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# Country report

## Non-discrimination

Montenegro

2016

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# **Country report**

# **Non-discrimination**

# **Montenegro**

Nenad Koprivica

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## EXECUTIVE SUMMARY

### 1. Introduction

Montenegro is one of the successor states of the former Socialist Federal Republic of Yugoslavia. It remained as a joint state with Serbia after Yugoslavia's violent break-up, but in 2006 the country regained independence and is now moderately prepared candidate country for membership of the European Union and NATO membership.

The country is also undergoing an intensive process of urbanisation and migration from the poorer north to the central and southern regions.<sup>1</sup>

According to the World Bank classification, Montenegro is an upper-middle-income economy. The 2011 census showed Montenegro as having a population of 620 029. Data from this census also showed that the main ethnic groups were Montenegrins, with 45% of the total population, followed by Serbs (29%), Bosniaks (9%), Albanians (5%), Muslims<sup>2</sup> (3%), Croats (0.97%) and Roma (1.01%). The main religions are Orthodox Christianity (Serbian and Montenegrin Orthodox Churches), Islam and Roman Catholicism. The average age in Montenegro is 37.7, although the process of demographic ageing is very rapid.<sup>3</sup> Statistical information on people with disabilities is largely unavailable. However, according to estimates by the World Health Organisation, at least 10% of the Montenegrin population has some form of disability.<sup>4</sup> The Constitution establishes Montenegrin as the official language, while Serbian, Bosniak, Albanian and Croatian are 'in official use'. No official data is available on sexual orientation.

Montenegro is frequently acknowledged as a multi-faith and multi-ethnic society. The Government's official position is that the affirmation of fundamental European values, including those of equality and non-discrimination, is the best way to realise individual and state interests and join the European Union. Nevertheless, discrimination is present and certain groups suffer from discrimination and social exclusion. There has been a process to harmonise Montenegrin anti-discrimination legislation in accordance with EU legislation, including both directives, but the implementation of anti-discrimination policy is still weak and remains a matter of concern, especially with regard to Roma people, people with disabilities and LGBT people.

There are only a few examples of case law in relation to discrimination which have been processed by the courts. SM, an activist with the NGO LGBT Forum Progress, initiated criminal proceedings against a group of young men who in April 2015, in the early hours of the morning, attacked him and his friend in the centre of Podgorica. The young men evoked feelings of fear and embarrassment in SM and his friend and brazenly insulted them by touching their genitals, simulating masturbation and by aggressive intimidation. The case was reported to the police and criminal proceedings were initiated against the young men. The High Court in Podgorica confirmed the judgment of the Basic Court in which SM, BV and NR, all from Podgorica, were condemned to three and a half months in prison for

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<sup>1</sup> Montenegrin Academy of Arts and Science, *Montenegro in the 21st century - in the age of competitiveness*, Working Document, (available in Montenegrin, *Crna Gora u XXI vijeku – u eri kompetitivnosti*), [www.gov.me/files/1269953473.pdf](http://www.gov.me/files/1269953473.pdf), accessed 11 November 2015.

<sup>2</sup> 'Muslim' was one of the ethnic groups included in the Classification of National and Ethnic Belonging, used for the 2011 census. At the same time, 'Islam' was listed as one of the religions the respondents were able to say they practised.

<sup>3</sup> Monstat, *Population projections of Montenegro by 2060 with a structural analysis of the population of Montenegro* [Projekcije stanovništva Crne Gore do 2060. godine sa strukturnom analizom stanovništva Crne Gore], p. 55 and 56. [www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20%20mart.pdf](http://www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20%20mart.pdf), accessed 11 November 2015.

<sup>4</sup> Government of Montenegro, *Strategy for the Integration of Persons with Disabilities in Montenegro 2008-2016*. [www.mrs.gov.me/biblioteka/strategije](http://www.mrs.gov.me/biblioteka/strategije), accessed 13 November 2015.

hate speech against LGBT people and endangering the safety of the executive director of LGBT Forum Progress, SM.<sup>5</sup>

## 2. Main legislation

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,<sup>6</sup> and other regulations must be in conformity with the Constitution and the law (Article 145 of the Constitution). Montenegro has ratified all the major international human rights treaties, including the European Convention on Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. It has also ratified the 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 and anti-discrimination conventions of the International Labour Organization, including the Discrimination (Employment and Occupation) Convention and the Equal Remuneration Convention. Montenegro has ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

Anti-discrimination legislation in Montenegro includes the constitutional framework and several laws.

- The Constitution contains a general prohibition of both direct and indirect discrimination 'on any grounds'.<sup>7</sup> It explicitly guarantees protection to people with disabilities (Article 63) and equality between men and women (Article 18).
- The Law on the Prohibition of Discrimination prohibits discrimination on the grounds explicitly listed in Article 2,<sup>8</sup> which include race, skin colour, national affiliation, social or ethnic origin, association with a minority people or minority national community, language, religion or belief, political or other opinion, sex, gender identity, sexual orientation, health, disability, age, property and membership of a group or assumed membership of a group.
- Article 5 of the Labour Law<sup>9</sup> provides for the prohibition of discrimination against people seeking employment and employees, based on sex, birth, language, race, religion, skin colour, age, pregnancy, health or disability, ethnicity, marital status, family duties, sexual orientation, political or other affiliation, social background, material status, membership of political and trade union organisations or other personal characteristics.
- Article 39 of the Law on Minority Rights and Freedoms<sup>10</sup> prohibits any direct or indirect discrimination on any basis, including on the basis of race, colour, sex,

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<sup>5</sup> Name of the court: High Court Podgorica, Date of decision: April 2015, Name of the parties: SM against SM, BV and NR.

<sup>6</sup> International treaties are directly applicable in Montenegro and need not 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.

<sup>7</sup> Constitution of Montenegro (*Ustav Crne Gore*) *Official Gazette of Montenegro*, no. 1/07. Article 8.

<sup>8</sup> Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 46/10 and 18/2014.

<sup>9</sup> Montenegro, Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, no. 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012 and 31/2014.

<sup>10</sup> Montenegro, Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), *Official Gazette of Montenegro*, 31/06, 51/06 and 38/07, 02/11 and 08/11.



- national origin, social origin, birth or similar status, religion, political or other beliefs, property status, culture, language, age, mental or physical disability.
- The Law on Professional Rehabilitation and Employment of Persons with Disabilities prohibits direct and indirect discrimination of persons with disabilities in relation to vocational rehabilitation, admission to employment and employment.<sup>11</sup>
- The Criminal Code<sup>12</sup> provides for the criminal offence of violating the equality of citizens and explicitly lists as prohibited grounds national affiliation or affiliation to an ethnic group, race or religion or absence of such an affiliation, political or other opinion, sex, language, education, social status, social origin and property, while allowing that 'other personal status' can be regarded as a prohibited ground (Article 159).

### 3. Main principles and definitions

The definition and prohibition of discrimination are contained in the Constitution and the Law on the Prohibition of Discrimination. Discrimination through harassment, instruction to discriminate and victimisation are defined and outlawed, but not discrimination by association. The duty to provide reasonable accommodation is not explicitly defined in the law. The Constitution guarantees special protection for people with disabilities (Article 68) but does not explicitly provide for the duty to provide reasonable accommodation. Nevertheless, Montenegro is also a state party to the United Nations Convention on the Rights of Persons with Disabilities, which establishes denial of reasonable accommodation as a form of discrimination and imposes a duty to provide reasonable accommodation. In line with Article 9 of the Constitution, the provisions of this Convention form an integral part of the national legal order, have supremacy over national legislation and are directly applicable if they provide differently from national legislation.

Prohibition of multiple discrimination is included in the Law on the Prohibition of Discrimination (Article 20, para. 1), which states that, 'A grave form of discrimination, on any ground referred to in Article 2, paragraph 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, paragraph 2, of this Law (multiple discrimination)' [...]. In Montenegro there is no case-law dealing with multiple discrimination.

### 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 employment and vocational training, it applies to the following areas: social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing. National legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive. Under the Constitution, everyone has the right to health protection and children, elderly people and people with disabilities, together with 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

Discrimination can be dealt with out of court by the Protector of Human Rights and Freedoms. Anybody who claims that their human rights or freedoms have been violated by means of an enactment, action or failure to act on the part of state authorities, local

<sup>11</sup> Montenegro, Law on 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, and 39/11, Article 5.

<sup>12</sup> Montenegro, Criminal Code (*Krivični zakonik*), *Official Gazette of Montenegro*, no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

authorities, public services or other holders of public power (i.e. healthcare facilities, schools, higher education institutions, public enterprises, etc.) may address their concerns to the Protector of Human Rights and Freedoms. When 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 of Human Rights and Freedoms 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 of Human Rights and Freedoms, the Protector can either refer the matter to an immediately superior authority or address the Parliament of Montenegro or the public. The Protector of Human Rights and Freedoms cannot issue binding decisions or award compensation for human rights violations.

The Law on the Prohibition of Discrimination provides for the right to bring an action before the court to seek: a) the establishment of the fact that the respondent has acted discriminatorily towards the claimant; b) prohibition of executing the action that carries a potential threat of discrimination, i.e. prohibition of a repetition of the discriminatory action; c) compensation of damages; and d) in cases where discrimination is perpetrated through the media, publication in the media of the judgment establishing discrimination, at the cost of the respondent (Article 23).

The burden of proof is regulated by Article 29 of the Law on the Prohibition of Discrimination: 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. This rule does not apply to petty offence (which are conducted by Ministries and special petty offence authorities) and criminal proceedings. It does, however, apply to administrative proceedings (conducted by state and administrative authorities), administrative dispute proceedings (conducted before the Administrative Court in relation to lawfulness of administrative and other acts) and to civil proceedings. Generally speaking, all the enforcement mechanisms for protection against discrimination are very rarely used in practice. Victims are reluctant to pursue the enforcement of their equal rights and their level of confidence in their chances of obtaining redress remains low.

## **6. Equality bodies**

The Protector of Human Rights and Freedoms 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, para. 1, the law establishes the Protector as an institutional mechanism for protection against discrimination.

Through the amendment of this law<sup>13</sup> in 2014 it should be noted that the concept of discrimination was corrected and additional forms of discrimination, such as sexual discrimination and hate speech, as well as racial discrimination have been prescribed by law.<sup>14</sup> The law also provides the Protector of Human Rights and Freedoms with powers consistent with the requirements of Directive 2000/43/EC.

The actions taken by the inspection authorities in charge of implementing the decisions concerning protection against discrimination remain a matter of concern, as they have limited capacity and their actions tend to be weak. In 2011 the Government of Montenegro

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<sup>13</sup> Law on the Protector of Human Rights and Freedoms (*Zakon o Zastitniku ljudskih prava i sloboda*) Official Gazette No.18/14.

<sup>14</sup> Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), Official Gazette of Montenegro, no. 46/10 and 18/2014, Article 17.

adopted a Decision on establishing a Council on the Prohibition of Discrimination as a national body for promoting non-discrimination and coordinating anti-discrimination activities at national level. The Protector of Human Rights and Freedoms acts independently as a national mechanism for individual protection against discrimination, while the Council on the Prohibition of Discrimination is a governmental, advisory body with the role of promoting and conducting anti-discrimination activities at national level.

## 7. Key issues

1. In general, research and data are extremely limited, which makes it very difficult to ascertain the forms in which discrimination on the grounds of ethnic origin, religion and belief, age, disability and sexual orientation take place, as well as the number of incidents of discrimination. In addition, with regard to all these grounds, numbers and general trends are difficult to determine, case-law is virtually non-existent and there are no judgments of the ECHR or information on cases pending before it.
2. With regard to discrimination on the grounds of ethnic origin, the Roma, Ashkali and Egyptian populations continue to be the most discriminated groups in society.<sup>15</sup> Widespread illiteracy among this group and low levels of education are the main drivers in their social exclusion and marginalisation. In addition, discrimination against members of this community is present in employment, healthcare and social welfare.<sup>16</sup> The issues of electoral and fair representation of ethnic minorities at all levels of society, the availability of education in all minority languages, access to employment, health insurance, social welfare and property rights have been raised as areas of concern.<sup>17</sup>
3. Cases of discrimination and intolerance on the grounds of religion and belief have been reported, but they are rare.
4. Discrimination on the ground of age is also prevalent. Anecdotal evidence suggests that discrimination on the ground of age occurs most frequently in employment.
5. The situation regarding discrimination on the ground of disability indicates that concerted efforts aimed at promoting equal treatment of people with disabilities are needed in almost all areas of life, including healthcare, social welfare, education, vocational training and employment and accessibility.<sup>18</sup>
6. The situation in relation to sexual orientation suggests that LGBT people are the most invisible group in society and face strong prejudices.<sup>19</sup> NGOs engaged in anti-discrimination work agree that LGBT people experience discrimination frequently with regard to their rights to privacy, freedom of assembly and expression, as well as in the field of employment.<sup>20</sup>
7. There is a lack of case-law on discrimination and there is no database bringing together information about the fields, grounds and types of discrimination in practice.

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<sup>15</sup> Analytical report accompanying the Communication from the Commission to the European Parliament and the Council Commission Opinion on Montenegro's application for membership of the European Union { COM (2010) 670 }, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/mn\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf), p. 32, accessed 11 November 2015.

<sup>16</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination, Montenegro (CERD/C/MNE/CO/1), paras. 16 and 17.

<sup>17</sup> Commissioner for Human Rights, Thomas Hammarberg, Report on his visit to Montenegro, 2-6 June 2008, para. 98.

<sup>18</sup> As evidenced by the Strategy for the Integration of Persons with Disabilities in Montenegro 2008-2016. The full text of the Strategy in Montenegrin is available at: [www.mrs.gov.me/biblioteka/strategije](http://www.mrs.gov.me/biblioteka/strategije), accessed 13 November 2015.

<sup>19</sup> Conclusions of the National Conference, 'Montenegro – A Brighter Spot on the LGBT Map', available at <http://web.archive-me.com/page/939913/2012-12-12/http://www.montenegro-gay.me/component/content/article/26-crna-gora-svijetla-tacka-na-gej-mapi/301-zakljucci-nacionalne-konferencije-crna-gora-svijetlija-tacka-na-lgbt-mapi.html>, accessed 11 November 2015.

<sup>20</sup> A local NGO, Juventas, which has been implementing projects concerning LGBT rights, recently signed a memorandum of understanding with the Employment Agency of Montenegro aimed at promoting the rights of LGBT people in the area of employment.

8. The new Law on the Prohibition of Discrimination of Persons with Disabilities recently adopted is a matter of concern because this law has not been harmonised with around 30 national laws and regulations.

## RÉSUMÉ

### 1. Introduction

Le Monténégro est l'un des États issus de l'ex-République fédérative socialiste de Yougoslavie. Il a formé, au moment de l'éclatement violent de celle-ci, un État commun avec la Serbie; mais il a retrouvé son indépendance en 2006 et le pays est actuellement un candidat relativement préparé à une adhésion à l'Union européenne et à l'OTAN.

Le Monténégro connaît par ailleurs un processus intensif d'urbanisation et de migration au départ de sa partie septentrionale, plus pauvre, vers la partie centrale et méridionale de son territoire.<sup>21</sup>

Le Monténégro est, selon le classement de la Banque mondiale, une économie à revenu intermédiaire supérieur. Le recensement de 2011 fait état d'une population totale de 620 029 habitants principalement formée des groupes ethniques suivants: les Monténégrins (45 %), suivis des Serbes (29 %), des Bosniaques (9 %), des Albanais (5 %), des Musulmans<sup>22</sup> (3 %), des Croates (0,97 %) et des Roms (1,01 %). Les religions principales sont le christianisme orthodoxe (Églises orthodoxes serbe et monténégrine), l'islam et le catholicisme romain. L'âge moyen s'établit à 37,7 ans, mais le pays connaît un processus de vieillissement particulièrement rapide.<sup>23</sup> Très peu de données statistiques sont disponibles en ce qui concerne les personnes handicapées, mais il ressort des estimations de l'Organisation mondiale de la santé que 10 % au moins de la population monténégrine souffre d'une forme ou d'une autre d'invalidité.<sup>24</sup> La Constitution instaure le monténégrin en tant que langue officielle – le serbe, le bosniaque, l'albanais et le croate ayant le statut de langue d'usage officiel. Il n'existe aucune donnée officielle concernant l'orientation sexuelle.

Le Monténégro est fréquemment considéré comme une société multiconfessionnelle et multiethnique. Le gouvernement a pour position officielle que l'affirmation des valeurs européennes fondamentales, en ce compris l'égalité et la non-discrimination, est le meilleur moyen de réaliser les intérêts individuels et nationaux, et d'adhérer à l'Union européenne. Il n'en reste pas moins qu'une discrimination existe et que certains groupes sont victimes de ce phénomène et d'une exclusion sociale. Un processus a été amorcé pour harmoniser la législation antidiscrimination du Monténégro avec la législation européenne, y compris les deux directives, mais la mise en œuvre de la politique dans ce domaine reste embryonnaire et préoccupante, en particulier pour ce qui concerne les Roms, les personnes handicapées et les personnes LGBT.

On ne compte que quelques cas de jurisprudence en matière de discrimination suite à des affaires traitées par des tribunaux. SM, militant de l'ONG «LGBT Forum Progress», a engagé des poursuites pénales contre un groupe de jeunes gens qui, en avril 2015, l'ont agressé ainsi que son ami aux petites heures du matin dans le centre de Podgorica. Les

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<sup>21</sup> Académie monténégrine des sciences et des arts, *Crna Gora u XXI vijeku – u eri kompetitivnosti* (Le Monténégro au 21<sup>e</sup> siècle – à l'âge de la compétitivité), document de travail disponible (en monténégrin) sur <http://www.gov.me/files/1269953473.pdf>, consulté le 11 novembre 2015.

<sup>22</sup> «Musulman» désignait l'un des groupes ethniques inclus dans la Classification de l'appartenance nationale et ethnique utilisée pour le recensement de 2011. Parallèlement, l'islam figurait parmi les religions que les répondants pouvaient déclarer pratiquer.

<sup>23</sup> Monstat, *Projekcije stanovništva Crne Gore do 2060. godine sa strukturnom analizom stanovništva Crne Gore* (Projections démographiques du Monténégro à l'horizon 2060 avec une analyse structurelle de la population monténégrine), p. 55 et 56. <http://www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20%20mart.pdf>, consulté le 11 novembre 2015.

<sup>24</sup> Gouvernement du Monténégro, *Strategy for the Integration of Persons with Disabilities in Montenegro 2008-2016*. <http://www.mrs.gov.me/en/library/strategije?alphabet=lat> consulté le 13 novembre 2015.

jeunes gens ont fait état de sentiments de peur et de gêne à l'égard de SM et de son ami, et les ont impudemment insultés en touchant leurs parties génitales pour simuler une masturbation et en se livrant à une intimidation agressive. L'affaire a été signalée à la police et une action pénale a été engagée. La Haute Cour de Podgorica a confirmé l'arrêt rendu par le tribunal de base condamnant SM, BV et NR, tous originaires de Podgorica, à trois mois et demi de prison pour discours haineux à l'encontre de personnes LGBT et pour mise en péril de la sécurité du directeur exécutif de «LGBT Forum Progress», SM.<sup>25</sup>

## 2. Législation principale

Le Monténégro est une démocratie que sa Constitution définit comme un État civil, démocratique et écologique fondé sur la justice sociale et l'état de droit. La Constitution institue également une séparation entre pouvoir législatif, pouvoir exécutif et pouvoir judiciaire. Le Monténégro est un pays de droit civil dont la Constitution est l'instrument juridique suprême. La législation doit être conforme à la Constitution et aux traités et accords internationaux ratifiés,<sup>26</sup> et les autres réglementations doivent être conformes à la Constitution et à la loi (article 145 de la Constitution). Le Monténégro a ratifié l'ensemble des grands traités internationaux en matière de droits de l'homme: la Convention européenne des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention sur l'élimination de toute les formes de discrimination raciale et la Convention relative aux droits de l'enfant. Il a également ratifié les principaux instruments du Conseil de l'Europe concernant les droits des minorités, la Charte européenne des langues régionales ou minoritaires et la Convention-cadre pour la protection des minorités nationales, ainsi que les conventions de l'Organisation internationale du travail sur les discriminations, parmi lesquelles la convention concernant la discrimination en matière d'emploi et de profession et la convention sur l'égalité de rémunération. Le Monténégro a ratifié la Convention relative aux droits des personnes handicapées et son protocole facultatif.

La législation antidiscrimination monténégrine comprend le cadre constitutionnel et plusieurs lois:

- la Constitution contient une interdiction générale de discrimination, directe et indirecte, «pour quelque motif que ce soit».<sup>27</sup> Elle garantit expressément une protection aux personnes handicapées (article 63) et l'égalité entre les hommes et les femmes (article 18);
- la loi sur l'interdiction de la discrimination proscriit la discrimination fondée sur les motifs expressément énoncés à l'article 2,<sup>28</sup> qui comprennent la race, la couleur de peau, l'appartenance nationale, l'origine sociale ou ethnique, l'association à un peuple minoritaire ou une communauté nationale minoritaire, la langue, la religion ou les convictions, les opinions politiques ou autres, le sexe, l'identité de genre, l'orientation sexuelle, la santé, un handicap, l'âge, la fortune, l'appartenance à un groupe ou l'appartenance supposée à un groupe;

<sup>25</sup> Haute Cour de Podgorica, arrêt rendu en avril 2015 dans l'affaire SM c. SM, BV & NR.

<sup>26</sup> Les traités internationaux sont directement applicables au Monténégro sans devoir être incorporés par une loi du Parlement: ils offrent donc théoriquement en droit interne une réelle protection contre les discriminations, même si les juridictions invoquent rarement le droit international comme fondement de leurs décisions.

<sup>27</sup> Constitution du Monténégro (*Ustav Crne Gore*), *Journal officiel du Monténégro* n° 1/07, article 8.

<sup>28</sup> Monténégro, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel du Monténégro* n° 46/10 et 18/2014.

