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Country report

Non-discrimination

Montenegro
2022
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

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Reporting period 1 January 2021 – 31 December 2021

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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 as regards protection against discrimination, and as *lex specialis* it applies even when other pieces of legislation do not cover all the protected grounds stipulated by the LPD. 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 persons with disabilities. Furthermore, the 2019 Labour Law (LL) contains 11 articles with regard to anti-discrimination that are aligned with the LPD and the directives.

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.

Under the Law on the Protector of Human Rights and Freedoms of Montenegro (LPHR), 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 (LPD), the Law on the Prohibition of Discrimination against Persons with Disabilities (LPDPD), the Labour Law (LL), the Law on Minority Rights and Freedoms (LMRF), the Law on Civil Servants and State Employees (LCSSE) 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,¹ gender identity,² 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

¹ The LPD uses an outdated term 'sex change' which presently refers to physical characteristics and should be replaced with the term 'gender affirming process' as the latter can imply both social and medical gender affirmation. The work on the new text of the LPD is under way and it is expected to improve the wording of the protected grounds.

² Gender identity should be understood as an internal sense of self.

characteristics as a protected ground and explicitly listing the membership or assumed membership of a trade union as a protected ground.³

The definition of direct and indirect discrimination is not fully aligned with both directives (2000/43/EC and 2000/78/EC). 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). This differs from the wording of both directives, which address a situation in which 'a person is treated less favourably than another person', as those two concepts do not necessarily overlap.

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,⁴ 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 to adapt the workplace and working conditions in accordance with special regulations (meaning that only those people who have been officially assessed as having a disability can claim a reasonable accommodation) 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 a disability cannot be allocated to a job that corresponds to their working capacity, 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 occupational training for persons with disabilities and collective agreements (Article 119(2)). These 'other rights' are not defined as such, although pursuant to the Law on the Professional Rehabilitation and Employment of Persons with Disabilities (LPREPD), vocational rehabilitation includes, among other

³ The LPD is a systemic law in the field of anti-discrimination, so the general view is that the anti-discrimination provisions in different laws do not necessarily need to be identical.

⁴ 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.

things, analysis of the specific workplace and work environment of persons with disabilities; development of a plan for adjusting the workplace and work environment for a person with disabilities; and preparation of a plan for the equipment and resources necessary for a person with disabilities to work at that workplace (Article 12).

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 agreements, the employer may declare that the work that that person does has ceased to exist so the person with a disability will be dismissed.

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.

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.⁵

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.⁶

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; affiliation with a political, trade union or other organisation; 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.

⁵ See Protector of Human Rights and Freedoms, reports from previous years.

⁶ European Commission against Racism and Intolerance (ECRI) (2017) *ECRI report on Montenegro (Fifth monitoring cycle)*, p. 12.

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 (the LPD, although some relevant provisions are also contained in the Law on the Prohibition of Discrimination against Persons with Disabilities and the Law on Social and Child Protection and the Law on Healthcare) 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,⁷ and children, elderly people, persons 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.⁸ These powers include assistance to victims, conducting surveys on discrimination and publishing reports and making recommendations 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

⁷ Individuals have the right to receive medical treatment / have publicly funded health insurance.

⁸ 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>.

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 26).

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 LPDPD, in Article 29, provides for a wide range of misdemeanours in its 14 provisions.⁹ A fine shall be imposed on a legal entity, a natural and responsible person in a legal entity, a responsible person in a state administration body, state body and local government body and an entrepreneur.

The LPREPD contains a single article with provisions for a misdemeanour where a legal entity which has not employed a person with a disability fails to pay the special contribution in accordance with the quota system prescribed by this Law. A fine will be imposed on a legal entity which has not employed a person with a disability, if it does not pay the special contribution referred to in Article 22 of this Law. Furthermore, on the same grounds a fine shall be imposed on a natural and responsible person within a legal entity, a responsible person within a state administration body, state body and local government body or an entrepreneur (Article 43).

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 (220 in 2020, in comparison with 141 cases in 2019 and 155 cases in 2018), which is by far the largest number since the establishment of the Protector's competence as an institutional mechanism for protection against discrimination. The reasons for the increase in the number of complaints are multiple and interrelated. Apart from the fact that their content indicates that trust in the institution of Protector is growing, they can be related to the growing trend of discrimination in society, as well as to the empowerment of people at risk of discrimination to report and combat it. The largest number of complaints was filed in the field of labour and employment (73), which follows the trend in previous years. Of the total number of cases resolved (159), there were 55 cases in the field of work and employment; in 13 cases discrimination and/or violation of another right was established, based on religion or belief,

⁹ Singling out a person or group of persons with disabilities and merging them into one or more groups; not providing for Braille in public premises; increasing the price of public and private goods and services to a person or group of persons with disabilities; accessibility of aids/devices. Other listed cases are in the field of education, employment, healthcare and sports and recreation.

gender, gender identity, disability, age, health condition, or belonging or the presumption of belonging to a group, political party or other organisation.

According to data from the Judicial Council of Montenegro, the Judicial Information System (PRIS) recorded during 2020 that there were 14 cases regarding discrimination in progress, and two completed cases dealing with discrimination in the field of work;¹⁰ however, the cases have not yet been made public. According to the same source, they cannot provide data regarding compensation based on discrimination, because this type of dispute is registered in the current information system as 'Compensation for damages'.

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.

Dialogue and consultation with NGOs on disability rights as well as LGBT 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).

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, persons with disabilities);
- availability and effectiveness of procedures and remedies for protection against discrimination;
- proper application and interpretation of terms related to discrimination such as reasonable accommodation and ethos-based organisations;
- appropriate and dissuasive sanctions in court cases and inspection procedures;
- ignorance and non-application of positive measures and their implementation for the benefit of particularly vulnerable groups (persons with disabilities, Roma);
- lack of statistics on discrimination from the point of view of prevention and as the evidence in discrimination proceedings.

¹⁰ Information sent to the Protector by email on 22 February 2021.

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.¹¹

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

¹¹ 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,¹² *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,¹³ *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, 003/20, 26/21, 144/21 and 145/21

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,¹⁴ *Official Gazette of Montenegro*, Nos. 74/19, 8/21, 59/21, 68/21 and 145/21

Date of adoption: 30 December 2019

Entry into force: 6 January 2020

¹² 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.

¹³ 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, 49/2018, 003/20, 26/21, 144/21 and 145/21.

¹⁴ Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, Nos. 74/19, 8/21, 59/21, 68/21 and 145/21.

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, trade union or other organisation as well as other personal characteristics

Material scope: employment

Title of the law: Law on Minority Rights and Freedoms,¹⁵ *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,¹⁶ *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,¹⁷ *Official Gazette of Montenegro*, Nos. 30/12, 54/16

Date of adoption: 29 May 2012

Entry into force: 16 June 2012

Grounds protected: not specified¹⁸

Material scope: employment

Title of the law: Law on the Prohibition of Discrimination against Persons with Disabilities,¹⁹ *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)

¹⁵ 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 31/17.

¹⁶ Law on the Professional Rehabilitation and Employment of Persons with Disabilities (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), *Official Gazette of Montenegro*, No. 49/08, 73/10, 39/11, 55/16.

¹⁷ Law on the Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), *Official Gazette of Montenegro*, Nos. 30/12, 54/2016.

¹⁸ 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. No. 554/2017); age (Supreme Court of Montenegro, judgment of 14 June 2017, Rev. No. 689/2017); and ethnicity (Nikšić Basic Court, judgment of 11 October 2017, P. No. 1890/2015).

¹⁹ Law on the Prohibition of Discrimination against Persons with Disabilities (*Zakon o zabrani diskriminacije lica sa invaliditetom*), *Official Gazette of Montenegro*, Nos. 35/15 and 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'.²⁰ 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 persons with disabilities.²¹ 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.²² 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).²³

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 case²⁴, 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.

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,²⁵ the Protector issued an opinion invoking Council Directive 2000/43/EC of

²⁰ Constitution of Montenegro, Article 8, *Official Gazette of Montenegro*, No. 1/07.

²¹ Constitutional Court, decision U-I No. 6/16; Constitutional Court, decision U-I No. 32/14.

²² However, the judiciary in Montenegro traditionally adheres to a strict literal interpretation of the legal provisions, and the scarce publicly available information on court practice is not sufficient for drawing conclusions on whether other grounds could be protected.

²³ Constitutional Court, decision of 26 December 2012, U-I No 3/09.

²⁴ Constitutional Court, decision of 22 October 2009, U No. 95/08, p. 4: 'The law whose provisions are disputed determines the right to payment of foreign currency to citizens residing in Montenegro, which created a legal basis for the payment of unpaid foreign currency deposited with basic banks, which would not have existed without the adoption of the disputed law. ... The right is still retained by depositors who do not exercise the right to the payment of foreign currency in accordance with the said Law'.

²⁵ 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.

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 employment²⁶ and disability discrimination in employment²⁷ 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). In cases in 2020, there was no invoking of the directives. In a small country such as Montenegro, with very scarce human resources, a change of practice may happen for a subjective reason, as the overall workload may depend on the availability of a few people. Normally, very few people draft all the decisions, so if one of them is elected as the Protector and the other is on maternity leave, for example (and the two are well acquainted with the directives and make reference to them on a regular basis) their substitutes may not be acquainted with the EU law and therefore their decisions may lack reference to the directives.²⁸

²⁶ 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.

²⁷ 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.

²⁸ The former deputy Protector, who was well acquainted with EU anti-discrimination law, is now Protector and is presumably involved to a lesser degree in writing opinions and recommendations.

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),²⁹ religion or belief, disability, age, social or ethnic origin, political or other opinion, sex, sex change, gender identity, sexual orientation and/or intersex characteristics,³⁰ health conditions, material status, marital or family status,³¹ membership of a group or assumed membership of a group, political party, trade union or other organisation as well as 'other personal characteristics'. Those characteristics are not defined but may encompass, for example, affiliation to a minority nation or minority national community, language etc.

The LPD is a systemic law as regards protection against discrimination, and as *lex specialis* it applies even where other pieces of legislation do not explicitly cover all the protected grounds stipulated by the LPD (normally they use the phrase 'other personal characteristics', which shall be construed in accordance with the LPD).

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. However, it may be considered narrow, as it is based on subjective concepts – belief and intent of superiority – and therefore it is not in line with Directive 2000/43/EC:³²

'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

²⁹ 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).

³⁰ 'Sexual orientation and/or intersex characteristics' is the literal wording of the LPD, as introduced by the 2017 amendments to the LPD.

³¹ The provision should be interpreted to cover registered partnerships.

³² 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.

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'.

Ethnicity

Regarding ethnic origin, there is a wide definition of minorities under the Law on Minority Rights and Freedoms,³³ 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. The number of Roma in Montenegro (6 251) accounts for about 1 % of the population.³⁴ According to public opinion research conducted by an NGO, the Centre for Democracy and Human Rights,³⁵ 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. The Law on Freedom of Religion or Belief and the Legal Status of Religious Communities³⁶ stipulates in Article 1(2) that the state guarantees the unimpeded exercise of freedom of religion and belief.

Article 3 states:

'Freedom to manifest one's religion or beliefs is subject only to such limitations as are necessary in a democratic society and which are in the interests of public security, public order, health or morals, or the rights and freedoms of others.
The restrictive measure must be proportionate to the legitimate aim referred to in paragraph 1 of this Article, and the public authority must take care not to apply a

³³ Law on Minority Rights and Freedoms, *Official Gazette of Montenegro*, Nos. 31/06, 51/06, 38/07, 2/11, 8/11, 31/17.

³⁴ Montenegro has 620 029 inhabitants, according to the Census of Population, Households and Dwellings in 2011.

³⁵ CEDEM (2020), *Zaštita prava manjinskih naroda i drugih manjinskih nacionalnih zajednica – pravna analiza (Protection of the rights of minority peoples and other minority national communities in Montenegro – legal analysis)*, available at: <https://www.cedem.me/aktivnosti/1228-objavljena-pravna-analiza-zastita-prava-manjinskih-naroda-i-drugih-manjinskih-nacionalnih-zajednica-u-crnoj-gori>.

³⁶ 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*, Nos. 74/19 and 08/21.

stricter restrictive measure, if the same legitimate aim can be achieved by a milder restrictive measure.'

The adoption of this Law provoked massive and long-lasting protest in 2020, organised by the Serbian Orthodox Church in Montenegro, for its controversial and allegedly discriminatory provisions addressing property matters in relation to that community, as they were not previously regulated by international treaties along with other religious communities.³⁷ This issue also heavily influenced the results of national elections held on 30 August 2020.

