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including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Montenegro

Maja Kostić-Mandić*

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* The author has gratefully built on the reports written until 2018 by the previous expert Nenad Koprivica.

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EXECUTIVE SUMMARY

1. Introduction

Montenegro is one of the successor states of the former Socialist Federal Republic of Yugoslavia. During the turbulent history of the Balkans, Montenegro has changed its status several times. From being an independent state in the late 19th century, in 1918 it became a part of what would later be called Yugoslavia. Although an equal member of the Yugoslav Federation, Montenegro only regained full independence in a referendum in 2006 when it became an independent state. The 2007 Constitution defined it as a civic and ecological state based on the sovereignty of the citizen. At present, it is a member of NATO and a moderately prepared candidate country for membership of the European Union.

According to the most recent census in 2011, Montenegro has a population of 622 781 and an area of 13 812 square kilometres. The country is comprised of 23 municipalities with different demographic, economic and cultural characteristics. Although there is no formal division, three characteristic regions are the Northern, Central and Southern parts of Montenegro. Most of the country's inhabitants live in the central area which, together with the capital, Podgorica, is the most important administrative and industrial region.

Montenegro is a multi-ethnic and multi-confessional state in which no nation has a numerical majority. The 2007 Constitution of Montenegro in its Preamble refers to free and equal citizens, belonging to nations and national minorities living in Montenegro: Montenegrins, Serbs, Bosnians, Albanians, Muslims, Croats and others. The Montenegrins are the most numerous ethnic group, while the Serbs are the second largest group living in Montenegro. One peculiarity is that Bosnians and Muslims are listed as separate groups (although both of them adhere to the same religion, the status of the latter being a relic of the former Yugoslav constitutional legacy). The Law on Minority Rights and Freedoms implicitly recognises Roma as an ethnic group on the basis of their linguistic characteristics. The same Law defines 'minority people and other minority national communities' as 'any group of Montenegrin citizens which is less numerous than the rest of the predominant population, with common ethnic, religious or linguistic characteristics different from the rest of the population, being historically tied to Montenegro and motivated by a desire to express and preserve their national, ethnic, cultural, linguistic and religious identity' (Article 2).

All these ethnic groups (including Roma) have institutionalised their activities by forming national councils as special forms of expression and protection of their ethnic interests.

2. Main legislation

The Montenegrin legal framework consists of the Constitution, as the supreme legal act, and the laws of Montenegro. The Constitution itself prescribes the primacy of international agreements when a situation is regulated differently from national legislation. The basis of the standard of equality is contained in constitutional guarantees and special laws, of which the most important is the Law on the Prohibition of Discrimination (LPD). This law was passed in 2010 and has been amended on several occasions, the most important being the changes in 2017 which encompassed 17 provisions. It is a systemic law in the protection against discrimination. Its foundation is the European Convention on Human Rights and its protocols.

As the process of bringing Montenegro closer to the European Union has progressed, the law has increasingly adopted the principles and standards of the European directives on equality (this report focuses on Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directives 2000/43/EC and

2000/78/EC). This is clearly seen from the definitions and institutions on which anti-discrimination legislation is based in Montenegro.

It should be emphasised that even before the adoption of this systemic law, a whole set of laws in the fields of labour, education and healthcare, and in some other areas, contained so-called clauses on the prohibition of discrimination. In addition, in 2015 the Law on the Prohibition of Discrimination against Persons with Disabilities (LPDPD) was adopted, which is an extremely important basis for further development of the system of protection from inequality for people with disabilities. These laws have established a unique legal order that prohibits discrimination in all areas of work and life, regardless of whether it is legal or natural persons who are discriminated against or are the alleged discriminator.

The main novel development with regard to anti-discrimination in 2019 was the adoption of the new Labour Law (LL), which contains 11 articles in the respective fields aligned with the LPD and the directives.

Under the Law on the Protector of Human Rights and Freedoms of Montenegro, the Protector is a central mechanism for protection against discrimination. This role is multiple – promotional, proactive and protective. In addition to the promotion of equality, the Protector is authorised to conduct proceedings on individual complaints, initiate court proceedings or intervene in favour of the person seeking protection against discrimination and may also warn, point out or publicise about serious forms of discrimination.

The Law on Minority Rights and Freedoms addresses the status of national minorities in Montenegro and provides for three pillars which are of importance for the exercise of minority rights and freedoms: the obligation to adopt a State Minority Policy Strategy, the establishment of minority councils as bodies representing the interests of minorities in Montenegro and the establishment of the Fund for Minorities, through which projects of practical importance for the promotion and protection of minority rights are financed.

3. Main principles and definitions

The definition of discrimination and its prohibition are contained in provisions of the Constitution, the Law on the Prohibition of Discrimination, the Law on the Prohibition of Discrimination of Persons with Disabilities, the Labour Law, the Law on Minority Rights and Freedoms, the Law on Civil Servants and State Employees and other laws containing anti-discrimination clauses.

The LPD, as the systemic law, applies equally to the public and private sectors. The anti-discrimination provisions of other laws must be construed in accordance with the principles of this Law. Protected grounds of discrimination prescribed by this law are as follows: race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics (Article 2(2)). The protected grounds in the Labour Law are now aligned with those in the LPD, except for two distinctions: the omission of intersex characteristics as a protected ground and explicitly listing the membership or assumed membership of a syndicate as a protected ground.

The definition of direct and indirect discrimination is aligned with both directives (2000/43/EC and 2000/78/EC). Thus, the LPD in Article 2(3) states that direct discrimination exists if a person or a group of persons, in the same or similar situation in respect to another person or group of persons, is brought or were brought, or may be brought into an unequal position by an act, action or failure to act, on any ground referred to in the definition of discrimination contained in Article 2(2).

On the other hand, indirect discrimination, according to Article 2(4) of the same law, exists 'if an apparently neutral provision of a regulation or general act, criterion or practice is bringing or can bring a person or a group of persons into an unequal position in respect to another person or group of persons, on any ground referred to in paragraph 2 of this Article, unless the provision, criterion or practice is objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved'.

Thus, direct discrimination cannot be justified under any circumstances, whereas indirect discrimination can be justified if the objective is legitimate and the requirement is proportionate.

Discrimination through harassment or sexual harassment,¹ incitement or giving an instruction to discriminate and victimisation are recognised as forms of discrimination by the LPD.

With regard to direct and indirect discrimination, the LL mirrors the wording of the LPD in its Article 8, but it does not address incitement or giving an instruction to discriminate either in the same provision or elsewhere in the LL.

Article 1 of the LPDPD refers to the provisions of the LPD and other laws if they are not in conflict with this Law. In these circumstances, definitions of direct and indirect discrimination are drawn up from the general (systemic) prohibition law.

The duty to provide reasonable accommodation is explicitly defined in the LPDPD, so failing to take and failing to implement measures for adapting the workplace and working conditions in accordance with special regulations is considered as discrimination in the area of the professional rehabilitation and employment of persons with disabilities (Article 22(4)). The LL does not explicitly introduce the concept of reasonable accommodation, but it stipulates that if an employed person with disability cannot be allocated to a job that corresponds to their remaining work ability, level of education or professional qualifications, in accordance with the assessment of the competent authority for determining disability, the duty of the employer is to provide them with other rights, in accordance with the law governing the occupational training of persons with disabilities and collective agreement (Article 119(2)). This provision refers to an employee who becomes disabled while in employment, pursuant to paragraph 3 of the same Article. If the employer cannot provide the person with other rights, in accordance with the law governing the occupational training of persons with disabilities and collective agreement, the employer may declare that the work that that person does has ceased to exist.

The Constitution of Montenegro recognises the importance of regulations and the introduction of special measures (positive action) aimed at creating conditions for the realisation of national, gender and overall equality and the protection of people who are in an unequal position on any grounds. Special measures must be applied in proportion to the needs and possibilities and must last until the goals established by those measures are achieved (Article 8). The introduction and implementation of special measures is also provided by the above-mentioned laws in the areas of spatial planning and construction, information, transport, education, employment, labour, health, social protection, culture, public and political activity, as well as in other areas of social life in which there are reasons for their adoption or implementation.

¹ Although it is not explicitly mentioned in the LPD, in the absence of any case law it must be concluded that the wording 'any unwanted verbal, nonverbal or physical behaviour of a sexual nature which has the purpose of violating the dignity of a person or group of persons' means that same-sex sexual harassment is prohibited by this law.

The prohibition of multiple discrimination is included in the LPD (Article 20(1)), which states that, 'A grave form of discrimination, on any ground referred to in Article 2(2), of this Law shall be deemed to be discrimination 1) committed against the same person or group of persons on multiple grounds referred to in Article 2(2) of this Law (multiple discrimination)' [...]. Multiple discrimination cases have been recorded in previous reports by the Protector of Human Rights and Freedoms of Montenegro.²

The LPD prohibits discrimination by assumption as discrimination based on 'assumed membership of a group, political party or other organisation or other personal characteristics' (Article 2(2)). These provisions still need to be interpreted in order to clarify whether they encompass all the grounds covered by the directives. However, discrimination by association is not explicitly prohibited.³

4. Material scope

The material scope of the prohibition of discrimination regulated by the Law on the Prohibition of Discrimination is in line with the wider material scope of the Racial Equality Directive. In addition to labour, employment and vocational training, it applies to the following areas: access to and supply of goods and services in the public and private sectors, including housing; use of facilities/buildings and areas in public use; social protection, including social security and healthcare; social advantages; and education.

The LPDPD also covers access to information and communications; access to public transport; appropriate living standards; political and public life; culture; and sport, recreation and leisure activities. The Labour Law (LL) more precisely prescribes that discrimination shall be prohibited in relation to: 1) employment requirements and selection of candidates for the performance of a particular job; 2) terms of employment and all rights arising from the employment relationship; 3) education, training and professional development; 4) promotion at work; 5) termination of the contract of employment. The LL explicitly states that provisions of that Law relating to the prohibition of discrimination apply to the public and private sectors alike, and different stipulations cannot therefore be applied in any other specific law (Article 2(5)).

National legislation covers social protection, including social security and healthcare as formulated in the Racial Equality Directive. Under the Constitution, everyone has the right to health protection, and children, elderly people, people with disabilities and pregnant women have the right to health protection from public revenues, if they do not exercise this right on any other grounds.

5. Enforcing the law

The enforcement of anti-discrimination laws provides for several options. A person who complains of discrimination may address the inspection bodies, depending on their actual jurisdiction; the Protector; the courts; and, pursuant to the LL, alternative dispute resolution forums.

Under Article 27 of the Law on the Protector of Human Rights and Freedoms (LPHR), the Protector shall be the national institutional mechanism for protection against discrimination. The LPD provides the Protector with powers consistent with the requirements of Directive 2000/43/EC.⁴ These powers include assistance to victims, conducting surveys on discrimination and publishing reports and making recommendations

² See Protector of Human Rights and Freedoms, reports from previous years.

³ European Commission against Racism and Intolerance (ECRI) (2017) *ECRI report on Montenegro (Fifth monitoring cycle)*, p. 12.

⁴ Council Directive 2000/43/EC of 19 July 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), OJ L 180, Article 13, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>.

for the elimination of discrimination, including the possibility to initiate and participate in court proceedings.

Anyone who considers they have been discriminated against by an act, action or failure to act by an authority or other legal or natural person, may address the Protector with a complaint. The complaint can also be submitted to the Protector by organisations or individuals dealing with human rights protection, with the consent of the person or group of persons discriminated against. Action on the complaints must be conducted in compliance with regulations setting up the manner of operation of the Protector, unless that law provides otherwise.

In addition, anyone who considers they have suffered damage due to discriminatory treatment by an authority or other legal or natural person is entitled to court protection. Organisations or individuals who are involved with protection of human rights may also file a lawsuit on behalf of people who have been discriminated against. Such a lawsuit may only be filed with the written consent of the person or group of persons who have experienced discrimination.

If the Protector of Human Rights and Freedoms finds that a violation has occurred, he or she issues an opinion and makes a recommendation to the body concerned, specifying what needs to be done in order to correct the violation. The Protector also sets a deadline for compliance with this recommendation. The body is then under a duty to provide the Protector with a report detailing the measures taken with a view to implementing the recommendations. If the body fails to comply with the recommendation from the Protector, the Protector can either refer the matter to an immediately superior authority or address the Parliament of Montenegro or the public. The Protector cannot issue binding decisions.

The LPD provides for the right to bring an action before the court to seek: 1) a finding that the defendant has acted discriminatorily towards the claimant; 2) prevention of the commission of an act that is threatening discrimination, or prohibition of a repetition of an act of discrimination; 2a) elimination of the consequences of discriminatory treatment; 3) compensation for damage, in accordance with the law; and 4) in cases where discrimination is perpetrated through the media, publication in the media of the judgment establishing discrimination, at the cost of the respondent (Article 23).

The burden of proof is regulated by Article 29 of the LPD: when the claimant submits evidence, which demonstrates the likelihood that the respondent committed an act of discrimination, it is for the respondent to prove that there was no breach of equal rights and equality before the law. The rule on the burden of proof applies in proceedings before the court and the procedure for protection from discrimination before the Protector of Human Rights and Freedoms. The provision relating to the burden of proof does not apply to misdemeanour and criminal proceedings.

The LL introduces an obligation on an employee who considers themselves to be a victim of discrimination: before filing a complaint with the court, they must start a procedure before the Agency for Peaceful Settlement of Labour Disputes or the Centre for Alternative Dispute Resolution. A person who is no longer employed is entitled (but not obliged) to act in the same manner (Article 16(1) and (3)). The LL introduces a rule on shifting the burden of proof that is similar to the rule in the LPD (the requirement to prove that no violation of equality in rights and equality before the law occurred due to the act passes to the respondent). This rule applies in proceedings before courts, the aforementioned institutions or other competent bodies alike (Article 142(2)).

Generally speaking, all the enforcement mechanisms for protection against discrimination are rarely used in practice. Victims are reluctant to pursue the enforcement of their equal rights, and their confidence in the chances of obtaining redress remains low. However, the Protector of Human Rights and Freedoms has recorded a continuous increase in the number

of cases seeking protection against discrimination. According to the latest available data, from the period between 1 January and 31 December 2018, the Protector dealt with 155 discrimination cases (of a total of 916 cases), while in 2017 there were 135 cases (of a total of 889). Of the 146 finalised cases in 2018, in 30 cases the Protector issued 76 recommendations on various subjects, and in 18 cases the procedure was suspended because the violation was eliminated during the procedure.

A small number of anti-discrimination cases are recorded before the basic courts: according to the latest available data in 2018, only six litigations for protection against discrimination were initiated. On the other hand, according to the latest available data in 2018, the prosecutors in Montenegro filed 227 criminal charges for criminal offences with elements of discrimination. Of those cases the largest number were related to gender-based violence, while a very small number of cases were relevant to the grounds covered by this report. This can be inferred from the court criminal cases statistics in 2018, where only four cases concerning violation of equality were registered: violation of equality (one), violation of the right to profess a religion (one) and national, racial and religious hatred and intolerance (two). In the absence of complete information on these cases, it was not possible to determine in which specific areas discrimination occurred.

The Montenegrin legislation provides for sanctions in cases of discrimination. The LPD and the LL provide for numerous offences. The sanction is most often a fine, but for some offences one or more safeguards may be imposed, either alone or with a fine or warning measure: confiscation of objects; prohibition on performing a certain vocation, activity or duty; and making the decision public. The Criminal Code provides for the criminal offences punishable by imprisonment. At present, there is no available information on the application and effectiveness of penalties.

Some positive activities in 2019 include the amendment of the Law on Civil Procedure to enable easier access to justice as the costs of translation into sign language shall be borne by court funds, and the adoption of several strategic documents: *Strategy for Minority Policy (2019-2023)*; *Strategy for Inclusive Education in Montenegro (2019-2025)* (for pupils with disabilities), accompanied by an action plan; and *Action Plan for Implementation of the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020* (the latter provides for numerous activities aimed at awareness-raising in respect of discrimination).

Dialogue and consultation with NGOs on disability rights is very active, and NGO representatives often take part in joint working groups and are consulted on different occasions. The Roma organisations are becoming more visible, especially regarding housing and education issues. The promotion of dialogue between different social partners in the field of labour is functioning well.

6. Equality bodies

The Protector of Human Rights and Freedoms was established as an institutional mechanism for protection against discrimination (equality body) and undertakes measures including receiving and handling complaints, providing legal advice to victims, engaging in mediation and conciliation activities and representing complainants in court (initiating the procedure for protection against discrimination in court or appearing in proceedings as an intervener). Independent assistance given to victims by the Protector includes engagement or assisting in litigation in order to address structural and systematic discrimination in cases selected by the Protector because of their prevalence, seriousness or need for legal clarification (Article 21 of the LPD). Thus, the Law provides the Protector of Human Rights and Freedoms with powers consistent with the requirements of both directives.

7. Key issues

The main problems encountered in implementing the standards of the European Equality Directives relate to:

- vulnerability of certain social groups which are particularly marginalised in society and do not have the capacity to recognise discrimination and to protect themselves against it (Roma, disabled people);
- availability and effectiveness of procedures and remedies for protection against discrimination;
- interpretation of the exceptions of discrimination;
- application of the burden-of-proof principle and in particular the moment when this obligation is passed on to the potential discriminator;
- proper application and interpretation of terms related to discrimination such as: direct and indirect discrimination, instruction to discriminate, discrimination by association, etc.;
- application of the principle of victimisation;
- appropriate and dissuasive sanctions in court cases and inspection procedures;
- misunderstanding and non-application of positive measures and their implementation for the benefit of particularly vulnerable groups (disabled people, Roma);
- lack of statistics on discrimination from the point of view of prevention and as the evidence in discrimination proceedings;
- the need to strengthen the autonomy and independence of equality bodies in accordance with European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 2 (revised) and the European Commission Recommendation as of 22 June 2018 on standards for equality bodies.

INTRODUCTION

The national legal system

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

Montenegro has ratified all the major international human rights treaties, including the European Convention on Human Rights and its Protocol 12, the European Social Charter (revised) and United Nations conventions – the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol to this Convention, the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Rights of Child and the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

Montenegro has also ratified two main Council of Europe minority rights instruments – the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities.

Montenegro is also a state party to International Labour Organization (ILO) conventions, including those on discrimination in employment and occupation and the Equal Remuneration Convention.

International treaties are directly applicable in Montenegro and do not need to be incorporated by an act of Parliament, thus theoretically offering effective protection against discrimination in domestic law, although the courts seldom invoke international law as a basis for their decisions. Article 9 of the Constitution provides that, 'ratified and published international agreements and generally accepted rules of international law shall form an integral part of the national legal order, shall have supremacy over national legislation and shall be directly applicable when they regulate relations differently from domestic legislation'. There is no unanimous doctrinal attitude, neither in the official legal attitude of the Constitutional Court nor in that of the Supreme Court, regarding whether the supreme position of the Constitution over other sources remains the case. In practice, Montenegrin courts rarely invoke international anti-discrimination standards other than those deriving from the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. If and when they do so, the courts generally invoke the norm without properly engaging in a discrimination test in accordance with the generally accepted standard of testing.⁵

A somewhat different situation applies when the standards of the UN Convention on the Rights of Persons with Disabilities are applied but only when it comes to the accessibility of public buildings. However, even in these cases there is no reference to specific case-law from the jurisprudence of international judicial or quasi-judicial bodies.

The Stabilisation and Association Agreement with the European Union came into force on 1 May 2010. This international treaty has had far-reaching consequences for the legal order of Montenegro. Namely, according to Article 72 of this agreement, Montenegro has committed itself to gradually approximating its legislation and policies with the *acquis* in line with the European Partnership priorities. With the same provision Montenegro

⁵ For example, Nikšić Basic Court, decision of 11 October 2017, P. No. 1890/15.

undertook to harmonise national legislation in line with EU law. This process was supposed to start on the date of signing of this Agreement, gradually being extended to all the elements of the *acquis communautaire* until the end of the transition period of five years, as defined in Article 8. Approximation at an early stage was focused on fundamental elements of the internal market *acquis*, including financial sector legislation, justice freedom and security, as well as on trade-related areas. At a further stage, Montenegro must focus on the remaining parts of the *acquis*. Finally, Montenegro must ensure that existing and future legislation will be properly implemented and enforced.

Bearing this in mind, each piece of legislation submitted to the Parliament for adoption must be accompanied by an assessment of the level of harmonisation with, *inter alia*, primary and secondary sources of EU law. Montenegro has opened 29 of the 35 chapters, of which three have already been provisionally completed within the negotiation process with the EU. Two of the crucial chapters which have been opened are Chapter 23 (Judiciary reform and fundamental rights), which among other things covers non-discrimination of marginalised groups in employment, and Chapter 24 (Justice, freedom and security). Negotiations relating to these chapters will last until the end of the negotiation process. This is a new approach by the European Commission which is being implemented for the first time in the case of Montenegro.

List of main legislation transposing and implementing the directives

Title of the law: Law on the Prohibition of Discrimination,⁶ *Official Gazette of Montenegro*, Nos. 46/2010, 18/2014, 42/2017

Date of adoption: 6 August 2010

Entry into force: 13 August 2010

Grounds protected: race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics.

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

Title of the law: Criminal Code,⁷ *Official Gazette of Montenegro*, Nos. 070/03, 013/04, 047/06, 040/08, 025/10, 073/10, 032/11, 064/11, 040/13, 056/13, 014/15, 042/15, 058/15, 044/17, 049/18

Date of adoption: 17 December 2003

Entry into force: 3 January 2004

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

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

Title of the law: Labour Law,⁸ *Official Gazette of Montenegro*, No. 74/19

Date of adoption: 30 December 2019

Entry into force: 6 January 2020

⁶ Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro* (*Službeni list Crne Gore*), Nos. 46/2010, 18/2014 and 42/17.

⁷ Criminal Code (*Krivični zakonik*), *Official Gazette of Montenegro*, Nos. 40/2008, 25/2010, 32/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017 and 49/2018.

⁸ Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, No. 74/19.

Grounds protected: race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party, syndicate or other organisation as well as other personal characteristics

Material scope: employment

Title of the law: Law on Minority Rights and Freedoms,⁹ *Official Gazette of Montenegro*, Nos. 31/06, 51/06 and 38/07, 02/11, 08/11, 31/17

Date of adoption: 10 May 2006

Entry into force: 20 May 2006

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

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

Title of the law: Law on Professional Rehabilitation and Employment of Persons with Disabilities,¹⁰ *Official Gazette of Montenegro*, Nos. 49/08, 73/10, 39/11, 55/16

Date of adoption: 29 July 2008

Entry into force: 23 August 2008

Grounds protected: disability

Material scope: employment

Title of the law: Law on the Prohibition of Harassment at Work,¹¹ *Official Gazette of Montenegro*, Nos. 30/12, 54/16

Date of adoption: 29 May 2012

Entry into force: 16 June 2012

Grounds protected: not specified¹²

Material scope: employment

Title of the law: Law on the Prohibition of Discrimination of Persons with Disabilities,¹³ *Official Gazette of Montenegro*, Nos. 35/15, 44/15

Date of adoption: 26 June 2015

Entry into force: 15 July 2015

Grounds protected: long-term physical, mental, intellectual or sensory disability

Material scope: applies to all fields protected by the Law on the Prohibition of Discrimination (education, labour, provision of goods and services)

⁹ Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), *Official Gazette of Montenegro*, Nos. 31/06, 51/06, 38/07, 02/11, 08/11 and 31/2017.

¹⁰ Law on Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji zapošljavanju lica sa invaliditetom*), *Official Gazette of Montenegro*, No. 49/08, 73/10, 39/11, 55/2016.

¹¹ Law on the Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), *Official Gazette of Montenegro*, Nos. 30/12, 54/2016.

¹² Although the grounds of discrimination are not explicitly stated in this law, from the case law it may be concluded that they notably include group membership/trade union membership (Supreme Court of Montenegro, judgment of 25 April 2017, Rev. 554/2017); age (Supreme Court of Montenegro, judgment of 14 June 2017, Rev. 689/2017); and ethnicity (Nikšić Basic Court, judgment of 11 October 2017, P. No. 1890/2015).

¹³ Law on the Prohibition of Discrimination of Persons with Disabilities (*Zakon o zabrani diskriminacije lica sa invaliditetom*), *Official Gazette of Montenegro*, Nos. 35/15, 44/15.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution contains a general prohibition in Article 8 of both direct and indirect discrimination 'on any grounds'.¹⁴ So far the Constitutional Court has addressed discrimination issues only in the context of abstract control of legislative compliance with the Constitution in relation to social benefits in the childcare system and access to polling stations for disabled people.¹⁵ In addition, Article 7 of the Constitution states that, 'infliction or encouragement of hatred or intolerance on any grounds shall be prohibited'. As can be concluded from this formulation, the constitutional protection from discrimination in Montenegro is wider than required by the directives, since it includes a potentially limitless list of grounds. An illustration of what might constitute these grounds can be found in Article 25 of the Constitution, which provides that:

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

Since the concept of discrimination from EU law has not yet been applied in the practice of the Constitutional Court, this judicial institution analyses the violation of the principle of non-discrimination/equality before the law, primarily based on principles developed in the jurisprudence of the European Court of Human Rights (ECtHR). Therefore, on the basis of the legal reasoning of the Constitutional Court, the analysis of the existence of discrimination is subject to a procedure consisting of three interdependent elements (similar, i.e. comparable situations where there is equal or different treatment, difference in treatment based on the individual's particular status, less favourable treatment due to the individual's status or equal treatment in significantly different circumstances).¹⁶

The Constitutional Court examined the concept of protected grounds in a review of the constitutionality of the law on the payment of foreign currency funds of citizens deposited with a number of banks operating in the territory of Montenegro. In this case, the Constitutional Court did not accept the fact of residence (domicile) as a protected ground which could lead to violation of the principle of equality, that is, non-discrimination.¹⁷

The Constitution explicitly guarantees broad special welfare-based protection for people with disabilities (Article 68) and equality between men and women (Article 18). With regard to the latter, the Constitution also provides for the state's duty to develop equal opportunities policy (also Article 18). Other provisions of the Constitution contain guarantees of equality before the law (Article 17) and equal protection of rights and freedoms (Article 19) and prohibit 'infliction or encouragement of hatred or intolerance on any grounds' (Article 7) and 'operations of political and other organisations directed towards [...] instigating national, racial and religious and other hatred and intolerance' (Article 55).

The Constitution permits positive action by providing that, 'regulations and introduction of special measures aimed at creating conditions for the exercise of national, gender and overall equality and protection of people who are in an unequal position on any grounds shall not be considered discrimination'. Under the Constitution, special measures may only

¹⁴ Constitution of Montenegro, Article 8, *Official Gazette of Montenegro*, No. 1/07.

¹⁵ Constitutional Court, decision U-I No. 6/16; Constitutional Court, decision U-I No. 32/14.

¹⁶ Constitutional Court, decision of 26 December 2012, U-I No 3/09.

¹⁷ Constitutional Court, decision of 22 October 2009, U No. 95/08.

be applied until the achievement of the aims for which they have been undertaken (Article 8).