- l'article 5 de la loi sur le travail<sup>29</sup> prévoit l'interdiction de discrimination à l'égard des demandeurs d'emploi et des salariés, fondée sur le sexe, la naissance, la langue, la race, la religion, la couleur de peau, l'âge, la grossesse, la santé ou le handicap, l'origine ethnique, l'état matrimonial, les obligations familiales, l'orientation sexuelle, l'appartenance politique ou autre, l'origine sociale, la situation matérielle, l'affiliation à des organisations politiques et syndicales, ou toute autre caractéristique personnelle;
- l'article 39 de la loi sur les droits et les libertés des minorités<sup>30</sup> interdit toute discrimination directe ou indirecte, quel qu'en soit le fondement, y compris la race, la couleur de peau, le sexe, l'origine nationale, l'origine sociale, la naissance ou statut analogue, la religion, les convictions politiques ou autres, la situation de fortune, la culture, la langue, l'âge, un handicap mental ou physique;
- la loi sur la réadaptation professionnelle et l'emploi des personnes handicapées interdit la discrimination directe et indirecte envers les personnes handicapées pour ce qui concerne la formation professionnelle, l'admission à l'emploi et l'emploi;<sup>31</sup>
- le code pénal<sup>32</sup> définit l'infraction que constitue le non-respect de l'égalité des citoyens et énumère explicitement en tant que motifs interdits l'appartenance nationale ou l'appartenance à un groupe ethnique, à une race ou à une religion, ou l'absence d'une telle appartenance, les convictions politiques ou autres, le sexe, la langue, l'éducation, la situation sociale, l'origine sociale et la fortune, tout en permettant de considérer «toute autre situation personnelle» comme un motif interdit (article 159).

### 3. Principes généraux et définitions

La définition et l'interdiction de la discrimination figurent dans la Constitution et dans la loi sur l'interdiction de la discrimination. Les discriminations pratiquées via un harcèlement, une injonction de discriminer et des rétorsions sont définies et proscrites, mais pas la discrimination par association. L'obligation de fournir un aménagement raisonnable n'est pas expressément stipulée dans la loi. La Constitution garantit pour sa part une protection spéciale aux personnes handicapées (article 68) sans prévoir explicitement d'obligation d'aménagement raisonnable. Le Monténégro est cependant un État partie à la Convention des Nations unies relative aux droits des personnes handicapées, qui fait du refus d'aménagement raisonnable une forme de discrimination et qui impose le devoir de prévoir cet aménagement. En vertu de l'article 9 de la Constitution, les dispositions de cette Convention font partie intégrante de l'ordre juridique interne, prévalent sur la législation nationale et sont directement applicables si elles divergent des dispositions législatives nationales.

L'interdiction de discrimination multiple est incluse dans la loi sur l'interdiction de la discrimination qui dispose en son article 20, paragraphe premier, que sera considérée comme une forme grave de discrimination 1) une discrimination commise à l'encontre de la même personne ou d'un même groupe de personnes sur la base de motifs multiples visés à l'article 2, paragraphe 2, de la présente loi (discrimination multiple) [...]. Il n'existe au Monténégro aucune jurisprudence concernant la discrimination multiple.

<sup>29</sup> Monténégro, loi sur le travail (*Zakon o radu*), *Journal officiel du Monténégro* n° 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012 et 31/2014.

<sup>30</sup> Monténégro, loi sur les droits et les libertés des minorités (*Zakon o manjinskim pravima i slobodama*), *Journal officiel du Monténégro* n° 31/06, 51/06 et 38/07, 02/11 et 08/11.

<sup>31</sup> Monténégro, loi sur la réadaptation professionnelle et l'emploi des personnes handicapées (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), *Journal officiel du Monténégro* n° 49/08, 73/10 et 39/11, article 5.

<sup>32</sup> Monténégro, code pénal (*Krivični zakonik*), *Journal officiel du Monténégro* n° 40/2008, 25/2010, 32/2011, 40/2013 et 56/2013.

#### **4. Champ d'application matériel**

Le champ d'application matériel de l'interdiction de discrimination régie par la loi sur l'interdiction de la discrimination est conforme au champ d'application matériel plus large de la directive sur l'égalité raciale. Il englobe, outre l'emploi et la formation professionnelle, les domaines suivants: la protection sociale, y compris la sécurité sociale et les soins de santé; les avantages sociaux; l'éducation; et l'accès et la fourniture de biens et de services mis à la disposition du public, y compris le logement. La législation nationale couvre la protection sociale, en ce compris la sécurité sociale et les soins de santé comme le prévoit la directive sur l'égalité raciale. La Constitution dispose pour sa part que chacun a le droit de bénéficier d'une protection sociale et que les enfants, les personnes âgées et les personnes handicapées, de même que les femmes enceintes, ont le droit de bénéficier d'une protection de la santé financée par des recettes publiques pour autant qu'ils n'exercent pas ce droit au titre d'un autre motif.

#### **5. Mise en application de la loi**

Les cas de discrimination peuvent faire l'objet d'un règlement extrajudiciaire par le Défenseur des droits de l'homme et des libertés. Toute personne estimant que ses droits fondamentaux ou libertés fondamentales ont été lésés par une disposition, une action ou une inaction de la part d'une autorité de l'État, d'une autorité locale, d'un service public ou de tout autre titulaire du pouvoir public (établissements de soins, écoles, établissements de l'enseignement supérieur, entreprises publiques, etc.) peut en faire part au Défenseur des droits de l'homme et des libertés. Lorsque celui-ci ou celle-ci constate qu'une infraction a été commise, il ou elle émet un avis et formule une recommandation à l'instance en cause en précisant ce qu'il convient de faire pour y remédier. Le Défenseur fixe également un délai pour la mise en conformité avec sa recommandation. L'instance concernée a l'obligation de fournir au Défenseur des droits de l'homme et des libertés un rapport précisant les mesures prises pour se conformer à la recommandation. Si elle ne se conforme pas à la recommandation émise par le Défenseur des droits de l'homme et des libertés, celui-ci ou celle-ci peut porter l'affaire devant une autorité immédiatement supérieure ou la faire connaître au Parlement du Monténégro ou au grand public. Le Défenseur des droits de l'homme et des libertés ne peut ni rendre de décisions contraignantes ni accorder d'indemnisation pour non-respect des droits fondamentaux.

La loi sur l'interdiction de la discrimination prévoit le droit de saisir un tribunal pour réclamer: a) l'établissement du fait que la partie défenderesse a agi de façon discriminatoire envers la partie plaignante; b) l'interdiction de l'action comportant une menace potentielle de discrimination, à savoir l'interdiction d'une répétition de l'acte discriminatoire; c) l'indemnisation du préjudice; et d) au cas où la discrimination est commise via les médias, la publication dans les médias, aux frais de la partie défenderesse, du jugement établissant la discrimination (article 23).

La charge de la preuve est régie par l'article 29 de la loi sur l'interdiction de la discrimination: lorsque la partie plaignante fournit un élément probant démontrant la probabilité d'un acte de discrimination commis par la partie défenderesse, il incombe à cette dernière de prouver l'absence de non-respect de l'égalité des droits et de l'égalité devant la loi. Cette règle ne s'applique pas aux infractions mineures (lesquelles relèvent de ministères et d'instances spécialisées) ni aux procédures pénales. Elle s'applique néanmoins aux procédures administratives (menées par des organes de l'État et des autorités administratives), aux contentieux administratifs (portés devant le tribunal administratif en rapport avec la légalité d'actes administratifs et autres) et aux procédures civiles. Les différents mécanismes de mise en application de la protection contre la discrimination sont, de façon générale, très peu utilisés dans la pratique. Les victimes se montrent réticentes à faire valoir le respect de leurs droits à l'égalité, et leur degré de confiance quant à leur chance d'obtenir réparation reste faible.



## 6. Organismes de promotion de l'égalité de traitement

Le Défenseur des droits de l'homme et des libertés est une institution indépendante créée en 2003 sur la base de la loi sur le Défenseur des droits de l'homme et des libertés. Sa position a été renforcée par l'adoption de la nouvelle Constitution du Monténégro en 2007, la première à mentionner cette institution en la chargeant de prendre des mesures pour protéger les droits de l'homme et les libertés. La loi institue, en son article 27, paragraphe 1, le Défenseur en tant que mécanisme de protection contre la discrimination.

Un amendement apporté en 2014 à la dite loi<sup>33</sup> a rectifié le concept de discrimination et consacré en droit des formes supplémentaires de discrimination telles que la discrimination sexuelle et le discours de haine, ainsi que la discrimination raciale.<sup>34</sup> Cette loi dote également le Défenseur des droits de l'homme et des libertés de compétences répondant aux exigences de la directive 2000/43/CE.

Les mesures prises par les autorités de contrôle en charge de la mise en œuvre des décisions relevant de la protection contre la discrimination continuent de susciter certaines préoccupations en raison des capacités limitées des autorités en question et de la nature assez faible des mesures adoptées. Le gouvernement du Monténégro a adopté en 2011 une décision visant à instaurer un Conseil pour l'interdiction de la discrimination en tant qu'organisme national chargé de promouvoir la non-discrimination et de coordonner à l'échelon national les activités de lutte contre la discrimination. Le Défenseur des droits de l'homme et des libertés agit de façon indépendante en tant que mécanisme national pour la protection individuelle contre la discrimination, tandis que le Conseil pour l'interdiction de la discrimination est un organisme consultatif gouvernemental chargé de promouvoir et de diriger les activités antidiscrimination au niveau national.

## 7. Points essentiels

1. Les recherches et les données étant, de façon générale, extrêmement limitées, il s'avère très difficile de déterminer sous quelles formes se manifeste la discrimination fondée sur l'origine ethnique, la religion et les convictions, l'âge, un handicap et l'orientation sexuelle, ainsi que le nombre d'incidents de discrimination. Il s'avère difficile en outre d'établir des chiffres et des tendances générales en ce qui concerne ces différents motifs car la jurisprudence nationale est quasiment inexistante; aucun arrêt n'a par ailleurs été rendu par la CouEDH et on ne dispose d'aucune information sur les affaires en instance devant elle.
2. En ce qui concerne la discrimination fondée sur l'origine ethnique, ce sont les communautés rom, ashkali et égyptienne qui continuent de se heurter à la plus forte discrimination au sein de la société monténégrine.<sup>35</sup> L'analphabétisme est largement répandu parmi la communauté rom et le faible niveau d'instruction est l'une des causes principales d'exclusion sociale et de marginalisation. La discrimination envers les membres de cette communauté se manifeste dans les domaines de l'éducation, de l'emploi, des soins de santé et de la protection sociale.<sup>36</sup> La représentation électorale et équitable des minorités ethniques à tous les niveaux de la société,

<sup>33</sup> Monténégro, loi sur le Défenseur des droits de l'homme et des libertés (*Zakon o Zastitniku ljudskih prava i sloboda*) *Journal officiel du Monténégro* n° 18/14.

<sup>34</sup> Monténégro, loi sur l'interdiction de la discrimination (*Zakon o zabrani diskriminacije*), *Journal officiel du Monténégro* n° 46/10 et 18/2014, article 17.

<sup>35</sup> Rapport analytique accompagnant la Communication de la Commission au Parlement européen et au Conseil, avis de la Commission sur la candidature du Monténégro à l'Union européenne {COM (2010) 670} (en anglais), [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/mn\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf), p. 32, consulté le 11 novembre 2015.

<sup>36</sup> Observations finales du Comité pour l'élimination de la discrimination raciale, Monténégro (CERD/C/MNE/CO/1), points 16 et 17.

- l'existence d'un système d'éducation dans toutes les langues minoritaires, l'accès à l'emploi, l'assurance-maladie, les services sociaux et les droits patrimoniaux sont autant de domaines de préoccupation.<sup>37</sup>
3. Des cas de discrimination et d'intolérance fondées sur la religion et les convictions ont été signalés, mais ils sont rares.
  4. La discrimination fondée sur l'âge est également très répandue, et il ressort de témoignages anecdotiques qu'elle se produit surtout dans le domaine de l'emploi.
  5. La situation en matière de discrimination fondée sur le handicap montre que des efforts concertés s'imposent pour promouvoir l'égalité de traitement des personnes handicapées dans tous les domaines de vie, y compris les soins de santé, la protection sociale, l'éducation, la formation professionnelle et l'emploi, et l'accessibilité.<sup>38</sup>
  6. La situation en matière d'orientation sexuelle conduit à conclure que les personnes LGBT forment le groupe le plus invisible au sein de la société monténégrine et qu'elles se heurtent à de puissants préjugés.<sup>39</sup> Les ONG actives dans la lutte contre la discrimination conviennent que les personnes LGBT subissent fréquemment une discrimination en termes de droit à la vie privée, de liberté de rassemblement et d'expression, ainsi qu'en matière d'emploi.<sup>40</sup>
  7. La jurisprudence relative à la discrimination est peu abondante et il n'existe aucune base de données regroupant des informations concernant les domaines, les motifs et les types de discrimination pratiquée.
  8. La nouvelle loi relative à l'interdiction de discrimination à l'égard des personnes handicapées, récemment adoptée, suscite certaines préoccupations dans la mesure où elle n'a pas été harmonisée avec une trentaine d'actes législatifs et réglementaires nationaux.

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<sup>37</sup> Rapport du Commissaire aux droits de l'homme, Thomas Hammarberg, sur sa visite au Monténégro, 2-6 juin 2008, point 98.

<sup>38</sup> Comme en témoigne la stratégie d'intégration des personnes handicapées au Monténégro pour la période 2008-2016. Le texte intégral de la stratégie est disponible (en monténégrin) sur: <http://www.mrs.gov.me/biblioteka/strategije>, consulté le 13 novembre 2015.

<sup>39</sup> Conclusions de la conférence nationale «*Monténégro – A Brighter Spot on the LGBT Map*», disponible sur <http://web.archive-me.com/page/939913/2012-12-12/http://www.montenegro-gay.me/component/content/article/26-crna-gora-svijetla-tacka-na-gej-mapi/301-zakljucci-nacionalne-konferencije-crna-gora-svijetlija-tacka-na-lgbt-mapi.html>, consulté le 11 novembre 2015.

<sup>40</sup> Une ONG locale, Juventas, qui a mis en œuvre des projets en faveur des droits des personnes LGBT, a récemment signé un protocole d'accord avec l'Agence pour l'emploi du Monténégro en vue de promouvoir les droits de ces personnes dans le domaine de l'emploi.

## ZUSAMMENFASSUNG

### 1. Einleitung

Montenegro ist einer der Nachfolgestaaten der ehemaligen sozialistischen föderativen Republik Jugoslawien. Nach dem gewaltsamen Zerfall Jugoslawiens blieb Montenegro zunächst ein Teil Serbiens; 2006 erlangte es jedoch seine Unabhängigkeit zurück und ist inzwischen ein mäßig vorbereitetes Kandidatenland für den Beitritt zur Europäischen Union und zur NATO.

Das Land erlebt derzeit eine Phase intensiver Urbanisierung und Migration vom armen Norden in die mittleren und südlichen Regionen des Landes.<sup>41</sup>

Gemäß der Klassifizierung der Weltbank ist Montenegro ein Land mit gehobenen mittleren Einkommen. Die Volkszählung von 2011 hat in Montenegro eine Bevölkerungszahl von 620 029 ergeben. Außerdem zeigen die Daten der Volkszählung, dass die wichtigsten ethnischen Gruppen des Landes die Montenegriner (45 % der Gesamtbevölkerung) sind, gefolgt von den Serben (29 %), Bosniern (9 %), Albanern (5 %), Muslimen<sup>42</sup> (3 %), Kroaten (0,97 %) und Roma (1,01 %). Die wichtigsten Religionen sind das orthodoxe Christentum (serbisch-orthodoxe und montenegrinisch-orthodoxe Kirche), Islam und Katholizismus. Das Durchschnittsalter der Bevölkerung liegt bei 37,7 Jahren, es findet jedoch ein rasanter demographischer Alterungsprozess statt.<sup>43</sup> Statistische Daten über Menschen mit Behinderung liegen kaum vor. Nach einer Schätzung der Weltgesundheitsorganisation haben jedoch mindestens 10 % der montenegrinischen Bevölkerung eine Behinderung.<sup>44</sup> Die Verfassung erklärt Montenegrinisch zur Amtssprache des Landes, jedoch werden auch Serbisch, Bosnisch, Albanisch und Kroatisch „offiziell“ gesprochen. Zur sexuellen Ausrichtung der Bevölkerung gibt es keine Daten.

Montenegro wird regelmäßig als multireligiöse und multiethnische Gesellschaft anerkannt. Nach der offiziellen Position der Regierung ist die Durchsetzung der europäischen Grundwerte, wie Gleichstellung und Nichtdiskriminierung, im besten Interesse der einzelnen Bürger und des Staates und der beste Weg zum Beitritt in die Europäische Union. Dennoch kommt Diskriminierung vor, wobei einzelne Gruppen besonders unter Diskriminierung und sozialer Ausgrenzung leiden.

Es gibt nur sehr wenig Fallrecht, d. h. Verfahren, in denen vor einem Gericht gegen Diskriminierung geklagt wurde. S. M., ein Aktivist der Nichtregierungsorganisation LGBT-Forum „Progress“, stellte Strafanzeige gegen eine Gruppe junger Männer, die ihn und seinen Freund im April 2015 in den frühen Morgenstunden im Zentrum von Podgorica angegriffen hatten. Die jungen Männer riefen bei S. M. und seinem Freund Angst- und Schamgefühle hervor und beleidigten sie massiv, indem sie ihre Genitalien berührten, Masturbation simulierten und die beiden bedrohten. Der Fall wurde der Polizei gemeldet

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<sup>41</sup> Montenegrinische Akademie der Künste und Wissenschaften, *Montenegro im 21. Jahrhundert – im Zeitalter des Wettbewerbs (Crna Gora u XXI vijeku – u eri kompetitivnosti)*, Arbeitsdokument, abrufbar (in montenegrinischer Sprache) unter: [www.gov.me/files/1269953473.pdf](http://www.gov.me/files/1269953473.pdf) (letzter Zugriff am 11. November 2015).

<sup>42</sup> „Muslim“ war eine der ethnischen Gruppen in der Kategorie nationale und ethnische Zugehörigkeit, die in der Volkszählung von 2011 vorgegeben waren. Gleichzeitig war „Islam“ als eine der Religionen aufgeführt, deren Ausübung die Befragten angeben konnten.

<sup>43</sup> Monstat, *Bevölkerungsentwicklung in Montenegro bis 2060 mit einer strukturellen Analyse der montenegrinischen Bevölkerung (Projekcije stanovništva Crne Gore do 2060. godine sa strukturnom analizom stanovništva Crne Gore)*, S. 55 und 56. [www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20%20mart.pdf](http://www.monstat.org/userfiles/file/publikacije/Demografska%20analiza%20-%20za%20sajt%2028%20%20mart.pdf) (letzter Zugriff am 11. November 2015).

<sup>44</sup> Montenegrinische Regierung, Strategie zur Eingliederung von Menschen mit Behinderungen in Montenegro 2008-2016; [www.mrs.gov.me/biblioteka/strategije](http://www.mrs.gov.me/biblioteka/strategije) (letzter Zugriff am 13. November 2015).

und es wurde ein Strafverfahren gegen die jungen Männer eingeleitet. Das Höhere Gericht in Podgorica bestätigte das Urteil des Amtsgerichts, in dem S.M., B.V. und N.R., allesamt aus Podgorica, wegen Hassreden gegen LGBT-Personen und Gefährdung der Sicherheit des geschäftsführenden Direktors des LGBT-Forums „Progress“ S. M. zu dreieinhalb Monaten Gefängnis verurteilt wurden.<sup>45</sup>

## 2. Wichtigste Gesetze

Montenegro ist eine Demokratie und gemäß der Verfassung ein „ziviler, demokratischer, ökologischer Staat mit sozialer Gerechtigkeit, der auf dem Prinzip der Rechtsstaatlichkeit beruht“. Die Verfassung verankert außerdem die Trennung von Gesetzgebung, Verwaltung und Rechtsprechung. Montenegro ist ein Rechtsstaat und die Verfassung ist sein höchstes Rechtsdokument. Alle Gesetze müssen mit der Verfassung und den ratifizierten internationalen Abkommen<sup>46</sup> übereinstimmen, und alle untergeordneten Rechtsvorschriften mit der Verfassung und den Gesetzen (Artikel 145 der Verfassung).

Montenegro hat alle wichtigen internationalen Menschenrechtsabkommen ratifiziert, dazu gehören die Europäische Menschenrechtskonvention, der Pakt über bürgerliche und politische Rechte und der Pakt über wirtschaftliche, soziale und kulturelle Rechte, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung und das Übereinkommen über die Rechte des Kindes. Außerdem hat es die wichtigsten Minderheitenrechtsinstrumente des Europarats ratifiziert, die Europäische Charta der Regional- und Minderheitensprachen und das Rahmenübereinkommen zum Schutz nationaler Minderheiten sowie die Antidiskriminierungsübereinkommen der Internationalen Arbeitsorganisation, einschließlich des Übereinkommens über die Diskriminierung in Beschäftigung und Beruf und des Übereinkommens über die Gleichheit des Entgelts. Montenegro hat das Übereinkommen über die Rechte von Menschen mit Behinderungen und dessen Fakultativprotokoll ratifiziert.

Zum montenegrinischen Antidiskriminierungsrecht gehören die Verfassungsordnung und mehrere Gesetze.