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 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.³⁸

c) Disability

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

According to the Law on the Prohibition of Discrimination against 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).

³⁷ The Law contained several provisions which would in fact impact only the Serbian Orthodox Church in MN, as it is the only one of the traditional religious communities which is not officially registered, and there is still no special agreement between the state and that church, as the most influential church. The disputed provisions addressed property in MN and shifted the burden of proof of proprietary rights to the church in administrative procedure and not court procedure. See: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)010-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)010-e).

³⁸ 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.'

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,³⁹ 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 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,⁴⁰ 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 persons 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'.⁴¹

As far as we know, these principles have never been used in Montenegro.

³⁹ Law on Pensions and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of Montenegro*, Nos. 54/03, 39/04, 79/04, 47/07, 79/08, 14/10, 78/10, 34/11, 66/12, 38/13, 61/13, 60/14, 10/15, 42/16, 55/16, 80/20 and 145/21 Article 30.

⁴⁰ Law on Social and Child Care (*Zakon o socijalnoj i dječjoj 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, 59/21 and 145/21 Article 19.

⁴¹ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 2007, 'Introduction', p 6.

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.'⁴²

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.⁴³ 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 employment⁴⁴ and referred in its deliberation to Directive 2000/78/EC, Article 6. However, in this case, there was no reference to CJEU case law on discrimination on the ground of age. In a 2020 case,⁴⁵ the Protector issued a Recommendation to the ministry in charge to prepare a Draft Law on Amendments to the Labour Law in order to introduce provisions that will entitle persons over the age of 67 to work and will specify the legal basis, criteria and jobs, as well as the length of time of possible continuation of work with the employer, in accordance with the Decision of the Constitutional Court of Montenegro (*Official Gazette of Montenegro*, No. 04/18).

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 2020 cases do not address multiple discrimination on the grounds covered by this report.

⁴² Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10, 18/14 and 42/17, available at: <https://www.gov.me/mpa/en/library/zakoni>.

⁴³ Protector of Human Rights and Freedoms, Opinion No. 823/17 of 25 June 2018.

⁴⁴ 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.

⁴⁵ Protector of Human Rights and Freedoms, Opinion No. 143/19-3 of 3 March 2020, available at: https://www.ombudsman.co.me/docs/1591097269_03032020-preporuka-mrs.pdf.

The Ministry of Sustainable Development and Tourism has issued a licence for audit and supervision to two companies. However, it subsequently revoked the licence, stating that the companies employed retired engineers (over age of 67) who therefore cannot obtain a personal licence. The complainants argued that, by such an interpretation of the vague provisions of the relevant legislation, they were denied the rights to work guaranteed by the Constitution (Article 62) and the LL (Articles 5 and 16) by the Ministry in charge.

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,⁴⁶ as well as the Law on the Prohibition of Discrimination,⁴⁷ 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 persons with particular characteristics is not prohibited in national law. Although international monitoring mechanisms⁴⁸ 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.

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.⁴⁹ 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 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 stipulates the general prohibition of discrimination 'on any grounds and form' regarding disability, in the public and private sectors alike, without further explanation (Article 2(1)). Furthermore, it does not provide a clear definition of direct and indirect discrimination on the ground of disability in Article 4:

⁴⁶ Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, Nos. 02/18,34/19 and 08/21, Article 7.

⁴⁷ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10,18/14 and 42/17, Article 2(2).

⁴⁸ ECRI (2017), *Report on Montenegro (Fifth monitoring cycle)*, p. 12.

⁴⁹ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10, 18/14 and 42/17, Article 2(3).

'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 persons 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.

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.'

According to Article 4 of the Law on the Prohibition of Discrimination against 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 against 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.

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

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 persons 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.⁵⁰ 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.⁵¹

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.⁵² The data belonging to any of these categories may be processed where:

⁵⁰ 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.

⁵¹ 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).

⁵² Law on Personal Data Protection, *Official Gazette of Montenegro*, Nos. 79/08, 70/09, 44/12 and 22/17, Article 9(7).

- 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.⁵³

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.⁵⁴

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 (assigned at birth), religion (based on self-determination) and language.⁵⁵

The 2011 census in Montenegro collected information on persons 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 persons 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,⁵⁶ 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 Rulebook⁵⁷ issued by the Ministry for Human and Minority Rights of Montenegro.

⁵³ Law on Personal Data Protection, *Official Gazette of Montenegro*, Nos. 79/08, 70/09, 44/12 and 22/17, Article 13.

⁵⁴ 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.

⁵⁵ The terms in brackets were added by the author of this Report for the purpose of clarity. For the original wording see [https://www.monstat.org/userfiles/file/popis2011/saopstenje/saopstenje\(1\).pdf](https://www.monstat.org/userfiles/file/popis2011/saopstenje/saopstenje(1).pdf).

⁵⁶ Law on State Administration (*Zakon o državnoj upravi*), *Official Gazette of Montenegro*, Nos. 38/03, 22/08, 42/11, 54/16 and 70/21.

⁵⁷ 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.

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,⁵⁸ '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'.

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.⁵⁹ 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,⁶⁰ 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

⁵⁸ Law on Criminal Procedure (*Zakon o krivičnom postupku*), *Official Gazette of Montenegro*, Nos. 57/09, 49/10, 47/14 02/15, 28/18, 116/20 and 145/21.

⁵⁹ 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.

⁶⁰ 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.

and sexual harassment, while the Law on the Prohibition of Harassment at Work⁶¹ 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 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.

⁶¹ Law on the Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), *Official Gazette of Montenegro*, Nos. 30/12 and 54/16.

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 Misdemeanours⁶² 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.⁶³ 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.

⁶² Law on Misdemeanours (*Zakon o prekršajima*), *Official Gazette of Montenegro*, Nos. 1/11, 6/11, 39/11, 32/14, 43/17, 51/17.

⁶³ Supreme Court of Montenegro, judgment of 11 October 2018, No. 887/2018.

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.⁶⁴ 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 persons with disabilities. Finally, when it comes to inspection this law provides for the same institutional mechanisms as the LPD.

The Law on the Prohibition of Harassment at Work⁶⁵ 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).⁶⁶

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)).

⁶⁴ Law on Misdemeanours, *Official Gazette of Montenegro*, Nos. 01/11, 6/11, 39/11, 32/14, 43/17 and 51/17.

⁶⁵ 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.

⁶⁶ Indemnity represents a certain amount of money demanded by the employer from those responsible for the damage incurred by the aggrieved person.

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(2) 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 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.⁶⁷

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 persons with disabilities in the area of employment

In Montenegro the duty on employers to provide reasonable accommodation for persons with disabilities is included in the law and is defined. According to the Law on Professional

⁶⁷ 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.

Rehabilitation and Employment of Persons with Disabilities (LPREPD) reasonable accommodation is 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 employed in the company (Article 15(4)). This obligation on the employer is at the same time a right of the employee with a disability. However, this duty applies only in the case of employment of persons with disabilities 'under special conditions' who have a formal disability assessment and are officially recognised as needing an accommodation. The legislator created an awkward situation through poor drafting of the relevant provisions and defining general and special conditions of employment dependent on reasonable accommodation. Thus, employment of persons with disabilities under general conditions is considered to be employment without reasonable accommodation (Article 15(2)) while special conditions refer to employment with reasonable accommodation or in a special employment organisation (Article 15(3) and (5)).

As the reasonable accommodation duty is owed only to workers employed under special conditions (who need to have a formal disability assessment and be officially recognised as needing an accommodation in order to be employed under these terms) a worker with a fairly minor impairment/disability who needs only a modest accommodation, e.g. use of an adapted mouse or keyboard, is not covered by these relevant provisions. According to the general principles of the Montenegrin law, a person in that situation can rely on ratified international conventions as well as internationally recognised general legal principles, which according to Article 9 of the Constitution of Montenegro prevail over domestic legislation. However, even the Protector, in a recent opinion, explicitly pointed out that only persons with disabilities who are employed under special conditions have the right to adjust their job, i.e. workplace, while persons with disabilities who are employed under general conditions do not have that right.⁶⁸

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.

Article 22 of the LPDPD considers the employment of persons 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 employees with disabilities is achieved through inspections or civil litigation.

The legislative framework does not address either the issue of disproportionate burden on the employer or further regulate the manner in which this obligation must be fulfilled. Therefore, it is hard to tell whether, in the first place, assessment of disproportionate burden is made in practice and, consequently, whether the availability of financial assistance from the state is taken into account in assessing potential disproportionate burden.

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,⁶⁹ 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

⁶⁸ See: https://www.ombudsman.co.me/docs/1595589979_21072020-prpeoruka-fzzocgmz.pdf, p. 11.

⁶⁹ The LPREPD does not explain in any way what other rights are referred to.

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 persons 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 person with a disability 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'.⁷⁰

In addition, Article 14 of the Law on Occupational Health and Safety⁷¹ 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 persons with disabilities, in accordance with this and other laws.

b) Case law

Employers who employ persons with disabilities, as well as persons 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 persons with disabilities, loans under favourable conditions for the purchase of equipment and tools required in order to employ a person with a disability and partial coverage of the costs of personal assistants.

The 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

⁷⁰ 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>.

⁷¹ Law on Occupational Health and Safety (*Zakon o zaštiti i zdravlju na radu*), *Official Gazette of Montenegro*, Nos. 34/14, 44/18.

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.

However, in a 2020 case,⁷² the Association of the Blind of Montenegro filed a complaint against the Health Insurance Fund of Montenegro due to discrimination against persons with visual impairment contained in a provision of the Rulebook on exercising the right to medical and technical aids (Article 64(2)). The Rulebook stipulates:

'An insured person with visual impairment disability who is in school has the right to a player and recorder of audio books, speech software and a Braille notebook in accordance with the List of Aids.'

In the opinion of the Association of the Blind, such a provision is very unfavourable and represents an act of discrimination in relation to persons with completely impaired vision, who are not at school, and those who acquired a disability or lost their sight during later life. The Protector further assessed as unfounded the Fund's allegations that, in determining the conditions for exercising the right to those technical aids, the Fund had in mind the fact that employed persons with disability could be provided with those devices by their employer, if needed. In this regard, the Protector points out that only persons with disabilities who are employed under special conditions are entitled to reasonable accommodation, and that aids are equally necessary and essential for all visually impaired persons, regardless of their age, education, work or other activism and interest in order to enable the social inclusion of persons with disabilities and equal access to information for all citizens.

c) Definition of disability and non-discrimination protection

There are four relevant pieces of legislation (LPREPD, LPDPD, LL and the Law on Occupational Health and Safety) which provide a definition of disability and non-discrimination protection.

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 persons 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 persons with disabilities 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).

⁷² Protector of Human Rights and Freedoms, Opinion No. 238/20-2 of 21 July 2020, available at: https://www.ombudsman.co.me/docs/1595589979_21072020-prpeoruka-fzzocgmz.pdf.

Pursuant to Article 2 of this Law, discrimination against persons with disabilities and groups of persons 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 persons 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 persons 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 persons with disabilities, is recognised as a form of discrimination, but only for those people who have been assessed as needing to work under 'special conditions' (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 persons with disabilities.

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

e) Duties to provide reasonable accommodation in areas other than employment for persons 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 Foreigners⁷³ and the Law on International and Temporary Protection of Foreigners.⁷⁴

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,⁷⁵ 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.⁷⁶

⁷³ Law on Foreigners (*Zakon o strancima*), *Official Gazette of Montenegro*, Nos. 2/18 and 3/19.

⁷⁴ Law on International and Temporary Protection of Foreigners (*Zakon o međunarodnoj i privremenoj zaštiti stranaca*), *Official Gazette of Montenegro*, Nos. 2/17 and 3/19.

⁷⁵ Constitution of Montenegro, *Official Gazette of Montenegro*, No. 02/07, Article 8.

⁷⁶ 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 grounds⁷⁷ (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.⁷⁸

b) Liability for discrimination

In Montenegro, the personal scope of anti-discrimination law does not cover both natural and legal persons for the purpose of criminal liability for discrimination; nevertheless, other legislation does.

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,⁷⁹ 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

⁷⁷ Prohibited grounds are set out in the Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10, 18/14 and 42/17, Article 2(2).

⁷⁸ Labour Law, *Official Gazette of Montenegro*, Nos. 74/19, 8/21, 59/21, 68/21 and 145/21.

⁷⁹ 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).⁸⁰ 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)).⁸¹

3.2 Material scope

3.2.1 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.

Self-employment and occupation are not covered by the existing legislation. In defining employment discrimination, the Law also fails to extend this protection. Therefore, it is not possible to contemplate conditions for access to self-employment and related matters.

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, against people seeking employment, as well as employees or people who, on other grounds, perform work for the employer.

