



European
Commission

European network of legal experts in
gender equality and non-discrimination

Country report

Gender equality



Montenegro
2019

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.2 Gender Equality

*European Commission
B-1049 Brussels*

Country report

Gender equality

How are EU rules transposed into
national law?

Montenegro

Vesna Simovic-Zvicer

Reporting period 1 January 2018 – 31 December 2018

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2020

© European Union, 2020

PDF ISBN 978-92-76-01844-5

ISSN 2600-0164

doi:10.2838/339508

DS-BD-19-022-EN-N

CONTENTS

1	Introduction	5
1.1	Basic structure of the national legal system	5
1.2	List of main legislation transposing and implementing the directives	5
1.3	Sources of law	9
2	General legal framework	12
2.1	Constitution	12
2.2	Equal treatment legislation	12
3	Implementation of central concepts	13
3.1	General (legal) context.....	13
3.2	Sex/gender/transgender	16
3.3	Direct sex discrimination	17
3.4	Indirect sex discrimination	18
3.5	Multiple discrimination and intersectional discrimination	19
3.6	Positive action.....	19
3.7	Harassment and sexual harassment.....	23
3.8	Instruction to discriminate	26
3.9	Other forms of discrimination	26
3.10	Remaining issues.....	26
3.11	Evaluation of implementation	27
4	Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)	29
4.1	General (legal) context.....	29
4.2	Equal pay	31
4.3	Access to work, working conditions and dismissal	34
4.4	Evaluation of implementation	36
4.5	Remaining issues.....	36
5	Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)	37
5.1	General (legal) context.....	37
5.2	Pregnancy and maternity protection	40
5.3	Maternity leave	43
5.4	Adoption leave	46
5.5	Parental leave	47
5.6	Paternity leave	53
5.7	Time off/care leave.....	53
5.8	Leave in relation to surrogacy	54
5.9	Flexible working time arrangements.....	54
5.10	Evaluation of implementation	55
5.11	Remaining issues.....	55
6	Occupational social security schemes (Chapter 2 of Directive 2006/54) ..	56
6.1	General (legal) context.....	56
6.2	Direct and indirect discrimination	56
6.3	Personal scope	56
6.4	Material scope.....	56
6.5	Exclusions	56
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54	56
6.7	Actuarial factors	56
6.8	Difficulties	56
6.9	Evaluation of implementation	57
6.10	Remaining issues.....	57
7	Statutory schemes of social security (Directive 79/7)	58
7.1	General (legal) context.....	58

7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	59
7.3	Personal scope	59
7.4	Material scope.....	60
7.5	Exclusions	60
7.6	Actuarial factors	60
7.7	Difficulties	60
7.8	Evaluation of implementation	60
7.9	Remaining issues.....	60
8	Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....	61
8.1	General (legal) context.....	61
8.2	Implementation of Directive 2010/41/EU.....	62
8.3	Personal scope	62
8.4	Material scope.....	63
8.5	Positive action.....	63
8.6	Social protection	63
8.7	Maternity benefits.....	63
8.8	Occupational social security	64
8.9	Prohibition of discrimination	64
8.10	Evaluation of implementation	64
8.11	Remaining issues.....	64
9	Goods and services (Directive 2004/113)	65
9.1	General (legal) context.....	65
9.2	Prohibition of direct and indirect discrimination	65
9.3	Material scope.....	65
9.4	Exceptions	66
9.5	Justification of differences in treatment	66
9.6	Actuarial factors	66
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	66
9.8	Positive action measures (Article 6 of Directive 2004/113).....	66
9.9	Specific problems related to pregnancy, maternity or parenthood	66
9.10	Evaluation of implementation	67
9.11	Remaining issues.....	67
10	Violence against women and domestic violence in relation to the Istanbul Convention	68
10.1	General (legal) context.....	68
10.2	Ratification of the Istanbul Convention	74
11	Compliance and enforcement aspects (horizontal provisions of all directives)	75
11.1	General (legal) context.....	75
11.2	Victimisation	75
11.3	Access to courts	76
11.4	Horizontal effect of the applicable law	77
11.5	Burden of proof.....	77
11.6	Remedies and sanctions	77
11.7	Equality body	78
11.8	Social partners	79
11.9	Other relevant bodies.....	80
11.10	Evaluation of implementation	80
11.11	Remaining issues.....	80
12	Overall assessment	81
	Bibliography	83

1 Introduction

1.1 Basic structure of the national legal system

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

1.2 List of main legislation transposing and implementing the directives

After regaining independence, Montenegro has made significant progress in building a legislative and institutional framework for ensuring equal treatment for women and men.

Montenegro has ratified all of the more important international and regional human rights treaties which contain guarantees of the prohibition of and protection against discrimination, including the European Convention on Human Rights and basic freedoms, as well as Protocol no. 12 to Convention (adopted in 2000), which is a general prohibition against discrimination and extends to the enjoyment of all the rights specified by law.

The Law on Amendments to the Law on the Prohibition of Discrimination, adopted in the Parliament of Montenegro on 29 June 2017,² realised full compliance with Recast Directive 2006/54/EC and Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.^{3 4} In addition, this piece of legislation ensures compliance with the other non-discrimination directives: the Racial Equality Directive and the Employment Equality Directive.⁵

Among other grounds, the current Law on the Prohibition of Discrimination (LPD) prohibits discrimination based on gender identity, sexual orientation and/or intersexual characteristics (Article 19). Amendments to this law introduced a new prohibited ground of discrimination: the change of gender and intersexual characteristics.⁶ This means that the protection against discrimination also covers persons with physical characteristics that do not correspond to the binary medical definition of a man or woman and who change the sex that was assigned to them and registered at birth.

The law stipulates that multiple discrimination is one of the aggravated forms of discrimination, based on two or more of the above-mentioned grounds of discrimination. Amendments to the law also changed the definition of the term 'discrimination': the previous law defined discrimination as any 'unjustified, legal or factual, direct or indirect making of a difference'. The new amendments deleted the term 'unjustified' because direct discrimination cannot be justified by the existence of a legitimate aim and proportionate means. This served to point out that the facts raised in order to justify direct discrimination

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

http://www.wipo.int/wipolex/en/text.jsp?file_id=187543,

<http://www.skupstina.me/images/dokumenti/ustav-crne-gore.pdf>.

² Montenegro, Law on Amendments to the Law on the Prohibition of Discrimination, Official Gazette of Montenegro, 42/2017.

³ Recast Directive 2006/54/EC and Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6.

⁴ Work is in progress to harmonise the Montenegrin Labour Law and Company Law with other EU gender equality directives on: self-employment (Directive 2010/41/EU), pregnancy (92/85/EEC), access to goods and services (Directive 2004/113/EC), parental leave (2010/18/EU), and part-time work (97/81/EC).

⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

⁶ The Law on the Prohibition of Discrimination (among other things) mentions change of gender and gender identity as a ground of discrimination (Article 2, par 2). According to Article 19, Sat 4 of the Law on the Prohibition of Discrimination, gender identity implies one's own gender experience, which does not have to depend on the sex that was established and registered at birth.

do not relieve the perpetrator of responsibility. They are legally relevant only in cases of indirect discrimination, in which differentiation measures must be objectively and reasonably justified by a legitimate aim and with the use of means that are appropriate and necessary for reaching the goal.

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

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

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

The LPD stipulates several procedures in relation to the right to protection from discrimination that could be confusing to potential beneficiaries, which makes its implementation more difficult.

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

The Ombudsman has the responsibility for the procedural mechanism implementing the gender provisions of the LPD and the Law on Gender Equality (LGE). This means that an alleged victim of discrimination has two options for protection – to submit a complaint to the Ombudsman for a quasi-judicial decision or to submit the case before a court for its judgment. The courts are overloaded by diverse cases and there is a backlog, so it is commendable that the Ombudsman was given the responsibility for implementing the LPD, so that the protection from discrimination could be more efficient.⁷

The Labour Law⁸ was adopted in 2008 and has been amended several times since (in 2009, 2011, 2012 and 2014). It includes the prohibition of discrimination, both direct and indirect, towards persons seeking employment and employees. It specifies the general anti-discrimination provisions stipulated in the LPD, and Article 7 includes the prohibition of discrimination with regard to: employment conditions and the selection of candidates for a specific job; working conditions and all rights arising from employment; education, training and development; promotion; and the termination of employment. Furthermore, it is stipulated that the provisions of a labour contract that define discrimination in contradiction to the discriminatory grounds under the law (among which are gender, pregnancy, marital status, family obligations and sexual orientation) are null and void. Under Article 10, the Labour Law entitles persons seeking employment and employees to initiate a lawsuit based on the anti-discrimination provisions in the law. In addition, the law guarantees an equal salary for a man and a woman for the same work (Article 77(2)). The Labour Law has still not been harmonised with relevant EU directives, and therefore the Government of Montenegro has decided to adopt a new draft law before the end of 2019. Work on the new labour law, which is supposed to be fully harmonised with the *acquis* with an emphasis on removing discrimination on the ground of sex in the labour market, is on-going. Full harmonisation of the Labour Law with the relevant EU directives has been assigned to the working group for drafting the new labour law. A positive development is that one member of the working group for drafting the new law is a chief

⁷ Although the Ombudsman is responsible for the protection from discrimination procedure, protection from discrimination by the courts has never been questioned or explicitly excluded.

⁸ Montenegro, Labour Law, *Official Gazette*, Nos 49/2008, 26/2009, 59/2011, 66/2012 and 31/2014.

of the department for gender equality in the Ministry for Human and Minority Rights, who is charged with following up on ensuring harmonisation with the relevant EU directives.⁹

The Law on Social and Child Protection¹⁰ was adopted in 2013 and was amended on several occasions in 2015 and 2016.¹¹ It prescribes the rights relating to social and child protection, as well as the conditions for their realisation. It defines social and child protection as being activities in the public interest to be realised at the state and local level. The aims of the law relating to gender equality include the protection of: pregnant women and girls without family support and adequate living conditions; persons who are victims of neglect, abuse, exploitation and family violence or persons who are in danger thereof; victims of human trafficking; and single parents with a child without family support and adequate living conditions. Article 7 contains principles of social and child protection including the prohibition of discrimination against beneficiaries of social and child protection based, *inter alia*, on their sex or sexual orientation.

The new Law on Healthcare was adopted and amended at the beginning of 2016.¹² The law regulates the healthcare system, as well as the implementation of health protection, healthcare services, the rights and obligations of patients and establishing a special centre for autism, etc. Article 3 stipulates that all terms in the law for natural persons using the masculine gender include the same terms in feminine gender. Article 5 stipulates that in accordance with law, all citizens are *equal*, regardless of their nationality, race, gender, gender identity, sexual orientation, age, disability, language, religion, education, social origin, property or other personal property, in the exercise of the right to healthcare. *Equal conditions* for realising healthcare for all citizens, especially at the primary healthcare level, taking into account the physical, geographical and economic accessibility, are emphasised in Article 10. In addition, in the implementation of healthcare, each citizen has the *right to equality in overall treatment* when receiving healthcare according to Article 11. Article 16(7) stipulates that healthcare for women in relation to reproductive and sexual health is one of the priority healthcare measures that the state provides, which aim to preserve and improve the health of citizens and are available to all citizens. Article 17(10) stipulates health protection of victims of domestic violence, in accordance with the special law, as one of the fields of healthcare for which funds are allocated from the budget of Montenegro.

The Law on Health Insurance¹³ was adopted on 28 December 2015 and entered into force on 30 January 2016. This law regulates the conditions and manner of exercising the rights of healthcare insurance, the rights and obligations of insured persons and other entities, supplementary health insurance, financing and other issues relevant to the implementation of compulsory health insurance. In Article 2, compulsory health insurance is stipulated as a part of the social security system, which provides equal rights for all insured persons, in accordance with the law, on the basis of the principles of compulsoriness, mutuality and solidarity. The same provision introduces additional health insurance that is to be used in accordance with the law. Health insurance covers medical care and treatments for women during pregnancy, childbirth and one year after childbirth in several articles of the law (Articles 16(6), 19(2) and 20). Article 25(1) excludes compulsory health insurance for non-medical abortions. Wage compensation during temporary inability to work due to maintenance of pregnancy (treatment of threatened miscarriage) is reimbursed to the employer, from the first day of granting temporary inability to work, through the healthcare fund (Article 38(3)) and amounts to 100 % of the

⁹ Ministry for Human and Minority Rights (2017), *Report for 2016 on the Implementation of the 'Programme 2015-2016 for Implementation of the Government Activity Plan for the Realization of Gender Equality'*, March 2017, p. 23, Action 3.1.1.

¹⁰ Montenegro, Law on Social and Child Protection, *Official Gazette*, Nos 27/2013, 1/2015, 42/2015, 47/2015, 1/2017.

¹¹ The Parliament of Montenegro in its last session on 29 December 2016 adopted the Law on Changes and Amendments to the Law on Social and Child Protection, *Official Gazette*, No. 1/2017.

¹² Montenegro, Law on Healthcare, *Official Gazette*, Nos 3/2016, and 39/2016.

¹³ Montenegro, Law on Health Insurance, *Official Gazette*, No. 6/2016.

base salary (Article 40). Healthcare at secondary and tertiary levels is provided in the amount of 80 % of the cost of health services, including - among other things - to change gender in accordance with the medical indications prescribed by the Ministry of Health (Article 18(9)).

Some strategic documents related to gender equality and the protection against domestic violence were adopted, including the 'Action Plan for Achieving Gender Equality 2017-2021'. This is the third development document on gender equality policy in Montenegro, and it highlights the following areas: promotion of gender equality and women's human rights; gender-sensitive upbringing and education; gender equality in the economy; gender-sensitive healthcare; gender-based violence; gender equality in the media, culture and sports; equality in the decision-making process in political and public life; and institutional mechanisms for the implementation of gender equality policies. In each area, a strategic goal is defined, as well as the activities, duty bearers, partners, timeframe, indicators, means of verification and the necessary funds for the implementation of the proposed activities.

In the part on promoting gender equality, for example, the Ministry of Defence adopted the 'Human Resources Management Strategy of the Ministry of Defence and the Army of Montenegro', which set out the gender equality policy and certain strategic goals, including increased representation of women in the army, command duties and missions and the continuous implementation of national policies on gender equality, and United Nations Security Council Resolution 1325 and other applicable and accepted regulations. Through the cooperation of the Ministry of Defence and NGOs, a large number of employees in the army have been educated about Resolution 1325, gender equality and violence against women¹⁴.

In July 2018, a new Law on Civil Servants and State Employees¹⁵ came into force, which improved the normative framework that regulates the procedure for establishing a working relationship between civil servants and state employees and exercising employment rights. The new law contains general provisions on the prohibition of discrimination, but unlike the previous law¹⁶, there is no obligation to adopt measures in order to ensure gender balanced representation and the proportional representation of members of minority peoples or other minority national communities, and people with disabilities, when choosing a candidate.

1.3 Sources of law

According to Article 9 of the Constitution, ratified international legal instruments form an integral part of the Montenegrin internal legal system and they have supremacy over national legislation in the event of a difference in regulating relations.

Montenegro has ratified all relevant international legal instruments concerning anti-discrimination and gender equality, which have become applicable in the state.

Montenegro is a candidate for accession to the EU and is in the process of harmonising its legal system with European standards. In 2018, Montenegro continued to work towards meeting the obligations stipulated in the action plan for EU accession. In the previous course of negotiations, 32 out of 33 negotiating chapters were opened, including Chapter 19 on Social Policy and Employment. In June 2018, Montenegro opened a new negotiating chapter, Chapter 17: Economic and Monetary Union, and in December it opened Chapter 27: Environment and climate change.

¹⁴ Government of Montenegro - Ministry of Defence (2017), Action Plan for implementation of United Nations Security Council Resolution 1325 Women, Peace and Security in Montenegro (2017-2018), p. 6. available at: <http://www.mod.gov.me/en/library>.

¹⁵ Montenegro, Law on Civil Servants and State Employees, *Official Gazette*, No. 2/2018.

¹⁶ Montenegro, Law on Civil Servants and State Employees, *Official Gazette*, No. 66 /2012.

The court system is regulated by the Constitution and the Law on the Courts.¹⁷ According to the Law on the Courts, the court is a state organ with judicial competence.

Articles 14 and 15 of the Law on the Courts stipulates that the court system in Montenegro consists of 15 basic courts located in 15 municipalities (Ulcinj, Herceg Novi, Kotor, Plav, Rožaje, Cetinje, Bar, Bijelo Polje, Kolašin, Berane, Nikšić, Žabljak, Pljevlja, Podgorica and Danilovgrad), two high courts located in Bijelo Polje (which has jurisdiction in the areas covered by the basic courts of Bijelo Polje, Berane, Žabljak, Kolašin, Plav, Pljevlja and Rožaje) and Podgorica (which has jurisdiction over the areas covered by the basic courts of Podgorica, Bar, Danilovgrad, Kotor, Nikšić, Ulcinj, Herceg Novi and Cetinje), as well as the commercial courts of Montenegro, which are located in Bijelo Polje and Podgorica, the Appellate Court of Montenegro located in Podgorica, the Administrative Court of Montenegro located in Podgorica, and the Supreme Court which sits in Podgorica.¹⁸

There is also the Constitutional Court of Montenegro,¹⁹ which protects constitutionality and legality (Constitution, Articles 149-154).