The anti-discrimination provisions of the Constitution are directly applicable. They apply to all areas covered by the directives. Their material scope is broader than that of the directives. These provisions can be enforced against private individuals as well as against the state, although no relevant case law is available. Unlike the Constitutional Court, the Protector of Human Rights and Freedoms of Montenegro (the Protector) has a different approach based on the Stabilisation and Association Agreement and its applicability in Montenegro. In 2019, in a case relating to discrimination on the basis of nationality in employment,¹⁸ the Protector issued an opinion invoking Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. In another two cases relating to, respectively, age discrimination in employment¹⁹ and disability discrimination in employment²⁰ the Protector issued an opinion invoking Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directives 2000/43/EC and 2000/78/EC).

¹⁸ Protector of Human Rights and Freedoms, Opinion No. 01-339/19-2, 28 June 2019, available at: http://www.ombudsman.co.me/docs/1562758608_28062019-preporuka-pl.pdf.

¹⁹ Protector of Human Rights and Freedoms, Opinion No. 263/19, 16 September 2019, available at: http://www.ombudsman.co.me/docs/1572434114_16092019-preporuka-ma.pdf.

²⁰ Protector of Human Rights and Freedoms, Opinion No. 692/18, 19 July 2019, available at: http://www.ombudsman.co.me/docs/1564563125_19072019-preporuka-tv.pdf.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation (as listed in the Introduction) transposing and implementing the two EU anti-discrimination directives: race, skin colour, national affiliation, affiliation to a minority nation or national minority community, language (as an aspect of ethnicity),²¹ religion or belief, disability, age, social or ethnic origin, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, material status, marital or family status, membership of a group or assumed membership of a group, political party, syndicate or other organisation as well as other personal characteristics.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

a) Racial or ethnic origin

The Constitution of Montenegro in its Preamble emphasises the determination that, 'we, as free and equal citizens, members of peoples and national minorities living in Montenegro: Montenegrins, Serbs, Bosnians, Albanians, Muslims, Croats and others are committed to democratic and civic Montenegro'. In Article 79 the Constitution proclaims that, 'persons belonging to minority nations and other minority national communities shall be guaranteed... rights and liberties, which they can exercise individually or collectively with others'.

Racial origin

In Article 17 of the Law on the Prohibition of Discrimination, a definition of 'racial discrimination' was provided in accordance with the General Policy Recommendation No 7 of the European Commission against Racism and Intolerance:²²

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

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

²¹ The concept of ethnicity implies a group with a common nationality, religious faith, language, cultural and traditional origin, as expressed in paragraph 46 of the CJEU's judgment of 5 February 2014, *CHEZ Distribution Bulgaria AD v. Commission for the Protection of Discrimination*, C-83/14 (issued in response to a request for a preliminary ruling under Article 267 of the TFEU from the Administrative Court of Sofia). On this occasion, the ECJ also referred to the case law of the European Court of Human Rights in relation to Article 14 of the ECHR and its judgments in the following cases: *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, ECHR 2005-VII and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, paras. 43 to 45 and 50, ECHR 2009).

²² European Commission against Racism and Intolerance (ECRI) (2012) *ECRI Report on Montenegro*, p. 13, available at: www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Montenegro/MNE-CbC-IV-2012-005-ENG.pdf.

Ethnicity

Regarding ethnic origin, there is a wide definition of minorities under the Law on Minority Rights and Freedoms,²³ where people from minorities and other minority communities are defined as 'any group of citizens of Montenegro, numerically smaller than the rest of the predominant population, having common ethnic, religious or linguistic characteristics, different from those of the rest of the population, being historically tied to Montenegro and motivated by the wish to express themselves and maintain their national, ethnic, cultural, linguistic and religious identity' (Article 2). No difference between a national and an ethnic minority is recognised by the law.

Numerically, the largest national/ethnic communities in Montenegro are Montenegrins, Serbs, Bosnians, Albanians and Muslims and the smallest are Roma, Egyptians, Croats and others. According to public opinion research conducted by an NGO, the Centre for Democracy and Human Rights,²⁴ ethnic distance (measuring the extent to which individuals or groups are removed from or excluded from participating in one another's lives based on their ethnic affiliation) in relation to the Roma population is a matter of concern. The data indicate that almost every second citizen of Montenegro exhibits considerable distance from the Roma population, which is a particularly vulnerable group. The issue of Roma inclusion remains a serious challenge for institutions and Montenegrin society as a whole.

b) Religion and belief

There is no definition of religion or belief as such in Montenegrin law. Although it is an anachronous law which certainly requires significant changes in this area, the Law on the Legal Position of Religious Communities²⁵ is still applicable. Article 8 stipulates:

'Citizens cannot be restricted in exercising their rights under the law because of their religious beliefs, affiliation with a religion or religious community, or because they perform or participate in performing religious ceremonies and other religious sentiments.

No-one may enjoy any privileges, advantages or special protection on the basis of [their] religious beliefs.'

Article 9 of this Law stipulates:

'Religious observances and congregations may be performed in churches, temples and official premises of religious communities, as well as in the grounds and cemeteries associated with these buildings if they form an integral part of them.

Religious gatherings and religious activities may be performed in other publicly accessible premises used by the religious community in accordance with the law. These premises must form a separate unit, have a separate entrance and meet the requirements laid down by law for gathering people and holding rallies.'

The LPD defines discrimination based on religion or belief. Article 17 states that:

'Discrimination based on religion or belief is considered to be any act contrary to the principle of freedom of religion. That is, any unequal treatment, differentiation, or

²³ Law on Minority Rights and Freedoms, *Official Gazette of Montenegro*, Nos. 31/06, 51/06, 38/07, 2/11, 8/11, 31/17.

²⁴ CEDEM (2013) *Etnička distanca u Crnoj Gori: Empirijsko istraživanje (Ethnic distance in Montenegro: empirical research)*, p. 19, available at: www.cedem.me/publikacije/studije-i-javne-politike/download/69-studije-i-javne-politike/720-etnika-distanca-2013.

²⁵ Law on the Legal Position of Religious Communities (*Zakon o pravnom položaju vjerskih zajednica*), *Official Gazette of Montenegro*, Nos. 9/77, 26/77, 29/89, 39/89, 27/94, 36/03.

placing in an unequal position of a person on the basis of religion or personal beliefs, as well as affiliation or non-affiliation to a religious community.’

In this way, the definition of discrimination based on religion or belief fulfils the need to ensure respect for the principle of freedom of religion, which requires freedom of choice and cannot be restricted in terms of the rights of members of these communities and individuals who share other beliefs. Membership of these organisations determines the rules of conduct of their members and these cannot be considered discriminatory. The community has the right to determine its internal rules as a fundamental human right, provided those rules do not exceed the level stipulated by international standards of human rights, which in each specific case is decided by the competent state bodies and, ultimately, the international bodies, including the European Court of Human Rights and the European Court of Justice.²⁶

c) Disability

The definition of ‘disability’ is provided for by several pieces of national legislation.

According to the Law on the Prohibition of Discrimination of Persons with Disabilities (LPDPD) in Article 2(2), ‘a person with a disability is a person who has a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder the full and effective participation of this person in society on an equal basis with others’.

Within the meaning of the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD), a person with a disability is an individual with permanent consequences of physical, sensory or mental disorders or diseases that cannot be cured by medical treatment or rehabilitation, and who faces social and other restrictions that may affect their ability to work and pursue employment, to enjoy the maintenance and advancement of employment and for whom it is not possible or for whom there are reduced opportunities for inclusion in the labour market on equal terms (Article 3).

However, the definition of disability provided by LPREPD is not in line with the judgment in *HK Danmark (Ring and Skouboe Werge)* because it requires ‘permanent consequences’, although this is not an issue in practice, since the LPDPD also covers employment and has a broader definition of disability. The definition of disability provided by the LPDPD is broader than the CJEU case law definition as it refers to participation in society rather than professional life as prescribed by CJEU case law.

In addition to the LPDPD and LPREPD, several specific laws also contain definitions of disability for the purposes of those laws. The general anti-discrimination rules in the Constitution and in other pieces of legislation apply in connection to their provisions.

According to the Law on Pensions and Disability Insurance,²⁷ disability exists when, due to changes in their state of health, which cannot be eliminated by treatment or medical rehabilitation, an individual experiences a complete loss of working ability. Disability also exists when, due to changes in their health condition that cannot be eliminated by treatment or medical rehabilitation, an insured employee experiences partial loss of

²⁶ The CJEU, in its judgment of 14 March 2017 in *Achbita v. G4S Secure Solutions NV*, C-157/15, stated that: ‘... the EU legislature referred, in recital 1 of Directive 2000/78, to fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’), which provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.’

²⁷ Law on Pensions and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of Montenegro*, Nos. 54/2003, 39/2004, 79/2004, 47/2007, 79/2008, 14/2010, 78/2010, 34/2011, 66/2012, 38/2013, 61/2013, 60/2014, 10/2015, 42/2016 i 55/2016, Article 30.

working capacity of 75 %. Disability in the sense of this article may arise due to injury at work, occupational diseases, injuries or illness. According to the Law on Social and Child Care,²⁸ a person with disabilities means a 'person with longstanding physical, mental, intellectual or sensory disorders which, in conjunction with diverse barriers, can make difficult full and effective participation of these persons in the society based on equality with others'.

From the definitions presented it can be concluded that some laws still use a restrictive definition of disability based exclusively or primarily on medical indicators. However, recent legislation and, above all, special laws directly governing the protection of people with disabilities use (for the most part) the guidance contained in the UN Convention on the Rights of Persons with Disabilities (Article 2(3)).

'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

d) Sexual orientation

The Law on the Prohibition of Discrimination explicitly defines discrimination based on sexual orientation as 'any differentiation, unequal treatment or putting a person in an unequal position based on sexual orientation'. In Article 19 of the LPD, sexual orientation refers to 'emotional and/or physical attraction or sympathy towards persons of the same and/or different sex'.

Although the existing definition is not in conflict with legally binding international standards, it seems that it could be subject to some improvement by applying the Yogyakarta principle according to which sexual orientation is:

'...understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.²⁹

e) Age

Age as a ground of discrimination has not been defined in the Montenegrin legislative framework. However, the LPD in Article 13 prohibits discrimination based on age: 'Disabling or restricting the exercise of the rights or any other unjustified differentiation or unequal treatment of a person or a group of persons on the basis of age, shall be deemed to be discrimination.'³⁰

Unlike the legislature and the courts, the Protector has in practice established a standard according to which age discrimination entails different treatment of other age groups and not just against elderly people. Thus, the Protector found discrimination between persons over the age of 26 and younger than this age in relation to the use of health services and medical devices.³¹ In a 2019 case, the Protector found that prescribing an age requirement for pilots (who must be under the age of 30 at the time of applying for the job) constitutes age discrimination in employment³² and referred in its deliberation to Directive

²⁸ Law on Social and Child Care (*Zakon o socijalnoj i dječijoj zaštiti*) *Official Gazette of Montenegro*, Nos. 27/13, 01/15, 42/15, 47/15, 56/16, 66/16, 01/17, 31/17, 42/17, 50/17, Article 19.

²⁹ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 2007, 'Introduction', p 6.

³⁰ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/2010, 18/2014 and 42/17, available at: <http://www.mmp.gov.me/en/library/zakoni>.

³¹ Protector of Human Rights and Freedoms, Opinion No. 823/17 of 25 June 2018.

³² Protector of Human Rights and Freedoms, Opinion No. 263/19 of 16 September 2019, available at: http://www.ombudsman.co.me/docs/1572434114_16092019-preporuka-ma.pdf.

2000/78/EC, Article 6. However, in this case, there was no reference to CJEU case law on discrimination on the ground of age.

2.1.2 Multiple discrimination

In Montenegro, multiple discrimination is prohibited by law in Article 20(1)(1) of the LPD:

'A grave form of discrimination, on any ground referred to in Article 2(2) of this Law shall be deemed to be *inter alia* that:

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

In Montenegro, there is no case law dealing with multiple discrimination. Although multiple discrimination is defined by law as a grave form of discrimination (LPD, Article 20(1)), specific criminal policy has not been developed in relation to this form of discrimination. However, higher levels of compensation can be awarded for multiple discrimination, as there is a broad range of fines for offences (EUR 1 000 to EUR 20 000 – LPD, Articles 34, 34a and 34b).

As already mentioned, multiple discrimination cases are registered in the reports of the Protector, especially when it comes to women who are affected by discrimination not only on the ground of gender, but also on other grounds, such as disability, belonging to a group, work experience, marital status, maternity, etc. The available data regarding the 2019 cases do not address multiple discrimination on the grounds covered by this report.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Montenegro discrimination based on assumed membership of a group is prohibited in national law. The Law on Civil Servants and Employees,³³ as well as the Law on the Prohibition of Discrimination,³⁴ prohibits discrimination on the ground of 'belonging to a group or assumed membership of a group, political party or other organisation' with the identical wording. These provisions still need to be interpreted in order to clarify whether they encompass all the grounds covered by the Directives.

b) Discrimination by association

In Montenegro, discrimination based on association with people with particular characteristics is not prohibited in national law. Although international monitoring mechanisms³⁵ have pointed to the lack of an explicit norm on discrimination through association, this type of discrimination has still not been explicitly recognised in Montenegrin legislation. Currently, beside the direct and indirect discrimination the LPD also contains provisions on inciting, assisting and giving instructions to discriminate, as well as an announced intention to discriminate.

The Protector of Human Rights and Freedoms has registered a case of discrimination by association concerning the mother of a child with special developmental needs who was disadvantaged when she was stigmatised by her employer in relation to work-related benefits (prevented from participating in work and sports activities with the reasoning that

³³ Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, Nos. 02/18 and 34/19, Article 7.

³⁴ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/2010, 18/2014 and 42/17, Article 2(2).

³⁵ ECRI (2017), *Report on Montenegro (Fifth monitoring cycle)*, p. 12.

she had to take care for her child with disabilities).³⁶ The Protector's opinion did not explicitly state that this was discrimination by association, but stated that the basis of discrimination was a blood kinship with the child with a disability.³⁷

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

a) Prohibition and definition of direct discrimination

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

Article 2(1) of the LPD prohibits direct discrimination and Article 2(3) defines it. The LPD provides that direct discrimination exists if a person or a group of persons, in the same or similar situation in respect to another person or group of persons, is/are placed, was/were placed, or may be placed in an unequal position by an act, action or failure to act, on any ground proposed by law.³⁸ The previous law defined discrimination as any, 'unjustified, legal or factual, direct or indirect distinction'. The amendments to the LPD adopted in 2017 deleted the term 'unjustified' because direct discrimination cannot be justified. Although the list of grounds of discrimination is prescribed as open, two personal characteristics have been added in 2017 (sex change and intersex characteristics) by which the explicit provision has reduced the space for the flexible interpretation of personal characteristics arising from the different sexual and gender experience of each individual. However, the practical impact of these provision has still to be seen. This definition of direct discrimination is in line with the directive. The new Labour Law contains a provision on the prohibition of discrimination (Article 7) and direct discrimination that is fully aligned with the definitions provided for in the LPD.

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

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

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

b) Justification of direct discrimination

National law does not include articles that permit justification of direct discrimination, except in respect of age.

³⁶ Protector of Human Rights and Freedoms, Opinion No. 408/15 of 9 November 2015.

³⁷ Protector of Human Rights and Freedoms, Opinion No. 408/15 of 9 November 2015: 'The very notion of discrimination indicates that a personal characteristic can be derived both from the immediate membership of a particular group or from another affiliation, in this case the fact of being the parent of a child with developmental disabilities'.

³⁸ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10, 18/14 and 42/17, Article 2(3).

The justification of direct discrimination should be distinguished from the exceptions to discrimination provided for in both Directive 2000/78/EC and the LPD.

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

a) Prohibition and definition of indirect discrimination

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

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

The new Labour Law contains a provision on the prohibition of discrimination and indirect discrimination (Article 7) that is fully aligned with the definitions provided for in the LPD.

According to Article 4 of the Law on the Prohibition of Discrimination of Persons with Disabilities, discrimination based on disability is any legal or factual, direct or indirect, intentional or unintentional unequal treatment or failure to act towards a person or group of persons with disabilities compared to other persons, as well as exclusion, restriction or preference of a person compared to a person with disabilities, as a result of which the person with a disability is hindered in or denied the recognition, enjoyment or exercise of human rights and freedoms in political, educational, economic, social, cultural, sporting, civil and other areas of public and private life. In this way, no distinction has been made between direct and indirect discrimination, which may cause problems with interpretation. However, this provision must be linked to the subsidiary application of the LPD which complements the provisions of Law on the Prohibition of Discrimination of Persons with Disabilities.

Furthermore, the Law on Professional Rehabilitation and Employment of Persons with Disabilities, in Article 5, explicitly prohibits both direct and indirect discrimination in its respective field.

b) Justification test for indirect discrimination

National law includes provisions that permit justification of indirect discrimination, if the provision, criterion or practice are objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved (Article 2(4) of the LPD).

With regard to the justification test for indirect discrimination, there is no available court case law on testing proportionate means of achieving a legitimate aim in this respect. Furthermore, there are no data on court decisions on justification of discrimination.

On the other hand, the Protector of Human Rights and Freedoms has its own 'Guidelines for proceedings in discrimination cases' ('Smjernice za postupanje u slučajevima diskriminacije') in which the procedure for applying the test for indirect discrimination is set out. The test that is applied by the Protector consists of the following criteria: a)

establishing the existence of an apparently neutral rule and b) the particular disadvantage for people with a protected characteristic compared to others.

According to these Guidelines, in applying the test for the (objective and reasonable) justification of indirect discrimination, the Protector applies standards of legitimacy, appropriateness and necessity based on the application of the EU Equality Directives.

2.3.1 Statistical evidence

a) Legal framework

In Montenegro, there is legislation regulating the collection of personal data. Statistical evidence is not covered by national law in order to establish indirect discrimination, but in practice such evidence would be permissible. Data collection is governed by the Personal Data Protection Law.³⁹ Personal data means any information relating to an identified or identifiable natural person (Article 9(1)). Under this Law, personal data may be processed only for a purpose established by law or with the prior consent of the person concerned. In addition, the Law provides that personal data may not be processed more than necessary to achieve the purpose of processing nor in a way incompatible with this purpose.⁴⁰

The Law defines personal data concerning racial or ethnic origin, political, religious or other beliefs, social origin, trade union membership, health, sexual life or sexual orientation, biometric data and the data from offences and criminal records as special categories of personal data.⁴¹ The data belonging to any of these categories may be processed where:

- 1) the data subject has given their consent to the processing of the data;
- 2) the processing of personal data is necessary for employment in accordance with the law governing labour relations, with the need to prescribe adequate protection measures;
- 3) processing is necessary for the purpose of detecting, preventing or diagnosing an illness in the data subject or carrying out their medical treatment, as well as for the improvement of health services, in so far as the processing is done by a health worker or another person subject to the professional duties of maintaining confidentiality;
- 4) processing is necessary to protect the life, health or interests of the data subject or of another person where the data subject is incapable of giving their consent personally, as well as in other cases provided for by law;
- 5) the data subject has manifestly made personal data available to the public or the processing is necessary for the establishment or protection of legal interests;
- 6) processing is carried out in the course of the activities of an association or any other non-profit-seeking body with political, religious or other aims, provided that the data relates solely to the association or other organisation and that the data are not disclosed without the consent of the data subjects.⁴²

³⁹ Law on Personal Data Protection (*Zakon o zaštiti podataka o ličnosti*), *Official Gazette of Montenegro*, Nos. 79/08, 70/09, 44/12 and 22/17.

⁴⁰ The Law defines processing of personal data as, 'any operation which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction or any other operation performed upon personal data' (Article 9).

⁴¹ Law on Personal Data Protection, *Official Gazette of Montenegro*, Nos. 79/08, 70/09, 44/12 and 22/17, Article 9(7).

⁴² Law on Personal Data Protection, *Official Gazette of Montenegro*, Nos. 79/08, 70/09, 44/12 and 22/17, Article 13.

In this situation, it is obvious that there is a need to harmonise the terminology of the provisions of the law that regulates the conditions under which personal data can be used with the standards of the EU Personal Data Protection Regulation.⁴³

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

The 2011 census in Montenegro collected information on people with disabilities for the first time. As a result of efforts by NGOs, the Government's *Strategy for Integration of Persons with Disabilities in Montenegro (2016-2020)* proposed the creation of a central database on people with disabilities (to be managed by the Ministry of Labour and Social Welfare) but unfortunately this measure has not yet been implemented.

Under the Law on State Administration,⁴⁴ the Human Resources Management Authority is charged with monitoring the implementation of measures aimed at achieving proportional representation of national and ethnic minorities within state bodies. Thus, when applying in response to an internal announcement or an open advertisement or open competition, candidates may state their national or ethnic origin in their job applications.

Finally, Article 33 of the Law on the Prohibition of Discrimination prescribes the obligation of all state bodies that conduct proceedings dealing with alleged discrimination to establish a special, electronically managed database of such cases. At the request of the Protector of Human Rights and Freedoms (the central body for protection against discrimination), these bodies are obliged to provide all the statistical data from these records. The content and method of keeping records is established by the Rulebook⁴⁵ issued by the Ministry for Human and Minority Rights of Montenegro.

According to the latest available information such records have not been established by any state body, which significantly undermines all the efforts to combat discrimination. This applies particularly in proceedings where statistics might be used as relevant evidence in proving the existence or otherwise of discrimination.

a) Practice

In Montenegro, statistical evidence is not used in practice in order to establish indirect discrimination before the courts. Therefore, it is not possible to ascertain whether there would be any reluctance to use such evidence on the part of the courts.

According to Article 17 of the Law on Criminal Procedure,⁴⁶ 'courts and state prosecutors shall appraise the existence or non-existence of facts on which to base their decisions at their discretion'. Evidence collected in an unlawful way is not admissible in the courts. In addition, according to Article 9 of the Law on Civil Procedure, 'the court shall decide which facts shall be considered as proved, on the basis of free evaluation of evidence. The court shall conscientiously and meticulously evaluate each individual piece of evidence and all evidence in its entirety'.

⁴³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), Articles 9-11.

⁴⁴ Law on State Administration (*Zakon o državnoj upravi*), *Official Gazette of Montenegro*, Nos. 38/03, 22/08, 42/11 and 54/16.

⁴⁵ Rulebook on the content and method of keeping a special record of cases of reported discrimination (*Pravilnik o sadržaju i načinu vođenja posebne evidencije o slučajevima prijavljene diskriminacije*), *Official Gazette of Montenegro*, No. 50/14.

⁴⁶ Law on Criminal Procedure (*Zakon o krivičnom postupku*), *Official Gazette of Montenegro*, Nos. 57/09, 49/10, 47/14 and 02/15.

However, in several cases in 2019, the Protector addressed the significance of statistical evidence regarding indirect discrimination. In one case, it was claimed that a person had experienced discrimination on the ground of disability when applying for a position at a hospital; the claim relied on statistics in order to establish that no persons with disabilities were employed by the hospital.⁴⁷ In this case, five persons applied for two posts, one of them based at the hospital reception, and the claimant was the only applicant with disability. The Protector explicitly stated that statistics represent an important means of proof of discrimination, as the statements from both the hospital director and the claimant confirmed that at Bijelo Polje general hospital, there are no employees with disabilities, nor any internal action by the hospital to provide posts for the employment of persons with disabilities. The Protector referred to relevant national legislation, the UN Convention on the Rights of Persons with Disability and the practice of the ECtHR, but made no reference to specific case law.

In 2019, the Protector also addressed this issue in relation to the employment of national minorities. It established the existence of discrimination on the basis of nationality in employment. In its recommendation to the Centre for Social Work for the Municipalities of Plav and Gusinje,⁴⁸ it emphasises the centre's obligation to take 'due care in all future procedures for establishing an employment relationship with respect to the representation of the Albanian minority in the overall structure of employees, and to take action on the basis of statistics, in accordance with the principle of equality and special measures conditions for proportional representation of Albanians.' In its deliberation, the Protector referred to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Articles 1, 3(1)(a) and 5).

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Montenegro, harassment is prohibited and defined in national law. The Law on the Prohibition of Discrimination and the Labour Law include articles which prohibit harassment and sexual harassment, while the Law on the Prohibition of Harassment at Work⁴⁹ includes articles which prohibit harassment 'at work and in relation to work'.

The LPD in Article 7(1) provides a definition of harassment as follows:

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

Pursuant to Article 10 of the LL, harassment is defined as any undesirable conduct caused by any of the grounds referred to in its provisions on prohibition of discrimination and direct and indirect discrimination (Articles 7 and 8 of the LL). The LL in Article 10(2) mirrors the definition of harassment in the LPD; the only difference being that it refers to the person seeking employment as well as the employee, instead of following the general approach of the LPD and its numbering of articles). The prohibition of harassment and sexual harassment at work and in relation to work applies also in relation to access to

⁴⁷ Protector of Human Rights and Freedoms, Opinion No. 01-256/19-2, 5 June 2019, available at: http://www.ombudsman.co.me/docs/1562758329_05062019-preporuka-bp.pdf.

⁴⁸ Protector of Human Rights and Freedoms, Opinion No. 01-339/19-2, 28 June 2019, available at: http://www.ombudsman.co.me/docs/1562758608_28062019-preporuka-pl.pdf.

⁴⁹ Law on the Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), *Official Gazette of Montenegro*, Nos. 30/12 and 54/16.

vocational guidance, vocational training and advanced vocational training, promotion at work and termination of employment as well as other issues arising from employment (Article 10(1)).

The LL aligns its provisions with the directives, so there are now separate articles addressing the prohibition of discrimination in relation to access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 12), and to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 13).

Under the Labour Law, sexual harassment is defined as any unwanted verbal, non-verbal or physical conduct which has the aim or effect of violating the dignity of an individual seeking employment or an employee, in particular when such conduct creates an intimidating, hostile, degrading, unpleasant, aggressive or offensive environment (Article 10(3)).

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

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

This basically implies that any abuse at work and in connection with work is to be defined as 'mobbing', which is the exact word used in both the official Montenegrin text and the English version of the text of the law. In such a situation, it is difficult to understand and distinguish mobbing from harassment which is also prohibited in relation to work and in connection with work in accordance with Article 10 of the Labour Law. In this way, multiple sources of adjudication can create confusion over the application of substantive law when it comes to discrimination cases and cases based on a lawsuit for protection against mobbing.

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

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

The LL introduces a provision on 'harassment at work (mobbing)', which mirrors the aforementioned Article 2, and it directs the application of the Law on the Prohibition of Harassment at Work as *lex specialis*. It also includes encouraging or inciting others to conduct, within the meaning of paragraph 1 of this Article.

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

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

b) Scope of liability for harassment

In Montenegro, where harassment is perpetrated by an employee, liability lies with that employee, and in some cases with the employer.

The legal framework regarding liability for harassment (and mobbing/bullying) is quite complex and confusing and encompasses provisions of the Law on the Prohibition of Discrimination, the Law on Civil Servants and State Employees, the Law on Misdemeanours⁵⁰ and the Law on the Professional Rehabilitation and Employment of Persons with Disabilities.

Bearing in mind that the Law on the Prohibition of Discrimination prescribes harassment and sexual harassment as a special form of discrimination, the provisions on judicial protection provided by this law are also to be applied in relation to protection against harassment. Thus, Article 24 of the LPD stipulates that anyone who believes that they have been discriminated against by a state institution, commercial company, other legal entity, entrepreneur and/or natural person has the right to protection before a court in accordance with the law. In addition, this law provides for protection against discrimination in the administrative inspection proceedings in which different inspection bodies are engaged according to the field of their competence (Article 32 of LPD).