Article 22 of the LPDPD establishes that discrimination in the field of professional rehabilitation, labour and employment shall be considered as: 1) not hiring persons with disabilities who have equal or better qualifications, professional or working abilities than persons without disabilities, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities; 2) limiting access by persons with disabilities to employment, self-employment or occupation or membership of an organisation of workers or employers; 3) laying down more restrictive rules relating to work and working conditions, including dismissals and wages, for persons with disabilities; 4) non-implementation of measures for adjusting the workplace and conditions for work in accordance with special regulations, and in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities; and 5) prescribing different and unfavourable conditions for a person or group of persons with disabilities to exercise other rights arising from employment, in accordance with the laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities.

⁸⁰ See *Official Gazette of Montenegro*, Nos. 02/07, 13/07, 73/10, 30/12 and 39/16.

⁸¹ Law on Civil Servants and Employees, *Official Gazette of Montenegro*, Nos. 02/18, 34/19 and 08/21.

Pursuant to the LPREPD, direct and indirect discrimination during professional rehabilitation, employment and during the employment of persons with disabilities is prohibited (Article 5).

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 *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 disfavours 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 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).⁸²

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).

⁸² Law on the Armed Forces of Montenegro (*Zakon o Vojsci Crne Gore*), *Official Gazette of Montenegro*, Nos. 51/17 and 34/19, Article 16.

3.2.2 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 the 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 persons with disabilities. However, the LPDPD refers to special laws regulating the field of work and the field of professional rehabilitation and employment of persons with disabilities when it comes to the prohibition of discrimination on the ground of disability. In practice, this means that when something is not regulated directly and in detail by the LPDPD, that law indicates 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.⁸³

⁸³ 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.

3.2.3 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,⁸⁴ vocational education is accessible to everyone and cannot be directly or indirectly restricted on grounds listed by that law and the Law on the Prohibition of Discrimination as *lex specialis* in the field of anti-discrimination.

3.2.4 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.

⁸⁴ Law on Vocational Education (*Zakon o stručnom obrazovanju*), *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10, 39/13, 47/17 and 145/21 Article 2b.

The Statute of Association of Trade Unions in Montenegro⁸⁵ 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 statute⁸⁶ 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,⁸⁷ 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 (covering all the grounds listed in the LPD).⁸⁸ 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.

Article 22 of the LPDPD states that discrimination in the field of professional rehabilitation, labour and employment will be considered as limiting access for persons 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 (judicial interpretation of Article 14 is needed). 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.

3.2.5 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. In addition to the Law on the Prohibition of Discrimination, relevant provisions are contained in the Law on the Prohibition of Discrimination against Persons with Disabilities, the Law on Social and Child Protection and the Law on Healthcare.

⁸⁵ Statute of Association of Trade Unions in Montenegro (*Statut saveza sindikata Crne Gore*), available at: http://www.sindikats.me/fajlovi/dokumenta/Statut_Saveza_sindikata_Crne_Gore.pdf.

⁸⁶ 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>.

⁸⁷ 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.

⁸⁸ Statute of the Montenegro Education Trade Union (*Statut sindikata prosvjete Crne Gore*), available at: http://www.sindikatsprosvjete.me/dokumenta/propisi/Statut_SPCG.pdf.

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 persons 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 against Persons with Disabilities sets out in Article 24 a definition of discrimination in the area of social and child protection and adequate living standards.⁸⁹

Article 23 of the LPDPD prescribes the list of what is considered to constitute discrimination based on disability in the field of healthcare in terms of the regulations governing healthcare and health insurance.⁹⁰

The rights regarding social and child protection are governed by the Law on Social and Child Protection.⁹¹ 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, persons 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:

⁸⁹ It includes: refusal, restriction or hindrance of the provision of social and child protection to a child or adult with disabilities; 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 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.

⁹⁰ 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 persons 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.

⁹¹ 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, 50/17, 59/21 and 145/21.

'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)).

The Law on Healthcare⁹² 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). As previously stated, 'the other personal characteristics' should be construed in accordance to the LPD. 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. Foreign nationals have the right to healthcare in accordance with this Law and with an international agreement. If not otherwise stipulated by an international treaty, the foreigner shall bear the costs of the emergency medical assistance or other type of healthcare provided, according to the price list of the health institution (Article 12).

According to media reports, several cases of alleged discrimination against people of different gender identity or sexual orientation have occurred during medical examinations. The most recent one referred to the case of a transgender person in the process of transition and the offensive attitude of a member of medical staff towards her during a visit to a health centre (a medical technician has in her presence disrespectfully disclosed information regarding therapy and a process to other medical officers, grossly violating her right to privacy).

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.⁹³

a) 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.

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

In Montenegro, national legislation prohibits discrimination only 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(1)(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.

⁹² Law on Healthcare, *Official Gazette of Montenegro*, Nos. 03/16, 39/16, 02/17, 44/18, 24/19, 82/20 and 08/21.

⁹³ 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-dzpq.pdf.

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 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 persons 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.

Specific benefits for persons with disabilities are provided for by the Law on Travel Benefits for Persons with Disabilities.⁹⁴ Under Article 7 of this Law, persons with disabilities, people in receipt of carers' allowance and children in receipt of assistance for children and young persons 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, and judicial interpretation is needed.

Benefits provided by private actors fall outside the scope of the above provisions. Such benefits are not prohibited, which means that they are permitted.⁹⁵ 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 persons 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.

3.2.7 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).

⁹⁴ 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.

⁹⁵ 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 faith-based schools. 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. 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, but it relates to the field of work in the education context.

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.⁹⁶ For the time being, there is only one school of this type: Mehmed Fatih Medres, founded by the Islamic Community of Montenegro.⁹⁷ 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.⁹⁸

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

⁹⁶ General Law on Education (*Osnovni Zakon o obrazovanju i vaspitanju*), *Official Gazette of Montenegro*, Nos. 64/02, 44/13, 47/17, 59/21, 76/21 and 146/21, Article 5a.

⁹⁷ 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.

⁹⁸ 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, 44/13, 47/17, 59/21, 76/21 and 146/21; 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, 47/17, 59/21, 76/21 and 146/21; Law on Grammar and High Schools (*Zakon o gimnaziji*), *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10, 39/13, 47/17 and 145/21; Law on Vocational Education, *Official Gazette of Montenegro*, Nos. 64/02, 49/07, 45/10, 39/13, 47/17 and 145/21; 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, 72/19, 74/20 and 104/21; 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, 47/17 and 145/21.

- 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 (sexual orientation and other non-listed grounds, e.g. age, are included in the notion of '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 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 as it also prohibits discrimination on other similar grounds, positions or circumstances for which judicial interpretation is needed.

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).

In Montenegro, 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, especially with the adoption of the Law on the Education of Children with Special Needs, which introduced a multi-faceted approach: individual assessment of every child's needs, introducing educational mediators into the process and focusing on the inclusion of children in mainstream schools wherever possible.⁹⁹ According to this Law, schools and institutions have a duty to develop an individual education plan for each child with special needs, in cooperation with their parents, while education mediators should facilitate the inclusion of children in mainstream schools.

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.

According to data from the Government's *Strategy for Inclusive Education in Montenegro (2019-2025)* on children receiving education in resource centres,¹⁰⁰ there is a total of 82 children in primary and 62 in secondary education.¹⁰¹ The strategy document, which was adopted in May 2019, is accompanied by a detailed action plan.

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.

It is essential that teachers are trained to have specific knowledge of certain disabilities.

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.

a) Roma pupils

In Montenegro, there are specific trends and patterns in education regarding Roma pupils, such as segregation, which are not of a legal nature. This is even truer in 2021, as the COVID-19 crisis has deeply affected this population.

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

⁹⁹ 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.

¹⁰⁰ The resource centre is a public institution that educates children with visual impairment, motor impairment and combined disabilities.

¹⁰¹ *Strategy for Inclusive Education in Montenegro 2019-2025*, p. 6, available at: <https://www.unicef.org/montenegro/media/7871/file/MNE-media-MNEpublication311.pdf>.

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. In 2021 *the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2021-2025* was adopted.¹⁰²

Pursuant to the Strategy, policy implementation should encompass the following:

- the development of programmes to encourage greater participation of Roma and Egyptian children in preschool education (especially in mainstream preschool institutions), in order to enable their social inclusion and overcome possible obstacles to language and cultural participation in primary school;
- each school needs to develop an individual transition plan for Roma students as the percentage of school dropouts among Roma and Egyptian children is highest after primary education, and later after high school;¹⁰³
- it is important to provide additional support (mentoring and tutoring) in order to enable the transition from primary to secondary level, as well as from secondary education to higher education;
- provision of transportation and other resources so that they can participate in extracurricular activities and social events;
- additional measures are needed in order to include Roma and Egyptians in higher education. In addition to existing measures that include additional posts for Roma to enrol in university, as well as scholarships, it is necessary to provide mentoring support to Roma students;
- organising a campaign for the inclusion of adults in the programme of elementary functional literacy and primary education for adults, as well as in vocational education and training programmes.¹⁰⁴

The numbers of students from the Roma and Egyptian population enrolled in an education institution in the school year 2021-22 are as follows: primary school – 1 916; secondary school – 225; and university – 12.¹⁰⁵

In Montenegro, primary education is obligatory, but education still remains a huge challenge for RAE communities, primarily because of the high drop-out rate. The reasons for that 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.

However, the general public may not recognise access to education as a problem for the RAE community, especially in the COVID-19 context. According to the 2020 survey on 'Familiarity of Podgorica high school students with the history, language and culture of Roma',¹⁰⁶ more than half of the surveyed high school students (60 %) think that, when it comes to access to education, Roma in Montenegro are not discriminated against.

¹⁰² *Strategy for Social Inclusion of Roma and Egyptians in Montenegro (2021-2025)*, available at: <https://www.gov.me/dokumenta/ac62f522-fc63-4408-b164-546aefa52a4b>.

¹⁰³ In 2020, the ECRI recommended that the authorities institutionalise and increase the number of Roma educational mediators at the pre-school and primary school levels to ensure children's attendance and reduce the risk of them dropping out. ECRI acknowledges that the Montenegrin authorities have taken several steps regarding this recommendation, including the development by the Centre for Vocational Education of a professional qualification, namely 'Associate in the social inclusion for Roma and Egyptians in the field of education' (educational mediator).

¹⁰⁴ *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2021-2025*, pp. 46-47.

¹⁰⁵ Information provided by the NGO Phiren Amenca.

¹⁰⁶ Project 'Meet Roma and Judgments – UROP', implemented by the NGO Phiren Amenca within the Regional Programme of Local Democracy in the Western Balkans – ReLOaD, funded by the European Union, and implementing the United Nations Development Programme (UNDP), http://phirenamenca.me/media/files_down/Upoznatost%20podgorickih%20srednjoskolaca%20sa%20identitetom%20Roma.pdf.

However, the practice shows otherwise. In a 2020 case, the Protector of Human Rights and Freedoms found that the Ministry of Education had taken a discriminatory attitude towards educational mediators in the field of education, in connection with the violation of labour rights, as no mediator was employed for an indefinite period of time, but only with a fixed-term contract during the school year, on a yearly basis.¹⁰⁷ According to the Protector, the claim that educational mediators cannot be employed for an indefinite period of time because the number of engaged mediators depends on the number of pupils (one associate per 70 pupils), is not acceptable. On the other hand, the Protector states that the claim that it is not possible for educational mediators to establish a permanent employment relationship due to the fact that the school year lasts from September to the end of June, which is explicitly expressed in the *Report on Implementation of the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016–2020 for 2019*, does not have the character of a reasonable justification. Furthermore, the Ministry of Human and Minority Rights was instructed to ensure that during the development, i.e. adoption, of the new Strategy for Social Inclusion, educational mediators can establish employment for an indefinite period of time. As a result, in 2021 the amendments to the Law on Education of Children with Special Educational Needs¹⁰⁸ addressed the legal position of educational mediators. Now the school concludes a contract with the teaching assistant for an indefinite period of time.¹⁰⁹

Another example of difficulties in the social inclusion of Roma and Egyptian pupils is addressed in the most recent case, which is still pending.¹¹⁰ The Roma youth organisation 'Step with us – Phiren Amenca' filed a lawsuit against the Ministry of Education of the Government of Montenegro for failing to regulate the regime of transportation of Roma students to schools in Podgorica in the changed conditions caused by the COVID-19 epidemic, and/or to provide other possibilities for regular education. According to the complaint, the Ministry of Education has put over 230 pupils from the Roma and Egyptian communities (from first to fifth grade) in an unequal and unfavourable position compared with other pupils by not providing school transportation as stipulated and not taking into account lack of internet access, general illiteracy, digital illiteracy and lack of a personal email address in over 80 % of cases, which represents the real inability of Roma parents to enrol their children in educational institutions in a timely and successful manner and for children to take part in online education.¹¹¹ Since 11 November 2020, when a dispute was initiated, so far there have been several hearings of witnesses and the examination of other witnesses is underway. It is important to emphasise that the organisation, as a representative of Roma parents, clearly stated in the petition of the lawsuit that they waive any financial compensation, but that their goal is for the Ministry to pass an act defining the obligation to organise transportation and that this situation does not happen again in the future.