The Judicial Council²⁰ is an independent and autonomous judicial body which is constitutional (Constitution, Articles 126, 127 and 128).²¹ Its responsibilities are to: 1) elect and dismiss judges, the president of a court and lay judges; 2) establish the cessation of judicial duties; 3) determine the number of judges and lay judges in a court; 4) deliberate on the activity report of the court, as well as applications and complaints regarding the work of the courts and to take a standpoint with regard thereto; 5) decide on the immunity of a judge; 6) propose to the Government the amount of funds for the work of the courts; 7) perform other duties stipulated by the law. The Judicial Council operates under the Law on the Judicial Council and Judges,²² which regulates the manner of appointing and dismissing members of the Judicial Council, the organisation and working methods of the Judicial Council, the procedure for the appointment of judges and lay judges, certain rights and duties, the means of determining that a judicial office should be terminated, the disciplinary liability and dismissal of judges and lay judges and other issues decided upon by the Judicial Council.

According to information provided by the Judicial Council of Montenegro, in 2018, the authorities launched a total of six litigation procedures for the protection against discrimination in the basic courts.

Three cases were concluded: in one case the lawsuit was reversed, one suit was dismissed, and in one case the procedure was interrupted. The average length of proceedings before the basic courts is 190 days, and of the six cases, the suit was filed by four female complainants and two male complainants. This data confirms the practice of the basic courts from the previous years on the incomplete keeping of records of the procedures for protection against discrimination that have been initiated. The specific information is not detailed: the data does not provide the grounds, fields or type of discrimination, which are the most important parameters in monitoring discrimination. Furthermore, it does not provide information about any procedures that have continued from the previous year.²³

According to the Judicial Council data, in the work of the courts in 2018, there were 627 cases for crimes that, according to their elements, could be considered to relate to

¹⁷ Montenegro, Law on the Courts, *Official Gazette*, Nos 5/2002, 49/2004, 22/2008, 39/2011, 46/2013 and 48/2013.

¹⁸ The Courts of Montenegro, available at: <http://en.sudovi.me>.

¹⁹ Montenegro, Law on Constitutional Court, *Official Gazette*, No. 11/2015.

²⁰ <http://sudovi.me/sscg/sudski-savjet/propisi/>.

²¹ Article 126 of the Constitution reads: 'The Judicial Council shall be an autonomous and independent authority that ensures the autonomy and independence of the courts and the judges.'

²² Montenegro, Law on the Judicial Council and Judges, *Official Gazette*, No. 28/15. Available at: <http://sudovi.me/podaci/sscg/dokumenta/2437.pdf>.

²³ Ombudsman of Montenegro (2019): *Ombudsman's Report for 2018*, Podgorica, p. 168.

discrimination: the severe murder at the expense of the burden of a woman, a child - 43 cases; violation of equality - 1; violation of the freedom of confession of faith and performing religious ceremonies - 1; rape - 15; the promise of a helpless person - 1; a promise with a child - 5; pledge of abuse of position - 1; mediation in prostitution - 2; child pornography, displaying pornographic material to children and the production and possession of child pornography - 4; out-of-wedlock community with a minor face - 7; confiscation of a minor - 19; family change - 1; abandonment and maltreatment of a minor - 1; domestic violence or family - 232; lack of support - 290; violation of family obligations - 1; violation of equality in employment - 1; and provoking national, racial and religious hatred and intolerance - 2.²⁴

In addition, according to the *Annual Report on the Work of Misdemeanour Courts* on cases in the area of the Law on the Prohibition of Discrimination and cases from other areas in which violations contain elements of discrimination, in 2018, the misdemeanour courts had 60 cases in connection with offences, threats and drunken behaviour towards members of the LGBT population, which were prosecuted as offences under the Law on Public Order and Peace.²⁵

An electronic database on submitted applications/charges, pending cases and decisions on the discrimination cases before the courts, public prosecutors, the public administration body in charge of police affairs and inspections has not been created. Creating such a database is a legal obligation according to Article 33 of the LPD and the Rulebook on the content and manner of keeping separate records on cases of reported discrimination.²⁶ The Ombudsman has stated that this fact makes its work more difficult as it is not possible to extract crucial indicators in order to analyse discrimination as a phenomenon.²⁷

There is still a need for harmonisation of the judicial and quasi-judicial practice applied by the courts and other state bodies concerning discrimination.²⁸ This process is of great importance, both for individuals seeking protection from discrimination, and in the efficient and effective functioning of state bodies where such practice is the basis of action. This is especially important for achieving gender equality, because the Ombudsman has the responsibility for the procedural mechanism implementing the gender provisions of the LPD and the Law on Gender Equality (LGE).

²⁴ Ombudsman of Montenegro (2019): *Ombudsman's Report for 2018*, Podgorica, p. 152.

²⁵ *Annual Report on the Work of Misdemeanor Courts* (2019) SU II br. 22/19, 24.01.2019.

²⁶ Montenegro, Rulebook on the content and manner of keeping separate records on cases of reported discrimination, *Official Gazette*, No. 50/14.

²⁷ Ombudsman of Montenegro (2019), *Ombudsman's Report for 2018*, Podgorica, p. 167.

²⁸ Namely, according to LPD and other laws concerned, there are several legal procedural possibilities for protection against discrimination: criminal, civil, misdemeanour, constitutional and administrative with several options.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

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

2.1.2 Other constitutional protection of equality between men and women

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

The Constitution has not been drafted using gender-sensitive language.

2.2 Equal treatment legislation

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

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

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

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

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

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

In Montenegro, several reports have been published in recent years, covering issues of discrimination, including gender equality. Of special significance is the *NGO Report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Montenegro*, which was produced with financial assistance from the European Union through the project 'Ending Violence against Women in the Western Balkans and Turkey: Implementing Norms, Changing Minds', implemented by UN Women and UNDP Montenegro. This report states that Montenegro does not have any court case law on gender discrimination and that the number of complaints concerning gender discrimination submitted to the Protector of Human Rights remains extremely low. It implies that there is a lack of awareness of gender equality, lack of public information about protection mechanisms as well as a low level of confidence among citizens in the work of the institution responsible for protection.³²

According to the Government action plan, the statistics show that

'there is a gap between the normative and the actual status women in Montenegro':

- Out of total 620 029 inhabitants, 313 793 are women (50.61 %) and 306 236 (49.39 %) are men;
- The average earnings of women in Montenegro are 14 % lower than the average earnings of men, which means that - in order to receive the same salary annually as men - women should work more than 51 days than men, and the year would have to last 416 days;
- Pension beneficiaries are made up of 46 509 men and 28 561 women. This is not related to the same age categories, because the Law on Pension Insurance provides for different retirement ages for men and women;
- Among property owners, women make up 4 % of homeowners, 8 % of landowners and 14 % of holiday home owners;
- Only 9.6 % of the owners of business entities in Montenegro are women.³³

3.1.2 Other issues

A positive step is the Ministry of Defence's adoption of the 'Human Resources Management Strategy of the Ministry of Defence and the Army of Montenegro', which defines the gender equality policy and certain strategic goals.

The Ministry of Defence has a total of six regional trainers for gender equality in military operations, who are responsible for the education of all members of the army on UNSC Resolution 1325 on gender equality. Through a special programme, Mentoring for Gender Equality the senior officer of the Army General Staff (who has determined the duty to realise tasks in the area of gender equality), undertook one year of training. The training involved new knowledge on how to integrate the gender perspective into policy making and everyday work in the army.

³² Women's Rights Centre (2017) *NGO Report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Montenegro*, Podgorica, p. 18. <https://rm.coe.int/report-ngo-montenegro-2/168073c980>

³³ Government of Montenegro - Ministry of Defence (2017), *Action Plan for implementation of United Nations Security Council Resolution 1325 Women, Peace and Security in Montenegro (2017-2018)*, p. 6. available at: <http://www.mod.gov.me/en/library>.

3.1.3 General overview of national acts

At the national level, Montenegro has several regulations concerning the gender-neutral protection of human rights in the context of violence. The Law on Gender Equality (LGE)³⁴ defines gender-based violence as any act that causes or could cause physical, mental, sexual or economic harm or suffering, as well as threat of such act that seriously impede a person's ability to enjoy his or her rights and freedoms in both public or private life, including domestic violence, incest, rape and human trafficking.

The LGE was adopted and entered into force in July 2007. It stipulates equality between women and men in all areas of public and private life, as well as an equal opportunities policy. In 2015, the law was amended by the Law on Amendments to the Law on Gender Equality, which extended the scope of the sanctions concerning discrimination based on sex and violation of the principle of the equal treatment of men and women in certain spheres of life, including discrimination against women due to pregnancy.³⁵

The law has now been harmonised with the Law on the Prohibition of Discrimination and the Law on the Protector of Human Rights and Freedoms (the Protector)³⁶ – the Montenegrin Ombudsman – as well as the EU *acquis*. The definitions of discrimination based on sex have been harmonised, such that the definitions of direct and indirect discrimination are now in line with EU standards.

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

The amendment to the Law on Gender Equality in 2015, defined the responsibilities of the Protector in dealing with complaints of a breach of the principle of gender equality and the right to equal treatment. Such complaints are dealt with through the protection mechanism established by the Law on Prohibition of Discrimination. The Law on Gender Equality categorizes domestic violence as a form of gender-based violence, so that domestic violence can be a form of discrimination against women.

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

Article 5 of the Labour Law stipulates that:

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

³⁴ Montenegro, Law on Gender Equality, *Official Gazette* No. 46/2007; *Official Gazette* No. 073/10, 040/11, 035/15.

³⁵ Montenegro, Law on Amendments to the Law on Gender Equality, adopted by Parliament on 26 June 2015.

³⁶ Montenegro, Law on the Protector of Human Rights and Freedoms of Montenegro, *Official Gazette*, No. 42/11 and 34/12, Article 2: 'The Protector shall autonomously and independently, on the principles of justice and fairness, take measures to protect human rights and freedoms, when they are violated by an act, action or failure to act of state bodies, state administration bodies, bodies of local self-administration and local administration, public services and other holders of public powers (hereinafter referred to as: authorities) as well as measures to prevent torture and other forms of inhuman or degrading treatment or punishment and measures for protection from discrimination. The Protector does not have authority over the work of courts, except in cases determined by this Law.'

3.1.4 Political and societal debate and pending legislative proposals

The Draft Law on Life Partnership of Same-Sex Partners aims to regulate same-sex partnership for the first time in Montenegro. The law will create conditions for respecting the basic human rights of all citizens, as guaranteed by the Constitution of Montenegro, at the same time as fulfilling one of the obligations that Montenegro has undertaken as part of the EU accession programme.

According to Article 2 of the draft law, a partnership is defined as a legally regulated union of two persons of the same sex, which must be concluded before the competent authority. The draft law regulates the issues of the principle, conclusion and termination of same-sex life partnerships, as well as providing for the keeping of a register of same-sex life partnerships. It also regulates the procedure for concluding and terminating a same-sex life partnership before the competent authorities.

The law provides that a same-sex life partnership may be concluded before the competent authority, with the consent and free will of both partners. There are certain limitations on the possibility of entering into a life partnership.

Regarding the legal effect of the partnership, it is intended that partners will have the following rights:

- mutual partner's support (both during and after the termination of the partnership, based on a court decision);
- custody of the other partner's children - if they do not have relatives who, according to the law governing family relations, are obligated to support them or relatives do not have the opportunity to do so. In addition, it is important to note that the draft law does not provide for the ability of same-sex partners to adopt children.
- the right to inherit the property of the partner;
- in terms of property relations, the draft law provides that partners can have individual assets (which the partner acquired prior to the conclusion of the partnership, as well as the property acquired during the partnership by inheritance, gift or other forms of unencumbered acquisition) and common property (the property that the partners acquired through work during the partnership, as well as profits from this property. The joint property includes the revenues from special property realised by the work of the partner, as well as the property acquired through gambling, unless one partner has invested in this game a special asset). Furthermore, it provides the possibility for the partners to regulate their property relations on existing or future property with a partner's property contract;
- same-sex partners are equated with spouses with regard to exercising the right to health insurance, the rights of social and child protection, the rights during the execution of the prison sentence of one of the partners, as well as in respect of the right to compensation for non-pecuniary damage to mental illness in the event of a partner's death or serious disability.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

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

Article 4(3) of the LGE stipulates the following:

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

3.2.2 Protection of transgender, intersex and non-binary persons

Article 2(2) of the LPD provides for the prohibition of discrimination on the grounds of, *inter alia*, sex, gender, gender identity, sexual orientation and/or intersexual characteristics.

The LPD provides for discrimination based on gender identity, sexual orientation and/or intersexual characteristics as a specific form of discrimination. Article 19 of the LPD stipulates the following:

'Any differentiation, unequal treatment or bringing persons or groups of persons in an unequal position on the grounds of gender identity, sexual orientation and/or intersexual characteristics shall be considered to be discrimination.

Everyone has the right to express its gender identity, sexual orientation and/or intersexual characteristics.

No one may be called upon to publicly declare his/her gender identity sexual orientation and/or intersexual characteristics.

Under the gender identity is understood the own gender experience that does not have to depend on the sex that is determined and registered at birth.

Gender identity refers to every person and does not imply only a binary concept of male or female.

Under the sexual orientation is understood an emotional and/or physical attraction or affection towards persons of the same and/or different sex.

Under the intersexual characteristics are understood different physical characteristics of a person (which can be chromosomal, hormonal and/or anatomical), that do not meet the strict medical definition of men or women and may be present in different degrees'

In 2018, the Ombudsman dealt with one case of gender inequality in which discrimination was established and recommendations were made and one case based on sexual orientation, which was suspended, as a court procedure was initiated after the complaint was filed.

Out of a total of 68 cases with elements of discrimination dealt with by the misdemeanour courts in 2018, in 62 cases, the defendants were charged with misdemeanours,

harassment, insulting, dishonest behaviour or provoking feelings of vulnerability directed at the LGBT community and made with a discriminatory intent based on sexual orientation.³⁷

The LGBT NGO, Forum Progress, submitted 94 applications to the Police Directorate. Out of a total of 104 applications for discrimination, sexual orientation constituted the basis of the alleged inequality in as many as 102 applications. All applications submitted by the non-governmental organisation referred to comments made by citizens on social networks (Facebook profiles).

In 2018, the misdemeanour courts had 60 cases in connection with offences, threats and drunken behaviour towards members of the LGBT population that were prosecuted as public order and breach of the peace offences. In these cases, fines, an apology, or conditional convictions are imposed.³⁸

3.2.3 Specific requirements

According to the Article 2(1) of the Personal Data Protection Law (PDPL),³⁹ personal data may be processed only to the extent necessary to achieve the purpose of processing and in a way compatible with the aims for which they were collected. Personal data may be processed for statistical purposes or for the purposes of scientific research, subject to the provision of appropriate safeguards. Where the personal data filing system controller makes personal data available for processing for statistical purposes or for the purposes of scientific research, such data must be made available in a way that the identity of the individual is not disclosed.

Article 4 of the PDPL stipulates that protection of personal data will be provided to every individual, regardless of nationality, domicile, race, skin colour, sex, language, religion, political or other belief, ethnicity, social origin, property, education, social position or other personal attributes.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

Direct sex discrimination is prohibited and defined by the LGE. Article 4(1) prohibits direct and indirect sex discrimination. Article 7(5) defines direct sex discrimination as follows:

'Discrimination on the ground of sex exists if a person or a group of persons of one sex, in the same or similar situation, are put or can be put - by an act, action or omission - in an unequal position in relation to another person or a group of persons of the other sex.'

3.3.2 Prohibition of pregnancy and maternity discrimination

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

³⁷ Ombudsman (2019) *Report for 2018*, p. 186. available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

³⁸ See Ombudsman (2019) *Report for 2018*, p. 187. Available at https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

³⁹ Montenegro, Personal Data Protection Law, *Official Gazette*, Nos 79/08, 70/09, 44/12.

3.3.3 Specific difficulties

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

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

During this reporting period, the Protector had 16 cases relating to gender discrimination, sex and gender identity. The cases were concluded as follows: in four cases a violation of rights was established and recommendations were given; one case was resolved by pointing to the existence of discrimination; in four cases applicants were referred to another legal procedure; the proceedings in three cases were suspended because the infringement of the right was remedied during the proceedings; one case was suspended due to the opening of court proceedings; in two cases, the Protector could not act because the complaints were not amended by the deadline; and one case was closed by being merged with another case.⁴⁰

In this reporting year, a group of women employed in the private sector for a certain period requested protection from discrimination. Their claims concerned the problem of non-payment of social security contributions by the employer, as well as the lack of extension of a fixed-term employment contract due to pregnancy. A number of complainants pointed to the practice of terminating a fixed-term employment contract, so as not to meet conditions for the transformation of fixed-term employment contracts into a permanent contract in accordance with the Labour Law.⁴¹

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Indirect sex discrimination is prohibited and defined by the LGE. The above-mentioned Article 4(1) prohibits direct and indirect sex discrimination. Article 7(6) defines indirect sex discrimination as follows:

‘Indirect discrimination on grounds of sex exists if an apparently neutral provision, regulation or general act, criterion or practice puts or may put a person or a group of persons of one sex in an unequal position in relation to another person or a group of persons of the other sex, unless that provision, criterion or practice is objectively and reasonably justified by a legitimate aim, with means that are appropriate and necessary to achieve the objective, i.e. that are reasonable and proportionate in relation to the objective to be achieved.’

3.4.2 Statistical evidence

Statistical evidence has not been used to establish a presumption of indirect sex discrimination.

