).

⁶⁷ Serbien, Asylgesetz (*Zakon o kretanju uz pomoć psa vodiča*), Amtsblatt der Republik Serbien, Nr. 109/2007, 28. November 2007.

⁶⁸ Serbien, Gesetz zum Schutz der Rechte und Freiheiten nationaler Minderheiten, Amtsblatt der Bundesrepublik Jugoslawien, Nr. 11/2002, Amtsblatt von Serbien und Montenegro, Nr. 1/2003, Amtsblatt der Republik Serbien, 172/2009, 27. Februar 2003.

⁶⁹ Serbien, Jugendgesetz (*Zakon o mladima*), Amtsblatt der Republik Serbien, Nr. 50/2011, 8. Juli 2011.

⁷⁰ Serbien, Sportgesetz (*Zakon o mladima*), Amtsblatt der Republik Serbien, Nr. 10/2016, 16. Februar 2016.

⁷¹ Serbien, Gesetz über Kirchen und religiöse Vereinigungen (*Zakon o crkvama i verskim zajednicama*), Amtsblatt der Republik Serbien, Nr. 36/2006, 27. April 2006.

⁷² Serbien, Gesetz über die Grundlagen des Bildungssystems (*Zakon o osnovama sistema obrazovanja i vaspitanja*), Amtsblatt der Republik Serbien, Nr. 88/2017, 7. Oktober 2017.

vorschulische Bildung⁷³ verbietet Diskriminierung und schreibt vor, dass der Unterricht unter bestimmten Bedingungen in einer Minderheitensprache erfolgen kann. Das Gesetz zur Änderung des Gesetzes über die Grundschulbildung⁷⁴ führt ein Programm zum Schutz vor Gewalt, Missbrauch und Vernachlässigung ein. Das Gesetz zur Änderung des Gesetzes über die Sekundarschulbildung⁷⁵ unterstreicht die Wichtigkeit der Verhütung von Diskriminierung und führt positive Maßnahmen ein, die darin bestehen, dass Angehörige bestimmter Gruppen unter günstigeren Bedingungen eine weiterführende Schule besuchen können, um eine vollständige Gleichstellung im Bildungswesen zu erreichen.

2017 wurde das Gesetz über elektronische Dokumente, elektronische Identifizierung und Vertrauensdienste für elektronische Transaktionen⁷⁶ verabschiedet, das unter anderem in Artikel 6 vorsieht, dass Vertrauensdienste und Dienste für die elektronische Identifizierung für Menschen mit Behinderungen gleichberechtigt zugänglich sein müssen.

Das Gesetz über die Beschäftigten im öffentlichen Dienst⁷⁷ lässt positive Maßnahmen für die Beschäftigung von Angehörigen nationaler Minderheiten zu, die darin bestehen, dass zur Erreichung einer angemessenen Vertretung gleich qualifizierten Kandidierenden Vorrang eingeräumt wird.

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

2016 wurde die Strategie zur sozialen Integration der Roma in der Republik Serbien für den Zeitraum 2016-2025 verabschiedet,⁸⁰ und im Juni 2017 wurde der Aktionsplan für die Umsetzung der Strategie im Zeitraum 2017-2018 beschlossen.

3. Wichtigste Grundsätze und Begriffe

Das GVD kennt sieben Formen von Diskriminierung: unmittelbare und mittelbare Diskriminierung, Verletzung des Grundsatzes der gleichen Rechte und Pflichten, Verhinderung des zur Verantwortung Ziehens,⁸¹ Vereinigung zum Zweck der Diskriminierung, Hassrede, Belästigung und Herabwürdigung und schwere Formen von Diskriminierung.

⁷³ Serbien, Gesetz über die vorschulische Bildung (*Zakon o predškolskom vaspitanju i obrazovanju*), Amtsblatt der Republik Serbien, Nr. 101/2017, 18. November 2017.

⁷⁴ Serbien, Gesetz zur Änderung des Gesetzes über die Grundschulbildung (*Zakon izmenama Zakona o osnovnom obrazovanju i vaspitanju*), Amtsblatt der Republik Serbien, Nr. 101/2017, 18. November 2017.

⁷⁵ Serbien, Gesetz zur Änderung des Gesetz über die Sekundarschulbildung (*Zakon o izmenama Zakona o srednjem obrazovanju i vaspitanju*), Amtsblatt der Republik Serbien, Nr. 101/2017, 18. November 2017.

⁷⁶ Serbien, Gesetz über elektronische Dokumente, elektronische Identifizierung und Vertrauensdienste für elektronische Transaktionen (*Zakon o elektronskom dokumentu, elektronskoj dokumentaciji i uslugama od poverenja u elektronskoj komunikaciji*), Amtsblatt der Republik Serbien, Nr. 94/2017, 27. Oktober 2017.

⁷⁷ Serbien, Gesetz über die Beschäftigten im öffentlichen Dienst (*Zakon o zaposlenima u javnim službama*), Amtsblatt der Republik Serbien, Nr. 113/2017, 1. Januar 2019.

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

⁷⁹ Serbien, Gesetz über Ordnungswidrigkeiten (*Zakon o prekršajima*), Amtsblatt der Republik Serbien, Nr. 65/2013, 13/2016, 25. Juli 2013.

⁸⁰ Serbien, Strategie zur sozialen Eingliederung der Roma in der Republik Serbien für den Zeitraum 2016-2025 (*Strategija za socijalno uključivanje Roma i Romkinja u Republici Srbiji za period od 2016. do 2025. godine*), Amtsblatt der Republik Serbien, Nr. 26/16, 10. März 2016.

⁸¹ Viktimisierung wird im serbischen Recht als „zur Verantwortung ziehen“ bezeichnet.

Die Definition von unmittelbarer Diskriminierung entspricht fast vollständig der Definition in den EU-Richtlinien, ist jedoch auf eine weniger günstige Behandlung beschränkt und enthält nicht den Begriff des Schadens. Die Definition von mittelbarer Diskriminierung ist nicht konditional formuliert („können“) und kann daher so ausgelegt werden, dass sie nur für eine tatsächlich vorgekommene Benachteiligung gilt, wodurch es unmöglich wird, gegen neutrale Vorschriften vorzugehen, bevor tatsächlich ein Opfer benachteiligt wird. Außerdem verwendet sie nicht den Wortlaut „dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren“, was eine plausible Erklärung für dieses Phänomen bietet. Es ist nicht klar, warum die Verletzung des Grundsatzes der gleichen Rechte als spezielle Form von Diskriminierung angeführt wird, weil dies entweder eine unmittelbare oder eine mittelbare Diskriminierung darstellt und sogar als Test für Diskriminierung verwendet wird. Das Verbot, jemanden „zur Verantwortung zu ziehen“, ist – in anderen Worten – das Verbot von „Viktimisierung“; diese Vorschrift muss jedoch insofern mit dem EU-Recht in Einklang gebracht werden, als sie einen ausdrücklichen Kündigungsschutz beinhalten muss.

Die Definition von Hassrede ist zweideutig, weil sie die Formulierung „und auf andere Weise“ verwendet, und Hassrede in der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse und der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung nicht als spezielle Form von Diskriminierung enthalten ist. Das GVD verbietet Vereinigung zum Zweck der Diskriminierung, worunter unter anderem die Anstiftung zu nationalistisch, rassistisch, religiös oder anderweitig motiviertem Hass und zu Spaltung und Feindschaft gezählt wird. Anweisung zur Diskriminierung wird im GVD erwähnt, jedoch nicht definiert. Belästigung wird mit Herabwürdigung zusammengefasst und als spezielle Form von Diskriminierung anerkannt. Allerdings ist diese Bestimmung verwirrend, weil Herabwürdigung ein mögliches Element von Belästigung darstellt, der Begriff „Belästigung“ selbst jedoch nicht definiert wird.

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

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

Mehrfachdiskriminierung gilt in Serbien als schwere Form der Diskriminierung; in Fällen von Mehrfachdiskriminierung bzw. intersektioneller Diskriminierung können daher härtere Strafen verhängt werden.⁸²

4. Sachlicher Geltungsbereich

Das GVD gilt für alle Bereiche des öffentlichen und privaten Lebens, da Artikel 2 Absatz 1 Diskriminierung definiert als „jede ungerechtfertigte Diskriminierung oder Ungleichbehandlung“ aufgrund einer persönlichen Eigenschaft. Allerdings erkennt das GVD einige Sonderfälle von Diskriminierung an, z. B. Diskriminierung in Verfahren vor einer staatlichen Verwaltungsbehörde, Diskriminierung bei der Bereitstellung von öffentlichen Dienstleistungen und bei der Nutzung von Anlagen und Räumen sowie Diskriminierung in den Bereichen Beschäftigung und Bildung. Somit geht der sachliche Anwendungsbereich des GVD über die Bereiche hinaus, die von den beiden EU-Richtlinien abgedeckt sind.

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

Das GVD bezieht weder die betriebliche Altersversorgung noch Sozialleistungen noch selbständige Erwerbstätigkeit mit ein, und es ist unklar, ob es für Sozialschutz und Wohnraumversorgung gilt. Auch wenn einige dieser Bereiche, etwa selbständige Erwerbstätigkeit und Wohnraumversorgung, in bestimmten anderen Gesetzen geregelt sind, sollten diese Bestimmungen in das GVD eingebunden werden.

Das GVD erwähnt nur den Zugang zu Dienstleistungen, nicht aber ausdrücklich den Zugang zu Gütern.

5. Rechtsdurchsetzung

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

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

Nach Artikel 41 GVD kann jede Person, die sich wegen einer diskriminierenden Behandlung für beschwert hält, Klage einreichen. Kläger können folgende Maßnahmen beantragen:

⁸² Art. 13 GVD.

- 1) Verbot einer Handlung, durch die eine Diskriminierung droht, Verbot der Fortsetzung einer diskriminierenden Handlung oder Verbot der Wiederholung einer diskriminierenden Handlung,
- 2) Feststellung durch das Gericht, dass die beklagte Partei die Klagepartei oder eine dritte Partei diskriminiert hat,
- 3) Maßnahmen zur Abhilfe der Folgen der diskriminierenden Behandlung,
- 4) Entschädigung für den erlittenen materiellen und immateriellen Schaden und
- 5) Veröffentlichung des Urteils.

Artikel 46 sieht außerdem vor, dass sowohl der/die Gleichbehandlungsbeauftragte als auch Organisationen, die sich für den Schutz der Menschenrechte oder der Rechte bestimmter Gruppen einsetzen, vor Gericht klagen können.

Ausdrücklich erlaubt sind positive Maßnahmen in der serbischen Verfassung (Art. 21 Abs. 4) und im GVD (Art. 14); angewendet werden sie vor allem in Bezug auf Frauen im Bereich Politik, in Bezug auf Roma im Bereich Bildung und in Bezug auf Menschen mit Behinderungen im Bereich Beschäftigung.

6. Gleichbehandlungsstellen

Die Einrichtung der/des Gleichbehandlungsbeauftragten wurde im Rahmen des GVD als unabhängige und eigenständige staatliche Fachstelle geschaffen, die über ein umfassendes Mandat zur Förderung von Gleichbehandlung und Antidiskriminierung in allen gesellschaftlichen Bereichen verfügt. Der oder die Beauftragte hat zwei Hauptaufgaben: die Verhinderung von und den Schutz vor Diskriminierung. Der Gleichbehandlungsstelle stehen zahlreiche Mittel zur Verfügung, von denen aus Sicht der Diskriminierungsopfer sicher die Entgegennahme und Untersuchung von Diskriminierungsbeschwerden, die Einreichung strategischer Klagen und die Erstattung von Strafanzeigen besonders wichtig sind.⁸³

Das Verfahren zur Einreichung von Beschwerden bei der/dem Beauftragten ist in Artikel 35 bis 40 geregelt, und als grundsätzliche Regel gilt, dass die allgemeinen Vorschriften der Verwaltungsverfahrensordnung auch bei Verfahren zur Anwendung kommen, an denen der/die Beauftragte beteiligt ist. Eingehende Beschwerden müssen innerhalb von 15 Tagen an die beschwerte Partei weitergeleitet werden, die dann 15 Tage Zeit hat, sich zu der Beschwerde zu äußern. Der/die Beauftragte kann ein Schlichtungsverfahren durchführen, wenn beide Parteien dem zustimmen. Dies entspricht Artikel 7 Absatz 1 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse, der die Mitgliedstaaten verpflichtet sicherzustellen, dass Opfer ihre Ansprüche auf dem Gerichts- und/oder Verwaltungsweg sowie, wenn die Mitgliedstaaten es für angezeigt halten, in Schlichtungsverfahren geltend machen können. Wird der Streit jedoch nicht in einem Schlichtungsverfahren geregelt, so muss der/die Beauftragte innerhalb von 90 Tagen nach Eingang der Beschwerde dazu Stellung nehmen, ob das Diskriminierungsverbot verletzt wurde, und sowohl die beschwerdeführende Partei als auch die Person, gegen die sich die Beschwerde richtet, darüber unterrichten. Stellt der/die Beauftragte eine Verletzung fest, so erteilt er/sie der Person, gegen die sich die Beschwerde richtet, eine Empfehlung, in der Mittel zur Abhilfe vorgeschlagen werden. Die Person, an die sich die Empfehlung richtet, muss diese befolgen und der Verletzung innerhalb von 30 Tagen abhelfen. Außerdem muss sie den/die Beauftragte/n über die Durchführung der Maßnahmen informieren. Wird der Verletzung innerhalb von 30 Tagen

⁸³ Der/die Gleichbehandlungsbeauftragte kann der beschwerdeführenden Person auch Auskunft erteilen und eine Schlichtung empfehlen; er/sie legt der Nationalversammlung einen Jahresbericht und Sonderberichte vor, warnt die Öffentlichkeit vor den häufigsten, typischsten und schwersten Formen von Diskriminierung, überwacht die Umsetzung von Gesetzen und sonstigen Vorschriften, initiiert die Verabschiedung oder Änderung von Regelungen, gibt Stellungnahmen zum Inhalt von Gesetzentwürfen und anderer Regularien ab, etabliert und unterhält die Zusammenarbeit mit verschiedenen Gremien und Organisationen und empfiehlt Verwaltungsbehörden und anderen Einrichtungen Maßnahmen zur Sicherstellung von Gleichbehandlung.

nicht abgeholfen, kann der/die Beauftragte dies in elektronischen Medien und Printmedien öffentlich machen, jedoch keine Sanktionen verhängen. Er/sie kann jedoch ein Ordnungswidrigkeitsverfahren beantragen, Strafanzeige stellen oder Klage einreichen, wenn der Fall von strategischer Bedeutung ist.

2017 hat die Gleichbehandlungsstelle zahlreiche Sensibilisierungsmaßnahmen in Bezug auf Diskriminierung und Mechanismen zum Schutz vor Diskriminierung durchgeführt und die regionale Zusammenarbeit weiter gefördert. Der Jahresbericht wurde fristgerecht (am 15. März 2018) vorgelegt und zeigt, dass die Gleichbehandlungsbeauftragte im Jahr 2017 sehr aktiv war: Sie nahm 532 Beschwerden entgegen, gab in 51 Fällen Stellungnahmen ab, legte 41 Gutachten zu Gesetzentwürfen und allgemeinen Gesetzen vor, reichte drei strategische Klagen ein, stellte drei Strafanzeigen, beantragte ein Ordnungswidrigkeitsverfahren und nahm 13 Verwarnungen und 20 Bekanntmachungen vor.⁸⁴

7. Zentrale Punkte

1. Übereinstimmung mit den beiden Antidiskriminierungsrichtlinien der EU

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

- Diskriminierung aufgrund von Assoziierung wird im GVD zwar anerkannt, bezieht sich jedoch nur auf „Familienmitglieder“ und Menschen, die dem Diskriminierungsopfer nahestehen;
- die Definition von unmittelbarer Diskriminierung entspricht der Definition in den EU-Richtlinien, ist jedoch auf eine weniger günstige Behandlung beschränkt und enthält nicht den Begriff des Nachteils;
- die Definition von mittelbarer Diskriminierung ist nicht konditional formuliert („können“) und kann daher so ausgelegt werden, dass sie nur für eine tatsächlich vorgekommene Benachteiligung gilt, wodurch es unmöglich wird, gegen neutrale Vorschriften vorzugehen, bevor ein Opfer tatsächlich benachteiligt wird;
- Anweisung zur Diskriminierung ist im GVD nicht definiert und sollte in das Gesetz aufgenommen werden;
- das GVD legt nicht ausdrücklich fest, dass Situationstests vor Gericht als Beweis zulässig sind. Diese mangelnde Klarheit lässt viele Fragen offen (zum Beispiel wer die Testperson ist, ob Testpersonen ein bestimmtes Verhältnis zu der Person haben dürfen, die wegen Diskriminierung klagt, ob die Testpersonen früher diskriminiert wurden, usw.);
- das GVD enthält keine speziellen Vorschriften über statistische Daten, das Fallrecht ist noch recht beschränkt und es ist nicht klar, wie die Gerichte statistische Beweise bewerten;
- das GVD gilt nicht für Betriebsrenten, soziale Vergünstigungen und selbständige Beschäftigung und es ist unklar, ob es für Sozialschutz und Wohnraum gilt. Obwohl andere Gesetze einige dieser Bereiche, wie selbständige Beschäftigung und Wohnraum, regulieren, sollten entsprechende Bestimmungen in das GVD aufgenommen werden;
- das GVD erwähnt nur den Zugang zu Dienstleistungen und nicht ausdrücklich den Zugang zu Gütern;
- das GVD sollte Segregation als eine schwere Form von Diskriminierung berücksichtigen;
- in das GVD müssen Vorschriften über angemessene Vorkehrungen für Menschen mit Behinderungen aufgenommen werden;

⁸⁴ Gleichbehandlungsbeauftragte (2018), *Ordentlicher Jahresbericht der Gleichbehandlungsbeauftragten für 2017*, Belgrad, S. 216.

- das nationale Recht kennt keine Ausnahme für Arbeitgeber, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, gewährt jedoch religiösen Amtsträgern eine Blankovollmacht zur Diskriminierung, wenn dies von ihrer religiösen Doktrin gefordert oder erlaubt ist;
- das GVD enthält keine ausdrückliche Ausnahmeregelung für unmittelbare Diskriminierung aufgrund des Alters, daher ist hier eine weitere juristische Klärung, insbesondere in Bezug auf die Prüfung der Verhältnismäßigkeit erforderlich;
- obwohl es zahlreiche Sanktionsmöglichkeiten in Diskriminierungsfällen gibt, ist deren Anwendung in der Praxis mit Problemen behaftet, z. B. reduzieren lange Verfahren und milde Sanktionen die Wirksamkeit und Verhältnismäßigkeit der Sanktionen;
- das GVDMB bietet keinen Schutz vor Viktimisierung, und die Definition von Viktimisierung im GVD muss dem Unionsrecht stärker angeglichen werden, da sie keinen ausdrücklichen Kündigungsschutz enthält;
- das GVDMB enthält keine Bestimmungen zur Umkehrung der Beweislast;
- das serbische Recht erlaubt in Diskriminierungsfällen keine Sammelklagen.

2. Umsetzung des bestehenden normativen Rahmens

Auch wenn der in Serbien bestehende normative Rahmen für Antidiskriminierung die einschlägigen EU-Normen im Wesentlichen erfüllt, sind in der Praxis doch einige Probleme bei der Umsetzung festzustellen:

- es ist wichtig, das Verfahren zur Verabschiedung von Änderungen des GVD abzuschließen, um das Gesetz vollständig an den Besitzstand der Union anzupassen;
- einige Probleme erfordern dringende Aufmerksamkeit, zum Beispiel die soziale Integration von Menschen mit Behinderungen und der Zugang zu Dienstleistungen und Gebäuden sowie die Bekämpfung von Hassreden und Hassverbrechen gegen Roma und LGBTI-Menschen;
- es ist wichtig, ein effizienteres Asylverfahren einzurichten und für Migranten einen Status zu schaffen, der ihnen einen „geduldeten“ Aufenthalt in Serbien erlaubt, um den Umfang ihrer Rechte zu bestimmen; die Praxis der Gleichbehandlungsbeauftragten zeigt, dass es wichtig ist, sich auf die Verhinderung von Diskriminierung im Bereich der Bereitstellung von Dienstleistungen zu konzentrieren;
- eine alternde Bevölkerung muss in Serbien einen besseren Zugang zum Gesundheitswesen und zu sozialen Dienstleistungen haben;
- Serbien verfügt noch nicht über ein einheitliches, zentrales System zur Erfassung von Daten über die Funktionsweise des rechtlichen Antidiskriminierungsschutzes, was die Analyse und Überwachung von Diskriminierung enorm erschwert;
- die Zahl der von der Gleichbehandlungsbeauftragten bearbeiteten Fälle ist in den Jahren 2016 und 2017 zurückgegangen und im Vergleich dazu, wie weit Diskriminierung in der Praxis in allen Bereichen der Gesellschaft verbreitet ist, immer noch sehr gering; Gründe dafür sind das unzureichende Bewusstsein und Wissen über Diskriminierung sowie die mangelnde Entschlossenheit der Opfer, Hilfe zu suchen – trotz vieler Aktivitäten und einer besseren Sichtbarkeit der Institution der Gleichbehandlungsbeauftragten; Schulungsveranstaltungen zum Thema Antidiskriminierungsrecht für Angehörige der Polizei, der Arbeitsinspektion, der Medien und des Richterstands unterschiedlicher Gerichtsbarkeiten wurden zwar bereits durchgeführt, es ist aber wichtig, dass der Staat diese Schulungen, die umfassend und dauerhaft sein müssen, fortsetzt.

INTRODUCTION

The national legal system

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

List of main legislation transposing and implementing the directives

Several general and specialised anti-discrimination laws have been adopted in the Republic of Serbia.

The Law on the Prohibition of Discrimination (LPD) was adopted on 26 March 2009,⁸⁵ thereby establishing an integral system of protection from discrimination within the country's legal system. It entered into force on 3 April 2009 (except for the provisions relating to the Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*) which entered into force on 1 January 2010). The Law on the Prohibition of Discrimination expressly prohibits the following grounds of discrimination: race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance and membership of political, trade union and other organisations. However, it also includes other grounds of discrimination, as it has an open clause containing the words 'and other real or presumed personal characteristics'.

The Law applies to all areas of life, but also prescribes special cases of discrimination covering the following areas: discrimination in the course of proceedings conducted before bodies of the public administration, discrimination in the employment sector, discrimination in the provision of public services and in the use of premises and spaces, and discrimination in the sphere of education and professional training.

The Law has not yet been amended, although intensive consultations were undertaken on changes to further align the text with the EU *acquis*. In 2017, the Commissioner for the Protection of Equality organised two round tables on necessary changes to the LPD and submitted the proposed amendments to the Ministry of Labour, Employment, Veteran and Social Affairs for the preparation of a draft Law.⁸⁶ The European Commission acknowledged that amendments to the Law are under preparation and that further amendments are necessary in order to bring the law fully in line with the *acquis*.⁸⁷

⁸⁵ Serbia, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of the Republic of Serbia*, no. 22/2009, 26 March 2009; English version available at www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia, last accessed on 15 March 2018.

⁸⁶ Commissioner for the Protection of Equality (2018), Regular annual report of the Commissioner for the Protection of Equality for 2017, Belgrade, pp. 21-22.

⁸⁷ *Non-paper on the state of play regarding chapters 23 and 24 for Serbia, May 2017*, English version; *Non-paper on the state of play regarding chapters 23 and 24 for Serbia, November 2017*, English version; available at www.mei.gov.rs/eng/documents/eu-documents/non-paper-on-the-state-of-play-regarding-chapters-23-and-24-for-serbia/, last accessed on 15 March 2018.

The Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD) prohibits discrimination based on disability.⁸⁸ The Law was adopted on 17 April 2006 and entered into force on 1 January 2007.⁸⁹ This Law prohibits discrimination on the ground of disability and aims to promote the inclusion of people with disabilities in all spheres of society. It addresses various forms of discrimination against people with disabilities which were previously included piecemeal in a number of different laws (such as social security, employment and labour laws, family law, public healthcare laws, public education laws, pension and disability laws, etc.). The Law was amended on 12 February 2016,⁹⁰ stipulating in Article 34, para. 3, that public authorities are obliged to allow the use of personal facsimile signature stamps by people with disabilities, especially those who are blind or visually impaired, for the signing of legal documents. Article 34a extends this duty to other legal entities and individuals. Finally, Article 34a prescribes a criminal penalty in the event of this right being denied. This Law was followed by the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD),⁹¹ which was adopted with the aim of creating the possibility for greater numbers of people with disabilities to be included in the open labour market and to improve the quality of their employability and/or employment. The Law was amended on 8 April and entered into force on 16 April 2013.⁹²

The Law on the Protection of the Rights and Freedoms of National Minorities⁹³ was adopted on 27 February and entered into force on 7 March 2003. The Law defines national minorities as citizens who are numerically sufficiently representative and belong to a group of residents with a long-term and firm bond with the territory of a state, and who possess 'characteristics such as language, culture, national or ethnic affiliation, origin or confession, differentiating them from the majority of the population and whose members are distinguished by efforts to collectively nurture their common identity, including their culture, tradition, language or religion'. This definition of national minorities thus excludes migrants from its scope.