3.2.8 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.

¹⁰⁷ Protector of Human Rights and Freedoms, Opinion No. 453/20-3 of 30 October 2020, available at: https://www.ombudsman.co.me/docs/1605170523_301020202-preporuka-mpmlimp.pdf.

¹⁰⁸ The Law on Education of Children with Special Educational Needs (*Zakon o vaspitanju i obrazovanju djece sa posebnim obrazovnim potrebama*), *Official Gazette of Montenegro*, Nos. 80/04 45/10, 47/17 and 145/21.

¹⁰⁹ See in more details infra under 12.1 Legislative amendments.

¹¹⁰ See: <http://phirenamenca.me/?content=home&mod=news&tip=single&id=291>.

¹¹¹ In 2020, the Ministry of Education made a decision not to allow these families to enrol their children in the nearest primary school, but instead to assign them to six city schools in Podgorica, and at the same time provide them with transportation to and from school. However, the children are not provided with school transportation. In addition to the new teaching system, i.e. online teaching, no field survey was conducted regarding the degree of readiness of Roma and Egyptian families to provide the basics of digitalisation needed for learning.

Namely, Article 11 of the systemic Law on the Prohibition of Discrimination prescribes prohibition of discrimination only 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 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 against Persons with Disabilities.¹¹²

On the other hand, the Law on Consumer Protection¹¹³ 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.¹¹⁴ 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

¹¹² 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.

¹¹³ Law on Consumer Protection (*Zakon o zaštiti potrošača*), *Official Gazette of Montenegro*, Nos. 2/14, 6/14, 43/15, 70/17, 67/19 and 146/21.

¹¹⁴ Law on Services (*Zakon o usluzama*), *Official Gazette of Montenegro*, Nos. 71/17 and 67/19.

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 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).

3.2.9 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.¹¹⁵

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:

¹¹⁵ Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos. 46/10, 18/14 and 42/17, Article 9.

'The following groups, in particular, have priority in exercising their right to social housing, in accordance with this law: single parents, or guardians, persons with disabilities, persons over 67 years of age, young people who were children without parental care, families with children with disabilities, members of the Roma and Egyptian communities (RE population), internally displaced persons (IDPs), internally displaced persons from Kosovo residing in Montenegro,¹¹⁶ foreign nationals with permanent or temporary residence awarded the status of displaced person or IDP and victims of domestic violence.'¹¹⁷

The Law on Social and Child Protection 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.

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,¹¹⁸ 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 'internally displaced persons' (IDPs) from Kosovo 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. After the expiry of the latest strategy, the transitional Action Plan for 2020¹¹⁹ has been developed by the Ministry of Human and Minority Rights. However, information on its implementation is not available at the moment. In 2021 the *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2021-2025* was adopted.

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 2018.¹²⁰

¹¹⁶ According to the previous Law on Foreigners, these groups have the same legal status.

¹¹⁷ Law on Social Housing (*Zakon o socijalnom stanovanju*), *Official Gazette of Montenegro*, No. 35/2013, 23 July 2013.

¹¹⁸ See: <https://www.vijesti.me/vijesti/drustvo/baftijari-stanove-za-rome-i-egipcane-nije-trebalo-graditi-na-mjestima-prepoznatim-kao-geto>.

¹¹⁹ *Action Plan for the Implementation of the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020* (for 2020).

¹²⁰ See: <https://regionalhousingprogramme.org/konik-camp-in-montenegro-now-officially-closed-remaining-51-families-move-to-new-homes/>.

According to the most recent data, by 2020 a total of 218 flats had been built in Podgorica, along with 62 in Nikšić and 94 in Berane.¹²¹ 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 did not have adequate accommodation in 2016; many of them continued to live in unsanitary conditions, often without electricity and water (mainly in dilapidated barracks, located in places out of public view) in the coastal part of Montenegro.¹²² According to the most recent data from the research of the Ministry of Human and Minority Rights on the socio-economic position of Roma and Egyptians in Montenegro, the majority live in settlements with a majority population, but nevertheless 42.2 % of them still live in settlements where only members of the Roma and Egyptian communities live. Every second RAE respondent claims that their family owns the home in which they live, but only 14 % of respondents say that their family owns the land on which that home is located. According to this research, an average of 5.5 household members live together in a typical Roma or Egyptian community.

The largest number of household members reported as living together in this survey is 16. A large percentage of households in which respondents live do not have the basic conditions for a decent household life. Thus, for example, 9.8 % claim that there is no electricity in their household, and 11.6 % have no water (13.8 % no running water). As many as 17.8 % do not have a bathroom and refrigerator. 20 % of them do not have a stove or hot water. 80 % of households do not have a computer, which was necessary for remote learning during the COVID-19 virus epidemic. Only 65.5 % of households have access to the internet in some way (via mobile phone, wifi router or in some other way), while only 55.1 % of respondents use the internet every day.

The Roma community, including 'displaced persons' from countries of the former Yugoslavia and 'internally displaced persons' from Kosovo, continues to face serious socioeconomic problems, including in housing. In its report on Montenegro (fifth monitoring cycle) published on 19 September 2017, ECRI emphasised that the Roma remained the most vulnerable and marginalised group in Montenegro. ECRI recommended 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.

In terms of the main goals in the field of housing, the *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2021-2025*¹²³ envisages that in the next five-year period it is necessary to: legalise the existing housing facilities by resolving the issue of ownership of the homes that have been built and solve the problem of overcrowding in the residential buildings in which the RAE population lives; provide the basic requirements for decent

¹²¹ Action Plan for the Implementation of the Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016-2020 (for 2020), p. 6.

¹²² Information is available here: <http://www.mladiromi.me/dekada-roma/romi-u-medijima/461-iseljivaju-170-romskih-porodica>.

¹²³ <https://www.gov.me/clanak/strategija-socijalne-inkluzije-roma-i-egipcana-u-crnoj-gori-2021-2025>.

living conditions in residential buildings (availability of public utilities, such as water, electricity, waste collection and maintenance of access roads, etc. for Roma and Egyptian settlements) and provide for systematised data on the beneficiaries of the Regional Housing Programme, the Social Housing Programme and the Legalisation Programme.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Montenegro, national legislation provides an exception for genuine and determining occupational requirements. The Law on the Prohibition of Discrimination addresses those issues in two articles. 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 that job, provided that the objective is legitimate and the requirement is proportionate. The LPD, in Article 2a, among others, copies the content of Article 4(1) of Directive 2000/78/EC.

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'.

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. Furthermore, the Labour Law, in Article 15(1), provides an exception for genuine and determining occupational requirements, as described above under Section 4.1.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, 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 Forces¹²⁴ 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.

¹²⁴ Law on the Armed Forces, *Official Gazette of Montenegro*, Nos. 51/17 and 34/19.

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, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law (Law on the Prohibition of Discrimination, Article 2(2)).

The same Law, 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).¹²⁵

According to Article 66 of the Law on Foreigners,¹²⁶ 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. An exception to that concerns cases enumerated by the Law which include work on the basis of a temporary residence permit for the purpose of family reunification; study; humanitarian reasons; for a stateless person; recognised refugee status or the granting of additional protection and in relation to the EU (on a basis of a temporary residence permit for a third-country national who has been granted permanent residence in another EU Member State and for the purpose of family reunification with the holder of an EU Blue Card).

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

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

¹²⁵ Law on Foreigners, *Official Gazette of Montenegro*, Nos. 12/18 and 13/19.

¹²⁶ Law on Foreigners, *Official Gazette of Montenegro*, Nos. 12/18 and 13/19.

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.¹²⁷ 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 persons with disabilities, women during pregnancy and maternity leave and special leave in order to care for a child, are not to be considered discrimination.

Under 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 in order to assess and improve professional capabilities. Some of them directly address persons with disabilities in terms of providing for professional help, assessment of professional and work capabilities, advice, support, technical training, adjustment of working posts and so on, while others refer to analysis and assessments of the labour market, financial issues and similar relevant activities for enabling such rehabilitation.

According to Article 14 of the Law on Occupational Health and Safety,¹²⁸ 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 persons 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 persons with disabilities in cases where work is done under onerous conditions (such as under water, underground, in open spaces or at high altitudes). A protective workshop is organised only if the employer has established jobs for which persons with disabilities can be employed in an adapted environment and depending on their needs. A protective workshop may be organised provided that at least 50 % of jobs within it are for the employment of persons with disabilities (Article 33 of the LPREPD).

Article 9(2) of the Labour Law provides exceptions for health and safety in relation to disability, as mentioned on the previous page.

¹²⁷ See the *Kaluđerski laz* case; in 1999, soldiers from the Yugoslav army killed six Albanian IDPs from Kosovo.

¹²⁸ Law on Occupational Health and Safety, *Official Gazette of Montenegro*, Nos. 34/14, 44/18.

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

In Montenegro, national law provides for specific exceptions for direct discrimination on the ground of age. Age as a protected ground is stipulated in a general provision of the LPD (Article 2(2)) as well as in a specific provision stating that 'disabling or restricting the exercise of rights or any other unjustified making difference or unequal treatment of a person or group of persons, on the basis of age, is considered discrimination' (Article 13 of the LPD). However, the LPD also provides for exceptions from the above-mentioned provision. Article 2a of the LPD explicitly lists permitted differences on the ground of age for any activities within the material scope of Directive 2000/78. They include:

'3) age when contracting insurance premiums and other insurance conditions in accordance with generally accepted principles of risk assessment, relevant and accurate statistical data and rules of actuarial mathematics (mathematical method used in the field of insurance);

[...]

5) determining the lowest or highest age limit, professional experience, i.e. level of education as a condition for establishing employment or as a condition for acquiring other rights from employment, in accordance with special regulations;

6) 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.'

b) Justification of direct discrimination on the ground of age

The LPD explicitly stipulates the proportionality test for determining the appropriate maximum age limit (Article 2a(1)(6)) as a reason for termination of employment only in accordance with the conditions for acquiring the right to an old-age pension, stating that conditions 'shall be determined in proportion to the goal and purpose for which they are determined, if the means for achieving that goal are proportionate and necessary' (Article 2a(2)). The assessment of other differences on the ground of age (as well as other permitted differences, except for 'nationality in accordance to the special legislation') depends on practice.

The above-mentioned test also applies when accessing indirect discrimination on any ground (age included) listed in Article 2 of the LPD (according to Article 2(4)). The institution of Protector has already used the proportionality test for age in a case¹²⁹ of indirect discrimination invoking Article 2, while judicial interpretation for grounds under Article 2a ((3) and (5)) is still needed.

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*,¹³⁰ the claimant had applied for a position as an engineer, but a younger candidate was chosen. The court held that this choice could be justified by reference to the interest of the company in employing an expert who could continue their work and professional development in the company on a long-term basis.

¹²⁹ 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.

¹³⁰ High Court of Podgorica, judgment No. 2786-13/12 2014.

c) Fixing of ages for admission to occupational pension schemes

National law allows occupational pension schemes to fix ages for admission to the scheme taking up the possibility provided for by Article 6(2).

There is a standard age (64/66) 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 younger or 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.¹³¹ 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.

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,¹³² 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).

¹³¹ Special protection for persons 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.

¹³² 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.

The Protector noted that 'Montenegro Airlines' A.D. Podgorica, in the competition for the training of professional pilots for certification of co-pilots on Embraer 195 aircraft, by prescribing an age requirement (must be 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 prescribed age (64/66, see below) at which individuals must begin to collect their state pensions. However, if an individual wishes to work beyond the state pension age, the pension can be deferred and 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 Insurance¹³³ 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 66 and women when they reach 64.¹³⁴ In both cases they must have at least 15 years of pensionable service. In addition, at the age of 61 both men and women can start collecting their pensions if they have 40 years of pension insurance.

A person who has contributed to the pension scheme acquires the right to an early old-age pension when he/she reaches the age of 63 and has at least 15 years of insurance history (17a).

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 (197a-197b).