There are no exceptions to civil liability so that all holders of rights and obligations in legal order, including state bodies, are responsible.⁵¹ If a state body does not possess the capacity of a legal personality civil liability rests with the state as a legal person. According to Article 116 of the Law on Civil Servants and State Employees, civil servants or state employees are liable for damage caused unlawfully, intentionally or by extreme negligence at work or in connection with work for a public body. The state is liable for damage caused to a third party by a civil servant or state employee at work or in connection with work. The person who suffered the damage may also seek compensation from the civil servant or state employee who caused the damage, if the damage was done intentionally.

The Law on Misdemeanours also provides for the misdemeanour liability of legal and natural persons who commit a discriminatory offence (Articles 34, 34a, 34b, and 34c of the LPD) with an exception contained in Article 15 of the same law, which stipulates that state bodies, state administration bodies, local self-government bodies and local governments cannot be held responsible for an offence.⁵² It does not exclude the responsibility of the head of a state institution and / or other responsible person in a state or other body exercising public authority in accordance with the law.

A legal person is liable for an offence if it was committed by the act or omission of due supervision by the managing authority or the responsible person or by the action of another person authorised to act on behalf of the legal person. The legal person is responsible for the misdemeanour even in cases where it cannot be determined who the responsible person is within the legal person or the court finds that there are legal or actual obstacles for determining the liability of the responsible person (Article 17).

The LPDPD refers to the Law on the Prohibition of Discrimination as subsidiary when it comes to civil liability, while in relation to misdemeanour liability it prescribes the same responsible legal entities and individuals as mentioned above for the LPD and the Law on Misdemeanours. It envisages specific penal provisions in relation to the protection against discrimination of people with disabilities. Finally, when it comes to inspection this law provides for the same institutional mechanisms as the LPD.

⁵⁰ Law on Misdemeanours (*Zakon o prekršajima*), *Official Gazette of Montenegro*, Nos. 1/11, 6/11, 39/11, 32/14, 43/17, 51/17.

⁵¹ Supreme Court of Montenegro, judgment of 11 October 2018, No. 887/2018.

⁵² Law on Misdemeanours, *Official Gazette of Montenegro*, Nos. 01/11, 6/11, 39/11, 32/14, 43/17 and 51/17.

The Law on the Prohibition of Harassment at Work⁵³ prescribes that the following may be considered to be perpetrators of bullying: 'an employer in the capacity of a natural person, a responsible person engaged by the employer in the capacity of a legal entity, an employee or group of employees engaged by the employer or a third person with whom the employee or the employer have contact during the performance of tasks in the workplace' (Article 2(3)).

According to Article 10 of the Law, 'an employer shall be liable for the damage that a responsible person, an employee or group of employees causes to another employee through bullying, in accordance with the Law hereof. An employer who has compensated the damage caused by persons referred to in paragraph 1 of this Article shall be entitled to require payment of these damages from those persons'. The employer is responsible for the damage caused to another employee by a senior member of staff, employee or group of employees responsible for perpetrating bullying. The employer is responsible for paying/compensating for damages to the aggrieved persons from their own resources on behalf of the responsible person or persons/employees and then requiring fee paid damage (indemnity) from those responsible for the damage incurred (the senior staff member, employee or group of employees who perpetrated the bullying).⁵⁴

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

Article 370(1) of the Criminal Code establishes the prohibition of instructions to discriminate in all areas of life (without defining it), while the Law on the Prohibition of Discrimination provides a definition and prohibits instructions to discriminate. According to Article 2(5) of the LPD, 'the incitement or giving instruction to discriminate against a certain person or a group of persons on any ground referred to in paragraph 1 of this Article shall be deemed to be discrimination'. By referring to 'incitement', Montenegrin legislation goes beyond what is required by the Equality Directive, since the concept of 'incitement' is understood as being wider than the concept of 'instruction'. In Montenegro, according to Article 2 of the LPD and Article 4 of the LPDPD, instructions explicitly constitute a form of discrimination.

In practice, the Montenegrin Protector of Human Rights and Freedoms registered one case in 2017 in which discrimination was perpetrated by giving instructions to a state body to restrict the business activity of the victim. Discrimination occurred on the ground that the victim was closely related to the head of a certain opposition political party. The proof was

⁵³ According to the Law, bullying (or mobbing) is harassment at work. In addition to harassment and harassment at work, the Law also mentions sexual harassment.

⁵⁴ Indemnity represents a certain amount of money demanded by the employer from those responsible for the damage incurred by the aggrieved person.

derived from a letter from the director of a company with majority state ownership, with an interest in the issue, which was sent to the competent state authority.⁵⁵

b) Scope of liability for instructions to discriminate

In Montenegro, the instructor and the discriminator are liable. The legislation does not explicitly stipulate the sharing of civil liability between them. However, the Criminal Code, which criminalises, *inter alia*, racial and other discrimination, violation of the equality of citizens and violation of equality in employment, contains a general provision to the effect that anybody who incites another to commit a criminal offence is liable to the same punishment as the offender. Anyone who publicly incites violence or hatred against a group or member of a group determined on the basis of race, colour, religion, descent or national or ethnic affiliation shall be punished with imprisonment of between six months and five years (Article 370(1)). The LPD addresses incitement or giving instructions to discriminate only in one line (Article 2(5)) where it is explicitly defined as a form of discrimination.

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

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

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

In Montenegro the duty to provide reasonable accommodation in the field of employment is not explicitly prescribed by national law. However, the Law on Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD) stipulates that people with disabilities are to be employed under general or special conditions, in accordance with the law. Employment of people with disabilities under general conditions is considered to be employment with an employer without adjustments being made to the job or workplace. Employment of people with disabilities under special conditions encompasses the duty of the employer to adjust the job (work processes and tasks) and workplace (technical and technological equipment for the work station, assets and premises) to the needs of the person with disabilities who is going to be employed in the company (Article 15). This obligation on the employer is at the same time a right of the disabled employee. A person with a disability is employed in a special employment organisation if employment under general or special conditions is not viable (Article 15(5)).

The enforcement of these provisions of the law is monitored by the labour inspectorate which has a special unit supervising the implementation of occupational safety measures.

This provision must be read in conjunction with the provision of Article 22 of the LPDPD which considers the employment of people with disabilities without reasonable accommodation as discrimination in the field of vocational rehabilitation, work and employment if duty of reasonable accommodation is stipulated by the LPREPD.

If an employer fails to fulfil a reasonable accommodation obligation, that constitutes a form of discrimination, according to the LPDPD. The protection of disabled employees is achieved through inspections or civil litigation.

The legislative framework does not further regulate the manner in which this obligation must be fulfilled.

⁵⁵ Protector of Human Right and Freedoms, Opinion No. 01-491/17 of 29 December 2017, available at: http://www.ombudsman.co.me/docs/1516888788_29122017-preporuka-ul.pdf.

The LL does not explicitly introduce the concept of reasonable accommodation, but it stipulates that if an employed person (job applicants are excluded) with disability cannot be allocated jobs that correspond to their remaining work ability, level of education or professional qualifications, in accordance with the assessment of the competent authority for determining disability, there is a duty on the employer to provide them with other rights,⁵⁶ in accordance with the law governing the occupational training of persons with disabilities and the collective agreement (Article 119(2)). If an employee who has been assessed by the competent authority as having disability cannot be assigned to a suitable post nor provided with these other rights, the employer may declare them redundant (Article 119(3)).

In that case, an employee with a minimum 50 % disability is entitled to severance pay equivalent to a minimum of 12 average monthly salary payments if the disability resulted from injury outside work or from illness, or a minimum of 36 average monthly salary payments if the disability resulted from an injury at work or an occupational disease (Article 169(6)).

The Constitution guarantees special protection for people with disabilities (Article 68) but does not explicitly establish a duty to provide reasonable accommodation. However, the Constitution in Article 9 contains a principle on the primacy of international treaties when a certain legal issue stipulates differently from national legislation and at the same time obliges all state law enforcement authorities to apply international treaties directly in such situations. This further implies that, in the case of a legal gap or lacuna, the UN Convention on the Rights of Persons with Disabilities will be applied directly.

The purpose of reasonable accommodation is clear from Article 2 of the CRPD – it is to enable a disabled person to enjoy or exercise their rights 'on an equal basis with others'. The individual-oriented nature of the duty is also evident – from the reference to the making of modifications 'where needed in a particular case' and is also recognised in the following words of the CRPD Committee:

'...the duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, in her or his workplace or school, in order to enjoy her or his rights on an equal basis in a particular context. [...] Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation'.⁵⁷

In addition, Article 14 of the Law on Occupational Health and Safety⁵⁸ prescribes the rights, obligations and responsibilities of employers regarding the implementation of protective measures by preventing, eliminating and controlling risks at work, by informing and training employees, with the appropriate organisation and necessary resources. The employer is obliged to provide special health and safety protection for the work of people with disabilities, in accordance with this and other laws.

b) Practice and case law

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

⁵⁶ The LPREPD does not explain in any way what other rights are referred to.

⁵⁷ UN Committee on the Rights of Persons with Disabilities (2014), 'General Comment on Article 9 of the Convention', available at <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>.

⁵⁸ Law on Occupational Health and Safety (*Zakon o zaštiti i zdravlju na radu*), *Official Gazette of Montenegro*, Nos. 34/14, 44/18.

conditions for the purchase of equipment and tools required in order to employ a person with a disability and partial coverage of the costs of personal assistants.

The general provisions of the Montenegrin legislation that vaguely address the duty of reasonable accommodation have still not been appropriately and thoroughly implemented in practice.

This is especially true when taking into account Article 5 of the Employment Equality Directive, which can be broken into two constituent elements: 1) the employer's obligation to take 'appropriate measures' 2) unless this would result in a 'disproportionate burden' for them. Neither of these two elements is further clarified in the legislation or in the practice of Montenegrin institutions nor have standards on these issues been established in the context of jurisprudence from the Montenegrin courts.

c) Definition of disability and non-discrimination protection

As previously stated (see under a) and b) of the same section) there is neither a clear-cut definition of reasonable accommodation, nor any relevant practice in the application of provisions of the four relevant pieces of legislation (LPREPD, LPDPD, LL and the Law on Occupational Health and Safety) which vaguely address this issue.

According to Article 3 of the LPREPD, a person with disabilities is someone with permanent consequences of physical, sensory or mental disorders or diseases which cannot be cured by medical treatment or rehabilitation and who faces social and other restrictions which may affect their ability to work and pursue employment, to enjoy the maintenance and advancement of employment and for whom it is not possible or for whom there are reduced opportunities for inclusion in the labour market on equal terms. Pursuant to Article 5 of this Law, direct and indirect discrimination is prohibited during professional rehabilitation, recruitment and during the employment of people with disabilities.

The LPREPD stipulates in Article 15 a duty of reasonable accommodation in the case of 'employment under special conditions'. In order to claim protection from discrimination regarding reasonable accommodation, a person must have been previously assessed by the competent authority, so the same definition in Article 3 is therefore not applied to entitlement to reasonable accommodation and protection from discrimination.

The LPDPD defines disabled people as having long-lasting physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (Article 2).

Pursuant to Article 2 of this Law, discrimination against people with disabilities and groups of people with disabilities on any grounds is prohibited, as is any form of discrimination based on disability, in both the public and private sectors.

The employment of people with disabilities without reasonable accommodation is considered as discrimination in the field of vocational rehabilitation, work and employment if a duty of reasonable accommodation is stipulated by the LPREPD (LPDPD, Article 21(4), in connection with the LPREPD, Article 5). Therefore, the same requirements apply here as stipulated by the LPREPD.

The LL does not contain a definition of reasonable accommodation, but the relevant provision (Article 119(2)) should be interpreted in the light of Article 119(1) of the LL, which provides that only a person officially assessed as having a disability can receive a reasonable accommodation – a very restrictive definition. The protection from discrimination in relation to reasonable accommodation in the LL is restricted to that group and does not encompass job applicants.

The Law on Occupational Health and Safety addresses reasonable accommodation as one of the principles applied in implementation of the protective measures. According to Article 15 of this Law, the employer is obliged to implement protective measures 'by adaptation of work and workplace to the employee, especially with regard to job design, choice of means of work, choice of work and production methods, with particular regard to avoiding monotonous work and work at a certain speed and reducing their health effects.' This provision is obviously not confined to persons with disability.

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

In Montenegro, failure to take and implement measures to adjust the workplace and working conditions consistent with the special regulations, in accordance with the laws governing the field of work and the field of vocational rehabilitation and employment of people with disabilities, counts as discrimination (LPREPD, Article 5 and LPDPD, Article 21(4) in connection with LPREPD, Article 5) Accordingly, protection may be sought against this form of discrimination in civil proceedings and through inspections. The legislator neglected to include failure to take reasonable adaptation measures in misdemeanour and penal provisions. There is no appropriate practice or case law that can confirm or disprove the assumption that this obligation is sanctioned through the general obligation (referred to in Article 22(1)(5) of the LPDPD) to refrain from applying less favourable working conditions to people with disabilities.

The rule on sharing the burden of proof is foreseen for proceedings before the Protector and in court proceedings but not in criminal and misdemeanour cases.

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

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

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

In Montenegro, there is no legal duty to provide reasonable accommodation in respect of other grounds in the public or private sectors.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Montenegro, there are no residence or citizenship/nationality requirements for protection under the relevant national anti-discrimination legislation.

The right to protection against discrimination belongs to all natural and legal persons 'to whom the regulations of Montenegro apply', if they are discriminated against on any of the grounds referred to in Article 2(2) of the LPD. The position of EU and non-EU nationals is not especially addressed by the LPD but the Stabilisation and Association Agreement between EU and Montenegro addresses the prohibition of discrimination of nationals of the Parties among other, regarding movement of the employees (Article 49), education and vocational training (Article 102) and access to justice (Article 126).

The Labour Law explicitly stipulates that its provisions apply to foreigners who work for the employer in the territory of Montenegro if not provided otherwise by a special law (Article 2(3)).

Other laws addressing the rights of foreigners do not contain anti-discrimination provisions. The Law on Foreigners only explicitly stipulates the obligation on foreigners to respect the regulations in force in Montenegro and the decisions of state bodies during their movement, stay and work in Montenegro. Although it does not provide explicit protection against discrimination, those persons are protected by the Constitution of Montenegro and the LPD. The same interpretation should apply to asylum seekers and migrants.

With regard to the treatment of irregularly present migrants on its territory, Montenegro has fully implemented EU migration standards through the adoption of the Law on Foreigners⁵⁹ and the Law on International and Temporary Protection of Foreigners.⁶⁰

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

a) Protection against discrimination

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

The provisions of the Montenegrin Constitution which govern human rights and freedoms, including the prohibition of discrimination,⁶¹ do not distinguish between natural and legal persons and employ neutral terms to offer protection. Both categories are entitled to protection from discrimination. As the ultimate guardian of the human rights and freedoms set out in the Constitution, the Constitutional Court of Montenegro has made it clear that both natural and legal persons can seek protection of these rights.⁶²

⁵⁹ Law on Foreigners (*Zakon o strancima*), *Official Gazette of Montenegro*, Nos. 2/2018 and 3/19.

⁶⁰ Law on International and Temporary Protection of Foreigners (*Zakon o međunarodnoj i privremenoj zaštiti stranaca*), *Official Gazette of Montenegro*, Nos. 2/2017 and 3/19.

⁶¹ Constitution of Montenegro, *Official Gazette of Montenegro*, No. 02/07, Article 8.

⁶² The Court's 'Instruction for Completing a Constitutional Complaint Template' offers this clarification.

The Law on the Prohibition of Discrimination explicitly provides that both natural and legal persons may seek protection from discrimination on the basis of its provisions if they feel they have been discriminated against on any of the prohibited grounds⁶³ (Article 3).

Due to its nature, the provisions of the Labour Law (Article 5) offer protection only to natural persons who are either seeking employment or are already employed.⁶⁴

b) Liability for discrimination

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

With regard to criminal liability for discrimination, the regimes for natural and legal persons differ. Criminal liability in relation to natural persons is governed by the Criminal Code, Article 443, while liability in relation to legal persons is governed by a separate law. Under the Law on the Liability of Legal Persons for Criminal Offences,⁶⁵ a legal person can be held liable for criminal offences committed by persons acting on its behalf within the boundaries of their powers with the intention of obtaining benefits for the legal person. Liability of legal persons also exists where the action of the responsible person was in contravention of the business policy and orders of the legal person. Pursuant to Article 2 of the Law, the State of Montenegro, state and local authorities cannot be held liable for criminal offences, nor can a legal entity vested with public powers be held liable for a criminal offence committed in the performance of such powers.

With regard to civil law liability, national law does not distinguish between natural and legal persons and both natural and legal persons may be held civilly liable, for instance, under the LPD and the LPDPD.

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

a) Protection against discrimination

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

Article 3 of the LPD stipulates:

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

b) Liability for discrimination

In Montenegro, the personal scope of anti-discrimination law covers both the private and public sectors for the purpose of liability for discrimination.

The provision that allows employees and job applicants to initiate legal proceedings against employers (natural and legal persons, including the public sector) before the relevant court in cases of discrimination does not explicitly specify the type of legal proceedings, but it is clear that it covers both civil and administrative procedures regarding liability for discrimination in the workplace and employment in general (LL, Article 16). However, other

⁶³ Prohibited grounds are set out in the Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/2010, 18/2014 and 42/17, Article 2(2).

⁶⁴ Labour Law, *Official Gazette of Montenegro*, Nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/212, 31/14 and 04/2018.

⁶⁵ Law on the Liability of Legal Persons for Criminal Offences (*Zakon o odgovornosti pravnih lica za krivična djela*), *Official Gazette of Montenegro*, Nos. 02/07, 13/07, 073/10, 30/12 and 39/16.

pieces of legislation provide exceptions to that general rule by stipulating that the public sector, as an employer, cannot be liable in terms of misdemeanour liability (Law on Misdemeanours, Article 15) and nor may it bear criminal liability for discrimination (Law on Criminal Liability of Legal Entities, Article 2).⁶⁶ However, this applies to public bodies as institutions but does not exclude the liability of responsible persons holding positions in legal entities in general, including the public sector. On the other hand, institutions that have a special status, such as schools, healthcare institutions, social work centres, etc., are not exempted from liability for misdemeanours and criminal offences.

When it comes to civil liability, no one is exempted from claims for compensation for discrimination committed. State administration bodies do not have the status of legal entity and the state of Montenegro is responsible for the damage they may inflict. For damage caused to a third party by a civil servant in their work or in connection with that work and committed through extreme negligence, the state is entitled to a recourse claim against the civil servant in the amount of the total or part of that amount (Law on Civil Servants and Employees, Article 119(2)).⁶⁷

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

The LPD prohibits discrimination against people seeking employment, as well as employees or people who, on some other basis, perform work for an employer (Article 16).

The Labour Law, which contains anti-discrimination provisions (Articles 2, 7-16) described above, applies to the private sector, but also to employment with state bodies, the state administration and local authorities and public services, if otherwise not provided for by separate laws. The key law which governs employment-related issues in the public sector is the Law on Civil Servants and Employees.⁶⁸ This legislation contains only a prohibition of discrimination without further elaboration. It can therefore be concluded that anti-discrimination provisions contained in the general labour legislation also apply to this type of employment. In line with the two laws, appointed, but not elected, office holders are also covered by these provisions. In addition, general labour legislation also covers contract work but does not cover self-employment, as it applies only to people working for employers (Article 3).

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

- 1) not hiring people with disabilities who have equal or better qualifications, professional or working abilities than people without disabilities, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of people with disabilities;
- 2) limiting access by people with disabilities to employment, self-employment or occupation or membership of an organisation of workers or employers;
- 3) laying down more restrictive rules relating to work and working conditions, including dismissals and wages, for people with disabilities;
- 4) non-implementation of measures for adjusting the workplace and conditions for work in accordance with special regulations, and in accordance with the laws regulating

⁶⁶ See *Official Gazette of Montenegro*, Nos. 02/07, 13/07, 73/10, 30/12 and 39/16.

⁶⁷ Law on Civil Servants and Employees, *Official Gazette of Montenegro*, Nos. 02/18 and 34/19.

⁶⁸ Law on Civil Servants and Employees, *Official Gazette of Montenegro*, Nos. 02/18 and 34/19.

- the field of work and the field of professional rehabilitation and employment of people with disabilities; and
- 5) prescribing different and unfavourable conditions for a person or group of people with disabilities to exercise other rights arising from employment, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of people with disabilities.

In a series of cases in 2019, the Protector established that there was disability discrimination in employment.⁶⁹ In all cases there were several applicants for a position in a public institution (primary school/general hospital). In its reasoning, the Protector highlighted that, by failing to state objective, concrete and measurable criteria that influenced its decision-making in a statement of reasons, the public institution failed to prove that the fact the complainants were not employed was the result of an objective circumstance unrelated to a personal characteristic such as disability.

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

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

The main anti-discriminatory law, the Law on the Prohibition of Discrimination, in Article 16 prohibits discrimination on any grounds referred to in Article 2(2) of this Law, of people seeking employment, as well as employees or people who, on other grounds, perform work for the employer.

The Labour Law, which provides general labour-related regulations, applies to both the public and private sectors. It defines direct and indirect discrimination and harassment as prohibited forms of conduct. Under Article 9(1)(1) of this Law, direct and indirect discrimination are prohibited in relation to the requirements for access to employment and selection of candidates for the performance of a specific job.

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

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

This Law defines civil servants and clerical staff as people employed by state bodies and provides that the heads of state bodies and appointed office holders are considered to be

⁶⁹ Protector of Human Rights and Freedoms, Opinion No. 692/18 of 19 July 2019, available at: http://www.ombudsman.co.me/docs/1564563125_19072019-preporuka-tv.pdf; Opinion No. 01-256/19-2 of 5 June 2019, available at: http://www.ombudsman.co.me/docs/1562758329_05062019-preporuka-bp.pdf; Opinion No. 01-458/19-2, of 23 September 2019, available at: http://www.ombudsman.co.me/docs/1570088670_23092019-prpeoruka-og.pdf.

civil servants in the exercise of specific rights (Article 2). State bodies include public administration bodies, services of the President, Parliament, Government and the Constitutional Court. Members of Parliament and people appointed and elected by the Parliament (Government ministers, the Prime Minister, the President of the Supreme Court, the President and judges of the Constitutional Court, the Supreme State Prosecutor and state prosecutors, the Protector of Human Rights and Freedoms etc.) are not considered to be civil servants and are therefore not covered by the provisions of this Law. However, the Law on the Prohibition of Discrimination purports to offer protection from discrimination to 'all natural and legal persons to whom Montenegrin legislation applies' if they are discriminated against.

People applying for the service in the armed forces are guaranteed the application of the principle of transparency, fairness and equal rights, without discrimination on any ground (sex, race, nationality, language, religion, political or other opinion, ethnic or social origin, gender identity, sexual orientation, property status or any other personal status or property). It is forbidden to put in a privileged or unequal position people serving in the armed forces in exercising their rights and obligations or to deny or restrict this (including promotion and advancement).⁷⁰

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

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

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

In Montenegro, national legislation prohibits discrimination in working conditions including pay and dismissals in relation to all five grounds mentioned in EU directives and widely by protecting all other personal grounds of possible victims of discrimination - both in private and public sector.

The anti-discrimination provisions of the Labour Law apply to working conditions, all employment-based rights (the right to pay is considered to be one of these rights) and dismissals (Articles 7, 8, 9, 10, 14, 15 and 16). The Law also provides that provisions of an employment contract which constitute discrimination are considered null and void (Article 9(2)).

The LPD provides that, in addition to the forms of discrimination prohibited by the Labour Law, discrimination in employment also includes unequal pay or other type of remuneration on prohibited grounds. It goes on to say that people engaged in temporary or seasonal work or contract work, interns and other people participating on any ground in work for an employer are also entitled to protection from pay discrimination (Article 16).

Article 22 of LPDPD defines that it will be considered to be discrimination in the field of professional rehabilitation, labour and employment if more restrictive rules relating to work and working conditions, including dismissals and wages, are laid down for people with disabilities. However, the LPDPD refers to special laws regulating the field of work and the field of professional rehabilitation and employment of people with disabilities when it comes to the prohibition of discrimination on the ground of disability. In practice, this means that when something is not regulated directly and in detail by the LPDPD, that law indicates

⁷⁰ Law on the Armed Forces of Montenegro (*Zakon o Vojsci Crne Gore*), *Official Gazette of Montenegro*, No. 51/17, Article 16.

that the Law on Professional Rehabilitation and Employment of Persons with Disabilities should apply.

In the practice of the Montenegrin Protector of Human Rights and Freedoms, the largest number of cases were initiated in relation to complaints of discrimination in the field of labour and employment on various grounds. However, a very small number of these complaints resulted in the determination of a violation of a right, which is explained by the lack of information regarding the substantive law and the procedures conducted before this institution.

In one such case which was initiated by the victim because of discrimination in employment, the Protector found a violation of the equality principle based on ethnicity in the procedure of employment with a state body. In this case, the Protector notes that neither the decision on employment nor the statement of the responsible institution after shifting the burden of proof to the respondent contain the reasons why the employer did not comply with the Constitution and the legislation stipulating affirmative action in order to guarantee the rights of minorities to be adequately represented in the structure of employees within a state body. In this case, the claimant argued that he, as an Albanian, was not employed despite the fact that Albanians make up a significant part of the population of the local self-government unit, as that ethnicity is not being adequately represented in the domain of employment with a municipal body.⁷¹

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

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

The Labour Law (Article 9) explicitly provides that the prohibition of direct and indirect discrimination applies to 'education, vocational training and advanced vocational training'. Furthermore, its new Article 12 literally mirrors Article 3(1)(b) of the directives.

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

According to the Law on Vocational Education,⁷² vocational education is accessible to everyone and cannot be directly or indirectly restricted on grounds of: sex, race, colour, language, religion, marital status, political or other opinion, national, ethnic or other origin, property, disability, or another similar ground, position or circumstances, in accordance with a special law (Law on the Prohibition of Discrimination).

⁷¹ Protector of Human Rights and Freedoms, Opinion No. 01-339/19-2 of 28 June 2019, available at http://www.ombudsman.co.me/docs/1562758608_28062019-preporuka-pl.pdf.

⁷² Law on Vocational Education (*Zakon o stručnom obrazovanju*), *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10, 39/13, 47/17, Article 2b.

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

In Montenegro, national legislation prohibits discrimination in relation to membership of and involvement in workers' or employers' organisations, as formulated in the directives for all five grounds and for both private and public employment.

The Labour Law prohibits direct and indirect discrimination on all grounds (within the meaning of Articles 7 and 8 of this Law) in relation to membership and participation in organisations of employees or employers or any organisation that brings together members of a particular profession, including the benefits provided by those organisations.

Membership of employees' organisations in Montenegro is based on the principles of freedom of organisation and association in trade unions. The Labour Law stipulates that employees and employers have the right, without prior authorisation, to establish their own organisations and to join them under the conditions laid down in the statutes and rules of those organisations (Article 188). Employees are guaranteed freedom of trade union organisation and action without prior authorisation (Article 189).

On the basis of freedoms and powers established by the law, trade unions in Montenegro independently make rules on the organisation, membership and operation of trade union organisations.

The Statute of Association of Trade Unions in Montenegro⁷³ stipulates that the worker joins a trade union voluntarily, regardless of political or religious affiliation commitment, nationality, occupation, profession and gender. The statute contains a narrow list of personal characteristics as grounds of discrimination.