⁴⁰ Ombudsman (2019) *Report for 2018*, p.182. available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

⁴¹ Ombudsman (2019) *Report for 2018*, p.181. available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

3.4.3 Application of the objective justification test

Unfortunately, relevant case law is still lacking on the issue of the application of the objective justification test. From the interviews carried out with national court representatives as well as representatives of the Judicial Council, it became apparent that no cases were completed in 2018, so it is not possible to assess the objective justification test.

3.4.4 Specific difficulties

There are difficulties in understanding and applying the concept of indirect sex discrimination due to the lack of reported cases on indirect sex discrimination, the low level of awareness, as well as a lack of relevant and detailed statistical data. Also, the LGE contains a proportionality test requirement, so it is up to the courts how to apply it.

3.5 Multiple discrimination and intersectional discrimination⁴²

3.5.1 Definition and explicit prohibition

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

3.5.2 Case law and judicial recognition

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

Most of the cases before the civil courts concerning gender as a ground of discrimination are connected with mobbing (i.e. workplace bullying),⁴³ and domestic violence. None of them was finally decided during the reporting period. In addition, considering the previous jurisprudence and the lack of reliable detailed statistics, it could be concluded that there is still no case law that could be used as material for an analysis of either the assessment of multiple discrimination and its recognition, or its influence, so that harsher sanctions can be imposed.

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action is explicitly allowed in the Constitution and in several laws.

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

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

⁴² See for more information Fredman, S., (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

⁴³ Montenegro, Law on the Prohibition of Harassment at Work, *Official Gazette*, No. 30/2012, entered into force on 17 June 2012. Before the law was adopted, mobbing was contained in the LPD (Article 8), but did not result in any lawsuit in practice. The relevant provision of the LPD was repealed in the amended law.

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

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

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

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

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

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

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

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

LPD in Article 5 provided that regulations and special measures aimed at creating the conditions for the realisation of national, gender and overall equality and the protection of persons who, on any grounds, are in unequal position may be adopted (introduced and implemented), by state bodies, state administration bodies, local self-government units, public enterprises and other legal entities that exercise public authority (within their competences and powers), as well as by other legal and natural persons.

According to the Article 5(2) these measures must be applied proportionately to the needs and aims and will last until the achievement of the objectives determined by those measures.

The relevant provision is Article 7(3), which reads: 'Equal opportunities means the absence of restrictions on grounds of sex for male and female participation in political, economic, social, cultural and other spheres of life which provides for the exercise of their rights and freedoms.'

3.6.3 Specific difficulties

Bearing in mind the small number of women participating in the legislative and executive authorities in Montenegro,⁴⁴ gender balancing should be strengthened. As an illustration, the new Government, established at the end of 2016, has 4 women ministers out of 18,

⁴⁴ Ministry of Human and Minority Rights (2015), 'Information on the Participation of Women in the Legislative, Executive and Judicial Power in Montenegro', Podgorica.

and the General Secretary is a woman. The Prime Minister and three Deputy Prime Ministers of the Government are all men.

The proportion of female members of the Parliament of Montenegro was only 23.46 % (although this is an increase compared to the 25th convocation, which started in 2012, where there were only 15 women, i.e. 18.5 %). Available data shows that only 8 % of women are property owners, while only 9.6 % of women have registered a business.

Of the 24 municipalities, only two municipalities have mayors who are women.⁴⁵

According to the data from the central personnel records on the representation of women in public administration, submitted by the Human Resources Management Authority of Montenegro for the needs of this report, on 31 December 2017, 7 169 men (57.80 %) and 5 234 women (42.20 %) were employed in the state bodies.⁴⁶

Local action plans for gender equality have been adopted in 12 municipalities. A decision on gender equality was adopted in 16 municipalities. Gender equality councils have been formed in 12 municipalities. Even though a coordinator for gender equality was appointed in 21 municipalities in Montenegro, only the municipalities of Tivat, Bar, Budva, Berane, Herceg Novi and Pljevlja recognised the importance of gender budgeting and provided special funds for the implementation of local action plans, while at the state level only three ministries feature a developed system for gender-sensitive management of budget funds.⁴⁷

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

3.6.4 Measures to improve the gender balance on company boards

There is no explicit act to stimulate an improvement in the gender balance on company boards. However, there are strategic documents that aim to improve women's participation in decision-making processes, such as, *Action Plan for Achieving Gender Equality (PAPRR) 2017-2021 with the implementation programme for 2017-2018*.⁴⁸ In order to ensure gender equality in the economy, the following objectives have been set:

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

⁴⁵ MONSTAT (2018), *Women and Men in Montenegro*, seventh edition, Podgorica, p. 95.

⁴⁶ Ombudsman (2019) *Report for 2018*, p. 187. Available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

⁴⁷ Ombudsman (2018) *Report for 2017*, p. 187. Ministry of Human and Minority Rights (2017), *Plan for achieving gender equality (PAPRR) 2017-2021 – with the program of implementation for the period 2017-2018*, p. 21.

⁴⁸ Ministry of Human and Minority Rights (2015), 'Guidelines for creating a favourable environment for female entrepreneurship', Podgorica.

Furthermore, the participation of women on company boards could be included within the concept of equal opportunities, which is promoted in anti-discriminatory legislation in Montenegro.

There are no official statistical data in Montenegro on the participation of women and men in managerial positions (at different levels of management), positions of executive director and in managing bodies of companies, nor are there any data on managerial structure depending on the size, sectoral affiliation and ownership structure of the company. According to MONSTAT, in the school year 2017/2018, women made up 77.6 % of teaching staff in elementary schools, while 22.4 % were men. Even though women make up the majority of employees in education, they are in an absolute minority in decision-making positions, except for in pre-school education. The same the data source points out that the participation of women in the judiciary is 59.1 %, while in relation to the total number of prosecutorial functions in Montenegro, the participation of women is 61 %.⁴⁹

In the course of 2017, the Montenegrin Employers Federation published data in this area obtained through new research conducted with the support of the ILO (2017) following a standardised ILO questionnaire (enabling a comparative analysis of data gathered in the period 2013-2017). The results of the research were published on 21 July 2017 at the conference 'Women in Management in Montenegro - Support to Leadership and Professional Development of Women in Montenegro' held in Podgorica, which was organised by the Montenegrin Employers Federation and ILO, in cooperation with the Ministry of Labour and Social Welfare, the Ministry of Human and Minority Rights, the Directorate for Development of SMEs, the Ministry of Economy and the Association of Business Women of Montenegro. The results of the research were published in the report, *Women in Management in Montenegro*.

Some data for Montenegro for 2017 (from the Montenegrin Employers Federation survey) shows that women in Montenegro are most strongly present in middle management, where they represent 50.1 %. At the highest level of management (top management) female representation drops to only 36.6 % (against 63.4 % for men), while there are 42.9 % of women in senior management positions and 43.3 % in lower management positions. The comparative analysis of two surveys by the Montenegrin Employers Federation, from 2017 and 2013, shows negative trends for female representation. In fact, their participation in top management positions had decreased in 2017 (36.3 %) compared to 2013 (42.4 %). In addition, the results of this research show the apparent dominance of men in relation to women at all levels of company management - except at the level of middle management. Only 26.4 % of enterprises in Montenegro are managed by a female CEO. Women are chairs of steering committees in only 6.1 % of Montenegrin enterprises.⁵⁰

Since 2015, the European Institute for Gender Equality (EIGE) has been collecting data for Montenegro, both for the business and the public sector, or for the 50 most-rated national companies defined on the basis of the blue-chip index of the national stock exchange of each country. EIGE data show that, in 2015, the positions of the president of the boards of companies in our country were 'reserved' exclusively for men (100 %). However, this has changed so that in 2017, 90 % of presidents of company boards were men and 10 % were women, which is 3 % more than the EU28 average. Although still insufficient, positive trends are also noticeable when we talk about women members of the board of directors/in companies in Montenegro - the share of women in these bodies in 2015 was 18.3 %, while in 2017, 23.3 % of the total number of members of the management boards were women.

⁴⁹ Ombudsman (2019) *Report for 2018*, p. 178. available at:

https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf, p. 178.

⁵⁰ Montenegrin Employers Federation (2017) *Women in Management in Montenegro*, Podgorica, p. 27, available at: <http://poslodavci.org/aktivnosti/projekti/zene-u-menadzmentu-u-crnoj-gori-podrska-liderstvu-i-profionalnom-razvoju-zena-u-crnoj-gori/>.

3.6.5 Positive action measures to improve the gender balance in other areas

The Law on the Election of Councillors and MPs⁵¹ was amended in 2016. The amendments constituted a step further towards affirmation of women's representation in political and parliamentary life. The law now stipulates that the electoral list has to be composed of at least 30 % women. The proclamation and verification of candidate lists is determined by the quota of women's representation. Where the lists consist of alternating groups of four candidates, there must be at least one from the underrepresented gender. In addition, it has been stipulated that in the event of the termination of the mandate of Councillors and MPs from the less represented gender, the next candidate on the list of candidates from the underrepresented sex should replace the previous one (Article 41). This encourages the actual participation of women in representative bodies at national and local level.

Article 39a, as amended, reads:

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

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

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

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

In reality the requirement has not yet been met as only 23.46 % of deputies in the Parliament of Montenegro are women (although this is an increase compared to the 25th call where there were 15 women, i.e. 18.5 % of deputies).⁵²

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

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

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

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

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

⁵¹ Montenegro, Law on the Election of Councillors and MPs, *Official Gazette*, No. 46/11,014/14, 047/14, 012/16.

⁵² Ombudsman (2019) *Report for 2018*, p.186. Available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

- '(1) Harassment and sexual harassment at work or in relation to work shall be prohibited.
- (2) Harassment, pursuant to this Law, shall include any unwanted conduct based on any of the grounds referred to in Articles 5 and 6 of this Law, as well as harassment through audio and video surveillance, intended to or actually undermining the dignity of a person seeking employment, and an employed person, creating an intimidating, hostile, degrading or offensive environment.
- (3) Sexual harassment, pursuant to this Law, shall include any unwanted verbal, non-verbal or physical conduct intended to or actually undermining the dignity of a person seeking employment, and an employed person in the sphere of sexual life, creating an intimidating, hostile, degrading, embarrassing or offensive environment.
- (4) An employee may not suffer harmful consequences in case reporting or witnessing harassment and sexual harassment at work and in relation to work pursuant to paragraphs 2 and 3 of this Article.'

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

The LPHW (Article 2) stipulates that:

'Mobbing, pursuant to this Law, shall include any active or passive conduct at work or related to work against an employee or group of employees, which recurs, and which is intended to or actually undermines the dignity, reputation, personal and professional integrity of the employee and which causes fear or creates an intimidating, humiliating or offensive environment, aggravates working conditions or leads to the isolation of the employee or leads the employee to terminate contract of employment or another type of contract upon his own initiative.

Mobbing shall include incitement or leading others to behave in the manner referred to in Paragraph 1 of this Article.

Executor of mobbing shall be considered an employer in the capacity of natural person, responsible person engaged by the employer in the capacity of legal entity, an employee or group of employees engaged by the employer or a third person with whom the employee or the employer have contact during the performance of tasks at the workplace.'

3.7.2 Scope of the prohibition of harassment

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

The LPHW (in Article 3) stipulates that the law

'shall apply to employers and employees, in accordance with the provisions regulating the labour issues, as well as persons engaged outside the employment, such as persons attending professional training and expertise; pupils and students attending practical training; volunteers; persons performing certain tasks while serving a sentence of imprisonment or corrective measures; persons in voluntary and public works, works organized in the common interest, labour activities and

competitions, and any other person taking part in the work of the employer (hereinafter: Employee).

This Law shall apply to cases of harassment and sexual harassment, in accordance with the provisions regulating the labour issues.

The employer, in terms of this Law, is the state authority, a state administration authority and institution or department of local government, public institution, company and domestic or foreign legal or natural person or part of legal entity.'

3.7.3 Definition and explicit prohibition of sexual harassment

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

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

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

Sexual harassment at work and in connection with work is prohibited by Article 8(3) of the Labour Law:

'Sexual harassment, pursuant to this Law, shall include any unwanted verbal, non-verbal or physical conduct intended to or actually undermining the dignity of a person seeking employment, and an employed person in the sphere of sexual life, creating an intimidating, hostile, degrading, embarrassing or offensive environment.'

3.7.4 Scope of the prohibition of sexual harassment

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

Under Article 3 of the LPHW, the scope of sexual harassment is the same as for harassment.

This Law shall apply to cases of harassment and sexual harassment, in accordance with the provisions regulating the labour issues.

The employer, in terms of this Law, is the state authority, a state administration authority and institution or department of local government, public institution, company and domestic or foreign legal or natural person or part of legal entity.'

3.7.5 Understanding of (sexual) harassment as discrimination

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

3.7.6 Specific difficulties

Harassment and sexual harassment, although regulated by the 2008 Labour Law, is difficult to prove in practice. So far, there has not been a single Supreme Court judgment on this issue.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

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

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

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

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

3.8.2 Specific difficulties

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

3.9 Other forms of discrimination

LGE prescribes the obligations of state authorities, local government, political parties, media, etc. to promote gender equality and prevent gender-based discrimination. This law does not regulate specific measures for preventing discrimination and achieving gender equality in fields such as employment, health, education, etc. but these fields are covered by separate laws, which also include non-discrimination provisions.

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

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

The Labour Law provides that membership in political and trade union organisations is a prohibited ground of discrimination (Article 5).

3.10 Remaining issues

The UN Committee for the Elimination of All Forms of Discrimination against Women pointed out one of the problems in Montenegro, which is the lack of adequate training in

the area of gender equality and gender-based violence, especially with regard to sexual education for educational staff, as well as the absence of gender studies at the university.

Gender disaggregated data collection represents another obstacle in the path of gender equality, not only within bodies working on the promotion of equality and the suppression of discrimination, but also in the framework of cross-sectoral consolidation of data, which would enable a more comprehensive analysis and presentation of the situation based on reliable, relevant and verifiable data.

According to the *Global Gender Gap Report for 2018*, Montenegro is ranked 69 out of 149 countries. The report's analysis of progress towards gender parity has four dimensions: economic participation and opportunities, scientific achievements, health and political empowerment.⁵³

3.11 Evaluation of implementation

In the area of gender equality, Montenegro has achieved a high degree of alignment with international and regional protection instruments developed within the UN and the Council of Europe, which was, *inter alia*, noted in the Concluding Observations of the UN Committee for the Elimination of All Forms of Discrimination against Women on the second periodic report for Montenegro.⁵⁴ In spite of the relatively good national framework in which international standards have been implemented, insufficient knowledge of gender equality bodies and rights arising from the principle of equality between women and men has been noticed.⁵⁵

Montenegro is in the process of harmonising legislation with EU standards, in all areas, and in terms of standards related to gender equality issues.

A particularly pronounced problem is the failure to understand the legal concept of discrimination, which could be tolerated in the case of non-professional third parties, but not in terms of the professionals, and especially those who are required to comply with or apply the law. According to the Ombudsman's Report, citizens often appear as complainants, and they commonly have poor financial standing, which is why they cannot ask for another kind of protection –the expenses incurred by team procedures present a basic obstacle.

So far, the function of LGE has been a preventive one, aimed at fostering the improvement of the legal system in the field of gender equality and policies for prevention of gender discrimination. However, the practical implementation of the law has mainly failed to materialise, even in those fields in which it sets sanctions and prescribes pecuniary punishments.

Some of the provisions of the LGE are not implemented in practice, and there are no sanctions prescribed for some provisions, such as those that require the state authorities to nominate coordinators of activities for gender equality issues and the education of employees on gender equality. In addition, Article 3 of the LGE obliges Government authorities, at both state and local levels, as well as of other holders of public authority, to adopt and implement, in all stages of planning, decisions and activities within their competence, to appraise their impact on the position of women and men. This provision is also not implemented in practice.

⁵³ MONSTAT (2018), *Women and Men in Montenegro*, seventh edition, Podgorica, p. 56, available at: <http://monstat.org/userfiles/file/publikacije/Zene%20i%20muskarci%20u%20Crnoj%20Gori%202019%20preview%20FINAL.pdf>.

⁵⁴ CEDAW Committee (2017) *Concluding Observations on the Second Periodic Report of Montenegro*, Part D, par. 10, 21.07.2017.

⁵⁵ Ombudsman (2019) *Report for 2018*, p. 168, available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

According to the Ombudsperson's *Report for 2018*, social distancing as a form of prejudice and potential discriminatory behaviour is highly pronounced towards LGBT persons (72.4 %), while according to the perception of citizens surveyed for the report, discrimination against homosexuals (17.6 %) and sexual minorities (17.1 %) is less evident than discrimination in relation to persons with disabilities (28.5 %), workers working for a private employer (27.5 %), persons with special needs (26.1 %), Roma (24.1 %) and other groups at risk of facing discrimination. These data indicate that the degree of prejudice, stereotypes and discriminatory patterns of behaviour towards LGBT persons is alarmingly present despite continuous work on raising awareness and preventing discrimination against this group. Intolerance, homophobia and transphobia are also manifested through physical attacks on LGBT people, who therefore do not feel safe enough to freely and willingly express their gender, sexual orientation and diversity in such an atmosphere.⁵⁶

⁵⁶ Ombudsman (2019) *Report for 2018*, p. 171. Available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

According to the survey conducted by the Montenegrin Employers Federation, the difference in earnings between men and women is 13.9 %, which means that women earn only 86.1 % of the average salary paid to men for the same work and work of equal value.⁵⁷

According to the *Plan of activities for achieving gender equality in Montenegro 2017-2021*, the causes of gender pay gap include:

- 1) direct discrimination;
- 2) indirect discrimination;
- 3) lower evaluation of women's work;
- 4) segregation in the labour market;
- 5) tradition and stereotypes;
- 6) increased need for women to balance work and private life, which is probably related to taking additional responsibilities as care providers (not only to children but also the elderly and disabled members of the household).