The 2020 amendments to this Law provoked an awkward situation concerning a particular profession in Montenegro, as almost one third of the available judicial staff fulfilled the conditions for receiving an old-age pension and, according to the Constitutional provision, their judicial duty must cease.¹³⁵ However, instead of declaring the fact that a significant number of judges had ceased to carry out judicial duties due to fulfilling the conditions for retirement, the Judicial Council submitted a proposal to assess the constitutionality of Article 17(1) and (2) of the Law on Pension and Disability Insurance in terms of age and gender discrimination. The said judges were retired and the case is still pending before the Constitutional Court. However, this court was unable to rule on any complex cases in 2021, as every decision should be rendered with a unanimous vote by its remaining four judges, since three judges from this Court had also retired and the new judges needed to be elected by the Parliament of Montenegro by a 2/3 majority.

¹³³ Law on Pension and Disability Insurance, *Official Gazette of Republic of Montenegro*, Nos. 54/03, 39/04, 61/04, 79/04, 81/04, 29/05, 14/07, 47/07, *Official Gazette of Montenegro*, Nos. 12/07, 13/07, 79/08, 14/10, 78/10, 34/11, 39/11, 040/11, 66/12, 36/13, 38/13, 61/13, 06/14, 60/14, 60/14, 10/15, 44/15, 42/16, 55/16, /80/20 and 145/21.

¹³⁴ 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).

¹³⁵ The Constitution of Montenegro stipulates that the duty of a judge shall cease, *inter alia*, 'when he/she fulfils the requirements for old-age pension' (Article 121(2)). Furthermore, the Constitution prescribes in Article 128(1)(6) that the Judicial Council 'establishes the cessation of the judicial duty'.

b) Occupational pension schemes

In Montenegro, there is a standard age (64/66) at which people can begin to receive payments from occupational pension schemes and other employer-funded pension 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 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

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

Employment contracts can impose retirement only at an age at which the employee is entitled to a state pension.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do not apply to all workers irrespective of age. If they remain in employment on attaining the state pension age, they lose their right to protection against dismissal.

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

In Montenegro, national legislation is not fully in line with the CJEU case law on age regarding mandatory retirement.

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.¹³⁶ 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.

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 Montenegro¹³⁷ 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 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).

¹³⁶ 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.

¹³⁷ Constitutional Court, decision U-I No. 18/15.

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 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 covered by this report) 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(1), 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(1) must be applied in proportion to what is required and possible and should last until the goals established by those measures are achieved (Article 5(2)). 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 minority¹³⁸ (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

¹³⁸ 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.

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).

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 persons with disabilities, women during pregnancy and maternity leave and leave from work for the purpose of childcare, i.e. special childcare, as well as provisions relating to special rights for parents, adoptive parents, guardians or foster parents.

On the other hand, the Law on the Prohibition of Discrimination against Persons with Disabilities, in Article 5(1), prescribes an 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 persons with disabilities, who are on any ground in an unequal position compared with other people.

Regarding equality in employment in state administration, the human resources administration unit is an independent body in charge, among others, of monitoring the implementation of measures in order to achieve proportional representation of minority peoples and other minority national communities in state bodies, gender-balanced representation and employment of persons with disabilities.¹³⁹

In addition, in order to ensure employment for persons 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 persons 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 persons with disabilities, provided that they are not produced in the country;
- 2) release from payment of income tax, in line with the number of persons 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 persons 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.

¹³⁹ See: https://uzk.gov.me/direktor/O_nama.

b) Quotas in employment for persons with disabilities

In Montenegro, national law provides for quotas for the employment of persons 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 persons with disabilities make up at least 5 % of their total number of employees. In the main, persons 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 persons with disabilities with regard to their employment and professional rehabilitation.

Pursuant to the same Law, employers who do not hire persons 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 persons 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 persons 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.

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 persons 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 persons with disabilities who have a working capacity of 50 % or lower compared to people of the same age, qualifications and under the same conditions. Work centres must have at least 80 % of employees with disabilities in relation to the total number of employees. A person with disabilities who works in the centre has the position of a service user.

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 persons with disabilities.¹⁴⁰ 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 persons with disabilities, subsidies to employers who employ persons with disabilities, 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 persons with disabilities as well as intended use of the Fund (Article 39).

However, in the last 12 years since this Law was adopted, employers have paid several million more into the budget each year than the Ministry of Finance allocated to the Fund through the budget. In the previous two years, that amount was EUR 6 million annually.¹⁴¹

If the Fund were a separate legal entity, and not under the Employment Service, this would contribute to its greater independence.

¹⁴⁰ The quota system in Article 21 of the LPDPD is already addressed above.

¹⁴¹ Information provided by the president of the Fund's Council, available at <https://ss-cq.org/?p=1340>.

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 procedure before the Protector, civil law procedure, general administrative procedure, administrative dispute procedure, misdemeanour procedure, criminal procedure and a procedure before the Constitutional Court. Relevant legislation except for the Criminal Code and the Law on the Constitutional Court provides for more than one procedure. Thus, the LPD and the LL (as well as the Law on Administrative Dispute) stipulate that the civil procedure (mainly the provisions of the Law on Civil Procedure) will apply in the case of a dispute, if not otherwise stipulated by the respective law; in inspection procedure, they apply administrative procedure while the penal provisions of the LPD and the LL stipulate offences where misdemeanour procedure is applicable.

1. Procedure in accordance with the Law on the Protector

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. The Protector is not authorised to change, repeal or annul acts of public bodies (Articles 20 and 22).

2. Procedure in accordance with the LPD

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 in civil law procedure (if not otherwise stipulated by that Law).¹⁴² The proceedings shall be initiated by filing a lawsuit. The lawsuit may be filed within one year of the day of learning about the discrimination, and at the latest within three years of the day of the discrimination. On the other hand, the Law on Obligation (Article 385) stipulates that a claim for damages (non-pecuniary damages in the case of infringement of personal rights are implicitly included) shall expire three years after the party sustaining injury or loss became aware of the injury and loss and of the party inflicting damage. In any event, such claim shall expire five years after the occurrence of injury or loss. The LO also stipulates that all claims determined by a final court decision, court settlement or decision of other competent body shall expire after a 10-year period, including ones which are subjected by statute to a shorter limitation period due to the statute of limitations (Article 389(1)). Thus, even as the LPD prescribes a shorter deadline for filing a lawsuit for protection against discrimination and claiming damages compared with the deadline prescribed for filing a lawsuit for the protection of other personal rights, such as those

¹⁴² The LPD also obliges the relevant inspectorates to undertake monitoring with respect to discrimination in the fields of labour and employment, occupational safety, healthcare, education, building and construction, traffic, tourism and other fields (Article 32) and stipulates misdemeanour provisions (Articles 34, 34(a), 34(b) and 34(c)).

provided by the Law on Obligations, the party may claim damages according to the deadlines from the LO. In this case, it seems that the LPD ('transposing' EU law) does foresee less favourable redress procedures than other national law providing redress for violations of personal rights. Therefore, it could appear that the principle of equivalence is not respected. However, as the (more favourable) procedural rules foreseen by national law are also available to victims seeking redress of violations of the AD law, it is a matter of interpretation whether the principle of equivalence is respected or not.

The proceedings before the court are deemed to be urgent. In a dispute concerning protection from discrimination, in addition to an appeal, revision as an extraordinary legal remedy shall always be allowed.¹⁴³ 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) removing the consequences of discriminatory treatment; d) compensation for damages; and e) 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 cases under a), b) and c), the claim may be presented together with the claims for protection of rights decided in civil proceedings, if these claims are interrelated and are based on the same factual and legal basis.

3. Procedure in accordance with the Labour Law and the related legislation

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

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.¹⁴⁴ 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 Inspection¹⁴⁵ 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 an obligation on an employee who considers themselves a victim of discrimination that, before filing a complaint to the court, they should start a procedure with the Agency for Peaceful Labour Dispute Resolution 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), (3)). While the proceedings are pending before the

¹⁴³ Supreme Court of Montenegro, judgment of 25 June 2015, Už-Rev. No. 4/15; judgment of 19 April 2017, Rev. No. 365/17.

¹⁴⁴ In Montenegro, there are no special labour courts and discrimination cases are therefore dealt with by the civil courts.

¹⁴⁵ Law on Labour Inspection (*Zakon o inspekciji rada*), *Official Gazette of Montenegro*, Nos. 79/08 and 40/11.

Agency, the time limits for bringing a dispute before a competent court do not expire (Article 65(5), Law on the Peaceful Resolution of Labour Disputes¹⁴⁶ and Article 17(1), Law on Alternative Dispute Resolution¹⁴⁷).

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 Disputes¹⁴⁸ offers procedures for the resolution of collective and individual labour disputes without going to court. 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 in 2008.

The Centre for Alternative Dispute Resolution performs professional and administrative tasks relating to mediation, early neutral assessment of disputes and other methods of alternative dispute resolution.¹⁴⁹

4. Administrative procedures in different fields of discrimination

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 Disputes¹⁵⁰ 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.

¹⁴⁶ Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rješavanju radnih sporova*), *Official Gazette of Montenegro*, No. 145/21.

¹⁴⁷ Law on Alternative Dispute Resolution (*Zakon o alternativnom rješavanju sporova*), *Official Gazette of Montenegro*, No. 77/20. The new law is harmonised with Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

¹⁴⁸ Law on the Peaceful Resolution of Labour Disputes, *Official Gazette of Montenegro*, No. 145/21.

¹⁴⁹ Law on Alternative Dispute Resolution (*Zakon o alternativnom rješavanju sporova*), *Official Gazette of Montenegro*, No. 77/20, Article 56. 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>.

¹⁵⁰ Law on Administrative Disputes (*Zakon o upravnom sporu*), *Official Gazette of Montenegro*, No. 54/16.

5. Criminal procedure

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 Montenegro¹⁵¹ 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, persons 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 arising from the scope of the directives covered by this report.

In 2021 the Parliament of Montenegro adopted amendments to the Criminal Code, which provide for greater protection for journalists as well as people performing activities of public importance who face increased risk to their security, namely medical workers and attorneys and other lawyers who provide legal aid in courts and other state bodies.¹⁵²

Discrimination-related criminal offences are prosecuted *ex officio* by the competent state prosecutor. At the moment, this is the only discrimination-specific remedy. In all these cases, an alleged victim of discrimination has the status of an injured party whose personal or property right is put at risk or impaired by a criminal offence being committed. The injured party has the right to report a criminal offence to the competent state prosecutor (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). 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.

6. Procedure before the Constitutional Court

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

¹⁵¹ Law on Amendments to the Criminal Code of Montenegro, *Official Gazette of Montenegro*, No. 44/2017.

¹⁵² Law on Amendments to the Criminal Code of Montenegro, *Official Gazette of Montenegro*, Nos. 144/21 and 145/21.

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.¹⁵³

c) Number of discrimination cases brought to justice

In Montenegro, statistics on the number of cases relating to discrimination within the scope of this report that are brought to justice are not available, except for the incomplete data collected in the Protector's reports.

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

¹⁵³ Protector of Human Rights and Freedoms, report for 2016.

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 LPD. In 2020, the High Court for Misdemeanours of Montenegro has reported discrimination-related cases only in the field of protection from domestic violence.¹⁵⁴ According to the latest available data, in 2020, 14 requests for initiating misdemeanour proceedings before the Misdemeanour Court in Podgorica involved discrimination based on sexual orientation, 13 involved discrimination based on nationality and three involved discrimination based on religious affiliation.¹⁵⁵

According to data from the Police Administration, in 2020 a total of 269 criminal charges were submitted, as follows: from LGBT Forum Progres – 248 reports; from the LGBTIQ Social Centre – 10 reports; and from natural persons – 11 reports. Of that number, 269 reports of discriminatory treatment were adopted. The basis of discrimination in the cases is: in 259 cases – sexual orientation; in three cases – religion; and in seven cases – nationality. All applications submitted by LGBT Forum Progres and the LGBTIQ Social Centre refer to comments made by citizens on Facebook profiles.¹⁵⁶ There is no further information regarding criminal cases of discrimination.

Finally, some civil law cases are available thanks to the legal database 'Katalog propisa', which lists courts' practice in respect of all major laws. Recently, in one¹⁵⁷ of three¹⁵⁸ judgments of the Supreme Court of Montenegro, upon revision the Court found discrimination. As the Court stated: 'By paying unequal remuneration for work of the same value, the employer committed an act of discrimination against the employee. The different treatment of the plaintiff and the other employee cannot be objectively and reasonably justified by the existence of a legitimate aim, nor are the means applied by the defendant reasonably proportionate to the legitimate aim.' However, the Court did not mention on what ground the discrimination was committed (the claimant was a female and a defendant a male). The defendant did not prove that the claimant was paid a lower salary in relation to him on the basis of smaller workload or poorer work results, but the claimant's contract determined a lower basic salary for work of equal value, based on the findings and the opinion of financial experts.