- Die Verfassung enthält ein allgemeines Verbot von unmittelbarer und mittelbarer Diskriminierung „aus irgendeinem Grund“.<sup>47</sup> Sie garantiert ausdrücklich den Schutz von Menschen mit Behinderungen (Artikel 63) und die Gleichstellung von Männern und Frauen (Artikel 18).
- Das Gesetz über ein Verbot von Diskriminierung verbietet Diskriminierung aufgrund der in Artikel 2 ausdrücklich aufgeführten Gründe,<sup>48</sup> zu denen Rasse, Hautfarbe, nationale Zugehörigkeit, soziale oder ethnische Herkunft, Zugehörigkeit zu einer ethnischen oder sprachlichen Minderheit, Sprache, Religion oder Weltanschauung, politische oder sonstige Überzeugung, Geschlecht, Geschlechtsidentität, sexuelle Ausrichtung, Gesundheit, Behinderung, Alter, Vermögen und tatsächliche oder mutmaßliche Mitgliedschaft in einer Gruppe gehören.
- Artikel 5 des Arbeitsgesetzes<sup>49</sup> verbietet die Diskriminierung von Arbeitssuchenden und Arbeitnehmern aufgrund von Geschlecht, Geburt, Sprache, Rasse, Religion,

<sup>45</sup> Höheres Gericht Podgorica, April 2015, *S.M. gegen S.M., B.V. und N.R.*

<sup>46</sup> Internationale Übereinkommen sind in Montenegro direkt anwendbar und müssen nicht durch Gesetz umgesetzt werden. Damit bieten sie theoretisch einen wirksamen Schutz gegen diskriminierende Bestimmungen im nationalen Recht, wobei die Gerichte ihre Urteile nur selten auf internationales Recht stützen.

<sup>47</sup> Verfassung von Montenegro (*Ustav Crne Gore*), *Amtsblatt von Montenegro*, Nr. 1/07. Artikel 8.

<sup>48</sup> Montenegro, Gesetz über ein Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), *Amtsblatt von Montenegro*, Nr. 46/10 und 18/2014.

<sup>49</sup> Montenegro, Arbeitsgesetz (*Zakon o radu*), *Amtsblatt von Montenegro*, Nr. 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012 und 31/2014.

Hautfarbe, Alter, Schwangerschaft, Gesundheitszustand oder Behinderung, ethnischer Zugehörigkeit, Personenstand, familiären Verpflichtungen, sexueller Ausrichtung, politischer oder sonstiger Zugehörigkeit, sozialem Hintergrund, Vermögensstand, Mitgliedschaft in einer politischen Organisation oder Gewerkschaft oder sonstigen persönlichen Merkmalen.

- Artikel 39 des Gesetzes über die Rechte und Freiheiten von Minderheiten<sup>50</sup> verbietet jede unmittelbare und mittelbare Diskriminierung aus irgendeinem Grund, einschließlich von Rasse, Hautfarbe, Geschlecht, nationaler Herkunft, sozialer Herkunft, Geburt oder ähnlichem Status, Religion, politischen oder sonstigen Überzeugungen, Vermögensstand, Kultur, Sprache, Alter und geistiger oder körperlicher Behinderung.
- Das Gesetz über die berufliche Rehabilitation und Beschäftigung von Menschen mit Behinderungen verbietet unmittelbare und mittelbare Diskriminierung von Menschen mit Behinderungen bei der beruflichen Rehabilitation, beim Zugang zu Beschäftigung und im Arbeitsleben.<sup>51</sup>
- Nach dem Strafgesetzbuch<sup>52</sup> ist eine Verletzung der Gleichheit der Bürger strafbar, wobei ausdrücklich nationale Zugehörigkeit oder Zugehörigkeit zu einer ethnischen Gruppe, Rasse oder Religion bzw. das Fehlen dieser Zugehörigkeit, politische oder sonstige Überzeugung, Geschlecht, Sprache, Bildung, sozialer Status, soziale Herkunft und Vermögen als verbotene Diskriminierungsgründe aufgezählt wird und „jeder sonstige persönliche Status“ ebenfalls als verbotener Diskriminierungsgrund ausgelegt werden kann (Artikel 159).

### 3. Wichtigste Grundsätze und Begriffe

Eine Definition und ein Verbot von Diskriminierung sind in der Verfassung und im Gesetz über ein Verbot von Diskriminierung enthalten. Diskriminierung durch Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind definiert und verboten, jedoch nicht Diskriminierung aufgrund von Assoziierung. Die Pflicht zur Bereitstellung angemessener Vorkehrungen ist nicht ausdrücklich in einem Gesetz definiert. Die Verfassung garantiert Menschen mit Behinderung einen besonderen Schutz (Artikel 68), sieht aber nicht ausdrücklich eine Pflicht zu angemessenen Vorkehrungen vor. Allerdings hat Montenegro das Übereinkommen über die Rechte von Menschen mit Behinderungen der Vereinten Nationen ratifiziert, das die fehlende Bereitstellung angemessener Vorkehrungen als eine Form der Diskriminierung definiert und eine Pflicht zu angemessenen Vorkehrungen enthält. Nach Artikel 9 der Verfassung sind die Bestimmungen dieses Übereinkommens Teil des nationalen Rechtssystems, sie haben Vorrang vor nationalen Rechtsvorschriften und sind direkt anwendbar, wenn sie vom montenegrinischen Recht abweichen.

Der Schutz vor Mehrfachdiskriminierung ist im Gesetz über ein Verbot von Diskriminierung (Artikel 20 Absatz 1) mit dem folgenden Wortlaut enthalten: „Eine schwere Form der Diskriminierung aufgrund der in Artikel 2 Absatz 2 dieses Gesetzes genannten Gründe liegt vor, 1) wenn die Diskriminierung gegen dieselbe Person oder Gruppe aus mehreren der in Artikel 2 Absatz 2 dieses Gesetzes genannten Gründen begangen wird (Mehrfachdiskriminierung) [...]“. In Montenegro gibt es bisher kein Fallrecht zu Mehrfachdiskriminierung.

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<sup>50</sup> Montenegro, Gesetz über die Rechte und Freiheiten von Minderheiten (*Zakon o manjinskim pravima i slobodama*), *Amtsblatt von Montenegro*, 31/06, 51/06 und 38/07, 02/11 und 08/11.

<sup>51</sup> Montenegro, Gesetz über die berufliche Rehabilitation und Beschäftigung von Menschen mit Behinderungen (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom*), *Amtsblatt von Montenegro*, Nr. 49/08, 73/10 und 39/11, Artikel 5.

<sup>52</sup> Montenegro, Strafgesetzbuch (*Krivični zakonik*), *Amtsblatt von Montenegro*, Nr. 40/2008, 25/2010, 32/2011, 40/2013 und 56/2013.

#### **4. Sachlicher Anwendungsbereich**

Der sachliche Anwendungsbereich des im Gesetz über ein Verbot von Diskriminierung festgelegten Diskriminierungsverbots entspricht dem breiten Geltungsbereich der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse. Neben der Beschäftigung und beruflichen Bildung gilt es für die folgenden Bereiche: Sozialschutz, einschließlich der sozialen Sicherheit und der Gesundheitsdienste, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum.

Unter das nationale Recht fallen außerdem die Bereiche Sozialschutz, einschließlich der sozialen Sicherheit und Gesundheit, nach den Vorgaben der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse. Gemäß der Verfassung hat jeder ein Anrecht auf Gesundheitsschutz. Kinder, Senioren und Menschen mit Behinderungen sowie schwangere Frauen haben Anspruch auf öffentlich finanzierten Gesundheitsschutz, sofern sie diesen Anspruch nicht aus anderen Gründen geltend machen.

#### **5. Rechtsdurchsetzung**

Diskriminierungsfälle können außergerichtlich vor dem Anwalt für Menschenrechte und Freiheiten verhandelt werden. Jeder, der seine Menschenrechte oder Freiheiten durch eine Rechtssetzung, Handlung oder Unterlassung von Seiten einer staatlichen oder kommunalen Behörde, öffentlichen Stelle oder anderen Akteuren, die öffentliche Macht ausüben, verletzt sieht (z. B. Gesundheitseinrichtungen, Schulen, Universitäten, staatliche Unternehmen usw.), kann beim Anwalt für Menschenrechte und Freiheiten eine Beschwerde einreichen. Wenn der Anwalt für Menschenrechte und Freiheiten zu dem Urteil kommt, dass eine Rechtsverletzung vorliegt, erstellt er oder sie ein Gutachten und erteilt der betreffenden Stelle eine Empfehlung, in der die erforderlichen Abhilfemaßnahmen aufgezählt werden. Der Anwalt legt außerdem eine Frist für die Umsetzung der Maßnahmen fest. Die betreffende Stelle muss dem Anwalt für Menschenrechte und Freiheiten dann einen Bericht vorlegen, in dem die Umsetzung der in der Empfehlung enthaltenen Maßnahmen erläutert wird. Setzt die Stelle die Empfehlungen des Anwalts für Menschenrechte und Freiheiten nicht um, kann der Anwalt den Fall entweder an eine unmittelbar übergeordnete Behörde weiterleiten oder sich an das Parlament von Montenegro oder die Öffentlichkeit wenden. Der Anwalt für Menschenrechte und Freiheiten kann weder verbindliche Entscheidungen treffen noch Opfern von Menschenrechtsverletzungen eine Entschädigung zusprechen.

Nach dem Gesetz über ein Verbot von Diskriminierung können Opfer vor Gericht auf folgende Rechtsbehelfe klagen: a) Feststellung der Tatsache, dass der Beklagte den Kläger diskriminiert hat, b) Verbot von Handlungen, durch die eine mögliche Diskriminierung droht, d. h. Verbot der Wiederholung einer diskriminierenden Handlung, c) Schadensersatz und d) in Fällen, in denen die Diskriminierung in den Medien erfolgt ist, Veröffentlichung des Urteils, in dem die Diskriminierung festgestellt wird, in den Medien auf Kosten des Beklagten (Artikel 23).

Die Beweislast ist in Artikel 29 des Gesetzes über ein Verbot von Diskriminierung reguliert: Wenn der Kläger Beweise vorlegt, die glaubhaft machen, dass der Beklagte eine diskriminierende Handlung begangen hat, muss der Beklagte beweisen, dass keine Verletzung des Gleichbehandlungsgebots und der Gleichheit vor dem Gesetz vorliegt. Diese Regel gilt nicht bei Ordnungswidrigkeiten (die von Ministerien und speziellen Ordnungsämtern verfolgt werden) und auch nicht in Strafverfahren. Allerdings gilt es in Verwaltungsverfahren (die vom Staat oder von Verwaltungsbehörden durchgeführt werden), die Verwaltung betreffende Rechtsverfahren (bei denen vor dem Verwaltungsgericht die Gesetzmäßigkeit von behördlichen und sonstigen Handlungen geprüft wird) und für Zivilverfahren. Insgesamt werden die Mechanismen zur Durchsetzung des Rechtsschutzes vor Diskriminierung in der Praxis jedoch nur sehr selten genutzt. Opfer

scheuen davor zurück, ihre Rechte durchzusetzen und haben wenig Vertrauen in die Funktionsweise des Rechtssystems.

## 6. Gleichbehandlungsstellen

Der Anwalt für Menschenrechte und Freiheiten ist eine unabhängige Institution, die durch das Gesetz über den Anwalt für Menschenrechte und Freiheiten von 2003 eingerichtet wurde. Mit Inkrafttreten der neuen montenegrinischen Verfassung im Jahr 2007, in der diese Institution genannt und mit dem Schutz der Menschenrechte und Freiheiten beauftragt wird, wurde seine Stellung weiter gestärkt. Nach Artikel 27 Absatz 1 des Gesetzes ist der Anwalt auch ein institutioneller Mechanismus zum Schutz vor Diskriminierung.

Es ist zu beachten, dass in einer Neufassung des Gesetzes<sup>53</sup> von 2014 der Begriff Diskriminierung überarbeitet und weitere Formen von Diskriminierung wie sexuelle Diskriminierung und Hassrede sowie Rassendiskriminierung in das Gesetz aufgenommen wurden.<sup>54</sup> Das Gesetz erteilt dem Anwalt für Menschenrechte und Freiheiten ferner Befugnisse, die den Anforderungen der Richtlinie 2000/43/EG entsprechen.

Die Tätigkeit der Aufsichtsbehörden, die für die Umsetzung der Entscheidungen zum Schutz vor Diskriminierung zuständig sind, lässt weiterhin zu wünschen übrig, da deren Kapazität begrenzt ist und ihre Maßnahmen in der Regel schwach sind. 2011 beschloss die Regierung von Montenegro die Einrichtung eines Rates für den Schutz vor Diskriminierung als nationale Stelle zur Förderung der Gleichbehandlung und Koordination von Antidiskriminierungsmaßnahmen auf nationaler Ebene. Der Anwalt für Menschenrechte und Freiheiten ist ein unabhängiger nationaler Mechanismus zum individuellen Schutz vor Diskriminierung, wogegen der Rat für den Schutz vor Diskriminierung als Beratungsorgan der Regierung fungiert, das die Gleichbehandlung auf nationaler Ebene fördert und entsprechende Maßnahmen durchführt.

## 7. Wichtige Punkte

1. Weil ganz allgemein nur sehr wenige Studien und Daten vorliegen, lässt sich nur schwer einschätzen, in welcher Form und in welchem Umfang Diskriminierungen aufgrund von ethnischer Herkunft, Religion und Weltanschauung, Alter, Behinderung und sexueller Ausrichtung tatsächlich vorkommen. Auch liegt praktisch kein Fallrecht vor und es gibt auch keine Urteile oder anhängige Verfahren vor dem EGMR. Daher lassen sich kaum Zahlen und allgemeine Trends in Bezug auf diese Diskriminierungsgründe benennen.
2. Hinsichtlich der Diskriminierung aufgrund der ethnischen Herkunft gehören die Roma, die Aschkali und die Ägypter zu den gesellschaftlichen Gruppen, die am stärksten diskriminiert werden.<sup>55</sup> Ihre soziale Ausgrenzung und Marginalisierung wird durch die hohe Analphabetenquote und den geringen Bildungsstand dieser Gruppen weiter verfestigt. Mitglieder dieser Gemeinschaften werden außerdem auf dem Arbeitsmarkt, im Gesundheitswesen und bei der sozialen Fürsorge diskriminiert.<sup>56</sup> Weitere Problembereiche sind die angemessene Vertretung ethnischer Minderheiten

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<sup>53</sup> Gesetz über den Anwalt für Menschenrechte und Freiheiten (*Zakon o zaštitniku ljudskih prava i sloboda*) Amtsblatt Nr.18/14.

<sup>54</sup> Montenegro, Gesetz über ein Verbot von Diskriminierung (*Zakon o zabrani diskriminacije*), Amtsblatt von Montenegro, Nr. 46/10 und 18/2014, Artikel 17.

<sup>55</sup> Analysebericht zur Mitteilung der Kommission an das Europäische Parlament und den Rat Stellungnahme der Kommission zum Antrag Montenegros auf Beitritt zur Europäischen Union {KOM (2010) 670}, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/mn\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf), S. 32 (letzter Zugriff am 11. November 2015).

<sup>56</sup> Schlussbemerkungen des Ausschusses zur Beseitigung der Rassendiskriminierung: Montenegro (CERD/C/MNE/CO/1), Pkt. 16 und 17.

- auf allen gesellschaftlichen Ebenen in Wahlen und politischen Ämtern, die Bildung in allen Minderheitensprachen und der Zugang zu Beschäftigung, Krankenversicherung, Sozialleistungen und Eigentum.<sup>57</sup>
3. Es gibt vereinzelte Beschwerden über Diskriminierung und Intoleranz aufgrund der Religion oder Weltanschauung, diese kommen aber nur selten vor.
  4. Auch Diskriminierung wegen des Alters ist verbreitet. Einzelberichte deuten darauf hin, dass Diskriminierung aufgrund des Alters vor allem im Bereich Beschäftigung vorkommt.
  5. In Bezug auf Diskriminierung aufgrund einer Behinderung deuten die vorhandenen Probleme darauf hin, dass in so gut wie allen Lebensbereichen, einschließlich von Gesundheit, sozialen Vergünstigungen, allgemeiner und beruflicher Bildung und Beschäftigung sowie Barrierefreiheit gemeinsame Anstrengungen notwendig sind, um die Gleichbehandlung von Menschen mit Behinderungen zu gewährleisten.<sup>58</sup>
  6. Die Lage in Bezug auf sexuelle Ausrichtung deutet darauf hin, dass LGBT-Personen in der Gesellschaft so gut wie nicht sichtbar und starken Vorurteilen ausgesetzt sind.<sup>59</sup> NROs, die sich im Kampf gegen Diskriminierung engagieren, sind sich einig, dass LGBT-Personen häufig in ihrem Recht auf Privatsphäre, ihrer Versammlungsfreiheit und ihrer Meinungsfreiheit verletzt und insbesondere im Arbeitsleben diskriminiert werden.<sup>60</sup>
  7. Es gibt kaum Fallrecht im Bereich Diskriminierung und keine Datenbank, in denen Daten über die Lebensbereiche, in denen Diskriminierung in der Praxis erfolgt, sowie über die Gründe und Formen von Diskriminierung erfasst werden.
  8. Das kürzlich verabschiedete neue Gesetz über das Verbot von Diskriminierung von Menschen mit Behinderungen gibt Anlass zu Sorge, da es auf rund 30 nationale Gesetze und Verordnungen nicht abgestimmt wurde.

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<sup>57</sup> Menschenrechtskommissar, Thomas Hammarberg, Bericht über seinen Besuch in Montenegro, 2. -6. Juni 2008, Kapitel 98.

<sup>58</sup> Darauf weist auch die Strategie zur Eingliederung von Menschen mit Behinderungen in Montenegro 2008-2016 hin. Der vollständige Text der Strategie (in montenegrinischer Sprache) ist verfügbar unter: <http://www.mrs.gov.me/biblioteka/strategije> (letzter Zugriff am 13. November 2015).

<sup>59</sup> Fazit der Nationalen Konferenz, „Montenegro – Ein heller Fleck auf der LGBT-Karte“, abrufbar unter <http://web.archive-me.com/page/939913/2012-12-12/http://www.montenegro-gay.me/component/content/article/26-crna-gora-svijetla-tacka-na-gej-mapi/301-zakljucci-nacionalne-konferencije-crna-gora-svijetlija-tacka-na-lgbt-mapi.html> (letzter Zugriff am 11. November 2015).

<sup>60</sup> Juventas, eine örtliche NRO, die Projekte zu den Rechten von LGBT-Personen durchführt, unterzeichnete vor kurzem eine Absichtserklärung mit der Arbeitsvermittlungsstelle von Montenegro, in der vereinbart wurde, die Rechte von LGBT-Personen im Arbeitsleben stärker zu unterstützen.



## 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, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities and its Optional Protocol. It has also ratified the 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 and anti-discrimination conventions of the International Labour Organization, including the Discrimination (Employment and Occupation) Convention and the Equal Remuneration Convention.

International treaties are directly applicable in Montenegro and need not 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 make an integral part of the national legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from domestic legislation'. Montenegro has committed itself to gradually approximating its legislation and policies with the *acquis*, in line with the Stabilisation and Association Agreement and the European Partnership priorities. 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 24 out of 35 chapters of which 2 chapters have already been provisionally closed within the negotiation process with the EU. Two main chapters which have been opened are Chapter 23 (Judiciary reform and fundamental rights), which among other things covers the issue of 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:<sup>61</sup> Law on the Prohibition of Discrimination, Official Gazette of Montenegro 46/10 and 18/2014

Abbreviation: LPD

Date of adoption: 6 August 2010

Entry into force: 13 August 2010

Latest amendments: 11 April 2014

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

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<sup>61</sup> Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), Official Gazette of Montenegro, no. 46/10 and 18/2014.

or other opinion, gender, 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 or other organisation as well as other personal characteristics.

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

Title of the law: Criminal Code,<sup>62</sup> Official Gazette of Montenegro no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

Abbreviation: CC

Date of adoption: 17 December 2003

Entry into force: 3 January 2004

Latest amendments: 30 July 2013

Grounds protected: race, colour, gender, sex, religion and descent, national or ethnic affiliation

Material scope: the scope of application is not limited to specific fields. However, Criminal Code, Article 443, para. 4, prescribes that an individual who commits an offence covered by Article 443, para. 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,<sup>63</sup> Official Gazette of Montenegro nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14.

Abbreviation: LL

Date of adoption: 29 July 2008

Entry into force: 6 August 2008

Latest amendments: 16 July 2014

Grounds protected: sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership of political and trade union organisations or any other personal characteristic.

Material scope: employment.

Title of the law: Law on Minority Rights and Freedoms,<sup>64</sup> Official Gazette of Montenegro 31/06, 51/06 and 38/07, 02/11 and 08/11.

Abbreviation: LMRF

Date of adoption: 10 May 2006

Entry into force: 20 May 2006

Latest amendments: 12 January 2011

Grounds protected: any ground including race, colour, sex, ethnic affiliation, social origin, birth or similar status, religion, political or other conviction, personal property, 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,<sup>65</sup> Official Gazette, no. 49/08, 73/10, 39/11

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<sup>62</sup> Montenegro, Criminal Code (*Krivični zakonik*), Official Gazette of Montenegro, no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

<sup>63</sup> Montenegro, Labour Law (*Zakon o radu*), Official Gazette of Montenegro, nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/212 and 31/14.

<sup>64</sup> Montenegro, Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), Official Gazette of Montenegro, 31/06, 51/06 and 38/07, 02/11 and 08/11.

<sup>65</sup> Montenegro, Law on 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, and 39/11.

Abbreviation: LPREPD  
Date of adoption: 29 July 2008  
Entry into force: 23 August 2008  
Latest amendments: 4 August 2011  
Grounds protected: disability  
Material scope: employment

Title of the Law: Law on the Prohibition of Harassment at Work,<sup>66</sup> Official Gazette no. 30/12  
Abbreviation: LPHW  
Date of adoption: 29 May 2012  
Entry into force: 16 June 2012  
Latest amendments: N/A  
Grounds protected: not specified  
Material scope: employment

Title of the law: Law on the Prohibition of Discrimination of Persons with Disabilities,<sup>67</sup>  
Official Gazette of Montenegro 35/15, 44/15  
Abbreviation: LPDPD  
Date of adoption: 26 June 2015  
Entry into force: 15 July 2015  
Latest amendments: 15 August 2015  
Grounds protected: long-term physical, mental, intellectual or sensory disability.  
Material scope: it applies to all fields protected by the Law on the Prohibition of Discrimination (education, labour, provision of goods and services).

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<sup>66</sup> Montenegro, Law on Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), Official Gazette no. 30/12.