The Law provides protection to national minorities from all forms of discrimination in exercising their civil rights and freedoms, and the duty of public officials to refrain from acts and regulations that are discriminatory towards them. It further creates instruments that guarantee and protect the special rights of minorities to minority self-governance in the fields of education, use of language, media and culture. The law regulates the way in which the rights of people belonging to national minorities are implemented. Those rights include the right of national affiliation, the right to co-operate with co-nationals in the country and abroad, the right to use one's native language, the right to use national symbols and all the other rights which protect the specificity of national minorities in the

⁸⁸ The position of people with disabilities is further supported by two pieces of legislation adopted in 2015: the Law on the Use of Guide Dogs (Serbia, Law on the Use of Guide Dog (*Zakon o kretanju uz pomoć psa vodiča*), *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015) and the Law on the Use of Sign Language, Serbia (Law on the Use of Sign Language (*Zakon o upotrebi znakovnog jezika*), *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015).

⁸⁹ Serbia, Law on the Prevention of Discrimination against Persons with Disabilities (*Zakon o sprečavanju diskriminacije osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 33/2006, 17 April 2006. Serbia, Amendments to the Law on the Prevention of Discrimination against Persons with Disabilities (*Izmene i dopune Zakona o sprečavanju diskriminacije osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 13/2016, 19 February 2016.

⁹⁰ Serbia, Amendments to the Law on Prevention of Discrimination against Persons with Disabilities, *Official Gazette of the Republic of Serbia*, no. 13/16, 19 February 2016.

⁹¹ Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 17 April 2006.

⁹² Serbia, Amendments to the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Izmene i dopune Zakona o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 32/2013, 8 April 2013.

⁹³ Serbia, Law on the Protection of the Rights and Freedoms of National Minorities (*Zakon o zaštiti prava i sloboda nacionalnih manjina*), *Official Gazette of FRY*, no. 11 of 27 February 2002, *Official Gazette of Serbia and Montenegro*, no. 1/2003 – Constitutional Charter, *Official Gazette of the Republic of Serbia*, no. 72/2009 – other law, *Official Gazette of the Republic of Serbia*, no. 97/2013 – decision of the Constitutional Court, 27 February 2003.

fields of special interest to them (use of the language of the national minorities in the work of public bodies and agencies, education and public information in the languages of the national minorities, preservation and protection of cultural heritage, etc.). The law has been amended several times, in 2003, 2009 and 2013.⁹⁴

The Labour Law⁹⁵ was adopted on 15 March and entered into force on 23 March 2005. It provides specific provisions against discrimination at work and related to employment. Thus, while the LPD contains general anti-discrimination provisions, the Labour Law provides for more specific provisions related to discrimination at work and entitles employees to initiate lawsuits and claim damages based on anti-discrimination provisions contained within it. It contains an open anti-discrimination clause, but explicitly mentions the following grounds of discrimination: gender, birth, language, race, skin colour, age, pregnancy, health condition, disability, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial capacity, and membership of political, labour union or other organisations. In particular, the Labour Law prohibits discrimination with respect to employment conditions and the choice of candidates for an employment position; working conditions and rights; professional development and training; career development; and termination of employment by the employer. The Law has been amended several times, in 2005, 2009, 2013, 2014 and 2017.

Many other laws also contain anti-discrimination provisions, such as the Law on Youth,⁹⁶ the Law on Sport,⁹⁷ the Law on Churches and Religious Organisations,⁹⁸ etc.

In 2017, a set of educational laws was adopted. The Law on the Fundamentals of the Education System⁹⁹ prohibits discrimination in education and states that equality and accessibility of the right to education are based on social justice and equal opportunities without discrimination. The Law on Preschool Education¹⁰⁰ prohibits discrimination and prescribes that, under certain conditions, education may be provided in a national minority language. The Law on Amendments to the Law on Primary Education and Upbringing¹⁰¹ introduces a programme of protection from violence, abuse and neglect. The Law on Amendments to the Law on Secondary Education¹⁰² emphasises the importance of the prevention of discrimination and introduces affirmative measures, namely that members of certain groups can enrol in secondary education under more favourable conditions in order to achieve full equality in education.

Also in 2017, the Law on Electronic Documents, Electronic Identification and Trust Services for Electronic Transactions was adopted which, among other things, stipulates in

⁹⁴ On 3 March 2016, the Action Plan for Exercising the Rights of National Minorities was adopted, as envisaged by the Action Plan for negotiation Chapter 23. It completes Serbia's strategic commitment aimed at the improvement of the institutional and legislative framework in the field of human and minority rights. The document contains 11 chapters: personal status; prohibition of discrimination; culture and media; freedom of religion; the use of language and script; education; democratic participation; representation of national minorities in the public sector and public enterprises; national councils; the economic position of national communities; and international cooperation.

⁹⁵ Serbia, Labour Law (*Zakon o radu*), Official Gazette of the Republic of Serbia, no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017, 15 March 2005.

⁹⁶ Serbia, Law on Youth (*Zakon o mladima*), Official Gazette of the Republic of Serbia, no. 50/2011, 8 July 2011.

⁹⁷ Serbia, Law on Sports (*Zakon o sportu*), Official Gazette of the Republic of Serbia, no. 10/2016, 16 February 2016.

⁹⁸ Serbia, Law on Churches and Religious Organisations (*Zakon o crkvama i verskim zajednicama*), Official Gazette of the Republic of Serbia, no. 36/2006, 27 April 2006.

⁹⁹ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), Official Gazette of the Republic of Serbia, no. 88/2017, 7 October 2017.

¹⁰⁰ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), Official Gazette of the Republic of Serbia, no. 101/2017, 18 November 2017.

¹⁰¹ Serbia, Amendments to the Law on Primary Education (*Zakon izmenama Zakona o osnovnom obrazovanju i vaspitanju*), Official Gazette of the Republic of Serbia, no. 101/2017, 18 November 2017.

¹⁰² Serbia, Amendments to the Law on Secondary Education (*Zakon o izmenama Zakona o srednjem obrazovanju i vaspitanju*), Official Gazette of the Republic of Serbia, no. 101/2017, 18 November 2017.

Article 6 that trust services and electronic identification services must be equally accessible for people with disabilities.

The Law on Public Servants¹⁰³ recognises affirmative measures for the employment of members of national minorities when, in order to achieve appropriate representation, priority is given to equally qualified candidates.

In 2017, the Strategy on the Prevention and Suppression of Human Trafficking for the period 2017-2022 was adopted¹⁰⁴ and supplemented by the Action Plan for 2017-2018.¹⁰⁵ This strategic document specifies, among its goals, protection of children from trafficking and exploitation in pornography and prostitution. This protection is promoted through the implementation of programmes for children in primary and secondary education, which emphasise the unacceptability of gender discrimination and its consequences. In addition, the Action Plan to monitor the implementation of the Strategy for the Social Inclusion of Roma in the Republic of Serbia (2017-2018) was adopted, which defined measures and activities, responsible actors and funds in five priority areas: housing, employment, education, healthcare and social protection, and prevention of discrimination. A body was set up to monitor the implementation of the strategy but it rarely meets. Its work is supported by NGOs and the National Roma Council. In its Progress Report for Serbia for 2017, the European Commission stressed that there is an urgent need for effective implementation and monitoring of the strategy and action plan for Roma inclusion.¹⁰⁶

¹⁰³ Serbia, Law on Public Servants (*Zakon o zaposlenima u javnim službama*), *Official Gazette of the Republic of Serbia*, no. 113/2017, 1 January 2017.

¹⁰⁴ Strategy for the Prevention and Suppression of Trafficking in Human Beings, particularly women and children for the period 2017-2022, *Official Gazette of the Republic of Serbia*, No. 77/2017.

¹⁰⁵ Serbia, Action Plan to monitor the implementation of the Strategy for the Social Inclusion of Roma in the Republic of Serbia, adopted by the Government on 7 June 2015.

¹⁰⁶ European Commission, *Serbia report 2018*, p. 24.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Serbia¹⁰⁷ 2006 includes the following articles dealing with non-discrimination.

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

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

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

Article 76 provides that, 'Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection' (para. 1), and that, 'Any discrimination on the grounds of affiliation to a national minority shall be prohibited' (para. 2). Paragraph 3 of this article states that, 'specific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavourable living conditions which particularly affect them'.

Articles 15 and 76 also apply to all areas covered by the directives, as the material scope of the above-mentioned provisions is broader than those of the directives (including economic, social, cultural and political life).

These provisions are directly applicable, while Article 15, Article 21, para. 4, and Article 76, para. 3, require further adoption of laws and regulations that will enable their implementation.

The constitutional equality clause prescribed in Article 21, para. 3, and Article 76, para. 2, can be enforced against the state, as well as against private actors.

¹⁰⁷ Serbia, Constitution of Serbia (*Ustav Republike Srbije*), *Official Gazette of the Republic of Serbia* no. 98/2006, 10 November 2006.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The Constitution contains a brief list of prohibited grounds of discrimination, specifically mentioning (in Article 21, para. 3) race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability. Article 2, para. 1, of the comprehensive anti-discrimination Law on the Prohibition of Discrimination (LPD) contains a longer list of prohibited grounds, specifically mentioning race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, and membership of political, trade union and other organisations.

The Labour Law¹⁰⁸ prohibits discrimination based on sex, birth, language, race, colour, age, pregnancy, health condition or disability, national origin, religion, marital status, family obligations, sexual orientation, political or other opinion, social origin, property, and membership of political organisations and trade unions.

The Law on the Police¹⁰⁹ prohibits discrimination based on race, sex or ethnicity, social origin, birth, religion, political or other conviction or orientation, gender and gender identity, financial status, culture, language, age and mental and physical disability.

The Law on the Fundamentals of the Education System¹¹⁰ prescribes equal rights and access to education without discrimination based on race, skin colour, ancestors,¹¹¹ citizenship, migrant or displaced person status, nationality or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, property, social and cultural background, birth, genetic features, health, disability, marital and family status, convictions, age, appearance, and membership of political, trade union and other organisations. The Law on Youth¹¹² prohibits discrimination based on race, gender, nationality, religious belief, language, social background, financial standing, affiliation to political, trade union or other organisations, mental or physical disability, health, physical appearance, sexual orientation and gender identity.

The Law on Public Information and Media¹¹³ prohibits incitement to discriminate based on belief, national, ethnic, religious, gender and racial affiliation, political, sexual and other orientation, financial standing, culture, language, age, and mental or physical disability. The Law on Advertising¹¹⁴ prohibits incitement to discriminate based on belief, national, ethnic, religious, gender and racial affiliation, political, sexual and other orientation, ancestry,¹¹⁵ financial standing, culture, language, age, and mental or physical disability.

¹⁰⁸ Serbia, Labour Law (*Zakon o radu*), *Official Gazette of the Republic of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017, 15 March 2005.

¹⁰⁹ Serbia, Law on the Police (*Zakon o policiji*), *Official Gazette of the Republic of Serbia*, no. 6/2016, 28 January 2016.

¹¹⁰ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 88/2017, 7 October 2017.

¹¹¹ The word 'ancestors' used in this provision actually means 'descent'.

¹¹² Serbia, Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

¹¹³ Serbia, Law on Public Information and Media (*Zakon o javnom informisanju i medijima*), *Official Gazette of the Republic of Serbia*, no. 83/2014, 58/2015 i 12/2016, 5 August 2014.

¹¹⁴ Serbia, Law on Advertising (*Zakon o oglašavanju*), *Official Gazette of the Republic of Serbia*, no. 6/2016, 28 January 2016.

¹¹⁵ The word 'ancestry' used in this provision actually means 'descent'.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

As in the EU directives, national law does not provide definitions of the different grounds of discrimination. However, the interpretation of the terms is equivalent to those in EU law, although jurisprudence in the area of anti-discrimination is not yet very well developed. In addition, since international law is directly applicable in Serbia, in the event of inconsistencies in the interpretation of different terms, the judge can directly apply definitions provided in EU directives and CJEU jurisprudence. Nevertheless, judges are reluctant to directly apply international norms so it is important to define some grounds that can be interpreted differently, such as religion which refers to theistic, atheistic and agnostic beliefs, according to the jurisprudence of the European Court of Human Rights.¹¹⁶

Some problems arise due to the fact that Serbia does not have a single, comprehensive definition of disability, which is instead defined in several laws, by-laws and policy documents. Some older laws contain a medical definition of disability,¹¹⁷ while Article 3, para. 1, of the LPDPD defines people with disabilities as people with a congenital or acquired physical, sensory, intellectual or emotional (psycho-social) impairment who are, due to social or other barriers, unable or have limited opportunities to engage in social activities at the same level as others, regardless of whether they are capable of carrying out such activities with the use of technical aids or support services. This definition is not *ad verbum* taken from Article 1, para. 2, of the UN Convention on the Rights of Persons with Disabilities, but the meaning is the same. In addition, the Serbian definition of disability in the LPDPD is broader than the CJEU's definition.¹¹⁸ Here disability is defined as a condition medically diagnosed as curable or incurable entailing a limitation, 'which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one'. Thus, the Serbian definition takes into account opportunities to engage in social activities in general, rather than the more limited sphere of professional life, which is what the CJEU refers to in its case law.

A further definition of people with disabilities is included in another law that, together with the LPDPD, prohibits discrimination against people with disabilities. Thus, Article 3, para. 1, of the Law on the Professional Rehabilitation and Employment of Persons with Disabilities defines people with disabilities as people who live with the permanent consequences of a physical, sensory, mental or psychiatric impairment or disease that cannot be eliminated by any treatment or medical rehabilitation and are faced with social and other limitations and barriers affecting their working capacity and possibility of finding or retaining employment, and who have no possibility or have reduced possibilities of being involved in the labour market or applying for employment on equal terms with other people.

¹¹⁶ See, e.g. ECtHR, *Dimitras and Others v. Greece*, App. no. 42837/06, 3269/07, 35793/07 and 6099/08, 3 June 2013.

¹¹⁷ The Law on the Fundamentals of the Education System defines a disability in the educational system as 'children and students with developmental impairments and disabilities', i.e. 'handicapped students', according to the Law on Higher Education. See Serbia, Law on Higher Education (*Zakon o visokom obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 76/2005, 100/2007 – authentic interpretation, 97/2008, 94/2010, 93/2012, 89/2013, 52/2011, 99/2014, 45/2015, 68/2015, 87/2016, 26 June 2005. According to the Law on Pension and Disability Insurance, a disability exists when an insured person experiences total loss of their working capacity due to changes in their health resulting from an injury at work, occupational disease, injury outside of work or illness which cannot be eliminated by any treatment or medical rehabilitation. See Serbia, Law on Pension and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of the Republic of Serbia*, no. 34/2003, 64/2004 – CC decision, 84/2004 – CC decision, 85/2005, 101/2005, 63/2006, 5/2009, 107/2009, 93/2012, 108/2013, 75/2014, 142/2014, 2 April 2003.

¹¹⁸ See CJEU, Joined Cases C-335/11 and C-337/11, judgment of 11 April 2013.

This definition determines the concept of 'long-term impairments' as impairments that cannot be eliminated by any treatment or medical rehabilitation, which creates long-term consequences. Having different definitions of disability in different laws leads to legal uncertainty, as each definition applies in the area of law which is governed by that legal instrument. Not only is the wording different, but the meaning of this definition is not compatible with the CJEU's judgment, as it refers to permanent impairment.

'Race' and 'ethnic origin' are similarly not defined in the LPD. Case law in which 'race' is invoked as a ground of discrimination is almost non-existent. According to the general annual reports by the Commissioner for the Protection of Equality, in 2010¹¹⁹ and 2012¹²⁰ no-one claimed to be a victim of race discrimination, while in 2011 there was only one complaint,¹²¹ in 2013 five complaints,¹²² and in 2015¹²³ and 2016¹²⁴ only two complaints. In 2017 there were again no complaints.¹²⁵ In one handbook prepared by the Commissioner's Office, 'race' is explained, for example, as discrimination against African Americans. National affiliation and ethnic origin are considered to be one ground of discrimination and in the same handbook these grounds are explained as discrimination against Roma.¹²⁶ Thus, it can be said that the logic of the *Timishev* case is followed: 'race' is considered to represent the idea of a biological classification of human beings into subspecies, while 'ethnic origin' refers to the idea of societal groups marked by common characteristics, such as nationality, religion, language, cultural and traditional origins.¹²⁷

In 2017, 62 (9.8 %) complaints were submitted to the Commissioner claiming discrimination based on ethnicity. The majority of these cases dealt with unequal treatment of Roma or other national minorities (Bosniak, Croatian, Albanian or Romanian, etc.).¹²⁸ For example, a presenter reacted to the point made by a Minister appearing as a guest on a show that the key for the improvement of the position of Roma in society is education. He said that Roma are not 'interested in the key, but in the cover of the manhole', implying that they steal. The Commissioner for the Protection of Equality found that this statement violates the dignity of Roma people.¹²⁹

The Law on Asylum, which applies to asylum seekers and refugees, does not contain definitions of any of the five grounds recognised as grounds for persecution.¹³⁰ However, the draft Law on Asylum and Temporary Protection suggests that race refers to skin

¹¹⁹ Commissioner for the Protection of Equality (2011), *Regular annual report of the Commissioner for the Protection of Equality for 2010*, Belgrade, p. 52.

¹²⁰ Commissioner for the Protection of Equality (2013), *Regular annual report of the Commissioner for the Protection of Equality for 2012*, Belgrade, p. 66.

¹²¹ Commissioner for the Protection of Equality (2012), *Regular annual report of the Commissioner for the Protection of Equality for 2011*, Belgrade, p. 51.

¹²² Commissioner for the Protection of Equality (2014), *Regular annual report of the Commissioner for the Protection of Equality for 2013*, Belgrade, p. 101.

¹²³ Commissioner for the Protection of Equality (2016), *Regular annual report of the Commissioner for the Protection of Equality for 2015*, Belgrade, p. 253.

¹²⁴ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 217.

¹²⁵ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, pp. 217-218.

¹²⁶ Petrusic, N. and Beker, K., *Šta je diskriminacija i kako se od nje zaštititi?* [What is discrimination and how to protect from discrimination?], Partnership for Tolerance and Protection from Discrimination in Serbia, www.ravnopravnost.gov.rs/jdownloads/files/jednostavna_verzija_praktikuma_za_zastitu_od_diskriminacije.pdf, last accessed on 15 March 2018.

¹²⁷ See ECtHR, *Timishev v. Russia*, App. no. 55762/00 and 55974/00, 13 December 2005, para. 55, <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-218-Timishev-v.-Russia-full-case.pdf>, last accessed on 15 March 2018.

¹²⁸ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 139.

¹²⁹ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*) N.M., N.S.R. N.M. v. P. TV, complaint no. 07-00-702/2015-02, opinion from 15 January 2016.

¹³⁰ Serbia, Law on Asylum (*Zakon o azilu*), *Official Gazette of the Republic of Serbia*, no. 109/2007, 28 November 2007.

colour, descent and membership of a specific ethnic group. This draft law also defines the terms 'religion', 'nationality' and 'political opinion'. Thus 'religion' is defined as 'theistic and atheistic beliefs, participation in or abstention from formal worship in private or in public, either alone or in community with others, other religious acts or expressions of faith, or forms of personal or communal conduct founded on or arising from religious beliefs', while 'nationality' means 'membership of a group that is specific in terms of its culture, ethnic or linguistic identity, common geographical or political origins, or its relationship with the population of another state, and may also include citizenship.

2.1.2 Multiple discrimination

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

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

...

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

...'

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

In Serbia, the Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*) is aware of the negative consequences and detrimental effects of multiple discrimination, and acknowledges that the number of complaints claiming multiple discrimination increased in 2017.¹³¹

Thus in 2017, 532 complaints were submitted to the Commissioner for the Protection of Equality. In 2.7 % of complaints grounds were not explicitly mentioned, while 138 complaints (compared to 102 in 2016)¹³² contain two or more grounds for discrimination. However, this does not mean that multiple discrimination was present in all these cases, as it is usual for applicants to name several grounds of discrimination when they are not sure what personal characteristic was the ground for discrimination in their case.

The Commissioner's practice shows that multiple discrimination is most frequent in relation to women, due to their sex and marital and family status, particularly in the area of employment, as well as in cases of women with disabilities who are Roma.¹³³ However, multiple discrimination often occurs in relation to health status and age, disability and sex.¹³⁴ The Commissioner also underlines that intersectional discrimination mostly exists in relation to women with disabilities, who are discriminated against in comparison to women without disabilities or men with disabilities. The Commissioner notes that these

¹³¹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 162.

¹³² Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 162.

¹³³ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 162.

¹³⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 162.

forms of discrimination occur most frequently in employment and in various proceedings before public authorities.¹³⁵

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

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

In many opinions, the Commissioner underlines that discrimination can be perpetrated on the basis of real or presumed personal characteristics, but in practice only one case dealt with presumed characteristics. However, in this case,¹³⁶ the Commissioner didn't find that a subordinate's behaviour was based on the presumed sexual orientation of a police officer, the complainant in this case.¹³⁷ In addition, the Strategy on the Prevention of and Protection from Discrimination mentions among its specific goals the elimination of discriminatory language towards people of real or presumed non-heterosexual orientation, and promotion of tolerance in education and respect of all regardless of real or presumed sexual orientation and gender identity.

b) Discrimination by association

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

¹³⁵ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 77.

¹³⁶ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *B.K. v. the D.L.*, complaint no. 07-00-549/2014-02, opinion from 24 March 2015.

¹³⁷ In this case, there was no mention of the *Coleman* (ECJ, C-303/06, *Coleman v. Attridge*, 17 July 2008) and *Nikolova* cases (ECJ, 83714, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015).

application is limited to 'family members' and people close to those discriminated against.¹³⁸

Article 3, para. 2, of the LPDPD contains the same provision in relation to discrimination based on disability. It also includes the possibility for a lawsuit to be initiated by the individual with a disability who is a victim of discrimination, their legal representative and an individual accompanying them at the time they experience the discrimination (in other words, someone who is discriminated against on the ground of their association with a person with disabilities). Thus, national law is in line with the judgment in the *Coleman* case.¹³⁹

In one case, an applicant claimed that she was fired due to her disability and the disability of her child.¹⁴⁰ The court didn't find discrimination in this case, but accepted that discrimination by association is possible.

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

a) Prohibition and definition of direct discrimination

In Serbia, direct discrimination is prohibited by Article 2, para. 1, of the LPD. Article 6 of the LPD states that, 'Direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission'. This definition is almost in line with the definition in the EU directives. However, it is limited to less favourable treatment and does not cover detriment.

b) Justification of direct discrimination

According to the wording of Article 6, there is no justification of direct discrimination. However, the LPD allows some exceptions and exemptions from the equality clause. Firstly, according to Article 14, 'measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position shall not be considered to constitute discrimination'. In addition, different treatment, exclusion or giving priority on account of the specific character of a job, is allowed if an individual's personal characteristic constitutes a genuine and decisive precondition for performing the job, and the objective to be achieved is justified. These exceptions are also stipulated in Council Directive 2000/78/EC.

However, the exception in relation to religious ethos, set out in Article 4, para. 3, of Council Directive 2000/78/EC is interpreted much more widely in Article 18, para. 2, of the LPD, which prescribes that the 'conduct of religious officials, which is in accordance with a religious doctrine, beliefs or the objectives of churches and religious communities included in the register of religious communities, in accordance with the law regulating the freedom of religion and the status of churches and religious communities', is not considered to be discrimination.

This article is problematic as it provides a blanket exemption for religious officials who can discriminate, if this is what their religious doctrines require or allow.

¹³⁸ There is no definition of 'persons close to them' and judicial interpretation is required in order to define who is covered under 'discrimination by association'.

¹³⁹ ECJ, *Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008.

¹⁴⁰ Supreme Court of Cassation, Rev 2 26/17, judgment from 18 January 2017.

2.2.1 Situation testing

a) Legal framework

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

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

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

b) Practice

In Serbia, situation testing is used in practice. It is considered as proof before the Commissioner for the Protection of Equality and forms the basis for further action by the Commission, such as the initiation of litigation in discrimination cases, recommendations, warnings, etc. It is provided by 23 NGOs whose activists have undergone specific training and work in cooperation with the Commissioner. In 2017, the Commissioner organised training for 16 NGOs in order to increase their capacity to conduct situation testing and submit complaints in discrimination cases.¹⁴¹

Three situation tests were conducted in 2017. Between 23 June and 10 July 2017 the NGO Jednakost (Equality) conducted situation testing in the area of housing in the Serbian capital, Belgrade. Two activists replied to advertisements for apartments to rent and no case of discrimination occurred, compared to 2013 when the first similar situation tests were conducted.¹⁴² Furthermore, no discrimination occurred when tests were carried out on health services for people with HIV/AIDS, as well as in relation to the provision of catering services to LGBTI people.¹⁴³

¹⁴¹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 185.