¹⁵⁴ According to the annual report on the work of misdemeanour courts in the field of the Law on Protection from Domestic Violence Act (information from the High Court for Misdemeanours of Montenegro - Su II No. 24 / 21 of 26 January 2021) 137 courts in 2020 had 2 133 cases (as compared with 2 059 in 2019, 1 972 in 2018 and 1 790 in 2017).

¹⁵⁵ Protector of Human Rights and Freedoms, report for 2020, p. 233.

¹⁵⁶ Protector of Human Rights and Freedoms, report for 2020, p. 235.

¹⁵⁷ Supreme Court of Montenegro, judgment of 17 December 2019, Rev. No. 761/19.

¹⁵⁸ In the following two cases the revision was rejected as unfounded. According to the Supreme Court of Montenegro (judgment of 3 March 2020, Rev. No. 700/19), the adoption of a new internal regulation on systematisation cannot be considered indirect discrimination, because it is the right of the employer to organise and systematise work in a way that he considers to be expedient and in accordance with the needs of the work process. In another case (Supreme Court of Montenegro, judgment of 11 June 2019, Rev. No. 192/19), the Court states that the fact that in the reintegration procedure the employer assigned the employee to another job for which he meets the conditions and for which he voluntarily concluded an employment contract cannot be considered an act of discrimination. Not assigning the work tasks to the employee if they overlap with the jobs performed by other employees and communication and work with that employee is difficult is not considered unlawful.

According to information from the Directorate for Inspection Affairs,¹⁵⁹ inspections within its remit (health/sanitary, tourism) did not involve any reported cases of discrimination during 2020, while the Labour Inspectorate, of a total of 1 569 initiatives, dealt with four relating to discrimination. No irregularity was found in any of the cases. This is striking information, especially in comparison with the information obtained from the NGO Association of the Blind of Montenegro, as it has continuously addressed the inspection bodies (during 2020, it submitted as many as 652 reports regarding problems experienced by visually impaired consumers).¹⁶⁰

When it comes to free legal aid and representation through the legal team of the NGO Association of Young People with Disabilities of Montenegro, during 2021, according to their data, one civil procedure for protection against discrimination on the grounds of disability in the field of labour and employment was completed. Nine litigation proceedings continued, two of which are in the field of labour and employment¹⁶¹ while eight new civil proceedings have been initiated, none of them in the field of labour and employment.

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.

d) Registration of national court decisions on discrimination cases

In Montenegro, court decisions on discrimination 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.

¹⁵⁹ Act of the Directorate for Inspection Affairs, No. 02/03-745/21-795/2 of 22 February 2021.

¹⁶⁰ Protector of Human Rights and Freedoms, report for 2020, p. 239.

¹⁶¹ Of the remaining cases, five are in the field of access to facilities and public spaces, one procedure is in the field of independent living and community life and one is in the field of transport in relation to exercising the right to lower cost travel.

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

- b) Engaging in 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 persons 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.

1. Sanctions for misdemeanours (offences) in administrative procedure

Sanctions which can be imposed in administrative proceedings include fines and monetary and non-monetary obligations.

The LPD contains a specific chapter that lists numerous offences.¹⁶² 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 penalty provisions in the LPD have been defined for all substantive provisions of the Law and they apply to physical persons, 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.

Non-monetary obligations, among others, include seizure of items; prohibition on carrying out an occupation, activity or duty; and public announcement of a decision.

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.

2. Sanctions for criminal offences

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. Imprisonment as a sanction is always stipulated when the act of discrimination is committed by a person acting in official capacity. In other cases, imprisonment is the most usual sanction, and in some cases imprisonment and fines are stipulated as interchangeable sanctions.

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, sexual orientation, gender, disability, property or other personal status 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, 'for hatred towards a member of a group determined on the basis of race, colour, religion,

¹⁶² Article 34, 34a, 34b, 34c of the LPD.

origin, nationality or ethnicity', such a person is liable to imprisonment for a term of one to eight 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.

3. Sanctions in civil cases

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.

b) Compensation – maximum and average amounts

Under the Law on Contracts and Torts,¹⁶³ which governs the awarding of compensation, there is no ceiling on the maximum amount of compensation that can be awarded. No

¹⁶³ Law on Contracts and Torts (*Zakon o obligacionim odnosima*), *Official Gazette of Montenegro*, Nos. 47/8, 4/11 and 22/17.

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 natural persons are addressed *supra* under 6.5 a) 1, 2 and 3 while sanctions that can be imposed on legal persons are stipulated by the Law on Criminal Liability of Legal Entities and penalties include fines and the dissolution of the legal person (Article 13).¹⁶⁴

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 amount of damage caused or illegal material benefit acquired or between EUR 20 000 and EUR 50 000. Obviously, this is not in line with the CJEU case law in *Marshall* (case C-271/91) and *Lindquist* (case C-101/01).

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, proportionate and dissuasive, as required by the directives. 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 persons 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.

¹⁶⁴ Law on Criminal Liability of Legal Entities (*Zakon o odgovornosti pravnih lica za krivična djela*), *Official Gazette of Montenegro*, Nos. 2/2007, 13/2007, 30/2012 and 39/16.

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

- a) Body 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. Other bodies include the Fund for the Professional Rehabilitation and Employment of Persons with Disabilities,¹⁶⁵ and national councils,¹⁶⁶ which do not have competence to combat discrimination as their main fields of work involve promoting and preserving the culture, literature and history of the relevant minority nation or national community.

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.

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

The political situation in Montenegro is complex and is reflected in the work of all state institutions. Nonetheless, political influence on the work of the Protector is not evident, in contrast to the position of e.g. the heads of the judiciary and the Prosecutor's office. However, the underlying reason for this may be less positive. 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 the

¹⁶⁵ The role of this governmental body is to allocate financial resources to foster employment policy programmes for participation by persons with disabilities. In order to monitor the implementation of measures and activities to improve vocational rehabilitation and employment of persons 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 Professional Rehabilitation and Employment of Persons with Disabilities.

¹⁶⁶ National councils are equality bodies aimed at preserving national identity and improving the rights and freedoms of minority nations and other minority national communities. They 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).

Protector's Office and in 2021, in spite of an increase in the number of the cases and generally the increase in multiple forms of discrimination, in particular in the context of the COVID-19 crisis, the budget for the Protector's Office was reduced by 5 % compared to 2020.¹⁶⁷ The Law on the Budget of Montenegro for 2019 stipulated EUR 695 322 for the work of the Protector's Office, with EUR 725 227¹⁶⁸ for 2020 and EUR 686 139 for 2021. Even the European Commission, in its *Montenegro 2020 Report*,¹⁶⁹ acknowledges that the financial resources provided to the Ombudsman's Office are modest.¹⁷⁰ However, according to information from the annual reports for the previous six 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 2019 Report*,¹⁷¹ acknowledges that the Protector's Office is an independent institution and that the work of this institution in particular has improved. 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. The improved site is now also accessible for persons with visual impairments.

ECRI also recognised, in its conclusions on the implementation of recommendations,¹⁷² the more proactive work of the institution, and it affirmatively pointed out the Protector's engagement regarding the amendment of the bylaw regulating the issue of records of discrimination cases. According to the European Commission, in 2021 the Protector of Montenegro continued to be perceived as the institution with the greatest impact and highest level of trust with regard to the promotion and protection of citizens' rights. The capacities of the Office to handle complaints and the quality of its decisions continued to improve. The Office reinforced its communication with competent authorities and the public as well as the visibility of its actions. However, the European Commission emphasises that the implementation of the Protector's recommendations by the authorities needs to be more systematic, effective and prompt.¹⁷³

Furthermore, the Protector of Montenegro is perceived by the general public¹⁷⁴ 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 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 persons with disabilities, have also resulted in changing attitudes among the

¹⁶⁷ Commission staff working document, *Montenegro 2021 Report*, Strasbourg, 19.10.2021, p. 29, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0293>.

¹⁶⁸ See: https://www.ombudsman.co.me/docs/1607694339_polugodisnji--2020..pdf, p. 5.

¹⁶⁹ See: https://www.ombudsman.co.me/docs/1607694339_polugodisnji--2020..pdf, p. 5.

¹⁷⁰ European Commission, *Montenegro 2020 report*, available at: https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/montenegro_report_2020.pdf.

¹⁷¹ European Commission, *Montenegro 2020 report*, available at: https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/montenegro_report_2020.pdf.

¹⁷² ECRI, 'ECRI Conclusions on the Implementation of the Recommendations in Respect of Montenegro Subject to Interim Follow-up', available at: <https://rm.coe.int/ecri-conclusions-on-the-implementation-of-the-recommendations-in-respe/16809e8273>.

¹⁷³ Commission staff working document, *Montenegro 2021 Report*, Strasbourg, 19.10.2021, p. 29., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0293>.

¹⁷⁴ 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.

general public. However, the Protector highlights the general public's insufficient knowledge of the concept of discrimination and the elements, manifestations and mechanisms of protection against discrimination. It has been noticed that discrimination is one of the most frequently used words in public discourse and that citizens use it when they experience any injustice or inequality.¹⁷⁵

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 – 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 and it holds a 'B' status accredited by the Global Alliance of National Human Rights Institutions. However, one may question whether the procedure of the Protector's appointment envisaged by the Constitution substantially guarantees its impartiality.¹⁷⁶ 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,¹⁷⁷ while the latest ECRI report recommends the authorities 'amend the legislation concerning the election and dismissal of the Ombudsman, to further strengthen its independence and to ensure public confidence in the institution'.¹⁷⁸

The Protector must be a citizen of Montenegro, and 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, and 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.

¹⁷⁵ Commission staff working document, *Montenegro 2021 Report*, Strasbourg, 19.10.2021, p. 5.

¹⁷⁶ 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.

¹⁷⁷ Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro by the Venice Commission and the OSCE/ODIHR, Opinion No. 637/2011 ODIHR Opinion No.: NHRI-MNG/194/2011, available at: https://www.legislationline.org/download/id/3550/file/Joint%20Opinion%20on%20the%20law%20on%20the%20protector%20of%20human%20rights%20and%20freedoms%20of%20Montenegro%2019%20October%202011_en.pdf.

¹⁷⁸ 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 function of the Protector or Deputy is terminated before the expiration of the term for which he is appointed: by resignation; by loss of citizenship; by fulfilling the conditions for old-age pension; by dismissal. The Protector or Deputy shall be relieved of his/her duties if: is sentenced to unconditional imprisonment or for an act that makes him/her unworthy of performing a function; has been deprived of legal capacity by a final decision; becomes a member of a political organisation; performs another public function or professionally performs another activity (Article 15).

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 this appointment is very good practice, in the view of the author, as other candidates (except one) had no experience in that institution but had different professional backgrounds.

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 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.

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

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. According to Article 21(7) of the LPD, one of the Protector's competences include 'collecting and analysing cases of discrimination'. 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 (Article 47). 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 (Article 48). 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. In the past three years, a semi-annual report on discrimination has been published on the website of the institution of Protector in November of the respective year. 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 any state authority, local institution authority or respondent in the private sector on what they should do to eliminate the violation and also sets a deadline for the elimination of violations (Article 41 of the LPHR). 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.

However, the Protector can unilaterally make an initiative for the enactment of laws, other regulations and general acts for the purpose of harmonisation with internationally

recognised standards in the field of human rights and freedoms (Article 18 of the LPHR).

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

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 LPHR). 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 or respondents in the private sector to cooperate with the Protector and provide the body with assistance. In line with this, the head of a body or entity in the private sector 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, for example, in 2018, of a total of 76 recommendations given

in 30 cases, 28 recommendations were implemented and 5 were partially implemented, while 11 recommendations were still being implemented.¹⁷⁹

i) Registration by the body of complaints and decisions

In Montenegro, the Protector registers the number of complaints of discrimination made and decisions (by ground, field, type of discrimination, etc). These data are available to the public. 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 unofficial data, in 2021 there were 173 cases pending, of which no discrimination was found in 167 cases (in 6 out of 167 cases a violation of another right was found).

According to the Protector's 2020 report, there were 220 cases pending (in comparison with 141 cases in 2019 and 155 cases in 2018), which is by far the largest number since the establishment of the Protector's competence as an institutional mechanism for protection against discrimination. The reasons for the increase in the number of complaints are multiple and interrelated. Apart from the fact that they indicate that trust in the institution of Protector is growing, they can be related to the growing trend of discrimination in society, as well as to the empowerment of people at risk of discrimination to report and fight against it. The causal link between discrimination and the still current epidemic of COVID-19, which has greatly changed the policies and patterns of behaviour that have emerged in response to it, carries a real and/or potential risk of violating the principles of equality and non-discrimination.