The Union of Independent Trade Unions of Montenegro stipulates in its statute⁷⁴ that the Union is an organisation representing the interests of employees independent of state bodies, employers, religious organisations and political parties (Article 6). Pursuant to Article 10 of the Statute, the work of the Union is based on 'the Charter of Human Rights, the Charter of the European Union,'⁷⁵ the Constitution of Montenegro, conventions of the International Labour Organization, the European Social Charter and the Statute of the Union. The basic principles of organising in the Union are: voluntariness, solidarity, autonomy of the members, equality, tolerance, freedom of thought and expression, gender equality; democratic elections and the right of each member to vote and to be elected to Union bodies. The statute does not contain an explicit anti-discriminatory norm. and is retained on general organising principles.

The Statute of the Montenegro Education Trade Union stipulates that membership is acquired independently of gender, race, national or ethnic origin, skin colour, age, health status or disability, religion, political or other belief, national and social origin, family status, property status, sexual orientation and/or other personal characteristics.⁷⁶ The norm of this statute is closest to the constitutional principle of equality and the standards of the EU directives. This is all the truer bearing in mind the open clause contained in the membership provision of this Statute.

⁷³ Statute of Association of Trade Unions in Montenegro (Statut saveza sindikata Crne Gore), available at: http://www.sindikrat.me/fajlovi/dokumenta/Statut_Saveza_sindikata_Crne_Gore.pdf.

⁷⁴ Statute of the Union of Independent Trade Unions of Montenegro (Statut Unije slobodnih sindikata Crne Gore), available at: <http://usscg.me/wp-content/uploads/2017/10/Statut-USSCG-precisceni-tekst.pdf>.

⁷⁵ While this is an obvious imprecision, from the working principles of this organisation it may be concluded that this wording refers to the key UN instruments on human rights (Universal Declaration on Human Rights and the covenants) and the EU Charter of Fundamental Rights.

⁷⁶ Statute of the Montenegro Education Trade Union (Statut sindikata prosvjete crne gore), available at: http://www.sindikatrprosvjete.me/dokumenta/propisi/Statut_SPCG.pdf.

Article 22 of the LPDPD states that discrimination in the field of professional rehabilitation, labour and employment will be considered as limiting access for people with disabilities to employment, self-employment or occupation or membership of an organisation of workers or employers.

Article 2 of the Law on the Prohibition of Discrimination prohibits discrimination on the basis of affiliation with a group or the assumption of affiliation with a group, political party or another organisation as a personal characteristic while Article 14 refers to a particular form of discrimination on the grounds of political belief, affiliation or non-affiliation with a political, trade union or other organisation. This is another example of the ambiguity of the law, while the case law and quasi-judicial practice have registered neither cases nor a difference in the interpretation of these two provisions.

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

In Montenegro, national legislation prohibits discrimination in: social protection, including social security and healthcare, as formulated in the Racial Equality Directive. Article 2 of the Law on the Prohibition of Discrimination prohibits any form of discrimination on any ground, but it explicitly enumerates grounds in a non-exhaustive list of 'health conditions'. Article 3 of this Law provides that all natural and legal persons to whom Montenegrin legislation is applicable have the right to protection from discrimination, if they are discriminated against on any ground referred to in Article 2(2). In addition, Article 17 of the same Law directly prohibits discrimination based on racial or ethnic origin with regard to social protection, social security and healthcare, and Article 17a prohibits discrimination on the grounds of religion or belief and of belonging or not belonging to a religious community.

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

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

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

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

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

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

Article 23 of the LPDPD prescribes that discrimination based on disability in the field of healthcare in terms of the regulations governing healthcare and health insurance is considered to be:

- 1) non-implementation of healthcare measures for early detection, treatment, habilitation and rehabilitation of developmental disabilities in order to reduce the degree of disability;
- 2) non-implementation of healthcare measures for early detection of a disease that can cause disability and timely treatment in order to prevent disability or reduce the degree of disability;
- 3) refusal to provide healthcare and rehabilitation to a person or group of persons with disabilities;
- 4) preventing, limiting or impeding the provision of healthcare and rehabilitation to a person or group of persons with disabilities;
- 5) establishing special conditions regarding age for people with disabilities when providing healthcare and rehabilitation;
- 6) providing healthcare and rehabilitation to a person or group of persons with disabilities under conditions not required for other persons;
- 7) late provision of healthcare and rehabilitation to a person with disabilities, even though the person requested and fulfilled the conditions for timely provision of healthcare, as well as giving priority in providing healthcare and rehabilitation to other persons in relation to persons with disabilities;
- 8) denial, restriction and untimely provision of information on the established health condition, undertaken or intended measures of treatment and rehabilitation of persons with disabilities;
- 9) performing surgery or other medical treatment without the written consent of a patient with a disability;
- 10) denying or restricting the right to health and life insurance to a person or group of persons with disabilities if these rights are not denied or are not restricted to other persons.

The rights regarding social and child protection are governed by the Law on Social and Child Protection.⁷⁷ Article 5 of this Law provides that all Montenegrin citizens who are domiciled in the country are entitled to these rights and that, among others, people with disabilities and elderly people enjoy special protection. Pursuant to Article 7(1)(2) of this Law, citizens are equal in their exercise of social and child protection rights, regardless of ethnicity, race, sex, language, religion, social origin and other similar characteristics. The Law also provides that one of the criteria for the establishment of the network of social and child protection institutions is the creation of equal conditions for all beneficiaries (Article 68).

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

- '2) prohibition of discrimination of users of social protection or welfare based on race, gender, age, ethnicity, social background, sexual orientation, religion, political, trade union or other affiliation, economic status, culture, language, disability, nature of social exclusion, membership of a particular social group or other personal characteristics' (Article 7(2)).

⁷⁷ Law on Social and Child Protection, *Official Gazette of Montenegro*, Nos. 27/13, 01/15, 42/15, 47/15, 56/16, 66/16, 01/17, 31/17, 42/17 and 50/17.

The same law stipulates that housing for socially disadvantaged people can be financed by the municipality (Article 154(4)) and with the participation of the state if needed (Article 154(5)). This right is not reserved only for Montenegrin citizens domiciled in Montenegro, but also applies to a foreigner with an approved temporary residence or permanent residence in the country; an asylum seeker or foreigner under subsidiary protection may also be eligible. Racial discrimination in social housing has not been reported.

The Law on Healthcare⁷⁸ lists among its aims the creation of conditions to ensure availability of healthcare for all citizens of Montenegro (Article 2). It also provides that citizens are equal in their exercise of health protection rights, regardless of ethnicity, race, sex, language, religion, education, social origin, property and other personal characteristics (Article 5). The principle of equality is further underlined in Article 11, which provides that citizens are entitled to the right to equality in the overall treatment when exercising healthcare.

According to media reports, several cases of alleged discrimination against people of different gender identity and sexual orientation (LGBTIQ) have occurred during medical examinations. The most recent one referred to the case of a transgender person and the offensive attitude of a member of medical staff towards her during a visit to a health centre (*Dom zdravlja*). In this case, the Protector of Human Rights and Freedoms found harassment as the form of discrimination, violation of the right to privacy (discovering personal data) and the lack of a proper investigation after the victim reported the case. The Protector gave two recommendations of which the one was to invite the victim and the representative of the NGO which submitted the case to the Protector. At the same time the Protector drew attention in the case report to the examination of responsibility, protection of personal data and the elimination of the consequences of discrimination.⁷⁹

3.2.6.1 Article 3(3) exception (Directive 2000/78)

Montenegrin law does not rely on the exception in Article 3(3) of the Employment Equality Directive 2000/78/EC.

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

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

The Law on Social and Child Protection covers both social protection and social advantages. Articles 21 and 32-42 cover social advantages.

According to this law the basic material benefits (social care advantages) are: material support (financial subsidies); personal disability allowance; 3) care and assistance allowance; funeral expenses; one-off financial assistance; and benefit to the parent or guardian of the beneficiary of the right to personal disability allowance (Article 20). The state may provide other material benefits in social protection, in accordance with financial (budgetary) capabilities.

According to Article 39, a municipality may, depending on material resources, provide material benefits in the area of social protection, such as: one-off assistance; subsidies for

⁷⁸ Law on Healthcare, *Official Gazette of Montenegro*, Nos. 03/16, 39/16, 02/17, 44/18 and 24/19.

⁷⁹ Protector of Human Rights and Freedoms, Opinion No. 702/18 of 31 December 2018, available at: http://www.ombudsman.co.me/docs/1551275736_31122018-prpeoruka-dzpg.pdf.

the payment of utility services provided by public companies established by municipalities; and other material benefits in the area of social protection.

Basic material benefits (advantages) from the childcare system are:

1) new-born benefit; 2) child allowance; 3) nutrition costs in preschools; 4) assistance for the upbringing and education of children and young people with special educational needs; 5) reimbursement of wage compensation and wage compensation for maternity or parental leave; 6) childbirth allowance; 7) reimbursement of remuneration and remuneration for part-time work.

The state may provide other benefits (advantages) for childcare, in accordance with its financial capacities.

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

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

Specific benefits for people with disabilities are provided for by the Law on Travel Benefits for Persons with Disabilities.⁸⁰ Under Article 7 of this Law, people with disabilities, people in receipt of carers' allowance and children in receipt of assistance for children and young people with special needs, as well as people accompanying these individuals are entitled to a refund of the costs of 12 journeys by train or road each year. According to Article 4 of this Law, this right is enjoyed by Montenegrin citizens; foreign nationals with temporary or permanent residence in Montenegro; and asylum seekers and foreigners under subsidiary protection. Misdemeanour liability is provided for by this Law (Article 25) for public bodies which approve travel benefits contrary to the law. Indirectly, this provision refers to potential discrimination that might occur if a public body acts contrary to the law.

Benefits provided by private actors fall outside the scope of the above provisions. Such benefits are not prohibited, which means that they are permitted.⁸¹ In practice, they are granted mainly as the result of agreements between the commercial sector and organisations representing the interests of specific groups (for instance, agreements between private companies and organisations of people with disabilities regarding access to leisure facilities). The Law on the Prohibition of Discrimination is silent on this issue but, given the fact that: a) its scope is not limited and b) it offers protection against discriminatory treatment by authorities and private persons (legal and natural), discrimination in this area is likely to be unlawful under its provisions.

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

In Montenegro, national legislation prohibits discrimination in the field of education. The Law on the Prohibition of Discrimination prohibits discrimination in the field of education and vocational training (Article 15) encompassing all types and levels of education. In 2017, amendments to the LPD introduced a definition of discrimination in the respective field. The protected grounds are those enshrined in Article 2(2).

⁸⁰ Law on Travel Benefits for Persons with Disabilities (*Zakon o povlastici na putovanje za lica sa invaliditetom*), *Official Gazette of Montenegro*, Nos. 80/08, 40/11, 10/15 and 50/17.

⁸¹ Under Article 10 of the Constitution, anything which is not prohibited by the Constitution or law is permitted.

Pursuant to Article 15 of the LPD, discrimination in the field of education and vocational training is, 'making it difficult or impossible to enrol in an educational institution and higher education institution and to choose programmes at all levels of education, exclusion from these institutions contrary to regulations in the field of education, aggravation or denial of opportunities to attend classes and participation in other educational activities, classifying children, pupils and students, or otherwise making distinctions or treating them unequally'.

However, relations between faith-based and state institutions, including educational ones, have not been regulated appropriately and harmonised with international law and standards, including the Racial Equality Directive, as the LPD fails to mention that it also applies to this type of school. The LPD in Article 2a stipulates an exception which provides that it will not be considered as discrimination to disadvantage someone when performing professional activities, that is, finding employment, joining religious communities and other organisations, if religious learning or a conviction constitutes a true, lawful and justifiable condition for doing the job. However, there is no case-law or quasi-case-law to date to confirm or refute the position that this provision can be applied in the education system, since the provision implies that it relates to the field of work.

The Montenegrin legislation recognises secondary religious schools that carry out state-approved educational programmes and have the status of officially recognised educational institutions. Public certificates (diplomas) issued by these institutions in accordance with the law are legally valid and are recognised for further education.⁸² For the time being, there is only one school of this type: Mehmed Fatih Medres, founded by the Islamic Community of Montenegro.⁸³ However, it is currently not certain whether or not national anti-discrimination law applies to this school.

The Constitution of Montenegro guarantees the right to schooling under equal conditions (Article 75). The field of education is regulated by a set of laws, which includes the General Law on Education, the Law on Preschool Education, the Law on Primary Education, the Law on Grammar and High Schools, the Law on Vocational Education and the Law on Higher Education, as well as the Law on the Education of Children with Special Needs.⁸⁴

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

- 1) preventing, restricting or impeding a person with a disability in choosing an educational programme and enrolling in, accessing and staying in an educational institution, in accordance with his or her abilities;
- 2) preventing, restricting or impeding a person with a disability in teaching and knowledge testing, as well as participation in other educational activities, including participation in extra-curricular activities and competitions;
- 3) non-implementation of special measures for the establishment and provision of individualised support for unhindered monitoring of teaching and assessment of

⁸² General Law on Education (*Osnovni Zakon o obrazovanju*), *Official Gazette of Montenegro*, Nos. 64/2002, 44/2013, Article 5a.

⁸³ The National Council for Education's decision of 30 June 2015, No. 04-5-1274, established the validity and equal value of the educational programme of this institution with the corresponding publicly valid educational programme for general secondary education.

⁸⁴ General Law on Education, *Official Gazette of Montenegro*, Nos. 64/02, 31/05, 49/07, 4/08, 21/09, 45/10, 40/11, 45/11, 36/13, 39/13 and 44/13, 47/17; Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of Montenegro*, Nos. 64/02 and 49/07, 80/10, 40/11, 40/16 and 47/17; Law on Primary Education (*Zakon o osnovnom obrazovanju i vaspitanju*), *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10, 39/13 and 47/17; Law on Grammar and High Schools (*Zakon o gimnaziji*), *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10, 39/13 and 47/17; Law on Vocational Education, *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10 and 39/13; Law on Higher Education (*Zakon o visokom obrazovanju*), *Official Gazette of Montenegro*, Nos. 44/14, 52/14, 47/15, 40/16, 42/17, 71/17, 55/18, 3/19, 17/19, 47/19 and 72/19; Law on Education of Children with Special Needs (*Zakon o obrazovanju djece sa posebnim obrazovnim potrebama*), *Official Gazette of Montenegro*, Nos. 80/04, 45/10 and 47/17.

- knowledge, as well as participation in other educational activities, including participation in extra-curricular activities and competitions, in accordance with the regulations in the field of education; and
- 4) exclusion of persons with disabilities from an educational institution when, in a same or similar situation, their peers are not excluded.

The General Law on Education provides that Montenegrin citizens and foreigners with permanent or temporary rights to stay are equal in the exercise of the right to education regardless of their ethnic origin, race, sex, language, religion, social origin, disability or other personal characteristics (Article 9). It also provides that one of the tasks of the principals of educational institutions is to ensure equality among students in the exercise of their right to education. There is also a specific provision prohibiting 'physical, psychological and social violence; abuse and neglect of children and students; physical punishment and insult of a person, i.e. sexual abuse of children and students or employees and any other form of discrimination within the meaning of the law' (Article 9a).

The Law on Primary Education, the Law on Grammar and High School (Article 2a) and the Law on Vocational Education (Article 2b) stipulate that education should be accessible to all persons and may not be limited, directly or indirectly, by gender, race, colour, language, religion, marital status, political or other persuasion, national, ethnic or other background, financial status, disability, or on another similar basis, position or circumstance, in accordance with a separate law. These laws now have contain provisions addressing grounds identical to those in the Law on Higher Education. Under Article 7 of this Law, discrimination in the exercise of the right to higher education is prohibited. The list of explicitly mentioned grounds of discrimination includes sex, race, marital status, colour, language, religion, political or other opinion, ethnic origin, membership of a national community, property and disability. However, this is an open-ended provision which also prohibits discrimination on other similar grounds, positions or circumstances.

The Law on Education of Children with Special Needs contains a provision on the prohibition of discrimination in schools and resource centres, including physical, psychological and social violence; child and student abuse and neglect; the physical punishment and insulting of a person, such as sexual abuse of children and students or employees; and any other form of discrimination in accordance with a special law (Article 8a). Similar provision is contained in the General Law on Education (Article 9a).

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

Private schools are covered by education legislation. Private schools (including religious ones) which implement valid public educational programmes may be financed from the budget of Montenegro in accordance with the General Law on Education. The law regulates financing of private schools, in accordance with the financial and educational criteria established by the Ministry of Education, which previously obtain the opinion of the National Council for Education (Article 138).

a) Pupils with disabilities

In Montenegro, the general approach to education for pupils with disabilities gives rise to certain problems. The implementation of the legal framework regarding education for pupils with disabilities is not satisfactory, although the framework for inclusive education

has improved in recent years. During 2014 and 2015, a legal framework was established to cover the work of teaching assistants for people with disabilities in primary and secondary education. Through a public works programme, 270 teaching assistants were hired by the National Employment Agency for the 2017 school year, to support inclusive education for children with disabilities. At the same time, 217 personal assistants⁸⁵ were employed to provide social support in institutions, day care centres and people's homes.

Previously, teaching assistants for pupils with disabilities were recruited through the National Employment Agency through a public work programme. However, starting from January 2018, the role of teaching assistant has been systemised and approved by the Ministry of Education so a person interested in becoming a teaching assistant must have as a minimum a high school diploma and a certificate obtained after completing a programme of training for teaching assistants. The teaching assistant's duties are to help children with movement and spatial orientation impairments, and they must know how to use didactic techniques. Furthermore, schoolteachers should provide assistance to a child with special educational needs regarding writing, counting, handling of tools, writing a response and turning pages.

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

Inclusive education for children with disabilities is a relatively new concept in Montenegro. Its implementation was initiated during the 2003-2004 school year by the then Ministry of Education and Science with the support of UNICEF and Save the Children. In 2004, the Law on the Education of Children with Special Needs⁸⁶ was passed to replace the 1992 Law on Special Education. Under the latter law, children with disabilities were educated exclusively in special institutions, schools and classes. The Law on the Education of Children with Special Needs created a legal basis for the inclusion of children with disabilities in the mainstream system.

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

Schools and institutions have a duty to develop an individual education plan for each child with special needs, in cooperation with their parents. The decision on the referral of a child to a specific type of education is made by municipal bodies in charge of education issues on the basis of a proposal by a Children's Orientation Commission, made up of a paediatrician, doctors specialising in the relevant area, a psychologist, a pedagogue, a disability specialist and a social worker. Parents and teachers are allowed to take part in the work of the commission. The commission performs an assessment of children's abilities and refers them to the appropriate educational institutions which then develop an individual education programme for each child. The schooling of children with special needs is

⁸⁵ National Employment Agency, Decision on reallocation of funds for engaging personal assistants in 2017, available at: <http://www.zzzcg.me/wp-content/uploads/2017/08/Odluka-Personalni-asistent.pdf>.

⁸⁶ Law on Education of Children with Special Needs, *Official Gazette of Montenegro*, Nos. 80/04 and 45/10.

financed from the state budget and the policy framework was enhanced in 2008 with the adoption of the Government Strategy on Inclusive Education.

Nevertheless, the exclusion of children with learning disabilities from mainstream education continues to be a problem. It is necessary to establish a system, and establish a database of children and students with disabilities at central and local level by type and disability.

Children with moderate or severe disabilities are enrolled in separate classes at seven mainstream schools. These students attend joint classes in some subjects with peers in regular classes.⁸⁷

According to data from the Government's *Strategy for Inclusive Education in Montenegro (2019-2025)* on children receiving education in resource centres,⁸⁸ there is a total of 82 children in primary and 62 in secondary education.⁸⁹ The strategy document, which was adopted in May 2019, is accompanied by a detailed action plan.

The strategy envisages an individual developmental-educational programme (IDEP) as the basis for working with children with special educational needs. Kindergartens and schools develop IDEPs for each child and define the academic and developmental goals to be achieved. Training on the individualisation of teaching, approach and work is continuously conducted. In addition, an individual transition plan for the transition of students from primary to secondary school has been developed, as well as an Individual Transition Plan that links education and employment. For children with special educational needs, schools hire teaching assistants to provide technical support for the school year. The law defines the conditions, scope and manner of the provision of this service. The scope of the support that the teaching assistant provides (under the supervision of the teacher, the professional service and the school principal) is determined in accordance with the IDEP and the schedule of classes.

Resource centres play a significant role in supporting inclusive education, providing support through: counselling, education, preparation, adaptation, development, special textbooks and didactic methods, work, teaching and means of assisted communication.

There is currently a pilot programme of transition from class to subject teaching in progress. The programme will better prepare a child for dealing with a larger number of teachers, and enable more adequate realisation of subject programmes. In addition, a programme is being piloted for adolescents with disabilities to enable them to successfully face the challenges of this age.

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

The Ministry of Education should update the database on children with special educational needs based on the decision on orientation.⁹⁰ At the same time, data collection is performed

⁸⁷ *Strategy for the Integration of Persons with Disabilities 2008-2016, (Strategija za integraciju osoba sa invaliditetom 2016-2020)*, p. 70.

⁸⁸ The resource centre is a public institution that educates children with visual impairment, motor impairment and combined disabilities.

⁸⁹ *Strategy for Inclusive Education in Montenegro (2019-2025)*, p. 6, available at: <https://www.unicef.org/montenegro/media/7871/file/MNE-media-MNEpublication311.pdf>, p. 6.

⁹⁰ On the basis of a Commission proposal, the local government body in charge of educational affairs makes a decision on the placement of children with special educational needs in the appropriate educational programme. This decision on orientation includes a period (which may not be longer than one year), during which the general educational institutions monitor the achievements and progress of the child to check that

by the Montenegrin Education Information System, based on several criteria: disability, preparing individually tailored educational programmes (IROPs);⁹¹ and the orientation decision. The data indicate that a number of children have not gone through the orientation process. Potential reasons for the poor flow of information at the level of early detection and intervention by the education system are: lack of information, resistance from parents, lack of proper recording in schools and lack of support for parents when they need to choose an orientation for their children. Educational institutions develop IROPs for every child who has special educational needs, using the recommendations of the Children's Orientation Commission.

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

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

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

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

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

b) Roma pupils

With regard to the education of Roma, all levels of the education system, from pre-school to university, are formally accessible to the Roma, Ashkali and Egyptian (RAE) populations. However, the lack of implementation of legally binding instruments, such as the Framework

they have the appropriate learning pathways, inputs, additional help and support, and that the objectives for individual development and educational programmes are being realised.

⁹¹ Individually tailored educational programme (Individualno Razvojno Obrazovni Program – IROP).

Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, especially regarding education in the mother tongue, remains the main cause of social exclusion of Roma.

The Ministry of Education and civil society organisations (CSOs) have continuously undertaken significant efforts to prevent school drop-out by employing educational mediators.

The number of Roma in Montenegro (6 251) accounts for about 1 % of the population.⁹² The most recent data available show that in the 2019-2020 school year, 120 pre-school Roma and Egyptian children were enrolled (in comparison with 190 in the 2017-2018 school year).

According to information obtained from the Ministry of Education, the data for pre-school education are incomplete and do not reflect the current situation.

The number of Roma and Egyptian pupils enrolled in regular primary education for the 2019-2020 school year was 1 782 (1 860 in 2017-2018). Of this number, 158 students were enrolled in the first grade of primary school.

In the 2019-2020 school year, 140 Roma and Egyptian students were enrolled in secondary schools (142 in 2017-2018). Of these, 54 students were enrolled in the first grade of high school. For comparison, according to the latest data available, in 2018-2019 the total number of students enrolled in all secondary schools in Montenegro was 28 008.

Regarding university education, according to data provided from the NGO Young Roma at the University of Montenegro, no Roma student was enrolled in the academic year 2019-2020. Although two Roma persons applied for admission to a faculty, they were not enrolled. According to the same source, in the academic year 2018-2019, approximately 20 Roma studied at the University (the data cannot be officially verified), of whom 14 were beneficiaries of scholarships awarded by the state.

The reasons for this are manifold and include lack of knowledge of the official language; lack of Roma teachers; a low level of awareness among Roma about the importance of education; and their inability to cover education-related expenses. Roma organisations also cite a lack of understanding of higher education institutions when it comes to facilitating the enrolment of this population in universities.

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

In Montenegro, national legislation prohibits discrimination in access to and the supply of goods and services, as formulated in the Racial Equality Directive.

Namely, Article 11 of the systemic Law on the Prohibition of Discrimination prescribes prohibition of discrimination in access to goods and services in the public and private sectors, on one of the grounds referred to in Article 2(2) of this Law, including race and ethnic origin. The definition of this type of discrimination covers: 1) making difficult or impossible access to goods and services in the public and private sectors; 2) refusing of access to goods and services in the public and private sectors; 3) setting conditions for access to goods and services in the public and private sectors, which are not required from other persons or groups of persons; 4) intentional delay or postponement of access to goods and services in the public and private sectors, even though the person or group of persons requested and met the requirements for timely access to goods and services before

⁹² Montenegro has 620,029 inhabitants, according to the Census of Population, Households and Dwellings in 2011, available at: [https://www.monstat.org/userfiles/file/popis2011/saopstenje/saopstenje\(1\).pdf](https://www.monstat.org/userfiles/file/popis2011/saopstenje/saopstenje(1).pdf).

the other persons or group of persons. The definition covers only access to goods and services, not provision or supply.

Within the same Law, racial discrimination is recognised as a specific form of discrimination and includes any differentiation, unequal treatment or putting people in an unequal position due to a belief that race, skin colour, language, nationality or national or ethnic origin justifies prejudice against a person or group of persons, or justifies the idea of the superiority of a person or group of persons in relation to those who are not members of that group. All this applies especially in the fields of education, work, employment and career choice, vocational training, social protection and social benefits, healthcare and housing and access to goods and services in the public and private sectors.

The prohibition of discrimination in the provision of public and private goods and services is also regulated by Article 14 of the Law on the Prohibition of Discrimination of Persons with Disabilities. In accordance with Article 14, discrimination based on disability in this area is considered to be:

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

On the other hand, the Law on Consumer Protection⁹³ provides that the consumer's right to public services includes the right to use such services under equal conditions, 'if technically feasible, without discrimination'. Public services include distribution and supply of electricity, gas, heat and water, treatment and disposal of waste water, maintenance of cleanliness in cities and other settlements, disposal of municipal waste, maintenance of cemeteries and burial grounds, smokers' and other utility services, passenger transport, electronic communications services, postal and other services (Article 35).

The Law on Consumer Protection in Article 29 prohibits advertising of products and services that mislead or may mislead consumers, but also prohibits advertising which discriminates against consumers on grounds of race, sex or nationality, as well as advertising that offends the dignity, religious or political convictions of consumers, or encourages violence or behaviour that is detrimental to the safety and health of consumers or the environment.

On 16 October 2017, the Parliament of Montenegro adopted the Services Act.⁹⁴ The Act prohibits discrimination in the issuing of permits for the provision of services (Article 12) and the selection of candidates (Article 15). The Law regulates the right to carry out economic activities and the freedom to provide services in Montenegro. The Law will apply from the day of Montenegro's accession to membership of the EU, coinciding with the planned delayed implementation of certain provisions for accession to the European Union (Article 8(2), (3) and 4; Article 9(2), (3), (4) and (5); Article 10; Article 13(1) and (2); Article 14(2), (3) and (4); Article 16(1), (2), (4), (5) and (6); Article 17; Article 18; Article

⁹³ Law on Consumer Protection (*Zakon o zaštiti potrošača*), *Official Gazette of Montenegro*, Nos. 2/14, 6/14, 43/15, 70/17 and 67/19

⁹⁴ Law on Services (*Zakon o uslugama*), *Official Gazette of Montenegro*, Nos. 71/17 and 67/19.