¹⁴² Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 140.

¹⁴³ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 81.

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

a) Prohibition and definition of indirect discrimination

In Serbia, indirect discrimination is prohibited in national law. The LPD defines indirect discrimination. In Article 7 it states that, 'Indirect discrimination shall occur if an individual or a group of individuals, on account of their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.' However, the definition of indirect discrimination doesn't contain the conditional wording ('would be placed in a less favourable position') and can thus be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge apparently neutral provisions before they incur disadvantages for actual victims. Therefore, the ECRI recommended to Serbia to ensure that it is possible to take legal action in cases of indirect discrimination even before actual disadvantages occur, and to amend the definition of indirect discrimination in that respect.¹⁴⁴

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

b) Justification test for indirect discrimination

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

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Serbia, there are national rules permitting data collection. Data are provided by the National Employment Service and the Office of Statistics. The Statistical Office of the Republic of Serbia (*Republički zavod za statistiku*) is a special professional organisation in the public administration system which, according to the Law on Official Statistics,¹⁴⁵ is responsible for performing technical tasks related to the adoption of programmes, the organisation and conducting of statistical research, data collection, statistical analysis, publication of data, etc. All data subjects are required to submit the requested information to the Statistical Office, which on the other hand provides data protection and confidentiality.

¹⁴⁴ Council of Europe, *ECRI report on Serbia (fifth monitoring cycle)*, adopted on 22 March 2017, p. 16, available in English at www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Serbia/SRB-CbC-V-2017-021-ENG.pdf, last accessed on 15 March 2018.

¹⁴⁵ Serbia, Law on Official Statistics (*Zakon zvaničnoj statistici*), *Official Gazette of the Republic of Serbia*, no. 104/2009, 16 December 2009.

Serbia has not yet established a unified and centralised system for collecting data relevant to the functioning of the system of legal protection against discrimination, and this fact represents a huge problem in assessing and monitoring discrimination. However, the Statistical Office of the Republic of Serbia holds some data, such as in the areas of employment, education etc., which could also be relevant for the assessment of the existence of discrimination. It should be mentioned that the collection of some data is sensitive (e.g. religious affiliation, sexual orientation, etc.) and the right to privacy in providing these data is prescribed in the Law on Personal Data Protection.¹⁴⁶ This Law governs the conditions for the collection and processing of personal data, protection and the limitations to that protection, as well as data security. Personal data protection is provided for each individual irrespective of their 'nationality, residence, race, age, sex, language, religious, political and other belief, national or social origin, property, birth, education, social status and other personal characteristics' (Article 1, para. 2).

The LPD does not contain any specific rule in relation to statistics. The case law is still developing and it is not clear how the courts will treat statistical evidence. However, it must be said that it is permitted by national law in order to establish indirect discrimination. Sometimes it is very important to have statistical data and they are widely used where possible in cases submitted to the Commissioner for the Protection of Equality.

b) Practice

In Serbia, statistical evidence in order to establish indirect discrimination is used in practice by the Commissioner for the Protection of Equality and mostly in cases in relation to pregnancy. However, statistical evidence is not so widely used in practice by the courts, as case law is still developing and most cases fall within the category of direct discrimination. The Civil Procedure Code does not mention statistical evidence as evidence before the court.¹⁴⁷ It just states in Article 7 that parties are obliged to present all the facts on which they base their claim and to provide evidence which determines those facts. Thus, further judicial interpretation is required in this matter.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Serbia, harassment is prohibited in national law. In the LPD it explicitly constitutes a form of discrimination. However, it is not defined, as Article 12 prohibits harassment and humiliating treatment together, which is confusing. Thus, it states that, 'It is forbidden to expose an individual or a group of persons, on the basis of their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment.' In other words, this article defines humiliating treatment and this is confusing as humiliating treatment is a possible element of harassment. This law applies to everyone (any individual under the jurisdiction of Serbia, as well as any legal entity registered or operating on the territory of the Republic of Serbia) and in all areas of public life.

However, Article 21, para. 2 of the Labour Law prohibits harassment and provides a definition of these terms. Thus, harassment means any unwanted conduct aiming at or amounting to the violation of the dignity of an individual seeking employment, as well as of an employee, and which causes fear or creates a hostile, degrading or offensive

¹⁴⁶ Serbia, Law on Personal Data Protection (*Zakon o zaštiti podataka o ličnosti*), *Official Gazette of the Republic of Serbia*, no. 97/2008, 104/2009 – other law, 68/2012 – decision of the CC 107/2012, 23 October 2008.

¹⁴⁷ Serbia, Civil Procedure Code (*Zakon o parničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 72/2011, 49/2013 – decision CC, 74/2013 – decision CC and 55/2014, 3 September 2011.

environment. The Labour Law applies to all rights, duties and responsibilities arising from employment, and/or on the basis of work and includes all employees who work on the territory of the Republic of Serbia with a national or foreign legal entity and/or an individual.

In the LPDPD, harassment is not defined and is not recognised as a special form of discrimination, but is considered to be a more severe form of discrimination if it is committed by public authorities when people with disabilities are seeking to have their rights recognised (Article 11, para. 3).

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Serbia the employer and/or the employee is liable. The scope of liability for harassment is not defined in the LPD, but derives from the Labour Law, and is enshrined in Article 12 which states that employees have the right to protection of their personal integrity and dignity.

Employers are liable for harassment. They are also liable for harassment perpetrated by an employee, if they didn't prevent it or undertake appropriate measures, as an employer is obliged to create the conditions for a healthy working environment. This obligation also stems from the Law on the Prevention of Bullying at Work¹⁴⁸ (although there is a clear distinction between discrimination and bullying), which states that employers are responsible for their own acts of bullying and are vicariously liable if other employees or management engage in bullying (Article 4). In addition, employees are obliged to refrain from bullying, otherwise they are responsible for the violation of their duties at work (Article 11).

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

In 2017, the Commissioner delivered an opinion concerning complaints by NGOs against a weekly newspaper, its director and editor-in-chief, who published an article entitled 'The diary of the convicted - full insult and the hot Gypsy'.¹⁴⁹ The author of the text stated among other things: '...So there is no violence in fagots. The only risk is that you will get AIDS... For those who cannot have intercourse with someone of the same sex, I highly recommend going with Gypsy women (...) When she loves you, it is down to the bone; you are beating her, and if someone interferes in order to protect her, she turns to him and says: "Why do you interfere, let him beat me, he is my man." These are real women, not those who are persuaded that you insult their dignity.' The Commissioner for the Protection of Equality found that this article contains ideas and attitudes that are

¹⁴⁸ Serbia, Law on the Prevention of Bullying at Work (*Zakon o sprečavanju zlostavljanja na radu*), *Official Gazette of the Republic of Serbia*, no. 36/2010, 26 May 2010.

¹⁴⁹ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), NGO D. and B. v. weekly newspaper E., complaint no. 07-00-241/2017-02, opinion from 12 October 2017.

disturbing, that they created a humiliating and offensive environment and violated the dignity of members of the LGBT population and members of the Roma national minority.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Serbia, instructions to discriminate are prohibited in national law. Instructions are not defined. However, the LPD only prohibits the activities of organisations with the purpose of e.g. 'inciting nationally, racially, religiously or otherwise motivated hatred, divisions or enmity' (Article 10). This constitutes a form of discrimination. Therefore, the European Commission against Racism and Intolerance (ECRI) criticises the fact that under the LPD the instruction to discriminate and the announced intention to discriminate do not appear to be considered forms of discrimination as recommended in the General Policy Recommendation No. 7.¹⁵⁰

On the other hand, hate crime is not included in the LPD. According to Article 54a of the Criminal Code, if a crime is committed out of hatred because of someone's race or religion, national or ethnic origin, sex, sexual orientation or gender identity, the court shall consider this circumstance as an aggravating circumstance, unless it has been prescribed as an element of the criminal offence.¹⁵¹

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

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

The Law on Public Assembly¹⁵² regulates public gatherings in the Republic of Serbia. Article 8 prescribes restrictions on freedom of assembly, and in paragraph 2 expressly provides that a gathering is not allowed if its objective is to incite violation of the human and minority rights and freedoms of others, or to incite or encourage racial, ethnic, religious or other inequality, hatred and intolerance.

A prohibition of incitement to discrimination is also contained in the Law on Advertising.¹⁵³ Article 8 stipulates that it is prohibited to publicise advertising messages, directly or indirectly, which give rise to discrimination on any grounds, particularly on the basis of 'beliefs, national origin, ethnic origin, religion, gender or race, political, sexual or other opinion, social origin, property status, culture, language, age, or mental or physical disability'.

b) Scope of liability for instructions to discriminate

In Serbia, the instructor and the discriminator are liable if they associate for the purpose of inciting hatred under the LPD (civil responsibility) and are subject to criminal liability

¹⁵⁰ Council of Europe, *ECRI report on Serbia (fifth monitoring cycle)*, adopted on 22 March 2017, p. 14.

¹⁵¹ Serbia, Criminal Code (*Krivični zakonik*), *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 6 October 2005.

¹⁵² Serbia, Law on Public Assembly (*Zakon o javnom okupljanju*), *Official Gazette of the Republic of Serbia*, no. 6/2016, 28 January 2016.

¹⁵³ Serbia, Law on Advertising (*Zakon o oglašavanju*), *Official Gazette of the Republic of Serbia* no. 6/2016, 28 January 2016.

for incitement of national, racial and religious hatred and intolerance in the Criminal Code.

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

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

In Serbia, the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD)¹⁵⁴ states in Article 11, para. 4, that one of the actions in connection with the promotion of employment of people with disabilities is to ensure technical, professional and financial support for the adaptation of work tasks, the workplace or both work tasks and the workplace, including technical and technological aids for the purpose of enhancing opportunities for people with disabilities to find and retain employment. However, this provision does not give an individual the right to claim reasonable accommodation under the LPREPD.

Furthermore, the LPREPD prescribes that people with disabilities can be employed under general and special conditions (Article 22). While 'general conditions' means the job placement without adapted work activities, workplace, or work activities and workplace, 'special conditions' means job placement with the adaptation of work activities, workplace, or work activities and workplace. The LPREPD further clarifies that the adaptation of work activities can be adjustments to the work process and work tasks (Article 23, para. 3). Adaptation of the workplace can refer to the technical and technological equipment used in a workplace, tools, space and equipment in accordance with the capabilities and needs of the individual with disabilities. It may also include professional assistance to support the individual with disabilities in induction to the job or workplace, through counselling, training, assistance services and support in the workplace, work monitoring, development of personal work methods and evaluation of efficiency.

In addition, Article 22, para. 4, of the LPDPD further prescribes that discrimination occurs in the case of refusal to undertake a technical adaptation of the workplace that enables a person with disabilities to carry out their work effectively, if the costs of adaptation are not borne by the employer or are not excessive in relation to the gain achieved by the employer who is employing a person with disabilities. This provision gives the right to reasonable accommodation to workers, although it is not clear if this right extends to job applicants, as well. Therefore, in this provision, the reasonable accommodation duty is an individualised duty and is part of non-discrimination law. However, it is limited in its application, as reasonable accommodation can take forms other than workplace adaptation, but Article 22, para. 4, refers only to technical adaptations of the workplace. Therefore, the obligation provided for in the LPDPD is not sufficient, as noted by the Committee on the Rights of Persons with Disabilities. This is why the Committee recommended that Serbia review its legislation to adequately guarantee the provision of reasonable accommodation in the workplace.¹⁵⁵

Nevertheless, the duty to provide reasonable accommodation is not included in the LPD. Therefore, the Committee on the Rights of Persons with Disabilities is concerned that neither the concept of reasonable accommodation nor recognition that the denial of such

¹⁵⁴ Serbia, Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom*), *Official Gazette of the Republic of Serbia*, no. 36/2009, 17 April 2006.

¹⁵⁵ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1, 23 May 2016, para. 53.

accommodation is a form of discrimination are explicitly included in a general anti-discrimination law.¹⁵⁶

b) Practice

The lack of this duty to provide reasonable accommodation in the LPD leads to a high unemployment rate among people with disabilities and has reduced their possibilities of inclusion in the labour market. Although it is positive that the LPDPD provides these duties, relevant case law is still lacking on this issue, as the reasonable accommodation duty is not recognised in the LPD. Consequently, in its progress report for Serbia for 2016, the European Commission acknowledges that Serbian non-discrimination legislation is generally in line with European standards, but amendments to bring it fully in line with the *acquis* remain to be adopted, in particular in regard to the obligation to ensure reasonable accommodation for employees with disabilities.¹⁵⁷ In addition, the Committee on the Rights of Persons with Disabilities expressed its concern that neither the concept of reasonable accommodation nor recognition that the denial of such accommodation is a form of discrimination are explicitly included in anti-discrimination laws.¹⁵⁸

c) Definition of disability and non-discrimination protection

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

The LPREPD also provides a definition of people with disabilities as people who live with the permanent consequences of a physical, sensory, mental or psychiatric impairment or disease that cannot be eliminated by any treatment or medical rehabilitation and are faced with social and other limitations and barriers affecting their working capacity and possibility of finding or retaining employment, and who have no possibility or have reduced possibilities of being involved in the labour market or applying for employment on equal terms with other persons (Article 3, para. 1). Thus, this definition is based on a social model of disability and determines the concept of 'long-term impairments' as impairments that cannot be eliminated by any treatment or medical rehabilitation, which creates permanent consequences. This provision is not *ad verbum* taken from Article 1, para. 2, of the UN Convention on the Rights of Persons with Disabilities, as in the LPDPD but the meaning is the same.

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

In Serbia, there is a duty to provide reasonable accommodation for people with disabilities in the field of the provision of services and the use of facilities and services. Thus, the LPDPD describes as discrimination a 'refusal to carry out a technical adaptation of the facility, necessary to provide a service to users with disabilities' (Article 13, para. 5, sec. 3). The Law does not mention any limits to the application of this duty. In its concluding observations, the Committee on the Rights of Persons with Disabilities also

¹⁵⁶ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1, 23 May 2016, para. 9.

¹⁵⁷ European Commission, Serbia 2016 Report, Brussels, 9 November 2016, p.62; text available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf, last accessed on 15 March 2018.

¹⁵⁸ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1, 23 May 2016, p. 2.

recommended that Serbia take immediate steps to ensure that all people with disabilities have access to inclusive and quality primary, secondary and tertiary education and that reasonable accommodation, in accordance with established individual education plans, is provided in mainstream education.¹⁵⁹

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

In Serbia, failure to meet the duty of reasonable accommodation in both the field of the provision of services and the use of facilities, as well as in employment, counts as discrimination. The LPDPD stipulates in Article 22, para. 4, that discrimination occurs in the case of a refusal to carry out a technical adaptation of the workplace that enables efficient work by people with disabilities, and an individual can request such an adaptation. However, the employer can be exempted from this obligation if the costs of the adaptation are disproportionate to the profit of the employer employing a person with a disability. In other words, the disproportionality of the burden is only assessed in financial terms. In addition, there is an individual relationship between the profit gained from employing the person with a disability and the cost of the accommodation for that person. This provision is not clear and someone can argue that it seems to imply that the employer still has to gain some profit from employing the person with a disability. Therefore, further judicial interpretation is required in order to clarify this matter. Furthermore, Article 2, para. 1, of the LPD, as well as Article 3, para. 2, of the LPDPD, clearly state that discrimination occurs as an act or omission and this can be interpreted as a failure to provide reasonable accommodation. However, strictly interpreting Article 22, para. 4, it is important to mention that reasonable accommodation assumes only technical adaptation and cannot take other forms, such as reassigning tasks, moving people to another function, etc., which is in contradiction with Article 5 of the Directive 2000/78/EC.

It is important to mention that a failure to provide reasonable accommodation can be either direct or indirect discrimination, as both definitions contain failure to act as an act of discrimination. Therefore, potential sanctions are the same as in a case of direct or indirect discrimination. Furthermore, the burden of proof shifts when claiming discrimination due to failure to provide reasonable accommodation.

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

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

g) Accessibility of services, buildings and infrastructure

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

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

¹⁵⁹ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1, 23 May 2016, p. 8.

environmental protection and protection against natural disasters). Public authorities, as well as private institutions and individuals who open facilities to the public, have a duty to ensure accessibility.

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

Regarding physical access to buildings, Article 5 of the Law on Planning and Construction¹⁶⁰ specifies that facilities for public and commercial use must fulfil the condition that people with disabilities, children and the elderly are provided with appropriate access to and mobility within them. In addition, residential buildings with ten or more units must be designed to meet accessibility requirements. In its annual report for 2017, the Commissioner for the Protection of Equality acknowledges that access to buildings remains one of the main challenges in improving the position of people with disabilities.¹⁶¹

The Law on Housing and Building Maintenance¹⁶² provides in Article 90 that the term 'adequate flat' means an accessible flat if the beneficiaries of a housing support programme are people with disabilities. This Law also prescribes in Article 79, para. 6, that in the event of forced eviction, there is a duty to provide adequate alternative housing, which must be accessible.

The Law on Road Traffic Safety prescribes in Article 24 that a blind person who participates independently as a pedestrian in areas where traffic is present should move around with the aid of a white cane and/or a trained guide dog.¹⁶³ This provision is further elaborated in the Law on the Use of Guide Dogs,¹⁶⁴ with the aim of enabling people with disabilities to move around using guide dogs on public transport, in all public buildings and all public places (including covered public places), as well as in workplaces. This Law is primarily aimed at the 12 000 citizens who have severe visual impairments, 9 000 citizens who are completely blind and 3 000 citizens who have impaired vision¹⁶⁵ and should help them to move around more freely.¹⁶⁶ The Law is not limited only to Serbian nationals.

In January 2017, a strategy was adopted on measures and activities to increase the quality of services in the field of geospatial data and registration of real estate rights in the official state records.¹⁶⁷ The Strategy contains several provisions relating to the prohibition of discrimination and requiring technical adaptation of buildings, if necessary, in order to provide services for people with disabilities. It also anticipates improvements

¹⁶⁰ Serbia, Law on Planning and Construction (*Zakon o planiranju i izgradnji*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 81/2009 - corr., 64/2010 - decision CC, 24/2011, 121/2012, 42/2013 - decision CC, 50/2013 - decision CC, 98/2013 - decision CC, 132/2014, 145/2014, 3 September 2009.

¹⁶¹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 8.

¹⁶² Serbia, Law on Housing and Building Maintenance (*Zakon o stanovanju i održavanju zgrada*), *Official Gazette of the Republic of Serbia*, no. 104/2016, 23 December 2016.

¹⁶³ Serbia, Law on Road Traffic Safety (*Zakon o bezbednosti saobraćaja na putevima*), *Official Gazette of the Republic of Serbia*, no. 41/2009, 53/2010, 101/2011, 32/2013 - decision of the CC, 55/2014, 96/2015, 9/2016 - decision of the CC, 10 June 2009.

¹⁶⁴ Serbia, Law on the Use of Guide Dogs (*Zakon o kretanju uz pomoć psa vodiča*), *Official Gazette of the Republic of Serbia*, no. 29/2015, 31 March 2015.

¹⁶⁵ Social Inclusion and Poverty Reduction Unit, 'Law on movement using guide dogs adopted', 25 March 2015, available at <http://socijalnoukljucivanje.gov.rs/en/law-on-movement-using-guide-dogs-adopted/>, last accessed on 15 March 2018.

¹⁶⁶ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 6.

¹⁶⁷ Serbia, Strategy of measures and activities to increase the quality of services in the field of geospatial data and registration of real estate rights in the official state records (*Strategija mera i aktivnosti za povećanje kvaliteta usluga u oblasti geoprostornih podataka i upisa prava na nepokretnosti u zvaničnoj državnoj evidenciji*), *Official Gazette of the Republic of Serbia*, no. 8/2017, 11 February 2017.

in the availability of services for members of vulnerable groups (primarily people with disabilities and older people) in the form of mobile teams.

In 2017, the Commissioners dealt with several cases where questions of accessibility were raised. In one case, the Commissioner found discrimination where a bank branch was not accessible for people with disabilities.¹⁶⁸ In another case it found a violation because a polling station was not accessible for a person in a wheelchair¹⁶⁹ and there was a similar case where a police station was not accessible.¹⁷⁰ In these cases, the Commissioner found violations of Articles 6 (direct discrimination), 17 (discrimination in the provision of services) and 26 (discrimination against people with disabilities) of the LPD in conjunction with Articles 13 (discrimination of people with disabilities regarding accessibility of services and facilities) and 16 (accessibility of public facilities) of the LPDPD.

h) Accessibility of public documents

Article 5 of the Law on Free Access to Information of Public Importance¹⁷¹ stipulates that everyone has the right to be informed if a public authority holds specific information of public importance and has the right to be allowed to see a document containing information of public importance, the right to a copy of that document and the right to receive a copy of the document upon request, by mail, fax, electronic mail or in another way. This right must be exercised under equal conditions, notwithstanding citizenship, temporary or permanent residence, location of headquarters (in the case of a legal entity), or personal characteristics, such as race, faith, nationality, ethnicity, gender or any other personal characteristic (Article 6).

In addition, the Law on Public Information and Media¹⁷² and the Law on Electronic Communications¹⁷³ introduce positive innovations with explicit reference to people with disabilities. Thus, the Law on Public Information and Media sets out the obligation to provide access to information and communication. Article 12 states that authorities must take measures to ensure the smooth receipt of information intended for the public, in an appropriate form and by use of appropriate technologies, and provide part funding or other conditions for the operation of media outlets which publish information in sign language, Braille or in another way to facilitate the exercise of the rights of people with disabilities pertaining to the public information sector. The Law on Electronic Communications contains several articles which have the purpose of securing the availability of electronic communication for people with disabilities. However, access to information and communications is still very difficult for people with sensory impairments.¹⁷⁴

Despite the fact that there are around 30 000 deaf and hearing impaired people in Serbia, there were only three registered sign language interpreters. Therefore, the Law

¹⁶⁸ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), C. S. Ž. O. from B. v. The Bank, complaint no. 07-00-233/2017-02, opinion from 22 September 2017.

¹⁶⁹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, pp. 95-96.

¹⁷⁰ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), U. D. K. v. The Ministry of Interior, complaint no. 07-00-192/2017-02, opinion from 25 July 2017.

¹⁷¹ Serbia, Law on Free Access to Information of Public Importance (*Zakon o slobodnom pristupu informacijama od javnog značaja*), *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009, 36/2010, 31 December 2004.

¹⁷² Serbia, Law on Public Information and Media (*Zakon o javnom informisanju i medijima*), *Official Gazette of the Republic of Serbia*, no. 83/2014, 58/2015, 12/2016, 13 August 2014.

¹⁷³ Serbia, Law on Electronic Communications (*Zakon o elektronskim komunikacijama*), *Official Gazette of the Republic of Serbia*, no. 44/2010, 60/2013 – CC decision, 62/2014, 30 June 2010.

¹⁷⁴ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 6; available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SRB&Lang=EN, last accessed on 27 March 2018.

on the Use of Sign Language¹⁷⁵ was adopted in order to regulate the use of sign language in political, educational, employment and other areas of social life. The purpose of this Law is to enable the full inclusion of deaf people in society and the right to use sign language in various proceedings in relation to public services, in education, employment and all other areas. With this Law, sign language becomes an official language for the hearing impaired, providing a legal basis for greater accessibility to information and communication.¹⁷⁶ The Ministry of Justice appointed 17 permanent court sign language interpreters, in addition to the already existing three interpreters, with the aim of improving the opportunities for people with disabilities to exercise their rights,¹⁷⁷ in a range of circumstances, such as court proceedings, different services provided by municipalities, visa applications, etc. In March 2017, the Commissioner for the Protection of Equality welcomed the decision to appoint 17 permanent court sign language interpreters, which will significantly improve the position of people with disabilities who need their support.¹⁷⁸

¹⁷⁵ Serbia, Law on the Use of Sign Language, *Official Gazette of the Republic of Serbia*, no. 38/2015, 7 May 2015.

¹⁷⁶ The Law on the Prevention of Discrimination against Persons with Disabilities was amended in February 2016 in order to guarantee the right of blind or visually impaired people to use personal facsimile stamps to sign legal documents. Amendments to the Law on the Prevention of Discrimination against Persons with Disabilities, *Official Gazette of the Republic of Serbia*, no. 13/2016, 19 February 2016.

¹⁷⁷ This information was published on the website of the Commissioner for the Protection of Equality on 14 March 2017, <http://ravnopravnost.gov.rs/saopstenje-povodom-postavljanja-sudskih-tumaca/>, last accessed on 15 March 2018.