<sup>67</sup> Montenegro, Law on Prohibition of Discrimination of Persons with Disabilities (*Zakon o zabrani diskriminacije lica sa invaliditetom*), Official Gazette of Montenegro, 35/15, 44/15.

## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Constitution contains a general prohibition of both direct and indirect discrimination 'on any grounds'.<sup>68</sup> In addition, Article 7 of the Constitution states that 'infliction or encouragement of hatred or intolerance on any grounds shall be prohibited.' As can be concluded from this formulation, the constitutional protection from discrimination in Montenegro is wider than required by the directives, since it includes a potentially limitless list of grounds. An illustration of what might constitute these grounds can be found in Article 25 of the Constitution, which provides that:

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

The courts have not yet interpreted the issue of prohibited grounds. The Constitution explicitly guarantees broad special welfare-based protection for persons with disabilities (Article 68) and equality between men and women (Article 18). With regard to the latter, the Constitution also provides for the state's duty to develop equal opportunities policy (also Article 18). Other provisions of the Constitution contain guarantees of equality before the law (Article 17) and equal protection of rights and freedoms (Article 19) and prohibit 'infliction or encouragement of hatred or intolerance on any grounds' (Article 7) and 'operations of political and other organisations directed towards [...] instigating national, racial, and religious and other hatred and intolerance' (Article 55).

The Constitution permits positive action by providing that, 'regulations and introduction of special measures aimed at creating conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination'. Under the Constitution, special measures may only be applied until the achievement of the aims for which they have been undertaken (Article 8).

The anti-discrimination provisions of the Constitution are directly applicable (theoretically against both public and private parties, but no relevant case-law is available), as can be derived from its Article 17, which provides that human rights and fundamental freedoms are exercised directly on the basis of the Constitution and ratified international treaties. These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

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<sup>68</sup> Montenegro, Constitution, Article 8, *Official Gazette of Montenegro* 1/07.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: disability, sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial status as well as any other personal characteristics.

#### Criminal acts

The Criminal Code<sup>69</sup> provides for the criminal offence of violating the equality of citizens and explicitly lists as prohibited grounds national affiliation or affiliation to an ethnic group, race or religion or absence of such an affiliation, political or other opinion, sex, language, education, social status, social origin and property, while allowing that 'other personal status' can be regarded as a prohibited ground (Article 159). The concept of 'other personal status' has not been interpreted by courts, but age, sexual orientation and disability are likely to be covered.<sup>70</sup>

#### Civil acts

The Labour Law<sup>71</sup> provides for the prohibition of discrimination against employees and people seeking employment based on sex, birth, language, race, religion, skin colour, age, pregnancy, health or disability, ethnicity, marital status, family duties, sexual orientation, political or other affiliation, social background, material status, membership of political and trade union organisations or other personal characteristics. Therefore, here also there is an open-ended prohibition of discrimination and other grounds can be regarded as being incorporated in addition to those explicitly mentioned, which include all five grounds covered by the directives.

The Law on Minority Rights and Freedoms<sup>72</sup> prohibits any direct or indirect discrimination on any basis, including on the basis of 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.

Similarly, laws covering the areas of healthcare, social and child protection and education also include open-ended equality provisions. With regard to the five grounds, racial and ethnic origin and religion (but not beliefs) are explicitly covered by all these pieces of legislation, while age is explicitly listed only in the Law on Healthcare.<sup>73</sup>

Specific aspects of discrimination on the ground of disability are covered by a separate law, namely, the Law on Professional Rehabilitation and Employment of Persons with Disabilities, which prohibits direct and indirect discrimination against people with

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<sup>69</sup> Montenegro, Criminal Code (*Krivični zakonik*), *Official Gazette of Montenegro*, no. 40/2008, 25/2010, 32/2011, 40/2013 and 56/2013.

<sup>70</sup> Particularly in view of the fact that Montenegro is a party to the European Convention on Human Rights, Article 14 of which has been interpreted by the European Court of Human Rights to include sexual orientation, disability and age as prohibited grounds.

<sup>71</sup> Montenegro, Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14, Article 5.

<sup>72</sup> Montenegro, Law on Minority Rights and Freedoms (*Zakon o manjinskim pravima i slobodama*), *Official Gazette of Montenegro*, 31/06, 51/06 and 38/07, 02/11 and 08/11, Article 39.

<sup>73</sup> Montenegro, Law on Healthcare (*Zakon o zdravstvenoj zaštiti*), *Official Gazette of Montenegro*, 39/2004 and 14/2010, Article 4.

disabilities in relation to vocational rehabilitation, admission to employment and employment.<sup>74</sup>

Grounds of discrimination explicitly listed in the Law on the Prohibition of Discrimination<sup>75</sup> include race, skin colour, national affiliation, social or ethnic origin, association with a minority people or minority national community, language, religion or belief, political or other opinion, sex, gender identity, sexual orientation, health, disability, age, property and membership of a group or assumed membership of a group. This provision also leaves open the possibility for other 'similar personal characteristics' to be interpreted as grounds of discrimination.

As can be concluded above, there is a tendency to cover a broad range of grounds, and in this respect national legislation goes beyond the requirements of the directives. This holds particularly true for the Law on the Prohibition of Discrimination with its extensive list of explicitly prohibited grounds. The Council of Europe's Commission for Democracy through Law (Venice Commission) stated in its Opinion on the Draft Law that, 'when defining discrimination, trying to cover as many grounds as possible cannot constitute either a practicable or a constructive approach', highlighting that, 'such an approach may entail the risk that the concept of discrimination may become diluted in a way which could weaken the protection against more serious discriminatory actions' and that 'providing an extensive list of non-discrimination grounds is unnecessary from a legal point of view, since the list is not exhaustive'.<sup>76</sup> This view is not shared by some local NGOs who welcome the explicit reference to some of the traditional grounds of discrimination such as sexual orientation.

### **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 there is a definition provided by anti-discriminatory laws.

Racial or ethnic origin

In amending the Law on Prohibition of Discrimination in 2014,<sup>77</sup> a definition of 'racial discrimination' was provided in accordance with the Recommendations of the European Commission against Racism and Intolerance:<sup>78</sup>

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

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

<sup>74</sup> Montenegro, Law on 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, and 39/11, Article 5.

<sup>75</sup> Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 46/10 and 18/2014.

<sup>76</sup> Opinion no. 564 / 2009 on the Draft Law adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), CDL-AD(2010)011, available at: [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29011-e).

<sup>77</sup> Montenegro, Law on Amendments to the Law on Prohibition of Discrimination (*Zakon o izmjenama i dopunama Zakona o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 18/2014.

<sup>78</sup> ECRI Report on Montenegro, published on 21 February 2012, page 13 [www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Montenegro/MNE-CbC-IV-2012-005-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Montenegro/MNE-CbC-IV-2012-005-ENG.pdf)

to racial or other discrimination. Regarding ethnic origin, there is a wider definition of minorities under the Law on Minority Rights and Freedoms, where people from minorities and other minority communities are defined as 'any group of citizens of the Republic, 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 the Republic and motivated by the wish to express themselves and maintain their national, ethnic, cultural, linguistic and religious identity' (Article 2). No difference between a national and an ethnic minority is recognised by the law. Numerically, the largest national/ethnic communities in Montenegro are Montenegrins, Serbs, Bosnians, Albanians and Muslims and the smallest are Roma, Egyptians, Croats and others. According to public opinion research conducted by the NGO, Centre for Democracy and Human Rights,<sup>79</sup> ethnic distance measuring the extent to which individuals or groups are removed from or excluded from the participating in one another's lives based on their ethnic affiliation, in relation to the Roma population is a matter of concern. The data indicates that almost every second citizen of Montenegro exhibits considerable distance from the Roma population, which represents a particularly vulnerable group. The issue of Roma inclusion remains a serious challenge for the institutions and Montenegrin society as a whole.

### Disability

Within the meaning of the Law on 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). The definition of 'a person with disability' within the meaning of the Law on the Prohibition of Discrimination of Persons with Disabilities (LPDPD), Article 2, para. 2, is very similar to the definition provided by the LPREPD - a person with a disability is a person who has a long-term physical, mental,<sup>80</sup> intellectual or sensory impairment which in interaction with various barriers may hinder the full and effective participation of that person in society on an equal basis with others.

### Sexual orientation

In amending the Law on the Prohibition of Discrimination in 2014, a definition of sexual orientation was provided. Sexual orientation refers to emotional and/or physical attraction or sympathy towards persons of the same and/or different sex. In addition, a definition of sexual harassment was established by amendments to this Law:

'Any unwanted verbal, non-verbal or physical behaviour of a sexual nature which has the purpose to violate dignity of a person or group of persons, or which achieves such effect, and especially which causes intimidation, creates a hostile or degrading environment, and produces feelings of humiliation or offensiveness, shall also be considered as discrimination.'

### Religion and belief

Amendments to the Law on the Prohibition of Discrimination adopted in 2014 regulate discrimination based on religion or belief. Discrimination on the basis of religion or belief is any treatment which is against the principle of freedom of religion. This means any unequal treatment, differentiation, or placing in an unequal position of persons on the basis

<sup>79</sup> Ethnic Distance in Montenegro, Empirical Research, CEDEM, December 2013, page 19, <http://www.cedem.me/me/izdavatvo/publikacije/send/27-publikacije/720-etnika-distanca-2013->.

<sup>80</sup> Mental impairments considers disabilities related to mental health problems.

of religion or personal belief, as well as on the basis of membership or non-membership of a certain religious community. In this way the definition provided 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 authorities and, ultimately, the international bodies, including the European Court of Human Rights.

## Age

Age as a ground of discrimination has not been defined in the Montenegrin legislative framework. However, the Law on the Prohibition of Discrimination 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.'

### 2.1.2 Multiple discrimination

In Montenegro prohibition of multiple discrimination is included in the Law on the Prohibition of Discrimination, Article 20, para.1, item 1:

'A grave form of discrimination, on any ground referred to in Article 2, paragraph 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, paragraph 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, specific criminal policy has not been developed in relation to this form of discrimination.

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In Montenegro the Law on Civil Servants and Employees,<sup>81</sup> as well as the Law on the Prohibition of Discrimination,<sup>82</sup> prohibits discrimination based on a perception or assumption of an individual 'belonging to a group or assumed membership of a group, political party or other organisation'.

#### b) Discrimination by association

In Montenegro discrimination by association is not explicitly regulated by national law.

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

#### a) Prohibition and definition of direct discrimination

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<sup>81</sup> Montenegro, Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, 39/11, 50/11, 66/12 and 34/14, Article 7.

<sup>82</sup> Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, 46/10 and 18/2014, Article 2, para.2.



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.

The Labour Law defines direct discrimination as any treatment which puts an individual seeking employment or an employee in a less favourable position compared with other people in the same or similar situation, on grounds of sex, birth, language, race, religion, skin colour, age, pregnancy, health or disability, ethnicity, marital status, family duties, sexual orientation, political or other affiliation, social background, material status, membership of political and trade union organisations or some other personal characteristics (Article 6). This definition does not cover hypothetical discrimination or discrimination which occurred in the past. Thus, it is not in line with the definition in the directive.

Article 5 of the Labour Law prohibits 'any direct or indirect discrimination of persons seeking employment as well as employees with respect to sex, origin, language, race, religion, colour, age, pregnancy, health condition or disability, ethnicity, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property condition, membership of political and trade union organisations or some other personal characteristics'. This provision applies to conditions for access to employment and selection of candidates, working conditions and all employment-based rights; education, vocational training and advanced vocational training, promotions and dismissals (Article 7).

The Law on the Prohibition of Discrimination 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 placed or were placed, or may be placed in an unequal position by an act, action or failure to act, on any ground proposed by law.<sup>83</sup> This definition of direct discrimination is in line with the directive.

The LPDPD provides a definition of direct and indirect discrimination on the ground of disability, Article 4:

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

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

#### b) Justification of direct discrimination

National law doesn't include articles that permit justification of direct discrimination.

### **2.2.1 Situation testing**

#### a) Legal framework

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<sup>83</sup> Montenegro, Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), *Official Gazette of Montenegro*, no. 46/2010 and 18/2014, Article 2, para. 3.

In Montenegro situation testing is clearly permitted in the Law on the Prohibition of Discrimination. Article 30, para. 3, stipulates that an anti-discriminatory lawsuit, which enables court protection for anyone who considers they have been damaged by discriminatory treatment, may also be filed by a person who, with the intention of directly verifying the application of the rules on non-discrimination, introduces themselves as a person or puts themselves in the position of a person who may be discriminated against on the grounds covered by the law.

Evidence from situation testing can be submitted to the court, but the admissibility of such evidence is at the discretion of the judge on a case-by-case basis. Judicial practice in Montenegro is not uniform. Each judge makes a judgment on the basis of the evidence they receive, but it often happens that in similar cases two judges decide differently. According to Article 9 of the Law on Civil Procedure,<sup>84</sup> 'the court will make a decision based on the judge's conviction, conscientious and careful assessment of each piece of evidence separately and all the evidence together'.

#### b) Practice

In Montenegro situation testing is used in practice. The Protector of Human Rights and Freedoms has used the legal provision contained in the Law on the Prohibition of Discrimination to conduct situation testing in several cases.

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

#### a) Prohibition and definition of indirect discrimination

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

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

The Labour Law provides that indirect discrimination is taken to occur where a specific provision, criterion or practice puts or would put an individual seeking employment or an employee in a less favourable position compared with other people because of a particular characteristic, status, orientation or belief (Article 6).

According to Article 4 of the Law on the Prohibition of Discrimination of Persons with Disabilities, discrimination based on disability is any legal or factual, direct or indirect, intentional or unintentional unequal treatment or failure to act towards a person or group of persons with disabilities compared to other persons, as well as exclusion, restriction or preference to a person compared to a person with disabilities, due to which the person with a disability is hindered in or denied the recognition, enjoyment or exercise of human rights and freedoms in the political, educational, economic, social, cultural, sports, civil and other areas of public and private life.

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<sup>84</sup> Law on Civil Procedure (*Zakon o parničnom postupku*) Official Gazette of Montenegro, No. 22/04, 28/05 and 76/06.

b) Justification test for indirect discrimination

Article 8 of the Constitution prescribes that new legislation and the introduction of special measures to achieve the overall equality and protection of people who are in an unequal position can be applied only until the achievement of the objectives for which those measures are undertaken, and shall not constitute discrimination. With regard to the justification test for indirect discrimination, there is no available case law on testing proportionate means of achieving a legitimate aim in this respect. Furthermore, there is no data on court decisions on justification of discrimination.

c) Comparison in relation to age discrimination

Discrimination based on age (over 60 years) is reported<sup>85</sup> by the Protector of Human Rights and Freedoms in the field of employment and social protection for people who live in rural areas, especially women. In terms of the labour market there is a particularly acute problem because this category is marginalised, hard to employ, redundant and at great social risk. The Protector of Human Rights and Freedoms, among other responsibilities, keeps separate records of submitted complaints with regard to discrimination and collects and analyses data on cases of discrimination. According to the Protector's Report 2015, there are no specific data with regard to comparison in relation to age discrimination, but only data on the total number of cases of discrimination compared with the previous year.

### 2.3.1 Statistical evidence

a) Legal framework

In Montenegro there are national rules permitting data collection. Statistical evidence is not covered by national law in order to establish indirect discrimination, but in theory such evidence would be permissible. Data collection is governed by the Personal Data Protection Law.<sup>86</sup> Personal data means 'any information relating to a natural person or identifiable natural person' (Article 9, para. 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.<sup>87</sup>

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.<sup>88</sup> The data belonging to any of these categories may be processed where:

- 1) the data subject has given their consent to the processing of the data;
- 2) the processing of personal data is necessary for employment in accordance with the law governing labour relations, with the need to prescribe adequate protection measures;
- 3) processing is necessary for the purpose of detecting, preventing or diagnosing an illness in the data subject or carrying out their medical treatment, as well as for the

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<sup>85</sup> Report by the Protector of Human Rights and Freedoms, 2014.

<sup>86</sup> Montenegro, Personal Data Protection Law (*Zakon o zaštiti podataka o ličnosti*), *Official Gazette of Montenegro*, no. 79/08, no. 70/09 and no. 44/12.

<sup>87</sup> 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).

<sup>88</sup> Personal Data Protection Law, Article 9, para. 7.

- 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.<sup>89</sup>

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

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

Under the Law on State Administration, 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 authorities. Thus, when applying in response to an internal announcement or an open advertisement or open competition, candidates may state national or ethnic origin in their job applications.

#### b) Practice

According to Article 17 of the Law on Criminal Procedure,<sup>90</sup> '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 their entirety'. In Montenegro statistical evidence in order to establish indirect discrimination is not used in practice. Statistical evidence has not yet been used to prove discrimination; therefore, it is not possible to ascertain whether there would be any reluctance to use such evidence on the part of the courts.

## 2.4 Harassment (Article 2(3))

#### a) Prohibition and definition of harassment

In Montenegro harassment is prohibited and defined in national law. At the moment, the Labour Law and the Law on the Prohibition of Harassment at Work<sup>91</sup> include articles which prohibit harassment 'at work and in relation to work'. The Labour Law differentiates between harassment as a general notion and sexual harassment and gives definitions of both. Harassment is defined as any unwanted conduct related to any of the prohibited grounds, including harassment via audio and video surveillance, which takes place with the aim or effect of violating the dignity of an individual seeking employment or an employee

<sup>89</sup> Personal Data Protection Law, Article 13.

<sup>90</sup> Law on Criminal Procedure (*Zakon o krivičnom postupku*), Official Gazette of Montenegro, No. 57/09, 49/10, 47/14, 02/15.

<sup>91</sup> Law on Prohibition of Harassment at Work (*Zakon o zabrani zlostavljanja na radu*), Official Gazette no. 30/12.

and which creates an intimidating, hostile, degrading or offensive environment (Article 8). This definition was clearly drawn up taking account of the provisions of Article 2 (3) from the two directives.

Under the Labour Law sexual harassment is understood to mean 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 the sphere of sexual life and which creates an intimidating, hostile, degrading, unpleasant, aggressive or offensive environment (Article 8). The Law on the Prohibition of Discrimination purports to give wide scope to the prohibition of harassment, as it applies to areas outside employment. Under Article 7 of the Law, harassment on any of the prohibited grounds represents unwanted conduct or treatment which has the aim or effect of violating someone's dignity, causing fear, feelings of humiliation or offence or creating a hostile or humiliating environment. In addition, Article 7 states that discrimination is considered to be any unwanted verbal, non-verbal or physical conduct of a sexual nature which aims to harm the dignity of an individual or group of people, or produces such effect, and which specifically causes fear, creates a hostile or humiliating environment and causes a feeling of humiliation or offence.

Article 4 of the Law on the Prohibition of Harassment at Work stipulates that any form of bullying, 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, harassment does explicitly constitute a form of discrimination.

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Montenegro the employee is liable. The Law on the Prohibition of Harassment at Work<sup>92</sup> 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 at the workplace' (Article 2, para. 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 remunerated the damage caused by persons referred to in Paragraph 1 of this Article shall be entitled to require a remuneration of paid 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 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 (senior staff member, employee or group of employees who perpetrated the bullying).<sup>93</sup> 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, para. 1).

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<sup>92</sup> According to the Law, bullying (or mobbing) represent harassment at work. In addition to harassment and harassment at work, the law also mentioned sexual harassment.

<sup>93</sup> Fee paid damage 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. Article 370, para. 1, of the Criminal Code establishes the prohibition of instructions to discriminate, while the Law on the Prohibition of Discrimination provides a definition of instructions to discriminate. According to Article 2, para. 5, of this Law 'the incitement or giving instruction to discriminate against 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 instructions explicitly constitute a form of discrimination.

### **b) Scope of liability for instructions to discriminate**

In Montenegro the instructor and the discriminator are liable. However, the Criminal Code, which *inter alia* criminalises 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, national or ethnic affiliation shall be punished with imprisonment of between six months and five years (Article 370, para. 1). There are no additional civil law provisions on instructions to discriminate in the other fields.

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

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

In Montenegro the duty to provide reasonable accommodation in the field of employment, in accordance with Article 5 of Directive 2000/78/EC and the UNCRPD, is not provided by national law. However, the Law on Professional Rehabilitation and Employment of Persons with Disabilities provides an obligation to adapt workplaces and working operations to the needs of people with disabilities. However, an individualised tailoring of the reasonable accommodation duty for every specific case is not provided. There are no available data when it comes to the implementation of these measures in practice so it may be said these measures are not effective.

The Constitution guarantees special protection of people with disabilities (Article 68) but does not explicitly establish a duty to provide reasonable accommodation. Article 15, para. 1, of the Law on Professional Rehabilitation and Employment of Persons with Disabilities ensures that disabled people are employed under general or special conditions, in accordance with the law. The definition of 'special conditions' refers to the measures to adapt workplaces and jobs to the needs of people with disabilities, but the problem is that these measures are not individualised for each specific situation and specific person. The employment of people with disabilities under special conditions is considered to be employment with adaptations made to the job or workplace, according to the needs of the people with disabilities, as well as employment in special working organisations. Adapting a job is considered to be making adjustments to working operations, working processes and tasks in accordance with the needs of people with disabilities. Adapting workplaces means the technical and technological equipment of the workplace, capital equipment, premises and equipment, in accordance with the needs of people with disabilities.

### **b) Practice**

Employers who employ people with disabilities, as well as people with disabilities who are self-employed, employed in a family agricultural enterprise or owners of commercial enterprises are entitled to subsidies from the state. These subsidies can be used for the purpose of reasonable accommodation and include grants for adaptations to be made to the work and working conditions for people 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 Law on Mobility of Persons with Disabilities with the Assistance of Guide Dogs *inter alia* provides that people with disabilities are entitled to be accompanied by guide dogs in their workplaces.<sup>94</sup> According to a report by the National Employment Agency, on 31 December 2014, there were 2 193 people with disabilities, of whom 1 358 were disabled workers and 578 were categorised persons.<sup>95</sup> Of the total number of women, 12% had problems with performing daily activities, while this percentage for men was 10%.