19; Article 20; Article 21; Article 22; Article 24; Article 25; Article 26(3) and (4); Article 27; Article 28; Article 29(1) and (4); Article 30; Article 31; Article 32; Article 33; Article 34; Article 35; Article 36; and Article 38(1)(b) and (c). In order to ensure the full application of the Services Act, the competent authorities were obliged to amend about 60 domestic legal acts as set out in the action plan for the transposition of the Services Directive, adopted in June 2015, for the period 2015-2018.

a) Distinction between goods and services available publicly or privately

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

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

In Montenegro, national legislation prohibits discrimination based on race or ethnic origin in the field of housing and in the sense of equal access to housing. The Law on Prohibition of Discrimination in Article 17 directly prohibits discrimination in housing based on race, skin colour, language, nationality or national or ethnic origin. The LPDPD contains two provisions addressing disability discrimination in housing. Thus, disability discrimination is considered to limit the right to an independent and community life:

- 1) by restricting the choice of place of residence for a person with a disability, as they may lose the right to social housing as well as support for living in the community when moving from one place of residence to another;
- 2) by the non-implementation of special measures on establishing and providing support to persons with disabilities to enable them to live in the community, and
- 3) by not providing support for living in the community to the extent objectively determined necessary to enable the independent life of persons with disabilities.

In all these cases, regard should be paid to the regulations governing social and child protection (Article 17).

Pursuant to the LPDPD, disabling, restricting or hindering the exercise of the right to social housing in the local community by choice of a person or group of persons with disabilities is considered to be discrimination on the basis of disability in the field of social and child protection and adequate standard of living (Article 24).

The LPD also recognises segregation as a special form of discrimination. Article 9 prohibits segregation and defines it as any act, activity or failure to perform an activity, whereby forced or systemic separation or differentiation of people is carried out on any of the grounds contained in Article 2(2) of the Law, including race and ethnic origin.⁹⁵

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

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

'The following groups, in particular, have priority in exercising their right to social housing, in accordance with this law: single parents, or guardians, persons with disabilities, persons over 67 years of age, young people who were children without parental care, families with children with disabilities, members of the Roma and

⁹⁵ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10, 18/14 and 42/17, Article 9.

Egyptian communities (RE population), internally displaced persons (IDPs), internally displaced persons from Kosovo residing in Montenegro,⁹⁶ foreign nationals with permanent or temporary residence awarded the status of displaced person or IDP and victims of domestic violence.⁹⁷

a) Trends and patterns regarding housing segregation for Roma

In Montenegro, there are certain patterns of housing segregation for Roma people. Most of them still live in the same suburban areas of towns, which some of them regard as ghettos,⁹⁸ in special housing units built for the purpose of solving their housing problems. After the Kosovo conflict, the number of Roma in Montenegro increased significantly, and they settled in suburban areas of Podgorica, Nikšić and Berane. Most of the settled, domiciled Roma are living in private houses and are connected to the infrastructure. In contrast, most of the Roma IDPs used to live in substandard housing, lacking basic infrastructure, often in spatially segregated neighbourhoods and suburbs and with no legal permits for building. Since the adoption of the first strategy for Roma inclusion in 2007 (*Strategy for Improvement of the Position of RAE Population in Montenegro 2008-2012*), followed by the *Strategy for Improving the Position of Roma and Egyptians in Montenegro 2012-2016* and the *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020* as well as the associated 2019 *Action Plan*, a number of measures in the area of housing have been implemented.

Most of the Roma in Montenegro (over 1 400 of them) live in Konik in Podgorica, in newly built flats in the area where the Konik camp used to be. They are mainly internally displaced persons from Kosovo who fled to Montenegro in 1999. The gradual closure of the Konik Camp was identified as one of the key priorities in the European Commission's 2010 'Opinion on Montenegro's application for membership of the European Union'. By the summer of 2015, the construction of five residential buildings with 10 flats of different sizes in each of them, all compliant with the relevant social housing standards, was completed. Around 120 additional apartments for internally displaced families were to be built on this site in the course of 2015-2018, within the framework of the Regional Housing Programme. The Programme was fully implemented and the Konik camp closed in December 2018.⁹⁹ According to the most recent data, by 2019 a total of 218 flats had been built in Podgorica and 62 in Nikšić. A further 94 flats are being built in Berane.¹⁰⁰

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

On the other hand, according to estimates by the NGO Young Roma, 170 Roma families still do not have adequate accommodation; many of them continue to live in unsanitary conditions, often without electricity and water (mainly in dilapidated barracks, located in

⁹⁶ According to the previous Law on Foreigners, these groups have the same legal status.

⁹⁷ Law on Social Housing (*Zakon o socijalnom stanovanju*), *Official Gazette of Montenegro*, No. 35/2013, 23 July 2013.

⁹⁸ See: <https://www.vijesti.me/vijesti/drustvo/baftijari-stanove-za-rome-i-egipcane-nije-trebalo-graditi-na-mjestima-prepoznatim-kao-geto>.

⁹⁹ See: <https://regionalhousingprogramme.org/konik-camp-in-montenegro-now-officially-closed-remaining-51-families-move-to-new-homes/>.

¹⁰⁰ *Action Plan for the Implementation of the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020* (for 2019), p. 6.

places out of public view) in the coastal part of Montenegro.¹⁰¹ The Roma community, including 'displaced persons' from countries of the former Yugoslavia and 'internally displaced persons' (IDPs) from Kosovo, continues to face serious socioeconomic problems, including in housing. In its most recent report on Montenegro from 2017,¹⁰² ECRI emphasises that the Roma remain the most vulnerable and marginalised group in Montenegro. ECRI recommends that the authorities, in cooperation with civil society, conduct a thorough evaluation of the implementation of the Roma Strategy (2016-2020) on an annual basis in order to measure its impact and redefine its parameters and goals where necessary. In this context, ECRI urged the authorities to strengthen the collection of equality data on Roma, among others, in the area of housing, while ensuring respect for the principles of confidentiality, voluntary self-identification and informed consent.

Information is available here: <http://www.mladiromi.me/dekada-roma/romi-u-medijima/461-iseljavaju-170-romskih-porodica>.

¹⁰² ECRI (2017) *ECRI report on Montenegro (Fifth monitoring cycle)*, available at: <https://rm.coe.int/second-report-on-montenegro/16808b5942>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Montenegro, national legislation provides an exception for genuine and determining occupational requirements. Under the title 'Special measures', Article 15 of the Labour Law provides an exception for genuine and determining occupational requirements. Namely, pursuant to Article 15(1) of the LL, difference, exclusion or giving priority with regard to a specific job is not considered discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, characteristics related to grounds such as sex, birth, language, race, religion, skin colour, age, pregnancy, health status, disability, national origin, marital status, family duties, sexual orientation, political or other affiliation, social background, material status and membership of political and trade union organisations constitute a genuine and determining occupational requirement, provided that 'the purpose to be achieved is justified'.

Although the legislation does not use wording 'provided that the objective is legitimate, and the requirement is proportionate', it may be construed that the legislator had in mind the proportionality principle. Therefore, the provisions in Article 15 of the Labour Law are drawn up in line with Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC.

In addition to the general prohibition of discrimination in the field of labour, the Law on the Prohibition of the Discrimination in Article 16(2) contains an exception for genuine and determining occupational requirements by prescribing that it is not considered to be discrimination to differentiate, exclude or give priority due to the characteristics of a particular job in which an individual's personal characteristics represent a real and decisive condition for performing a job.

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

In Montenegro, national law provides for an exception for employers with an ethos based on religion or belief. The Law on the Prohibition of Discrimination in Article 2a(1)(2) provides that it is not considered as discrimination to differentiate when performing professional activities, i.e. employment, membership of religious communities and other organisations or activities of persons who are in accordance with religious education, rituals and activities of the religious community, as well as other public or private organisations whose value system is based on religious learning or belief, and which act in accordance with the Constitution and the law, if so required by religious learning or belief, and due to the nature of those activities or the circumstances in which they are performed, religious learning or belief is a true, lawful and justifiable condition for the conduct of a job. This exception could be covered by Article 15 of the Labour Law which provides an exception for genuine and determining occupational requirements, as described above under Section 4.1.

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

In Montenegro, there are no specific provisions and/or case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment. The 2019 Law on Freedom of Religion or Belief and the Legal Status of Religious Communities¹⁰³ (LRR) stipulates in

¹⁰³ Law on Freedom of Religion or Belief and the Legal Status of Religious Communities (*Zakon o slobodi vjeroispovijesti ili uvjerenja i pravnom položaju vjerskih zajednica*), Official Gazette of Montenegro, No. 74/19.

Article 57 that teaching at a religious school may be conducted by a person licensed to work in accordance with the law, as well as by the accreditation or approval of the religious community that establishes the religious school. In its activities, the religious community is subject only to the restrictions prescribed by law that are necessary in a democratic society for the protection of public security, public order, health or morals, or the protection of the rights and freedoms of others, and the restriction must be commensurate with these values (Article 8).

As previously stated, exceptions for employers with an ethos based on religion or belief are not considered as discrimination if religious learning or belief is a true, lawful and justifiable condition for the conduct of a job. In practice, there are no known cases of discrimination based on religion or belief in employment and occupation, or discriminatory employment conditions based on religion or belief.

However, individual statements by representatives of the Serbian Orthodox Church and some parliamentary parties against freedom of sexual orientation have been publicly disseminated. During a public statement made on the occasion of the 2016 New Year celebrations at the end of December 2015, according to the Julian calendar, a priest of the Serbian Orthodox Church spread hate speech against the LGBT community. The NGO, Queer Montenegro, submitted a complaint to the Protector of Human Rights and Freedoms. According to the recommendation issued by the Protector, the priest was obliged to apologise publicly within two weeks to the LGBT community for the hate speech.¹⁰⁴ The recommendation was not followed. In its 2016 annual report, the Protector recalled its opinion sent to a priest of the Serbian Orthodox Church, in which it determined that there had been hate speech directed at members of the LGBT community and organisations that protect their rights. In drafting this opinion, the Protector used ECRI General Policy Recommendation No. 15 on Combating Hate Speech. However, positive practice has recently been reported, as the first trans person, who has undergone a limited medical transition, was baptised in the Orthodox Church with the blessing of the head of the Serbian Orthodox Church in Montenegro.¹⁰⁵

In 2015, one complaint was submitted to the Protector of Human Rights and Freedoms by an educational worker who considered that her rights to work or work engagement had been violated due to discrimination for wearing religious symbols (headscarves) and political affiliation. Since the complainant was from a city (Rožaje) where 95 % of the population is Muslim and where the wearing of headscarves does not constitute 'exclusivity', it was difficult to determine whether the wearing of the headscarf was the reason for non-employment and discrimination. In this particular case, the Protector was unable to determine the existence of discrimination, but noted irregularities by the labour inspectorate when monitoring the selection of certain individuals which pointed to a violation of the law on another basis (abuse of authority, unprofessional work).

– Religious institutions affecting employment in state-funded entities

In Montenegro, religious institutions are in practice permitted to select people (on the basis of their religion) to be hired for or dismissed from a job when that job is in a state entity, or in an entity financed by the state (Article 57 of the LRRC).

In relation to educational institutions, in Montenegro there are two religious schools, Bogoslovija in Cetinje and Mehmed Fatih Medresa in Tuzi. According to the official curriculum in Montenegro, Bogoslovija in Cetinje is still not part of the official education system. In this sense, there are no known cases of unjustified discrimination in the engagement of teaching staff based on religion or belief. Religious education as a subject is not included in the curricula of non-religious schools.

¹⁰⁴ This opinion, with recommendations, is available at: https://www.ombudsman.co.me/docs/1463660404_13052016-preporuka-km.pdf.

¹⁰⁵ See: <https://www.bbc.com/serbian/lat/balkan-50310595>.

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

In Montenegro, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC). However, the Law on the Armed Forces of Montenegro prescribes some strict conditions that must be fulfilled by candidates for admission to the armed forces which may exclude certain categories of persons with disabilities. Under the Law on the Armed Forces of Montenegro, one of the general conditions for admission to the armed forces is that the candidate is not under the age of 18; fulfils the health requirements for serving in the Army; fulfils the criteria in terms of physical fitness, except for admission of civilian persons and fulfils the criteria in terms of psychological ability for service in the Army (Article 47(1)). In addition, Article 50(4) of the same Law prescribes the age criteria so that an individual person serving in the Army as a soldier under a contract cannot be older than 25 years.

Determining health and psychological abilities is carried out by a military-medical commission established by the minister (Article 47(4)).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Montenegro national law includes exceptions relating to difference of treatment based on nationality.

The basic Law on the Prohibition of Discrimination, in Article 2a, prescribes acts that are not considered as discrimination in the sense of Article 2(2) of this Law, including different treatment based on citizenship in accordance with special regulations. Nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law and can be understood as one of the 'other personal characteristics' referred to in the Law on the Prohibition of Discrimination, Article 2(2).

The Labour Law does not list Montenegrin nationality as a condition for employment, although some laws do. In Article 44, it prescribes that foreigners may conclude an employment contract if they fulfil the requirements specified by this law, special laws and international conventions.

The Law on the Armed Forces provides that only Montenegrin nationals (who do not hold another nationality) may serve in the armed forces. While the Law on Civil Servants and Employees (Article 32(1)) lists Montenegrin nationality as a condition for employment by state authorities, it also allows employment of foreign nationals and stateless persons under the provisions of a separate law (Law on Employment and Work of Foreigners) and international conventions. A foreign citizen or stateless person can establish employment in a state body as a state employee, under conditions determined by a special law and international conventions (Article 32(4)).

The rights covered by the Law on Social and Child Protection refer to Montenegrin citizens residing in Montenegro, as well as to foreign nationals with temporary or permanent residence in Montenegro, in accordance with the Law on Foreigners (Article 5).¹⁰⁶

According to Article 66 of the Law on Foreigners,¹⁰⁷ a foreigner in Montenegro may work on the basis of a temporary residence and work permit or a certificate of work registration, unless otherwise provided by this Law. A foreigner can work in Montenegro only on jobs for which they are granted a temporary residence and work permit or a certificate of work registration and only with the employer who employs them. (By way of exception, a

¹⁰⁶ Law on Foreigners, *Official Gazette of Montenegro*, Nos. 12/18 and 13/19.

¹⁰⁷ Law on Foreigners, *Official Gazette of Montenegro*, Nos. 12/18 and 13/19.

foreigner may be issued with a temporary residence permit and work permit to perform the duties of an executive director with several employers, in accordance with the regulations governing the area of employment).

In addition, an employer may allocate a foreign employee only jobs for which they have been issued a residence and work permit or a certificate of registration. The employer must have a copy of the residence and work permit at the business premises, i.e. the place of work of the foreign employee, or a copy of the certificate of registration of the work of the foreign employee working for them. The employer is obliged to notify the Ministry of Interior of the termination of the work of a foreign employee before the expiry of the validity period of the residence and work permits, no later than eight days after the termination of the work of the foreign employee. The employer may not employ or use the work of a foreigner who is illegally staying in Montenegro.

Without a temporary residence permit and work or confirmation of work registration, foreign nationals and stateless people may work in Montenegro if they have: 1) a temporary residence permit for the purpose of family reunification with a Montenegrin citizen or with a foreign national who has a permanent residence permit, a temporary residence permit for scientific research or a temporary residence permit and work for the transfer of persons within a foreign company; 2) a temporary residence permit for study; 3) a temporary residence permit for humanitarian reasons; 4) a temporary residence permit for a stateless person; 5) a certificate of registration of residence referred to in Article 152 of this Law; 6) a temporary residence permit for a third-country national who has been granted permanent residence in another EU Member State; 7) a temporary residence permit for the purpose of family reunification with the holder of an EU Blue Card; 8) recognised refugee status or granted additional protection in accordance with the Law on Asylum (*Official Gazette of Montenegro*, No. 45/06),¹⁰⁸ respectively granted asylum or subsidiary protection or temporary protection, in accordance with the law regulating the international and temporary protection of aliens.

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

According to the Law on Foreigners, a foreigner is a citizen of another state or a stateless person. A stateless person is a foreigner whom, in accordance with national legislation, no state considers as a citizen.

Until December 2014, when the previous Law on Foreigners was adopted, there was uneven regulation and practice in Montenegro in the treatment of refugees, displaced persons, foreign nationals with temporary or permanent residence and stateless people. This relates to nationality in combination with ethnic origin and there were a number of incidents at the time, where victims were refugees of Croatian or Bosnian ethnicity and with Bosnian or Croatian citizenship, Roma IDPs from Kosovo and Albanian IDPs from Kosovo.¹⁰⁹ The Law on International and Temporary Protection of Foreigners created the legal prerequisites for these groups to enjoy equal rights with nationals of Montenegro, with the exception of the right to vote.

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

In Montenegro, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). Article 9(2) of the Labour Law provides that provisions of the law, collective agreements and labour contracts regarding special protection and assistance for certain categories of employed people, and especially those regarding the protection of people with disabilities, women during pregnancy and maternity leave and special leave in order to care for a child, are not to be considered discrimination.

¹⁰⁸ The Law on Asylum has been replaced by the Law on International and Temporary Protection of Foreigners, *Official Gazette of Montenegro*, Nos. 2/17 and 3/19.

¹⁰⁹ See the *Kaluđerski laz* case; in 1999, soldiers of the Yugoslav army killed six Albanian IDPs from Kosovo.

Under Article 119(1) of the Labour Law, where it is necessary to ensure health and safety, the employer has a duty to assign employees with disabilities to work corresponding to their residual working ability at the level of professional development, in accordance with the Rulebook on internal organisation and systematisation. If an employed person with disabilities cannot be assigned, within the meaning of Article 119(2), the employer is obliged to provide them with other rights, in accordance with the law regulating the vocational training of persons with disabilities and the collective agreement (paragraph 2). In this sense, other rights include rights under the Law on Professional Rehabilitation and Employment of Persons with Disabilities (notably Article 12)

Professional rehabilitation, according to Article 12 of the LPREPD, includes a number of measures and activities such as: 1) Providing professional information and advice and assessment of professional capabilities, in order to make decisions about occupation, training programmes and employment; 2) Implementation of the procedure for assessing work capabilities and skills; 3) Psychosocial and motivation support and assistance in assigning people with disabilities to appropriate rehabilitation programmes; 4) Realisation of programmes for training people with disabilities for certain types of occupation and their participation on the labour market i.e. maintenance of employment; 5) Adjustment of working posts to the capacities of people with disabilities; 6) Professional assistance and monitoring of people with disabilities with the aim of their efficient inclusion in the working environment, maintenance of employment and advancement; 7) Analysis of the labour market, opportunities for employment and inclusion in the labour process of people with disabilities; 8) Assessment of possibilities to perform, develop and improve professional rehabilitation programmes; 9) Training for work, additional training, change of vocation and programmes to maintain and improve working and social skills with the aim of quality preparation for employment; 10) Providing information and advice on the appliance of various technologies and techniques in learning and working; 11) Providing information on financial resources; 12) Technical support, monitoring and assessment of working results of people with disabilities.

According to Article 14 of the Law on Occupational Health and Safety,¹¹⁰ the employer is obliged to provide special health and safety protections for the work of employed women during pregnancy, people under 18 years of age and people with disabilities, in accordance with this and other laws. However, Article 32 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities establishes a duty for the employer to organise a special protective workshop (type of sheltered employment) for people with disabilities in cases where work is done under onerous conditions (such as under water, underground, in open spaces or at high altitudes). Article 9(2) of the Labour Law provides exceptions for health and safety in relation to disability, as mentioned on the previous page.

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

4.6.1 Direct discrimination

In Montenegro, national law provides for specific exception(s) for direct discrimination on the ground of age.

a) Justification of direct discrimination on the ground of age

In Montenegro, national law provides for justification for direct discrimination on the ground of age.

An example of justification of direct discrimination on age-related grounds can be found in the case law of the High Court of Podgorica. In the case of *SA v. GB*,¹¹¹ the claimant had applied for a position as an engineer, but a younger candidate was chosen. The court held

¹¹⁰ Law on Occupational Health and Safety, *Official Gazette of Montenegro*, Nos. 34/14, 44/18.

¹¹¹ High Court of Podgorica, judgment No. 2786-13/12 2014.

that this choice could be justified by reference to the interest of the company in employing an expert who could continue their work and professional development in the company on a long-term basis.

b) Permitted differences of treatment based on age

In Montenegro, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

The Law on the Prohibition of Discrimination in Article 2a prescribes acts that are not considered as discrimination in the sense of Article 2(2) of this Law, including, among other exceptions, determining upper or lower age limits, professional experience or level of education as conditions for establishing employment or as conditions for acquiring other rights from employment, in accordance with special regulations, but also determining the appropriate maximum age limit as a reason for termination of employment in accordance with the conditions for acquiring the right to an old age pension.

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

In Montenegro, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlements to benefits, taking up the possibility provided for by Article 6(2).

There is a standard age (65/67) at which people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. However, in Montenegro, this kind of retirement scheme does not work in practice, due to the fact that most employers do not pay pension contributions.

4.6.2 Special conditions for young people and older workers

In Montenegro, there are no special conditions set by law for older and younger workers in order to promote their vocational integration. However, there are some measures of a protective nature not specifically aimed at the purpose of promoting vocational integration. Article 17 of the Labour Law, which deals with the rights of employees, guarantees special protection for employees under 18 years of age.¹¹² Article 118 provides for the special protection of young people (under the age of 18). The Labour Law pays special attention to this category by introducing numerous provisions. Article 120 of the Law prescribes protection for employees under the age of 18.

4.6.3 Minimum and maximum age requirements

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

¹¹² Special protection for people with disabilities as well as for women and young people is guaranteed by the Constitution and national law and cannot be considered as positive action but as broad special welfare measures.

The Law on the Prohibition of Discrimination establishes discrimination on the grounds of age as a special type of discrimination and prescribes minimum and maximum age requirements as exceptions for establishing employment or acquiring other rights arising from employment. In addition, the same Law prescribes age limit as a reason for the termination of employment, in accordance with the conditions for acquiring the right to the old-age pension.

In a 2019 case regarding age discrimination in employment,¹¹³ the Protector issued an opinion invoking, *inter alia*, Article 6 of Directive 2000/78/EC. It is common practice for opinions to list relevant international legal sources/standards/case law, but in the final instance the Protector relies on national legislation and ECHR and ECtHR case law. This institution applies the discrimination test of the ECtHR in the discrimination procedure on the basis of the methodology set out in numerous cases, including *Fabris v. France* (point 29 of the Protector's opinion).

The Protector noted that 'Montenegro Airlines' A.D. Podgorica at the Competition for the Training of Professional Pilots for the Certification of Co-Pilots on Embraer 195 Aircraft and Prescribing Age Requirement (Under 30 at the Time of Application) discriminated against the complainant on that personal basis in the field of employment.

4.6.4 Retirement

a) State pension age

In Montenegro, there is a state pension age at which individuals must begin to collect their state pensions. However, under certain conditions, an individual can collect a pension and still work. An individual/beneficiary of the state pension may enter into a contract of employment for additional work, without limitation. However, under such a contract of employment, the pensioner receives only their salary and not the social protection insurance. The Law on Pension and Disability Insurance provides for the right and duty to begin to collect old-age pensions. Under the provisions of this Law, men acquire this right when they reach the age of 65 and women when they reach 60.¹¹⁴ In both cases they must have at least 15 years of pensionable service. In addition, at the age of 55 men can start collecting their pensions if they have 40 years of pension insurance, as can women if they have 35 years of pension insurance.

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

b) Occupational pension schemes

In Montenegro, there is a standard age (65/67) at which people can begin to receive payments from occupational pension schemes and other employer-funded pension

¹¹³ Protector of Human Rights and Freedoms, Opinion No. 263/19 of 16 September 2019, available at: http://www.ombudsman.co.me/docs/1572434114_16092019-preporuka-ma.pdf.

¹¹⁴ The age of retirement for each employee is regulated according to the law on pensions and social insurance which was in force at the time when these employees started work for the first time. Therefore, some workers become eligible for the pension at 65 (men) and 60 (women), while others are only eligible at 67 (men) and 65 (women).

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

c) State imposed mandatory retirement ages

In Montenegro, there is a state-imposed mandatory retirement age. Under the Labour Law, employment is terminated by law when the employee reaches 67 years of age (65 for women) and has a minimum of 15 years of pensionable service (the same requirements apply to men and women), (Article 164).

d) Retirement ages imposed by employers

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment on attaining pensionable age. As a contract can be terminated on reaching retirement age, the law that protects against dismissal does not apply to those who are of post-retirement age.

Article 9 of the Labour Law establishes a guarantee that employment rights are applicable to all workers, including equal conditions in access to employment and the selection of candidates, working conditions and all employment-based rights, education, vocational training and advanced vocational training, promotions and dismissals.

f) Compliance of national law with CJEU case law

Since Montenegro has not yet become a member of the EU, its national law has not yet been fully harmonised with EU legislation and CJEU case law. At the moment, it can be said that the practice of national courts does not rely on CJEU case law and judges don't take into account, to a sufficient extent, CJEU case law during trials.

Montenegro has undertaken the obligation of direct application of international agreements, both through harmonisation of national regulations, as well as through judicial and quasi-judicial practice, in accordance with the Stabilisation and Association Agreement.¹¹⁵ In this respect, secondary sources of EU law on equality and non-discrimination are equally important sources of law.

Under actions which are not considered discrimination (Article 2a(1)(6)), the Law on the Prohibition of Discrimination includes the establishment of an appropriate maximum age limit as a reason for termination of employment in accordance with the conditions for obtaining the right to an old-age pension. This article is in accordance with Article 6 of Directive 2000/78/EC on justified difference in treatment on the basis of age, and consequently in accordance with CJEU case law.

¹¹⁵ Montenegro signed the Stabilisation and Association Agreement on 15 October 2007, which, after ratification by EU Member States, entered into force on 1 May 2010.

Pursuant to Article 164 of the Labour Law, employment shall terminate by virtue of the law when the employee reaches the age of 67 and has a minimum of 15 years of pension insurance. This provision was adopted with the aim of legitimate employment policy and labour market. Prior to the amendment of the former Labour Law, it was stipulated that employment shall not terminate by virtue of the law if otherwise agreed between an employer and an employee. The Constitutional Court of Montenegro¹¹⁶ ruled that this legal provision was contrary to the principle of legal certainty and the rule of law. The Court explained that the law must indicate the extent of the discretion entrusted to the competent authorities and regulate the use of that discretion in a sufficiently precise form, in order to provide adequate protection against arbitrary decisions. In accordance with the Court's decision, the provision was deleted by amendments to the former Labour Law of 2018.

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

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

However, the criteria for selecting workers for redundancy must not be in contravention of the provisions of the Labour Law prohibiting discrimination, which explicitly list age as a prohibited ground of discrimination.