¹⁷⁸ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 104.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Serbia, there is a residence requirement for protection under the relevant national laws transposing the directives. Thus, the LPD prescribes that the law applies to 'an individual residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether that individual is a national of the Republic of Serbia, some other state or a stateless person'. It can be derived from the wording that this requirement means legal residence and not only presence on the state territory, as there is a difference between the terms 'reside' (*boraviti*) and 'is present' (*nalazi se na*). Thus, the LPD requires that a person is resident in the Republic of Serbia, regardless of their citizenship. In the case of a cross-border worker (for example, someone who resides in Croatia and works in Serbia), it can be argued that this person is not covered by the LPD. But Article 21 of the Constitution also applies, which means that the LPD must be interpreted in accordance with the constitutional provisions and provide protection in this case as well. This dilemma is not resolved, even with Article 3, para. 2, which states that a foreigner, in accordance with international treaties, has all the rights guaranteed by the Constitution and by law, with the exception of those rights that, in accordance with the Constitution and the law, are only enjoyed by the citizens of the Republic of Serbia.

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

a) Protection against discrimination

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

b) Liability for discrimination

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

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

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

a) Protection against discrimination

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

individuals, as well as 'any legal entity registered or operating on the territory of the Republic of Serbia'.

b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Serbia, national legislation applies to all sectors of private¹⁷⁹ and public employment,¹⁸⁰ self-employment and occupation, including contract work, military service and holding statutory office, for the five grounds.¹⁸¹

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

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

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

¹⁷⁹ See, e.g. Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *I.K. from U. v. PTP D. DOO from K.*, complaint no. 07-00-00555/2016-02, opinion from 17 November 2017.

¹⁸⁰ See, e.g. Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), *Z. D. from B. v. O. hospital Š.*, complaint no. 07-00-263/2017-02, opinion from 17 October 2017.

¹⁸¹ It covers sex, birth, language, race, skin colour, age, pregnancy, health condition, and/or disability, ethnic origin, religion, marital status, family obligations, sexual orientation, political or other belief, social background, financial status, membership of political organisations or trade unions, or any other personal characteristic.

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

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

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

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

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

Article 13, para. 2, of the Law on the Employment of Foreigners applies to asylum seekers,¹⁸² stipulating that people who apply for asylum shall be issued personal work permits nine months after submitting their asylum application. These personal work permits shall be valid for six months with the possibility of extension for the duration of the holders' status. This solution is to a certain extent in line with the standards set out in the Directive on Reception Conditions.¹⁸³ Article 15 of the Directive guarantees asylum seekers access to the labour market, but it actually states that this access must be provided no later than nine months at the maximum after the application is lodged and the state parties shall each regulate this issue ensuring that asylum seekers have effective access to the labour market.¹⁸⁴ For refugees, Article 43 of the Law on Asylum¹⁸⁵

¹⁸² Serbia, Law on Employment of Foreigners, (*Zakon o zapošljavanju stranaca*), *Official Gazette of the Republic of Serbia*, no. 128/2014, 113/2017, 12/2016, 4 December 2014.

¹⁸³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

¹⁸⁴ Tošković Sonja, *Op.cit.*, p. 42.

applies and stipulates that refugees have the same rights as foreign nationals who have permanent residence in Serbia in relation to access to employment and the right to work.

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

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

In Serbia, national legislation prohibits discrimination in relation to working conditions including pay and dismissals, for all five grounds and for both private and public employment.¹⁸⁶

Article 20, para. 2, of the Labour Law prescribes the prohibition of discrimination regarding employment conditions, working conditions and all the rights deriving from employment relations and cancellation of an employment contract (in para. 5).

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

3.2.3.1 Occupational pensions constituting part of pay

In respect of occupational pensions, anti-discrimination law does not cover prohibition of discrimination. However, according to Article 119, para. 5, of the Labour Law, an employer is entitled to pay a premium for voluntary supplementary pension insurance to employees, and this is considered to constitute 'pay', which is subject to the Labour Law and the LPD.

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

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

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

In other words, this right is also guaranteed for people who perform some kind of practical work experience, although there is no employment relationship. Article 19, para. 1, prescribes that everyone has the right to professional training in education in equal

¹⁸⁵ Serbia, Law on Asylum (*Zakon o azilu*), *Official Gazette of the Republic of Serbia*, no. 109/2007, 6 December 2007 (entered into force on 1 April 2008).

¹⁸⁶ This covers sex, birth, language, race, skin colour, age, pregnancy, health condition and/or disability, ethnic origin, religion, marital status, family obligations, sexual orientation, political or other belief, social background, financial status, membership of political organisations or trade unions, or any other personal characteristic.

circumstances, in accordance with the law. It includes higher education and adult lifelong learning courses.

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

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

In Serbia, national legislation expressly prohibits discrimination in relation to membership of and involvement in workers' or employers' organisations as formulated in the directives for the ground of disability, and does not recognise it for other grounds.

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

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

In Serbia, national legislation prohibits discrimination in relation to social protection, including social security and healthcare as formulated in the Racial Equality Directive.

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

Article 25 of the Law on Social Protection¹⁸⁷ prohibits discrimination in the area of social protection which is based on 'race, sex, age, national origin, social background, sexual orientation, religion, political, trade union or other opinion, property status, culture, language, disability, the nature of social exclusion or other personal characteristics'.

The Law on Healthcare¹⁸⁸ guarantees the right to healthcare for citizens of the Republic of Serbia, as well as to any other person who has permanent or temporary residence in the territory of the Republic of Serbia (Article 3). According to Article 25, every citizen has the right to healthcare, exercised with respect to the highest possible standards of human rights, and respecting their moral, cultural, religious and philosophical beliefs. The principles in the areas of healthcare include, among others: 1) the principle of accessibility (physically, geographically and economically available), especially at the primary level (Article 19); 2) the prohibition of discrimination in the provision of healthcare based on race, sex, age, national origin, social background, religion, political or other opinion, property status, culture, language, type of illness, mental or physical

¹⁸⁷ Serbia, Law on Social Protection (*Zakon o socijalnoj zaštiti*), *Official Gazette of the Republic of Serbia*, no. 24/2011, 4 April 2011.

¹⁸⁸ Serbia, Law on Healthcare (*Zakon o zdravstvenoj zaštiti*), *Official Gazette of the Republic of Serbia*, no. 107/2005, 72/2009 – other laws, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013, 93/2014, 96/2015, 106/2015, 113/2017, 2 December 2005.

disability (Article 20); and 3) the principle of comprehensiveness, which involves the inclusion of all citizens of the Republic of Serbia in the healthcare system.

Asylum seekers and refugees have equal rights to healthcare in Serbia. Healthcare institutions and private practice, as well as medical staff, are obliged to provide emergency medical assistance to foreigners.¹⁸⁹ All asylum seekers undergo medical examinations on admission to asylum centres. They are examined by medical doctors in healthcare centres in the municipalities where they are living. This procedure is set down in the Rulebook on Medical Examinations of Asylum Seekers for Admission to Asylum Centres.¹⁹⁰

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

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

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

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

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

¹⁸⁹ Article 240, para. 1 of the Health Care Law.

¹⁹⁰ The Rulebook on Medical Examinations of Asylum Seekers for Admission to Asylum Centres (*Pravilnik o zdravstvenim pregledima lica koja traže azil prilikom prijema u Centar za azil*), Official Gazette of the Republic of Serbia, no. 93/2008, 23 October 2008.

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

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

In Serbia, national legislation prohibits discrimination in relation to education as formulated in the Racial Equality Directive.

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

This means that migrants also have the right to education and they also enjoy protection from discrimination under the LPD. The Law on Asylum sets out provisions that relate to asylum seekers and those granted international protection. Thus Article 41 prescribes that asylum seeker and refugees have the right to free primary and secondary education, while Article 38, para. 4, establishes that right for those granted temporary protection. However, in practice, the implementation of these provisions has proven to be a major challenge.¹⁹¹

In December 2016, a Decree on Ways to Involve Persons Recognised as Refugees in Social, Cultural and Economic Life¹⁹² was enacted and it entered into force in January 2017. The Decree foresees assistance to various areas crucial to the integration of refugees, including education. It stipulates that refugee children will be provided with textbooks, assistance in initiating the foreign school diploma recognition, study support and financial aid for attending extracurricular activities. In addition, it stipulates in Article 4 that the Commissariat for Refugees and Migration will provide Serbian language lessons to refugees, which is not covered by mainstream education in Serbia. Therefore, there was hardly any practice in the field of the education of migrants, asylum seekers and refugees in Serbia until 2017. This year, several initiatives were implemented regarding the education of migrant children, launched by the UNICEF Office in Belgrade and endorsed by the Ministry of Education, Science and Technological Development.

By February 2017 ten schools near two asylum centres had been provided with capacity-building support in the form of training, mentorship and mini grants. Meetings were held with the regional school administration to discuss enrolment procedures, necessary documentation and monitoring and support mechanisms. In addition, informal education guidelines were drafted to facilitate the development of basic skills (communication in native and foreign languages, computer skills, basic knowledge of maths and other natural sciences, civic education, cultural awareness and learning skills).¹⁹³ Around 90 children of asylum seekers are currently exercising their right to education. They are enrolled in mixed classes, but they also go to separate classes for some lessons, such as Serbian language course.

¹⁹¹ See Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia in 2016*, Belgrade, 2016, pp. 103-106, available at www.bgcentar.org.rs/bgcentar-eng-lat/wp-content/uploads/2017/03/Right-to-Asylum-in-the-Republic-of-Serbia-2016-2.pdf, last accessed on 3 May 2018.

¹⁹² Decree on Ways to Involving Persons Recognised as Refugees in Social, Cultural and Economic Life, (*Uredba o načinu uključivanja u društveni, kulturni i privredni život lica kojima je priznato pravo na utočište*), *Official Gazette of the Republic of Serbia*, no. 101/2016, 16 December 2016. It only refers to recognised refugees and does not explicitly cover subsidiary protection beneficiaries.

¹⁹³ For further information, see Belgrade Centre for Human Rights (2017), *Right to asylum in the Republic of Serbia*, periodic report for January - March 2017, Belgrade, April 2017, pp. 31-33.

In May 2017, the Ministry adopted professional guidance on the inclusion of asylum seekers in the education system and provided training for school administration staff from areas with asylum and reception centres. During August and September 2017 around 400 teachers from nine school administrations were trained. The inclusion of refugee and migrant children in education was accepted by local communities without major problems, except in Šid where parents opposed to this measure claimed that the already overloaded education system in their community would suffer negative effects, impairing to the quality on the education of their children.¹⁹⁴ This problem was overcome after intensive discussions between parents and the school administration.

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

The Law on the Fundamentals of the Education System is a systemic law in the area of education which prescribes an inclusive education. It states that the education system must secure for all children, students and adults equal rights to and accessibility of education based on social justice and the principle of equal opportunities without discrimination (Article 7, para. 1). This provision is further elaborated in a Regulation on the detailed criteria for the recognition of forms of discrimination perpetrated by an employee, child, student or third party in an educational institution.¹⁹⁵ In 2017, the Commissioner for the Protection of Equality and UNICEF prepared three handbooks - for teachers, parents and students - in order to help them to recognise discrimination in practice and to take legal remedies to protect themselves from discrimination.

Article 3 guarantees everyone the right to education. Citizens of the Republic of Serbia are equal with regard to exercising their rights to education. The Law guarantees the right to education of foreign citizens and stateless persons under the same conditions and in the manner prescribed for citizens of the Republic of Serbia (Article 3, para. 5). It also contains Article 110 which prohibits discrimination, direct or indirect, on any ground, and specifically includes migrant status. Article 100, para. 2, expressly allows special measures that have been introduced to achieve full equality for, protection of and advancement of people or groups of people who are in an unequal position. Pupils are protected from discrimination, violence, abuse and neglect (Article 79, para. 4). According to Article 99, para. 3, educational institutions are required to adopt anti-discrimination programmes and to establish anti-discrimination teams.

Other specific laws regulate different levels of education (preschool,¹⁹⁶ primary,¹⁹⁷ secondary¹⁹⁸ and higher education)¹⁹⁹ and all contain provisions on the prohibition of

¹⁹⁴ Belgrade Centre for Human Rights (2018), *Human Rights in Serbia in 2017 (Ljudska prava u Srbiji u 2017)*, Belgrade, March 2018, pp. 360-361.

¹⁹⁵ Serbia, Regulation on detailed criteria for the recognition of forms of discrimination by an employee, child, student or third party in an educational institution (*Pravilnik o o blizim kriterijumima za prepoznavanje oblika diskriminacije od strane zaposlenog, deteta, učenika ili trećeg lica u ustanovi obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 22/2016, 4 March 2016.

¹⁹⁶ The principles of preschool education include, inter alia, equal rights and access to all forms of preschool education, without discrimination on the basis of gender, social, cultural, ethnic, religious or other affiliation, place of residence or domicile, material or health conditions, disability, as well as on other grounds, in accordance with the law (Article 4, para. 2, sec. 1).

¹⁹⁷ Serbia, Law on Primary Education (*Zakon o osnovnom obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 55/2013, 101/2017, 25 June 2013. Article 9 states that the main task of the school is to provide education of good quality and education for every child and student, under the same

discrimination which cover different grounds. However, Article 7, para. 1, of the Law on the Fundamentals of the Education System applies as a systemic law, as well as Article 2, para. 1, of the LPD, which means that all grounds covered in the two EU directives are covered by these laws as well.

a) Pupils with disabilities

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

The Law on the Fundamentals of the Education System recognises inclusive education and provides that people with disabilities have the right to education respecting their educational needs in the mainstream education system, with additional individual or group support in a special group or school, in compliance with this and special laws (Article 3, para. 3). In certain cases, pupils with disabilities will be enrolled in special schools, but the majority of them are integrated within the mainstream school system. There are 41 schools in Serbia for children with developmental impairments (23 primary schools with preschool departments, 17 schools for primary and secondary education with preschool departments and one secondary school).²⁰⁰

Those pupils with disabilities who are integrated within the mainstream school system need special support and have an individual teaching plan. Children with disabilities may be enrolled in special schools based on the opinion of an intersectoral commission and with the consent of their parents (Article 20). Many schools are still inaccessible and there is also a lack of transportation, accessible books and teaching equipment which make it difficult or prevent children from attending lessons.²⁰¹

The Commissioner for the Protection of Equality also acknowledges that people with disabilities are discriminated against in the area of education. In 2017, 17 complaints (19.3 %) were submitted claiming disability discrimination in education.²⁰² In addition, support for children with disabilities is financed from the local budget and the level of support depends on the place of residence. Thus, in one case, the mother of a child with a disability submitted a complaint against the local municipality which didn't provide a personal assistant for her child. The Commissioner found the municipality responsible for failing to secure additional support for children with disabilities.²⁰³

In another case, additional individual help was not provided for a child with disabilities enrolled in preschool education.²⁰⁴ The Commissioner recommended implementing all the

conditions, no matter where the school is located, or where the education takes place. People carrying out educational work and other people employed in schools must promote equality among all students and actively oppose all forms of discrimination and violence.

¹⁹⁸ Serbia, Law on Secondary Education (*Zakon o srednjem obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 55/2013, 101/2017, 25 June 2013. Article 2, para. 1, sec. 6, provides as one of the goals of secondary education respect for equality in relation to racial, ethnic, cultural, linguistic, religious, gender, sex and age characteristics, tolerance and respect for diversity.

¹⁹⁹ Serbia, Law on Higher Education (*Zakon o visokom obrazovanju*) *Official Gazette of the Republic of Serbia*, no. 76/2005, 97/2008, 93/2012, 99/2014, 45/2015 – authentic interpretation, 68/2015, 2 September 2009. This Law recognises the principle of respect for human rights and freedoms, including prohibition of all forms of discrimination and equality of higher education institutions, regardless of their founder or form of ownership (Article 4, para. 1, sec. 6 and 9).

²⁰⁰ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 20.

²⁰¹ Coalition of NGOs, *Alternative report on the implementation of the Convention on the Rights of Persons with Disabilities in the Republic of Serbia*, Belgrade, July 2015, p. 20.

²⁰² Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 94.

²⁰³ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), R.A. from Z. v. City Administration Zaječar complaint no. 07-00-156/2017-02, opinion from 5 September 2017.

²⁰⁴ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), R.L. from B. v. PU "A" N.B., complaint no. 07-00-176/2017-02, opinion from 21 November 2017.

necessary educational, health and social support measures to provide the assistance required by the child in accordance with his age and needs.

The Law on Textbooks²⁰⁵ was adopted with the aim of publishing textbooks in all accessible formats: audio, audiovisual, large print and Braille (Article 10, para. 5). This Law also recognises the use of special books for children with developmental disabilities. However, Article 4, para. 1, prescribes that the content and format of textbooks for children with developmental disabilities can be adjusted to their capabilities and needs. In other words, it may be shorter in content and therefore lead to differences in achievement.

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

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

However, Article 19 provides two exceptions to the prohibition of discrimination: ascertaining the specific preferences of preschool children, pupils or students for admission to an educational institution for a particular subject or group of subjects, their artistic affinities or special talents (para. 1); and the organisation of specific forms of teaching or education for pupils and preschool children who, due to insufficient intellectual capacity, cannot follow regular courses, and their referral to these forms of teaching or education, if this is done on the basis of actions by a competent authority, which determines the need for such education (para. 2).

Since Article 19, para. 2, unduly makes a distinction between children with intellectual disabilities and other children, in 2011 the Commissioner for the Protection of Equality submitted an initiative to amend this article, but in 2018 the initiative had not yet received support.²⁰⁶

b) Trends and patterns regarding Roma pupils

In Serbia, specific patterns exist in education regarding Roma pupils, such as segregation. Segregation of Roma children is still present in certain schools; there are schools attended by a large percentage of Roma children, which also leads to segregation, and there are frequent problems related to the attitudes of the teaching staff and the community towards Roma pupils. Roma children are still victims of prejudice and various forms of discrimination, including segregation, as one of the most serious violations of the right of children to education (e.g. schools with a majority of Roma pupils, so-called 'Roma' schools, and the over-representation of Roma children in schools for the education of children with disabilities).²⁰⁷

²⁰⁵ Serbia, Law on Textbooks (*Zakon o udžbenicima*), *Official Gazette of the Republic of Serbia*, no. 68/2015, 113/2017, 12 August 2015.

²⁰⁶ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), opinion no. 1080/2011, 3 November 2011.

²⁰⁷ *Towards a comprehensive EU protection system for minorities*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2017, available at [www.europarl.europa.eu/RegData/etudes/STUD/2017/596802/IPOL_STU\(2017\)596802_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596802/IPOL_STU(2017)596802_EN.pdf), last accessed on 15 March 2018.

In one report prepared by the European Roma Rights Centre and Praxis, it was noted that Roma children are disproportionately represented in 'special schools', excluding them from equal access to quality education.²⁰⁸ Although the implementation of the Law on the Fundamentals of the Education System led to a decline in the proportion and overall number of Roma pupils in special education, an increase in the number of Roma pupils transferred from mainstream schools to special schools remains. It was also noted that, although general steps were taken to reduce the use of special schools, no particular measures have been taken with regard to Roma pupils.²⁰⁹

In addition, the UN Committee on the Elimination of all Forms of Racial Discrimination observes that different measures are introduced (scholarships and other supporting measures) to support Roma children, but there is still a significantly lower percentage of Roma children enrolled in all levels of education compared to the general population. The Committee is also concerned about the practice of segregation in education where in some schools most children are Roma, or where they are placed in Roma-only classes.²¹⁰ Therefore, the Committee recommended to Serbia to put an end to de facto state school segregation of Roma children and to ensure access to quality education for them, including through anti-racism and human rights training for school staff, awareness-raising efforts targeting parents and increased employment of Roma teachers.²¹¹

The Strategy for the Social Inclusion of Roma in the Republic of Serbia for the period 2016-2025, adopted on 3 March 2016, describes how Roma are still discriminated against in education. One of the goals is to reduce the drop-out rate of Roma pupils from the education system, which requires improvements in practice in schools and social work centres in the areas of both prevention and intervention. In March 2017, a coordination body to monitor the implementation of the Strategy was established, chaired by the Deputy Prime Minister and Minister of Construction, Transport and Infrastructure and including the Ministers and institutions responsible for the priority areas of the strategy, namely education, employment, health and housing. However, by the end of 2017 this body hadn't published any reports or recommendations.

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

In Serbia, national legislation does not prohibit discrimination in relation to access to and supply of goods and services as formulated in the Racial Equality Directive. Discrimination is prohibited in the provision of services for all grounds,²¹² but there is no provision prohibiting discrimination in access to and supply of goods on any ground.

Article 17, para. 1, of the LPD prohibits discrimination in the provision of public services, but not goods, and does not include housing. It states that discrimination is considered to take place 'if a legal or physical entity, within the framework of its/his/her activities or profession, refuses to provide a service on the grounds of a personal characteristic of an individual or a group of persons, or if the said entity, in order to provide the service in question, requires the fulfilment of some condition that is not required of other

²⁰⁸ Written Comments by the European Roma Rights Centre and Praxis, For Consideration by the Committee on the Rights of the Child at the Concluding Observations of the 74th Session (16 January to 3 February 2017), ERRRC, Praxis, December 2016, p. 2.

²⁰⁹ Written Comments by the European Roma Rights Centre and Praxis, For Consideration by the Committee on the Rights of the Child at the Concluding Observations of the 74th Session (16 January to 3 February 2017), ERRRC, Praxis, December 2016, p. 2.

²¹⁰ *Concluding observations on the combined second to fifth periodic reports of Serbia*, Committee on the Elimination of Racial Discrimination, UN, CERD/C/SRB/CO/2-5, 3 January 2018, para. 20.

²¹¹ *Concluding observations on the combined second to fifth periodic reports of Serbia*, Committee on the Elimination of Racial Discrimination, UN, CERD/C/SRB/CO/2-5, 3 January 2018, para. 21.

²¹² This includes race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations or any other ground.

individuals or groups of persons, or if the said entity unwarrantedly gives priority to another individual or a group of persons when it comes to providing a service'. In other words, the term 'public services' refers to services available to the public (whether provided by private or public authorities, entities, companies, etc.).

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

The LPDPD contains several provisions which relate to the provision of services to people with disabilities. Thus, Article 13, para. 1, prohibits discrimination based on disability in terms of the availability of services and access to public premises. Article 13, para. 2, of the LPDPD defines service as any service which a legal entity or an individual, with or without pay, provides in the course of its activities or permanent occupation. In addition, Article 13, para. 3, explains what is meant by premises and public areas: premises in the fields of education, health, social protection, culture, sport, tourism, or premises used for the protection of the environment or protection from natural disasters etc.; and Article 13, para. 4, sets out what are considered to be public areas (such as parks, green spaces, squares, pedestrian crossings and other public roads).

Discrimination includes, in particular:

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

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

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

3.2.9.1 Distinction between goods and services available publicly or privately

In Serbia, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association). However, the term 'public services' used in Article 17,

para. 1, refers to services available to the public (whether provided by private or public authorities, entities, companies, etc.).

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

In 2017, 12 % of all complaints submitted to the Commissioner for the Protection of Equality came from people who considered themselves to be victims of discrimination in relation to the provision of services.²¹³ In two cases, the Commissioner dealt with provision of services to migrants/refugees. In one case, a desk clerk at Belgrade Centre railway station refused to sell a train ticket to an asylum seeker who was going to a reception centre in Šid, as she was obeying an instruction given over the phone not to sell tickets to migrants/refugees.²¹⁴ Another case concerned the behaviour of a conductor who, on 14 March 2017, refused to allow two unaccompanied minors from Afghanistan to board a train and, on 24 April 2017, similarly refused three unaccompanied minors from Afghanistan, as well as a dozen other migrants, asylum seekers and refugees who attempted to board the train, although they had valid tickets.²¹⁵ In both cases the Commissioner found discrimination in the provision of services (Article 17, para. 1, of the LPD) based on the asylum seeker/migrant status.

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

In Serbia, national legislation does not explicitly prohibit discrimination in relation to housing as formulated in the Racial Equality Directive. The LPD does not include housing in Section III where it covers special cases of discrimination. However, Article 4, para. 1, of the LPD says that all people are equal and shall enjoy equal status and equal legal protection regardless of personal characteristics. This provision does not limit the application of the LPD to the special cases of discrimination covered by part III of the Law, and it means that housing is also protected.

There is a special law that deals with housing: the Law on Housing and Building Maintenance.²¹⁶ This Law regulates issues of housing usage, eviction and housing support, which is defined as any form of support in relation to housing for a citizen who cannot meet their housing needs under market conditions for themselves and their family household, due to any social, economic or other reasons (Article 89, para. 1). However, according to Article 89, para. 1, beneficiaries of housing support must be Serbian citizens. Beneficiaries of housing assistance are, in particular, homeless or temporarily homeless people, victims of domestic violence without accommodation, people without accommodation who are in receipt of social assistance, and people with disabilities who have nowhere to live. The Law also sets out in Article 80 what is considered to be adequate accommodation, which is a property 'that meets conditions according to the criteria of space, basic services, structural safety and security, and protection from external climate impacts, as well as meeting basic hygiene standards'.

The Law establishes that the municipality has jurisdiction to carry out a forced eviction if an individual moves into an apartment or common areas of residential or commercial buildings without legal ground. In such cases the residential community manager, the owner of a separate part of the building or another person with a legal interest has the

²¹³ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 7.