Furthermore, Article 11 of the Labour Law, which deals with the rights of employees, specifies that, together with people under the age of 18 (the age of majority in Montenegro), people with disabilities are entitled to special protection.<sup>96</sup> The same provision is contained in Article 103 of this Law, which extends this right to employed women. Article 107 gives content to the concept of 'special protection', imposing a duty on employers to assign employees with disabilities to work which is suitable for their working capacity and qualifications. If an employee with a disability cannot be assigned to such a post, the employer has a duty to provide them with other rights,<sup>97</sup> in accordance with the collective agreement and the law governing vocational training for people with disabilities (see below).

If an employee with a disability cannot be assigned to a suitable post nor provided with these other rights, the employer may declare them redundant, in which case the employee with a disability is entitled to severance pay equivalent to a minimum of 24 average monthly wages, if the disability resulted from injury outside work or from illness, or a minimum of 36 average monthly wages, if the disability resulted from an injury at work or an occupational disease. By way of comparison, the minimum amount of severance pay for other redundant workers is six average monthly wages (Article 94).

#### c) Definition of disability and non-discrimination protection

According to the Law on Professional Rehabilitation and Employment of Persons with Disabilities, there is no difference between the definition of disability for the purposes of claiming reasonable accommodation and that for claiming protection from discrimination in general. According to Article 3 of this law, a person with a disability is someone with permanent consequences of physical, sensory or mental disorders or diseases which cannot be cured by medical treatment or rehabilitation and who face 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.

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<sup>94</sup> Montenegro, Law on Mobility of Persons with Disabilities with the Assistance of Guide Dogs (*Zakon o kretanju lica sa invaliditetom uz pomoć psa pomagača*), *Official Gazette of Montenegro*, no. 76/09.

<sup>95</sup> A person with a disability is someone who has been assigned the status of disabled worker according to the regulations on pension and disability insurance. A categorised person is someone with a disability who is classified in a particular category and with a particular degree of disability, in accordance with the Law on the Education of Children with Special Needs.

<sup>96</sup> Special protection for people with disabilities as well as for women and young people is guaranteed by constitution and national law and cannot be considered as positive action but as broad special welfare measures.

<sup>97</sup> 'Other rights' mean that the employer should accommodate the employee with disabilities in a position in conformity with his/her capacity or provide the possibility of vocational training for another type of employment within the same enterprise.

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

There are no duties to provide reasonable accommodation outside the field of employment. However, there is a general clause on the obligation for public institutions to provide special measures to ensure equality for people with disabilities, defined by Article 5 of the Law on the Prohibition of Discrimination of Persons with Disabilities. According to this Law, state institutions, government bodies, bodies of local self-government, public companies and other legal public authorities, as well as other legal and natural persons within their jurisdiction and authority, are obliged to prepare and enforce regulations and special measures aimed at creating conditions for the realisation of equality and protection for people with disabilities who are in any way in an unequal position in relation to other people. Regulations and special measures are taken in the areas of spatial planning and construction of facilities, information, transport, education, employment, labour, health, social protection, culture, public and political activity, as well as in other areas of social life where reasons exist for their adoption or implementation in terms of the protection of people with disabilities. However, these measures are general and the law does not explicitly prescribe the duty of reasonable accommodation outside the field of employment.

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

In Montenegro, the duty of reasonable accommodation has not been implemented in practice so far and, accordingly, there are no available data on failure to meet this duty.

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

According to Article 11 of the Labour Law, there is a duty to provide reasonable accommodation in the field of employment in respect of people under the age of 18 and women. Article 104 prescribes that female employees and employees under 18 years old cannot be employed in jobs which involve hard physical labour, work underground or under water, nor in workplaces with harmful and increased risks to their health and life. Articles 105 and 106 prohibit night working for pregnant women and women employed in industry and construction as well as employees under the age of 18. Article 110 says that single parents or those with a child with special needs can work at night only if they provide written consent. There are no duties to provide reasonable accommodation in respect of race or ethnic origin, religion or belief or sexual orientation. It appears that the definition of reasonable accommodation in national law is more extensive compared with that provided by the Employment Equality Directive.

- g) Accessibility of services, buildings and infrastructure

Article 8 of the Law on the Prohibition of Discrimination of Persons with Disabilities says that: 1) unavailability of facilities and areas in public use; and 2) denial of access to, movement within, stay and work in buildings for public use will be considered discrimination against people with disabilities in the use of facilities and areas in public use. Using of parking spaces for the parking of vehicles displaying an accessibility symbol (for persons with disabilities) by a driver whose vehicle does not display that symbol is also considered as discrimination based on disability. In addition, occupying, using or destroying furniture or accessible toilets designed for people with disabilities in public buildings and spaces and areas for public use by a person who has no disability is considered as discrimination. Although the prohibition of discrimination in the field of accessibility of services, buildings and infrastructure is strictly defined by law, the implementation of these rules is very weak in the practice.



The right to use facilities and areas in public use may be limited in accordance with the law. The 2008 Law on Spatial Planning and Construction of Buildings<sup>98</sup> introduced duties requiring public buildings to be constructed so as to ensure accessibility for people with disabilities (see further Section 3.2.10)

#### h) Accessibility of public documents

The accessibility of public documents for people with disabilities is regulated by the Law on Free Access to Information,<sup>99</sup> Article 23 of which provides that, 'public bodies are responsible for enabling free access to information for people with disabilities in a manner and form that corresponds to their capabilities and needs'.

However, according to Article 97, para.3, of the Law on State Administration,<sup>100</sup> the Government of Montenegro adopted a Decree<sup>101</sup> on the procedure for conducting public hearings in the preparation of laws. Article 10 of this Decree prescribes that, when organising public hearings,<sup>102</sup> the relevant authority (ministry) must make sure that the venue for the hearing is accessible to people with disabilities. However, when it comes to people with hearing and speech impairments, the relevant ministry must make the public discussion available in audio format or in Braille only if the draft law, which is the subject of the debate, directly concerns the rights of people with hearing, speech and visual impairments. It can be concluded that this regulation is discriminatory and not in accordance with the Law on the Prohibition of Discrimination of Persons with Disabilities, Article 12, which provides an obligation for all public institutions to enable access to information for people with disabilities in a manner and form that corresponds to their needs.

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<sup>98</sup> Montenegro, Law on Spatial Planning and Construction of Buildings (*Zakon o uređenju prostora i izgradnji objekata*), *Official Gazette of Montenegro*, no. 51/08.

<sup>99</sup> Montenegro, Law on Free Access to Information (*Zakon o slobodnom pristupu informacijama*), *Official Gazette of Montenegro*, no. 44/2012.

<sup>100</sup> Montenegro, Law on State Administration (*Zakon o državnoj upravi*), *Official Gazette of Montenegro*, no. 38/03, 22/08 and 42/11.

<sup>101</sup> This Decree was adopted by law by the Government on 2 February 2012.

<sup>102</sup> Public hearings are organised for the purpose of discussing proposed legislation before its adoption in the Parliament.

### 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 the following citizenship requirements must be fulfilled in order to be entitled to protection under the relevant national laws transposing the directives.

The Law on the Armed Forces of Montenegro, general conditions of admission, Article 33, paragraph 1:

'In order to be admitted to the service, a person shall fulfil the following general and special conditions: A person must be a Montenegrin citizen and may not be a citizen of any other state'.<sup>103</sup>

The Law on Civil Servants and Employees, general terms and conditions, Article 32:

'A state authority<sup>104</sup> may establish an employment relationship with a person who: is a Montenegrin citizen'.<sup>105</sup>

A foreign national or a stateless person may establish an employment relationship with a state body as an employee, under conditions stipulated by a special law and international conventions.<sup>106</sup>

The Law on the National Security Agency,<sup>107</sup> Article 27a:

'Employment with the Agency may be established by a person who, in addition to the general requirements for employment in a state body, meets the following requirements: 1) does not have citizenship of another state.'

The conditions referred to in paragraph 1 lines 1, 2 and 3 of this Article shall also be fulfilled by a person employed by the Agency as a trainee.

All natural and legal persons to which Montenegrin legislation is applicable have the right to protection from discrimination, if they are discriminated against on any ground covered by Article 2, para. 2 of the Law on the Prohibition of Discrimination.

##### 3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

###### a) Natural and legal persons

<sup>103</sup> Montenegro, Law on the Armed Forces of Montenegro (*Zakon o Vojsci Crne Gore*), *Official Gazette of Montenegro*, nos. 88/09 of 31 December 2009, 75/10 of 21 December 2010, 40/11 of 8 August 2011, 32/14 of 30 July 2014.

<sup>104</sup> A state authority, in terms of this law, includes: the Office of the President of Montenegro, the Parliament of Montenegro, the Government of Montenegro, the Constitutional Court of Montenegro, the Court and State Prosecutor's Office (hereafter: state body). This law applies to employees of the Pension and Disability Fund of Montenegro, the Health Insurance Fund of Montenegro, the Employment Bureau of Montenegro, the Labour Fund and the Agency for Peaceful Settlement of Labour Disputes. This law also applies to employees in other agencies, regulatory and independent bodies, if prescribed by a special law.

<sup>105</sup> Montenegro, Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, nos. 39/11, 50/11, 66/12 and 34/14.

<sup>106</sup> Montenegro, Foreigners Law (*Zakon o strancima*), *Official Gazette of Montenegro*, no. 56/14, Articles 61-81, regulates the employment of foreign nationals and stateless persons.

<sup>107</sup> Montenegro, Law on the National Security Agency (*Zakon o Agenciji za nacionalnu bezbjednost*), *Official Gazette of Montenegro*, nos. 28/05, 86/09, 20/11, 8/15.

In Montenegro the personal scope of anti-discrimination law covers natural and/or legal persons for the purpose of protection against discrimination.

The provisions of the Montenegrin Constitution which govern human rights and freedoms, including the prohibition of discrimination,<sup>108</sup> 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.<sup>109</sup>

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 grounds<sup>110</sup> (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.<sup>111</sup>

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

With regard to criminal liability for discrimination, the regimes for natural and legal persons differ. Criminal liability in relation to natural persons is governed by the Criminal Code, Article 443, while liability in relation to legal persons is governed by a separate law. Under the Law on the Liability of Legal Persons for Criminal Offences,<sup>112</sup> 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.

b) Private and public sector including public bodies

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

The Law on the Prohibition of Discrimination, protection from discrimination, Article 3:

'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, paragraph 2 of this Law. This Law shall apply to the public and private sectors.'

In Montenegro the personal scope of anti-discrimination law covers the private sector for the purpose of liability for discrimination.

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<sup>108</sup> Article 8 of the Constitution, *Official Gazette of the Republic of Montenegro*, 02/07.

<sup>109</sup> The Court's Instruction for Completing a Constitutional Complaint Template offers this clarification.

<sup>110</sup> Prohibited grounds are set out in Article 2, para. 2 of the Law on the Prohibition of Discrimination.

<sup>111</sup> Montenegro, Labour Law (*Zakon o radu*), *Official Gazette of Montenegro*, nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14.

<sup>112</sup> Montenegro, Law on the Liability of Legal Persons for Criminal Offences (*Zakon o odgovornosti pravnih lica za krivična djela*), *Official Gazette of the Republic of Montenegro*, nos. 02/07 and 13/07.

## The Law on the Liability of Legal Persons for Criminal Offences:

'Exclusion and limitation of liability, Article 2

(1) The Republic of Montenegro (hereafter: Montenegro), state bodies and local authorities cannot be responsible for a crime.

(2) Legal entities which are legally entrusted with public authority are not responsible for criminal actions perpetrated in the exercise of these powers.'

'The crimes for which legal entities are liable, Article 3,

Legal persons may be held liable for criminal offences from the special section of the Criminal Code and for other criminal offences prescribed by a special law, if the conditions for liability of legal persons are prescribed by this Law.'

Article 10 of the Labour Law prescribes that employees can initiate legal proceedings against employers (natural and legal persons, including the public sector) before the relevant court in case of discrimination. This means that the public sector as employer can be liable in terms of misdemeanour liability. It covers civil and administrative procedures regarding liability for discrimination in the workplace and employment in general. The public sector bears no criminal liability for the discrimination according to the Criminal Code.

### 3.2 Material scope

#### 3.2.1 Employment, self-employment and occupation

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

The Labour Law, which contains anti-discrimination provisions described above, applies to the private sector, but also to employment within state authorities, state administration and local authorities and public services, if otherwise not provided for by separate laws. The key law which governs employment-related issues in the public sector is the Law on Civil Servants and Employees.<sup>113</sup> This legislation contains only a prohibition of discrimination without further elaboration. It can therefore be concluded that anti-discrimination provisions contained in the general labour legislation also apply to this type of employment. In line with the two laws, appointed, but not elected, officeholders are also covered by these provisions. In addition, general labour legislation also covers contract work but does not cover self-employment, as it applies only to people working for employers (Article 3).

The Law on the Armed Forces guarantees equal rights to people who apply to the military services, without discrimination on grounds of sex, race, language, religion, political or other opinion, ethnic or social origin, property or other status.<sup>114</sup>

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).

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<sup>113</sup> Montenegro, Law on Civil Servants and Employees (*Zakon o državnim službenicima i namještenicima*), *Official Gazette of Montenegro*, nos. 39/11, 50/11, 66/12 and 34/14.

<sup>114</sup> Montenegro, Law on the Armed Forces of Montenegro (*Zakon o Vojski Crne Gore*), *Official Gazette of Montenegro*, nos. 27/04 and 31/05, Article 52.

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

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 7 of this Law, direct and indirect discrimination are prohibited in relation to the following: a) requirements for access to employment and selection of candidates for the performance of a specific job; b) working conditions and all employment-based rights; c) education, vocational training and advanced vocational training; d) promotion; and e) dismissals.

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

Article 10 of this Law guarantees to all candidates equal access to all posts, while Article 13 prohibits favouring or disfavouring civil servants and employees in relation to their rights on the basis of political, national or religious affiliation, sex or other reasons in contravention of the provisions of the Constitution and 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 authorities and provides that the heads of state authorities and appointed office-holders are considered to be civil servants in the exercise of specific rights (Article 2). State authorities include public administration authorities, services of the President, Parliament, Government and Constitutional Court and other state authorities. Members of Parliament and persons 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. This Law 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).

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

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

In Montenegro national legislation covering discrimination includes working conditions including pay and dismissals in relation to all five grounds and both private and public employment.

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 5, 6, 8, 9, 10 and 16). The Law also provides that provisions of an employment contract which constitute discrimination are considered null and void (Article 7).

The Law on the Prohibition of Discrimination 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).

#### 3.2.3.1 Occupational pensions constituting part of pay

There are no provisions in national law which explicitly prohibit discrimination in the provision of occupational pensions for workers by their employers (whether in the public or private sector).

The Government of Montenegro adopted a Regulation on the terms and conditions and levels of wages of people serving in the Armed Forces of Montenegro.<sup>115</sup> A Decree on defining jobs in the state administration in which pension insurance is calculated at an accelerated rate was adopted on 23 December 2010.<sup>116</sup>

On the basis of the adopted Regulation, the Ministry of Labour and Social Welfare and the Ministry of Finance enacted a Decree on the detailed definition of jobs in the state administration where the insurance period is defined at an accelerated rate.

There are professions which allow an earlier retirement age. Pensions calculated at an accelerated rate are provided for soldiers, police officers, miners, employees of the armed forces, the National Security Agency, the police and some other employees who, after reaching a certain age, can no longer adequately carry out their professional activity. Depending on the occupation, the increased length of service ranges from two to six months, so that the 'value' of one working year increases to 14, 16 or 18 months.

With regard to mandatory pension insurance based on individual capitalised savings, there is no normative framework for its implementation.

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

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

The Labour Law (Article 15) explicitly provides that the prohibition of direct and indirect discrimination applies to 'education, vocational training and advanced vocational training'.

The Law on the Prohibition of Discrimination 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 taken to occur if,

<sup>115</sup> Montenegro, Regulation on the terms and conditions and levels of wages of persons serving in the armed forces of Montenegro (*Uredba o bližim uslovima, načinu ostvarivanja i visini zarade i drugih primanja lica u službi u Vojsci Crne Gore*), *Official Gazette of Montenegro*, no. 66/2010, adopted 19 November 2010, entered into force 27 November 2010.

<sup>116</sup> Montenegro, A Decree on defining jobs in the state administration in which pension insurance is calculated at an accelerated rate (*Uredba o određivanju radnih mjesta, odnosno poslova u organima državne uprave na kojima se staz osiguranja racuna sa uvećanim trajanjem*), *Official Gazette of Montenegro*, no. 1/2011 adopted 11 January 2011, entered into force 19 November 2011.

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.

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

In Montenegro national legislation does not include 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.

Montenegrin national law does not recognise membership of professional workers' organisations as an area of potential discrimination, but affiliation to the membership of professional workers organizations can be considered as a ground of discrimination.

The Labour Law (Article 5) explicitly lists membership of political and trade union organisations as one of the prohibited grounds of discrimination. The Law also provides that the employer is prohibited from putting an employee in a more or less favourable position due to their membership of a trade union or their trade union activities.

When defining the scope of its anti-discrimination provisions, the Labour Law fails to extend protection in relation to membership of and involvement in organisations of workers or employers and organisations whose members carry on a particular profession, including the benefits provided for by such organisations. No other laws contain provisions to the effect of Article 3 (1) (d) of the Employment Equality Directive. Article 2 of the Law on the Prohibition of Discrimination provides a general prohibition of discrimination with regard to membership of groups or organisations.

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

In Montenegro national legislation includes social protection, including social security and healthcare, as formulated in the Racial Equality Directive. Article 2 of the Law on the Prohibition of Discrimination prohibits any form of discrimination, on any ground. 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, para. 2.

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

The rights regarding social and child protection are governed by the Law on Social and Child Protection.<sup>117</sup> Article 2 of this Law provides that all Montenegrin citizens who are domiciled in the country are entitled to these rights and that, among others, people with disabilities and elderly people enjoy special protection. Pursuant to Article 5 of this Law,

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<sup>117</sup> Montenegro, Law on Social and Child Protection (*Zakon o socijalnoj i dječjoj zaštiti*), *Official Gazette of Montenegro*, no. 78/05. 27/13, 01/15.

citizens are equal in their exercise of social and child protection rights, regardless of ethnicity, race, sex, language, religion, social origin and other similar characteristics. The Law also provides that one of the criteria for the establishment of the network of social and child protection institutions is the creation of equal conditions for all beneficiaries (Article 68).

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

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

The Law on Healthcare<sup>118</sup> lists as 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 personal characteristics (Article 4). The principle of equality is further underlined in Article 18, which provides that citizens are entitled to equal treatment in healthcare and equal content thereof.

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

In Montenegro national legislation includes social advantages as formulated in the Racial Equality Directive.

The category of social benefits is primarily dealt with through the Law on Social and Child Protection. Under this Law, fundamental social protection rights include family allowance, personal disability allowance, carer's allowance, placement in an institution, placement in another family, assistance for children and young people with special needs, healthcare, funeral costs and ad-hoc cash benefits (Article 20). In addition, the Law provides that, in the area of child protection, entitlements include equipment for new-borns, childbirth grants, child allowance, wage refunds for part-time work and allowance for pupils and students (Article 23). As noted in Section 3.2.6, Article 7 of this Law provides that citizens are equal in the exercise of social and child protection rights, regardless of *inter alia*, ethnicity, race, sex, language, religion and social origin, and therefore also outlaws discrimination in relation to the above-mentioned benefits.

Specific benefits for people with disabilities are provided for by the Law on Travel Benefits for Persons with Disabilities.<sup>119</sup> Under Article 7 of this Law, people with disabilities, people in receipt of carers' allowance and children in receipt of assistance for children and young people with special needs, as well as people accompanying these individuals, are entitled to a refund of the costs of 12 journeys by train or road each year. According to Article 4 of this Law, this right is enjoyed by Montenegrin citizens and foreign nationals with temporary or permanent residence in Montenegro. Misdemeanour liability is provided for by this Law (Article 25), for public bodies which approve travel benefits contrary to the law. Indirectly, this provision refers to potential discrimination that might occur if a public body acts contrary to the law.

Benefits provided by private actors fall outside the scope of the above provisions. They are not prohibited, which means that they are permitted.<sup>120</sup> In practice they are mainly granted

<sup>118</sup> Montenegro, Law on healthcare (*Zakon o zdravstvenoj zastiti*), *Official Gazette of the Republic of Montenegro*, 39/2004 and 14/2010.

<sup>119</sup> Law on Travel Benefits for Persons with Disabilities (*Zakon o povlastici na putovanje za lica sa invaliditetom*), *Official Gazette of Montenegro*, nos. 80/08 and 40/11, 03/15.

<sup>120</sup> Under Article 10 of the Constitution, anything which is not prohibited by the Constitution or law is permitted.



as the result of agreements between the commercial sector and organisations representing the interests of specific groups (for instance, agreements between private companies and organisations of people with disabilities regarding access to leisure facilities). The Law on the Prohibition of Discrimination is silent on this issue but, given the fact that: a) its scope is not limited and b) it offers protection against discriminatory treatment by the authorities and private persons (legal and natural), discrimination in this area is likely to be unlawful under its provisions.

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

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.<sup>121</sup> The Law on the Prohibition of Discrimination also prohibits discrimination in the field of education and vocational training (Article 15).

The General Law on Education provides that Montenegrin citizens are equal in the exercise of the right to education regardless of their ethnic origin, race, sex, language, religion, social origin or other personal characteristics (Article 2). 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. The only other law in the area of education which contains an explicit prohibition of discrimination is the Law on Higher Education. Under Article 7 of this Law, discrimination in the exercise of the right to higher education is prohibited. The list of explicitly mentioned grounds of discrimination includes sex, race, marital status, colour, language, religion, political or other opinion, ethnic origin, membership of a national community, property and disability. However, this is an open-ended provision which also prohibits discrimination on other similar grounds, positions or circumstances.

The Constitution of Montenegro guarantees schooling for minorities in their native languages in state-run establishments. It also provides that school curricula include 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.