On the other hand, the Law on Civil Servants and State Employees regulates the question of the reorganisation of the state body and the reduction of the number of positions. Due to changes in the internal organisation of the state body, reassignment of civil servants or state employees shall be made to positions corresponding to their level of qualification and for which they fulfil other prescribed requirements. During the reassignment of civil servants or state employees, the employer takes into account their previous jobs and priority is given to civil servants or state employees who have had better performance appraisal grades within the last three years (Article 129).

b) Age taken into account for redundancy compensation

In Montenegro, national law provides compensation for redundancy. Such compensation is not affected by the age of the worker.

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

In Montenegro, national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

The Law on the Prohibition of Discrimination recognises acts that are not considered discrimination, including different treatment prescribed by law for the purpose of preserving health, safety of citizens, maintenance of law and public order, prevention of

¹¹⁶ Constitutional Court, decision U-I No. 18/15.

criminal offences and protection of the rights and freedoms of others, if measures are appropriate and necessary to achieve legitimate goals in a democratic society and proportionate to the aim to be achieved by undertaken measures (Article 2a). This provision does not cover the ground of racial/ethnic origin.

4.8 Any other exceptions

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

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

a) Scope for positive action measures

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

The Constitution of Montenegro provides that regulations and the introduction of special measures aimed at creating conditions for the realisation of ethnic, gender and overall equality and protection of people who are in an unequal position on any grounds is not considered discrimination, provided that the special measures last only until the achievement of the aims for which they were undertaken (Article 8). The Constitution also provides for special minority rights, which include the right to authentic representation of national and ethnic minorities in the Parliament of Montenegro and in the local government assemblies, in which they represent a significant share of the population, according to the principle of affirmative action, as well as the right to proportional representation in public services, state authorities and local government bodies (Article 79).

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

The Law on the Prohibition of Discrimination, in Article 5(2), provides that:

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

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

In a recent case, a procedure before the Protector was initiated in order to examine an alleged violation of the right to equality in relation to employment of the Muslim national minority¹¹⁷ (and in relation to Article 79(1)(10) of the Constitution of Montenegro). As the complaint did not address an individual violation of the right to equality in employment in a specific institution, and the national structure of senior management could not be determined on the basis of available data, the Protector issued a recommendation to the Police Directorate that it should take into account the representation of minorities in the police service in respect of the implementation of strategic documents. The deliberations also addressed the Racial Directive (Article 1, Article 3(1)(a) and Article 5).

¹¹⁷ The group of citizens addressed the Office of the Protector, stating there were no members of the Muslim minority employed in senior positions neither at the Bijelo Polje Security Centre, nor at the Border Police sector in Bijelo Polje. See Protector of Human Rights and Freedoms, Opinion No. 01-248/19-4 of 23 September 2019, available at: http://www.ombudsman.co.me/docs/1570088970_23092019-preporuka-cbbp.pdf.

Article 15(1) of the Labour Law, referred to as 'special measures', prescribes that provisions of laws, collective agreements or contracts of employment will not be considered as discrimination where they relate to special protection and assistance for specific categories of employees, and in particular where they govern the protection of people 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.

On the other hand, the Law on the Prohibition Discrimination of Persons with Disabilities prescribes the obligation for state bodies, government bodies, local self-government bodies, public enterprises and other legal persons vested with public powers, as well as other legal and natural persons within their competencies and powers, to deliver, introduce and implement, regulations and special measures, aimed at creating conditions for the realisation of equality and protection of people with disabilities, who are on any ground in an unequal position compared to other people.

In addition, in order to ensure employment for people with disabilities, sheltered workshops can be established by the Law on Professional Rehabilitation and Employment of Persons with Disabilities. In accordance with Article 31, sheltered workshops can be set up as a form of business organisation, if they ensure employment for people with disabilities as a share of at least 51 % of the total number of employees. Sheltered workshops may be established by local government, companies, entrepreneurs, the National Employment Agency, disability NGOs, employers' associations, trade unions and other legal and natural persons. Work centres, sheltered workshops and facilities have a privileged status in accordance with special regulations.

Privileged status, within the meaning of Article 35(1), implies:

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

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

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

Regulations and special measures must be adopted in the areas of: spatial planning and construction, information, transport, education, employment, labour, health, social protection, culture, public and political activity, as well as in other areas of social life in which there are reasons for their adoption or implementation.

b) Quotas in employment for people with disabilities

In Montenegro, national law provides for quotas for the employment of people with disabilities.

According to Article 21 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities, an employer who has between 20 and 50 employees is obliged to employ at least one person who has been officially recognised as having a disability. Employers with more than 50 employees are obliged to ensure that people with disabilities make up at least 5 % of their total number of employees. In the main, people with

disabilities have been engaged by employers through the programme of public works implemented by the National Employment Agency, as the Agency has a duty to provide special support to people with disabilities with regard to their employment and professional rehabilitation.

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

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

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

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

Positive action measures were taken in the area of professional rehabilitation for people with disabilities. On 15 December 2015, the Management Board of the Employment Agency adopted a decision to allocate a EUR 2 million grant to support 53 projects covering professional rehabilitation, an active labour market policy and the employment of people with disabilities. In partnership between the private, public and civil sectors, it was planned that activities for 311 people with disabilities would be implemented through the programme, and that 204 of the participants (65 %) would be employed for a period of three to 12 months, thus fully achieving the objectives of the call for proposals on the employment of people with disabilities.

All the measures for professional rehabilitation (except measure 14) covered people with disabilities and other hard-to-employ people, as can be seen from the records of all regional units. Since the beginning of 2016, 161 people have been included in professional rehabilitation measures (156 people with disabilities and five other hard-to-employ people), according to the records of the regional units. These measures have been delivered by two contractors (ZOPT – 80 people; Pamark – 81 people). Of the total number involved (161 people), 89 were women (55.27 %).¹¹⁸

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

¹¹⁸ There is no information available on the effective implementation of this measure.

and under the same conditions. Work centres must have at least 80 % of employees with disabilities in relation to the total number of employees. A person with disabilities who works in the centre has the position of a service user.

The LPDPD prescribes that the Employment Service of Montenegro establishes a Fund for Professional Rehabilitation and Employment of Persons with Disabilities and that the Fund's resources are provided, among other sources, from a special contribution paid by employers who, depending on the total number of employees, did not meet the prescribed employment quota for people with disabilities.¹¹⁹ This Fund also receives financial means from the budget of Montenegro, the budget of the local self-government in whose territory a person with a disability resides, donations and support from domestic and foreign legal and natural persons, as well as other sources in accordance with the law.

According to the LPRPD, the Fund's resources can be used, among other things, for co-financing of special employment organisations, programmes of active employment policies involving people with disabilities, subsidies to employers who employ disabled people, and financial assistance to programme participants for the duration of their professional rehabilitation and inclusion in an active employment policy measure: education and adult training. They are also provided for monitoring purposes in realisation of measures and activities for professional advancement, rehabilitation and employment of people with disabilities as well as intended use of the Fund (Article 39).

¹¹⁹ The quota system in Article 21 of the LPDPD is already addressed above.

6 REMEDIES AND ENFORCEMENT

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

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

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

The Protector of Human Rights and Freedoms of Montenegro is an independent and autonomous institution entrusted with protecting and promoting human rights and freedoms in general terms and represents a national mechanism for protection against discrimination (Article 2(1) of the Law on the Protector of Human Rights and Freedoms of Montenegro).

The Protector has special competences to act against discrimination and minority rights violations and to protect women's rights. The Law on the Prohibition of Discrimination provides the Protector of Human Rights and Freedoms with powers consistent with the requirements of Directive 2000/43/EC. These powers include provision of assistance to victims, conducting surveys on discrimination and publishing reports and making recommendations for the elimination of discrimination (Articles 20 and 22).

The LPD (Article 24) regulates proceedings before the courts and prescribes that anyone who considers themselves a victim of discriminatory treatment on the part of an authority, business entity, other legal person, entrepreneur or natural person shall be entitled to court protection. The proceedings shall be initiated by filing a lawsuit. The proceedings before the court are deemed to be urgent. In a dispute for protection from discrimination, in addition to an appeal, revision as an extraordinary legal remedy shall always be allowed.¹²⁰ Lawsuits also allow the following measures: a) the establishment of the fact that the respondent has acted discriminatorily towards the claimant; b) prohibition of executing the action that carries a potential threat of discrimination, i.e. prohibition of a repetition of the discriminatory action; c) compensation for damages; and d) in cases where the discrimination is perpetrated through the media, publication in the media of the judgment establishing discrimination, at the cost of the respondent (Article 26).

In relation to people who may file a lawsuit, the Law prescribes in Article 30 that the lawsuit may be filed on behalf of a person or group of persons who have been discriminated against, as well as by organisations or individuals who work in the field of human rights protection. The lawsuit may be filed only with the written consent of a person or group of persons who have experienced discrimination. The lawsuit may also be filed by a person who, with the intention of directly verifying the application of the rules on non-discrimination, presents themselves as or puts themselves in the position of a person who may experience discrimination on any ground.

The LPD also obliges the relevant inspectorates to undertake monitoring with respect to discrimination in the field of labour and employment, occupational safety, healthcare, education, building and construction, traffic, tourism and other fields (Article 32).

Article 139 of the Labour Law provides that the employer decides on the rights and responsibilities of the employees arising from and in relation to their work, in accordance with the law, collective agreements and the employment contract. An employee who believes that a right arising from or in relation to their work has been violated by the employer may submit a request to the employer to enable them to exercise that right. The decision on this request is final and enforceable, unless regulated otherwise by the law.

¹²⁰ Supreme Court of Montenegro, judgment of 25 June 2015, UŽ-Rev. No. 4/15; judgment of 19 April 2017, Rev. No. 365/17.

The decision is submitted to the employee in writing, with an explanatory note and a note on the legal remedy.

Employees who are not satisfied with the decision or who have not received a decision within the set time limit are entitled to initiate proceedings before the competent court in order to protect their rights, within 15 days of the date of the decision being issued.¹²¹ The employer is obliged to execute a final court decision within 15 days of the date of the decision being issued, unless a different time limit is set by the court decision.

A victim of discrimination in the field of labour and social security can also address a complaint to the Ministry of Labour, whose scope of work includes labour inspection. Article 39 of the Law on Labour Inspection¹²² lays down that, on completion of their investigation, the inspector issues a decision on measures, actions and deadlines for the elimination of irregularities. An appeal against the inspector's decision can be made within eight days of the day the written decision is delivered. The Minister is competent to decide on appeals. A dissatisfied party may initiate an administrative dispute before the court against the Ministry's decision.

The LL introduces obligation for the employee who consider themselves a victim of discrimination that before filing a complaint to the court start a procedure before the Agency for peaceful labour dispute resolution or before the Centre for alternative dispute resolution. A person that is no longer employed is entitled (but not obliged) to act in a same manner (Article 16(1), (3)). While the proceedings are pending before the Agency, the time limits for bringing a dispute before a competent court do not expire (Article 45 (2), the Law on alternative dispute resolution).¹²³ However, the proceeding before the mediator does not prevent the scheduling of a preliminary hearing or a first hearing for the main hearing (Article 27a (3), the Law on Mediation).¹²⁴

The rule that proving no violation of equality in rights and equality before the law occurred due to that act passes to the respondent applies in proceedings before courts, those institutions or other competent bodies alike (Article 142 (2)). The Law on the Peaceful Resolution of Labour Disputes¹²⁵ offers procedures for the resolution of collective and individual labour disputes without going to court. Within the meaning of this Law, collective disputes are those which arise: a) during the process of concluding or amending collective agreements; b) in the case that specific provisions of a collective agreement are not equally applied to all employees; c) in relation to the exercise of the right to establish a trade union; and d) in the exercise of the right to strike. Individual labour disputes are those which arise in the exercise of the employee's employment-related rights. Peaceful resolution of these disputes is entirely voluntary, and the procedure is carried out by mediators (who place themselves at the disposal of the parties with a view to securing an amicable settlement of the matter) and arbiters (who decide on the matter). The Agency for the Peaceful Resolution of Labour Disputes was the first institutional service for the out-of-court resolution of collective and individual labour disputes. It was established by a decision of the Government of Montenegro (*Official Gazette of Montenegro* No. 69/08), pursuant to the provisions of the Law on the Peaceful Resolution of Labour Disputes established in accordance with this Law.

¹²¹ In Montenegro, there are no special labour courts and discrimination cases are therefore dealt with by the civil courts.

¹²² Law on Labour Inspection (*Zakon o inspekciji rada*), *Official Gazette of Montenegro*, Nos. 79/08 and 40/11.

¹²³ Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rješavanju radnih sporova*), *Official Gazette of Montenegro*, Nos. 16/07, 53/11, 11/15, 42/15 and 55/16.

¹²⁴ Law on Mediation (*Zakon o posredovanju*), *Official Gazette of Montenegro*, Nos. 30/2005, 29/2012 and 18/2019.

¹²⁵ Law on the Peaceful Resolution of Labour Disputes, *Official Gazette of Montenegro*, Nos. 16/07, 53/11, 11/15, 42/15 and 55/16.

The Centre for Alternative Dispute Resolution provides for a procedure for the out-of-court settlement of labour disputes before an arbitrator or conciliator, which is different from mediation.¹²⁶

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

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

Article 10 of the Law on Administrative Disputes¹²⁷ stipulates that any natural or legal person who believes that any of their rights or interests based on a law have been violated by an administrative act or other administrative activity has the right to institute an administrative dispute. A state body, a state administration body, an organisation, a settlement, a group of people or others who do not have the status of a legal entity may also institute an administrative dispute if they can be holders of rights and obligations that were dealt with by administrative act or were subject to other administrative activity.

Finally, the Criminal Code of Montenegro has created preconditions for effective legal protection from criminal offences containing elements of discrimination. Namely, Article 42a of the Criminal Code prescribes a special circumstance for sentencing for a criminal offence committed based on hatred. In that sense, Article 42a prescribes if a criminal offence is committed based on hatred towards another person because of their national or ethnic identity, membership of a race or religion or because of the absence of such an identity, disability, sex, sexual orientation or gender identity, the court will consider this circumstance as aggravating, unless it is prescribed as a characteristic of the basic or severe form of the criminal offence.

The Law on Amendments to the Criminal Code of Montenegro¹²⁸ adopted a new regulation, Article 42a, which, in addition to the aggravating circumstances in paragraph 1 of this Article, introduces paragraph 2, according to which the fact that a criminal offence was committed against a person belonging to a particularly vulnerable category (children, people with disabilities, pregnant women, elderly people or refugees) obliges the court to take this circumstance as aggravating, without determining the motive of hatred, as a subjective element of the criminal offence.

At present, there are no available data from the courts regarding recent case law on discrimination relating to criminal offences.

Discrimination-related criminal offences are prosecuted *ex officio* by the competent state prosecutor. At the moment, this is the only discrimination-specific remedy. In all these

¹²⁶ Law on Mediation, *Official Gazette of Montenegro*, Nos. 30/05 and 29/12. More information on the practice of mediation in Montenegro can be found in Gorjanc Prelević, T. (2017), *Posredovanje u Crnoj Gori (Mediation in Montenegro)*, Human Rights Action, available at: <http://cemi.org.me/wp-content/uploads/2017/05/Posredovanje-medijacija-u-Crnoj-Gori.pdf>.

¹²⁷ Law on Administrative Disputes (*Zakon o upravnom sporu*), *Official Gazette of Montenegro*, No. 54/16.

¹²⁸ Law on Amendments to the Criminal Code of Montenegro, *Official Gazette of Montenegro*, No. 44/2017.

cases, an alleged victim of discrimination has the status of an injured party whose personal or property right is put at risk or impaired by a criminal offence being committed. The injured party has the right to report a criminal offence to the competent state prosecutor. The right to file a report with the competent state prosecutor is provided for in Article 229 of the Criminal Procedure Code. If the report is filed with the court, the police authority or a state prosecutor lacking jurisdiction, they have a duty to accept it and must forward it immediately to the state prosecutor who does have jurisdiction.

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

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

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

b) Barriers and other deterrents faced by litigants seeking redress

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

Participants in proceedings, primarily people seeking protection against discrimination, make several key observations that are important for efficient and effective judicial intervention in this area. Specifically, parties to proceedings express dissatisfaction with the time required to undertake certain procedural actions (period of time between submission of complaints and receiving a response, scheduling hearings) although, according to the Law on the Prohibition of Discrimination (Article 24(4)), this procedure is

deemed to be urgent. Furthermore, there is dissatisfaction with regard to the merits of court decisions when it comes to the amount of non-pecuniary damages.¹²⁹

c) Number of discrimination cases brought to justice

In Montenegro, statistics on the number of cases relating to discrimination that are brought to justice are not available.

According to Article 33 of the Law on the Prohibition of Discrimination, the courts (including misdemeanour authorities), the state prosecutor's offices, the authority responsible for police affairs and inspection authorities are obliged to keep separate records on complaints filed, proceedings initiated and decisions taken within their own jurisdiction in relation to discrimination. The authorities must deliver data from these separate records to the Protector of Human Rights and Freedoms no later than 31 January of the current year for the previous year, and at the request of the Protector they must also deliver the data from these records for a certain shorter period during the year. Details about the content and manner in which the records must be kept is prescribed by the state authority competent for human and minority rights.

Although this provision is clear and concretised through the Rulebook on the content and manner of keeping separate records on cases of reported discrimination, the authorities have not yet established the appropriate records. Instead, they submit information on discrimination in a largely unsystematic, uneven way and only on the explicit request of the Protector. Keeping separate records of cases of discrimination as a legal obligation is necessary not only for the purpose of creating policies in certain areas in which discrimination is manifested, but also for the effectiveness of conducting procedures for determining discrimination in which statistical data may be relevant evidence.

The Protector's annual report on discrimination usually contains some general information on the number of such cases, but without references it is difficult and time-consuming to trace those cases. As in previous years, the Protector notes the systematic keeping of records by the misdemeanour courts and points out that they are the only public authority to submit statistics for the previous year by 31 January of the current year to the Institution in accordance with the obligation arising from Article 33 of the Anti-Discrimination Act. According to the annual report on the work of the misdemeanour courts for 2019, in four cases, the offences were prosecuted as offences under the LPD, and three cases were prosecuted before the Misdemeanour Court in Podgorica, of which 2 misdemeanour charges were based on sexual orientation. In one case, the fine amounted to EUR 600 and in the other case to EUR 150, while on the third request an acquittal was made. One motion for misdemeanour proceedings was filed before the Budva Misdemeanor Court citing political affiliation as a basis for discrimination. In this case, the procedure was suspended.¹³⁰

According to the data of the Judicial Council of Montenegro, one discrimination lawsuit was filed in 2019. The filing date was April 30 2019, but the decision is not yet final. A procedure was conducted citing direct discrimination due to the inability of a male disabled person to access and use a facility; it lasted for 227 days. In one case in 2018, the prosecutor's claim was rejected as unfounded; it involved mobbing (abuse at work). The decision was not final, and the proceedings lasted 315 days. During 2019, two civil proceedings for protection against discrimination on the grounds of disability were closed in a judgment by the Basic Court in Podgorica of 30 September 2019 against the capital of Podgorica and a judgment by the Basic Court in Podgorica of 11 October 2019 against the Centre for Vocational Education. Both claims related to the area of access to facilities and outside areas in public use, and both were adopted in their entirety.¹³¹

¹²⁹ Protector of Human Rights and Freedoms, report for 2016.

¹³⁰ Protector of Human Rights and Freedoms, draft report for 2019, p. 185.

¹³¹ Protector of Human Rights and Freedoms, draft report for 2019, pp. 183, 196.

The data confirm that in previous years, the practice of the basic courts has involved keeping incomplete records of procedures that have been initiated to provide protection against discrimination. The presentation of the records has been slightly improved – they now give grounds and areas of discrimination as the most important parameters for monitoring discrimination and indicate information on procedures that have been transferred from the previous year.

The Police Directorate provided detailed information to the Protector on discrimination cases reported to this body in 2019. Of registered 100 cases, the discrimination related to sexual orientation in 89 cases, and to nationality in nine cases.¹³²

According to the Labour Inspectorate, of a total of 1 573 initiatives in 2019, eight initiatives were connected with alleged discrimination in the exercise of employment rights, and in none of these cases any irregularities that would indicate discrimination were found.¹³³

d) Registration of discrimination cases by national courts

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

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

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

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

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

Under the Law on the Prohibition of Discrimination, anyone who considers that they have been discriminated against by an act, action or failure to act by an authority or other legal or natural persons may submit a complaint to the Protector of Human Rights and Freedoms. A complaint can also be submitted to the Protector by organisations or individuals involved in human rights protection, with the consent of the person or the group of persons who have experienced discrimination (Article 22).

According to Article 21(1)(4) of the LPD, the Protector of Human Rights and Freedoms may initiate the procedure for protection against discrimination in court or appear in proceedings as an intervener.

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

¹³² Protector of Human Rights and Freedoms, draft report for 2019, p. 187.

¹³³ Protector of Human Rights and Freedoms, draft report for 2019, p. 187.

- b) Engaging in proceedings in support of victims of discrimination (joining as an intervenient in court proceedings)

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

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

According to Article 21(1)(4) of the Law on the Prohibition of Discrimination, the Protector of Human Rights and Freedoms of Montenegro is competent to initiate proceedings for protection against discrimination in court or appear in proceedings as an intervener. Thus, for example, during 2014 the Protector participated in three litigations for protection against discrimination in the capacity of intervener on the prosecutor's side (in which the prosecutors were people with disabilities). No such cases were reported in 2018.

- c) *Actio popularis*

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

In Montenegro, *actio popularis* is not available to challenge discrimination in legal proceedings, but the abstract constitutional review of discriminatory legislation can be requested by anybody (Article 150, Constitution).

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

Montenegro ratified the revised European Social Charter but did not ratify the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

- d) Class action

In Montenegro, national law allows associations and organisations to act in the interest of more than one individual victim for claims arising from the same event (class action). According to Article 30 of the Law on the Prohibition of Discrimination, a claim on behalf of a person or group of persons who have experienced discrimination may be submitted by organisations or individuals who deal with protection of human rights. The complaint may be filed only with the written consent of the person or groups of persons concerned. The provisions of the law governing civil proceedings shall apply accordingly to this procedure before the court. The provisions of the Law on Civil Procedure do not address the questions whether all claimants must be heard in court nor whether claimants can opt out.

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

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

Article 29 of the Law on the Prohibition of Discrimination provides that, if the complainant proves the likelihood of the respondent having committed an act of discrimination, the burden of proving that no violation of equality in rights and equality before the law occurred due to that act passes to the respondent. In addition, the rule on the burden of proof also applies in the procedure for protection from discrimination before the Protector of Human Rights and Freedoms. The provision relating to the burden of proof does not apply to misdemeanour and criminal proceedings.

The Law on the Prohibition of Discrimination has introduced procedural tools that create a more even balance between a person who feels discriminated against and an employer or service provider. The difficulty of proving that discrimination has taken place in a certain case is alleviated by the introduction of the shift of the burden of proof in national law. It was deemed reasonable that the party who has access to the most information, such as an employer, bears a more stringent responsibility for refuting a presumption of discrimination than the party without full access to the information.

The Labour Law introduced the new rule concerning the burden of proof in cases of discrimination: *prima facie* evidence on the basis of which it can be reasonably assumed that discrimination has occurred. If a party who is considered to be harmed because of unequal treatment within the meaning of this Law brings before the court or other competent authority facts which can be assumed to be direct or indirect discrimination, the burden of proving that there has been no violation of the principle of equal treatment shall be transferred to the defendant, respectively the legal or natural person against whom the proceedings have been brought before the competent authority (Article 144(2)).

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

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

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

The Labour Law, in Article 10(4), prohibits victimisation of employees if they report or testify about harassment and sexual harassment at work and in relation to work. As can be concluded from this provision, protection is not confined to the complainant, but also covers employees who report harassment or provide testimony about it. However, this would mean that people who, for example, provide help or support are not covered. Furthermore, the provision does not cover other forms of discrimination other than harassment and sexual harassment nor does it apply to fields outside employment.

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

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

The Montenegrin legislation provides for sanctions in cases of discrimination: fines, warning measures and security measures. The LPD contains a specific chapter that lists numerous

offences. The sanction is most often a fine ranging from EUR 1 000 to EUR 20 000, but for some offences one or more security measures (confiscation of objects; prohibition of performing a vocation, activity or duty; making the decision public) may be imposed, either alone or with a fine or warning measure.

The LL stipulates a fine ranging from EUR 1 000 up to EUR 10 000 as a sole sanction for the failure of the legal person to protect the rights of employees in accordance with Articles 7, 8, 9, 11, 12, 13 and 14 of this Law (Article 209). The responsible person, as the legal person or an entrepreneur, shall be fined for the same offence but will receive a milder fine.

At present, there is no available information on the application and effectiveness of penalties.

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

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

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

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

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

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

superiority of one race over another, or promotes racial hatred, or incites racial discrimination, is liable to imprisonment for a term of three months to three years.

In order to ensure effective, proportional and dissuasive sanctions the implementation of Article 42a of the Criminal Code is very important, because it would provide enhanced criminal protection for particularly vulnerable groups, whose members are victims of various crimes, including hate speech.

Sanctions are available in civil cases, including restitution, compensation of material damage and award of damages. Article 26 of the Law on the Prohibition of Discrimination provides that civil proceedings can be used to claim: 1) establishment of the fact that the respondent has acted in a discriminatory way against the complainant; 2) prohibition of the activity that has the potential to be discriminatory, i.e. prohibition of any repetition of a discriminatory act; 2a) elimination of the consequences of discriminatory treatment; 3) compensation of damage, in accordance with the law; 4) publication in the media of the judgement establishing discrimination, at the cost of the respondent.

In the chapter on penal provisions (Article 34, 34a, 34b, 34c) the same Law prescribes fines for offences under the Law. Through the amendments to the Law on the Prohibition of Discrimination from 2017, penalty provisions have also been defined for all substantive provisions in the Law and have been introduced for physical persons, while the misdemeanour penalties have also been increased for legal entities, responsible people in legal entities, state bodies, local self-government bodies and local administration bodies for the violation committed on any of the grounds stipulated in the Law. The goal was to ensure that the penalties are efficient, proportionate and deterrent.

In addition, for certain offences, individually or with a fine or a warning measure, one or more protective measures may be imposed as follows: 1) seizure of items; 2) prohibition on carrying out the occupation, activity or duty; 3) public announcement of a decision (Article 34c(1)). Bearing in mind that a final judgment may require elimination of the consequences of discriminatory treatment and compensation of damage, it means that reinstatement is available in labour disputes in which a request for protection from discrimination is highlighted.

Sanctions which can be imposed in administrative proceedings include fines and monetary and non-monetary obligations. Non-monetary obligations, among others, include seizure of items; prohibition on carrying out the occupation, activity or duty; and public announcement of a decision.

b) Compensation – maximum and average amounts

Under the Law on Contracts and Torts,¹³⁴ which governs the awarding of compensation, there is no ceiling on the maximum amount of compensation that can be awarded. No information is available on whether compensation has ever been awarded and, if so, the amount imposed.

c) Assessment of the sanctions

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

¹³⁴ Law on Contracts and Torts (*Zakon o obligacionim odnosima*), *Official Gazette of Montenegro*, Nos. 47/8, 46/14 and 43/18.

amount of damage caused or illegal material benefit acquired or between EUR 20 000 and EUR 50 000.