²¹⁴ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), C.K.P.R. v. Serbia Railways, complaint no. 07-00-575/2016-02, opinion from 27 March 2017.

²¹⁵ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), P. B. v. Serbia Train, complaint no. 07-00-211/2017-02, opinion from 7 September 2017.

²¹⁶ Serbia, Law on Housing and Building Maintenance (*Zakon o stanovanju i održavanju zgrada*), *Official Gazette of the Republic of Serbia*, no. 104/2016, 23 December 2016.

right to put in an eviction request to the local municipality with a 90-day deadline for eviction. On the other hand, the eviction of people from a building built illegally is carried out when necessary and justified in the public interest, primarily to protect the lives and health of people and for the protection of property, or when land is foreseen for the construction of buildings of public interest.²¹⁷

Asylum seekers are provided with accommodation and basic living conditions at an asylum centre, from when they express their intention to seek asylum until a final decision on their asylum application has been made. There are currently five migration centres with a total capacity of 1 200.²¹⁸ They are all of an open type and have house rules,²¹⁹ which prescribe conditions of accommodation and ensure basic living standards. As a result of the migration crisis, the authorities opened temporary reception centres in order to provide emergency reception facilities for people who wanted to continue their trip to preferred destination countries in the EU. These centres are meant only for temporary accommodation and humanitarian assistance and are not suitable for long-term stay.²²⁰ As of the end of 2017, there were 13 temporary reception facilities that could accommodate 3 683 people. In December 2017, there were 4 273 refugees, asylum seekers and migrants in Serbia, 96 % of whom were accommodated in one of 18 state centres. At least 68 % of refugees in Serbia come from Afghanistan, Iraq and Syria; 34 % of them are children, 15 % women and 51 % men.²²¹ A lot has been done in 2017 in terms of improving the quality of the accommodation, but the conditions in the asylum and reception centres differ from one centre to another.²²² According to Article 44 of the Law on Asylum, people granted international protection (refugee and subsidiary protection) are entitled to accommodation commensurate with the capacities of Serbia up to a year after their status becomes final. This means provision of specific housing or financial aid in order to rent a home.²²³

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Serbia, there are patterns of housing segregation and discrimination against the Roma. Roma face discrimination and exclusion in all spheres of life. Unemployment is particularly high among the Roma and those who are employed are usually in low paid positions. Poverty is widespread and many people do not have access to such necessities as electricity or even clean water. Living conditions are particularly appalling in informal settlements where mainly Roma displaced from Kosovo or forcibly returned from abroad live. They tend to move towards bigger cities where they have more opportunities and usually live in informal settlements on peripheral sites. Many of them are exposed to forcible eviction. This is documented in many reports. For example, a Special Rapporteur on adequate housing found that there are reportedly 583 informal settlements across

²¹⁷ These interests exist, under Article 78, when: 1) the land is unfavourable for construction; 2) it is undertaken during the preparation for the implementation of an investment project and if it has previously been proven that there is no alternative for relocation; 3) the settlement is located near natural resources, or near a protected cultural heritage area; 4) the settlement is located in protected zones around military facilities or infrastructure with a special purpose.

²¹⁸ Banja Koviljaca (100), Bogodvadjia (200), Tutin (150), Sjenica (250) and Krnjaca (500). IOM (2017), *Mixed migration flows in the Mediterranean: Compilation of available data and information*, 1 Feb – 28 February 2017.

²¹⁹ Rules on conditions of accommodation and provision of basic living conditions in asylum centres, *Official Gazette of the Republic of Serbia*, no. 31/2008, 28 March 2008.

²²⁰ AIDA, Asylum Information Database, Country Report: Serbia, p. 29.

²²¹ Help on the Route (2017), *Annual report for 2017, The rights of refugees, migrants and asylum seekers in Serbia*, Novi Sad, p. 7.

²²² Help on the Route (2017), *Annual report for 2017, The rights of refugees, migrants and asylum seekers in Serbia*, Novi Sad, p. 21.

²²³ Allocation of accommodation, priorities and other questions are regulated by the Decree on Criteria for Establishing Priority Accommodation for Persons Granted the Right to Refuge or Subsidiary Protection and the Conditions for the Use of Temporary Housing, *Official Gazette of the Republic of Serbia*, no. 63/20015, 17 July 2015.

Serbia, of varying sizes.²²⁴ In 2017, the Committee on the Elimination of all Forms of Racial Discrimination expressed its concern that one third of people registered homeless in Serbia are Roma and that 60 000 Roma, Ashkali and Egyptians live in substandard conditions in hundreds of informal settlements, often lacking access to basic services, including drinking water and sanitation.²²⁵ The Committee also expressed its concern that forced evictions from settlements continue to take place without consultation, due process of law or the possibility of alternative accommodation.

Living conditions in settlements are often inadequate, with virtually no utilities or infrastructure such as electricity, piped drinking water, sewage or regular waste collection. In some cases, other essential services such as ambulances or public transport are not available. Many are isolated from employment, schools and medical centres.²²⁶ Many claimants stated that evictions took place without consultation, due process of law or the possibility of alternative accommodation. Moreover, the disproportionate number of evictions of Roma and the authorities' failure to provide basic services or to guarantee legal security of tenure for residents in settlements reflect a stigmatisation of and discrimination against Roma.

There has also been a case of encroachment of a Roma settlement through the construction of a concrete wall in one city in central Serbia. Due to the importance of this case and its detrimental effect on Roma, the Commissioner for the Protection of Equality filed a lawsuit with the competent court.

A Law on Housing and Building Maintenance was adopted,²²⁷ for the first time setting out conditions, in Article 79, that must be fulfilled in cases of forced eviction. First, the Law requires the municipality bringing the eviction order to secure alternative accommodation. This accommodation must satisfy certain conditions: 1) adequate location which is near to basic communal infrastructure and accessible public services; 2) adequate price; 3) adequate space (no less than eight m² per person in the household); 4) basic electrical equipment, water supply and sanitary installations; and 5) satisfactory conditions with regard to safety and security.

²²⁴ Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context on her mission to Serbia and Kosovo, A/HRC/31/54, Add.2, 26 February 2016, p. 9.

²²⁵ CERD, Concluding Observations on the Combined second to fifth periodic report of Serbia, CERD/C/SRB/CO/2-5, 3 January 2018, p. 22.

²²⁶ In this case, the eviction was suspended by the municipal authorities on the basis of provisions of the International Covenant on Economic, Social and Cultural Rights, and in view of proceedings before the European Court of Human Rights regarding similar cases. Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context on her mission to Serbia and Kosovo, A/HRC/31/54, Add.2, 26 February 2016, p. 10.

²²⁷ Serbia, Law on Housing and Building Maintenance (*Zakon o stanovanju i održavanju zgrada*), *Official Gazette of the Republic of Serbia*, no. 104/2016, 23 December 2016.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

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

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

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

In Serbia, national law does not provide for an exception for employers with an ethos based on religion or belief as it is defined in Article 4, para. 2, of Directive 2000/78/EC. However, the LPD provides for a somewhat different exception by stipulating in Article 18, para. 2, that, 'The conduct of priests, that is to say, religious officials, which is in keeping with a religious doctrine, beliefs or the objectives of churches and religious communities entered in the register of religious communities, in accordance with the law regulating the freedom of religion and the status of churches and religious communities, shall not be considered to constitute discrimination'. The register is maintained by the ministry responsible for religious affairs in accordance with the Law on Churches and Religious Organisations.²²⁸ This provision is unclear, as it is not entirely certain what type of conduct this would pertain to; and it seems to be very problematic as it provides a blanket exemption for religious officials.

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

²²⁸ Serbia, Law on Churches and Religious Organisations, *Official Gazette of the Republic of Serbia*, no. 36/2006, 27 April 2006.

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

The Law on Churches and Religious Organisations recognises traditional churches²²⁹ and religious communities,²³⁰ confessional communities²³¹ and other religious organisations²³² (Article 4).

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

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

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

- Religious institutions affecting employment in state funded entities

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

²²⁹ Article 10, para. 1, defines traditional churches as those which have a centuries-long historical continuity and whose legal subjectivity was acquired on the basis of special laws. They are: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church, the Christian Reformed Church and the Evangelical Christian Church.

²³⁰ Traditional religious communities are those which have a centuries-long historical continuity and whose legal subjectivity was acquired on the basis of special laws. They are: the Islamic religious community and the Jewish religious community (Article 10, para. 2).

²³¹ In Article 16 'confessional communities' are defined as all churches and religious organisations whose legal status was regulated with an application in accordance with two laws adopted in the former Yugoslavia. These two laws are the Law on the Legal Status of Religious Organisations (*Zakon o pravnom položaju verskih zajednica*), *Official Gazette of the FPRY*, no. 22/1953 and the Law on the Legal Status of Religious Organisations (*Zakon o pravnom položaju verskih zajednica*), *Official Gazette of the SRS*, no. 44/1977.

²³² There is no further, more precise definition of the category of 'other religious organisations'.

to be financed from State funds (Article 36, para. 2). In order to promote religious freedoms and education, the State may offer financial support to religious educational institutions which are not included in the education system. Religious education institutions have organisational and curricular autonomy (Article 37, para. 1).

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

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

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

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Serbia, national law does not include exceptions relating to difference in treatment based on nationality. Article 2, para. 2, of the LPD explains that the terms 'person' and 'everyone' in the Law are used to designate an individual residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether that individual is a national of the Republic of Serbia, another state or a stateless person, as well as any legal entity registered or operating on the territory of the Republic of Serbia. Furthermore, Article 3 proclaims that everyone shall have the right to obtain effective protection from all forms of discrimination from the authorised courts and other public administration bodies of the Republic of Serbia. A foreign national in the Republic of Serbia, in accordance with international treaties, shall have all the rights guaranteed by the Constitution and by law, with the exception of those rights which, in accordance with the Constitution and the law, are only enjoyed by citizens of the Republic of Serbia.²³³

In Serbia, citizenship is explicitly mentioned as a protected ground in Article 2, para. 1, of the LPD. There have not been many cases in relation to discrimination based on citizenship. In 2017, only seven complaints (compared to 10 in 2016) were submitted to the Commissioner for the Protection of Equality claiming discrimination based on citizenship.²³⁴ The Commissioner for the Protection of Equality dealt in 2017 with several cases concerning certain municipal administrations which prevented children's fathers, in cases where the mother was a foreign national, from exercising the right to parental allowance, even if the child's father met the requirements laid down in the law. The Commissioner found that in these cases, the municipal administration unjustifiably placed families in which the mother is a foreign national in a more unfavourable position than other families with children in which the mother is a Serbian national and the father is a

²³³ For example, Article 38, para. 2, of the Constitution stipulates that Serbian citizens may not be expelled or deprived of their citizenship or the right to change it. In addition, Article 52, para. 1, states that every citizen who has reached their majority and working ability shall have the right to vote and be elected. Furthermore, Article 53 stipulates that citizens shall have the right to take part in the management of public affairs and to assume public service and functions under equal conditions.

²³⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 157.

domestic or foreign citizen, which is contrary to the provisions of the Law on the Prohibition of Discrimination.²³⁵

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

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

Today, discrimination based on nationality is considered to be discrimination based on citizenship, while discrimination based on ethnic origin relates to ethnic minorities whose culture, origin and lifestyle differs from the majority. Usually they are citizens, but if they are not citizens, then an overlap between 'nationality' and 'ethnic origin' can occur. However, this is a rather theoretical debate, as all these grounds are covered by Article 2, para. 1, of the LPD, meaning citizenship, national affiliation and ethnic origin. In other words, nationality is an explicitly protected ground under the LPD, and the Commissioner for the Protection of Equality has an explicit mandate to deal with nationality discrimination.

In Serbia, the ethnic minority which is considered to be most discriminated against is the Roma.²³⁶ The UN Human Rights Committee expressed its concern in 2017 that despite Serbia's efforts, Roma continue to suffer from widespread discrimination and exclusion, unemployment, forced eviction and *de facto* housing and educational segregation.²³⁷ The Committee was particularly concerned about the continued difficulties faced by internally displaced Roma in terms of: (a) registering births and their place of residence and acquiring identification documents, including as a result of a narrow interpretation of the law on permanent and temporary residence; (b) being integrated into Serbian society; and (c) the poor conditions reported in collective centres, where internally displaced people are accommodated by the Commissariat for Refugees and Migration.

²³⁵ See Commissioner for the Protection of Equality, General Recommendation to Municipal Administration, no. 021-01-00266/2017-02, 21 September 2017.

²³⁶ See, e.g. 'Attitudes of citizens on their satisfaction with public services in primary health care' (*Ставови грађана о задовољству јавним услугама у примарној здравственој заштити – Приказ налаза истраживања*), European Movement in Serbia, European Policy Centre, Belgrade, 2017, available at www.zdravlje.gov.rs/downloads/2017/April/analiza.pdf, last accessed on 15 March 2018. This research shows that Roma have more difficult accessing essential health services than other citizens. They are more exposed to hate speech than other citizens: Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 88. In addition, Roma children are perceived as the most discriminated against. See 'Position of children with disabilities and their rights in the Republic of Serbia' (*Положај деце са сметњама у развоју и инвалидитетом и остваривање њихових права у Републици Србији*), National Organization of Persons with Disabilities of Serbia (NOOIS), Belgrade 2017, p. 21.

²³⁷ CCPR, Concluding observations on the third periodic report of Serbia, CCPR/C/SRB/CO/3, 10 April 2017, p. 14.

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

a) Benefits for married employees

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

However, Article 3, para. 3, of the Family Law establishes that marriage is the cohabitation of a man and a woman, while cohabitation is defined in Article 4, para. 1, as 'a more permanent cohabitation of a man and a woman, between whom there are no obstacles to marriage'. In other words, the existing legislation recognises marriage only between opposite-sex couples. Although Article 2, para. 1, of the LPD prohibits discrimination based on sexual orientation, Article 21 only states that sexual orientation is a private matter and that every person has the right to declare their sexual orientation. There is still no relevant case-law which casts light on the scope of this provision.

There is no law on registered partnerships, notwithstanding the Model Law on Registered Same-Sex Partnerships which was prepared during 2013 by several NGOs and presented to the public in 2014. In the meantime, the media began to report news on the Model Law in a sensationalist manner and the Government withdrew from further negotiations, which have not yet been resumed. Therefore, in its report for 2016, the Commissioner called for the adoption of a Law on Registered Same-Sex Partnerships in accordance with Council of Europe recommendations,²³⁸ and repeated this recommendation in its report for 2017. Furthermore, the draft Civil Code contains a provision that it is necessary to comprehensively consider through public debate the possibility of introducing registered partnerships.²³⁹ Thus, there is an ongoing legislative debate on the need to introduce registered partnerships.

b) Benefits for employees with opposite-sex partners

In Serbia, it does not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners, as many provisions of the Labour Law concerning certain family benefits require marital status or extramarital community which is considered to be the cohabitation of partners of the opposite sex.

Although the LPD prohibits discrimination based on sexual orientation (Article 2, para. 1), Article 21 limits the application to privacy, stating that sexual orientation is a private matter and that discriminatory treatment on account of the declaration of someone's sexual orientation is prohibited. In other words, Article 21 does not provide any standing for combating discrimination in the area of benefits. On the other hand, Article 2, para. 1, prohibits any unlawful discrimination based, among other things, on sexual orientation, and someone can argue that this provision prohibits benefits provided only to employees with opposite-sex partners. Bearing in mind the current case-law, it is probable that the Commissioner for the Protection of Equality and judges would interpret the scope of Article 21 and Article 2, para. 1, in relation to sexual orientation differently. While the Commissioner would claim that it is discriminatory, judges would rather say that the application of Article 21 is limited, and would not find discrimination.

²³⁸ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 13.

²³⁹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 17.

Therefore, a change to the existing legislation is necessary, as well as the introduction of the institution of registered partnerships. Another problem is the general atmosphere in society due to which many members of sexual minorities do not openly reveal their sexual orientation and therefore do not invoke this provision in practice.

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

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

Article 12, para. 1, of the Labour Law states that an employee shall have the right to safety and protection of life and health at work. According to Article 16, para. 2, employers are obliged to provide their employees with working conditions which ensure safety and the protection of life and health at work in conformity with the law and other regulations. The Law further prescribes that employees are entitled to safety and the protection of life and health at work in conformity with the law (Article 80). Article 12, para. 4, entitles employees with disabilities to special protection. Article 22, para. 2, establishes that provisions relating to special protection of people with disabilities shall not be considered as discrimination. Finally, Article 101 prescribes that employers are obliged to enable employees with disabilities to perform their work according to their remaining working capacity. Employers shall, in accordance with the pension and disability insurance regulations, provide appropriate alternative tasks for an employee who is assessed to be at risk of becoming disabled by performing certain tasks.

Article 12, para. 4, entitles employees under 18 and employees with disabilities to special protection. In addition, Article 22, para. 2, stipulates that provisions of the law, general acts and employment contracts relating to special protection and assistance for specific categories of employees, cannot be considered to be discrimination. Those categories are: people with disabilities, women on leave from work due to pregnancy and childbirth (maternity leave), and on leave to look after a child (parental leave), and during special care for a child (in the case of a child requiring special care due to serious physical or psychological need, where the parent, upon expiry of the maternity and paternity leave, is absent from work, or works half-time, at most until the child reaches the age of five). There are also provisions relating to special rights for parents, adoptive parents, guardians and foster parents. Article 84 lists jobs which are prohibited for employees under 18. It also protects motherhood (Articles 89-93a) and people with disabilities (Articles 101-102).

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

4.7.1 Direct discrimination

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

a) Justification of direct discrimination on the ground of age

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

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

There is still no significant case law on this ground of discrimination, except for cases brought before the Commissioner for the Protection of Equality.

In 2017, 75 complaints (or 11.8 %) submitted to the Commissioner for the Protection of Equality claimed age discrimination.²⁴⁰ Therefore, this ground of discrimination still ranks very high – among the top two grounds in 2017. More of the complaints (48 %) concerned discrimination against children (aged under 18) than discrimination against those in the 18-65 age group and the elderly (65+), which concerned 33.3 % complaints.²⁴¹ Of these complaints, the majority related to education and professional training (24 complaints), delivery of public services (18), employment (12) and the actions of public authorities (10).²⁴²

One case concerned an article published in the daily newspaper, 'D', where the author wrote about 'elderly voters', explaining that people over 65 are 'extremely seductive', as well as 'poor, miserable and dissatisfied' and always voting for 'despotically oriented candidates'.²⁴³ Consequently, the author of this article advocated the abolition of their right to vote. The Commissioner reasoned that this article humiliated elderly citizens and sent a message that their decisions are so problematic that it is in the interest of the whole of society to limit their right to vote. The Commissioner ordered that the editor-in-chief publish an apology to the elderly in the 'D' daily newspaper within 15 days from the date of receipt of this opinion. In addition, the Commissioner warned the editor not to publish similar articles that insult the dignity of elderly people in the future and instead to publish contributions that could positively change the patterns, customs and practice that instigate stereotypes, prejudices and discrimination in relation to them.

b) Permitted differences of treatment based on age

In Serbia, national law permits differences in treatment based on age for any activities within the material scope of Directive 2000/78/EC. Thus, Article 16, para. 3, of the LPD prescribes that different treatment is permissible on account of the specific nature of a job, for which an individual's specific age constitutes a genuine and decisive condition for performing the job, if the objective to be achieved is justified. In addition, it is permissible to provide protective measures for certain categories of people, such as children. Furthermore, Article 23, para. 2, stipulates that the elderly constitute a specific, protected group.

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

In Serbia, there are no occupational pension schemes.

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

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

²⁴⁰ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 109.

²⁴¹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 109.

²⁴² Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 110.

²⁴³ Serbia, Commissioner for the Protection of Equality (*Poverenik za zaštitu ravnopravnosti*), G.D.S. v. Daily Newspaper "D", complaint no. 07-00-150/2017-02, opinion from 10 July 2017.

their protection. However, although there is no general-scope law which sets special conditions for these groups, it does not mean that special conditions are not established at a local level, mostly in order to promote the employment of young people.²⁴⁴

The LPD only provides in Article 23, para. 2, that, 'Older people shall have the right to dignified living conditions, without discrimination, and especially the right to equal access and protection from neglect and harassment in the course of receiving healthcare services and other public services'.

On the other hand, the Labour Law protects young workers. Thus, Article 84 prescribes that employees younger than 16 cannot work in posts which require particularly hard physical work, exposure to harmful radiation or materials which pose a risk to health. Employees between the ages of 18 and 21 can perform such hazardous tasks only if a medical professional determines that such work is not harmful to their health (Article 85). Employees under the age of 18 cannot work for more than eight hours per day (a maximum of 35 hours per week) and cannot do overtime or night work, except for in some particular cases (Article 88). Certain safeguards are applicable in the case of pregnancy and early motherhood (Articles 89-93a). The Labour Law sets some conditions for absence from work for employees in the case of them needing to provide special care for a child with long-term illness or disabilities, or to provide special care for an adopted or foster child (Articles 96-100). In addition, the Labour Law protects people with disabilities (Articles 101-103).

Certain categories of workers can, exceptionally, in circumstances and under conditions set out in the Law on Pension and Disability Insurance,²⁴⁵ be entitled to a pension (Article 7). Under Article 42, those categories are police officers, some categories of employees at the Ministry of Foreign Affairs, members of the Security Information Agency, members of the Military Security Agency and Military Intelligence Agency; employees of the Administration for the execution of plenipotentiary sanctions, authorised officials of the Tax Police, military personnel and other police officers.

4.7.3 Minimum and maximum age requirements

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

4.7.4 Retirement

a) State pension age

In Serbia, the state pension age at which individuals must begin to collect their state pensions is 65. However, an employee can decide to submit a request for early retirement.

If an individual wishes to work longer, the pension cannot be deferred, except for certain jobs (doctors or university professors), when it can be deferred for an additional three years (until the individual reaches 68).

An individual cannot collect a pension and still work.

²⁴⁴ The basis for affirmative measures is presented in the Law on Youth (*Zakon o mladima*), *Official Gazette of the Republic of Serbia*, no. 50/2011, 8 July 2011.

²⁴⁵ Serbia, Law on Pension and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of the Republic of Serbia*, no. 34/2003, 64/2004 - decision CC, 84/2004 - other law, 85/2005, 101/2005 - other law, 63/2006 - decision CC, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 2 April 2003.

According to Article 19 a) of the Law on Pension and Disability Insurance, men can retire at the age of 65 and with a minimum of 15 years of pension insurance contributions, and can submit a request for early retirement at the age of 55 and with a minimum of 40 years of pension insurance. Women can retire when they reach the age of 60 years and six months²⁴⁶ and have a minimum of 15 years of pension insurance (and can request early retirement at 54 years and four months and with 36 years and four months of pension insurance). However, the state pension age is rising, as the minimum age limit is extended each year, and by 2023 men will only be able to submit a request for early retirement at the age of 58 and with 40 years of contributions, compared to 58 and 38 years of contributions for women. Both sexes retire after 45 years of pension insurance contributions, no matter what their age.

However, in practice, some women are forced to retire when they reach the age of 60 years and six months, although it is their right to choose if they want to retire, or to work until 65.

b) Occupational pension schemes

In Serbia, it is not possible to receive payment from any employer-funded pension arrangements, since occupational pension schemes are not recognised as such in Serbia. The only system that exists is the mandatory public pension system.²⁴⁷

c) State imposed mandatory retirement ages

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

When an employee reaches 65, there is no possibility for them to continue to work and to defer their pension. However, the retiree can continue to work in the form of a fixed-term service contract. In addition, in the public sector, the mandatory retirement age for both sexes is 65. There is a possibility of extending this period for an additional three years in higher education for university professors and doctors.

d) Retirement ages imposed by employers

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

e) Employment rights applicable to all workers irrespective of age

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

²⁴⁶ The retirement age for women will increase each year until 2031, when it will reach 64 years and nine months, and in 2032 it will be 65.

²⁴⁷ However, voluntary pension savings are also possible, although the introduction of mandatory private funds has been dismissed. See the Law on Voluntary Pension Funds and Pension Plans (*Zakon o dobrovoljnim penzijskim fondovima i penzijskim planovima*), *Official Gazette of the Republic of Serbia*, no. 85/2005 and 31/2011, 13 October 2005.

f) Compliance of national law with CJEU case law

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

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

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

b) Age taken into account for redundancy compensation

In Serbia, national law provides compensation for redundancy. This is not affected by the age of the worker. Financial compensation is calculated from the first day of insurance until the termination of insurance, and the total amount depends on the number of insurance years. In other words, severance pay for redundancy dismissal is different for a worker with one year of tenure, five years of tenure, 10 years of tenure or more. However, it can indirectly have a different impact on younger age groups which mostly have fewer years of tenure and, thus receive a lower amount of redundancy compensation.