One of the results of the gender wage gap, in accordance with the fact that women earn less when they are employed, is that women have lower pensions, which consequently increases the risk of poverty.

4.1.2 Surveys on the difficulties of realising equal treatment at work

According to the Ombudsman survey conducted in November 2018 as part of the project 'Truths and Misconceptions of Discrimination', citizens perceive that discrimination against women is still highly pronounced (22.7 %). Other groups at a high risk of discrimination are: persons with disabilities; workers who have an employment contract with a private employer; Roma; and those living in underdeveloped and rural areas. When it comes to trust in protection against discrimination, men (22.3 %) have more trust in the state than women (16.4 %), which confirms women's mistrust of public authorities in situations when they have suffered discrimination or were potential victims of unequal treatment.⁵⁸

According to a survey by the Montenegrin Employers Federation,⁵⁹ the average number of employees in the companies surveyed is 172, of which 40.96 % are women. It should be noted that the survey shows that women are mostly employed by small companies (46.54 %), primarily engaged in the following economic activities: health and social work, financial intermediation, wholesale and retail trade.

Although 75 % of the companies surveyed said that they have an equal opportunities policy, none of them provided a copy of their policy as part of the survey.

The most commonly implemented initiatives for the promotion of gender equality are: recruitment, retention and promotion (78.9 %); maternity leave (78.5 %); access to vocational training (76.1 %); gender equality goals for employment (67.5 %); and parental leave (66.3 %).

⁵⁷ Montenegrin Employers Federation (2017) 'Više žena u menadžmentu – ključ uspješnog poslovanja', p. 13, available at: <http://www.poslodavci.org/biblioteka/publikacije/vise-zena-u-menadzmentu-kljuc-uspjesnog-poslovanja>.

⁵⁸ Ombudsman (2019) *Report for 2018*, p. 181.

⁵⁹ Montenegrin Employers Federation (2017) *Women in Management in Montenegro*, Podgorica, p. 36, available at: <http://poslodavci.org/aktivnosti/projekti/zene-u-menadzmentu-u-crnoj-gori-podrska-liderstvu-i-profionalnom-razvoju-zena-u-crnoj-gori/>.

The Montenegrin Employers Federation 2017 survey on women managers using a sample of 100 companies, provides data on the position of women at different levels of management and management in small, medium and large enterprises. In small enterprises in 2017, 11 % of the positions of general/executive director (CEO) are held by women, while 33.67 % of members of the board of directors are women. In small enterprises, the proportion of women at the highest level of management is 62.7 %, at the higher level is 73 %, at the middle level is 75.6 %, while at lower levels the proportion of women is 81.25 %. In medium-sized enterprises in 2017, 11 % of women are in the position of CEO, while the participation of women in the governing board is 24.74 %.

In medium-sized enterprises, the highest percentage of women is in the highest level of management (47.27 %), followed by the secondary level (46.1 %). At the higher level of management, 39.6 % of employees are women, and at lower levels 39.27 %. In large companies, in the year of 2017, 4.4 % of CEO positions are held by women, while 21.71 % of board members are women. In the top management of large companies, the share of women amounts to 45.3 %, at the higher level of women's management it is 42.3 %, 48.3 % at the middle level and 38.91 % at lower levels.

The sample results on women's participation in the ownership structure of the company show that women own 10 % of the companies, manage and control the activities of the company in 11 % of enterprises, but do not participate in the ownership structure in 77 % of the companies.

The relationship between women and men at different levels of management in companies shows that women are most present at the middle level of management (50.1 %), followed by lower (43.3 %) and higher managerial level (42.9 %). The highest level of management has the smallest proportion of women (36.6 %), which, according to the results of the survey, is still simply 'reserved' for men, who hold 63.4 % of positions at that level. A similar assessment can also be made for the participation of men in the higher (57.1 %) and the lowest level of management (56.7 %), where they are also more represented than women.

Women dominate the managerial positions in communications and public relations (82.1 %) and in the human resources sector (75.6 %).

According to the views of the survey respondents, the six most important barriers to women's leadership in enterprises are: 1) women have greater responsibility towards the family than men; 2) insufficient managerial or overall work experience of women; 3) the roles that society ascribes to men and women; 4) men are not encouraged to take leave of absence due to family obligations; 5) stereotypes about women 6) management is generally seen as a male job.

There are more highly educated women in Montenegro than there are highly educated men - 62.2 % of students who have obtained a basic degree are women, while 63.3 % of students who completed their Masters are women.

In Montenegro, there are no official statistical data on the participation of women and men in managerial positions (at different levels of management), or at executive director or company management level. There is also no data on women's participation in managerial structures in relation to the size, sector or ownership structure of the company.

4.1.3 Other issues

The unemployment rate among women in the north is seven times higher than in the south and three times higher than the central region. More than half of unemployed women in

rural areas have never tried to find a job. About a third of such women are housewives and perform jobs related to household maintenance.⁶⁰

4.1.4 Political and societal debate and pending legislative proposals

Montenegro is working with the European Commission on the draft of a new Labour Law to ensure harmonisation with EU legislation.

4.2 Equal pay

4.2.1 Implementation in national law

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

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

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

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

4.2.2 Definition in national law

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

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

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

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

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

The national law of Montenegro does not explicitly implement Article 4 of Recast Directive 2006/54 in the provision guaranteeing equal pay for equal work. However, as mentioned, Article 77 of the Labour Law guarantees equal remuneration for the same work or work of equal value performed with an employer.

⁶⁰ Ombudsman (2019) *Report for 2018*, p.181. Available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

4.2.4 Related case law

There is no related case law.

4.2.5 Permissibility of pay differences

According to national legislation, it is only permissible to make a difference in pay for employees who perform the same type of work and with the same degree of professional education, if that difference is based on the time spent at work and the results of work.

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

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

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

4.2.6 Requirement for comparators

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

4.2.7 Existence of parameters for establishing the equal value of the work performed

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

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

In this way, the concept of work of the same value is limited to the same degree of professional qualifications, or qualifications of the level of education, responsibilities, skills, working conditions and work results. This means that the law provides for equal pay only between employed women and men who perform the same or similar job.

4.2.8 Other relevant rules or policies

According to Article 86 of the Labour Law, the employer must keep monthly records of salaries and wage compensation, in accordance with the law. General Collective Agreement provides the following:

'The collective agreement with the employer or general act of the employer shall determine the criteria and standards for evaluating work results and incentives for achieving better work results.'

If no standards and criteria for the evaluation of work results achieved were determined, it shall be deemed that an employee achieved the standard work result for the time spent working during the working hours' (Article 23).

4.2.9 Wage transparency

Labour Law has not addressed wage transparency.

According to Article 55 of the General Collective Agreement, once a year, the employer must inform the trade union at an appropriate level of the total calculated gross and net salaries paid out, including contributions for mandatory social insurance and the amount of the average salary paid by the employer. This information applies to all employees, so there is no specified obligation in respect of diverse functions.

4.2.10 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

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

4.2.11 Other measures, tools or procedures

Article 84(2) of the Labour Law stipulates that the employer must deliver a payslip to an employee upon payment of the salary.

According to Article 32 of the General Collective Agreement, when paying out salaries and fringe benefits, the employer shall hand each employee a written payslip with a calculation of salary, which includes:

- employee's salary, made up of the starting salary increased by the product of accounting coefficient value and complexity coefficient;
- salary increases, per type, arising from the collective agreement or contract of employment;
- salary based on the work results achieved (an incentive part);
- fringe benefits, per type;
- other remuneration above the amounts determined by the collective agreement;
- gross salary;
- the amount of tax on salary;
- the amounts of contributions paid, per type;
- salary retentions excluding taxes and contributions per type;
- the amount of net salary (excluding taxes and contributions);
- the amount of net salary for payment.

The employer's calculation sheet must also show the compensation for expenses, per type, in accordance with the collective agreement.

The General Collective Agreement applies:

- to employees of employers in the territory of Montenegro and to employees that are sent to work abroad by an employer based in Montenegro;
- to the employees of state authorities, public administration bodies and institutions financed from the budget of Montenegro and local self-government budgets, unless otherwise provided by a separate law.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

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

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

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

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

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

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

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

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

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

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

The exception on occupational activities has been implemented into Montenegrin law.

National law provides for an exception for genuine and determining occupational requirements.

Article 16(3) of the LPD provides that:

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

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

'Any distinction, exclusion or preference in respect of a particular job shall not be considered discrimination when the nature of the job or conditions in which it is performed are such that characteristics related to particular grounds referred to in Articles 5 and 6 of this Law constitute a genuine and determining requirement for a position and that the objective aimed at is legitimate.'

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

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

Article 18(2) and (3) of the Labour Law stipulates:

'(2) An employer may not ask from a person information on family or marital status and family planning, or ask from him/her to present identity documents and other evidence which is not of direct importance for performing duties for which he/she is establishing employment relationship, i.e. contract of employment, or to give statement of termination of contract of employment by that person.

(3) An employer may not hold establishing employment relationship, i.e. contract of employment, conditional upon evidence of pregnancy, unless those are positions which include significant risk for the health of woman and child determined by a relevant health authority.'

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

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

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

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

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

4.3.6 Particular difficulties

In Montenegro, there are many difficulties in relation to women's access to work, vocational training, employment, working conditions, etc. In practice, especially in the private sector, women are very much discriminated against concerning access to work if they are planning a family and motherhood. According to interviews with NGOs and staff at the Ombudsman Institution, there have been several past and pending cases where women have been refused a particular job – much more so than men – with the explanation that a man is more suitable for that position, or due to their family status,

their motherhood, or their age. No improvement has been noted since the previous reporting period.

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

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

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

'distinction, exclusion or preference in respect of a particular job shall not be considered discrimination when the nature of the job or conditions in which it is performed are such that characteristics related to particular grounds referred to in Articles 5 and 6 of this Law constitute a genuine and determining requirement for a position and that the objective aimed at is legitimate.'

Furthermore, Article 9(2) stipulates that

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

4.4 Evaluation of implementation

Montenegrin legislation is in line with EU standards related to women's access to work, working conditions and dismissal protections.

4.5 Remaining issues

Companies in Montenegro are characterised by the dominance of men in relation to women at all levels of management and leadership. The analysis of the Montenegrin Employers Federation shows that women's participation in the top management positions is only 36.6 %, while only 6.1 % of presidents of the governing board are women.

Women predominate in the posts of communication and public relations managers (82.1 %), and human resources managers (75.6 %).⁶¹

It should be kept in mind that this information, among other things, suggests gender segregation within managerial occupations, that is, the existence of a glass ceiling phenomenon in Montenegrin companies.

The three most important barriers to the leadership of women in company management in Montenegro are: (1) women have greater responsibility for the family than men, (2) insufficient managerial or overall work experience of women, (3) roles that are awarded to men and women by society.

⁶¹ Montenegrin Employers Federation (2017) *Women in Management in Montenegro*, Podgorica, p. 27, available at: <http://poslodavci.org/aktivnosti/projekti/zene-u-menadzmentu-u-crnoj-gori-podrska-liderstvu-i-profesionalnom-razvoju-zena-u-crnoj-gori/>.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)⁶²

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

In the last five years there has been no research in Montenegro that provides insight into difficulties that workers face in practice in relation to work-life balance issues.

According to the official data, activity rates are the highest in the 25-49 age group (86 % for men and 73.6 % for women). Out of the total number of employees, 27 % work in enterprises belonging to the state or municipality. Most workers (54 %) are employed in private companies and of this workforce, just under half (47.4 %) are women.⁶³

Of all persons in employment in 2017, by employment status, most (178 900) are employees, of whom 93 600 are men and 85 300 are women.

Most women working for the companies surveyed are employed full time (97.96 %), while significantly less are employed in part-time work. It is interesting to note that the number of employed women in 2013 was 54.13 %, which is higher than the number of women employed in 2017 (40.96 %). On the other hand, comparative data also indicate changes in the number of women working full time (2013: 88.15 %, 2017: 97.96 %).⁶⁴

5.1.2 Other issues

In Montenegro there are 21 public pre-school institutions with a network of 103 educational units and 23 private pre-schools licensed by the Ministry of Education. Private pre-school facilities exist in just a few urban environments and are attended by only a small number of children (up to 3 % of the total number of children).

Pre-school nurseries and kindergartens are attended by children up to six years of age, i.e. until they go to elementary school. Children aged up to three attend nurseries, while children aged three to six attend kindergarten, and are arranged in age groups. Most children attend full-time programmes (more than 98 % of children in nurseries attend full time and 88 % in kindergartens), while less than 2 % of children in nurseries and 11 % of children in kindergartens attend half-day programmes.

There are fees for children to attend a pre-school institution and to eat while they are there. Single parents pay 50 % of the cost of fees and food expenses, while the fees for children who have no parents, whose parents are beneficiaries of family benefits and those from the most vulnerable groups are paid by the social work centre in the municipality where the child or parent is resident.

The coverage of children attending pre-school varies from high (88 %) in the central and southern regions, to very low in the northern region (27 %). The basic reasons for the low level of attendance in the north are the dispersal of the settlements and the distance to the educational unit. These municipalities are also characterised by low levels of

⁶² See: Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

⁶³ www.monstat.org.

⁶⁴ Ombudsman (2019) *Report for 2018*, p. 173. Available at: https://www.ombudsman.co.me/docs/1554124685_final-qodisnji-izvjestaj-2018.pdf.

development, higher poverty rates and higher unemployment rates than the rest of Montenegro. In order to increase the coverage of children, in 2015, UNICEF and the Ministry of Education launched a public campaign – All in the Kindergarten – to promote early childhood education and education in five municipalities in the north of the country where the enrolment rate is the lowest.⁶⁵

5.1.3 Overview of national acts on work-life balance issues

Special protection of women at work includes legal provisions relating to:

- 1) adapting the working conditions to the physical characteristics of a woman;
- 2) reconciliation of professional and family obligations.

According to the Labour Law, women enjoy the right to protection based on motherhood, after the end of maternity leave, or parental leave, and in some cases, the child's father also has special protection. In this respect, there are three situations that are covered:

- protection of single parents;
- the protection of a mother with a child who is younger than three years old, in some cases with a child younger than five;
- protection of parents who have a child with disabilities.

Article 11(3) of the Labour Law stipulates that the employee has the right to special protection for the care of a child in accordance with the law. It follows from this wording that the right to special protection in this case applies to both the mother and the father of the child. This provision is elaborated in the following text of the law, making the distinction between regular childcare and care for a child with disabilities.

A different level of work security is provided for a single parent compared to a situation where the child has both parents. The protection of employment status is provided for single parents with a child under seven years of age and is considered as a ban on contract termination.

The Labour Law in Article 108 provides the following:

'(2) An employer may not terminate contract of employment with a parent who is working with half of working hours due to providing care to a child with severe developmental disabilities, a single parent with a child up to seven years old or a child with severe disability, or with a person using any of the stated rights.

(3) During absence from work for the purpose of nursing a child and parental leave an employer may not terminate the employer's contract of employment.'

In addition, the Labour Law provides for additional rights for one of the parents of a child under three years of age. This includes the following:

Article 113(1):

'Upon expiry of the leave referred to in Article 111 paragraph 1 of this Law, one of the employed parents shall be entitled to work half the full-time working hours until the child reaches three years of age, if the child needs additional care.'

Article 118:

⁶⁵ www.mpin.gov.me.

'(1) One of the parents has a right to a leave from work until the time the child turns three, and he/she may not continue the leave if he/she terminates exercise of this right before expiry of the stated period.

(2) During the absence from work, as referred to in paragraph 1 of this Article, an employee shall be entitled to health insurance and pension and disability insurance, and other rights and obligations shall be suspended.

(3) Funds for the health insurance and pension and disability insurance referred to in paragraph 2 of this Article shall be provided from the health insurance and pension and disability insurance funds.

(4) An employee shall not be entitled to wage compensation during the leave from work referred to in paragraph 1 of this Article.'

Special protection is predetermined in relation to a deployment to work in another place outside the place of residence or temporary stay.

Article 42(3) of the Labour Law provides that an employed woman with a child under five years of age, a single parent with a child under seven years of age or an employed parent with a child with severe developmental disabilities, may not be assigned to work in another place outside the place of residence or temporary stay.

This provision is different from the protection of the woman as a single mother in relation to night work and overtime. The Labour Law sets out special protection in relation to night work and overtime. Article 110 states:

'1) An employed woman during pregnancy and a woman with a child under three years of age cannot work longer than full time hours, or at night.

(2) Exceptionally of paragraph 1 of this Article, an employed woman with a child over two years of age may work at night only if she accepts such work in a written statement.

(3) One of the parents with a child with severe developmental disabilities, as well as a single parent with a child under seven years of age may work overtime, or at night, only based on a written consent.'

Labour Law provides an entitlement to work half the full-time working hours for the purpose of caring for a child with developmental disabilities.

Article 114 states:

'(1) A parent, adoptive parent or a person entrusted with a child with developmental disabilities for care and nursing by a relevant guardianship authority or a person providing care to a person with severe disability shall be entitled to work half the full-time working hours, in accordance with special regulations.