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

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

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

In Montenegro, there are several bodies for the promotion of equal treatment, the Protector of Human Rights and Freedoms being the most important. The Protector is an independent institution which was set up on the basis of the Law on the Protector of Human Rights and Freedoms in 2003. Its position was further enhanced with the 2007 enactment of the new Montenegrin Constitution, the first to mention this institution and task it with taking measures for the protection of human rights and freedoms. Under Article 27(1), the law establishes the Protector as an institutional mechanism for protection against discrimination. Pursuant to the Law on the Prohibition of Discrimination, the Protector has competence, among other duties, to undertake activities for the promotion of equality.

The Protector, within its mandate, promotes equality and diversity and contributes to preventing discrimination, in particular by providing training, information, advice, guidance and support to duty bearers with obligations under the equality directives, institutions and individuals. The Protector also raises awareness among the general public, both of its role and of the content of the existing anti-discrimination regulations and how to seek redress. In this sense, the Protector has a regular dialogue with public authorities, communicates with groups and stakeholders who experience discrimination and promotes good practice and positive actions.¹³⁵

Another body for the promotion of equal treatment is the Fund for Professional Rehabilitation and Employment of Persons with Disabilities. The role of this governmental body is to allocate financial resources to foster employment policy programmes for participation by people with disabilities. In order to monitor the implementation of measures and activities to improve vocational rehabilitation and employment of people with disabilities, as well as the designated use of financial resources from the Fund, the Employment Agency formed the Council of the Fund for the Profession Rehabilitation and Employment of Persons with Disabilities.¹³⁶

National councils are equality bodies aimed at preserving national identity and improving the rights and freedoms of minority nations and other minority national communities. National councils represent and act on behalf of minority nations and other minority national communities; submit proposals for the promotion and development of the rights of minority nations and other minority national communities and their members; submit initiatives to the President of Montenegro to refuse to promulgate laws which violate the rights of minority nations and other minority national communities and their members; participate in the planning and establishment of educational institutions; provide an opinion on the subject curricula which reflect specificities of minority nations and other minority national communities; propose the enrolment of a certain number of students at higher education institutions in Montenegro; launch initiatives for the amendment of legislation and other acts that regulate the rights of members of minority nations and other minority national communities; and perform other activities in accordance with the Law on Minority Rights and Freedoms (Article 35 of the Law on Minority Rights and Freedoms).

The legal framework of Montenegro does not explicitly list the national minorities in Montenegro. The Constitution of Montenegro in its Preamble refers to the *de facto* national

¹³⁵ An advisory Council on the Prohibition of Discrimination existed between 2011 and 2016, with the task of promoting and conducting anti-discrimination activities at national level. This non-equality body mainly focused on monitoring implementation of legislation on anti-discrimination and monitoring the spending of the Fund for Professional Rehabilitation and Employment of Persons with Disabilities.

¹³⁶ See above, in section on Positive Action.

minorities (Serbs,¹³⁷ Bosnians, Albanians, Muslims, Croats 'and others') in a context of listing citizens, Montenegrins included 'belonging to nations and national minorities living in Montenegro'. Therefore, it was up to the representatives of all the nations mentioned (except Montenegrins) to opt for legal status. They have all formed respective national councils. Furthermore, a Roma Council has been also formed.

b) Political, economic and social context of the designated body

The political situation in Montenegro is complex and it reflects the work of all state institutions. However, political influence on the work of the Protector is not evident, as opposite to the position of e.g. the heads of the judiciary and the Prosecutor's office. However, the underlying reason may be less positive than it seems. It can be argued that politicians in Montenegro are either not interested or are in general benevolent towards the institution of the Protector, since they do not perceive its actions as threatening their position in any way.

The economic context for the work of the Protector's office is dependent on the Government which proposes the financing of this institution and is not obliged to take into account the Protector's proposed budget. The Parliament tends to rely on the Government's projections regarding the allocation of financial resources to this institution. The Law on the Budget of Montenegro for 2018¹³⁸ stipulated EUR 672 175.68 for the work of the Protector's office. This is a slight increase in comparison to the budget for 2017 (EUR 625 714.21)¹³⁹ while the budget for 2019 has not been made public. Even the European Commission, in its *Montenegro 2019 Report*,¹⁴⁰ acknowledges that the financial resources provided to the Ombudsman's office are not sufficient to enable it to carry out its tasks efficiently.¹⁴¹ However, according to information from the annual reports for the previous five years, the Protector's office demonstrates good discipline in terms of not spending all the financial resources allocated to it.

The European Commission, in its *Montenegro 2018 Report*,¹⁴² acknowledges that the Protector's Office is an independent institution and that the work of this institution in particular has improved, although there is still room to increase the efficiency and quality of its opinions and its data collection. In 2019, the Protector established a new database for electronic complaints records, which has improved the management and archiving of complaints. The revised database, which is available online, is now user-friendly as it contains the most important information on cases classified by grounds of discrimination.

Currently, the Protector of Montenegro is perceived by the general public¹⁴³ as one of the rare state institutions which is truly independent in practice, although this conclusion may vary depending on the period concerned and the personality of the Protector, as well as the legal framework governing its work. As a result, the workload is ever growing. Another

¹³⁷ By forming a national council, some representatives of Serbs living in Montenegro even embraced the status of a national minority, although their political representatives strongly oppose such a status, as Serbs used to be the constitutive nation of Montenegro, together with Montenegrins, until the adoption of the 2007 Constitution.

¹³⁸ See: http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

¹³⁹ The budget for 2018 was similar to the budget for 2016 (EUR 685 782); the year when the budget increased by EUR 154 327 in comparison to the budget for 2015. Annual reports are available at: http://www.ombudsman.co.me/Izvjestaji_Zastitnika.html.

¹⁴⁰ The report is published in March 2019 and covers the year 2018.

¹⁴¹ European Commission (2018) *Montenegro 2018 report*, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>, p. 26.

¹⁴² European Commission (2018) *Montenegro 2018 report*, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>, pp. 4, 15, 24, 26.

¹⁴³ In the course of the project, entitled 'Truths and Misconceptions about Discrimination', the Protector's Office carried out a poll regarding public perception of its work. According to the poll, 43.7 % of citizens mostly or largely expressed confidence in the work of the Protector, which is approximately equal to the established level of trust from the previous year, especially given that 28.4 % of respondents said that they did not have a particular position on this. See Protector of Human Rights and Freedoms, report for 2018, available at: http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf, pp. 157-158.

reason for this is the fact that the procedure for addressing the Protector is simple and free.

The general social context regarding equality is rapidly changing. The long-running public campaigns of the Government and NGOs promoting equality and diversity, especially regarding people with disabilities, have also resulted in changing attitudes among the general public. In the process of promoting equality and diversity, and the work of the Protector, the role of the media was crucial. They report on discrimination cases but also highlight problems. In its work the Protector also addresses issues such as reasonable accommodation and positive action.

c) Institutional architecture

In Montenegro, the designated body forms part of a body with multiple mandates, the Protector's office. Pursuant to the Ordinance on the Internal Organisation and Systematisation of the Protector's Professional Service of 2012, protection against discrimination is one of four groups of tasks (the others being general jurisdiction, the protection of children's rights, social protection and youth rights, and prevention of and protection from torture). As of 2018, the Protector has four deputies, one for each of the four groups of tasks, including protection against discrimination.

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

i) Status of the body

Pursuant to the Constitution of Montenegro and the Law on the Protector of Human Rights and Freedoms, the Protector is an independent and autonomous institution. However, one may question whether the procedure of the Protector's appointment envisaged by the Constitution substantially guarantees its impartiality.¹⁴⁴ Although the Parliament of Montenegro has the final say in the procedure, it is up to the President of Montenegro to propose a candidate for Protector. The need to strengthen the independence of the Protector has been emphasised by various bodies. The joint Venice Commission and OSCE / ODIHR Opinion recommended that the Protector be elected (and dismissed) by a qualified – not simple – majority in Parliament, while the latest ECRI report recommends to the authorities 'to amend the legislation concerning the election and dismissal of the Ombudsman, to further strengthen its independence and to ensure public confidence in the institution'.¹⁴⁵

In the process of selecting a candidate to put forward, the President carries out consultations with various stakeholders: members of academia (three law schools, one of which has a Centre for Human Rights) and professional institutions (associations of state prosecutors, bar associations) and non-governmental organisations whose main activity is the protection of human rights and freedoms. The Protector must be a citizen of Montenegro, have a university degree and at least 15 years of work experience in positions of personal and professional authority and at least seven years of experience in the field of human rights and freedoms. The Deputy must be a citizen of Montenegro, have a university degree and at least 10 years of work experience in positions of personal and professional authority and at least five years of experience in the field of human rights and freedoms. The Deputy Protector is appointed by the Parliament following a proposal from the Protector.

¹⁴⁴ The Parliament of Montenegro appoints the Protector by a simple majority vote, upon the proposal of the President of Montenegro. The State Public Prosecutor, the President of the Constitutional Court and the President of the Supreme Court are appointed by qualified majority vote.

¹⁴⁵ ECRI (2017) *Report on Montenegro (Fifth monitoring cycle)*, available at: <https://rm.coe.int/second-report-on-montenegro/16808b5942>.

The Law on the Protector of Human Rights and Freedoms stipulates that the Protector shall autonomously and independently, on the principles of justice and fairness, take measures to protect human rights and freedoms, as well as measures for protection from discrimination (Article 2f).

The work of the Protector is financed from the Budget of Montenegro. The Protector may submit a budget proposal for the work of the body and may participate in the debate in Parliament on the matter.

In relation to administrative capacity, the number of employees in the Protector's Office is constantly increasing and four additional staff were recruited in 2018, giving a current total of 28 employees. According to the internal regulations, a total of 33 civil servants and public employees should be provided, in addition to the Protector and four deputies.

The Protector is accountable to the Parliament of Montenegro as it has power to appoint and dismiss the Protector.

The Protector, who was elected in 2019, used to work as one of the deputies in the Protector institution, so the appointment is very good practice.

ii) Independence of the body

The independence of the Protector is explicitly stated in the Constitution of Montenegro (Article 81(1)) and the Law on the Protector (Article 2(1)). Both legal sources use the same terminology 'independent and autonomous', though the Constitution refers to the position of the Protector as an authority, while the focus of the Law on the Protector is on the actions of this authority. In practice, the Protector can be considered to be independent when acting on complaints of alleged discrimination, though it may lack a proactive attitude in politically sensitive matters.

e) Grounds covered by the designated body/bodies

According to Article 27(1) of the Law on the Prohibition of the Discrimination, the Protector of Human Rights and Freedoms is a national mechanism for protection against discrimination. According to Article 27(2) and Article 2 of the Law on the Prohibition of the Discrimination, it has an explicit mandate to deal with protection against discrimination based on race, skin colour, national affiliation social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics.

f) Competences of the designated body – and their independent exercise

i) Independent assistance to victims

The Protector has the competence to provide independent assistance to victims. In practice, the Protector receives and handles complaints, provides legal advice to victims, including pursuing their complaints, engages in activities of mediation and conciliation and represents complainants in court (initiating proceedings on protection against discrimination in court or appearing in proceedings as an intervener). Independent assistance to victims given by Protector includes engagement or assisting in litigation in order to address structural and systematic discrimination in cases selected by the Protector because of their prevalence, seriousness or need for legal clarification (Article 21(4) of the LPD). In practice, this competence is effectively and fully exercised in an independent manner.

ii) Independent surveys and reports

The Protector's power to deal with general issues that are important for the protection and promotion of human rights and freedoms includes conducting independent surveys on *inter alia* discrimination issues. In practice, the Protector uses the results of surveys on discrimination conducted by civil society organisations in its reports.

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

iii) Recommendations

The Protector, by law, acts on the basis of individual citizens' complaints about discrimination, and may initiate proceedings only upon a complaint from someone who has allegedly experienced discrimination. The deadline for filing complaints is one year from the date of the violation or the date of being informed of the violation. The person who complains does not have to exhaust all remedies in order to address the Protector, except upon the request of the Protector. If the Protector finds that discrimination has occurred, it will issue a final opinion and give recommendations to the authority on what it should do to eliminate the violation and also sets a deadline for the elimination of violations. If the authority fails to comply with the recommendation, the Protector may inform the next higher body, the Parliament of Montenegro and the public. This competence is effectively exercised in an independent manner in practice.

iv) Other competences

Other competences of the Protector include providing information about their rights and duties to complainants who believe they have been discriminated against by a public authority, business entity, other legal person, entrepreneur or natural person, as well as about the possibilities of court and other protection; keeping separate records of complaints submitted with regard to discrimination; collecting and analysing data on cases of discrimination; and undertaking activities to promote equality.

g) Legal standing of the designated body/bodies

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

The Protector may also initiate proceedings for protection against discrimination in court if the consequences of the unequal treatment would be of such a nature that they could

cause systematic violations of the principle of non-discrimination, and in particular serious harm to the dignity of the person, or the person seeking protection against discrimination could otherwise be put at a particular disadvantage on any of the grounds referred to in Article 2(2) of the LPD.

According to these provisions the Protector may bring discrimination complaints on behalf of identified victims to court but may not bring discrimination complaints on behalf of non-identified victims to court or *ex officio*. Finally, the Protector may appear in court proceedings as an intervener on the side of victim/s of discrimination, but may not intervene in legal cases concerning discrimination, such as *amicus curiae*.

h) Quasi-judicial competences

In Montenegro, there are no quasi-judicial institutions for discrimination cases. The Law on the Prohibition of Discrimination does not provide powers for the Protector of Human Rights and Freedoms to issue binding decisions or impose sanctions in discrimination cases.

The Protector in the exercise of its function acts to highlight, warn, criticise, propose or recommend (Article 20 of the Law on the Protector). The law also vests the institution with the power to carry out conciliation procedures between the victim and the alleged discriminator. As out-of-court settlements can be concluded on the basis of conciliation procedures, this power may be interpreted as quasi-judicial. However, the Law on the Protector obliges the authorities to cooperate with the Protector and provide the body with assistance. In line with this, the head of a body to which a recommendation has been issued is obliged to submit a report on actions taken to implement the recommendations within a specified deadline. If the head of the body fails to comply with the recommendation within the specified deadline, the Protector may inform the immediately superior authority, submit a special report or inform the public (Article 42). However, one of the peculiarities of Montenegro is that other state bodies may in some cases be reluctant to apply the recommendations and these sanctions cannot be considered sufficient. Thus, according to the most recent data in 2018, of a total of 76 recommendations given in 30 cases, 28 recommendations were implemented and five were partially implemented, while 11 recommendations were still being implemented.¹⁴⁶

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

In Montenegro, the equality body (Protector) records the number of complaints and decisions as a total number, as well as compiling records concerning specific types and grounds of discrimination in accordance with the competence to keep separate records of submitted complaints of discrimination. In 2019, a new database for electronic complaints records was established. The revised database allows for the possibility of undertaking a detailed review of cases in the field of protection against discrimination, focusing on the basis for and area of discrimination; the violation of other rights; the manner of termination of the case; the length of the proceedings; and the monitoring of the implementation of the recommendations.

These data are available to the public. Furthermore, other authorities (courts, inspection authorities and misdemeanour authorities) are obliged to keep separate records about lawsuits filed in connection with discrimination and must deliver data from the records to the Protector in a timely manner. However, those data are incomplete and without references, and are hard to track.

According to the statistical indicators for cases reported to the Protector in 2019, discrimination remains most present in the area of work and employment, with 51 registered cases (53 in 2018), and in access to goods and services, with nine cases.

¹⁴⁶ Protector of Human Rights and Freedoms, report for 2018, p. 162, available at: http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf.

With regard to the features of cases that came before the Protector in 2019, the most represented ground of discrimination was disability, with 24 cases. Sex constituted the basis of discrimination in 20 cases, 13 of which referred to gender-based violence. Nationality constituted the basis of discrimination in 18 cases, while connection with a minority nation or minority national community qualified as the basis for unequal treatment in one case.¹⁴⁷

j) Stakeholder engagement

In Montenegro, the Protector engages with stakeholders as part of implementing its mandate. The Protector cooperates with organisations and institutions dealing with human rights and freedoms (Article 21 of the Law on the Protector). In practice, the Protector cooperates with stakeholders of different types such as NGOs, employers' and workers' organisations, public bodies, local authorities, etc.

In recent years, relations between the Protector and civil society organisations have improved through the implementation of projects, the organisation of conferences, training and similar activities, mutual visits and other forms of cooperation. Exchange of information with representatives of civil society led the Protector to take on a certain number of cases *ex officio*. In addition, the Protector often writes in support of project proposals and addresses discrimination polls presented to other organisations.

Furthermore, the Protector relies in its work on analysis undertaken by NGOs.¹⁴⁸ In a recent case, the Protector initiated proceedings on its own initiative in relation to a violation of human rights and freedoms due to disability discrimination in respect of the accessibility of buildings and external areas in public use in Nikšić. The Protector learned about the problem from the daily newspapers.¹⁴⁹ During the examination procedure, the Protector had in mind the Accessibility Analysis published on the website of the NGO Association of Youth with Disabilities of Montenegro Nikšić, as well as a photo montage produced by the representative of the institution of the Protector during the 'Protector Day' in Nikšić, which showed that a large number of public buildings in Nikšić are not accessible to wheelchair users. Proceedings were initiated against eight authorities and institutions, and they concluded with the issuing of recommendations to eliminate discrimination.¹⁵⁰

k) Roma and Travellers

It is difficult to assess whether and to what extent the Protector deals with Roma issues in practice. The annual Protector's reports address Roma and Travellers, but mostly in a general manner (under the title 'Discrimination on grounds of nationality and affiliation with a minority nation or minority national community') by citing data from other reports (e.g. the UN Committee on the Elimination of Racial Discrimination Report for Montenegro and the European Commission's annual report on Montenegro) and the results of the public polls on discrimination. In several of the Protector's most recent reports, no specific cases relating to Roma or Travellers were mentioned. From 2019, when the classification of cases was improved and data on all discrimination cases specifically marked as such became available online, there were no such cases recorded.

However, in 2016, the Protector dealt with the issue of late and unpaid scholarships for Roma high school students and students who were eligible for funds as a result of the implementation of the affirmative action measures envisaged in the *Strategy for Improving the Position of Roma and Egyptians in Montenegro 2012-2016*. Funds for this purpose were provided by the Ministry of Human and Minority Rights and were redirected to an NGO for

¹⁴⁷ Protector of Human Rights and Freedoms, draft report for 2019, p. 169.

¹⁴⁸ Protector of Human Rights and Freedoms, draft report for 2019.

¹⁴⁹ See article: 'Hard to Access Hospital, Health Centre, Court, Bureau of Labour...'. *Pobjeda*, 31 July 2019.

¹⁵⁰ Protector of Human Rights and Freedoms, draft report for 2019, p. 192.

the realisation of a programme in which individual scholarship contracts with users were drawn up.

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

However, according to the European Commission's *Montenegro 2018 Report*, Montenegro should, in particular, ensure effective implementation of fundamental rights policies on, *inter alia*, Roma rights by securing sufficient budgetary allocation to implement the policies, improve the capacity of responsible institutions and increase inter-institutional coordination.

8 IMPLEMENTATION ISSUES

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

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

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

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

The Government cooperates with NGOs in the development of the policy framework on equal opportunities, while joint commissions monitor their implementation. The development of new anti-discrimination legislation has been accompanied by an ongoing dialogue with NGOs. In addition, the Government provides some funding for NGO projects promoting the principle of equal treatment. Through its mandate, the Protector of Human Rights and Freedoms also cooperates with organisations and institutions dealing with human rights and freedoms (Article 21 of the Law on the Protector), including NGOs which contribute to the fight against discrimination based on racial or ethnic origin and NGOs combating discrimination based on religion or belief, disability, age or sexual orientation in relation to employment and occupation. In 2019, this cooperation included the provision of support to the Centre for the Development of Non-Governmental Organisations in its application to a project at the European Union Delegation to Montenegro as part of the European Instrument for Democracy and Human Rights (EIDHR) competition; and support for an application by the Centre for Civic Education, also for an EU-funded project in the field of anti-discrimination and promotion; and providing two volunteer internships for persons with disability with the institution of the Protector.

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

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

In Montenegro, trade unions promote social dialogue around the principle of equal treatment within workplace practices. The Confederation of Trade Unions of Montenegro, the umbrella organisation under Montenegrin law, comprises 1 200 trade unions spread throughout the country and over 40 000 members (data from 2006).¹⁵¹ Another umbrella organisation, the Federation of Free Trade Unions of Montenegro, with close to 24 000 members, was established in 2008. The political and societal weight of trade unions is

¹⁵¹ Simovic, V. (2009), *Annual overview of employees' rights and social dialogue in Central and Eastern Europe and the Western Balkans, Report for Montenegro*, Friedrich Ebert Stiftung, courtesy of the author.

considerable, as they are involved in decision-making processes relating to employment and social policy and have significant levels of membership. However, the trade unions' work on anti-discrimination is very limited at present. Trade unions represent only their members, who must pay a membership fee in order to be able to exercise their trade union rights. Together with the government, trade unions and employers' organisations are social partners who negotiate employment-related issues and sign collective agreements.

In December 2006, the three social partners signed tripartite agreements and a year later the Law on the Social Council¹⁵² was adopted. In 2018, the 2007 Law was replaced by the new Law on the Social Council. The main task of the Social Council is to serve as a forum for discussion and to undertake joint initiatives relating to various aspects of economic and social policy.

The Social Council consists of eight representatives of the Government, eight representatives of the representative organisation of the trade unions of Montenegro and eight representatives of the representative association of employers in Montenegro (Article 14(1) of the Law on the Social Council). Since there are several representative organisations of trade unions and associations of employers in Montenegro, the number of representatives referred to in Article 14(1) is divided by the number of representative trade union organisations and employers' associations, so that they have the same number of representatives.

According to Article 2 of this Law, the goal of the Council is to establish and develop a social dialogue on issues of importance for achieving the economic and social status of employees and employers and the conditions of their life and work, developing a culture of dialogue, encouraging the peaceful resolution of individual and collective labour disputes and other issues arising from international documents and related to the economic and social position of employees and employers.

Generally speaking, trade unions need to 'do more' in terms of their overall involvement in the promotion of equal treatment. They should develop an understanding of the importance of strategic anti-discrimination work and the key role they can and should play in fighting employment discrimination. Their capacities must be strengthened, and appropriate strategies and programmes should be put in place.

d) Addressing the situation of Roma and Travellers

In Montenegro, a number of state institutions and bodies deal with the protection of the rights and improvement of the position of Roma and Travellers, such as the Ministry of Human and Minority Rights and a permanent working body of the Parliament of Montenegro's Committee for Human Rights and Freedoms. In addition, the Protector of Human Rights and Freedoms acts as an autonomous and independent institution. Other bodies include the councils of minority nations, such as the Roma Council, the Fund for the Protection and Realisation of Minority Rights and the Centre for the Preservation and Development of the Culture of Minorities, as well as a number of active and successful non-governmental associations and organisations dealing with the issue of protecting Roma and Travellers and improving the position of this community in Montenegrin society.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

Compliance of national legislation with the principle of equality is provided for by the Constitution of Montenegro. The Constitution, as a supreme legal source, prohibits

¹⁵² Law on the Social Council (*Zakon o Socijalnom savjetu*), *Official Gazette of Montenegro*, No. 44/18.

discrimination and guarantees equality. Anti-discrimination provisions form part of a series of laws governing various aspects of life and society. All legislation must comply with the Constitution and all by-laws must comply with the legislation. Furthermore, all legislation must comply with the ratified and published international agreements and general principles of international law (Constitution, Article 9).

The compliance of any laws, regulations and administrative provisions with the principle of equal treatment may be subject to review by the Constitutional Court, which is in charge of the protection of constitutionality and legality. An abstract constitutional review of discriminatory legislation can be requested by anybody (Article 150, Constitution). The Constitutional Court shall decide on the conformity of laws with the Constitution and ratified and published international agreements, and the conformity of other regulations and general acts with the Constitution and the law (Constitution, Article 149). As a result of such a review, any laws, regulations or administrative provisions that do not comply with the principle of equal treatment may be abolished.

The role of the Protector in ensuring the compliance of national legislation with the principle of equal treatment is of utmost importance.

A significant part of the Protector's recommendations relates to the amendment of by-laws containing discriminatory provisions and limiting rights to a larger extent than that permitted by law. Such acts are registered in different areas, primarily in the field of healthcare, social protection, housing needs of employees and inclusion of groups at risk of discrimination.

In the most recent case, from 2019,¹⁵³ a complaint was lodged by the NGO Union of the Blind of Montenegro due to the discriminatory nature of the Ordinance on the list of products, the mode of highlighting and the type of objects in which notices of goods in Braille stand out,¹⁵⁴ as this regulation did not provide for an obligation to notify consumers of the expiry date of goods in Braille lettering. As a result of the proceedings before the Protector, and following the issuing of the Protector's recommendation, the Ordinance was amended to make it reasonably acceptable to people with visual impairment and to bring about essential consumer equality.¹⁵⁵

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

At present, there are no adequate specific measures in place in national law to ensure that contracts, collective agreements, internal rules of businesses etc. that are contrary to the principle of equality are (or may be) declared null and void or are amended. However, in addition to the general legal framework on discrimination, some general provisions and principles of the Law on Obligations may apply in that respect. Thus, the principles of good faith and honesty are mandatory by their nature and may not be excluded or limited (Article 4) and a contract that is contrary to mandatory legislation or the morals of society shall be null and void unless the purpose of the rule violated refers to another sanction, or unless the law provides for something else in the specific case (Article 101(1)). Provisions of this Law relating to contracts shall apply accordingly to other legal transactions (Article 18)

¹⁵³ Protector of Human Rights and Freedoms, Opinion No. 01-801/18-3, available at: http://www.ombudsman.co.me/docs/1552552767_31122018-preporuka-me.pdf.

¹⁵⁴ Ordinance on the list of products, the mode of highlighting and the type of objects in which notices of goods in Braille stand out (*Pravilnik o listi proizvoda, načinu isticanja i vrsti objekata u kojima se ističu obavještenja o robi na Brajevom pismu*), *Official Gazette of Montenegro*, No. 030/17.

¹⁵⁵ The Protector issued a recommendation to the Ministry of Economy to reconsider the provisions of the current Rulebook: that is, in cooperation with the Ministry of Human and Minority Rights of the Government of Montenegro, to harmonise the ability for persons with visual impairment to exercise their rights in the area of the supply of goods and services, when it comes to the notification on the expiry date of goods in Braille lettering, so as to be reasonably acceptable to the visually impaired and to bring about essential consumer equality. It is recommended that this process involves consultation with civil society organisations advocating for the rights of persons with disabilities to provide valid input on the requirements and needs of this category of persons.

while, in establishing obligation relations, legal persons shall proceed in accordance with the general acts (Article 15(1)). Provisions of the Law on Obligations shall apply to obligation relations regulated by other special laws in matters not regulated by such laws (Article 16).

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

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

9 COORDINATION AT NATIONAL LEVEL

In Montenegro, there is a widespread network of institutional forms of protection against discrimination, the basis of which is formed by the institution of the Protector of Human Rights and Freedoms and the judicial authorities, misdemeanour courts and inspection services. In addition, a number of other institutions deal with the protection of human rights and freedoms with the aim of eliminating discrimination from society (such as the Committee for Human Rights and Freedoms of the Parliament of Montenegro, the Council for Civil Monitoring of the Police and regulatory agencies).