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

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<sup>121</sup> Montenegro, General Law on Education (*Opšti zakon o obrazovanju i vaspitanju*), *Official Gazette of the Republic 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; Montenegro, Law on Preschool Education (*Zakon o predškolskom vaspitanju i obrazovanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02 and 49/07, 80/10 and 40/11; Montenegro, Law on Primary Education (*Zakon o osnovnom obrazovanju i vaspitanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 49/07, 45/10 and 39/13; Law on Grammar and High Schools (*Zakon o gimnaziji*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 49/07, 45/10 and 39/13; Law on Vocational Education (*Zakon o stručnom obrazovanju*), *Official Gazette of the Republic of Montenegro*, nos. 64/02, 49/07, 45/10 and 39/13; Law on Higher Education (*Zakon o visokom obrazovanju*), *Official Gazette of the Republic of Montenegro*, no. 44/14 and 52/14; Law on Education of Children with Special Needs (*Zakon o obrazovanju djece sa posebnim obrazovnim potrebama*), *Official Gazette of the Republic of Montenegro*, no. 80/04 and 45/10.

Convention for the Protection of National Minorities<sup>122</sup> and the European Charter for Regional or Minority Languages,<sup>123</sup> especially regarding education in the mother tongue, remains the main cause of social exclusion of Roma.

In the last three years the Ministry of Education and civil society organisations (CSOs) have implemented significant efforts to prevent school drop-out by employing educational mediators. Drop-out rates have significantly decreased, although the educational achievements of the children are still poor. The situation is even worse with regard to high school education and there are only a handful of Roma university students. The reasons for this are manifold and include lack of knowledge of the official language, lack of Roma teachers, low level of awareness among Roma about the importance of education and their inability to cover education-related expenses.

Private schools are covered by education legislation. However, faith schools are not considered part of the education system of Montenegro and are therefore not covered by this legislation. Consequently, faith schools are not funded from public resources. Relations between faith-based and state institutions, including education, have not been regulated appropriately and harmonised with international law and standards, including the Racial Equality Directive. The Law on the Prohibition of Discrimination explicitly prohibits discrimination in education but fails to mention that it applies to this type of school.<sup>124</sup>

In Montenegro national legislation includes education as formulated in the Racial Equality Directive.

#### a) Pupils with disabilities

In Montenegro the implementation of the legal framework regarding education for pupils with disabilities is not satisfactory. The legal framework for inclusive education has improved over the last three years. The General Law on Education, the Law on Primary Education and the Law on Grammar and High Schools contain provisions on inclusive education for pupils with disabilities. However, the stereotypes and prejudices of other children's parents often mean that additional effort is required on the part of teachers and other staff in schools.

Inclusive education for children with disabilities is a relatively new concept in Montenegro. Its implementation was initiated during the 2003/04 school year by the then Ministry of Education and Science with the support of UNICEF and Save the Children. In 2004, the Law on the Education of Children with Special Needs was passed to replace the 1992 Law on Special Education. Under the latter law, children with disabilities were educated exclusively in special institutions, schools and classes. The Law on the Education of Children with Special Needs created a legal basis for the inclusion of children with disabilities in the mainstream system.

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

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<sup>122</sup> Montenegro ratified the Framework Convention for the Protection of National Minorities in 2006.

<sup>123</sup> Montenegro ratified the European Charter for Regional or Minority Languages in 2005.

<sup>124</sup> No data are available on the numbers of students in these schools.

Regardless of the type of education, schools and institutions have a duty to develop an individual education plan for each child with special needs, in cooperation with their parents. The decision on the referral of a child to a specific type of education is made by municipal bodies in charge of education issues on the basis of a proposal by a special commission, made up of a paediatrician, doctors specialising in the relevant area, a psychologist, a pedagogue, a disability specialist and a social worker. Parents and teachers are allowed to take part in the work of the commission. The commission performs an assessment of children's abilities and refers them to the appropriate educational institutions which then develop an individual education programme for each child. The schooling of children with special needs is financed from the state budget and the policy framework was enhanced in 2008 with the adoption of the Government Strategy on Inclusive Education.

Nevertheless, the exclusion of children with learning disabilities from mainstream education continues to be a problem. According to some estimates, the proportion of children with learning disabilities who are included in the regular school system is 2-5 %. There are no official data, however, as the Ministry of Education and Sports keeps records only on children who are included in either mainstream or special education, but not on children who receive neither type of education (according to the Strategy for the Integration of Persons with Disabilities, p. 27).<sup>125</sup>

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

The Ministry of Education should update the database on children with special educational needs based on the decision on orientation.<sup>126</sup> At the same time, data collection is performed by the Montenegrin Education Information System, based on several criteria: disability, preparing individually tailored educational programmes (IROP)<sup>127</sup> and the decision on orientation. Comparison data indicate that a number of children have not gone through the orientation process. Potential reasons for the poor flow of information on the level of early detection and intervention by the education system are: lack of information, resistance from parents, lack of proper recording in schools and lack of support for parents when they need to choose an orientation for their children. Educational institutions develop individually tailored educational programmes (IROP) for every child with special educational needs, using the recommendations of the Children's Orientation Commission.

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

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<sup>125</sup> Strategy for the Integration of Persons with Disabilities 2008-2016, (*Strategija za integraciju osoba sa invaliditetom 2008-2016*).

<sup>126</sup> On the basis of a Commission proposal, the local government body in charge of educational affairs makes a decision on the placement of children with special educational needs in the appropriate educational programme. This decision on orientation includes a period (which may not be longer than one year), during which the general educational institutions monitor the achievements and progress of the child to check that they have the appropriate learning pathways, inputs, additional help and support, and that the objectives for individual development and educational programmes are being realised.

<sup>127</sup> Individually tailored educational programme (*Individualno Razvojno Obrazovni Program, IROP*).

(psychologists, teachers and special education teachers), in order to competently respond to the needs of these children. It is essential that teachers are trained to have specific knowledge of certain disabilities.

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

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

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

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

#### b) Trends and patterns regarding Roma pupils

There was a trend in Podgorica from 1999 to enrol children from Konik Camp into the local segregated<sup>128</sup> Bozidar Vukovic Podgoricanin branch school. The Ministry of Education continuously implements activities aimed at eliminating specific patterns existing in education regarding Roma pupils, such as segregation in Podgorica. As part of the desegregation activities at Bozidar Vukovic Podgoricanin school, Roma parents do not enrol their children in the part of the town where they live, but at city schools. The aim is to close the segregated Bozidar Vukovic Podgoricanin branch school, which is located at the Konik settlement. Thus, at the beginning of each school year, there are four classes fewer in the segregated branch school than in the previous school year. Thanks to the programme of the Ministry of Education and project activities of the project Support for the Integration and Voluntary Return of I/DPs and residents of Konik Camp, from the beginning of the next school year, in September 2016, more children from the Konik Camp area will attend classes in six mainstream primary schools located in different city areas in Podgorica. All these children are aged between 5½ and 10 years, i.e. they are not able to travel to school unaccompanied. Children will attend classes either in the morning or afternoon shifts, regularly attending classes and participating in after school activities together with their siblings. The segregated school were finally closed in June 2016.

With regard to higher and university education, students are entitled (through the Roma educational programme) to select a mentor to help them to achieve better results in class and in their exams.

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<sup>128</sup> Segregation is any action, 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 paragraph 2 of Article 2 of this Law (Article 9, Law on the Prohibition of Discrimination).

On the other hand, there are still a large number of children who are not yet included in regular school and pre-school education and only a small percentage of children successfully complete primary and secondary school.

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

In Montenegro national legislation does not include access to and supply of goods and services as formulated in the Racial Equality Directive.

The Law on Consumer Protection provides that the consumer's right to public services includes the right to use such services under equal conditions, 'if technically feasible, without discrimination' (Article 28).

Public services include the sale of electric power, gas, heat and water, as well as telecommunications, postal and similar services. The Law on Consumer Protection stipulates the conditions for providing public services (Article 29), as well as the standard and quality of public service provision (Article 30).

The Law on the Prohibition of Discrimination prohibits discrimination in public buildings and spaces as well as with regard to the provision of goods and services available both privately and publicly (Article 10). Article 11 of the Law on the Prohibition of Discrimination prohibits discrimination in the area of the supply of public and private goods and services on any ground referred to in Article 2, para. 2 of the Law. The definition of this type of discrimination covers preventing the supply of public and private goods and services or making it difficult, refusal to supply public and private goods and services, making the supply of goods and services conditional on requirements not applied to other people and intentional delay or deferral with regard to the supply of goods and services (Article 11). The Law on the Prohibition of Discrimination does not prohibit discrimination in the area of access to public and private goods and services.

Key measures in relation to the social inclusion of people with disabilities as defined by laws and strategies are related to the removal of barriers that hinder access to spaces in public use, buildings, transportation and other infrastructural facilities. Unfortunately, the current situation in terms of accessibility for this population is very far from satisfactory. Although Article 8 of the Law on the Prohibition of Discrimination of Persons with Disabilities strictly defines the prohibition of discrimination in the field of accessibility of services, buildings and infrastructure, the implementation of these rules is very weak in practice.

The availability of services and information, access to public goods, public transport and other services provided equally to all users is a crucial condition in protecting the rights of persons with disabilities. There are some examples of good practice when it comes to access to public buildings for people with disabilities. In March 2016, after an intensive public campaign lasting several years and conducted by the Association of Youth with Disabilities, the Parliament of Montenegro finally installed the first ramp for people with disabilities. Although there were doubts that the Law on Spatial Planning and Construction of Buildings, which was enacted in 2008 and which precisely defines this area, would ever come into effect, the installation of the ramp in the Parliament building paid this suspicion to rest. However, access ramps must be completed for the remaining 12 facilities involved in the Government project and it is already expected that this will be achieved.

On 5 March 2015, the Chamber of Commerce of Montenegro presented its draft Services Act.<sup>129</sup> The Law regulates the right to carry out economic activities and the freedom to provide services in Montenegro. The Law enters into force eight days after its publication in the *Official Gazette of Montenegro* and will apply from 1 January 2017, coinciding with

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<sup>129</sup> Draft on Services Act (Nacrt Zakona o uslugama).

the planned delayed implementation of certain provisions of the date of accession to the European Union (Article 8, paras. 2, 3 and 4; Article 9, paras. 2, 3, 4 and 5; Article 10; Article 13, paras. 1 and 2; Article 14, paras. 2, 3 and 4; Article 16, paras. 1, 2, 4, 5 and 6; Article 17; Article 18; Article 19; Article 20; Article 21; Article 22; Article 24; Article 25; Article 26, paras. 3 and 4; Article 27; Article 28; Article 29, paras. 1 and 4; Article 30; Article 31; Article 32; Article 33; Article 34; Article 35; Article 36; and Article 38, para. 1, point b and c).

The exceptions to the freedom to provide services are listed in Article 20. The list includes 1) services of general economic interest, including services in the postal sector, b) services in the fields of electricity, c) natural gas and d) water supply and wastewater management, and e) treatment of waste; 2) rules of procedure for seconded workers; 3) rules on personal data protection; 4) rules that lawyers facilitate the exercise of the freedom to provide services; 5) activities in relation to the judicial collection of debts through the courts; 6) rules on cross-border services 7) EU rules concerning the application of social security schemes to employed persons, entrepreneurs (self-employed) and members of their families moving within the EU; 8) administrative procedures relating to the free movement of persons and their residence; 9) rules on visas and residence of third-country nationals; 10) rules on the supervision and control of waste shipments; 11) intellectual property rights; 12) procedures which by law require the participation of a notary; 13) the rules of law, statutory audits of annual and consolidated financial statements; and 14) the registration of vehicles taken on lease in another EEA Member State.

#### 3.2.9.1 Distinction between goods and services available publicly or privately

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

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

In Montenegro national legislation includes housing as formulated in the Racial Equality Directive.

The 2008 Law on Spatial Planning and Construction of Buildings<sup>130</sup> introduced duties to: a) construct buildings for public use in a way that provides people with reduced mobility with unimpeded access and with facilities for moving around, spending time and working in them; b) construct residential and office buildings in a way that provides people with reduced mobility with unimpeded access and with facilities for moving around public spaces; c) construct residential and office buildings in a way that ensures simple adaptations to the building and at least one residential unit per 10 apartments with unimpeded access and with facilities for moving around, spending time and working in them for people with reduced mobility. In order to implement these provisions, the Ministry of Economic Development adopted a very elaborate Rulebook with more detailed criteria and ways of adapting buildings for access and movement for people with reduced mobility.

Article 9 of the Law on the Prohibition of Discrimination prohibits segregation on several grounds. Segregation shall also be considered as discrimination in the sense of Article 2 of this Law:

'Discrimination is any unjustified, legal or actual, direct or indirect distinction or unequal treatment, or failure to treat a person or a group of persons in comparison to other persons, as well as exclusion, restriction or preferential treatment of a person in comparison to other persons...'

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<sup>130</sup> Law on Spatial Planning and Construction of Buildings (*Zakon o prostornom planiranju i izgradnji*), Official Gazette of Montenegro, no. 51/08.

Segregation is any action, 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 paragraph 2 of Article 2 of this Law. Article 7 of the Law on the Prohibition of Discrimination defines extensively the concept of segregation and is in compliance with Article 3 of the Racial Equality Directive:

'Harassment of a person or group of persons on one or more grounds referred to in Article 2, paragraph 2, of this Law, when such behaviour has the purpose of or the consequence of which is the violation of personal dignity, or causes intimidation, feelings of humiliation or offensiveness or creates a hostile or degrading environment, shall be considered as discrimination in the sense of Article 2 of this Law.'

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

'The following groups, in particular, have priority in exercising their right to social housing, in accordance with this law: single parents, or guardians, persons with disabilities, persons over 67 years of age, young people who were children without parental care, families with children with disabilities, members of the Roma and Egyptians (RE population), IDPs, internally displaced persons from Kosovo residing in Montenegro, foreign nationals with permanent or temporary residence awarded the status of displaced person or IDP and victims of domestic violence.'<sup>131</sup>

#### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Montenegro there are no patterns of housing segregation and discrimination against the Roma. After the Kosovo conflict, the number of Roma in Montenegro increased significantly and they settled in suburban areas. Most of the settled domiciled Roma are living in private houses and are connected to the infrastructure. In contrast, most of the Roma IDPs 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 2008, followed by the Strategy 2012-2016, a number of measures in the area of housing have been implemented. Between 2008 and 2015 the following projects have been undertaken:

- 2008: 12 houses built for displaced Roma in Pljevlja;
- 2008-2012: construction of housing units for 45 displaced Roma families in Berane;
- 2014: seven apartments built for seven Roma families from the illegal settlement of Zvjerinjak.
- 2015: 62 apartments in five buildings were built and 48 Roma families have moved in.

Most of the Roma in Montenegro (over 1 400 of them) live in Konik Camp in Podgorica. They are mainly internally displaced persons from Kosovo who fled to Montenegro in 1999. The gradual closure of Konik Camp was identified as one of the key priorities in the European Commission's 2010 Opinion on Montenegro's application for EU membership. By the summer of 2015, the building of five residential buildings with approximately 10 flats of different sizes in each of them, all compliant with the relevant social housing standards, were to be completed. Around 120 additional apartments for internally displaced families are to be built on this site in the course of 2015/2016, within the framework of the Regional Housing Programme.

The issue of segregation within the above-mentioned 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

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<sup>131</sup> Montenegro, Law on Social Housing (*Zakon o socijalnom stanovanju*), *Official Gazette of Montenegro*, nos. 35/2013, 23 July 2013.

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, a huge number of Roma people still do not have adequate accommodation; many of them continue to live in unsanitary conditions, often without electricity and water (mainly in dilapidated barracks, located in places out of public view). In terms of employment, there has been no sign of progress in the Roma community, with rates of employment falling in recent years. Roma mostly work in the municipal sector, in communal services, collecting second-hand materials and performing hard physical labour. These are low-paying jobs which others tend to avoid, which further encourages prejudice. There are no Roma employed in local government bodies. According to data from the Employment Agency of Montenegro, Roma, in addition to people with disabilities, are among the two most vulnerable categories when it comes to employment. The principle of affirmative action is inconsistently applied in relation to Roma.



## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Montenegro national legislation provides for an exception for genuine and determining occupational requirements. Although inappropriately titled ('positive discrimination'), Article 9 of the Labour Law provides an exception for genuine and determining occupational requirements. Namely, pursuant to its paragraph 1, 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 state, that is, 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. The provision is drawn up in line with Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC. The Law on the Prohibition of Discrimination does not include a provision on genuine and determining occupational requirements. However, Article 1 of this Law says that provisions of other laws which deal with the prohibition of and protection from discrimination on specific grounds and in relation to the exercise of specific rights continue to apply unless they are in contravention of the provisions of this Law.

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

In Montenegro national law does not provide for an exception for employers with an ethos based on religion or belief. There are no explicit provisions permitting this exception. It is possible, however, that this exception could be covered by Article 9 of the Labour Law which provides an exception for genuine and determining occupational requirements, as described above under 4.1, but no relevant case-law is available. The Law on the Prohibition of Discrimination is silent on this issue.

In practice, individual statements by representatives of the Serbian Orthodox Church and some parliamentary parties against freedom of sexual orientation have been publicly disseminated. During the New Year 2016 celebration at the end of December 2015, according to the Julian calendar, a priest of Serbian Orthodox Church, Jovan Plamenac, in his statement spread hate speech against the LGBT community. NGO Queer Montenegro submitted a complaint to the Protector for Human Rights and Freedoms. According to the recommendation from the Protector, the priest is obliged within two weeks to publicly apologise to the LGBT community for the hate speech.

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

In Montenegro national legislation contains extensive provisions for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC). Under the Law on the Armed Forces of Montenegro, one of the general conditions for admission to the armed forces is that the candidate's state of health must allow them to perform military service (Article 33). According to Article 115 of this Law, military personnel must stop work in the armed forces if inability to work in accordance with the regulations on pension and disability insurance is determined. The individual's ability in health terms to serve in the military must be assessed by a special doctors' commission established separately for each case. There are no specific exceptions regarding discrimination in the armed forces and other specific occupations. In order to be admitted in the armed forces for the first time as a soldier, individuals must be under the age of 25 (Article 35, para. 4). The Law prescribes that, regarding the reception of candidates into the armed forces, proportional representation of minority nations and other

minority communities will be ensured, in accordance with the Constitution and the Law on Minority Rights and Freedoms.<sup>132</sup>

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Montenegro national law does not include exceptions relating to difference of treatment based on nationality. In Montenegro nationality (as citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law and cannot be understood as one of the 'other personal characteristics' referred to in the Law on the Prohibition of Discrimination, Article 2, para. 2. The Labour Law does not list Montenegrin nationality as a condition for employment, although some separate laws do. 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 16) 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. 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 Foreigners Law (Article 5). Both the Foreigners Law (applies to the entry, movement and residence of foreigners in Montenegro) and the Law on Employment and Work of Foreigners<sup>133</sup> define the term 'foreigner' as meaning a person who either has nationality of another country or is stateless.

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

Until December 2014, when the new Foreigners Law 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. The new law created the legal prerequisites for these groups to enjoy equal rights with nationals of Montenegro, excluding the right to vote.

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

##### **a) Benefits for married employees**

Montenegrin national law provides benefits to those employees who are married, as well as those who are parents (married or non-married), and this does not constitute unlawful discrimination. There is a possibility for employers to provide benefits to any employee on the basis of his/her productivity, effectiveness, results of work, and those benefits do not constitute indirect discrimination. However, private owners of companies are not monitored in the same way as companies in the ownership or co-ownership of the state or local government. Therefore situations of indirect discrimination do occur. Given that there is no legal possibility for the registration of same-sex marriages in Montenegro or for the adoption of children by same-sex couples, receipt of benefits for married couples and parents by these couples is not possible. However, the implementation of government LGBT policy is constantly growing and the legislation has recently been improved on this issue. In collaboration with the LGBT community, reputable international experts and the European Commission, a model for a registered partnership for same-sex unions has been prepared and promoted so it is expected that the Law on Registered Partnership will be

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<sup>132</sup> Proportional representation ensures minority groups a measure of representation proportionate to their percentage share of the population. Employment of minorities in public state and local institutions is ensured according to the rule of proportional representation.

<sup>133</sup> Montenegro, Foreigners Law (*Zakon o strancima*), *Official Gazette of Montenegro*, no. 56/14 and Montenegro, Law on Employment and Work of Foreigners (*Zakon o zaposljavanju i radu stranaca*), *Official Gazette of Montenegro*, nos. 22/08 and 32/11, respectively.

adopted soon. This Law has not been drafted yet, but there is pressure from the LGBT community for it to be prepared during 2016.

b) Benefits for employees with opposite-sex partners

In Montenegro it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. The Labour Law provides for positive discrimination in certain cases, also stating that the provisions of the law, collective agreements and work contracts relating to special protection and assistance for certain categories of employees, especially those concerning the protection of people with disabilities, women during pregnancy, maternity and special childcare, as well as provisions relating to special rights for parents, adoptive parents, guardians and foster parents, are not considered to be discrimination (Article 9). Female employees, employees under the age of 18 and employees with disabilities are entitled to special protection, in accordance with this law (Article 103).

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

Exceptions in relation to disability and health/safety

In Montenegro there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). Article 9, para. 2, of the Labour Law provides that provisions of the law, collective agreements and labour contracts regarding special protection and assistance for certain categories of employed people, and especially those regarding the protection of people with disabilities, women during pregnancy and maternity leave and leave from work in order to care for a child, are not to be considered discrimination. Under this law, the employer has a duty to assign employees with disabilities to posts which correspond to their work capacity and qualifications (Article 107).

The Law on Safety at Work<sup>134</sup> does not contain specific provisions relating either to disability and health and safety or exceptions in relation to other grounds. However, Article 32 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities establishes a duty of the employer to organise a special protective workshop (type of sheltered employment) for people with disabilities in cases where work is done under onerous conditions (such as under water, underground, in open spaces or at high altitudes).

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

##### **4.7.1 Direct discrimination**

In Montenegro national law does not provide an exception for direct discrimination on the ground of age.