(2) Working hours referred to in paragraph 1 of this Article i Article 113 of this Law shall be considered as working hours for exercising of the rights arising from and based on employment.'

5.1.4 Political and societal debate and pending legislative proposals

A new Labour Law is under preparation, the adoption of which is expected by the end of 2019. It is intended to comply with Directives 92/85 and 2010/18.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

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

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

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

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

During the breastfeeding period, women are protected. According to the Article 11b, paragraph 2, if a female employee starts to work before the end date of her parental leave, she shall be entitled to 90 minutes of leave for the purpose of breastfeeding her child in addition to daily breaks, in agreement with the employer.

5.2.2 Obligation to inform employer

There is no explicit provision on the obligation of an employee to inform the employer about pregnancy.

However, in order to exercise the right to special protection on this basis (prohibition of night work, overtime, prohibition of deployment to another place of work, protection in terms of work on particularly difficult and dangerous jobs, etc.) the employee must submit the appropriate medical documentation.

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no relevant case law.

5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

In Montenegro, the protective measures mentioned in Articles 4-6 of Directive 92/85 are implemented to a certain extent.

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

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

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

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

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

5.2.5 Case law on issues addressed in Articles 4 and 5 of Directive 92/85

There has been no court case in Montenegro in connection with the exercise of this right.

5.2.6 Prohibition of night work

Article 110 of the Labour Law provides protection from having to work longer than full-time hours as well as from night work. In particular, a woman during her pregnancy and a woman who has a child under three years of age may not work longer than the full-time hours or overnight. Exceptionally, an employed woman who has a child older than two years of age may work at night, but only if she consents to such work in writing. Furthermore, parents with a child with severe disabilities, and single parents who have a child under seven years of age, may work longer than the full-time hours or at night, but again, only with his or her written consent.

The Labour Law is not fully in line with Directive 92/85 regarding the protection of women's night work during pregnancy because it does not provide for the possibility of transfer to daytime work, leave from work or an extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

5.2.7 Case law on the prohibition of night work

There is no case law available.

5.2.8 Prohibition of dismissal

In Montenegrin law, any dismissal is prohibited from the beginning of the pregnancy until the end of the maternity leave. Article 108 of the Labour Law provides protection due to pregnancy and childcare. It reads as follows:

'(1) An employer cannot refuse to conclude an employment contract with a pregnant woman or terminate her employment contract during her pregnancy or maternity leave.

(2) An employer may not terminate the employment contract with a parent who works half-time because of caring for a child with severe disabilities, a single parent who has a child under seven years of age or a child with a severe disability, as well as with a person who uses any of the foregoing rights.

(3) During an absence from work due to a childcare and the use of parental leave, the employer cannot terminate the employment contract of the employee.

(4) An employed woman whose contract of employment for a specified period of time expires during her use of the right to maternity leave shall have her employment contract extended until the right to maternity leave expires.

(5) The employee referred to in paragraph 2 of this Article may not be declared to be a person whose services are no longer required due to the introduction of technological, economic or restructuring changes in accordance with this Act.

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

This provision is not as precise as it should be in order to be completely explicit in its interpretation. In practice, this is problematic because there is still no explicit prohibition on the dismissal of a pregnant worker. The prohibition on dismissal is more than for 'due to pregnancy' (as in Directive 2006/54). In Article 10 of Directive 92/85, the dismissal is prohibited during a certain period, under the terms defined in the article.

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

5.2.9 Redundancy and payment during maternity leave

Labour Law stipulates that 'During maternity leave an employer may not terminate the employee's contract of employment' (Article 108(1)).

If an employed woman's fixed-term contract of employment expires while she is on maternity leave, the term of employment according to the fixed-term contract of employment shall be extended until expiry of the maternity leave (Article 108(4)).

In addition, employees during maternity leave may not be declared redundant employees due to the introduction of technological, economic or restructuring changes in accordance with the Labour Law (Article 108(5)).

5.2.10 Employer's obligation to substantiate a dismissal

Article 108(1) of the Labour Law states that an employer may not refuse to conclude a contract of employment with a pregnant woman or terminate her contract because of pregnancy or if she is on maternity leave.

Article 143c of the Labour Law provides:

'(1) A decision on termination of a contract of employment shall be passed by the relevant body of the employer, i.e. the employer, in the form of a decision, and it shall deliver it to the employee.

(2) A decision referred to in paragraph 1 of this Article shall contain: the grounds for termination of employment, explanation and note of legal remedy.

(3) A decision referred to in paragraph 1 of this Article shall be final.

(4) Provisions of the Law on General Administrative Procedure shall apply accordingly to delivery of warning notice, notification and decision, unless otherwise prescribed by this Law.'

According to the Labour Law, there is no specific obligation on the employer to further explain the reasons for the dismissal the employee is pregnant.

5.2.11 Case law on the protection against dismissal

In 2016, the Supreme Court of Montenegro stated that the absolute prohibition of issuing a dismissal to an employed woman while pregnant does not apply to a woman who has concluded a fixed-term employment contract.⁶⁶

In addition, in another judgment in 2016,⁶⁷ the Supreme Court stated that the fact that the claimant was pregnant during the period of validity of the said employment contract is without prejudice to the legality of the decision to terminate the employment relationship, since the absolute prohibition of dismissing an employed woman while pregnant under the aforementioned provision does not apply to a woman who is employed for a limited time.

In both cases, the reasoning of the judgment states that it is undisputed that Article 8(2) of the amended European Social Charter refers to the prohibition of the dismissal of an employed woman from the time when she informs the employer that she is pregnant until the expiration of maternity leave. However, the supplement to this provision provides for three exceptions to the absolute prohibition of dismissal, including an exception when a woman has concluded a fixed-term employment contract, in which case the employment terminates with the expiration of the employment contract, i.e. the time on the basis of which the contract is concluded.

5.3 Maternity leave

5.3.1 Length

According to Article 111(2) of the Labour Code, parental leave, can last up to 365 days from the birth of a child. The parent may start work prior to the end date of the leave referred to in paragraph 2 of this Article, but not before 45 days after the birth of the child.

The Labour Law (in Article 112) provides for protection in the event of a child being stillborn:

'If an employed woman gives birth to a stillborn or if the child dies prior to expiry of the maternal leave she shall be entitled to extend her maternity leave for as long as it is necessary, according to the finding of the relevant specialist doctor, to recover from the delivery and the physical condition caused by the loss of the child, and at least 45 days, and she shall be entitled to all rights based on maternity leave during that period.'

⁶⁶ Supreme Court, judgment of 31 March 2016, Rev 266/2016.

⁶⁷ Supreme Court, judgment of 27 April 2016, Rev 117/2016.

5.3.2 Obligatory maternity leave

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

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

5.3.3 Legal protection of employment rights (Articles 5, 6 and 7 of Directive 92/85)

General protection at work is provided by the Labour Law in Article 102, stipulating that an employee is entitled to protection at work in accordance with the law and a collective agreement, and an employee must not be assigned to a different workplace or to work for longer than the full-time hours or at night, if such work could be detrimental to his/her health according to the findings of the bodies that are responsible for assessing health. Employees may also not be assigned to workplaces where there is an increased risk of the emergence of a disability, occupational or other diseases; employees who (in addition to the 'conditions laid down by the systematisation act') fulfil the necessary conditions for work in terms of health, psychological and physical abilities and age, may be assigned to such a workplace.

There is special protection due to pregnancy and childcare in Article 108, as mentioned and quoted above. Special protection in relation to overtime and night work for mothers of children younger than three years old is stipulated in Article 110 of the Labour Law (as described above).

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

5.3.4 Legal protection of rights ensuing from the employment contract

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

5.3.5 Level of pay or allowance

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

The level of pay/allowance during sick leave differs depending on the type of illness.

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

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

Wage compensation during a temporary inability to work due to occupational diseases and injuries (except for consequences that occurred as a result of occupational diseases and injuries at work), maintenance of pregnancy (treatment of threatened miscarriage), as

well as donating blood, tissues and organs, is provided in the amount of 100 % of the basis for compensation.

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

The employer is entitled to reimbursement of funds on the basis of payment of salary compensation to the employee for maternity or parental leave. Article 51 of the Law on Social and Child Protection provides that the amount of maternity/parental pay to be reimbursed to the employer is equal to the average basic salary paid in the past 12 months prior to the month in which maternity/parental leave was taken, if the employee was employed continuously for at least 12 months by the employer concerned (Article 51(1)), which means 100 % of the basis for salary. The amount paid can be up to a maximum of two average salaries in the country during the previous year, according to the administrative authority in charge of statistics. If an employee has continuously worked for between 6 and 12 months before the leave, the compensation is calculated at 70 % of the average monthly salary (Article 51(2)). If an employee has worked continuously for between three and six months before the leave, the compensation is calculated at 50 % of the average monthly salary (Article 51(3)). If an employee has worked continuously for up to three months before the leave, the compensation is calculated at 30 % of the average monthly salary (Article 51(4)). The amount paid under Article 51(2), (3) and (4) can be up to a maximum amount of one average salary in the country during the previous year, according to the statistics authority.

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

5.3.6 Additional statutory maternity benefits

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

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

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

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

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

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

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

5.3.9 Legal right to share maternity leave

The Labour Law stipulates that an employed woman has the right to start her maternity leave 45 days prior to delivery, and at the latest 28 days prior to delivery.

Furthermore, Article 111(6) provides that the mother of the child cannot terminate the use of maternity leave before 45 days from the date of birth of the child. After that period the parental leave may be used by the father (if the mother has ceased to exercise the right).

These provisions apply to all employers in Montenegro - regardless of the number of employees employed by them. In addition, the right to maternity and parental leave is exercised independently of whether the employee is in full-time or part-time employment.

5.3.10 Case law

A 2015 judgment of the Supreme Court of Montenegro states that the termination of a labour contract is illegal if it occurs at any point after the employer has been notified of the pregnancy until the end of the employee's maternity leave, where the employed woman has informed the employer that she is pregnant, in a timely manner, with evidence of pregnancy-related illness.⁶⁸

The reasoning of the judgment states the following:

'By the provision of Article 108, paragraph 1 of the Labour Law provides that an employer cannot refuse to conclude an employment contract with a pregnant woman, nor can he cancel a labour contract due to pregnancy or if she uses maternity leave. Amended European Social Charter of 03.05.1996. The Law on the Confirmation of the Amended European Social Charter (*Official Gazette of Montenegro - International Treaties* No. 6/09 of 18 December 2009), in the provision of Article 8, foresees the rights of women employees on the protection of motherhood, and is, inter alia, considered to be illegal if the employer terminates employment contract at the time when she informed him that she was pregnant until the end of her maternity leave, or at such a moment when the notice period expired during such absence. Provision of Article 8, paragraph 2. The Appendix to the Amended European Social Charter provides for exceptions to the establishment of an absolute ban on dismissal, even if the period provided for in the employment contract expired. ILO Convention no. 183 on Maternity Protection, which was confirmed by Montenegro on January 10, 2011. (*Official Gazette of Montenegro - International Agreements*, No. 1/11) provides for the right to maternity leave and the protection of employed women during pregnancy and maternity leave from dismissals, except for reasons not related to pregnancy, childbirth and breast-feeding as a result of layoffs.'

A 2012 judgment of the Supreme Court found that the termination of an employment contract for an employed woman during her maternity leave when the employer proclaimed a technological surplus, was illegal.⁶⁹

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

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

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

⁶⁸ Supreme Court of Montenegro, judgment of 15 December 2015, Rev 1364/2015.

⁶⁹ Supreme Court of Montenegro, judgment of 27 September 2012, Rev. 777/2012.

Labour Law in Article 117 provides that an employee intending to use a right to leave due to adoption shall inform the employer of their intention in written form, one month prior to the beginning date of exercising the right.

An employee can stop exercising the right to adoption leave and employer must accept his/her return to work and provide deployment to an equivalent position within one month of receiving the employee's notification of their intention to terminate the exercise of the right.

An employee who has exercised the right to adoption leave is entitled to additional professional training, if the employer introduced certain changes of technological, economic or structural nature or changes in the method of operating.

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Montenegrin legislation does not explicitly provide for protection against the dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave. However, this can be challenged through general anti-discrimination provisions. Thus, Article 5 of the Labour Law provides for the prohibition of discrimination against an employee in relation to family responsibilities.

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

5.4.3 Case law

There is no case law available.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

Directive 2010/18 has not been explicitly implemented in Montenegro. According to the Government's plan, it will be implemented in the new draft of the Labour Law to be adopted in 2019.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

Article 111 of the Labour Law recognises the right to parental leave as follows:

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

(6) The mother of the child cannot cancel maternity leave before the expiry of 45 days from the date of birth.'

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

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

5.5.3 Scope of the transposing legislation

According to the Labour Law, all employees are entitled to parental leave, regardless of the type of employment contract (including employees with a fixed-term contract)

5.5.4 Length of parental leave

According to the Labour Law, the total duration of parental leave lasts from 45 days after the birth of a baby until the expiry of 365 days after the birth, in both the public and the private sector.

5.5.5 Age limits

The Labour Law, in Article 111(2), stipulates that parental leave may be used for 365 days from the birth of the child.

5.5.6 Individual nature of the right to parental leave

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

The Labour Law in this part does not comply with Article 2(1) of Directive 2010/18, since it does not anticipate the equal treatment of both parents with regard the right to parental leave. Namely, according to the Article 111 of the Labour Law, the father of a child can use the right to parental leave, only if the mother interrupts her use of that right. Therefore, the Labour Law does not stipulate that the father and mother have the right to parental leave for an equal duration, nor does it provide for the right to a non-transferable part of parental leave, which is the obligation stipulated in Article 2 of the directive.

5.5.7 Transferability of the right to parental leave

Labour Law allows a possibility for one parent to transfer part of the parental leave to the other parent. After the expiration of a fixed period, the right to parental leave can be transferred to another parent - the father of a child.

If a woman has terminated the use of parental leave, she is entitled to use, in addition to a daily break, in agreement with the employer, another 90 minutes per day of leave for the purpose of breastfeeding the child.

Article 111 of the Labour Law recognises the right to parental leave and is applicable to both public and private sectors:

(5) If one of the parents interrupts parental leave as referred to in paragraph 3 of this Article, the other parent shall be entitled to use the remaining part of the parental leave referred to in paragraph 2 of this Article.

(6) A child's mother may not interrupt parental leave prior to expiry of 45 days from the birth of the child'.

5.5.8 Form of parental leave

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

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

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

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

5.5.9 Work and/or length of service requirements (Article 3(b) of Directive 2010/18)

According to the Labour Law, the previous duration of employment is not a condition for exercising the right to parental leave.

5.5.10 Notice period

The notification period for using the right to parental leave is one month, according to Article 117(1) of the Labour Law. A one-month period is also prescribed for an employer to provide for an adequate return to work of a parent who is returning from this leave (Article 117(2)). In reality, however, there are problems, especially concerning the latter.

5.5.11 Postponement of parental leave (Article 3(c) of Directive 2010/18)

According to the Labour Law, there is no possibility for the employer to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation.

5.5.12 Special arrangements for small firms (Article 3(d) of Directive 2010/18)

There are no special arrangements for small firms. However, employers have called for the legislation to be amended with regard to establishing special arrangements for small firms that would remove existing business barriers.

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Article 3(3) of Directive 2010/18)

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

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

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

According to the Article 110(3), one of the parents with a child with severe developmental disabilities may work overtime, or at night, but only with their written consent.

In addition, special protection of parents with a child with severe development disabilities is provided in Article 108(5) of the Labour Law, which provides that parents with a child with severe developmental disabilities may not be declared redundant employees due to introduction of technological, economic or restructuring changes in accordance with the law.

According to the Article 42(3) of the Labour Law, an employed parent with a child with severe developmental disabilities may not be deployed to work in another place outside the place of residence or temporary stay.

In addition, the Labour Law in Article 114 stipulates the right to work half the full-time working hours for the purpose of nursing a child with developmental disabilities:

'(1) A parent, adoptive parent or a person entrusted with a child with developmental disabilities for care and nursing by a relevant guardianship authority or a person providing care to a person with severe disability shall be entitled to work half the full-time working hours, in accordance with special regulations.

(2) Working hours referred to in paragraph 1 of this Article in Article 113 of this Law shall be considered as working hours for exercising of the rights arising from and based on employment.'

5.5.14 Measures addressing the specific needs of adoptive parents (Article 4 of Directive 2010/18)

There are no measures addressing the specific needs of adoptive parents in addition to adoption leave.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Article 5(4) of Directive 2010/18)

Article 4(3) of the Law on Gender Equality (LGE) in connection with Article 33(1) of the Labour Law mean that pregnancy and motherhood must not be a ground for less favourable treatment with respect to employment, self-employment, and the realisation of social protection rights and other rights.

In addition, the protection of workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave can be challenged through the general anti-discrimination provisions.⁷⁰

The Labour Law states that: 'During absence from work for the purpose of nursing a child and parental leave an employer may not terminate the employer's contract of employment' (Article 108(3)).

Moreover employees taking parental leave may not be declared redundant employees due to introduction of technological, economic or restructuring changes in accordance with the Labour Law (Article 108(5)).

5.5.16 Right to return to the same or an equivalent job (Article 5(1) of Directive 2010/18)

⁷⁰ Article 5 of the Labour Law provides for the prohibition of discrimination against an employee in relation to family responsibilities.