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

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

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

4.9 Any other exceptions

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

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

a) Scope for positive action measures

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

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

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

The LPDPD provides that there is no discrimination if a provision of a law, a regulation, a decision or a special measure was adopted with the aim of improving the situation of people with disabilities, their family members and associations of persons with disabilities, when this special support is necessary in order to ensure they can enjoy and exercise their rights under the same conditions as the general population (Article 8, para. 1). Furthermore, a 'decision or the retention of existing laws or measures aimed at eliminating or repairing the adverse situation of people with disabilities who are given special support' is not considered to be discrimination either (Article 8, para. 2). In addition, Article 23, para. 2, stipulates that incentive measures should be introduced for faster employment of people with disabilities, in accordance with the law regulating the employment of persons with disabilities.

b) Main positive action measures in place at national level

In Serbia, there are no positive measures related to migrants. However, the new Law on the Fundamentals of Education stipulates in Article 23, para. 2, that schools are required to organise language classes and additional classes for refugees and migrant children who do not speak Serbian.²⁴⁸

Positive measures in relation to education for ethnic groups (primarily Roma) – With the aim of providing conditions for the promotion of and greater inclusion in the process of education and professional training, the Gender Equality Act (GEA) prescribes that the public authorities in charge of education can undertake special measures for the inclusion of pupils or groups of pupils who, because of their culture, tradition and socio-economic conditions, leave school prematurely (Article 33, para. 1).²⁴⁹ Measures of special support for pupils or groups of pupils in their transition from lower to higher educational levels can also be undertaken, namely, for the continuation of their education. The public authorities in charge of education shall establish special teaching curricula for the return of pupils to schools and other educational institutions – '*broad social policy measures*'.

Positive measures for people with disabilities in the area of employment – Article 24 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities establishes a duty for employers with at least 20 employees to employ a certain number of people with disabilities. An employer with 20 to 49 employees is obliged to employ one

²⁴⁸ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no.88/2017, 7 October 2017.

²⁴⁹ Serbia, Gender Equality Act (*Zakon o ravnopravnosti polova*), *Official Gazette of the Republic of Serbia*, no. 104/2009, 16 December 2009. This duty is included in the GEA, as the problem of early school drop-out is primarily perceived to be a gender issue, due to the fact that the drop-out rate is higher among girls, particularly Roma girls. However, the percentage of early school drop-outs among Roma boys is also very high, and therefore, it would be more logical to include this duty in the LPD.

person with disabilities (Article 24, para. 2). An employer with 50 or more employees is obliged to employ at least two people with disabilities and one more for every additional 50 employees (Article 24, para. 3). This obligation is not imposed on a newly established employer for a period of 24 months from the day of the establishment of the business.

However, according to Article 26, an employer can be relieved of this obligation if they pay a sum of at least 50 % of the average salary per employee for every person with a disability whom they do not employ. This amount is paid to the budget of the Republic of Serbia for the fund for the professional rehabilitation and employment of people with disabilities.²⁵⁰ In addition, an employer receives a wage subsidy for a duration of 12 months for an employee with disabilities and without work experience who is hired for an indefinite period of time. However, it is important to underline that this subsidy only applies to people who have been officially recognised as having a disability by the National Employment Service, which assesses disability in the context of employment. This subsidy is equivalent to 75 % of the salary costs associated with contributions for mandatory social insurance, but not more than the minimum wage determined in accordance with the regulations - 'quotas', 'broad policy measures'.

Positive measures for national minorities, particularly Roma – The Law on the Protection of National Minorities prescribes that authorities shall adopt legal rules, individual legal acts and measures with the aim of securing full and effective equality for people belonging to national minorities (Article 4, para. 1). Article 4, para. 2, sets an obligation on authorities to undertake positive measures with the aim of improving the status of Roma, which won't be considered as discrimination. These measures apply, in particular, to the parliamentary sphere, as the Law on the Election of MPs²⁵¹ stipulates in Article 81, para. 2, that the threshold of 5 % does not apply to parties and coalitions of parties of national minorities. Their list must win 0.4 % of the total votes in order to secure its first MP seat – 'broad policy measures'.

Positive measures for national minorities, particularly Roma – The Law on the Fundamentals of the Education System,²⁵² in Article 19, para. 3, prescribes that members of vulnerable groups (Roma, children with disabilities) can, exceptionally, enrol in secondary school under more favourable conditions in order to achieve full equality in the acquisition of education in accordance with the criteria and procedures prescribed by the Minister of Education. In addition, the Law on the Amendments to the Law on Secondary Education of 2017 also prescribes the same provision for the enrolment of members of certain groups in secondary education (Article 36 a). In 2017, the Minister of Education, Science and Technological Development adopted the Rulebook on enrolment of students in secondary school,²⁵³ containing part IV, which refers to the enrolment of Roma pupils under more favourable conditions in order to achieve full equality in the acquisition of education - 'broad policy measures'.

Positive measures for Roma – The Strategy for the Social Inclusion of Roma in the Republic of Serbia for the period 2016-2025 stipulates that local authorities will adopt regulations on the improvement of housing conditions for Roma and secure funding from the budget to implement these measures. In addition, local authorities shall undertake all

²⁵⁰ This obligation is defined in the Regulation on the monitoring of the execution of duties on the employment of persons with disabilities and the method of proving the execution of these obligations (*Pravilnik o načinu praćenja izvršavanja obaveze zapošljavanja osoba sa invaliditetom i načinu dokazivanja izvršavanja te obaveze*) Official Gazette of the Republic of Serbia, no.101/2016, 24 December 2016.

²⁵¹ Serbia, Law on the Election of MPs (*Zakon o izboru narodnih poslanika*), Official Gazette of the Republic of Serbia, no. 35/2000, 57/2003 - decision CC, 72/2003, 75/2003 - corr., 18/2004, 101/2005, 85/2005 - other law, 104/2009, 28/2011 - decision CC 36/2011, 10 October 2000.

²⁵² Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), Official Gazette of the Republic of Serbia, no.88/2017, 7 October 2017.

²⁵³ Serbia, Rulebook on enrolment of students in secondary school (*Pravilnik o upisu učenika u srednju školu*), Official Gazette of the Republic of Serbia, no. 38/17, 51/17 and 81/17, 29 April 2017.

measures to establish whether there are any possibilities for legalising existing residential structures in sustainable informal settlements – *'broad policy measures'*.

6 REMEDIES AND ENFORCEMENT

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

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

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

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

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

- court prohibition of further discriminatory behaviour;
- remedy actions to remove the consequences of discriminatory behaviour;
- the court's confirmation that an action or behaviour is discriminatory; and
- compensation for pecuniary and non-pecuniary damages incurred due to discriminatory behaviour.²⁵⁴

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

Article 44 provides that revision, a special appellate review for legal questions and serious breaches of procedure, is always available in cases of discrimination (no time limit). This law allows temporary measures at the request of the complainant, when initiating a lawsuit, in the course of the proceedings and after the termination of the proceedings, until the court decision is enforced. The court is allowed to pass a temporary measure in order to prevent discriminatory treatment, with a view to eliminating the risk of violence or major irreparable damage.²⁵⁵ The court is obliged to decide on a request to pass a temporary measure within 48 hours of receiving the request. However, the LPDPD does not recognise a reversal of the burden of proof.

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

²⁵⁴ In this complaint, the rules in the Law on Contracts and Torts apply, including the statute of limitations (Article 376). See Law on Contracts and Torts (*Zakon o obligacionim odnosima*), *Official gazette of SFRY*, no. 29/1978, 39/1985, 45/1989 - CCY, 57/1989, *Official gazette of SRY*, no. 31/1993, 22/1999, 23/1999, 35/1999, 44/1999, *Official gazette of SCG*, no. 1/2003 - Constitutional Charter, 1 July 1978.

²⁵⁵ A request to pass a temporary measure must prove the necessity of doing so in order to eliminate the risk of violence, use of force or irreparable damage (Article 45, para. 2).

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

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

Civil litigation with advocacy element - Under Article 46 of the LPD, the Commissioner for the Protection of Equality can initiate lawsuits. The Commissioner decides in which cases they will file a claim, taking into account whether it is a case of strategic litigation; in other words a case of frequent and widespread discrimination in respect of which there are good prospects for success (so far litigation has been initiated 16 times, and while in 2015 and 2016 no new strategic litigation was brought, in 2017 three litigation lawsuits were initiated).²⁵⁶ The litigation proceedings are initiated and conducted in the general public interest, in order to contribute to the consistent implementation of legislation and improvement of legal practice, to further encourage victims of discrimination to initiate anti-discrimination litigation, to uphold the rule of law and to contribute to improving access to justice.

The Commissioner filed a lawsuit against four defendants, based on a claim of discrimination on the ground of Roma ethnic origin. The alleged discriminatory action took place between 5 and 8 November 2016 when a concrete wall was built next to the Roma settlement and parallel to the street, so that the Roma settlement was actually enclosed.²⁵⁷ The Commissioner claimed that there is a non-Roma settlement across the road, along which the same type of traffic, at the same frequency and the same speed limit passes, but neither a sound barrier nor a peripheral wall has been built on that part of the road. The preparatory hearing and three subsequent hearings were held at the end of 2017.

Another lawsuit concerned an ill worker who was dismissed on the ground that she could only work day shifts due to illness.²⁵⁸ A third lawsuit was initiated against the author of a text, published in a daily newspaper, advocating that protection from domestic violence is not justified in all cases, but that it should be selective, depending on whether the woman is strong or weak, nervous, freaky or well-off, has a lover or not, whether she earns or is a dependant, whether she has entered into a marriage or moved into a husband's apartment, etc.²⁵⁹ The Commissioner highlighted the fact that the attitude that only 'weak' women deserve protection is based on stereotypes of the role of women. Furthermore, the author of this text described the LGBTI community as 'primitive', 'violent' and 'prostitutes'.

²⁵⁶ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 169.

²⁵⁷ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 170.

²⁵⁸ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 170.

²⁵⁹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 171.

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

The Civil Code governs the rules on proceedings in labour law disputes in order to provide adequate protection. Jurisdiction in such cases, in addition to the court of general territorial jurisdiction for the respondent, lies with the court on whose territory the work is being performed or was performed, if the complainant in a labour-related dispute is an employee (Article 60). This procedure is regulated by several articles (436-441). Article 438 prescribes that in labour-related litigation, and in particular prior to determining time limits and scheduling hearings, the court shall always take due account of the necessity of resolving labour disputes swiftly. In the course of the proceedings, Article 439 provides that the court may also *ex officio* order temporary measures to be applied in enforcement proceedings for the prevention of violent acts or the alleviation of irreparable damage. The court shall issue a ruling on the temporary measures at the request of a party within a time limit of eight days from the date of the request being submitted. No specific appeal shall be permitted against a ruling of a court on injunctions. In addition, in a judgment ordering the performance of a specific obligation, the court will determine a time limit of eight days for its execution (Article 439). An appeal may be submitted within a time limit of eight days (Article 440). Finally, a review shall be allowed in litigation pertaining to labour disputes on employment, the course of employment and termination of employment (Article 441). The amendments from 2014 provide a new rule: if, during proceedings concerning illegal termination, the court determines that there were grounds for termination, but the employer has not complied with the procedure, the court shall reject the employee's request to return to work and in terms of damages they will be awarded the equivalent of six monthly salaries.

Mediation – The Law on the Peaceful Resolution of Labour Disputes²⁶⁰ prescribes the jurisdiction of the National Agency for the Peaceful Resolution of Labour Disputes in procedures in both individual and collective disputes. This includes conciliation, mediation and, in fewer cases, arbitration. The law distinguishes between individual and collective labour disputes. Collective labour disputes are, for example, disputes about collective agreements, unions and strikes. On the other hand, individual labour disputes are disputes about minimum wages, termination of employment, payout of a minimum wage, as well as discrimination and bullying (Article 3).

Mediation is also prescribed by the Law on Mediation.²⁶¹ The adoption of this law made some improvements and advancements to the existing system, which dates from 2005, and brings changes in terms of the refinement and development of existing solutions which have proven inefficient in practice. The basic principles of mediation are that it should be conducted on a voluntary basis, in a procedure with strictly personal participation by the parties where the equal treatment of the parties, privacy of the procedure, confidentiality, neutrality, urgency and the prohibition of the use of evidence in other proceedings are guaranteed. Agreement in the mediation procedure is achieved with the assistance of mediators who are appointed by and registered with the Ministry of Justice and Public Administration. The legal effectiveness of the agreement reached in the mediation procedure is equal to that of a court decision and the agreement is enforceable through enforcement proceedings. Initiating mediation causes an interruption in the running of the statute of limitation for a period of 60 days in a court proceeding.

²⁶⁰ Serbia, Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rešavanju radnih sporova*), Official Gazette of the Republic of Serbia, no. 125/2004, 104/2009, 22 November 2004.

²⁶¹ Serbia, Law on Mediation (*Zakon o posredovanju u rešavanju sporova*), Official Gazette of the Republic of Serbia, no. 55/2014, 23 May 2014.

The Commissioner for the Protection of Equality is also entitled, but not obliged, to suggest or recommend mediation after an assessment of whether the case is suitable for mediation. On the other hand, the Commissioner is required to recommend mediation to the parties before taking the first action in the proceedings under the complaint. If both parties accept mediation, the complaint procedure is suspended until the end of the mediation process. If the parties reach an agreement, the procedure is completed, whereas if there has been no agreement reached through the mediation process, the complaint procedure before the Commissioner is continued.

The mediation procedure is conducted by a mediator appointed by an authorised official of the Commissioner, from a list of authorised mediators. Only qualified persons, who are not employed by the Commissioner, can be included in the list of mediators, provided they meet the criteria and closely defined requirements established by the Commissioner.

In 2015, mediation was offered and accepted for the first time in two cases. Whilst in 2016 there were no cases of mediation, in 2017 it was offered in one case.²⁶²

Misdemeanour procedure – This procedure is regulated by a special law.²⁶³ It can be initiated by certain bodies (administrative bodies, authorised inspectors, public prosecutors, etc.). Inspectors can initiate a misdemeanour procedure in order to secure the legality and safe operation and practices of public authorities (they can also review documents, take statements, see the premises, order enforcement measures, notify other authorities, etc). In addition, this procedure can be initiated by the individual who was discriminated against. The Commissioner for the Protection of Equality can initiate a misdemeanour notice, but cannot punish a discriminator with a fine directly. The LPD makes provision for several misdemeanours, regulated in 11 articles (Articles 50-60). In 2017, the Commissioner issued one misdemeanour charge due to discrimination against the LGBTI community in the provision of services, as they were not admitted to a particular catering facility in Belgrade.²⁶⁴ The Commissioner also criticises the effectiveness of the misdemeanour protection in discrimination cases as in the majority of such proceedings initiated by the Commissioner the judge did not take any legal action for a period of two years, which resulted in the expiry of the statute of limitation.²⁶⁵

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

- Article 128 prescribes a violation of equality. In 2016, an amendment to the criminal Code expanded the prohibited grounds of discrimination to cover disability, sexual orientation and gender identity;²⁶⁶
- Article 129 prescribes the violation of the right to use a language or alphabet;
- Article 317 establishes as a criminal offence the instigation or exacerbation of ethnic, racial and religious hatred or intolerance;
- Article 344a prohibits the instigation of ethnic, racial and religious or other hatred or intolerance by means of actions or slogans at sporting events or public gatherings;

²⁶² Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 7.

²⁶³ Serbia, Law on Misdemeanours (*Zakon o prekršajima*), *Official Gazette of the Republic of Serbia*, no. 65/2013, 13/2016, 25 July 2013.

²⁶⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 172.

²⁶⁵ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 82.

²⁶⁶ Serbia, Article 9 of the Amendments to the criminal Code (*Zakon o izmenama i dopunama Krivičnog zakonika*), *Official Gazette of the Republic of Serbia*, no. 94/2016, 24 November 2016. Other prohibited grounds are: national or ethnic origin, race or religion, political or other opinion, sex, language, education, social status, social origin, property and other personal characteristics.

- Article 387 prohibits propagation of the idea of racial superiority or racial intolerance or discrimination.

In 2017, three criminal charges were submitted by the Commissioner.²⁶⁷ The first case concerns a Roma child who was hit in school by a police officer, who threatened to set fire to his village, insulting him and cursing his 'Gypsy mother'.²⁶⁸ However, the Basic Public Prosecutor's Office in Novi Sad rejected the criminal complaint, stating that there were no grounds for suspicion that a criminal offence, which is prosecuted ex officio, was committed. Another two criminal charges concern the incitement of ethnic, racial and religious or other hatred or intolerance in comments to a news outlet published on a local website.²⁶⁹ Some comments were: 'It's good that you mentioned that the perpetrator is Roma, so we know whom to beat up', 'Kill the Gypsy', 'The Hitler knew what he was doing', etc.²⁷⁰

By means of Article 54a of the Criminal Code, racial, religious, national, ethnic and sexual hatred are considered to be aggravating circumstances. However, this is rarely applied in practice. The ECRI welcomed the introduction of this provision as it was intended to improve the protection against hate crime. However, it found that the application of the legislation against hate speech and violent hate crime is inefficient and that, 'there is no decisive action against the activities of racist, homophobic and transphobic hooligan groups'.²⁷¹ In order to address the problem of hate speech underreporting and given that it is increasingly disseminated on the internet, it is necessary to provide specialist knowledge to police officers and prosecutors and technical tools in order to conduct investigations in an efficient manner.²⁷²

Complaint procedure – This procedure before the Commissioner for the Protection of Equality is a specific procedure, which has the characteristics of a special administrative procedure. Article 40, para. 4, of the LPD expressly stipulates that the procedure before the Commissioner shall be conducted pursuant to the provisions of the Law on General Administrative Procedure.²⁷³ The procedure for submitting a complaint is regulated in Articles 35 to 40. A complaint must be forwarded within 15 days of its submission to the alleged perpetrator of the violation who has 15 days to respond to it. The Commissioner must give an opinion on whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint, and must inform the individual who submitted the complaint and the individual against whom the complaint was submitted.

If the Commissioner finds a violation, they will issue a recommendation to the individual against whom the complaint was submitted, suggesting a means of redressing the violation in question. The individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of receipt of the recommendation. The individual must inform the Commissioner of the measures taken. However, if the individual fails to redress the violation in question within 30 days, the Commissioner may inform the public in the press and online. If the discriminator fails to comply with the recommendation, the individual(s) exposed to the discriminatory act can decide to initiate a lawsuit, or the Commissioner for the Protection of Equality can initiate

²⁶⁷ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 171.

²⁶⁸ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 171.

²⁶⁹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 172.

²⁷⁰ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 172.

²⁷¹ ECRI, *report on Serbia (fifth monitoring cycle)*, Council of Europe, adopted on 22 March 2017, p. 10.

²⁷² ECRI, *report on Serbia (fifth monitoring cycle)*, Council of Europe, adopted on 22 March 2017, p. 23.

²⁷³ Serbia, Law on General Administrative Procedure (*Zakon o opštem upravnom postupku*), *Official Gazette of the Republic of Serbia*, no. 18/2016, 9 March 2016. The Law will start to apply from 1 June 2017.

a lawsuit in a case of strategic litigation. The Commissioner can also initiate a misdemeanour notice or a criminal charge.

In 2017, 532 complaints were submitted to the Commissioner for the Protection of Equality.²⁷⁴

a) Barriers and other deterrents faced by litigants seeking redress

There is a certain overlap between the three anti-discrimination laws, as disability and gender discrimination can be challenged under the general and specific law on discrimination. However, it seems that discrimination based on disability has thus far mostly been challenged under the specific law, while cases based on gender discrimination are mostly challenged under the LPD, although the GEA is better equipped to protect the victim of discrimination. The jurisdiction for cases of discrimination was transferred in January 2014 from the basic to the higher courts²⁷⁵ and some relevant jurisprudence is still developing. In addition, there is an overlap between the LPD and the Labour Law and it is not always clear to judges that in a case of discrimination, even if the procedure was initiated by the Labour Law, more favourable provisions enshrined in the LPD should be applied (e.g. that the procedure is urgent).

Judges have problems with applying the provision on shifting the burden of proof, although some progress has been visible in the past two years. In addition, it is problematic for them to identify the right comparator group, to apply the proportionality test or even to identify the real ground for discrimination. In some cases, judges mix up discrimination and bullying, although it must be admitted that this was happening less in 2017. In addition, some judges do not understand that not every case of unequal treatment can be considered to be discrimination, but in 2017 in several judgments courts underlined that the different treatment must be based on personal characteristics. Cases are still not decided with urgency and courts usually award small amounts for non-pecuniary damages, demonstrating that they still do not understand the detrimental effect of discriminatory treatment. The same applies to courts for misdemeanours and the range of fines is very small compared to other acts contained in other laws outside of discrimination (around EUR 80 to EUR 800).

Although the procedure before the Commissioner is free of charge, the Law on Free Legal Aid has still not been adopted and legal aid in discrimination cases is limited and depends on NGOs specialised in dealing with discrimination cases. Another problem is the length of proceedings, as Serbia is facing a huge problem of trials which last for an unreasonably long time. The Law on the Protection of Trials within a Reasonable Timeframe has come into force, aiming to provide legal remedies for unreasonably long trials and to speed up the procedure, but it did not achieve its purpose in 2017.²⁷⁶ There is also a problem with the enforcement of court decisions. The courts are subject to changes in their organisation and many buildings and courtrooms are not fully accessible for people with disabilities. Furthermore, mediation in discrimination cases should be used more often and this requires the creation of rules that will encourage the development of specific forms of mediation, including mediation in discrimination cases, which should be relocated from the courts.

Finally, although the Commissioner has a wide range of mechanisms at its disposal, these are not very efficient, as most recommendations are not fully considered and

²⁷⁴ Commissioner for the Protection of Equality (2018), *Regular Annual Report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 7.

²⁷⁵ Serbia, Law on the Organisation of the Courts (*Zakon o uređenju sudova*), *Official Gazette of the Republic of Serbia*, no. 116/2008, 104/2009, 101/2010, 31/2011 – other laws, 78/2011, 101/2011, 101/2013, 106/2015, 40/2015, 13/2016, 108/2016, 22 December 2008.

²⁷⁶ Serbia, Law on the Protection of Trials Within a Reasonable Timeframe (*Zakon o zaštiti prava na sudjenje u razumnom roku*), *Official Gazette of the Republic of Serbia*, no. 40/2015, 19 April 2015.

respected. Reasons for this arise from the fact that the Commissioner is not authorised to punish a perpetrator of discrimination by imposing fines and is not able to initiate proceedings ex officio when they have knowledge of discriminatory conduct. This was criticised by the ECRI which pointed out that the Commissioner still lacks the power to take up cases of discrimination ex officio.²⁷⁷ It also remains unclear whether the court is bound by the Commissioner's opinion on the existence or not of discrimination in a discrimination case brought to the court.

b) Number of discrimination cases brought to justice

In Serbia, there are no available statistics on the number of cases related to discrimination brought to justice. However, statistics are available on the complaints submitted to the Commissioner for the Protection of Equality. As mentioned above, in 2017, 532 complaints were submitted to this specialised body compared to 666 in 2014, 797 in 2015 and 626 in 2016.²⁷⁸ In total, 16 lawsuits have been initiated by the Commissioner since 2010. They concern the following grounds: 10 lawsuits for discrimination against Roma, 3 for sex discrimination, 1 for discrimination based on disability and 2 for multiple discrimination. Although the number of cases processed rises each year, it is still insignificant in comparison to the widespread nature of discrimination in practice in all spheres of society. The reasons for this lie in insufficient awareness and knowledge about discrimination and the lack of determination of victims to seek help.

c) Registration of discrimination cases by national courts

In Serbia, discrimination cases are not registered as such by national courts. Usually they are registered as labour disputes or bullying. These data are available to the public only if a decision is posted on the website of a particular court (they are put into a database for which a paid subscription is needed), or if someone requests the data under the Law on Free Access to Information of Public Importance.²⁷⁹ However, even in this case, some decisions will not be included, due to being wrongly classified.

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 Serbia, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination. Article 35, para. 3, of the LPD provides that a lawsuit may be initiated by an organisation engaged in the protection of human rights or the rights of a certain group of people, on behalf of and with the agreement of the individual whose rights have been violated. NGOs are more active in submitting complaints to the Commissioner for the Protection of Equality, but some of them also initiate lawsuits, mostly in relation to discrimination against members of the LGBTI and Roma communities. Trade unions can represent a member in a labour dispute, through a lawyer who has passed the bar exam (Article 85, para. 3, of the Civil Procedure Code).

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

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

²⁷⁷ ECRI, *report on Serbia (fifth monitoring cycle)*, Council of Europe, adopted on 22 March 2017, p. 16.

²⁷⁸ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 7.

²⁷⁹ Serbia, Law on Free Access to Information of Public Importance (*Zakon o pristupu informacijama od javnog značaja*), *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009 and 36/2010, 5 November 2004.

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

b) Engaging in support of victims of discrimination

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

c) Actio popularis

In Serbia, national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**). This right is not recognised in the LPD, but derives from the Law on Contract and Torts,²⁸⁰ which in Article 156 establishes a duty to eliminate danger of injury or loss.