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

Montenegrin national legislation does not provide exceptions regarding discrimination based on special conditions for young people, older workers and people with caring responsibilities.

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<sup>134</sup> Montenegro, The Law on Safety at Work (*Zakon o bezbjednosti na radu*) Official Gazette of Montenegro, no. 79/04.

### **4.7.3 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) and training. 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 requirement 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 but does not provide for any explicit exception (Article 13).

### **4.7.4 Retirement**

#### **a) State pension age**

In Montenegro there is a state pension age, at which individuals must begin to collect their state pensions. If an individual wishes to work longer, the pension cannot be deferred.

An individual can collect a pension and still work. An individual/beneficiary of the state pension may enter into a contract of employment for additional work, without limitation. However, under such a contract of employment, the pensioner receives only their salary and not the social protection insurance. The Law on Pension and Disability Insurance provides for the right but not duty to begin to collect old-age pensions. Under the provisions of this Law, men acquire this right when they reach the age of 65 and women when they reach 60.<sup>135</sup> In both cases they must have at least 15 years of pensionable service. In addition, at the age of 55 men can start collecting their pensions if they have 40 years of pension insurance, as can women if they have 35 years of pension insurance. The Law also provides for an interim period between 2004 and 2012 in which this right can be acquired under more favourable conditions. Under this arrangement in 2010 men acquire the right to an old-age pension at the age 63 and six months and women at the age of 58 and six months, provided that they have 16 years and six months of pensionable service.

In addition to these general rules, this Law also provides that people holding specific posts in the police and internal affairs, National Security Agency, defence, 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 in posts for which pensionable service is calculated at a higher rate. Earlier retirement at the age of 50 is also possible for other particularly onerous, dangerous and health-threatening occupations (for instance those which involve work under water or underground or in open spaces at high altitudes), for which pensionable service is also calculated at a higher rate (on the basis that each year of service counts as two years), if the person in question has spent at least 20 years in such posts. The 2008 amendments to the Law on Pension and Disability Insurance introduced a rule that people who receive an old-age pension can still work and continue to collect their pension.

#### **b) Occupational pension schemes**

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<sup>135</sup> The age of retirement for each employee is regulated according to the Law on Pension and Social Insurance which was in force at the time when these employees started work for the first time. Therefore, workers become eligible for the pension at 65 (men) and 60 (women), and some of them at 67 (men) and 65 (women).

In Montenegro, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wishes to work 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 contributions for retirement. 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 the force of law when the employee reaches 67 years of age (65 for women) and has a minimum of 15 years of pensionable service (the same requirements apply to men and women), unless the employer and the employee agree otherwise (Article 141). This provision can be deferred on the basis of an agreement between the two sides, but also leaves room for the employer to impose retirement at the age of 65/67. Article 142 of the same law provides that an employee with less than 15 years of pensionable service may continue to work beyond 65/67 years of age until such time as they meet the minimum years of service requirement. This article also provides that, based on a decision by the employer, teachers and university professors may continue to work until the end of the academic year and other employees may remain employed for a period necessary to finish specific work.

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.

Under the Labour Law, employment is terminated by force of law when the employee reaches 67 years of age (65 for women) and has a minimum of 15 years of pensionable service (unless the employer and the employee agree otherwise (Article 141). This provision can be deferred on the basis of an agreement between the two sides, but also leaves room for the employer to impose retirement at the age of 67, respectively 65.

e) Employment rights applicable to all workers irrespective of age

Article 7 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 law is not subject to CJEU case law. Since Montenegro has not yet become a member of the EU, its national law has not yet been fully harmonised with EU legislation and CJEU case law. At the moment, it can be said that the practice of national courts does not rely on CJEU case law and judges don't take CJEU case law into account during trials. Only international conventions and agreements signed and ratified by the Montenegrin Parliament have supremacy over national legislation. The case-law of international courts, including the case-law of the CJEU represents a part of national legislation but does not have such supremacy.

#### **4.7.5 Redundancy**

a) Age and seniority taken into account for redundancy selection

Under Article 93 of the Labour Law, employers are responsible for defining the criteria to be taken into account when selecting workers for redundancy. They are under a duty to cover this aspect as part of an overall programme for resolving redundancy issues, after having previously informed and sought an opinion from the trade union and the employment bureau. This programme must contain information on inter alia the age of the workers selected for redundancy. 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 (Article 93, para. 3).

b) Age taken into account for redundancy compensation

The employer is obliged to adopt a plan of measures to deal with proposed redundancies. The plan must include the number of workers to be made redundant, the qualification structure, the tasks they performed and their ages and number of years of service (Article 93, para. 2) Thus, age is taken into account during the adoption and implementation of the programme of redundancy compensation measures.

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

Neither the existing legislation nor the Law on the Prohibition of Discrimination provide explicitly for exceptions that seek to rely on Article 2(5).

#### **4.9 Any other exceptions**

There are no other exceptions in Montenegrin national law.

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

### **a) Scope for positive action measures**

The 2007 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 proportionate representation in public services, state authorities and local government bodies.

The Law on the Prohibition of Discrimination, Article 5 provides that:

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

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

Article 19 of the Law on Minority Rights and Freedoms provides that, for the purpose of ensuring the full exercise of minority rights, the University of Montenegro, upon a proposal from the minority council,<sup>136</sup> can enrol a certain number of students belonging to minorities at the beginning of each academic year, in accordance with the Statute of the University. When submitting their documentation for enrolment at the University, prospective students submit an application form in which they state their affiliation to a specific minority group.

According to the Law on Professional Rehabilitation and Employment of Persons with Disabilities (Article 25), in order to enable employment and labour, therapeutic activities under the habilitation and rehabilitation of persons with disabilities, especially those with severe disabilities who cannot be employed or maintain employment under general or specific conditions, special working centres for such people can be set up. Working centres can be established by local governments, the Employment Agency and the Centre for Social Work, as well as by legal entities and individuals. Working centre can employ people with disabilities who have a working capacity of 50% or under compared to people of the same age, qualifications and under the same conditions. Working 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. In addition, in order to ensure employment of people with disabilities, sheltered workshops can be established. Sheltered workshops can be set up as a form of business organisation, if they ensure employment for people with disabilities as a share of at least 51% of the total number of employees. Sheltered workshop may be established by local government, companies, entrepreneurs, the Employment Agency, a disability NGO, employers' associations, trade unions and other legal and natural persons. If sheltered workshops are founded by two or more founders, their mutual rights and obligations are provided for by special agreement.

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<sup>136</sup> The minority council is a representative body for minorities elected through indirect elections.

b) Main positive action measures in place on national level

In recent years a range of policy documents have been adopted by the Government of Montenegro with a view to achieving full and effective *de facto* equality for members of disadvantaged groups. These include the Action Plan for the Implementation of the Decade of Roma Inclusion 2005-2015 in the Republic of Montenegro (2005), the Strategy for Improving the Position of Roma and Egyptians in Montenegro 2012-2016, the Strategy on Minority Policy (2008) and the Strategy for the Integration of Persons with Disabilities 2012-2016. All of these documents promote the concept of positive action for the respective groups.

The Law on Professional Rehabilitation and Employment of Persons with Disabilities provides that people with disabilities can be employed under special requirements by special organisations (sheltered employment) if they are not able to find employment on the open labour market and under general conditions on the basis of their working and health capacity. Positive action measures are being taken in the area of professional rehabilitation for people with disabilities. On 15 December 2015, the Management Board of the Employment Agency adopted a decision on the allocation of a €2m grant to support 53 projects covering professional rehabilitation, active labour market policy and employment of people with disabilities. Within the partnership between the private, public and civil sectors, it is planned that activities for 311 people with disabilities will be implemented through the programme and 204 of the participants (65%) will be employed for a 3-12-month period, thus fully achieving the objectives of the call for proposals on the employment of people with disabilities.

According to the Law on Professional Rehabilitation and Employment of Persons with Disabilities, employers who do not hire people with disabilities must pay a special 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 contributions is 20% of the average monthly wage in Montenegro in the year preceding the payment of contributions. 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 contributions is 5% of the average monthly salary in Montenegro earned in the year preceding the payment of contributions. 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.

Pursuant to Article 38, para. 1, item 4, of the Law on Employment<sup>137</sup> and Exercising Rights with respect to Unemployment Insurance the Government of Montenegro, at its meeting of 26 January 2012, adopted a Decree on subsidies for the employment of certain categories of unemployed persons.<sup>138</sup> The Decree entered into force on 1 March 2012 and applied until 31 December 2014. In December 2014 the Government decided to extend the application of the Decree to 31 December 2015.

According to Article 4 of the Decree, the employer is released from contributions for:

- pension and disability insurance at a rate of 15%;
- health insurance at a rate of 8.5%; and
- unemployment insurance at a rate of 0.5%.

The vulnerable groups who are beneficiaries of the Decree are:

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<sup>137</sup> Montenegro, Law on Employment (*Zakon o zaposljavanju*), *Official Gazette*, no. 14/10.

<sup>138</sup> Montenegro, Decree on subsidies for the employment of certain categories of unemployed persons (*Uredba o subvencijama za zapošljavanje određenih kategorija nezaposlenih osoba*), *Official Gazette of Montenegro*, no. 11/2012, Article 7.



- people over the age of 40;
- unemployed Roma, Ashkali and Egyptians;
- people who have been on the records of the Employment Agency for more than five years;
- people employed in public works;
- people employed for an indefinite period of time after completion of an internship;
- people whose services are no longer needed (techno-economic surplus) and who are registered in the Employment Agency records;
- people who are employed for the purpose of performing seasonal jobs; and
- unemployed people with over 25 years of paid insurance, who are in receipt of unemployment benefits.

## **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 judicial and administrative procedures exist for enforcing the principle of equal treatment.

As described above, 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.

The Protector of Human Rights and Freedoms represents a national mechanism for protection against discrimination. Anybody who claims that their human rights or freedoms have been violated by means of an enactment, action or failure to act on the part of state authorities, local authorities, public services or other holders of public power (i.e. healthcare facilities, schools, higher education institutions, public enterprises, etc.) may address their concerns to the Protector of Human Rights and Freedoms. The Law on the Prohibition of Discrimination provides the Protector of Human Rights and Freedoms with powers consistent with the requirements of Directive 2000/43/EC. These powers include provision of assistance to victims, conducting surveys on discrimination and publishing reports and making recommendations for the elimination of discrimination (Articles 20 and 22).

When the Protector of Human Rights and Freedoms finds that a violation has occurred, it issues an opinion and makes a recommendation to the body concerned specifying what should 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 of Human Rights and Freedoms 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 of Human Rights and Freedoms, the Protector can either refer the matter to an immediately superior authority or address the Parliament of Montenegro or the public. The Protector of Human Rights and Freedoms cannot issue binding decisions or award compensation for human rights violations. The Protector can initiate administrative procedures regarding labour, consumer and school inspections at relevant institutions in order to investigate the reported case of discrimination.

Article 119 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 referred to in paragraph 3 of this article is submitted to the employee in writing, with an explanatory note and a note on the legal remedy.

Employees who are not satisfied with the decision or who have not received a decision within the set time limit are entitled to initiate proceedings before the competent court in

order to protect their rights, within 15 days of the date of the decision being issued.<sup>139</sup> 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 the tasks of labour inspection. Article 39 of the Law on Labour Inspection 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.

However, the Law on the Peaceful Resolution of Labour Disputes<sup>140</sup> offers procedures for the resolution of collective and individual labour disputes without going to court. Within the meaning of this Law, collective disputes are those which arise: a) during the process of concluding or amending collective agreements; b) in the case that specific provisions of a collective agreement are not equally applied to all employees; c) in relation to the exercise of the right to establish a trade union; and d) in the exercise of the right to strike. Individual labour disputes are those which arise in the exercise of the employee's employment-related rights. Peaceful resolution of these disputes is entirely voluntary and the procedure is carried out by mediators (who place themselves at the disposal of the parties with a view to securing an amicable settlement of the matter) and arbiters (who decide on the matter). The Agency for the Peaceful Resolution of Labour Disputes was recently established in accordance with this Law.

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 and Sports is competent to decide on appeals. A dissatisfied party may initiate an administrative dispute before the Administrative Court against a second instance decision.

Article 3 of the Law on Administrative Disputes<sup>141</sup> defines that the right to institute an administrative dispute belongs to any natural or legal person who believes that any of their rights or interests based on a law have been violated by an administrative or other act. A state authority, organisation, settlement (small community, village or similar), group of people or others who do not have the status of legal person, may institute an administrative dispute, if they are entitled to be holders of rights and obligations decided on in an administrative or other procedure. If the law has been violated by an administrative or other act to the advantage of a natural person, legal person or other party, an administrative dispute may be instituted by the state prosecutor or other competent body.

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<sup>139</sup> In Montenegro there are no special labour courts and discrimination cases are therefore dealt with by the civil courts.

<sup>140</sup> Montenegro, Law on the Peaceful Resolution of Labour Disputes (*Zakon o mirnom rješavanju radnih sporova*), *Official Gazette of Montenegro*, no. 16/07.

<sup>141</sup> Law on Administrative Disputes (*Zakon o upravnom sporu*), *Official Gazette of the Republic of Montenegro*, no. 60/03.

The Law on the Prohibition of Discrimination provides for the right to bring an action before the court to seek: a) the establishment of the fact that the respondent has acted discriminatorily towards the claimant; b) prohibition of executing the action that carries a potential threat of discrimination, i.e. prohibition of a repetition of the discriminatory action; c) compensation of damages; and d) in cases where the discrimination is perpetrated through the media, publication in the media of the judgment establishing discrimination, at the cost of the respondent (Article 23).

Anyone who believes they have been discriminated against may bring an action in civil proceedings, in which the court examines and decides on *inter alia* disputes arising from employment, property-related disputes and disputes arising from other civil-law relationships between natural and legal persons, unless any of these fall within the competence of another state body. These are, however, general proceedings and judgments made in these proceedings do not establish whether discrimination has occurred or not. At the moment, therefore, no specific civil claim exists against discrimination and compensation can be sought only for damages (material and non-material) but not for discrimination as such.

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. The right to file a report with the competent state prosecutor is provided for in Article 229 of the Criminal Procedure Code. If the report is filed with the court, the police authority or a state prosecutor lacking jurisdiction, they have a duty to accept it and must forward it immediately to the state prosecutor who does have jurisdiction.

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

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

The decision of the Constitutional Court is final and its adoption 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 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

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, paragraph 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.

c) Number of discrimination cases brought to justice

According to the 2015 report by the Protector of Human Rights and Freedoms, there were no court decisions on discrimination cases brought to justice in 2015.

d) Registration of discrimination cases by national courts

A registry of records of discrimination-related court cases has not yet been established. Although there are no exact data on the date of filing lawsuits to initiate civil proceedings in a discrimination case, according to the 2015 report of the Protector of Human Rights and Freedoms, there were no civil cases which were judged to be meritorious and were concluded, and in two cases the lawsuit was ultimately withdrawn.

According to the statistics submitted by the basic courts, during 2015 discrimination lawsuits were only filed with the basic courts in Podgorica, Herceg Novi, Niksic and Bar. The basic court in Podgorica recorded four lawsuits regarding discrimination. The basic court in Herceg Novi received two complaints and the basic courts in Bar and Niksic each dealt with one proceeding related to discrimination. Unfortunately, a registry of records of discrimination-related court cases has not yet been established, although a by-law regulating this area has been adopted. The statistical data used in this report were obtained directly from the courts. Based on the information received from the courts, it was only possible to consider the stage of the court proceedings as well as the jurisdiction of the court when it comes to the discrimination-related cases. More detailed information on case-law, the field and form of discrimination and ground of protection against discrimination is not available.

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

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

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) 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 dealing with the protection of human rights, with the consent of the person or the group of persons who have experienced discrimination (Article 22).

The Law on the Prohibition of Discrimination 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 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.

c) *Actio popularis*

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

There is a possibility for *actio popularis* before the national court (Constitutional court), since anybody can request an 'assessment of constitutionality and legality' and initiate proceedings for the protection of the public interest (Article 150, Constitution). Montenegro signed the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on 25 September 2012 in Geneva. 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.

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 persons or groups of persons concerned.

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

Article 29 of the Law on the Prohibition of Discrimination provides that 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. This rule does not apply to petty offences (which are dealt with by ministries and special petty offence authorities) and criminal proceedings. It does, however, apply to administrative proceedings (conducted by state and administrative authorities), administrative dispute proceedings (conducted before the Administrative Court in relation to the lawfulness of administrative and other acts) and to civil proceedings.

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

In Montenegro there are legal measures of protection against victimisation.

The Labour Law provides that no employee may suffer harmful consequences if they report or testify about harassment and sexual harassment at work and in relation to work (also prohibited under the Labour Law, Article 8, para. 4). 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. This would mean that people who e.g. 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.

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.

## **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**

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

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

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

Article 161 criminalises the infringement of freedom of confession of religion and performance of religious rites. The said 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 disturbs 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.

Sanctions are available in civil cases, including restitution, compensation of material damage and award of damages. Sanctions which can be imposed in administrative proceedings include fines and the performance of monetary and non-monetary obligations.

Sanctions which can be imposed on legal persons include fines and the dissolution of the legal person. Generally speaking, the fine depends on the damage caused or illegal material benefit acquired and cannot be smaller than twice the amount of damage caused or illegal material benefit acquired or larger 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.

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

#### b) Ceiling and amount of compensation

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



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

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

The Protector of Human Rights and Freedoms 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, para. 1, the law establishes the Protector as an institutional mechanism for protection against discrimination. Through the amendment of this law,<sup>142</sup> it should be noted that the concept of discrimination was extended and specific forms of discrimination such as sexual discrimination and hate speech, as well as the Institute of Racial Discrimination,<sup>143</sup> were enshrined in law. The Protector protects the following grounds of discrimination: 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, gender, 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 or other organisation as well as other personal characteristics.

The actions taken by inspection authorities in charge of implementing the decisions concerning protection against discrimination remain a matter of concern. In particular, there are difficulties in applying the standards of anti-discrimination at this stage of development to the legal framework and enforcing them. In 2011 the Government of Montenegro adopted a Decision on establishing a Council on the Prohibition of Discrimination as a national body for promoting non-discrimination and coordinating anti-discrimination activities at national level. The main tasks of the Council on the Prohibition of Discrimination are to:

1. Monitor and coordinate the activities of state bodies, state authorities and other competent institutions in the application of statutory mechanisms for protection against all forms of discrimination;
2. Analyse the current regulations in terms of their compliance with international standards on protection against all forms of discrimination and, if necessary, initiate amendments;
3. Analyse the implementation of administrative measures taken by the competent authorities in relation to the provision of protection against all forms of discrimination and the problems which arise in practice in the process of discrimination prevention, and propose measures for their elimination;
4. Propose and undertake appropriate measures to promote non-discrimination, as one of the basic and general principles of human rights;
5. Establish the necessary cooperation with national and international bodies and organisations dealing with the protection of human rights and freedoms;
6. Propose other measures relevant for the protection of human rights and freedoms.

The Protector of Human Rights and Freedoms acts independently as a national mechanism for individual protection against discrimination, while the Council on the Prohibition of Discrimination is a governmental, advisory body with the role of promoting and conducting anti-discrimination activities at national level. There is a governmental Fund for the Professional Rehabilitation and Employment of Persons with Disabilities, the role of which is to allocate financial resources to foster employment policy programmes for the

<sup>142</sup> Montenegro, Law on the Protector of Human Rights and Freedoms (*Zakon o Zastitniku/ci ljudskih prava i sloboda*), *Official Gazette of Montenegro*, nos. 41/03, 42/11 and 32/14.

<sup>143</sup> Montenegro, Law on the Protector of Human Rights and Freedoms (*Zakon o Zastitniku/ci ljudskih prava i sloboda*), *Official Gazette of Montenegro*, nos. 41/03, 42/11 and 32/14, Article 17.

participation of people with disabilities. In order to monitor the implementation of measures and activities to improve vocational rehabilitation and employment of people with disabilities, as well as the designated use of financial resources from the Fund, the Employment Agency formed the Fund Council. The funds are provided from: special contributions paid by employers; the national budget of Montenegro; the budget of the local authority in whose territory a person with disabilities is resident; donations and assistance from local and foreign legal entities and individuals; and other sources in accordance with the law.

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

According to the 2007 amendments to the Constitution, the Protector of Human Rights and Freedoms is elected as an independent body by the Montenegrin Parliament by a majority vote of all members of the Parliament. The Protector's term of office is six years and is renewable. Under the Law on the Protector of Human Rights and Freedoms, the Protector has at least one deputy and one of the deputies deals with protection against discrimination. The Parliament decides on the number of deputies by means of a special decision. At the moment, there are three deputies, who were also elected by majority vote of all members of the Parliament on the proposal of the Protector of Human Rights and Freedoms.

In relation to administrative capacity, five counsellors have been employed in 2015, and during 2016, additionally, four workers should be employed in the Protector's Office. According to the internal regulations, a total of 33 civil servants and public employees should be provided. In this way, provision has been made for continuity with regard to the obligations contained in the Action Plan for Chapter 23 - Judiciary and fundamental rights, in relation to the obligation to strengthen the human resources capacity of the Protector. The Protector's request in 2014 to the Ministry of Finance for the provision of additional workspace for the functioning of the Protector's office was fulfilled and the workspace in the Protector's office is fully utilised. The requirement has been met for the Protector, as the national mechanism for the prevention of torture, to have a physically separate workspace within the office. The Ministry of Finance released a total of EUR 531 457.54 for the Protector's work in 2015. The Protector's office did not spend the assigned amount because of the restricted administrative and operating capacity (fewer employees than was provided for by internal regulations). The funds used for the operation of the Protector's office in the reporting period amounted to EUR 463 000.99.

c) Grounds covered by the designated body/bodies

The Protector of Human Rights and Freedoms has a 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, gender, 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 or other organisation, as well as other personal characteristics. The Council on the Prohibition of Discrimination has a general mandate to deal with protection against discrimination, while the Council for the Prohibition of Discrimination against Persons with Disabilities has a mandate to deal with protection against discrimination on the ground of disability.

d) Competences of the designated body/bodies – and their independent exercise

As explained above, the key aspect of the work of the Protector of Human Rights and Freedoms involves dealing with complaints from victims of human rights violations and, to that end, the Protector of Human Rights and Freedoms is entitled to carry out independent enquiries. The Protector of Human Rights and Freedoms is authorised: 1. to provide information to complainants who believe they have been discriminated against by a public

authority, business entity, other legal person, entrepreneur or natural person about their rights and duties, as well as about the possibilities of court and other protection; 2. to keep separate records of complaints submitted with regard to discrimination; and 3. to collect and analyse data on cases of discrimination.