The largest number of complaints was filed in the field of labour and employment (73), which follows the trend in previous years. Of the total number of resolved cases (159) there were 55 in the field of work and employment. In 13 cases, discrimination and/or violation of another right was established, based on religion or belief; gender, gender reassignment or gender identity; disability; age; health condition; belonging to a group or the presumption of belonging to a group, political party or other organisation; as well as on the basis of another personal characteristic that is not explicitly recognised by the Law on the Prohibition of Discrimination, and which arises from the open clause of personal characteristics. This country report addresses all the cases falling within its scope.

j) Roma and Travellers

It is difficult to assess whether the Protector treats Roma and Travellers as a priority issue 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

¹⁷⁹ Protector of Human Rights and Freedoms, report for 2018, p. 162, available at: http://www.ombudsman.co.me/docs/1554124685_final-qodisnji-izvjestaj-2018.pdf.

polls on discrimination. In several of the Protector's most recent reports, no specific cases relating to Roma or Travellers were mentioned. In 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 2020, there were at least two such discrimination cases¹⁸⁰, one of which was completed. In that case, the Protector found that there had been a discriminatory attitude by the Ministry of Education towards educational mediators for Roma in the field of education in connection with the violation of labour rights, as no mediator was employed for an indefinite period of time, but only with a fixed-term contract during the school year, on a yearly basis.

Although the Roma population continue to experience multiple types of discrimination and difficulty in enforcing their rights in administrative and judicial proceedings,¹⁸¹ this assessment does not apply to the institution of the Protector and its practice in 2020.

¹⁸⁰ Precise data will be available on the publication of the Protector's annual report.

¹⁸¹ https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/montenegro_report_2020.pdf.

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. Public hearings on the revisions of the anti-discrimination law were held in March 2020. Despite this, throughout Montenegro, civil society organisations remain insufficiently involved in decision-making. 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 LPHR), 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.

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).¹⁸² Another umbrella organisation, the Federation of Free Trade Unions of Montenegro, with close to 24 000 members, was established in 2008. The political and societal weight of trade unions is considerable, as they are involved in decision-making processes relating to employment and social policy and have significant 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

¹⁸² 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.

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 Council¹⁸³ 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 discrimination and guarantees equality. The Constitution stipulates that everyone is equal before the law, regardless of any particularity or personal characteristic (Article 17(2)).

¹⁸³ Law on the Social Council (*Zakon o Socijalnom savjetu*), *Official Gazette of Montenegro*, No. 44/18.

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 a case from 2019,¹⁸⁴ a complaint was lodged by the Association of the Blind of Montenegro due to the discriminatory nature of the Ordinance on the list of products, the manner of display and the type of facilities in which notices on goods are displayed in Braille,¹⁸⁵ as this regulation did not include 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', as pointed in the Protector's recommendation, to people with visual impairment and to bring about essential consumer equality. However, there are obviously still a lot of improvements that need to be made in order to meet the international standards in the respective field.¹⁸⁶

The same NGO lodged another complaint in 2020 due to discrimination against persons with visual impairment contained in Article 64(2) of the Rulebook on exercising the right to medical and technical aids, which is addressed in detail under section 2.6 b) of this Report. The Protector issued a recommendation¹⁸⁷ to the Ministry of Health and the Health Insurance Fund of Montenegro to undertake measures in accordance with their competences to change the discriminatory provision in Article 64(2) of the said Rulebook, by which visually impaired persons, in order to exercise the right to obtain a player and recorder of audio books, speech software and a Braille notebook, are unjustifiably obliged

¹⁸⁴ 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.

¹⁸⁵ Ordinance on the list of products, the manner of display and the type of facilities in which notices on goods are displayed in Braille (*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.

¹⁸⁶ 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.

¹⁸⁷ Protector of Human Rights and Freedoms, Opinion No. 238/20-2 of 21 July 2020, available at: http://www.ombudsman.co.me/docs/1595589979_21072020-prpeoruka-fzocqgmz.pdf.

to meet the condition of being in school. The Ministry of Health and the Health Insurance Fund of Montenegro were also obliged, within 30 days from the date of receipt of the recommendation, to submit a report on the actions and measures taken to implement the recommendation. However, in the meantime, following the change of Administration after the general election, the institutions have not yet complied with the Protector's recommendation.

In a case from 2021¹⁸⁸ the applicant accused the Government of Montenegro of introducing COVID-19 measures that led to unequal treatment of employed people belonging to a risk group (i.e. employees who belong to risk groups (e.g. over 65 years of age) had to attend work at full capacity, without any reduction of working hours, while parents of children up to 11 years of age were entitled to paid leave). As the Ministry of Health did not prove that the applicant was not treated unequally according to the provisions of Article 17 paragraph 2 of the Constitution of Montenegro (which stipulates that, 'everyone is equal before the law, regardless of any particularity or personal characteristic'), the Protector issued a Recommendation to the Ministry to refrain in future from unequal treatment of different categories of people.

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 Contracts and Torts 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) while, in establishing obligation relations, legal persons shall proceed in accordance with the general acts (Article 15(1)). Provisions of the Law on Contracts and Torts 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.

¹⁸⁸ Protector of Human Rights and Freedoms, Opinion No. 01-888/20 of 31 May 2021, available at: https://www.ombudsman.co.me/docs/1625818794_31052021_preporuka_covid.pdf.

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,¹⁸⁹ the Ministry of Justice, 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, four independent departments have been established within the Directorate for Human and Minority Rights: the Department for Antidiscrimination Policies, the Department for National and Ethnic Minorities, the Department for Gender Equality (including LGBT rights) 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 persons 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 the promotion of non-discrimination and coordination of anti-discrimination activities at national level. Its main tasks included monitoring and coordinating the work of the institutions, analysing the legal framework and its compliance with international standards, analysing the practical implementation of discrimination prevention and making proposals.

¹⁸⁹ On 4 December 2020, following the general elections of 30 August, a new Government of Montenegro was formed, with somewhat different departments.

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 current best practices are the result of recommendations from the Protector. Thus, the amendments to the Law on Education of Children with Special Educational Needs¹⁹⁰ addressed the legal position of educational mediators, which was recognised as problematic previously.¹⁹¹ Now the school concludes a contract with the teaching assistant for an indefinite period of time and if their work is no longer needed, they can take up employment in another school, based on the agreement of the school principals. Furthermore, the teaching assistant may be transferred to another school by mutual agreement if they meet the conditions prescribed by law and the act on job systematisation.

The current best practices, upon the recommendation of the Protector, in relation to new legislation also encompass the equalisation of marital and extra-marital heterosexual union in the Law on Pension and Disability Insurance¹⁹² and in the Law on Compulsory Health Insurance.¹⁹³ The Protector, acting upon a complaint, recognised discrimination perpetrated by the Pension Insurance Fund of Montenegro and the ministry in charge both in the conduct and exclusively linguistic interpretation of the relevant provision of the Law on Pension and Disability Insurance by not explicitly listing an extra-marital partner as a member of the family and therefore considering those persons as not eligible for extra-marital partner's pension. The Protector pointed out that several laws in Montenegro equate marital and extra-marital unions that last three years, or less if the partners have a common child, in terms of exercising certain rights (Family Law and Inheritance Law) and that the existence of norms that regulate the same legal issue in different ways, and which are found in acts of equal legal force in the legal system of Montenegro, poses a risk to the legal security of citizens who in such cases cannot know for sure how they will be treated in certain situations. The recommendation asked the Ministry of Labour and Social Welfare, as the relevant ministry, to amend Article 43 in such a way as to explicitly state that an extra-marital partner is considered a family member of the deceased insured, i.e. a beneficiary of the right from Article 42 of that Law.

In addition to this improvement, the same Law stipulates in Article 43a that the right to a survivor's pension may be exercised by the life partner of the deceased insured, i.e. a pension beneficiary who has entered into a life partnership with a person of the same sex, in accordance with the law governing life partnership of persons of the same sex.¹⁹⁴ In addition, the right to a survivor's pension can be exercised by the child of the partner to whom the deceased insured person provided maintenance (Article 43a(2)).

The number of complaints addressed in the work of the Protector, and 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.

¹⁹⁰ The Law on Education of Children with Special Educational Needs (*Zakon o vaspitanju i obrazovanju djece sa posebnim obrazovnim potrebama*), *Official Gazette of Montenegro*, Nos. 080/04 045/10, 047/17 and 145/21.

¹⁹¹ Protector, Opinion No. 453/20-3, available at: https://www.ombudsman.co.me/docs/1605170523_301020202-preporuka-mpmlimp.pdf The Protector found a discriminatory attitude on the part of the Ministry of Education towards educational mediators in the field of education, in connection with the violation of labour rights, as no mediator was employed for an indefinite period of time.

¹⁹² Same-sex partners are equated with spouses in terms of rights and obligations in the health insurance system, as well as in terms of social and child protection rights. Law on Pensions and Disability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), *Official Gazette of Montenegro*, Nos. 54/03, 39/04, 79/04, 47/07, 79/08, 14/10, 78/10, 34/11, 66/12, 38/13, 61/13, 60/14, 10/15, 42/16, 55/16, 80/20.

¹⁹³ Law on Compulsory Health Insurance (*Zakon o obaveznom zdravstvenom osiguranju*) *Official Gazette of Montenegro*, No. 145/21.

¹⁹⁴ The application of this law will start on 15 July 2021.

In 2021 the Government of Montenegro adopted the *Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2021-2025* and the accompanying Action Plan¹⁹⁵ which 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. The strategic goal has been defined at the level of overall public policy, which reads: 'Improving the socio-economic and legal position of Roma and Egyptians in Montenegro, through building an inclusive and open society based on campaigning against and eliminating all forms of discrimination, anti-Gypsyism and poverty.'

The strategic document is based on seven basic principles: 1) The principle of social inclusion of Roma and Egyptians; 2) Combating discrimination, anti-Gypsyism, segregation and domestic violence; 3) Combating trafficking in human beings and child marriage; 4) Improving the existing level of education, health and social protection of Roma and Egyptians; 5) Combating all forms of exploitation and violence against women and children (with an emphasis on gender equality); 6) Principle of feasibility of set goals and accompanying indicators; 7) Active participation and involvement of Roma and Egyptian civil society in the process of implementation and monitoring of the implementation of the strategic document.

Montenegro has no experience whatsoever regarding artificial intelligence in order to improve the effective implementation of the national legislation transposing the directives.

¹⁹⁵ The full text of the Strategy is available at: <https://www.gov.me/clanak/strategija-socijalne-inkluzije-roma-i-egipcana-u-crnoj-gori-2021-2025>.

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.

- 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 persons with disabilities who are already employed and persons who have been officially assessed as having a disability and are therefore employed under special measures / conditions.

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

The ever present problem of the low employment rate among marginalised groups deteriorated further due to the COVID-19 epidemic, which has had a severe impact regarding employment in particular. According to the records of the National Employment Service, on 9 November 2021 there were 55 816 people registered unemployed, of whom as many as 11 000 are persons with disabilities. This means that every fifth unemployed person, according to the records, is a person with disabilities.¹⁹⁶

At the end of November 2020, there were 47 050 unemployed in Montenegro,¹⁹⁷ in comparison with a total of 37 616 unemployed as of 31 December 2019, registered with the National Employment Service.¹⁹⁸ According to the records of the same agency (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).

According to the records of the National Employment Service, as at 31.12.2020, there were 996 unemployed people from the Roma and Egyptian communities (527 women or 52.91 %), which is a share of 2.09 % of the total number of unemployed people at that date.¹⁹⁹ On 15 July 2020 there were 851 unemployed persons from the Roma and Egyptian communities (445 women, or 52.29 %). At the moment, there are no available data regarding active employment measures for this population for 2021.²⁰⁰ The qualification status of unemployed Roma and Egyptians is extremely unfavourable, as 807 persons, or 94.82 %, hold only the lowest level of education qualification (424 women or 52.54 %).

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

¹⁹⁶ <https://www.zzzcg.me/zavod-za-zaposljavanje-cini-sve-da-prevazide-problem-kasnjenja-subvencija-za-zaposljavanje-osoba-sa-invaliditetom/>.

¹⁹⁷ See: <https://investitor.me/2020/12/09/grad-nezaposlenih-u-crnoj-gori-bi-bio-cetvrti-po-velicini/>.

¹⁹⁸ See: <http://www.zzzcg.me/wp-content/uploads/2020/01/NEDJELJNI-IZVJE%C5%A0TAJ-31.12.2019..pdf>.