In the executive system, the Ministry of Human and Minority Rights has a key role in promoting and protecting human rights. The Ministry performs administrative tasks as follows: protection of human rights and freedoms, if such protection is not within the competence of other ministries; improvement and promotion of human rights and freedoms and protection against discrimination; monitoring the implementation of anti-discrimination legislation; and education and promotion of anti-discrimination behaviour and practices. In addition, the Ministry monitors the realisation and protection of the rights of members of minority nations and other minority national communities in relation to their national, ethnic, cultural, linguistic and religious identity; monitors progress on gender equality and the protection of the rights of religious communities in Montenegro; monitors the improvement of the status of Roma and their integration into society; and performs other tasks within its competence. In this context, two independent departments have been established within the Ministry: the Department for Gender Equality and the Department for the Improvement and Protection of the Rights of the Roma and Egyptian Communities.

The Committee for Human Rights and Freedoms of the Parliament of Montenegro, in accordance with its responsibilities, reviews draft laws, other regulations and general acts and other issues relating to: human and civil rights and freedoms, with special emphasis on minority rights; and the application of ratified international acts which are related to the protection and promotion of the right to equality. It monitors the execution of documents, measures and activities for enhancing equality on all grounds.

Other ministries are responsible for coordinating and dealing with anti-discrimination and equal opportunities, including the Ministry of Labour and Social Welfare, the Ministry of Education, the Ministry of Health and the Ministry of Culture.

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

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

- Monitor and coordinate the activities of state bodies, state authorities and other competent institutions in the application of statutory mechanisms for protection against all forms of discrimination;
- Analyse the regulations in terms of their compliance with international standards on protection against all forms of discrimination and, if necessary, initiate amendments;
- Analyse the implementation of administrative measures taken by the competent authorities in relation to the provision of protection against all forms of discrimination

- and the problems which arise in practice in the process of discrimination prevention, and propose measures for their elimination;
- Propose and undertake appropriate measures to promote non-discrimination, as one of the basic and general principles of human rights;
 - Establish the necessary cooperation with national and international bodies and organisations dealing with the protection of human rights and freedoms;
 - Propose other measures relevant for the protection of human rights and freedoms.

The Council consisted of a president, secretary and 11 members. The President of the Council was the Prime Minister of Montenegro. Members of the Council were: the Minister for Human and Minority Rights, the Minister of Justice, the Minister of Labour and Social Welfare, the Minister of Health, the Minister of Education, the Advisor to the Prime Minister of Montenegro for human rights and protection from discrimination, and representatives of four non-governmental organisations active in the fields of protection from and promotion of human rights; protection against discrimination in the field of education and vocational training; protection and promotion of women's rights; and protection from discrimination based on gender identity and sexual orientation, as well as one representative of the trade unions.

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

10 CURRENT BEST PRACTICES

The year 2019 witnessed significant improvements in the field of non-discrimination, especially regarding the practice of the Protector and public awareness. During the reporting period, a number of complaints about discrimination on the basis of disability in the area of work and employment were filed (there were five complaints, and in three cases a violation of rights was found and recommendations were made).¹⁵⁶ Furthermore, as a result of one case,¹⁵⁷ on the Protector's recommendation, the ability of persons with visual impairment to exercise their rights in the area of supply of goods and services has been improved by amendments to the relevant ordinance. In another group of cases,¹⁵⁸ the Protector addressed discrimination against national minorities in relation to labour, while in one case¹⁵⁹ age discrimination in the area of labour was established.

The reasoning of the Protector in these and other relevant cases often relies, *inter alia*, on directives (but not on CJEU case law) and also has educative value in that it explains in more detail issues which are rather new in Montenegrin legal practice, such as the rule on shifting the burden of proof and the use of statistics.

The mere fact that the recommendations are published on the Protector's website and the findings of landmark cases are published in the media has in itself led to an increase in public awareness and a growing trend in the number of complaints filed with the same, or a similar, factual and legal background.

The second area of best practice includes important positive action measures resulting from the adoption of new strategies or action plans and the implementation of existing documents.

In 2019, the *Minority Policy Strategy 2019-2023* was adopted, replacing the 2008 strategy, which had applied for a period of 10 years. The new strategy defines the measures and activities for the implementation of the Law on Minority Rights and Freedoms¹⁶⁰ and the improvement of the living conditions of minorities. In addition, the strategy, following the defined goals and measures set out in the *Mid-term Programme of Work of the Government of Montenegro 2018-2020*, envisages measures which will, when implemented, improve the representation of persons belonging to minorities in state and local self-government bodies. It is also important to bear in mind the recent cases¹⁶¹ brought before the Protector, in which recommendations were made to the respondent to take into account the representation of minorities in various services (police, local administration) in the implementation of strategic documents.

The *Minority Policy Strategy 2019-2023* is fully in compliance with the *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020*. One of the goals of the

¹⁵⁶ Protector of Human Rights and Freedoms, Opinion No. 692/18 of 19 July 2019, available at: http://www.ombudsman.co.me/docs/1564563125_19072019-preporuka-tv.pdf; Opinion No. 01-256/19-2 of 5 June 2019, available at: http://www.ombudsman.co.me/docs/1562758329_05062019-preporuka-bp.pdf; Opinion No. 01-458/19-2 of 23 September 2019, available at: http://www.ombudsman.co.me/docs/1570088670_23092019-prpeoruka-og.pdf.

¹⁵⁷ Protector of Human Rights and Freedoms, Opinion No. 01-801/18-3 of 31 December 2018, available at: http://www.ombudsman.co.me/docs/1552552767_31122018-preporuka-me.pdf.

¹⁵⁸ Protector of Human Rights and Freedoms, Opinion No. 01-339/19-2 of 28 June 2019, available at: http://www.ombudsman.co.me/docs/1562758608_28062019-preporuka-pl.pdf; Opinion No. 01-248/19-4 of 23 September 2019, available at: http://www.ombudsman.co.me/docs/1570088970_23092019-preporuka-cbbp.pdf.

¹⁵⁹ Protector of Human Rights and Freedoms, Opinion No. 263/19 of 16 September 2019, available at: http://www.ombudsman.co.me/docs/1572434114_16092019-preporuka-ma.pdf.

¹⁶⁰ Law on Minority Rights and Freedoms, *Official Gazette of Montenegro*, Nos. 31/06, 51/06 and 38/07, 02/11, 08/11 and 31/2017.

¹⁶¹ Protector of Human Rights and Freedoms, Opinion No. 01-339/19-2 of 28 June 2019, available at: http://www.ombudsman.co.me/docs/1562758608_28062019-preporuka-pl.pdf; Opinion No. 01-248/19-4 of 23 September 2019, available at: http://www.ombudsman.co.me/docs/1570088970_23092019-preporuka-cbbp.pdf.

Minority Policy Strategy 2019-2023 is the implementation of affirmative action aimed at promoting the employment of persons belonging to minorities, as well as the increased participation of members of minority peoples or other minority national communities in leadership positions in the public administration of Montenegro.

In 2019, the *Strategy for Inclusive Education in Montenegro (2019-2025)* (for pupils with disabilities), accompanied by an action plan, and the *Action Plan for Implementation of the Strategy for the Social Inclusion of Roma in Montenegro 2016-2020*, which provides for numerous activities aiming at awareness raising in respect of discrimination, were adopted. The *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020* emphasises the goal of reducing the discrimination and inequality long endured by the Roma and Egyptian communities. The strategy covers all areas that are considered important for solving the problems of the Roma and Egyptian communities, namely: legal status, social status and family protection (within which four sub-categories are defined: combating domestic violence and violence against women; prevention and suppression of begging; combating trafficking in human beings; and preventing child marriages), and the areas of culture, identity and information. The *2017 Report on the Implementation of the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020* showed some progress in all the defined areas of activity.

Previously, the Government developed a range of strategies and policies to promote social inclusion and equality, including the *Strategy for Integration of Persons with Disabilities in Montenegro (2016-2020)*, the *Strategy for Improving the Position of Roma and Egyptians in Montenegro 2016-2020*. The *Strategy for Integration of Persons with Disabilities* contains a wide range of interventions to promote the social inclusion of this highly disadvantaged group. Developed as the result of a partnership between Government institutions and the NGO sector, the strategy covers the areas of healthcare; social security, pensions and disability insurance; education, professional training and employment; accessibility; culture, sport and recreation; and the position of disability organisations within civil society. Action plans for the implementation of the strategy are adopted every two years, and a working group comprising representatives from all relevant ministries, state institutions and national disability rights NGOs has been tasked with monitoring implementation.

However, an alternative report on the progress of the *Action Plan for the implementation of the Strategy for the Protection of Persons with Disabilities from Discrimination and the Promotion of Equality for the period 2017-2018*¹⁶² notes that, of a total of 38 measures in the action plan, nine measures had been implemented, 18 had not been implemented and 11 measures had been partially implemented. In addition, this analysis found that it was planned that the measures would be implemented through 63 activities, 15 of which had been implemented, while 28 had not been implemented and 20 had been partially implemented. The Government's report on the implementation of this action plan showed a higher degree of implementation of measures and activities than was recorded in the alternative report, which was prepared by a group of disability rights NGOs.

Some positive activities in 2019 include an amendment to the Law on Civil Procedure,¹⁶³ which enables easier access to justice as the costs of translation into sign language shall be borne by the funds of the court (Article 102). This amendment represents a step forward in achieving substantive equality for persons with disabilities in proceedings before a judicial authority.

¹⁶² The alternative report is available at: <http://umhcg.com/wp-content/uploads/2018/06/Izvestaji-MNE.pdf>.

¹⁶³ Law on Civil Procedure (*Zakon o parničnom postupku*), *Official Gazette of Montenegro*, Nos. 22/04, 28/05, 76/06, 73/10, 47/15, 48/15, 51/17, 75/17, 062/18, 34/19 and 42/19.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Montenegrin legislation is, to a high degree, aligned with the *acquis* in the fields covered by the directives. The fields in which further alignment of legislation is needed include the duty to provide reasonable accommodation, same-sex partners and faith-based institutions.

- In the legislation of Montenegro, there is no general duty to provide reasonable accommodation in line with Articles 2(2)(b) and 5 of the Employment Equality Directive. Employers are obliged to take measures in this context only in relation to people with disabilities who are already employed.
- In Montenegro, it would not constitute unlawful discrimination in accordance with national law if an employer provided benefits only to those employees with opposite-sex partners. This is because the Constitution of Montenegro and relevant laws still do not recognise same-sex partners, and under current law, a marriage must be between two individuals of the opposite sex.
- Relations between faith-based and state institutions, including in education, have not been regulated appropriately and harmonised with international law and standards, including the Racial Equality Directive.

However, the implementation of the legislation may in some cases give rise to concern.

11.2 Other issues of concern

- Low employment rate among marginalised groups

As of 31 December 2019, a total of 37 616 unemployed people were registered with the National Employment Agency,¹⁶⁴ while according to the latest available records of the Employment Service (dated 26 March 2019), in the same year 8 882 persons with disabilities were unemployed. The general unemployment figure remains high, but the proportion of persons with disability who are unemployed is a matter of concern. Furthermore, the methodology that is used may give rise to concerns, as it may be misleading with regard to the real picture on unemployment (e.g. the data does not include those who are formally employed but are not actually working, or young people who are taking part in programmes of a limited duration such as apprenticeships).

The results of two independent 2019 surveys carried out by NGOs, on public opinion on discrimination give rise to concerns regarding discrimination in the labour market, in which—along with the Roma—people with disability and political opponents can be clearly perceived as being among the most vulnerable groups.

According to a survey by the Centre for Civic Education (CCE) on public opinion on discrimination, conducted in the first half of 2019,¹⁶⁵ three in five citizens consider discrimination to be most prevalent in job seeking and employment, while one quarter find it to be most prevalent at work, school or college. On the question of which groups are most exposed to discrimination according to the perceptions of Montenegrin citizens, the Roma remain at the top of the list, followed by persons with disabilities, the poor, sexual minorities/the LGBT population and political opponents.

The same survey found that over four-fifths of citizens surveyed believe that there is political discrimination¹⁶⁶ in Montenegro. Among those who believe that political

¹⁶⁴ See: <http://www.zzzcg.me/wp-content/uploads/2020/01/NEDJELJNI-IZVJE%C5%A0TAJ-31.12.2019..pdf>.

¹⁶⁵ See: <http://media.cgo-cce.org/2019/02/CGO-prezentacija-diskriminacija-2019.pdf>.

¹⁶⁶ Political discrimination in employment is in fact closely connected with the ethnicity issue, as the majority of opposition supporters are of Serbian ethnicity, although they hold Montenegrin nationality.

discrimination exists, four out of five respondents believe that it is most prevalent in employment, and almost half recognise state institutions as the area in which political discrimination can best be witnessed in the fields of education and health.

Another relevant survey indicates the prevalence of discrimination in the area of work and employment. According to this survey, 69.3 % of respondents believe that there is discrimination on the basis of disability—a figure which is about 18 % higher than when the same survey was conducted in 2010.¹⁶⁷

- Non-adoption of some legal instruments

In 2019, the adoption of the Law on Life Partnerships between Persons of the Same Sex in the Parliament of Montenegro was expected, but it did not get a majority vote. The ruling party in Montenegro (Democratic Party of Socialists, formerly the Communist Party) could not obtain support for this law from its coalition partners (the national parties of Bosniaks and Albanians) who explicitly stated that they would not support such a law, while Opposition parties did not want to collaborate with the ruling DPS.

Amendments to the Law on Professional Rehabilitation and Employment of Persons with Disabilities were prepared in 2018, but have not yet been adopted.

Montenegro has not yet adopted an action plan to adopt and implement the recommendations of the UN Committee on the Rights of Persons with Disabilities,

- Non-existent legal framework for social entrepreneurship

Montenegrin legislation does not make provisions for social entrepreneurship, which would be of benefit for vulnerable groups. There was an initiative in 2012 and a draft law was prepared by the Ministry of Labour, but it was not adopted, and the procedure was stopped. The most marginalised group is the Roma community, which is socially excluded, living in poverty and unable to make the necessary changes through participation in decision-making processes. Civil society organisations engaged in promoting the rights of these groups are trying to develop employment opportunities for them (mainly in the production of souvenirs and other items) but this is not economically viable. The new strategy and the action plan also address the employment possibilities of the Roma population, but it will take time for the results to be visible.

- Weak implementation of active measures for the employment of people with disabilities and other marginalised groups

Implementation of legislation in relation to the labour market, and poverty and inclusion of the Roma and Egyptian population, people with disabilities and other vulnerable groups, remains challenging.

A unique database (register) of persons with disabilities has not yet been established in Montenegro, and the lack of a single expert witness body constitutes an obstacle to the exercise of the rights of persons with disabilities in all areas of social life in which they are recognised on the basis of the findings and opinions of an expert witness.

Employers prefer to pay the prescribed amounts to the Fund for the Professional Rehabilitation and Employment of Persons with Disabilities instead of employing people with disabilities. In addition, there are many public objections to the manner in which the

¹⁶⁷ CEDEM, *Položaj lica sa invaliditetom u Crnoj Gori: identifikacija praksi i obrazaca diskriminacije* (The position of persons with disabilities in Montenegro: identification of practices and patterns of discrimination), 26 March 2019, available at: <https://www.cedem.me/publications/research/1129-published-face-with-disabilities-in-black-worse-identification-practice-and-obrazacadiskriminacije>.

funds raised from these sources are used and the purpose for which they are used. Funds from certain budgets should be used in a more transparent way in order to improve the situation for people with disabilities who are seeking employment.

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

In addition, issues which are having a negative effect on the efficient implementation of anti-discrimination measures include lack of institutional and administrative capacity to enforce anti-discrimination legislation, insufficient practical support for entrepreneurship in general,¹⁶⁸ weak public debates with civil society and lack of cooperation between state institutions and civil society organisations.

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

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

The development and implementation of the above-mentioned strategies for improving the quality of life of marginalised groups has not been accompanied by awareness-raising campaigns. Such campaigns are mainly organised by NGOs, with support from international donors, and tackle specific grounds and issues such as disability, gender equality and inclusive education. Training and assistance for victims are also provided mainly by NGOs (who also seek opportunities for their own capacity development), which receive mostly international funding for their activities. No measures of institutionalised training or assistance for victims are provided by the government.¹⁶⁹ Access to legal aid, provided both by the state and by NGOs, is very limited at present. Montenegro is only now developing legislation on free legal aid.

- Generally speaking, all the enforcement mechanisms are very rarely used in practice

Victims are reluctant to pursue enforcement of their equal rights, and their level of confidence in their chances of obtaining redress remains low. Given the fact that

¹⁶⁸ Local Democracy Agency Nikšić (2014), *Perspektive za primjenu modela socijalne ekonomije (Study: Perspectives for the implementation of a social economy model in Montenegro)*, available at: www.aldnk.me/images/Studija_Perspektive_za_primjenu_modela_socijalne_ekonomije_u_Crnoj_Gori.pdf.

¹⁶⁹ Some limited ad hoc training opportunities are organised with the assistance of international donors.

administrative proceedings are less expensive and burdensome, victims are more likely to use these than to enter court proceedings.

12 LATEST DEVELOPMENTS IN 2019

12.1 Legislative amendments

The year 2019 was marked by the adoption of the new Labour Law,¹⁷⁰ which contains non-discrimination provisions aligned with the LPD and the directives. In order to be fully aligned with the directives, the Law introduced special provisions on prohibition of discrimination in relation to professional social security systems; vocational training and in-service training; and membership of employees' and employers' organisations (Articles 11-13). This Law introduces important new provisions in the domain of enforcement. For example, an employee who considers themselves to be a victim of discrimination is now obliged, before filing a complaint to the court, to start a procedure before the Agency for Peaceful Labour Dispute Resolution or the Centre for Alternative Dispute Resolution. The Law also introduces a rule on shifting the burden of proof on to the respondent. However, it fails to address the duty of reasonable accommodation in a proper manner.

The two newly adopted pieces of legislation, the Law on Employment Assistance and Rights during Unemployment and the Law on Youth, address non-discrimination and equality issues.

The Law on Employment Assistance and Rights during Unemployment¹⁷¹ stipulates that it is based on the principles of non-discrimination, gender equality, affirmative action directed at especially vulnerable groups of unemployed persons, impartiality in employment affairs and free employment in connection with employment for unemployed persons and other job seekers (Article 4).

The Law on Youth defines the basic principles on which youth policy is based, one of them being the principle of youth equality in the exercise of rights regardless of: 'age, physical ability, physical appearance, health status, disability, national, racial, ethnic or religious affiliation, gender, language, political commitment, social origin and property, sexual orientation, gender identity, and other personal attributes'. It is indisputable that the said principle is intended to include all personal characteristics, but it is also certain that in the process of evaluating the scope of this and all other laws, when it comes to the principle of equality, the question of conformity of the definition with the definition contained in the LPD would be raised, so it is good that the legislative process in all fields accepts a single definition in terms of all the personal attributes listed as such in systemic law. This Law provides for the education of young people; the mechanisms of their involvement in active employment measures as a public interest in the field of youth policy (Article 5(1)(5)) will be addressed in more detail in the strategy and the action plan to follow.

As a result of amendments to the Law of Civil Procedure,¹⁷² the costs of translation into sign language shall be borne by the funds of the court (Article 102).

12.2 Case law

There is no case law from 2019 relating to the grounds of discrimination covered by this report.

¹⁷⁰ Labour Law, *Official Gazette of Montenegro*, No. 74/19.

¹⁷¹ The Law on Employment Assistance and Rights during Unemployment, *Official Gazette of Montenegro*, No. 24/19.

¹⁷² Law on Civil Procedure, *Official Gazette of Montenegro*, Nos. 22/04, 28/05, 76/06, 73/10, 47/15, 48/15, 51/17, 75/17, 062/18, 34/19 and 42/19.

12.3 Roma and Travellers

There are no trends and patterns in 2019 relating to cases brought by Roma and Travellers.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Montenegro
Date: 31 December 2019

Title of the law: Law on the Prohibition of Discrimination, Official Gazette of Montenegro, no. 46/10, 18/2014, 42/17

Abbreviation: LPD

Date of adoption: 6 August 2010

Entry into force: 13 August 2010

Latest relevant amendments: 30 June 2017

Web link: <http://www.mmp.gov.me/biblioteka/zakoni>

Grounds covered: race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and / or intersex characteristics, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics.

Material scope: education, labour, goods and service delivery

Civil law

Material scope: education and vocational training, labour, goods and service delivery, use of facilities/buildings and areas in public use, social protection, including social security and healthcare

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate, creation of a specialised body

Title of the law: Criminal Code of Montenegro, Official Gazette of the Republic of Montenegro, no. 070/03, 013/04, 047/06, Official Gazette of Montenegro, no. 040/08, 025/10, 073/10, 032/11, 064/11, 040/13, 056/13, 014/15, 042/15, 058/15, 044/17, 049/18

Abbreviation: CC

Date of adoption: 17 December 2003

Entry into force: 3 January 2004

Latest relevant amendments: 17 July 2018

Weblink:

<http://www.pravda.gov.me/ResourceManager/FileDownload.aspx?rid=49322&rType=2&file=1230044658.doc>

Grounds covered: national affiliation or affiliation to an ethnic group, race, religion, political or other opinion, disability, sex, sexual orientation or gender identity, language, education, social status, social origin and property, other personal status.

Criminal law

Material scope: Scope of application covers all relevant fields. Article 443(4) prescribes that a person who commits an offence from Article 443(1-3) by misusing their position will be sentenced to prison (1-8 years). This offence can be committed in any of relevant areas (education, employment, social services...)

Principal content: prohibition of all forms of discrimination

Title of the law: Labour Law, Official Gazette of Montenegro, no. 74/19

Abbreviation: LL

Date of adoption: 30 December 2019

Entry into force: 6 January

Latest relevant amendments:

Web link: <http://www.paragraf.me/propisi-crnegore/zakon-o-radu.html>

Grounds covered: race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership of a group or

<p>assumed membership of a group, political party, syndicate or other organisation as well as other personal characteristics</p> <p>Civil law</p> <p>Material scope: employment</p> <p>Principal content: prohibition of discrimination in the field of employment</p>
<p>Title of the law: Law on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette of Montenegro, no. 49/08, 73/10, 39/11 and 55/16</p> <p>Abbreviation: LSW</p> <p>Date of adoption: 29 July 2008</p> <p>Entry into force: 23 August 2008</p> <p>Latest relevant amendments: 17 August 2016</p> <p>Web link: http://www.zzzcg.me/wpcontent/uploads/2015/05/Zakon-o-profesionalnoj-rehabilitaciji-i-zaposljavanju-lica-sa-invaliditetom.pdf </p> <p>Grounds covered: disability</p> <p>Civil law</p> <p>Material scope: protection of persons with disabilities in the field of professional rehabilitation and employment</p> <p>Principal content: prohibition of discrimination of persons with disabilities</p>
<p>Title of the law: Law on Minority Rights and Freedoms, Official Gazette of Montenegro, no. 31/06, 51/06 and 38/07, 02/11, 08/11 and 31/17</p> <p>Abbreviation: LMRF</p> <p>Date of adoption: 10 May 2006</p> <p>Entry into force: 20 May 2006</p> <p>Latest relevant amendments: 12 May 2017</p> <p>Web link: http://media.cgo-cce.org/2013/06/7-Zakon-o-manjinskim-pravima-i-slobodama.pdf </p> <p>Grounds covered: any ground, including race, colour, sex, national belonging, social origin, birth or similar status, religion, political or other orientation, material status, culture, language, age and mental or physical disability.</p> <p>Civil law</p> <p>Material scope: minority rights protection</p> <p>Principal content: prohibition of discrimination of minority groups</p>
<p>Title of the law: Law on Prohibition of Discrimination of Persons with Disabilities, Official Gazette of Montenegro, no. 35/15, 44/15</p> <p>Abbreviation: LPDPD</p> <p>Date of adoption: 26 June 2015</p> <p>Entry into force: 15 July 2015</p> <p>Latest relevant amendments: 15 August 2015</p> <p>Weblink: http://www.skolskiportal.edu.me/Inkluzivno%20obrazovanje/Zakon%20o%20zabrani%20diskriminacije%20lica%20sa%20invaliditetom.pdf </p> <p>Grounds covered: long-term physical, mental, intellectual or sensory disability</p> <p>Civil law</p> <p>Material scope: prohibition of discrimination in the areas of education and vocational training; professional rehabilitation, labour and employment; access to facilities and areas in public use; provision of public and private goods and services; access to information and communications; access to public transport; healthcare; social and child protection and appropriate living standards; political and public life; culture; sports, recreation and leisure activities.</p> <p>Principal content: prohibition of discrimination of persons with disabilities</p>
<p>Title of the Law: Law on the Prohibition of Harassment at Work, Official Gazette of Montenegro, no. 30/12, 54/16</p>

Abbreviation: LPHW

Date of adoption: 29 May 2012

Entry into force: 16 June 2012

Latest relevant amendments: 17 August 2016

Web link:

<http://www.amrrs.gov.me/sites/default/files/documents/library/Zakon%20o%20zabrani%20zlostavljanja%20na%20radu.pdf>

Grounds covered: not specified

Civil law

Material scope: all labour issues, as well as people engaged outside the employment context, such as people attending professional training and expertise; pupils and students attending practical training; volunteers; people performing certain tasks while serving a sentence of imprisonment or corrective measures; people taking part in voluntary and public work, work organised in the common interest, labour activities and competitions; any other person taking part in work provided by the employer; and harassment and sexual harassment.

Principal content: prevention and protection against bullying and mobbing

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Montenegro
Date: 31 December 2019

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination¹⁷³	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?¹⁷⁴
European Convention on Human Rights (ECHR)	26.12.2003	06.06.2006	No	Yes	Yes
Protocol 12, ECHR	26.12.2003	06.06.2006	No	Yes	Yes
Revised European Social Charter	22.03.2005	03.03.2010	No	Ratified collective complaints protocol? No	Yes
International Covenant on Civil and Political Rights	2001	23.10.2006	No ¹⁷⁵	Yes	Yes
Framework Convention for the Protection of National Minorities	06.06.2006	06.06.2006	No	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	2001	23.10.2006	No	Yes	Yes
Convention on the Elimination of All Forms	23.10.2006	23.10.2006	No	Yes	Yes

¹⁷³ 'Derogations on the basis of gender, ethnicity, race, religion, language, ethnic or social origin, political or other opinion, financial status or any other personal characteristics are forbidden' (Article 25, Constitution of Montenegro).

¹⁷⁴ Anyone whose rights are violated by individual legal acts that do not comply with the Constitution and ratified international treaties, according to the opinion of the Constitutional Court, can request amendment of that act and initiate the procedure before the Constitutional Court, after exhausting all remedies (Law on the Constitutional Court, *Official Gazette of Montenegro*, Nos. 64/2008, 46/13 and 51/13, Article 47).

¹⁷⁵ Prohibition of derogation with regard to the prohibition of slavery, prohibition of debt slavery and abolition of the right to be recognised as a person before the law have not been incorporated in the Constitution of Montenegro.

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination¹⁷³	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?¹⁷⁴
of Racial Discrimination					
ILO Convention No. 111 on Discrimination	14.07.2006	14.07.2006	No	Yes	Yes
Convention on the Rights of the Child	23.10.2006	23.10.2006	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	13.12.2006	2.11.2009	No	Yes	Yes

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