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

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Article 5(2) of Directive 2010/18)

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

5.5.18 Status of the employment contract or relationship during parental leave

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

If an employed woman's fixed-term employment contract expires while she is on parental leave, the term of employment shall be extended until the expiry of the parental leave.

During the period of parental leave, employees must not be declared redundant due to the introduction of technological, economic or restructuring changes in accordance with the Labour Law (Article 108(3) and (4)).

5.5.19 Continuity of entitlement to social security benefits

There is general continuity concerning the entitlement to social security cover under the different schemes, in particular healthcare, during the period of parental leave. There is general synergy between the Law on Social and Child Protection, the Law on Healthcare, the Labour Law and the Law on Health Insurance, as described above.

Following amendments to the Law on Healthcare and the Law on Health Insurance at the beginning of 2016, the situation is more harmonised. The Labour Law is also expected to be amended, especially in relation to self-employment, in order to be harmonised with the rest of the relevant legislation.

Article 118 of the Labour Law provides leave from work without wage compensation for the purpose of nursing a child under the age of three. One of parents can use this right following parental leave:

'(1) One of the parents has the right to be absent from work until the child reaches the age of three years, and if the parent who has started using this right terminates it before the expiry of the said period, he/she shall not be further entitled to it.

(2) During the absence from work, in terms of paragraph 1 of this Article, the employee is entitled to health, pension and disability insurance, and other rights and obligations are suspended.

(3) Funds for healthcare, a pension and disability insurance under paragraph 2 of this Article shall be paid from the funds of the health, pension and disability insurance schemes.

(4) During the absence from work under paragraph 1 of this Article, the employee is not entitled to the compensation of his/her remuneration/salary.'

5.5.20 Remuneration

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

5.5.21 Social security allowance

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

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

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

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

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

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

According to Article 52 of the Law on Social and Child Protection, for a person engaged in an entrepreneurial activity as a sole employee, the wage compensation for maternity or parental leave is paid by the social work centre, according to the period of sole employment.

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

5.5.22 More favourable provisions (Article 8 of Directive 2010/18)

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

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

5.5.23 Case law

There is no case law available.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

The Labour Law, in Article 72, provides that an employee who has become a father will have paid leave from work in the case of childbirth. The duration of the paid leave is regulated by the collective agreement and is usually five working days. As this is paid leave, the salary is compensated in full during the leave.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

The Labour Law does not explicitly provide for protection for employees who use the right to paternity leave.

However, general anti-discrimination protection in the relevant legislation applies with regard to the protection against dismissal for workers who take paternity leave and the enjoyment of their rights after the end of paternity leave for both parents.

5.6.3 Case law

There is no case law available.

5.7 Time off/care leave

5.7.1 Existence of care leave in national law (Article 7 of Directive 2010/18)

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

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

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

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

The General Collective Agreement also makes provision on work-life balance issues. Article 10 of the agreement stipulates that an employee will be entitled to be absent from work,

with fringe benefits (paid leave), to a maximum of seven working days during a calendar year, in the event of:

- marriage – five working days;
- birth of a child – three working days;
- care for a child with developmental delay – three working days;
- death of a relative, outside the immediate family, up to the third-degree blood kinship inclusive, or the second-degree kinship by marriage – one working day;
- serious illness of an immediate family member – seven working days;
- eliminating the effects of natural disasters caused to the household – three working days;
- moving employee's own household in the area of the same populated place – one working day and moving from one populated place to another – three working days.

Paid leave may be used at a time when the predicted event occurred.

Employees shall exercise the right to paid leave by submitting the employer with a request and proof of the reason for the leave, unless the reason for the leave is generally known.

The employer shall keep records of each case when the right to paid leave is exercised.

5.7.2 Case law

There is no case law available.

5.8 Leave in relation to surrogacy

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

5.9 Flexible working time arrangements

5.9.1 Right to reduce or extend working time

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

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

5.9.2 Right to adjust working time patterns

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

5.9.3 Right to work from home or remotely

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

5.9.4 Other legal rights to flexible working arrangements

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

5.9.5 Case law

There is no case law available.

5.10 Evaluation of implementation

Montenegrin legislation is not fully in line with Directive 92/85 and Directive 2010/18.

Article 9 of Directive 92/85, which provides for the right to free hours for prenatal examination, has not been implemented. This right is not provided for by the Labour Law, or by other regulations.

The Labour Law does not provide for the right to a non-transferable part of parental leave, which is an obligation stipulated in Article 2(1) of Directive 2010/18 on parental leave. In contrast, the Labour Law provides that a mother can transfer parental leave to the father of the child 45 days after childbirth. This means she does not have to transfer that part. In this way, the father of a child will be deprived of parental leave

Even in the case of the transfer of the right to parental leave to the father of the child, it is not envisaged that he should exercise this right in the same period as the mother, and the minimum duration of parental leave used by the father of the child is not envisaged.

5.11 Remaining issues

There are no remaining issues.

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

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

There are no relevant surveys.

6.1.2 Other issues related to gender equality and social security

According to the data contained in the Gender Equality Action Plan (2017-2021),⁷¹ most rural women do not have pension insurance due to lack of earnings or in cash, or because they work on their own property. Some of these women have never worked and, as such, do not have pension insurance. More than 6 % of women do not have health insurance because they do not have regular contracts (36.7 %) or their status in the country is not regulated (63.2 %).

6.1.3 Political and societal debate and pending legislative proposals

There is no current debate or pending legislative proposals.

6.2 Direct and indirect discrimination

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

6.3 Personal scope

N/A.

6.4 Material scope

N/A.

6.5 Exclusions

There are no exclusions.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There are no such laws.

6.7 Actuarial factors

There are no relevant factors.

6.8 Difficulties

N/A.

⁷¹ Ministry for Human and Minority Rights (2017) *Gender Equality Action Plan (2017-2021) with a programme of implementation for period 2017-2018*, available at: <http://www.mmp.gov.me/en/library?alphabet=lat>.

6.9 Evaluation of implementation

Montenegrin legislation is not fully in line with Directive 2006/54, because in Montenegro there are no schemes of professional pension insurance.

6.10 Remaining issues

There are no remaining issues.

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

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

There are no relevant surveys.

7.1.2 Other relevant issues

There are no other relevant issues.

7.1.3 Overview of national acts

The Law on Health Insurance⁷² regulates compulsory health insurance and the exercise of these rights, the financing of compulsory health insurance, supplementary health insurance, contracting healthcare with providers of health services, and other issues of importance for exercising health insurance rights.

According to the Article 13 of the Law on Health Insurance, the rights stemming from compulsory health insurance under the law are:

- 1) the right to healthcare;
- 2) the right to compensation of earnings during temporary incapacity for work;
- 3) the right to compensation of travel expenses related to the use of healthcare.

The Law on Healthcare⁷³ in Article 5 stipulates that in exercising the right to healthcare, citizens are equal, irrespective of their nationality, race, gender, gender identity, sexual orientation, age, disability, language, religion, education, social origin, condition and other personal property, in accordance with the law.

The Law on Pension and Disability Insurance⁷⁴ in Article 9 stipulates that, for the purpose of this law, insured persons are:

- 1) employees (hereinafter: insured employee);
- 2) persons performing self-employment (hereinafter: insured person of self-employment);
- 3) farmers (hereinafter: insured-farmer).

If a person simultaneously fulfils the conditions for insurance on several grounds referred to in paragraph 1 of Article 9, the insurance basis is determined in such a way that the existence of the basis of insurance at the first point excludes the basis of insurance from the next item. This means that a person can only be insured on one basis.

Obligations for payment of contributions based on insurance are determined in accordance with the law.

According to the Article 16, the rights to be derived from pension and disability insurance are:

⁷² Montenegro, Law on Health Insurance, *Official Gazette*, Nos 6/2016, 2/2017, 22/2017 and 13/2018.

⁷³ Montenegro, Law on Health Care, *Official Gazette*, Nos 3/2016, 39/2016, 2/2017 and 44/2018.

⁷⁴ Montenegro, Law on Pension and Disability Insurance, *Official Gazette*, Nos 54/2003, 39/2004, 61/2004, 79/2004, 29/2005, 14/2007 and 47/2007; *Official Gazette*, Nos 12/2007, 13/2007, 79/2008, 14/2010, 78/2010, 34/2011, 40/2011, 66/2012, 39/2011, 36/2013, 38/2013, 61/2013, 6/2014, 60/2014, 10/2015, 44/2015, 42/2016 and 55/2016.

- 1) in the case of age, the right to old age pension and early retirement;
- 2) in the case of invalidity, the right to disability pension;
- 3) in case of death:
 - right to family pension;
 - the right to compensation for funeral expenses;
- 4) in the event of bodily injury caused by an injury at work or professional illness, the right to a financial compensation for bodily injury.

According to the Article 4 of the new Law on mediation in employment and the exercise of rights during unemployment,⁷⁵ the exercise of rights based on unemployment is based on the principles of:

- 1) prohibition of discrimination;
- 2) gender equality;
- 3) affirmative action directed at particularly vulnerable groups of unemployed persons;
- 4) impartiality in conducting employment-related tasks;
- 5) employment-related services for unemployed persons and jobseekers being provided free of charge.

7.1.4 Political and societal debate and pending legislative proposals

There is no such debate or pending proposals.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

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

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

Article 4(1) of the LGE defines gender-based discrimination as any legal or factual, direct and indirect unjustified differentiation or unequal treatment or a failure to deal with it (exclusion, restriction or prioritising) aimed at hindering, jeopardising, preventing or denying the exercise or enjoyment of human rights and freedoms for a person or a group of persons in the social area, among others.

Article 21 stipulates that gender-based equality has to be addressed by the Government in relation to labour, social and health protection in particular.

However, the law on pension and disability insurance does not have any specific provisions prohibiting sex discrimination.

7.3 Personal scope

The personal scope of the Montenegrin law on statutory social security schemes is broader than that of Directive 79/7. In accordance with the Law on Gender Equality, gender equality implies equal participation of women and men, as well as persons of different gender identities in all areas of public and private sector, equal position and equal opportunities for the exercise of all rights and freedoms and use of personal knowledge and abilities for the development of society, as well as deriving equal benefit from the results of the work. In accordance with Article 7 of this Law, equal opportunities include the absence of gender restrictions on the participation of men and women in political, economic, social, cultural and other fields of life, thereby ensuring the enjoyment of their

⁷⁵ Montenegro, Law on mediation in employment and exercise of rights during unemployment, *Official Gazette*, No. 24/2019.

rights and freedoms. In addition, one of the principles on which the Law on Social and Child Protection is based is the prohibition of discrimination based on sex (Article 7, par. 1).

7.4 Material scope

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

7.5 Exclusions

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

7.6 Actuarial factors

Sex is not used as an actuarial factor in statutory social security schemes.

7.7 Difficulties

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

According to the *Screening Report Montenegro, Chapter 19 – Social policy and employment*, further legal adjustments are, however, necessary, e.g. aligning several definitions with those of the LPD and further bringing the legislation into line with the EU *acquis*, notably concerning questions relating to occupational social security schemes (Directive 2006/54/EC) and statutory social security schemes (Directive 79/7/EEC).⁷⁶

7.8 Evaluation of implementation

Montenegrin legislation is mostly in line with Directive 79/7.

7.9 Remaining issues

There are no remaining issues.

⁷⁶ European Union External Action (2014), *Screening Report Montenegro, Chapter 19 – Social policy and employment*, Brussels, p. 13, available at: http://ec.europa.eu/enlargement/pdf/montenegro/screening_reports/screening_report_montenegro_ch19.pdf.

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

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

In 2015, 12.4 % of women were self-employed, which is more than twice as many as men. Women own only 4 % of houses, 8 % of land and 14 % of holiday homes in Montenegro, which also speaks to their dependent position and limitations on the possibility of starting a business.⁷⁷

8.1.2 Other issues

There are no other issues to be mentioned.

8.1.3 Overview of national acts

Montenegro has ratified a large number of international human rights instruments, among which the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is of particular importance.

National legislation provides the preconditions for achieving protection from discrimination in the field of entrepreneurship through a series of systemic documents regulating this field.

In addition, the Government of Montenegro has adopted several strategies aimed at increasing economic potential, including those relating to the development of women's entrepreneurship.

- *Strategy for the Development of Female Entrepreneurship in Montenegro 2015-2020, with the Action Plan*: This strategic document emphasises the need for an integrated approach to strengthening women's entrepreneurship based on the gender sensitivity of all actors in political, economic and social life.
- *National Strategy for Employment and Human Resources Development 2016-2020*. One of the objectives of this strategy is increasing the efficiency of employment measures with a special emphasis on inclusion in the labour market of young people, women and long-term unemployed persons.
- *Strategy for lifelong entrepreneurial learning 2015-2019*. This strategy recognises the six key challenges to be addressed in order to achieve the vision of lifelong entrepreneurial learning as the basis for the life philosophy of all citizens, which will: increase the level of awareness and development of the entrepreneurial spirit in the whole society; develop skills useful in life that will help individuals to get better jobs or create new businesses and make Montenegro a country of knowledge, innovation and competitive companies;
- *Plan of activities for achieving gender equality in Montenegro 2017-2021*. This plan has a strategic objective to increase the employment of women (including self-employment) and to eliminate all forms of discrimination against women in the labour market.

8.1.4 Political and societal debate and pending legislative proposals

There are no proposals pending.

⁷⁷ Government of Montenegro (2017) *Action Plan for the Implementation of United Nations Security Council Resolution 1325, Women's Peace and Security in Montenegro (2017-2018)*, February 2017.

8.2 Implementation of Directive 2010/41/EU

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

8.3 Personal scope

8.3.1 Scope

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

8.3.2 Definitions

Montenegrin legislation does not define self-employment, except in the Law on Contributions for Compulsory Social Insurance. According to a labour law expert, who is involved in the process of drafting the new Labour Law, self-employment is going to be included in the new version.

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

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

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

The Law on Contributions for Compulsory Social Insurance⁷⁸ defines 'entrepreneurial activity' as a commercial activity performed by an entrepreneur, and the 'entrepreneur' as a natural person who performs economic activities for the purpose of making a profit in accordance with the law (Article 4(11) and (13)). According to this law, entrepreneurs are compulsory payers of contributions towards pension and disability insurance (Article 5(12)), and must pay additional contributions towards pension and disability insurance (Article 8(2)) and health insurance (Article 6(12)). Furthermore, entrepreneurs are obliged to contribute to insurance against unemployment (Article 7(9)).

8.3.3 Categorisation and coverage

All self-employed workers are considered part of the same category.

8.3.4 Recognition of life partners

National legislation has not recognised life partners.

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

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

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

8.4.2 Material scope

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

8.5 Positive action

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

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

In addition, the Government of Montenegro has adopted guidelines for creating a favourable environment for female entrepreneurship in local communities,⁷⁹ as it supports women's entrepreneurship. Apart from the constant need to raise self-awareness and to promote a culture of human rights, the main problems are connected to the difficulty in obtaining funds for entrepreneurship, disadvantageous traditional lending models, the lack of knowledge and skills for entrepreneurship, and the traditional way of living in villages with a focus on the husband (in general, property is in husband's name), etc.

8.6 Social protection

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

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

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

8.7 Maternity benefits

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

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

⁷⁹ Ministry of Human and Minority Rights (2015), *Guidelines for creating a favourable environment for female entrepreneurship in local communities*, Government of Montenegro, Podgorica.

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

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

The pay rate referred to in paragraph 1 of this Article shall be determined in accordance with Article 51 of this Law.'⁸⁰

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

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

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

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast of Directive 2006/54)

N/A.

8.9 Prohibition of discrimination

There is no general prohibition of discrimination in relation to self-employment.

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

8.10 Evaluation of implementation

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

8.11 Remaining issues

Women continue to face various forms of discrimination in the political, social and economic spheres.

In Montenegro, the full economic contribution of women has not yet been achieved, certainly not to the extent that corresponds to their real potential. Less than 10 % of companies are owned by women, they earn about 14 % less than men for the same type of jobs, and they are still much less present in managerial positions in the public and private sectors. Despite evident progress and positive changes that have taken place in recent years, women are still a minority in social, economic and political life.

⁸⁰ Article 51 of the Law on Social and Child Protection is explained above in section 5.2.5 of this report.

9 Goods and services (Directive 2004/113)⁸¹

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

There are no such reports available.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There is no information available on this topic.

9.1.3 Political and societal debate

There is no current debate on this topic.

9.2 Prohibition of direct and indirect discrimination

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

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

'Discrimination in the provision of public and private goods and services, on the grounds of Article 2, paragraph 2,⁸² shall amount to:

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

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

9.3 Material scope

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

There was no relevant case law in 2018.

⁸¹ See e.g. Caracciolo di Torella, Eugenia and McLellan, Bridgette (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

⁸² Sex is one of the grounds mentioned in Article 2.

In the reporting year – as in the previous reporting year – the Protector had one case relating to access to goods and services.⁸³

9.4 Exceptions

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

9.5 Justification of differences in treatment

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

9.6 Actuarial factors

Montenegrin law does not explicitly ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurances and related financial services must not result in differences in individuals' premiums and benefits. However, from the anti-discriminatory legislation, gender discrimination is forbidden in all life spheres. Therefore, it can be concluded that the use of sex-based actuarial factors is prohibited and that the law does not allow for an exception in this regard.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

Montenegrin legislation does not provide this exception.