The Protector's power to deal with general issues that are important for the protection and promotion of human rights and freedoms could be interpreted to include the conducting of independent surveys on *inter alia* discrimination issues. However, there are no specific legal provisions that explicitly mandate the Protector to conduct independent surveys. 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, the Protector must submit an annual report to the Parliament by 31 March each year. The annual report must provide a general statistical overview of all cases dealt with, a general evaluation of the status of human rights and freedoms in Montenegro and the Protector's recommendations and suggested measures to remedy the observed failures. The annual report must be made available to the public. The Protector may submit a special report if it considers that such action is necessary for exceptionally important reasons. If it is decided to submit a special report, the Protector must also make it available to the public. In addition to this, the Law on the Prohibition of Discrimination provides for a duty of the Protector to dedicate a separate part of its annual report to discrimination issues and the promotion of equal treatment (Article 21). The Law also explicitly gives the Protector the right to submit a special report on discrimination issues. With regard to providing independent assistance to victims, the Protector's exercising of its competences in this area remains a matter of concern in practice.

e) Legal standing of the designated body/bodies

In Montenegro the designated body has legal standing to bring discrimination complaints on behalf of identified victim(s) and to take part as an intervener in legal civil, criminal and labour 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 an intervener 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 persons with the same personal characteristics.

f) Quasi-judicial competences

There are no quasi-judicial institutions for discrimination cases in Montenegro. The Law on the Prohibition of Discrimination does not provide for powers for the Protector of Human Rights and Freedoms to issue binding decisions or impose sanctions in discrimination cases. It does, however, vest this institution with the power to carry out conciliation procedures between the victim and the alleged discriminator. As out-of-court settlement can be concluded on the basis of the conciliation procedure, this power may be interpreted as quasi-judicial.

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

According to its 2015 report, the Protector of Human Rights and Freedoms received 83 complaints, which is 34.93% more compared to the previous year. All the cases for 2015 have been finalised. The primary grounds of discrimination observed in the processing of complaints during this reporting period were nationality, gender and minority group affiliation. The greatest number of complaints concerned ethnic and minority affiliation (15), gender (eight), bullying (eight), employment (six), disability (six), sexual orientation and gender identity (five), religion (four), gender-based violence (four), political

discrimination (four), citizenship (two), trade union membership (two), social status (two), marital status (two), health status (one), place of residence (one), alphabet and language (one), family reunification (right to privacy) (one), hate speech (one) and expressed opinion (one).

Of the total completed cases, in 13 the Protector found discrimination and issued a recommendation; in two cases the violations were corrected; in 30 cases the Protector found no violation of rights; in one case the Protector declared itself incompetent; in one case the Protector did not act because the complainant did not amend the complaint in due time; and in four cases the complainant withdrew the complaint. In 14 cases the complainants were referred to other legal remedies because the Protector considered that the elimination of violations would be effectively achieved by using other remedies. In six cases the Protector suspended the proceedings because the complainant did not cooperate appropriately and in the other six cases the procedure was cancelled because of the initiation of court proceedings.

In the reporting period there was no court procedure on protection against discrimination which was completed, while two cases ended with the withdrawal of the lawsuit.

## 8 IMPLEMENTATION ISSUES

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

*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 the judicial and other 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.

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

The Government cooperates with NGOs in the development of the policy framework on equal opportunities, while joint commissions monitor their implementation. The development of new anti-discrimination legislation has been accompanied by an ongoing dialogue with NGOs. In addition, the Government provides some funding for NGO projects promoting the principle of equal treatment.

*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).<sup>144</sup> 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 membership. However, the trade unions' work on anti-discrimination is very limited at present. Trade unions represent only their members, who must pay a trade union membership fee in order to be able to exercise their trade union rights. Together with the Government, trade unions and employers' organisations are social partners who negotiate employment-related issues and sign collective agreements.

In December 2006, the three social partners signed Tripartite Agreements and a year later the Law on Social Councils<sup>145</sup> was adopted. The main task of the Social Councils is to serve as a forum for discussion and joint initiatives relating to various aspects of economic and social policy. A Social Council, comprising 11 representatives of each social partner, was established at the national level and in almost all municipalities. 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

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<sup>144</sup> 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.

<sup>145</sup> Montenegro, Law on Social Councils (*Zakon o Socijalnom savjetu*), *Official Gazette of Montenegro*, nos. 16/07 and 20/11.

discrimination. Their capacities must be strengthened and appropriate strategies and programmes put in place.

#### *Addressing the situation of Roma and Travellers*

Within the Ministry for Human and Minority Rights there is a Directorate for Minority Rights. Within this Directorate there is a special department dedicated to issues affecting Roma, Ashkali and Egyptians. As a governmental body, this department is competent to give advisory support and implement anti-discriminatory policies concerning the social inclusion of Roma.

### **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

#### **a) Mechanisms**

Anti-discrimination provisions form part of a series of laws governing various aspects of social life. Generally speaking, all the enforcement mechanisms are very rarely used in practice. Victims are reluctant to pursue the 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.

The Employment Agency implements measures on improving the employability of marginalised groups in accordance with anti-discriminatory legislation: the Law on the Professional Rehabilitation and Employment of Persons with Disabilities, the Decree on subsidies for the employment of certain categories of unemployed persons, as well as other, short-term measures. These measures are not sufficient to ensure viable employment for members of hard-to-employ groups.

#### **b) Rules contrary to the principle of equality**

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, and rules governing the independent professions and workers' and employers' organisations.

## 9 COORDINATION AT NATIONAL LEVEL

Several ministries are responsible for coordinating and dealing with anti-discrimination and equal opportunities, including the Ministry for Human and Minority Rights, the Ministry of Labour and Social Welfare, the Ministry of Education, the Ministry of Health and the Ministry of Culture. The original portfolio of the Ministry for Human and Minority Rights was minority rights, with responsibility for dealing with human rights issues which do not fall under the competence of any other ministry being vested in it in 2006. As a result, this Ministry primarily deals with the protection of the rights of minorities and the promotion of inter-ethnic tolerance. Its tasks also include improving the position of Roma, as well as gender equality. In this context, two independent departments - the Department for Gender Equality and the Department for the Improvement and Protection of Roma and Egyptian Population Rights - have been established within the Ministry. This ministry also coordinates the development of anti-discrimination legislation.

The Ministry of Labour and Social Welfare is responsible for the protection of people with disabilities, elderly people and child protection, as well as for the areas of employment, social and child protection. The other ministries mentioned above generally have responsibilities in relation to areas of social life, rather than grounds of discrimination. Each ministry is the policy maker and coordinator of intersectional cooperation in respect of the specific discrimination issues which fall within its remit. There seem to be no contradictions among the ministries with regard to decisions or political lines.

In 2011 the Government of Montenegro adopted a Decision on establishing a Council on the Prohibition of Discrimination as a national body for promoting non-discrimination and coordinating anti-discrimination activities at national level. Its main tasks are to:

- Monitor and coordinate the activities of state bodies, state authorities and other competent institutions in the application of statutory mechanisms for protection against all forms of discrimination;
- Analyse the current regulations in terms of their compliance with international standards on protection against all forms of discrimination and, if necessary, initiate amendments;
- Analyse the implementation of administrative measures taken by the competent authorities in relation to the provision of protection against all forms of discrimination and the problems which arise in practice in the process of discrimination prevention, and propose measures for their elimination;
- Propose and undertake appropriate measures to promote non-discrimination, as one of the basic and general principles of human rights;
- Establish the necessary cooperation with national and international bodies and organisations dealing with the protection of human rights and freedoms;
- Propose other measures relevant for the protection of human rights and freedoms.

The Council consists of the president, secretary and 11 members. The President of the Council is the Prime Minister of Montenegro. Members of the Council are: 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 who act 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.<sup>146</sup>

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<sup>146</sup> 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 Government has developed a range of strategies and policies promoting social inclusion and equality, including the Strategy for the Integration of Persons with Disabilities (2012–2016), the Strategy on Minority Policy (2012–2016), the Strategy for Improving the Position of Roma and Egyptians in Montenegro (2012–2016), the Strategy for Improving Quality of Life for LGBT Persons (2013–2018) and the National Action Plan for the Implementation of the Decade of Roma Inclusion 2005–2015 in Montenegro.

The Strategy for the Integration of Persons with Disabilities contains a wide range of interventions to promote the social inclusion of this highly disadvantaged group. Developed as the result of a partnership between Government institutions and the NGO sector, the Strategy covers the areas of healthcare, social security and pensions and disability insurance, education, professional training and employment, accessibility, culture, sport and recreation, as well as the position of disability organisations within civil society. Action plans for the implementation of the Strategy are adopted every two years and a Working Group, comprising representatives from all relevant ministries, state institutions and national NGOs which deal with the rights of people with disabilities, has been tasked with monitoring the implementation.

The main intention behind the adoption of the new Law on the Prohibition of Discrimination of Persons with Disabilities was to make this law comply with the UN Convention on the Rights of Persons with Disabilities. The Law prescribes that 'failure to implement measures to adapt the workplace and ensure working conditions in accordance with special regulations as well as in accordance with the laws regulating the area of labour and professional rehabilitation and employment of persons with disabilities' represents an act of discrimination against those persons. On the other hand, penalties for failure by employers to implement measures and provide workplace adaptations for people with disabilities have not been provided for by this Law.

Professional rehabilitation and employment of people with disabilities is regulated by the Law on Professional Rehabilitation and Employment of Persons with Disabilities. This Act regulates the procedures for people with disabilities to exercise their rights in this respect, measures and incentives for their employment, financing and other related issues of importance. Professional rehabilitation, in terms of this law, includes the following measures and activities: 1) Career information, counselling and evaluation of professional opportunities; 2) implementation of procedures and methods for determining working abilities and skills; 3) psychosocial and motivational support to direct people to appropriate rehabilitation programmes; 4) the implementation of training programmes for people with disabilities, equipping them for certain occupations and for entering the labour market and maintaining employment; 5) adapting the workplace for people with disabilities; 6) technical assistance and monitoring of people with disabilities in order for them to effectively participate in the work environment, maintain their employment and make progress at work; 7) analysis of the labour market, employment opportunities and inclusion in the working environment of people with disabilities; 8) evaluation of the implementation, development and improvement of professional rehabilitation; 9) vocational training, additional training, retraining and programmes for maintaining and improving working and social skills and abilities in order to prepare people with disabilities for employment; 10) information and advice on the application of different technologies and techniques in learning and work; 11) information and support on sources of funding; and 12) technical assistance, support, monitoring and evaluation of the effectiveness of employment for people with disabilities.

The Strategy on Minority Policy focuses on the integration of ethnic minorities into society and the protection of their linguistic, ethnic and religious identity. It covers a range of areas, including education, culture, language, information and political participation.

The Strategy for Improving the Position of Roma and Egyptians in Montenegro 2012-2016 emphasises the goal of reducing the long-endured discrimination and inequality experienced by the Roma and Egyptian population. A commission on the implementation of the Strategy was set up to monitor the activities carried out within the framework of this document, but it held only a few meetings.

The implementation of the Strategy for Improving Quality of Life for LGBT Persons (2013-2018) has not been satisfactorily realised. LGBT organisations emphasise that all the reasons for the weak coordination and monitoring of the Strategy must be eliminated and a new model of coordination and monitoring must be set up which would consider individual agreements with the LGBT community as well as with all relevant state institutions charged with LGBT inclusion.

The development and implementation of the above-mentioned policy documents were not 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.<sup>147</sup> Access to legal aid, provided both by the state and by NGOs, is very limited at present. Montenegro is only now developing legislation on free legal aid.

The above-mentioned Government strategies are very ambitious 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.

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<sup>147</sup> Some limited ad hoc training opportunities are organised with the assistance of international donors.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives (if any)**

Montenegrin legislation is partially aligned with the *acquis* in the field of social policy and employment. Work on the legislation is currently underway in this area in terms of alignment with the *acquis*. Determined action is required to make progress in legislative harmonisation and to do something about the critical situation in the labour market. Efforts must be stepped up to reduce poverty and to improve the inclusion of the Roma and Egyptian population, people with disabilities and other vulnerable groups. The proper functioning and transparency of social dialogue must be ensured.

Generally speaking, legislation covering areas outside employment contains only declarations on the prohibition of discrimination and lacks effective provisions.

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 and access to housing are not covered by the anti-discrimination provisions in national laws.

The test to justify genuine occupational requirements is less rigorous than in the directives, as proportionality is not required.

There is no general duty to provide reasonable accommodation in line with Articles 2.2.b and 5 of the Employment Equality Directive. Employers are obliged to take measures in this context only in relation to people with disabilities who are already employed.

The duties of dissemination of information and social dialogue on equal treatment are not included in the existing proposed legislation.

Relations between the state and the church, including in the field of education and financing church schools from public resources, have not been regulated,

The provisions on the 'silence of the administration' (Article 129 of the Administrative Procedures Act), must be amended in order to enforce effective protection before the courts. However, there is no peremptory norm for how to proceed in a situation when the first instance public law body remains 'silent', and does not resolve this administrative matter in due course. This should therefore be considered as justification for another peremptory norm which would oblige the appellate body to resolve this administrative matter.

### **11.2 Other issues of concern**

Low employment rate among marginalised groups

According to Monstat data (Monthly Statistical Review no. 5/2015), there were 35 712 people looking for work in Montenegro, of whom most belong to vulnerable groups (people with disabilities, Roma, women over 45, people who have been unemployed for over five years, young people etc.) which experience short or long-term difficulties in finding employment, including 10 524 first-time job seekers, 6 185 unqualified unemployed people, 17 025 women and 2 405 unqualified women. In addition, the National Strategy on Employment and Human Resources 2012-2015 states that, according to data from 2010, the average rate of youth unemployment is higher than that for other groups (19.7 %), while long-term unemployment is very high (58.9%, according to data from the Employment Agency). The Government's 2014 Action Plan for the development of human resources and employment states that the biggest problem for the job market in Montenegro is the low employment rate. This is extremely significant, bearing in mind that

these data do not change fast and that it takes years of high GDP and a corresponding increase in employment in order to achieve sustainable progress.

#### Non-existent legal framework for social entrepreneurship

Montenegrin legislation doesn't 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, however, 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. 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 it is not economically viable.

#### Weak implementation of active measures for the employment of people with disabilities

Employers prefer to pay the prescribed amounts to the Fund for the Professional Rehabilitation and Employment of Persons with Disabilities instead of hiring people 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. Certain budget funds should be used in a more transparent way in order to improve the situation of people with disabilities seeking employment.

In addition, the new Law on the Prohibition of Discrimination of Persons with Disabilities recently adopted 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 governmental 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. NGOs participating in the working group are not satisfied with how this analysis has been adopted and consider that the process was not 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,<sup>148</sup> 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 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.

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<sup>148</sup> Agency for Local Development Niksic (2014), *Study: Perspectives for the implementation of a social economy model in Montenegro (Perspektive za primjenu modela socijalne ekonomije)*, available at: [www.aldnk.me/images/Studija\\_Perspektive\\_za\\_primjenu\\_modela\\_socijalne\\_ekonomije\\_u\\_Cmoj\\_Gori.pdf](http://www.aldnk.me/images/Studija_Perspektive_za_primjenu_modela_socijalne_ekonomije_u_Cmoj_Gori.pdf).

## 12 LATEST DEVELOPMENTS IN 2015

### 12.1 Legislative amendments

- Adoption of the new Law on the Prohibition of Discrimination of Persons with Disabilities in June 2015, which is harmonised with the UN Convention on the Rights of Persons with Disabilities.

### 12.2 Case law

**Name of the court:** High Court Podgorica

**Date of decision:** April 2015

**Name of the parties:** SM against SM, BV and NR

**Reference number:** *Podgorica*

**Address of the webpage:** *N/a*

**Brief summary:** During the early hours of 10 April 2015, SM, LGBT activist and executive director of NGO LGBT Forum Progress, was attacked in the Good Fellas cafe in the centre of Podgorica, while in the company of AM, a student from Podgorica. Following a night out, they were harassed by a group of young men who evoked feelings of fear and embarrassment in SM and AM. The young men brazenly insulted the feelings of SM and AM by touching their genitals, simulating masturbation and aggressive intimidation. The case was reported to the police and criminal proceedings were initiated against the young men. The High Court in Podgorica confirmed the judgment of the Basic Court in which SM, BV and NR, all from Podgorica, were condemned to three and a half months in prison for the criminal offence of 'endangering the safety' (in accordance with the Criminal Law, Article 168, para. 2) of SM, Executive Director of the NGO LGBT Forum Progress.

There are no significant trends and patterns in cases brought by Roma and Travellers in 2015.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Montenegro

**Date:** 31 December 2015

<b>Title of legislation (including amending legislation)</b>	<b>of</b>	Law on the Prohibition of Discrimination, Official Gazette of Montenegro 46/10 and 18/14 Abbreviation: LPD Date of adoption:06.08.2010 Entry into force: 13.08.2010 Latest amendments: 11.04.2014 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, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in 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 or creation of a specialised body.
<b>Title of legislation (including amending legislation)</b>	<b>of</b>	Title of the law: Criminal Code, Official Gazette of Montenegro no. 40 /2008, 25/2010, 32/2011, 40/2013 and 56/2013. Abbreviation: CC Date of adoption:17.12.2003 Entry into force:03.01.2004 Latest amendments: 30.07.2013 Grounds protected: race, colour, gender, sex, religion, descent, national or ethnic affiliation
		Criminal Code
		Material scope: Scope of application is not limited to the specific fields. However, Criminal Code Article 443 para. 4, prescribes that person who commits the offence from Article 443, para. 1-3 by misusing his/her position will be sentenced by prison. (1-8 years). This offence can be committed in any of relevant areas (education, employment, social service...)
		Principal content: prohibition of all forms of discrimination
<b>Title of legislation (including amending legislation)</b>	<b>of</b>	Title of the law: Labour Law, Official Gazette of Montenegro nos. 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14 Abbreviation: LL Date of adoption:29.07.2008 Entry into force:06.08.2008 Latest amendments:16.07.2014 Grounds protected: sex, birth, language, race, religion, colour, age, pregnancy, health condition or disability, nationality, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, property, membership in political and trade union organizations or any other personal characteristic.
		Civil law

		Material scope: employment
		Principal content: prohibition of discrimination in the field of employment
<b>Title of legislation (including amending legislation)</b>	<b>of</b>	<p>Title of the law: Law on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette, no. 49/08, 73/10, 39/11</p> <p>Abbreviation: LSW</p> <p>Date of adoption: 29.07.2008</p> <p>Entry into force: 23.08.2008</p> <p>Latest amendments: 04.08.2011</p> <p>Grounds protected: employment, persons with disabilities, age</p>
		Civil law
		Material scope: protection of persons with disabilities in the field of employment
		Principal content: prohibition of discrimination of persons with disabilities
<b>Title of legislation (including amending legislation)</b>	<b>of</b>	<p>Title of the law: Law on Minority Rights and Freedoms, Official Gazette of Montenegro 31/06, 51/06 and 38/07, 02/11 and 08/11.</p> <p>Abbreviation: LMRF</p> <p>Date of adoption: 10.05.2006</p> <p>Entry into force: 20.05.2006</p> <p>Latest amendments:</p> <p>Grounds protected: minority and ethnic groups' rights</p>
		Civil law
		Material scope: minority rights protection
		Principal content: prohibition of discrimination of minority groups
<b>Title of legislation (including amending legislation)</b>	<b>of</b>	<p>Title of the law: Law on Prohibition of Discrimination of Persons with Disabilities, Official Gazette of Montenegro 35/15, 44/15.</p> <p>Abbreviation: LPDPD</p> <p>Date of adoption: 26 June 2015</p> <p>Entry into force: 15 July 2015</p> <p>Latest amendments: 15 August 2015</p> <p>Grounds protected: long-term physical, mental, intellectual or sensory disability.</p> <p>Material scope: it applies to all fields protected by the Law on Prohibition of Discrimination (education, labour, provision of goods and service).</p>
		Civil law
		Material scope: education, labour, goods and service delivery
		Principal content: prohibition of discrimination of persons with disabilities

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Montenegro

**Date:** 31 December 2015

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations / reservations relevant to equality and non-discrimination<sup>149</sup></b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals? <sup>150</sup></b>
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 <sup>151</sup>	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	23.10.2006	23.10.2006	No	Yes	Yes

<sup>149</sup> The 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, Montenegrin Constitution).

<sup>150</sup> Anyone, whose right was violated by individual legal act that is not in compliance with Constitution and ratified international treaties according to the opinion of Constitutional Court, can request amendment of that act and initiate the procedure before the Constitutional Court, after exhausting all remedies. (Law on Constitutional Court, Article 47, "Official Gazette of Montenegro, no. 64/2008, 46/2013 i 51/2013).

<sup>151</sup> Prohibition of derogation with regard to 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 Montenegrin Constitution.



<b>Instrumen t</b>	<b>Date of signature (if not signed please indicate) Dd/mm/ yyyy</b>	<b>Date of ratificatio n (if not ratified please indicate) Dd/mm/ yyyy</b>	<b>Derogations / reservations relevant to equality and non- discriminatio n<sup>149</sup></b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals? <sup>150</sup></b>
of All Forms of Racial Discrimina- tion					
Convention on the Elimination of Discrimina- tion Against Women	23.10.2006	23.10.2006	No	Yes	Yes
ILO Convention No. 111 on Discriminati on	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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