¹⁹⁹ <https://www.gov.me/clanak/strategija-socijalne-inkluzije-roma-i-egipcana-u-crnoj-gori-2021-2025>.

²⁰⁰ Government of Montenegro, Ministry of Human and Minority Rights, *Results of the Action Plan for 2019*, March 2020, p. 42.

which—along with the Roma—persons 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 2019,²⁰¹ 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 discrimination²⁰² in Montenegro. Among those who believe that political 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 2010.²⁰³

- Non-adoption of some legal instruments

Amendments to the Law on Professional Rehabilitation and Employment of Persons with Disabilities were prepared in 2018 but have not yet been adopted. This has, among other things, delayed validation of the Rulebook on the working centres and facilities for employment of persons with intellectual and psychosocial disabilities. The *Montenegro 2020 Report* also addresses the right to exercise sign language, which is not enshrined in the law and is a factor in discrimination in terms of accessibility to public administration and communication and the limited availability of training for sign-language interpreters and trainers.²⁰⁴

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.

In December 2019, the Ministry for Human and Minority Rights established a working group for revising the Law on the Prohibition of Discrimination to further align it with the EU *acquis*. The finalisation of the draft, which was subject to public consultation, has been delayed due to the COVID-19 outbreak. The labour law and the linked anti-discrimination law were planned to be further aligned with the EU *acquis* in this area during 2021. The European Commission considers this, as well as implementation and monitoring of labour legislation, a priority. Strengthened capacities of labour inspection services and enhanced coordination between labour inspectors and the Ministry of Labour and Social Welfare will be required in order to ensure that the change in the law will have an impact.

- Adoption of some amendments to legislation which may create inequality

2021 has been marked by amendments to several pieces of legislation which mirror the 'social' component of the new Government. However, some provisions are a matter of

²⁰¹ See: <http://media.cgo-cce.org/2019/02/CGO-prezentacija-diskriminacija-2019.pdf>.

²⁰² 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.

²⁰³ 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>.

²⁰⁴ European Commission, *Montenegro 2020 Report*, Brussels, 6 October 2020, SWD (2020) 353 final p. 40.

concern as they may lead to inequality. Thus, the amendments to the Law on Social and Child Protection give the right to child allowance up to the age of six for all children, and at the same time increase the amount of allowance for children for whom this right is exercised on other grounds (e.g. a child without parental care). The Protector took the position that the norm 'up to the age of six' is not in accordance with ratified international documents, as well as domestic legislation, and that it should be amended, i.e. harmonised with applicable regulations, in order to eliminate substantial inequality for children of different ages (up to 18 years of age, as defined by the UN Convention on the Rights of the Child and the Law on Social and Child Protection). The legislator does not clearly specify the reasons for assessing that children under the age of six are considered the most vulnerable group in society, as well as whether this measure has a social protection character, or is possibly a population policy measure.

- The impact of political and religious affiliation in employment

The political changes following the general elections on 30 August 2020 led to some concerns particularly in the field of public sector employment. As the new Government is not a government of continuity there were many allegations of dismissals and termination of employment on the basis of belonging to a certain political party, as stated in the complaints - especially in the field of education and health. On the other hand, it has been widely perceived that, as in the previous period, political affiliation continued to contribute to selectivity and employment based on political affiliation.²⁰⁵ Furthermore, most of the new Government officials are perceived by the general public as being influenced and strongly advocating in favour of the Serbian Orthodox Church, which also added to polarisation and political instability in multi-ethnic and multi-faith Montenegro. In such an environment (and not necessarily related to employment) there has been an increase in reports of religiously and ethnically motivated attacks, hate crimes and hate speech.

- 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 2021 Strategy²⁰⁶ 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 persons 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, persons 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 disability assessment 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 assessor.

²⁰⁵ Due to very high unemployment rates and the fact that the State and Municipalities were the largest employers, the ruling party has had a practice of employing personnel on very short-term contracts in exchange for votes.

²⁰⁶ <https://www.gov.me/clanak/strategija-socijalne-inkluzije-roma-i-egipcana-u-crnoj-gori-2021-2025>.

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

Furthermore, the Law on the Prohibition of Discrimination against 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,²⁰⁷ 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.²⁰⁸ Access to legal aid, provided both by the state and by NGOs, is very limited at present.

²⁰⁷ 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.

²⁰⁸ Some limited ad hoc training opportunities are organised with the assistance of international donors.

- Generally speaking, most of 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 administrative proceedings are less expensive and burdensome, victims are more likely to use these than to enter court proceedings. The *Montenegro 2020 Report* acknowledges that disadvantaged groups, including Roma and Egyptians, and persons with disabilities, continue to experience multiple types of discrimination and face difficulty in enforcing their rights in administrative and judicial proceedings. The report recommends that Montenegro increase the capacity of institutions to protect against discrimination, with special emphasis on the judicial system.²⁰⁹

According to the *Montenegro 2021 Draft Report*²¹⁰ the Protector's capacities as an anti-discrimination body improved and the office has the necessary competences to handle discrimination complaints. However, the overall institutional framework remained insufficiently prepared to address the increase in multiple forms of discrimination, in particular in the context of the COVID-19 crisis. Court cases in the area of non-discrimination remained rare.

No practices can be identified in relation to the use of artificial intelligence (AI) to improve the effective implementation of the national legislation transposing the directives, as Montenegro has no experience whatsoever regarding artificial intelligence in this field.

²⁰⁹ European Commission, *Montenegro 2020 Report*, Brussels, 6 October 2020, SWD (2020) 353 final pp. 7, 40.

²¹⁰ Commission staff working document, *Montenegro 2021 Report*, Strasbourg, 19.10.2021, p. 34, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0293>.

12 LATEST DEVELOPMENTS IN 2021

12.1 Legislative amendments

In 2021 there were no legislative amendments in anti-discrimination law or anti-discrimination provisions in other forms of legislation.

12.2 Case law

Relevant discrimination ground(s): Disability

Name of the institution: Protector of Human Rights and Freedoms

Date of decision: 15 December 2021

Name of the parties: Anonymised

Reference number: No. 156/21-3 Podgorica, 15 December 2021

Link:

https://www.ombudsman.co.me/docs/1642756935_21120221_preporuka_mfss.pdf

Brief summary: The Association of the Blind of Montenegro filed a complaint about discrimination against people with complete visual impairment contained in Article 4 of the Rulebook on Medical Indications for Exercising the Right to Material Security, Allowance and Assistance, Personal Disability and Wage Compensation for Part-Time Working. The complaint is based on the fact that people with complete visual impairment, but also some other categories of people with a 100 % impairment -or disability, are excluded from the list of medical indications for exercising the right to personal disability allowance. As the Law on Social and Child Protection stipulates in Article 32 that anyone with a severe disability has the right to personal disability benefits, the Protector issued an opinion that the Rulebook discriminates against people with completely impaired vision on the basis of the type of impairment, with a recommendation to the Ministry of Finance and Social Welfare to draft a law on a single expert body in charge of assessing disability.

Relevant discrimination ground(s): Religion or belief

Name of the institution: Protector of Human Rights and Freedoms

Date of decision: 22 March 2021

Name of the parties: Anonymised

Reference number: Opinion No. 259/20

Link:

https://www.ombudsman.co.me/docs/1620716253_22032021_preporuka_rtcg.pdf

Brief summary: Ms XX from Podgorica filed a complaint due to discrimination based on religious grounds in the field of labour. She had been employed for a long time by Radio and Television of Montenegro (RTM), as a reporter from the Parliament of Montenegro, and always received plenty of assignments. However, after she started attending liturgies and prayers organised by the Metropolitanate of Montenegro in protest against the Law on Freedom of Religion and Belief, she experienced a year of not being assigned tasks by her editor.

The Protector referred to the practice of the ECtHR (*Zornić v. Bosnia and Herzegovina* from 2014), as well as the national case law, which is of the opinion that harassment at work (mobbing) as a form of discrimination may be considered discrimination only if the behaviour is based on the personal characteristics of the employee or group of employees (Judgment of the Supreme Court of Montenegro, Rev. No. 834/16 of 30 September 2016). The legislator defined 'mobbing' as 'any active or passive behaviour at work or in connection with work towards an employee or a group of employees that is repeated', but without determining how long a period should be taken into account. However, the case law establishes that, for mobbing to be considered to have taken place, it is necessary for the harmful acts to be performed continuously for at least six months (Vukčević, I. (2014), *Protection against discrimination in the practice of the Constitutional Court of Montenegro: Comparative analysis with the case law of the European Court of Human Rights and the Court of Justice*, Podgorica). The Protector states that the complainant did not receive any

work assignments for the entire period of 2020, which coincides with the period since the adoption of the Law on Freedom of Religion and Belief and the beginning of public gatherings, i.e. liturgies that marked public events in Montenegro, until the adoption of amendments to the same law in December 2020.

The Protector issued a recommendation to RTM to ensure equality in the rights and obligations of employees in their employment and work tasks, in accordance with the principle of non-discrimination, and also to ensure that employees do not suffer the consequences of discrimination on any grounds in exercising the rights and freedoms guaranteed by the Constitution, international treaties and the law.

Relevant discrimination ground(s): Age

Name of the institution: Protector of Human Rights and Freedoms

Date of decision: 31 May 2021

Name of the parties: Anonymised

Reference number: No. 01-888/20

Link:

https://www.ombudsman.co.me/docs/1625818794_31052021_preporuka_covid.pdf

Brief summary: The applicant accused the Government of Montenegro of introducing COVID-19 measures that led to unequal treatment of employed people belonging to a risk group (i.e. employees who belong to risk groups (e.g. over 65 years of age) had to attend work at full capacity without any reduction of working hours, while the parents of children up to 11 years of age were provided with paid leave). As the Ministry of Health did not prove that the applicant was not treated unequally according to the provisions of Article 17 paragraph 2 of the Constitution of Montenegro (which stipulates that, 'everyone is equal before the law, regardless of any particularity or personal characteristic'), the Protector issued a Recommendation to the Ministry to refrain in future from unequal treatment of different categories of people.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Montenegro
Date: 1 January 2022

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: <https://www.paragraf.me/propisi-crnegore/zakon-o-zabrani-diskriminacije.html>

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, Nos. 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, 3/20, 26/21, 144/21 and 145/21

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, 8/21, 59/21, 68/21 and 145/21

Abbreviation: LL

Date of adoption: 30 December 2019

Entry into force: 6 January 2020

Latest relevant amendments: 23 June 2021

Web link: <https://www.katalogpropisa.me/propisi-crne-gore/zakon-o-radu-2/>

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 assumed membership of a group, political party, trade union or other organisation as well as other personal characteristics Civil law Material scope: employment Principal content: prohibition of discrimination in the field of employment
Title of the law: Law on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette of Montenegro, Nos. 49/08, 73/10, 39/11, 55/16 Abbreviation: LSW Date of adoption: 29 July 2008 Entry into force: 23 August 2008 Latest relevant amendments: 17 August 2016 Web link: https://www.zzzcg.me/wp-content/uploads/2018/01/Zakon-o-profesionalnoj-rehabilitaciji-i.pdf Grounds covered: disability Civil law Material scope: protection of persons with disabilities in the field of professional rehabilitation and employment Principal content: prohibition of discrimination of persons with disabilities
Title of the law: Law on Minority Rights and Freedoms, Official Gazette of Montenegro, Nos. 31/06, 51/06 and 38/07, 02/11, 08/11, 31/17 Abbreviation: LMRF Date of adoption: 10 May 2006 Entry into force: 20 May 2006 Latest relevant amendments: 12 May 2017 Web link: http://media.cgo-cce.org/2013/06/7-Zakon-o-manjinskim-pravima-i-slobodama.pdf 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. Civil law Material scope: minority rights protection Principal content: prohibition of discrimination of minority groups
Title of the law: Law on Prohibition of Discrimination of Persons with Disabilities, Official Gazette of Montenegro, Nos. 35/15, 44/15 Abbreviation: LPDPD Date of adoption: 26 June 2015 Entry into force: 15 July 2015 Latest relevant amendments: 15 August 2015 Web link: https://www.csrcg.me/images/Dokumenti/Zakoni/Zakon%20o%20zabrani%20diskriminacije%20lica%20sa%20invaliditetom.pdf Grounds covered: long-term physical, mental, intellectual or sensory disability Civil law 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.

Principal content: prohibition of discrimination of persons with disabilities

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

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: 1 January 2022

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination²¹¹	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?²¹²
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 ²¹³	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

²¹¹ '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).

²¹² 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).

²¹³ 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-discrimination²¹¹	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?²¹²
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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