9.8 Positive action measures (Article 6 of Directive 2004/113)

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

9.9 Specific problems related to pregnancy, maternity or parenthood

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

When it comes to exceptions to discrimination, the law previously broadly determined that measures of positive action, i.e. regulations and special measures aimed at creating the conditions for achieving national, gender and overall equality and aiming at protecting persons who on any ground are in an unequal position, would not be considered discrimination. Such a provision created a lack of clarity in relation to which measures could not be regarded as discriminatory, although the restrictive measures were obviously subject to reasonable and objective justification. Amendments to the law have now listed specifically the factual and legal circumstances under which distinctions on different

⁸³ Ombudsman (2019) *Report for 2018*, p. 186. Available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

grounds will not be considered discrimination. Exceptions include setting conditions: for performing certain professional⁸⁴ and religious activities; for establishing the employment relationship;⁸⁵ for acquiring other work-related rights; for contracting insurance premiums; and in the access to goods and services, etc. These exceptions must be strictly applied and interpreted in proportion to the objective and purpose for which they are determined, when it is stated in the directives of the European Union in order to avoid potential unlawful justifications of discrimination.

9.10 Evaluation of implementation

Montenegrin law relating to access to goods and services is in line with Directive 2004/113.

9.11 Remaining issues

There are no remaining issues.

⁸⁴ For example, for certain particularly difficult jobs, an age requirement (e.g. over 18) may be set.

⁸⁵ For example, a male or female person might be explicitly sought for a role in a movie or a theatre performance.

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

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

According to the UNDP research conducted within the IPA 2010 programme, 65.8 % of women in Montenegro are experiencing some form of violence by their spouses and/or partners. In the last five years there has been a significant increase in the number of reported cases of domestic violence, which indicates the visibility of the phenomena itself and the improvement of a framework that encourages victims to report perpetrators and take steps to leave the violent situation. For example, in 2009 there were 481 reported cases; while in 2014 there were 1 249 cases, according to the official reports. Unfortunately, in recent years, the number of murders of women, most often a wife or partner, has increased, and these are commonly committed by persons who have been reported and brought in more often due to domestic violence.⁸⁶

The annual reports of the Protector of Human Rights and Freedoms of Montenegro in 2015 and 2016 specified that there were four complaints each year concerning gender-based violence. The Protector stated that data from previous reports indicated that violence against women and domestic violence has been worryingly present, and that the state's response is inadequate.⁸⁷

The basic report of the Group of Experts on Combating Violence against Women and Domestic Violence (GREVIO) for Montenegro from 2018 contains a systematic assessment of the measures taken by the national authorities in Montenegro with regard to all aspects of the Council of Europe Convention on the Prevention and Suppression of Violence against Women and Domestic Violence (the Istanbul Convention). The GREVIO committee notes that the greatest attention in legislation and policymaking is devoted to domestic violence, and that measures that deal with other forms of violence against women have yet to achieve the same level of comprehensiveness, in particular on issues of forced marriage, rape and persecution. The report notes that the committee is concerned that despite the introduction of standardised procedures provided for in the Protocol on the Treatment, Prevention and Protection against Domestic Violence, and extensive training efforts, law enforcement officials, judges and social workers, by their attitudes and prejudices, diminish the significance of violence, violating the trust of women in the authorities in charge of the prevention and protection of this offence.⁸⁸

According to the *Annual Report on the Work of Minor Offences Courts* in the area of the Law on Domestic Violence Protection in 2018, the courts had 1 972 cases (1 790 in 2017), of which 1 001 were dealt with by the misdemeanour court in Podgorica, 496 by the misdemeanour court in Budva and 375 cases by the magistrate court in Bijelo Polje. Of these cases, 1 563 cases were completed (1 366 cases in 2017) or 79.26 %, of which: 836 were in the misdemeanor court in Podgorica; 417 were in the misdemeanor court in Budva; and 310 were heard by the misdemeanor court in Bijelo Polje. The cases were completed as follows: 521 fines (443 in 2017); 165 prison sentences; 256 suspended sentences; 102 reminders; 27 educational measures; 13 cases were rejected; in 47 the

⁸⁶ Montenegro Government (2017) *Plan of activities for achieving gender equality in Montenegro (2017 - 2021)*, available at: <http://www.mmp.gov.me/en/library/strategije?alphabet=lat>.

⁸⁷ Women's Rights Centre (2017) *NGO Report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Montenegro*, Podgorica, 2017, p. 18.

⁸⁸ GREVIO (2018) *Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Montenegro*, available at: <https://rm.coe.int/grevio-reportmontenegro/16808e5614?fbclid=IwAR2VBn5O235bINHGMhDo054E-7vi4pL691uFy0LEm9MEhxNRkdSPn27Dww>.

procedure was stopped; in 368 cases the acquittal was passed, while 53 cases were resolved in a different way. In addition, 408 protective measures were imposed (302 in 2017), including: removal from an apartment or other living space - 65; prohibition of access - 116; prohibition of harassment and arrest - 154; compulsory psychiatric treatment and addiction treatment - 64; compulsory psychosocial treatment - 8; and enhanced supervision by parents - 1.

In the 1 563 cases completed, proceedings were conducted against 1 781 defendants, of which 1 732 were adults and 49 were minors. The defendants consisted of: 1 395 adult men and 337 women; and 40 male minors and 9 female minors.⁸⁹

Out of 1 563 completed cases, there were 1 817 victims of violence in total, out of which 1 664 (90.75 %) were adult victims and 168 (9.25 %) were minors. Of the 1 649 adult victims of violence, in 1 089 cases (66.04 %), the victims were women and in 560 cases they were men. Out of 168 victims of violence who were minors, in 104 cases the victims were male, and in 64 cases they were female.

In the complaints procedures, the High Misdemeanour Court of Montenegro in the course of 2018 had 139 cases for violations of the Law on Domestic Violence Protection (in 2017, there were 96 cases), of which 121 were in regular procedures; 3 were cases in procedures for pronouncing a protective measure before initiating a misdemeanour procedure; 13 were execution procedures and two were from the category of 'other cases'. Of the 121 cases that were resolved in a regular misdemeanour procedure, 117 were new, and 4 were administratively returned from 2017; 10 cases were dropped due to significant violations of the provisions of the misdemeanour procedure, and 5 cases were dropped because of an incomplete determination.

In the reporting year – as in the previous year – the Protector had 11 cases of gender-based violence. In nine cases, violations of rights and recommendations were given to the guardianship authorities, the police and judicial authorities that dealt with specific cases of gender-based violence, one was solved by pointing, while in one case no discrimination or violation was established under another law.⁹⁰

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

Montenegro signed the Istanbul Convention on 11 May 2011 and ratified it on 22 April 2013, so that it was among the first states in which the Convention came into force - 1 August 2014.

The existing national legal framework to combat violence against women includes several laws, strategies and mechanisms established at the national and local level.

The most important strategic documents on the protection of women against violence, either as their whole focus or through specific chapters/areas or sets of strategic goals are the following:

- *Strategy for Protection against Domestic Violence (2016-2020)*;
- *Action Plan for the Achievement of Gender Equality in Montenegro (2017-2021)*;
- *Strategy of combating human trafficking (2012-2018)*;
- *Strategy for Social Inclusion of Roma and Egyptians in Montenegro (2016-2020)*.

The legal framework for domestic violence covers a number of areas, including administrative and legal areas, and legal authorities for monitoring compliance.

⁸⁹ Annual Report on the Work of Minor Offences Courts: SU II br. 23/19 od 24.01.2019.

⁹⁰ Ombudsman (2019) *Report for 2018*, p. 183, available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

Legislation relating to violence against women and domestic violence includes:

- Law on Domestic Violence Protection, *Official Gazette*, Nos 46/2010 and 40/2011);
- Criminal Code, *Official Gazette*, Nos 70/2003, 13/2004, and 47/2006 and *Official Gazette*, Nos 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 14/2015, 42/2015, 58/2015, 44/2017 and 49/2018);
- Code of Criminal Procedure, *Official Gazette*, Nos 57/2009, 49/2010, 35/2015, 58/2015;
- Law on Misdemeanours, *Official Gazette*, Nos 1/2011, 39/2011, 32/2014, 43/2017 and 51/2017.

These laws relate to each other. For example, the Criminal Code in Article 220(5) provides that: 'Anyone who violates the measures which were ordered on the basis of law by court or other state authority as protection against domestic violence shall be punished by a fine or a prison term up to six months'.

The most important aspects of protection from domestic violence are regulated by law. The Law on Domestic Violence Protection (LDVP) regulates, among other things, the following issues: principles, concept and elements of domestic violence and family members; victim protection; protective measures and penal measures (Articles 36-39).

The LDVP defines domestic violence in Article 2:

'Domestic violence ('violence'), as used in this act, shall mean omission or commission by a family member in violating physical, psychological, sexual or economic integrity, mental health and peace of other family member, irrespective of where the incident of violence has occurred.'

According to the Article 8 of the LVPD, it will be particularly considered as constituting a violation of physical, psychological, sexual or economic integrity, mental health and peace of another family member, if a family member:

- uses physical force, irrespective of whether it inflicts a bodily injury on another family member;
- threatens to use force or induces danger that may provoke a feeling of personal insecurity or cause physical pain in another family member;
- assaults verbally, swears, calls name or otherwise insults another family member;
- denies another family member freedom of communication with third persons;
- exhausts through labour, deprives of sleep or other rest, threatens to expel from residence or take away children;
- sexually abuses another family member;
- stalks and otherwise severely abuses another family member;
- damages or destroys joint property or property of another family member or attempts to do so;
- denies means of subsistence to another family member;
- behaves rudely and so disturbs family peace of a family member that he does not share family community with.

Insufficient care by a family member to provide any of the following will also be considered as constituting a violation of physical, psychological, sexual or economic integrity, mental health and peace of another family member:

'food, personal hygiene, clothing, medical care or to ensure regular school attendance or his failure to prevent the child from being in harmful company, as well as from vagrancy, beggary or theft or otherwise severely neglect his duties concerning child development and education;

food, personal hygiene, clothing or medical care to other family member who he has a duty to take care of, where this family member needs special care for reason of his illness, disability, old age or other personal characteristics, which prevent him from taking care of himself.'

The failure to report (hiding) a family member with special needs will be considered as constituting a severe form of domestic violence.

The LDVP contains a broad definition of family members in Article 3. Thus, in addition to spouses (or former spouses), consensual partners (or former consensual partner) and children (those they have in common and their stepchildren), 'family members' means persons related by consanguinity and relatives by full and by incomplete adoption; relatives on the side of wife/consensual partner. Persons sharing the same household are also considered family members, irrespective of the nature of their relationship, as are persons who have a child in common or who have conceived a child.

This law pays special attention to the procedural aspects of the protection of victims of domestic violence. In this process, the provisions relating to them are particularly important and cover: a duty to report violence; emergency intervention policy and other public institutions; victim assistance plan, social care, victim security and procedure for the determination of protective measures.

The LDVP, in Article 20, stipulates that an abuser may be issued with one or more of the following protection orders:

- 1) order of removal from place of residence or other premises ('removal from residence');
- 2) restraining order;
- 3) prohibition of harassment and stalking;
- 4) mandatory addiction treatment;
- 5) mandatory psycho-social therapy.

The relevant legal framework for the criminal legal protection of victims of domestic violence predominantly encompasses the substantive aspects of domestic violence or family violence and is regulated by the Criminal Code of Montenegro, while the procedural aspects (procedures) are regulated by the Criminal Procedure Code.

The Criminal Code provides as a separate offence, violence during marriage and violence in the family, in Article 220 on 'Violence in the family or in the family community'. The law provides for a fine or a prison term up to two years for this offence, and where the offence was committed by means of weapons, dangerous tools or other instruments suitable for inflicting serious bodily injury or for seriously impairing one's health, the perpetrator may be punished by a prison term from three months to three years. The Criminal Code provides stricter sanctions in cases where the offences resulted in serious bodily injury or harm to one's health or where such offences were committed against a minor. In these cases, the perpetrator may be punished by a prison term from one to five years. Stricter sanctions apply in cases where the offences resulted in the death of a family member or member of the family community (a prison term of three to twelve years).

In Article 220, the Criminal Code sets out five forms of criminal offence: domestic violence (defined in paragraph 1); three others that constitute a qualified form of the criminal offence of domestic violence, referring to the degree of violence and the severity of the consequences of the violation of the physical or mental integrity of a member of his/her family or family community (paragraphs 2, 3 and 4); as well as a fifth form of criminal offence not related to the act of violence and its consequences, but to infringement of the measures that were ordered on the basis of law by court or other state authority as protection against domestic violence (paragraph 5).

In addition to the criminal offence of domestic violence, the Criminal Code provides for the possibility of undertaking temporary security measures. This possibility is set out in the Amendments to the Criminal Code (adopted in July 2013), introducing new protective measures/security measures against perpetrators of domestic violence or family violence, which is in line with the Istanbul Convention.

Thus, Article 77a of the Criminal Code provides for a measure on the prohibition of approaching the victim by the perpetrator of an offence against sexual freedom, a criminal offence of domestic violence or family violence, a criminal offence of genital mutilation or other criminal offence endangering the life or body of a person. The court determines the duration of the measure, which may not be shorter than one year or longer than five years.

In addition, the new Article 77b of the Criminal Code has introduced a special measure applicable to the perpetrators of the criminal offence: removal from an apartment or other living space if there is a danger that the perpetrator could re-execute the criminal offence. The court determines the duration of the measure, which may not be shorter than three months or longer than three years, counting from the date of the validity of the decision, while time spent in the prison will not be counted towards the duration of the measure. It is important to note that the person against whom the measure has been taken, must, in the presence of a police officer immediately after the final judgment, leave the apartment or other residential space that makes a joint household.

The Article 77b amendments to the Criminal Code from 2018 include two new offences in Chapter XIV on criminal offences against life and body: female genital mutilation (Article 151a) and forced sterilisation (Article 151b).

Article 151a provides as follows:

‘Whoever cuts out the outer parts of female genitals shall be punished by imprisonment for one to eight years.’

Forced sterilisation is regulated in Article 151b:

‘Whoever uses force or threatens the sterilisation of another person in order to disable his reproduction shall be punished by imprisonment of three months to five years.’

Amendments to the Criminal Code of 2018 provide a new criminal offence of persecution: ‘This criminal offence is regulated under Chapter XIV criminal offences against life and body, which is in accordance with Article 34 of the Istanbul Convention’.

According to the Article 168a, someone is persistently persecuted by another person if during a specified period of time, the persecutor: 1) follows without authorisation or takes other actions in order to physically approach this person; 2) tries to establish contact with the person contrary to their will directly, through a third party or by means of communication; 3) misuses that person’s personal information in order to order goods or services; 4) threatens an attack on a person's life, body or freedom or close relationship; 5) undertakes other similar actions against that person. This offence is punishable by a fine or imprisonment for a term not exceeding three years. If the offence has been committed against a former marital or extra-marital partner or a minor or a pregnant woman, the offender can be punished by imprisonment of three months to five years. The Criminal Code provides sanctions where the act constitutes a danger to the life, health or body of another person or a close person (the offender may be punished by imprisonment of three months to five years) and in the event that the offence results in the death of another person or a close person, the offender may be punished by imprisonment for a term between one and ten years.

Furthermore, paragraph 2 of Article 204, which regulates the criminal offence of rape, has changed, so that it now provides that:

'Whoever coerces the other on a promise or equality with it by the use of force or by threatening to directly attack the life or body of that or another person, shall be punished by imprisonment of two to ten years'.

Thus, it can be concluded that Article 204(2) implies a more serious form of criminal offense – rape – because it implies the application of coercion.

The Criminal Code in Article 142, paragraph 31 defines who are members of the family or the family community, and in this way determines who can be passive subjects in the commission of the criminal act of 'domestic violence':

'Family members are also considered to be former spouses, blood relatives and relatives from complete adoption in the right line without restriction, and in the sloping line, concluding with the fourth degree, relatives from incomplete adoption, relatives through marriage conclusively with the second degree, persons living in the same family household and persons who have a shared child or a child on the road to be born although they have never lived in the same family household.'

Criminal aspects of domestic violence are regulated by the Code of Criminal Procedure, which regulates certain types of supervision measures against the defendant (Articles 166-169). As a measure of supervision, the law prescribes:

- 1) a ban on leaving the apartment;
- 2) prohibition of leaving the place of residence;
- 3) prohibition to visit a specific place or area;
- 4) obligations occasional reporting to a particular state body;
- 5) prohibition of access or meeting with certain faces;
- 6) temporary seizure of travel document;
- 7) temporary seizure of driver's licence.

10.1.3 National provisions on online violence and online harassment

Online violence and online harassment of women and girls are not regulated under national law.

10.1.4 Political and societal debate

Pursuant to Article 12 of the Decree on the election of representatives of non-governmental organisations,⁹¹ which requires the involvement of NGO representatives in the working bodies of the state administration body and the holding of a public hearing in the preparation of laws and strategies, the Ministry of Justice issued a public invitation to citizens, professional and scientific institutions, state bodies, professional associations, political parties, non-governmental organisations, media and other interested bodies, organisations, associations and individuals (interested public) to get involved in the process of the preparation of the draft law on changes to the Law on Domestic Violence Protection.⁹² It is anticipated that the hearing will last for 20 days.

Within the deadline, a proposal was submitted to the Ministry of Justice by the Ministry of the Interior's Operational Team for Combating Domestic Violence and Violence Against Women.

⁹¹ Montenegro, Decree on the election of representatives of non-governmental organisations, *Official Gazette* No. 41/18.