This provision means that anyone can demand that appropriate measures be taken to prevent damage to them or to an unspecified number of people. This is particularly applicable in discrimination cases.²⁸¹

Although the Commissioner for the Protection of Equality is not allowed to initiate actio popularis under the LPD, they can initiate so-called proto-actio popularis in a strategic case or, in other words, if a case demonstrates frequent and widespread discrimination in respect of which there are good prospects for success. It was previously unclear whether the Commissioner needs consent in the case of two or more victims of discrimination, as is necessary in the case of one person. In September 2014, the Supreme Court of Cassation put an end to this debate and held that the Commissioner did not need written consent as the case affected a group of people – children of Roma origin.²⁸²

²⁸⁰ The Law on Contract and Torts (*Zakon o obligacionim odnosima*), *Official Gazette of the SFRJ*, no. 29/78, 39/85, 45/89 - decision CCJ and 57/89, *Official Gazette of the SRJ*, no. 31/93 and *Official Gazette of the Republic of Serbia SCG*, no. 1/2003 – Constitutional Charter, 1 July 1978.

²⁸¹ Article 156 prescribes that anyone may demand another to eliminate a source of danger threatening considerable damage to them or to an unspecified number of persons, as well as to refrain from an activity causing disturbance or risk of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures (para. 1). On the request of an interested person, the court shall order adequate measures to be taken to prevent the emergence of damage or disturbance, or to eliminate the source of risk – at the expense of the individual who is the source of the risk, should they fail to act accordingly (para. 2).

²⁸² See Commissioner for the Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 128.

d) Class action

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

The Civil Procedure Code from 2011 introduced so-called organisational claims for the protection of collective rights and interests,²⁸³ but in 2013, the Constitutional Court proclaimed the articles which regulate this procedure to be unconstitutional. As a consequence of this decision, on 23 June 2014, the third basic court in Belgrade rejected the first collective claim submitted by an association of bank clients on the issue of foreign currency loans in Swiss francs which covered 10 000 clients.²⁸⁴

The Law on Consumer Protection regulates protection of the collective interests of consumers, but this protection has been moved from civil to administrative procedure.

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

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

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

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

The case-law still does not provide clear rules on the application of this principle, although in 2017 in several cases the court relied on the reversal of the burden of proof. It also seems from the textual interpretation of the relevant articles that this rule applies only in cases of direct and indirect discrimination. However, it must be interpreted to mean that the rule on the burden of proof also applies to harassment.²⁸⁵ Since 2014, the Labour Law prescribes in Article 23, para. 2, the reversal of the burden of proof in discrimination cases, including harassment.

However, the rules on the burden of proof, despite being enshrined in the procedural part of the LPD, are not procedural in their nature, but substantive. As a consequence, the court decides whether particular conduct constitutes discrimination, and it is declared only in the explanation of the verdict.

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

²⁸³ They were introduced for the protection of collective rights and interests and for the protection of consumers (Articles 495-505). Civil Procedure Code (*Zakon o parničnom postupku*), *Official Gazette of the Republic of Serbia*, no. 72/2011, 49/2013 – CC decision, 74/2013 – CC decision, 55/2014, 28 September 2011.

²⁸⁴ See Efektiva, 'Kolektivna tužba odbačena kao nedozvoljena!?' ('Collective claim rejected as inadmissible?'), 8 July 2014, <http://efektiva.rs/aktuelnosti-krediti/kolektivna-tuzba-odbacena-kao-nedozvoljena>.

²⁸⁵ See Petrusić, N., Krstić, I., Marinković, T. (2014), *Commentary on the Law on the Prohibition of Discrimination*, Commissioner for the Protection of Equality, Judicial Academy, Belgrade, p. 188.

propose a timeframe for the implementation of the procedure (Article 308). This means that both sides provide their evidence at the beginning of the procedure and do not know whether the complainant has proved the likelihood of discrimination until the end of the procedure.

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

In Serbia, there are measures of protection against victimisation. Victimisation is enshrined in the LPD as a special form of discrimination.²⁸⁶ Article 9 says that, 'Discrimination shall exist if an individual or a group of persons is unwarrantedly treated worse than others are treated or would be treated, solely or predominantly on account of requesting or intending to request protection from discrimination, or due to having offered or intending to offer evidence of discriminatory treatment'. In other words, this law protects victims of discrimination, as well as people other than the complainant, such as witnesses and someone who helps the victim of discrimination to bring a complaint. However, there is still a lack of relevant case law on this matter, as well as judicial interpretation as to whether the reversal of the burden of proof applies to victimisation under the LPD. Nevertheless, it is necessary to align the definition of victimisation in the LPD with that given in the two EU directives from 2000, in order to provide protection against dismissal, and any other consequence that may arise as a reaction to the complaint.

In its annual report for 2017, the Commissioner indicates that 42 complaints (6.6 %) were submitted claiming discrimination based on sexual orientation, which is an increase compared to the 31 complaints submitted in 2015, as well as the 26 in 2016. However, the Commissioner is convinced that this number is still insignificant compared to the situation in the society and concludes that the reasons for the failure to report cases are lack of confidence in the work of public institutions and also fear of stigmatisation and victimisation.²⁸⁷

Victimisation is not covered by the LPDPD.

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

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

In Serbia, there is a range of applicable sanctions in discrimination cases. Article 43, para. 4, of the LPD expressly allows compensation for material and non-material damage in discrimination cases.²⁸⁸ Article 43, para. 4, of the LPDPD also expressly provides for compensation of damages which occur due to a discriminatory act.²⁸⁹ The principles set out in the Law on Contract and Torts apply for determining the type of damage, and a causal link between the discriminatory act and the damage.

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

²⁸⁶ Victimisation is known as 'calling to account' in Serbian law.

²⁸⁷ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 147.

²⁸⁸ If the complainant is the Commissioner for the Protection of Equality, an organisation engaged in the protection of human rights or the rights of a certain group of people, or a person who deliberately exposed themselves to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case, compensation cannot be claimed.

²⁸⁹ According to Article 43 of the LPDPD, the complainant can request: (1) court prohibition of further discriminatory behaviour, (2) remedy actions to remove the consequences of discriminatory behaviour, (3) the court's confirmation that an action or behaviour is discriminatory, and (4) compensation for pecuniary and non-pecuniary damages incurred due to discriminatory behaviour.

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

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

The LPD (Articles 50-60) and the LPDPD (Articles 46-52) prescribe the fines which can be imposed in misdemeanour proceedings. In addition, other laws which contain anti-discrimination clauses also prescribe misdemeanours, such as the Labour Law and the Law on the Fundamentals of Education.

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

b) Ceiling and amount of compensation

In Serbia, there is no ceiling on the maximum amount of compensation that can be awarded, and the amount is subject to the judge's discretion in civil procedures. However, the average amount in the current jurisprudence cannot be deemed appropriate in comparison to the amount of compensation in some other areas. This particularly applies to compensation of non-pecuniary damages. For example, there have been several cases involving discrimination against people with disabilities and their carers on public transport, who experienced insults and harassment from bus drivers and passengers as they used special cards for free travel, to which they were entitled by law. In these cases, the court found that discrimination had taken place and ordered pecuniary damages, but with regard to non-pecuniary damages the court believed that it shouldn't award the amount requested or it awarded a token amount in comparison to other cases (e.g. insult).²⁹⁰

Monetary fines for misdemeanours range from between RSD 10 000 and RSD 50 000 (approximately EUR 80 to EUR 400) for individuals (Articles 50-60 of the LPD), to the sum of between RSD 10 000 and RSD 100 000 (approximately EUR 80 to EUR 800) for legal entities (Articles 52-60 of the LPD), which cannot be considered to be dissuasive. The same can be said for the LPDPD, which in Articles 46 to 52 prescribes the same range of monetary fines. Despite the fact that anticipated fines are not very high, in practice, judges usually impose minimal fines. An illustrative example is a case of segregation of Roma children in a primary school. In this case, for several years Roma children attended separate classes in an old building, located in the same courtyard as

²⁹⁰ See, for example, Supreme Court of Cassation, Rev. 3602/10, 16 December 2010; Supreme Court of Cassation, Rev. 66/12, February 2012.

the new building, where the other pupils learned.²⁹¹ The judge imposed a fine of RSD 30 000 (EUR 250) on the school and RSD 5 000 (EUR 45) on the principal. In determining the amount and type of punishment, the court found as an aggravating circumstance the fact that it was an offence of a serious nature, while as a mitigating circumstance the court found that the principal was a father of three children, earning a middle-range income and that the offence did not cause serious consequences, although the children were completely separated from their peers for several years.

For criminal acts, prescribed by the Criminal Code, the following sanctions can be imposed:

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

c) Assessment of the sanctions

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

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

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

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

²⁹¹ See Court for Misdemeanours in Novi Pazar, Pr. br. 684/12-69, 13 September 2013; see also Court for Misdemeanours in Novi Pazar, Pr. br. 7 – 4162/ 13-67, 14 May 2014.

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

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

In Serbia, a 'specialised body' – the Commissioner for the Protection of Equality – has been designated under Article 1, para. 2, of the LPD for the promotion of equal treatment irrespective of any ground, including racial or ethnic origin, in accordance with Article 13 of the Racial Equality Directive. Grounds explicitly covered by the mandate are 'race, skin colour, ancestry, citizenship, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance and membership of political, trade union and other organisations'.

There is no other national institution, apart from the Commissioner, dealing with discrimination issues, although the Ombudsman (the Protector of Citizens) can decide on cases which contain elements of discrimination.

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

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

The Commissioner shall be relieved of their duty:

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

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

The Commissioner shall have the right to a salary equal to that of a judge of the High Court of Cassation, as well as the right to reimbursement of the expenses incurred in connection with performing their function. The Commissioner shall be entitled to the immunity enjoyed by representatives of the people in the National Assembly (Article 31). The Commissioner has an expert service to help them in performing the work they are authorised to do. They are also entitled to appoint three assistants. In addition, the

Commissioner decides independently, in accordance with the law, on the employment of staff members for the expert service, on the basis of the need for the professional and efficient discharge of the work the Commissioner is authorised to do. The funds required for the work of the Commissioner, their assistants and the expert service is provided from the budget of the Republic of Serbia, acting on a proposal submitted by the Commissioner. The Commissioner's head office is in Belgrade, with a regional office in Novi Pazar.

The Office of the Commissioner was opened in June 2011, in premises which were not adequate in terms of accessibility and technical and spatial capacity. The situation remained unchanged, although the number and range of activities of the Office increased over time. For this reason, the Commissioner repeatedly stated in its reports that there was a need to improve the spatial capacity for the Commissioner's work.²⁹² On 30 October 2015, the Commissioner finally received a decision on moving to other premises²⁹³ which would meet the spatial and technical requirements in an area of 1 008 m². Since October 2016, the Commissioner has been using the new premises, which also provides the possibility of employing an additional 19 members of staff for various posts (currently, 31 people are employed by the Commissioner). In 2017, 36 staff members were employed, which is 60 % of the estimated total number.²⁹⁴ However, the ECRI concludes that the Commissioner has been provided with additional staff and appropriate premises, and that she has a 'high degree of independence'.²⁹⁵

c) Grounds covered by the designated body/bodies

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

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

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

The Commissioner also submits annual reports (Article 48) and special reports (Article 49) to the Parliament on the situation in the field of protection of equality; warns the public about the most frequent, typical and severe cases of discrimination; monitors the enforcement of laws and other regulations, initiates the adoption of or amendments to such regulations, and provides an opinion on the provisions of the law and other

²⁹² Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 15.

²⁹³ Commissioner for the Protection of Equality (2016), *Regular annual report of the Commissioner for the Protection of Equality for 2015*, Belgrade, p. 28.

²⁹⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 20.

²⁹⁵ ECRI report on Serbia (fifth monitoring cycle), Council of Europe, adopted on 22 March 2017, pp. 9, 16.

regulations for the purpose of implementing and developing protection against discrimination; establishes and maintains cooperation with bodies in charge of equality and human rights protection on the territories of the autonomous provinces and local authorities; and recommends equality measures to state bodies and institutions aimed at ensuring equality.

The Commissioner submits regular annual reports on the work it has done to the National Assembly in March each year. These reports contain an evaluation of the situation in Serbia concerning the protection of equality and activities carried out by the Commissioner. In addition, the Commissioner can prepare and submit special reports on its own initiative, or upon the request of the National Assembly. These reports contain analyses of the position of certain discriminated groups and recommendations for the improvement of that position by undertaking measures to combat discrimination more effectively.

The annual report for 2017 was submitted on time (on 15 March 2018).²⁹⁶ There was no special report prepared in 2017, but the Commissioner requested some surveys and research. Research on the position of older women was conducted, with the aim of gaining a better insight into their position in the following areas: health, socio-economic situation, formal and informal work, use of social protection services, security and violence, development, community life and social relations, use of transport and mobility and participation in legal affairs.²⁹⁷

The Commissioner also conducted a survey, together with the Red Cross, entitled 'Aging in cities - the challenges of modern society', in order to examine the needs of the elderly, provide recommendations for improving the quality of their lives and promote examples of good practice.²⁹⁸ The results of the survey show that the most frequent need of elderly people in cities is care provided in their own homes, followed by better accessibility of healthcare and public transport. Most elderly people have had at least one chronic illness for some time (76 %). In addition, one in ten has an income below the absolute poverty line, and 27 % are currently in need of support. Some of the most important recommendations are to invest in urban infrastructure without architectural barriers that will enable pedestrians to move freely and safely; to invest in affordable and accessible public transport; to support social engagement of elderly people through work, education, volunteering, art and recreation; and to evenly develop the network of primary healthcare institutions.

e) Legal standing of the designated body/bodies

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

On the other hand, the Commissioner has legal standing to initiate a discrimination lawsuit, under Article 46 of the LPD. The Commissioner decides in which cases they will initiate a lawsuit, taking into account whether it is a case of strategic litigation; in other words a case of frequent and widespread discrimination in respect of which there are good prospects for success (so far litigation has been initiated 13 times).²⁹⁹ The litigation is initiated and conducted in the general public interest, in order to contribute to the consistent implementation of legislation and improvement of legal practice, to further

²⁹⁶ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade.

²⁹⁷ Commissioner for the Protection of Equality and UNWOMEN (2017) 'The position of elderly women in Serbia' (*Položaj starijih žena u Srbiji*), October 2017.

²⁹⁸ Commissioner for the Protection of Equality and the Red Cross (2017) 'Aging in cities - the challenges of modern society' (*Старење у градовима – изазови савременог друштва*), Belgrade.

²⁹⁹ Commissioner for the Protection of Equality (2016), *Regular annual report of the Commissioner for the Protection of Equality for 2015*, Belgrade, p. 171.

encourage victims of discrimination to initiate anti-discrimination litigation, to uphold the rule of law and to contribute to the improvement of access to justice.

However, in order to initiate a lawsuit, the Commissioner needs the consent of the person who has experienced discrimination. In September 2014, the Supreme Court of Cassation held that the Commissioner does not need written consent if the case affects a group of people, in this case children of Roma origin, who are unidentified.³⁰⁰ This decision is very important as the court noted that the complaint was not directed at the Commissioner's finding of discrimination against a particular individual, in which case the Commissioner would be required to obtain written consent to the filing of the lawsuit, but to establish the existence of discrimination against a group of people. However, in another case from 2015, the Appellate court of Belgrade rejected a complaint as the organisation didn't have the written consent of three Roma children who were allegedly discriminated against.³⁰¹ The court explained that in this case all three children (siblings in one Roma family) were known, and that consent is only not needed in a case of two or more unidentified persons.

The Commissioner can demand the following:

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

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

f) Quasi-judicial competences

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

This procedure before the Commissioner for the Protection of Equality is a specific procedure, which has the characteristics of a special administrative procedure. Article 40, para. 4, of the LPD expressly stipulates that the procedure before the Commissioner shall be conducted pursuant to provisions of the Law on General Administrative Procedure.³⁰² The procedure for submitting a complaint is regulated in Articles 35 to 40. A complaint must be delivered within 15 days from its submission to the alleged perpetrator of the violation who has 15 days to respond to it. The Commissioner must give an opinion on whether there has been a violation of the prohibition of discrimination within 90 days of receiving a complaint, and must inform the individual who submitted the complaint and the individual against whom the complaint was submitted. If the Commissioner finds a violation, they will issue a recommendation to the individual against whom the complaint was submitted, suggesting a means of redressing the violation in question. Although this decision is called a recommendation in the Law, it is obligatory. Thus, the individual to whom the recommendation is addressed is obliged to act upon it and to redress the violation in question within 30 days of the day of receiving it. The individual must inform

³⁰⁰ See Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 128.

³⁰¹ Appellate court in Belgrade, no.7 P. 782/15, decision from 29 May 2015.

³⁰² Serbia, Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, no. 18/2016, 9 March 2016.

the Commissioner of the measures taken. If the perpetrator fails to redress the violation in question within 30 days, the Commissioner may inform the public in the press and online (Article 40, para. 2, of the LPD).

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

In Serbia, the Commissioner registers the number of complaints and decisions by ground and field. These data are available to the public online, in regular annual and special reports, as well as in particular publications issued by the Commissioner. For example, in 2017 the Commissioner received 532 complaints. In respect of 108 complaints, the personal characteristic was not mentioned. In 424 complaints the personal characteristic invoked was as follows: 114 complaints (18 %) – disability; 75 complaints (11.8 %) – age; 71 complaints (11.2 %) – sex; 64 complaints (10.1 %) – health status; 62 complaints (9.8 %) – ethnic origin; 48 complaints (7.6 %) – marital and family status; 42 complaints (6.8 %) – sexual orientation; 33 complaints (5.2 %) – membership of political and trade unions; 23 complaints (3.6 %) – religious or political beliefs; 22 complaints (3.5 %) – property status; 17 complaints (2.7 %) – gender identity; 13 complaints (2.1 %) – appearance; 8 complaints (1.3 %) – conviction; 7 complaints (1.1 %) – citizenship; 6 complaints (0.9 %) – genetic features; 5 complaints (0.8 %) – language; 3 complaints (0.5 %) – ancestry; 3 complaints (0.5 %) – birth, and 17 complaints (2.7 %) for other grounds.³⁰³

With regard to the areas where discrimination occurs, the number of complaints was as follows: employment (166 complaints or 31.2 %); public authorities (114 complaints or 21.4 %); access to public services and facilities (64 complaints or 12 %); education and vocation (42 complaints or 7.9 %); public information and media (37 complaints or 7 %); healthcare (27 complaints or 5.1 %); private relations (16 complaints or 3 %); public sphere (15 complaints or 2.8 %); culture, art and sport (7 complaints or 1.3 %); functioning of trade unions and other organisations (5 complaints or 0.9 %); housing (5 complaints or 0.9 %); property rights (5 complaints or 0.9 %); pensions (2 complaints or 0.4 %); collective minority rights (1 complaint or 0.2 %); and other areas (5 complaints or 0.9 %).³⁰⁴ The Report contains some other data, such as the number of male/female applicants and who submitted complaints (individuals / organisations / legal entities / state institutions / groups / individuals).

h) Roma and Travellers

The Commissioner recognises that Roma are among the most discriminated against groups in Serbia, which is highlighted in all the regular annual reports. Every year on April 8, International Romani Day, the Commissioner issues a press release drawing attention to the fact that the situation of the Roma minority is still poor and that Roma are the most discriminated against group in Serbia. The Commissioner noted in its report for 2017 that Roma are frequently exposed to open and widespread hate speech, while discrimination against this national minority is very present in the areas of education, employment, healthcare and housing.³⁰⁵ Some statistics demonstrate that only 6 % of children age three to four are included in preschool programmes, 69 % attend primary school and just 22 % secondary school.³⁰⁶

³⁰³ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, pp. 217 - 218.

³⁰⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, pp. 217-218.

³⁰⁵ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, pp. 87, 141.

³⁰⁶ Social Inclusion Unit (2016), *'Analiza primene afirmativnih mera u oblasti obrazovanja roma i romkinja i preporuke za unapređenje mera'* ['Analysis of the implementation of positive measures for Roma in education and recommendations for their improvement'], Government of Serbia, Belgrade, June 2016, pp. 4-5.

For the past six years, a large number of complaints have concerned alleged discrimination against Roma. In 2017, 22 complaints were submitted claiming discrimination against Roma.³⁰⁷ The Commissioner initiated a strategic litigation case concerning the construction of a wall next to a Roma settlement and along the street, which meant that the Roma settlement was actually hidden.

The perception of citizens on the availability of public services was the subject of research in 2017. In a survey on views about satisfaction with public services in primary healthcare,³⁰⁸ several relevant areas were analysed regarding citizens' opinions on health services at the level of primary healthcare: efficiency and quality, satisfaction and expectations, abuse, discrimination and information. When it came to discrimination in this area, the survey showed that Roma (30 %) were perceived as a group which faces greater barriers in accessing essential health services compared to other citizens. Roma were also perceived to be the most discriminated against group in situational analyses on children with disabilities.³⁰⁹ In addition, it was found that Roma children with disabilities were disproportionately likely to be placed in foster care in relation to the total number of Roma in Belgrade.³¹⁰

In its Concluding Observations on Serbia, the Committee on the Elimination of All Forms of Racial Discrimination expressed its concern about the fact that the percentage of Roma children enrolled in all levels of education is drastically lower than that of children from the general population.³¹¹ Furthermore, the Committee is very concerned by reports that one third of people registered homeless are Roma and that 60 000 Roma, Ashkali and Egyptians live in substandard conditions in hundreds of informal settlements, often lacking access to basic services, including drinking water and sanitation.³¹²

The Committee especially welcomed the adoption of the Strategy for the Social Inclusion of Roma in the Republic of Serbia for the period 2016-2025. The aim of this strategic document is to create conditions for the social inclusion of Roma, to reduce poverty among them and to eliminate discrimination against them. Other reasons for the adoption of this strategic document is to introduce mechanisms for the implementation and improvement of strategic objectives, to enhance the capacity and accountability of both the state administration and local self-governments to effectively oversee the implementation and protection of Roma rights, to secure budget funds and to effectively involve representatives of the Roma community in the process of developing and implementing strategic measures and exercising their rights to employment, housing, education, social and health protection. Thus, it outlines five main areas: education, housing, health, employment and social protection. In March 2017, a coordination body to monitor the implementation of the Strategy was established, while in June 2017, an Action Plan for the implementation of the Strategy was adopted for the period 2017-2018.

³⁰⁷ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 112.

³⁰⁸ 'Attitudes of citizens on their satisfaction with public services in primary healthcare' ['Ставови грађана о задовољству јавним услугама у примарној здравственој заштити'], European Movement in Serbia, European Policy Centre, Belgrade, 2017, available at www.zdravlje.gov.rs/downloads/2017/April/analiza.pdf, last accessed on 15 March 2018.

³⁰⁹ Position of children with disabilities and their rights in the Republic of Serbia (*Положај деце са сметњама у развоју и инвалидитетом и остваривање њихових права у Републици Србији*), National Organization for Persons with Disabilities of Serbia (NOOIS), Belgrade 2017, p. 21.

³¹⁰ European Roma Rights Center, *Decreased Family Life - Excessive Number of Roma Children in the State Care Sector in Serbia (Ускраћен породични живот - Прекомеран обим ромске деце у оквиру државне бриге у Србији)*, December 2017.

³¹¹ CERD, *Concluding observations on the combined second to fifth periodic reports of Serbia*, Committee on the Elimination of Racial Discrimination, UN, CERD/C/SRB/CO/2-5, 3 January 2018, para. 20.

³¹² CERD, *Concluding observations on the combined second to fifth periodic reports of Serbia*, Committee on the Elimination of Racial Discrimination, UN, CERD/C/SRB/CO/2-5, 3 January 2018, para. 22.

8 IMPLEMENTATION ISSUES

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

a) Legal protection against discrimination

In relation to dissemination of information about legal protection against discrimination, the Commissioner for the Protection of Equality publishes brochures and handbooks for different professionals and the wider public in order to inform them about discrimination and to explain the available remedies if discrimination takes place. It actively works on the visibility of the institution, appears in the media and organises a moot court for law students. In 2017, a fifth competition was organised in partnership with the Judicial Academy and the Open Society Foundation. The competition was open to law students from undergraduate and masters programmes.

The Commissioner has the authority to recommend to public authorities measures for achieving equality. Recommendations can be directed towards ensuring that public authorities take measures to prevent and eliminate institutional discrimination and improve the functioning of the institutions, as well as to undertake positive measures in order to provide full equality, protection and advancement of people or groups who are in an unequal position compared to other citizens. In 2017, the Commissioner issued 501 recommendations.³¹³

b) Measures to encourage dialogue with NGOs

The Commissioner for the Protection of Equality cooperates with international organisations and international and national NGOs. They are very important partners in advising about complex discrimination cases, in being involved in joint activities, in providing important information about discrimination cases and for situation testing. In 2017, many meetings were organised with different organisations and the Commissioner participated in several seminars, round tables and conferences organised by NGOs. In addition, in 2017, NGOs submitted 105 complaints (19.7 %), showing that they are the most valuable partners of the Commissioner.³¹⁴

c) Measures to promote dialogue between social partners

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

The Office for Human and Minority Rights (*Kancelarija za ljudska i manjinska prava*) also undertakes a lot of activities in relation to discrimination. The Action Plan for the implementation of the Strategy for the Prevention of and Protection from Discrimination was adopted on 3 October 2014 and its implementation began in 2015. The Strategy and the Action Plan are the results of consultations with the relevant NGOs and social partners, and they continued in 2017.