⁹² The invitation was issued by the Ministry of Justice on 17.04.2019.

The Operational Team for Combating Domestic Violence and Violence Against Women proposed amendments to the Law on Domestic Violence Protection in such a way as to amend the definition of family members, to amend Article 23 in terms of name and content, and to amend Article 28, which refers to an order that determines a control measure to change the length of a control measure. There is also a proposal to amend Article 36 in order to increase the misdemeanour liability of a family member as well as to supplement the same article in order to prescribe a special amount of punishment for perpetrators who are repeat offenders.

10.2 Ratification of the Istanbul Convention

Montenegro ratified the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence, CETS no.210 (the Istanbul Convention) on 22 April 2013 and it entered into force on 1 August 2014.

When submitting a certificate of ratification, Montenegro, in accordance with Article 78(2)(1), and in relation to Article 30(2) of this Convention, expressed the following reservation:

'Montenegro reserves the right not to apply the provision of Article 30 paragraph 2 hereof of the Convention, as the harmonisation of national legislation with the above is in progress by the provision of the Convention.'⁹³

Article 30(2) provides for the following:

'Adequate state compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or state-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.'

According to the Ombudsman's report for 2018,⁹⁴ the number of criminal, misdemeanour and civil cases undoubtedly indicates a continuous trend or even an increase in domestic violence cases, regardless of whether it is a real indicator or an illusion arising from intensified activity to make this phenomenon more visible and the greater use of protection mechanisms.

When it comes to responding to domestic violence, the challenge is still to properly measure the sanctions, which must punish the perpetrator in proportion to the offence, and be effective and dissuasive. Although in a traditional environment, such as that of Montenegro, the protective measures of removal from the living space, the prohibition of admission and other measures adapted to the specific case and abuser are barely acceptable, they cannot have only a repressive or preventive function, but at the same time must send a clear social message that violence is not tolerated and that it cannot pass without sanction.

⁹³ Montenegro, Law on the confirmation of the Council of Europe Convention on the Prevention and Combating of Violence against Women and Domestic violence, Article 3, *Official Gazette*, No. 4/13.

⁹⁴ Ombudsman (2019) *Report for 2018*, p.132. available at: https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

There are no surveys available.

11.1.2 Other issues related to the pursuit of a discrimination claim

The Montenegrin environment is predominantly patriarchal, with a culture that highly values domination and power. Stereotypes of gender roles, the patriarchal model of gender relations, economic and social crisis and poverty create a favourable climate for domestic violence against women and children. Women usually do not talk about violence and endure it because of caring for children, lack of awareness of their rights and protection possibilities, the isolation and control mechanisms that the perpetrator subjects them to, feelings of guilt imposed by the patriarchal environment, material dependence, feelings of shame, lack of self-confidence, lack of support and similar reasons. Myths and beliefs that are present in Montenegrin society contribute to minimising the problem of domestic violence. This climate also impedes the enforcement of sex discrimination claims.

11.1.3 Political and societal debate and pending legislative proposals

There is no relevant debate.

11.2 Victimisation

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

Article 4 of the LPD reads:

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

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

Article 6 of the LGE states:

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

So far, those provisions have not been interpreted in any relevant case law. Unfortunately, there are many law enforcement officers who are ignorant of the notion of victimisation.⁹⁵

⁹⁵ Research interviews undertaken in the first three months of 2016 by the author of this report.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

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

The LPD, in Articles 24-30, provides judicial protection against discrimination. Accordingly, anyone who believes that a violation has taken place in the form of discriminatory treatment by an authority, a company, another legal person, an entrepreneur or a natural person, has the right to the protection of the court, in accordance with the law.

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

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

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

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

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

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

11.3.2 Availability of legal aid

The Law on Free Legal Aid⁹⁶ applies to alleged victims of gender discrimination as well as to others whose financial situation means that they cannot afford to pay for legal services. In addition, victims of gender discrimination usually receive free legal aid from NGOs specialising in gender equality protection. Such aid takes the form of information, legal

⁹⁶ Montenegro, Law on Free Legal Aid, *Official Gazette*, No. 20/2011.

advice and representation. Free legal assistance is given through the Ombudsman, NGOs, and a free SOS telephone line.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

Not relevant.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

Not relevant.

11.5 Burden of proof

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

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

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

The current Article 29 of the LPD, which concerns the burden of proof, is not in line with the wording of Article 8 of Directive 2000/43 and thus would need to be amended.

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

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

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

Article 33 of the LGE provides for fines for the legal entity (EUR 1 000 to 10 000), responsible persons in the legal entity (EUR 150 to 2 000) and for the entrepreneur (EUR 150 to 3 000) if a woman, due to pregnancy or maternity, or a person because of gender reassignment, has been placed in a less favourable position compared to other persons, during employment, self-employment, the exercise of rights to social protection and other rights.

Article 33a of the LGE provides for fines for the legal entity (EUR 500 to 5 000), responsible persons in the legal entity (EUR 150 to 1 000) and for the entrepreneur (EUR 150 to 1 500) in the following cases:

- 1) If in its work it does not use gender-sensitive language, or in laws on employment or a contract of employment, acts on the election or appointment of persons, as well as in acts on the election of academic titles, acts on deployment and other acts deciding on the rights and obligations of employees

- and other public documents and records, it does not express the titles of all jobs, occupations, titles and functions, in the natural gender;
- 2) If it does not provide for training to employees in achieving gender equality;
 - 3) If statistical data and information collected, recorded and processed are not expressed/aggregated by gender;
 - 4) If it does not submit to the Ministry, within the prescribed period, a report on achieving gender equality within its jurisdiction;
 - 5) If it does not specify the officer who will perform a coordinating activity in gender equality issues, or who participates in the preparation and implementation of the Action Plans.

11.6.2 Effectiveness, proportionality and dissuasiveness

In practice, cases of discrimination are not treated as urgently as they should be. However, there has been some progress in the approach to such cases, as demonstrated by the Ombudsman's report on non-pending cases and the effectiveness of courts reported by the Judicial Council above. However, the reaction of state bodies or other respondents remains slow, there are massive amounts of bureaucracy and psychological barriers to access justice and so on. Sanctions need to be higher in order to meet their purpose, which was a point suggested to the drafters of the amendments to the LPD. The fines remain inappropriately low compared to the fact that proceedings are long, uncertain and often ineffective.

11.7 Equality body

In Montenegro, the Protector of Human Rights and Freedoms of Montenegro, (the Institution of the Human Rights and Freedoms of Montenegro Ombudsman)⁹⁷ is in charge of the implementation of Montenegrin anti-discriminatory gender legislation, as well as the requirements of EU gender equality law. There are two main responsibilities with regard to discrimination: to prevent and to protect from discrimination.

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

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

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

The Ombudsman has a range of powers, out of which the most relevant are: receiving and considering claims regarding discrimination; providing an opinion and recommendations in specific cases as a sort of pre-trial arrangement/solution; providing information to a complainant on his/her rights and the potential for initiating a court procedure or other

⁹⁷ <http://www.ombudsman.co.me>.

type of protection measure; and filing complaints for protection from discrimination on behalf of, but with the approval of, the victim of discrimination.

In addition to shortcomings in human and financial resources, the Ombudsman has reported that its work has been made more difficult due to the lack of relevant evidence books on cases and records in respect of discrimination. In law, the Ombudsman has been given the role of monitoring the situation in relation to discrimination cases processed before various enforcement bodies. Although the provision in the Law on Prohibition of Discrimination is clear and imperative, the bylaws and regulations to this act are vague and ambiguous, (as already reported by the Ombudsman in its reports of 2014, 2015 and 2016). The notion of a discriminatory criminal offence or misdemeanour is significantly broader than the list of crimes and offences that include a personal attribute as a discriminatory ground, as previously reported.⁹⁸ The Ombudsman again pointed out the lack of an electronic database, and the lack of implementation of the 'Rulebook on the Content and Manner of Keeping Separate Records on Cases of Reported Discrimination', which is supposed to provide for the establishment of special records in the form of an electronic database, enabling the Ombudsman to gain immediate access to data.⁹⁹

11.8 Social partners

The social partners in Montenegro play an important role in ensuring compliance with and the enforcement of gender equality law. Their role is particularly evident in the work of the Social Council. The Social Council, according to the applicable legal framework, gives opinions on drafts and proposals of the laws and other regulations of importance for the economic and social status of employees and employers. Based on this process, the Social Council could be included in two stages in the process of adopting regulations (however, in practice, the Social Council is included in only one of these two stages). The first stage is before sending the text of regulation for Government discussion - when the text is in draft form. At this stage, the Social Council could have an impact on the amendment of decisions contained in the draft document. The second stage is when the text of the document is adopted by the Government and takes the form of the proposal - which the Government directs to the adoption procedure before the Parliament.

The Social Council, as a consultative body, is set out by the Constitution of Montenegro, which in Article 65 provides that the social position of employees shall be adjusted in the Social Council. Issues concerning the composition, scope of work and manner of work, financing and the levels at which it is established, as well as other issues of importance to the work of the Social Council are regulated by a separate law. According to Article 7 of the Law on the Social Council,¹⁰⁰ the Social Council considers and takes views on issues relating to:

- development and improvement of collective bargaining;
- the impact of economic policy and measures for its implementation on social development and the stability of employment,
- wage and price policies;
- competition and productivity;
- protection of work and environment,
- education and vocational training;
- health and social protection and security;
- demographic trends related to the International Labour Organization and
- other issues of importance for the realization and improvement of economic and social policy.

⁹⁸ Ombudsman (2016) *Report for 2015*, Podgorica, p. 133.

⁹⁹ Ombudsman (2017) *Report for 2016*, Podgorica, pp. 152 and 153.

¹⁰⁰ Montenegro, Law on Social Council, *Official Gazette*, No. 44/2018.

Social partners have an important role in the process of collective bargaining. According to Article 148(1) of the Labour Law, a collective agreement may be concluded as a general, branch and employer's collective agreement.

According to Article 4 of the Labour Law, the provisions of all collective agreements cannot be contrary to the law. Relevant acts in this context are the Labour Law, specifying the minimum rights of employees, and the General Collective Agreement,¹⁰¹ which is not designed to implement gender equality law. In addition, special collective agreements could be used to provide more extensive rights for employees, but not to provide fewer rights than are in the Labour Law.

11.9 Other relevant bodies

The Department for Gender Equality of the Ministry for Human and Minority Rights of the Government of Montenegro has been very active during the reporting period. It organises seminars and roundtable discussions, publishes brochures, and cooperates with governmental bodies, NGOs and international organisations on different matters. The NGO sector is also very active and vocal.

11.10 Evaluation of implementation

The GREVIO *Baseline Evaluation Report for Montenegro 2018* contains a systematic assessment of the measures undertaken by the national authorities in Montenegro with regard to all aspects of the Istanbul Convention. The GREVIO committee notes that the greatest attention in legislation and policymaking is devoted to domestic violence, and that measures that deal with other forms of violence against women have yet to achieve the same level of comprehensiveness, especially on issues of forced marriage, rape and persecution. It is disturbed by its observation that, despite the introduction of the standardised procedures provided for in the Protocol on the Treatment, Prevention and Protection against Domestic Violence, and extensive training efforts, law enforcement officials, judges and social workers, by their attitudes and prejudices, diminish the significance of violence by violating the trust of women in bodies in charge of preventing and protecting them from this offence.¹⁰²

Although there is a relatively good institutional and legislative framework to protect and promote human rights and freedoms in Montenegro, when it comes to protection against discrimination on grounds of gender, it is necessary to ensure further alignment with EU directives, especially in the area of exercising the right to maternity and parental leave, as well as the right to equal pay for men and women.

11.11 Remaining issues

There are no remaining issues.

¹⁰¹ Montenegro, General Collective Agreement 2014, *Official Gazette*, No. 04/2014 and 40/18.

¹⁰² GREVIO (2018) *Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Montenegro*, available at: <https://rm.coe.int/grevio-reportmontenegro/16808e5614?fbclid=IwAR2VBn5O235bINHGMhDo054E-7vi4pL691uFy0LEm9MEhxNRkdSPn27Dww>.

12 Overall assessment

In 2018, the anti-discrimination legislative framework of Montenegro is very much in accordance with the EU gender equality *acquis*. However, there are still aspects that need to be fully harmonised with the *acquis* and improved.

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

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

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

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

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

The UN Committee for the Elimination of Discrimination against Women issued its *Concluding Observations on the Second Periodic Report of Montenegro* (published on 21 July 2017). The Committee emphasises the key role of the legislative body in securing the full application of the Convention and invites the Parliament of Montenegro, in accordance with its mandate, to 'take the necessary steps' in relation to the implementation of these final observations:

'The Committee recommends that the State party substantially increase the human, technical and financial resources allocated to the implementation of gender equality legislation and legislation prohibiting gender or gender discrimination and to carry out an assessment of the impact of different efforts on capacity building, and to take the necessary measures on the basis of the outcome of that assessment to increase capacity building efficiency. These measures should also provide for the

dissemination of information aimed at the general public, and through cooperation with the Protector of Human Rights and Freedoms of Montenegro, on access to justice and the legal means available to obtain redress and reparations.¹⁰³

In addition, it recommends improving educational training for judges, prosecutors and lawyers, as well as the Protector of Human Rights and Freedoms of Montenegro, on the subject of the Convention, in order to 'directly apply or invoke its provisions in judicial or administrative proceedings and to interpret domestic law in compliance with it'.¹⁰⁴

Legislation in Montenegro contains normative guarantees expressing the administrative policy of Montenegro on equal access to legal and political processes, social services, health and medical care, education, literacy programmes, employment, property ownership and social services. Discriminatory provisions are not explicitly contained in any law, and all rights and obligations are equally applicable in the context of the legal framework both to women and men. However, this regulatory approach, called neutral norms, leaves space for discrimination in practice.

Given the current situation with regard to gender equality in Montenegro, it would be advisable for the institutional framework to be strengthened (if not in the sense of establishing a specialised commissioner for gender equality issues, then at least by providing for more staff and training with regard to the existing institution of the Ombudsman). It is important that additional measures are introduced, aimed at ensuring and promoting gender equality in certain areas of social life, where the unequal representation of women and men is a problem and an obstacle to realising equality. In addition, it is necessary to improve the promotion of gender-sensitive politics and to educate both genders in relevant matters.

Finally, in order to develop a culture of human rights and gender equality in Montenegro, it would be necessary to educate the youth. The Ministry for Human and Minority Rights pays attention to this target group, organising events aimed at them and in their premises, such as schools and educational centres. Furthermore, given that schools and universities have no relevant courses to cover the issue of gender equality, the role of the NGO sector is extremely important. In Montenegro, the sector is doing a very good job in promoting gender equality and providing assistance and protection to women in need, such as the NGOs Women's Safe House and the Women's Rights Centre, as previously reported.

¹⁰³ UN Committee on the Elimination of all forms of Discrimination against Women (2017) *Concluding Observations on the Second Periodic Report of Montenegro*, p. 2. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMNE%2fCO%2f2&Lang=en.

¹⁰⁴ Ombudsman (2018) *Report for 2017*, p. 162. Available at: http://www.ombudsman.co.me/docs/1522665383_final-izvjestaj-za-2017.pdf.

Bibliography

- Ministry of Human and Minority Rights of Montenegro (2018) *Women and men in Montenegro*, Podgorica, available at:
<http://monstat.org/userfiles/file/publikacije/Zene%20i%20muskarci%20u%20Crnoj%20Gori%202019%20preview%20FINAL.pdf>.
 - Government of Montenegro - Ministry of Defence (2017), *Action Plan for implementation of United Nations Security Council Resolution 1325 Women, Peace and Security in Montenegro (2017-2018)*, available at:
<http://www.mod.gov.me/en/library>
 - Ministry for Human and Minority Rights (2017) *Gender Equality Action Plan (2017-2021) with a programme of implementation for the period 2017-2018*, available at:
<http://www.mmp.gov.me/en/library?alphabet=lat>
 - Ministry of Human and Minority Rights (2015), 'Information on the Participation of Women in the Legislative, Executive and Judicial Power in Montenegro', Podgorica.
 - Ministry of Human and Minority Rights (2015), *Guidelines for creating a favourable environment for female entrepreneurship in local communities*, Podgorica.
 - Montenegrin Employers Federation (2017) *Report: Women in Management in Montenegro*, Podgorica, available at:
<http://www.poslodavci.org/biblioteka/publikacije/vise-zena-u-menadzmentu-kljuc-uspjesnog-poslovanja>
 - Ombudsman (Protector of Human Rights and Freedoms of Montenegro) (2018) *Report for 2017*, available at:
http://www.ombudsman.co.me/docs/1522665383_final-izvjestaj-za-2017.pdf.
 - Ombudsman (2019) *Report for 2018*, available at:
https://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf
 - UN Committee on the Elimination of Discrimination against Women (2017) *Concluding Observations on the Second Periodic Report of Montenegro*, available, at:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMNE%2fCO%2f2&Lang=en.
- Women's Rights Centre (2017) *NGO Report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Montenegro*, Podgorica.
- <https://rm.coe.int/report-ngo-montenegro-2/168073c980>.

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: https://europa.eu/european-union/contact_en.

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service: – by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls), – at the following standard number: +32 22999696, or – by email via: https://europa.eu/european-union/contact_en.

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european-union/index_en.

EU publications

You can download or order free and priced EU publications from: <https://publications.europa.eu/en/publications>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa.eu/european-union/contact_en).

EU law and related documents

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>.

Open data from the EU

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