³¹³ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 7.

³¹⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 217.

d) The situation of Roma and Travellers

The Commissioner for the Protection of Equality deals with cases of discrimination against Roma and issues public announcements on their situation. In addition, the Ombudsman deals with some cases of discrimination against Roma within its jurisdiction, especially in relation to cases of forced eviction. Furthermore, the Roma community also has a National Council for the Roma National Minority, established under the Law on National Councils of National Minorities.³¹⁵ It is an elected body which has the exclusive right to manage issues of education, official use of language and public information for Roma. In addition, a Council of National Minorities of the Republic of Serbia was established with the aim of preserving, improving and protecting the national, ethnic, religious, linguistic and cultural characteristics of national minorities, including Roma.³¹⁶ Among other things, the Council monitors the implementation of cooperation between national councils and the competent authorities of the Republic of Serbia, autonomous provinces and municipalities.

The Office for Human and Minority Rights of the Government of Serbia has a section for national minorities, which includes the Group for the Advancement of Roma and Assistance for Migrants. This body has a duty to undertake activities related to coordination and cooperation with relevant ministries in order to initiate, prepare and realise operational measures for the implementation of the Strategy and Action Plan for the Advancement of the Situation of Roma and to cooperate with local government with the aim of implementing local action plans. The Government adopted a Decision on the Establishment of the Council for the Improvement of the Situation of Roma and the Implementation of the Roma Decade.³¹⁷ The Council receives administrative and technical support from the Office for Human and Minority Rights. Its role is to prepare proposals for the development of a comprehensive and coherent policy to improve the situation of the Roma population and the implementation of the Decade of Roma Inclusion; to give opinions on the planned budgetary resources; and to provide opinions and expert explanations for the realisation of important social indicators, etc.

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

a) Mechanisms

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

b) Rules contrary to the principle of equality

In Serbia, there are some laws, regulations or rules which are contrary to the principle of equality. In order to identify all of them, specific research needs to be undertaken on this

³¹⁵ Serbia, Law on National Councils of National Minorities (*Zakon o nacionalnim savetima nacionalnih manjina*), *Official Gazette of the Republic of Serbia*, no. 72/2009, 20/2014 - decision CC, 55/2014, 3 September 2009.

³¹⁶ Decision on the Establishment of the Council for National Minorities (*Odluka o obrazovanju Saveta za nacionalne manjine*), *Official Gazette of the Republic of Serbia*, no. 50/2009, 10 July 2009; amended on 10 November 2016, *Official Gazette of the Republic of Serbia*, no. 91/2016.

³¹⁷ Decision on the Establishment of the Council for the Improvement of the Situation of Roma and the Implementation of the Roma Decade (*Odluka o obrazovanju Saveta za unapređenje položaja Roma i sprovođenje Dekade uključivanja Roma*), *Official Gazette of the Republic of Serbia*, no. 46/2013, 24 May 2013.

issue. The problem is that members of working groups established for the adoption of certain laws do not usually have enough expertise in anti-discrimination law. Furthermore, there are some laws which were adopted before the LPD was adopted in 2009.

It is very important for the Commissioner for the Protection of Equality to provide opinions on draft laws and other regulations and to initiate the introduction of new laws and other regulations, as well as adopting amendments to existing ones. In 2014, the Commissioner issued two opinions related to draft laws and other acts and submitted three proposals for the assessment of the constitutionality and legality of general legal acts to the Constitutional Court of Serbia,³¹⁸ compared to 17 opinions and one proposal for the assessment of constitutionality in 2015.³¹⁹ However, in 2016, the Commissioner issued 40 opinions on different laws, submitted one proposal for the assessment of constitutionality and initiated one initiative for a change to the law – the LPD.³²⁰ In 2017 this trend continued and the Commissioner issued 41 opinions on different laws, submitted one proposal for the assessment of constitutionality and initiated two initiatives for a change to the law.³²¹

³¹⁸ Commissioner for Protection of Equality (2015), *Regular annual report of the Commissioner for Protection of Equality for 2014*, Belgrade, p. 50.

³¹⁹ Commissioner for the Protection of Equality (2016), *Regular annual report of the Commissioner for the Protection of Equality for 2015*, Belgrade, p. 251.

³²⁰ Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 215.

³²¹ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 7.

9 COORDINATION AT NATIONAL LEVEL

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

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

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

10 CURRENT BEST PRACTICES

The work of the Commissioner for the Protection of Equality during its eight-year mandate must be evaluated as successful, despite the technical and spatial constraints, which were finally resolved in 2017. In May 2015, Brankica Jankovic, a new Commissioner for the Protection of Equality was elected, and she immediately continued to perform all the duties of her predecessor. In 2017, the Commissioner received 532 complaints and issued opinions in 51 cases, provided 41 opinions on draft laws and general acts and initiated three criminal charges, as well as one misdemeanour charge, 13 warnings and 20 announcements.³²² The Commissioner continued to support regional cooperation in 2017. The body also organised many training sessions and round tables, issued numerous handbooks and guides and contributed to awareness-raising about discrimination and the legal framework for protection against discrimination. The institution also became more visible in 2017, meaning that the public is more aware of the existence and activities of the Commissioner.

In October 2017 the Mental Disability Rights Initiative (MDRI) released a situation analysis on legal capacity and people with disabilities.³²³ The focus was on the procedure and consequences of the deprivation of capacity for people with disabilities. The analysis was conducted with respect for the human rights of people with disabilities, as well as with a thorough examination of their experience of inequality which leads to them being deprived of legal capacity. The document contains recommendations for further collection and analysis of data related to the deprivation of capacity for people with disabilities. Three key recommendations are: to reform national legislation in the area of deprivation of legal capacity and guardianship for adults, in accordance with relevant international standards (primarily Article 12 of the CRPD); to abolish deprivation of full legal capacity; and to introduce a decision-making system with support as an alternative to deprivation of legal capacity.

Bearing in mind that specialisation among judges is needed, as well as enhanced capacity and sensitivity to deal with complex issues, training for trainers on anti-discrimination at the Judicial Academy was continued in 2017 for eight judges from the higher courts from the jurisdiction of four appellate courts, with the support of the OSCE Mission in Serbia. The training programme consisted of two seminars on different issues in relation to discrimination, including the jurisprudence of the ECtHR and CJEU. The training for trainers was conducted in order to fulfil three main objectives: 1) to increase knowledge in the field of non-discrimination, including the national legal framework and applicable international law among judges; 2) to harmonise court practice in this area of law by enabling judges from different courts to specialise and become recognised authorities in this field; and 3) to have the possibility in the *follow-up* activities to exchange ideas and discuss controversial legal issues with other judges from the higher and appellate courts. The last activity was conducted in October 2017, when judges joined a study group and visited EQUINET in Brussels and the CJEU in Luxembourg. The main aim of this study group was to give Serbian judges greater insight into the work of the CJEU in the area of non-discrimination, as they have very modest knowledge of its functioning and jurisprudence.

The Commissioner for the Protection of Equality continued the successful cooperation with the Office of the Council of Europe in Belgrade, as the coordinator of their joint project, *'Don't judge a book by its cover – Living Library in Serbia'*. The aim of this project is to lessen the effect of negative stereotypes and prejudice as key causes of discrimination. In 2017, one national training event for the organisers of the Living Library was organised in Novi Sad, as well as nine living libraries, visited by more than

³²² Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 7.

³²³ Krstić, I. and Beker, K. (2017), 'Legal capacity and people with disabilities in Serbia' (*Poslovna sposobnost i osobe sa invaliditetom u Srbiji*), MDRI, Belgrade.

1 000 visitors. In 2017, nine libraries were organised: in Belgrade, Zrenjanin, Šabac, Kraljevo, Kragujevac, Čačak and Novi Sad.³²⁴

³²⁴ Commissioner for the Protection of Equality (2018), *Regular annual report of the Commissioner for the Protection of Equality for 2017*, Belgrade, p. 183.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

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

a) The definition of discrimination

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

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

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

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

b) Proving discrimination

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

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

c) Material scope

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

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

The LPD should recognise segregation as an aggravated form of discrimination.

The duty of reasonable accommodation exists in relation to provision of services and the use of facilities, as well as in employment. However, according to Article 22, para. 4, of the LPDPD, it can be invoked only in the case of a refusal to carry out a technical adaptation of the workplace that enables efficient work by people with disabilities, and cannot take other forms, such as reassigning tasks, moving people to another function, etc., which is in contradiction with Article 5 of the Directive 2000/78/EC. In addition, the employer can be exempted from this obligation if the costs of the adaptation are disproportionate to the profit of the employer employing a person with a disability. In

other words, the disproportionality of the burden is only assessed in financial terms. Furthermore, there is an individual relationship between the profit gained from employing the person with a disability and the cost of the accommodation for that person. This provision is not clear and it can be argued that it seems to imply that the employer still has to gain some profit from employing the person with disability. Therefore, further judicial interpretation is required in order to clarify this matter.

d) Exceptions from discrimination

The LPD should be amended to include provisions on reasonable accommodation for persons with disabilities.

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

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

e) Remedies, enforcement and sanctions

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

Victimisation is recognised in the LPD, but it has to be further aligned with EU law, as it does not expressly protect people from dismissal.

The LPDPD does not provide protection from victimisation. In addition, the LPDPD does not contain a provision on the reversal of the burden of proof, although the LPD does include this concept. Therefore, Article 45, para. 2, stipulates the following: 'If the complainant proves the likelihood of the defendant's having committed an act of discrimination, the burden of proof that no violation of the principle of equality or the principle of equal rights and obligations has occurred shall fall on the defendant.'

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

11.2 Other issues of concern

LGBTI rights improved in Serbia in 2017. The 2017 Gay Pride march was organised without any problems and the country's first openly lesbian Prime Minister was appointed. The Department for Combating High-Tech Crime is focusing on cyber hate speech and in several police units officers have been designated as contact people for LGBTI people.³²⁵ A considerable number of police and social welfare staff have been trained in LGBTI issues. However, the position of LGBTI people still remains a controversial issue in Serbia and the Law on Registered Partnerships has not yet been adopted. Furthermore, LGBTI people face prejudice, and a considerable proportion of discrimination is committed by civil servants and public officials who do not always promote understanding and tolerance towards LGBTI people.

Roma are still the most vulnerable group. As the ECRI noted, only 6 % of Roma children are enrolled in preschool; only 46 % complete the compulsory eight-year primary education and just 13 % secondary education. Only half as many Roma girls as Roma boys attend and complete secondary school. The figures for Roma living in settlements

³²⁵ ECRI, *Report on Serbia (fifth monitoring cycle)*, Council of Europe, adopted on 22 March 2017, p. 9.

and, in particular, displaced Roma from Kosovo are even worse. In addition, 72 % of all Roma settlements are still informal, while not a single Roma person is employed in public services.³²⁶

The growing number of asylum seekers and migrants who are staying longer in Serbia, due to limited possibilities of entering neighbouring EU states, requires a more efficient asylum procedure and better integration policies.

In addition, a main issue of concern is the lack of relevant anti-discrimination knowledge among prosecutors and judges, particularly judges in the lower criminal courts. Although several major training sessions were organised in 2017, this is still not enough and the current situation requires the implementation of different measures: the introduction of an obligatory anti-discrimination course at university level, workshops on anti-discrimination during initial training at the Judicial Academy, as well as mandatory seminars for the regular continuing professional development for judges from different jurisdictions. Of particular importance is the organisation of training in relevant international and European standards in this area of law, including workshops on prejudices and stereotypes. Furthermore, in the majority of cases, anti-discrimination proceedings are initiated for any wrongdoing that citizens have experienced, which also reflects their lack of understanding of the concept of discrimination.

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

Importantly, the LPD has not been amended in 2017 despite many efforts to finalise amendments and to fully align the text with the EU *acquis*.

Finally, it is necessary to enhance the statistical parameters and database for monitoring court proceedings concerning discrimination cases.

³²⁶ ECRI, *Report on Serbia (fifth monitoring cycle)*, Council of Europe, adopted on 22 March 2017, p. 10.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

In 2017, a set of educational laws was adopted. The Law on the Fundamentals of the Education System,³²⁷ the Law on Preschool Education,³²⁸ the Law on Amendments to the Law on Primary Education³²⁹ and the Law on Amendments to the Law on Secondary Education³³⁰ introduce several non-discrimination provisions and expressly recognise affirmative measures. For example, the Law on Amendments to the Law on Secondary Education allows members of certain groups to enrol in secondary education under more favourable conditions in order to achieve full equality in the acquisition of education. This measure primarily targets Roma pupils, and the Rulebook for the enrolment of pupils into secondary education³³¹ further requires that parents of Roma pupils, starting from the 7th grade, are informed about the criteria and the procedure for the enrolment of their children under more favourable conditions. The measure further includes guidance for obtaining relevant documentation and help in the selection of the right school and future profession.

In addition, the Law on Higher Education introduces a provision which prescribes that tertiary education is based on respect for human rights and freedoms and a rejection of all forms of discrimination (Article 4, para. 7). It also establishes that students have the right to be different and to be protected from discrimination (Article 101, para. 8).

In 2017, the Law on Electronic Documents, Electronic Identification and Trust Services for Electronic Transactions³³² was adopted which, among other things, stipulates in Article 6 that trust services and electronic identification services must be equally accessible for people with disabilities.

The Law on Public Servants³³³ recognises affirmative measures for the employment of members of national minorities when, in order to achieve appropriate representation, priority is given to equally qualified candidates.

In 2017, the process of further compliance of the LPD with the EU *acquis* continued, with the main proposals being to change the definition of indirect discrimination, to add sexual harassment, to recognise segregation as an aggravated form of discrimination, to include delivery of services, to include religious ethos, to include reasonable accommodation, and to increase fines for misdemeanour acts prescribed in the Law. However, this process has not been concluded as the Ministry of Labour, Employment, Veteran and Social Affairs has not finalised a draft LPD.

³²⁷ Serbia, Law on the Fundamentals of the Education System (*Zakon o osnovama sistema obrazovanja i vaspitanja*), *Official Gazette of the Republic of Serbia*, no. 88/2017, 7 October 2017.

³²⁸ Serbia, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Serbia*, no. 101/2017, 18 November 2017.

³²⁹ Serbia, Amendments to the Law on Primary Education (*Zakon izmenama Zakona o osnovnom obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 101/2017, 18 November 2017.

³³⁰ Serbia, Law on Amendments to the Law on Secondary Education (*Zakon o izmenama Zakona o srednjem obrazovanju i vaspitanju*), *Official Gazette of the Republic of Serbia*, no. 101/2017, 18 November 2017.

³³¹ Serbia, Rulebook for the enrolment of pupils into secondary education (*Pravilnik o upisu učenika u srednju školu*), *Official Gazette of the Republic of Serbia*, no. 38/17, 51/17, 29 April 2017.

³³² Serbia, Law on Electronic Document, Electronic Identification and Trusted Services in Electronic Commerce (*Zakon o elektronskom dokumentu, elektronskoj dokumentaciji i uslugama od poverenja u elektronskoj komunikaciji*), *Official Gazette of the Republic of Serbia*, no. 94/2017, 27 October 2017.

³³³ Serbia, Law on Public Servants (*Zakon o zaposlenima u javnim službama*), *Official Gazette of the Republic of Serbia*, no. 113/2017, 1 January 2017.

12.2 Case law

Ground not specified

Name of the court: Court of Cassation

Date of decision: 1 February 2017

Name of the parties:

Reference number: Rev 1/2017

Address of the webpage: www.vk.sud.rs/sr-lat/rev-12017-diskriminacija

Brief summary: This case concerns an adjudication by a court and a claim that an individual was exposed to discrimination due to the court's actions. Here, the case concerns a lawsuit initiated by an electricity company, requesting payment of a debt. However, the defendant (the electricity consumer) was dissatisfied with the court proceedings and the judgment, and he initiated another lawsuit claiming that he was discriminated against by the court. The Court of Cassation underlined that discrimination implies different treatment or omission which is based on certain personal characteristics. In this case, the Court explained that, in a situation where the party is dissatisfied with the conduct of the court, as well as with the outcome of the dispute in general, but it is not related to any of their personal characteristics, it can't be considered as discrimination according to the LPD.

Ground not specified

Name of the court: Court of Cassation

Date of decision: 15 March 2017

Name of the parties:

Reference number: RRev 357/2017Rev 357/2017ev 357/2017 402/16

Address of the webpage: www.vk.sud.rs/sr-lat/rev-3572017-zaštita-od-diskriminacije-pojam-diskriminacije

Brief summary: This case also concerns an adjudication by a court and a claim that an individual was exposed to discrimination due to the misapplication of law by a court. Here, the claimant alleged that he was discriminated against by two courts (specifically, the Commercial Court in Pancevo and the Appellate Commercial Court in Belgrade), as they erroneously applied the law in another proceeding where he sued the municipality of Kovin and the municipal fund for construction, land, roads and communal expenditure for compensation for damages. He claimed that due to their failure to fulfil contractual obligations he couldn't sell his house. However, his lawsuit was rejected.

Therefore, in the proceeding before the Court of Cassation, he claimed that, through an erroneous application of the law by the courts, he lost the possibility of obtaining compensation for the wrongdoing of the defendant. This claim shows that the claimant does not understand the meaning of discrimination, and this case is important to mention as many similar lawsuits were submitted to the court in 2017. The Court of Cassation found that this specific case did not involve discrimination, as there was no different treatment based on any personal characteristic. The Court of Cassation underlined the position of the courts and the independence of judges in their application of the law. The Court explained that possible misapplication of substantive and procedural law is corrected in a legally prescribed procedure, by submitting regular and extraordinary legal remedies, in the course of which monitoring of the regularity of the court decision is prescribed. The Court also took into account that parties in this case had access to court and equality of arms during procedure.

Residence

Name of the court: Court of Cassation

Date of decision: 30 March 2017

Name of the parties:

Reference number: Rev 401/2017

Address of the webpage: www.vk.sud.rs/sr-lat/rev-4012017-diskriminacija-isplata-ratnih-dnevnica-vojnim-rezervistima

Brief summary: On 25 March 2014, the Grand Chamber of the ECtHR delivered its judgment in *Vuckovic and others v. Serbia*.³³⁴ The case was initiated by 30 reservists in the Yugoslav army against the government's refusal to pay *per diems* for their work during the NATO intervention in Serbia in 1999. Since they were subsequently demobilised, the government refused to pay the *per diems* they were entitled to. After public protests, the Government reached an agreement in 2008 with some of the reservists residing in seven underdeveloped municipalities. Only these reservists were guaranteed payment of the *per diems*. The 30 applicants were unable to benefit from the agreement, since they resided in other parts of the country. The applicants filed a civil claim against Serbia and pointed to the discrimination resulting from the 2008 agreement. However, the applicants did not rely on any anti-discrimination provisions and the court of first instance dismissed the claim based on the fact that the three-year prescription period since their demobilisation had expired. Therefore, they filed a new lawsuit after the decision of the Grand Chamber was delivered. In this case, the Appellate Court agreed with the lower court that the payment received was not a means of social support, as an assessment of social status was not performed in each case, and it was considered to be a *per diem*. Therefore, the court concluded that this payment constituted discrimination without objective or reasonable justification. This judgment is also important, as the Court underlined that special measures are allowed by the Serbian Constitution (Article 21, para. 4) in order to achieve full equality for groups of people who are essentially in an unequal position compared with other citizens. Therefore, it is possible to introduce measures designed to assist underdeveloped municipalities. However, in this case discrimination occurred, as payments made under the 2008 Agreement were not directed to provide assistance to underdeveloped municipalities, but were payment to members of strike committees of war military reservists from these municipalities.

Health

Name of the court: Court of Cassation

Date of decision: 22 June 2017

Name of the parties:

Reference number: Rev 2197/2016

Address of the webpage: www.vk.sud.rs/sr-lat/rev-21972016-za%C5%A1tita-od-diskriminacije-pravo-na-privatnost

Brief summary: In this case, an employee was dismissed while on a sick leave. His employer entered his office, and his private and business affairs (personal correspondence and letters) were placed in boxes and taken to a restaurant. He claimed to be discriminated against, as he was dismissed and his belongings were taken without permission or any explanation. The Court of Cassation found a violation of the right to privacy, but underlined that discrimination didn't occur in this case, as the sick leave was not a factor relevant to the adverse treatment. The Court didn't consider that this was a case of discrimination based on a health condition, a ground recognised by Article 2 of the LPD. Therefore, the Court found that there was no differentiation based on personal characteristics.

³³⁴ ECtHR, *Vuckovic and Others v. Serbia*, app. no. 17153/11 et al., judgment from 25 March 2014.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

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

Country: Serbia
Date: 1 January 2018

Title of legislation (including amending legislation)	Title of the law: The Law on the Prohibition of Discrimination Abbreviation: LPD Date of adoption: 26 March 2009 Latest amendments: N/A Entry into force: 7 April 2009 Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: explicitly race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations It is an open clause
	Civil law
	Material scope: all areas of public life
	Principal content: prohibition of direct and indirect discrimination, violation of the principle of equal rights and obligations, calling to account ³³⁵ associating for the purpose of exercising discrimination, hate speech and disturbing and humiliating treatment
Title of legislation (including amending legislation)	Title of the law: The Gender Equality Act Abbreviation: GEA Date of adoption: 11 December 2009 Latest amendments: N/A Entry into force: 25 December 2009 Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: gender
	Civil law
	Material scope: all areas of public and private life
	Principal content: direct and indirect discrimination, harassment, sexual harassment
Title of legislation (including amending legislation)	Title of the law: The Law on the Prevention of Discrimination against Persons with Disabilities Abbreviation: LPDPD Date of adoption: 17 April 2006 Latest amendments: 19 February 2016 Entry into force: 1 January 2007 Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: disability
	Civil law
	Material scope: all areas of public life
	Principal content: direct and indirect discrimination, violation of the principle of equal rights and obligations, humiliating treatment
Title of legislation	Title of the law: Law on the Professional Rehabilitation and Employment of Persons with Disabilities

³³⁵ Victimisation is known as 'calling to account' in Serbian law.

(including amending legislation)	<p>Abbreviation: LPREPD Date of adoption: 13 May 2009 Latest amendments: 16 April 2013 Entry into force: 15 May 2009 (Article 24 and 29 on 24 May 2010) Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: disability</p>
	Civil law
	Material scope: employment
	Principal content: affirmation of equal opportunities
Title of legislation (including amending legislation)	<p>Title of the law: Law on the Protection of Rights and Freedoms of National Minorities Abbreviation: LPRFNM Date of adoption: 27 February 2002 Latest amendments: 6 November 2013 Entry into force: 7 March 2002 Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: national, ethnic, racial origin and language</p>
	Civil law
	Material scope: education, use of language, information, culture, participation in public affairs
	Principal content: prohibition of discrimination, affirmative actions
Title of legislation (including amending legislation)	<p>Title of the law: Labour Law Abbreviation: LL Date of adoption: 15 March 2005 Latest amendments: 25 December 2017 Entry into force: 23 March 2005 Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: gender, birth, language, race, skin colour, age, pregnancy, health condition, invalidity, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial capacity, membership of political, labour union or other organisations It is an open clause</p>
	Civil/administrative law
	Material scope: employment
	Principal content: direct and indirect discrimination
Title of legislation (including amending legislation)	<p>Title of the law: Law on the Fundamentals of Education Abbreviation: LFE Date of adoption: 27 September 2017 Latest amendments: N/A Entry into force: 7 October 2017 Web link: www.ravnopravnost.gov.rs/en/laws/laws-and-regulations-of-the-republic-of-serbia Grounds covered: racial, national, ethnic, linguistic, religious background or gender, physical and psychological characteristics, developmental impairments and disabilities, health condition, age, social and cultural origin, financial status or political views</p>
	Civil/administrative law
	Material scope: education
	Principal content: direct and indirect discrimination
Title of legislation (including	<p>Title of the law: Criminal Code Abbreviation: CC Date of adoption: 6 October 2005</p>

amending legislation)	<p>Latest amendments: 24 November 2016</p> <p>Entry into force: 14 November 2005</p> <p>Web link: www.paragraf.rs/propisi/krivicni_zakonik.html</p> <p>Grounds covered: race, colour, religion, nationality, ethnicity or any other personal characteristic</p>
	Criminal law
	Material scope: all indicated areas employment, access to goods or services (including housing), social protection, social advantages, education if the act is enough serious to be considered as criminal act
	Principal content: direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

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

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

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