PROHIBITION OF EMPLOYMENT DISCRIMINATION IN MONTENEGRO IN THE LIGHT OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

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"Support to the National Institutions in Preventing Discrimination in Montenegro" (PREDIM)

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The Council of Europe is the continent's leading human rights organization. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of Rights oversees the implementation of the Convention in the member states.

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INTRODUCTION

The prohibition of discrimination in the area of employment is protected by many international treaties, conventions and other legal instruments, among them: Council of Europe (CoE) law, in particular the European Convention on Human Rights; and EU law, more specifically the Charter of Fundamental Rights and the Employment Equality Directive (2000/78/EC). The European Social Charter is also an important treaty, even if it is not a subject of this comparative study, as it covers the right to work and just conditions of work, the right to social security, the right to fair remuneration etc.

Discrimination in the area of employment is based on different grounds: race or ethnic origin, sex or pregnancy, sexual orientation, religion or belief, disability, or age.

This comparative study focuses on European Court of Human Rights (ECHR) and Court of Justice of the European Union (CJEU) case law and it aims to determine the principles established by this case law and which should be implemented in Montenegrin legislation and practice in order to comply with international human rights standards.

PART I - PROHIBITION OF EMPLOYMENT DISCRIMINATION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights was signed on 4 November 1950 in Rome. In the framework of this Convention, the European Court of Human Rights and the European Commission of Human Rights were established. Since 1 November 1988, the European Court of Human Rights has been an international permanent court. If a State recognizes a right to lodge an individual complaint, the Court is competent in dealing with individual complaints, which raise allegations of human rights violations, including allegations of discriminatory treatment in conjunction with other substantive right protected by the Convention. Article 14 of the Convention requires:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Protocol 12, adopted in 2000, establishes general prohibition of discrimination:

1. "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

I Access to work free from discrimination

The European Convention on Human Rights does not explicitly guarantee the right to work. However, the case law of the European Court of Human Rights protects different aspects of this right. The right to seek or access employment is protected by article 8 of the Convention. Unfair dismissal can be challenged under article 6 and 8 of the Convention. Articles 8, 9 and 14 of the Convention protect against discrimination in the area of access and right to employment across all protected grounds. The concept of access to employment was explicitly determined by the Court of Justice of the European Union (*Meyers v. Adjudication Officer*, Case C-116/94, 13 July 1995): "not only the conditions obtaining before an employment relationships comes into being', but also all those influencing factors that need to be considered before the individual makes a decision of whether or not to accept a job offer".

Examples:
- In *Thlimmenos v. Greece* (*no. 34369/97*), the applicant was not appointed to a post as a chartered accountant because of his criminal records. In fact, he had previously been sentenced and imprisoned for insubordination for having refused to wear a military uniform in the period of general mobilisation. The conviction for refusal to wear the uniform caused by religious or philosophical reasons, unlikely to have resulted in convictions for other criminal offences, could not imply dishonesty or moral turpitude that would undermine the offender's ability to exercise this profession. The applicant was treated in a similar way to persons convicted for other reasons without any objective and reasonable justification. Therefore, the Court found that the sanction was disproportionate and did not pursue a legitimate aim, and resulted in a breach of Article 14 in conjunction with Article 9 of the Convention.

- In *Naidin v. Romania* (*no. 38162/07*), refusal of employment in the public service because of collaboration with the political police under the

communist regime was justified by loyalty required from civil servants to democratic regimes. This requirement constitutes a legitimate aim of the State, which should be based on constitutional principles. For this reason, the European Court of Human Rights found no violation of Article 14 in conjunction with Article 8 of the Convention.

- In *Sidabras and Džiautas v. Lithuania* (*nos. 55480/00 and 59330/00*), there were two applicants – former KGB agents – who complained of being dismissed from their positions as tax inspectors, because of their previous occupation and banned from finding employment in the private sector from 1999 to 2009. The European Court of Human Rights found that despite the fact that the ban had a legitimate aim, it constituted a disproportionate measure for the applicants. The Court found a violation of Article 14 taken in conjunction with Article 8 of the Convention.

- In *Sidabras and Others v. Lithuania* (*nos. 50421/08 and 56213/08*), among three applicants who complained in this case, the first two did not prove their allegations. The third applicant – a former KGB agent – complained that Lithuania did not repeal the legislation on the ban on employment in the private sector for former KGB agents despite a judgment of the European Court of Human Rights in his favour in 2004 and 2005. He referred to the refusal of his reinstatement to employment in a telecommunications company because the KGB Act was still in force. The Court found a violation of Article 14 taken in conjunction with Article 8 of the Convention as regards the third applicant.

- In *Emel Boyraz v. Turkey* (*no. 61960/08*), the applicant – a woman, was dismissed after three years' public service for not being a man and not having completed military service. The Court found that the fact that the security officers had had to work on night shifts and in rural areas and had had to use firearms and physical force under certain conditions had not in itself justified any difference in treatment between men and women. Taking into account that it was not proven that the applicant was unable to assume such duties or

responsibilities, the Court found that the domestic decision amounted to sex discrimination and therefore it resulted in a violation of Article 14 in conjunction with Article 8 of the Convention.

- In *I.B. v. Greece* (*no. 552/10*), the courts had upheld the decision of dismissal because the person is HIV positive, and had based their decision on clearly inaccurate information, namely the contagious nature of the illness. The European Court of Human Rights found that the authorities had not struck a fair balance and that there was a violation of Article 14 in conjunction with Article 8 of the Convention.

II The right to manifest religious beliefs at work

The exercise of the right to manifest religious beliefs can result in many problems. Public authorities impose restrictions on public institutions and private persons who wish to manifest their religious beliefs. Conflicts arise from wearing religious symbols in the workplace, which requires discipline and can have an impact on the exercising of professional duties.

The authorities should protect freedom of religion and, more particularly, the right to practise this religion (prayers and religious feasts). The eventual restrictions of freedom of religion, including the right to wear religious symbols, should always be proportional, and broader inference is justified in the case of public sector employees.

The European Convention on Human Rights does not guarantee the right to hold a public post and even less so to manifest religious beliefs during public service or for example a mandate by a judge, teacher or soldier.

Example:
The European Court of Human Rights dealt with the right to wear religious symbols in the workplace *(Eweida and Others v. the United Kingdom, nos.*

48420/10, 59842/10, 51671/10, 36516/10). The first applicant, Ms Eweida, was an air company employee, and the second applicant, Ms Chaplin, was a nurse. Both applicants were restricted from wearing Christian crosses around their necks during their working hours.

In respect of Ms Eweida, the Court had to strike a fair balance between the applicant's desire to manifest her religious beliefs and the employer's wish to project a certain corporate image. Even if there was a legitimate aim pursued by the authorities, who upheld the company's decision on the ban of wearing the religious symbol, it was not proportionate and resulted in a violation of Article 9 of the Convention.

As regards the second applicant, Ms Chaplin, the Court found that there was a fair balance between her freedom to manifest her religious beliefs and the protection of health and safety on a hospital word. Therefore, the Court considered that clinical safety constituted a legitimate aim and the inference in the applicant's rights to wear the religious symbol, which had resulted in the ban, had been proportionate. A consequence, the Court found no violation of Article 9, taken alone or in conjunction with Article 14 of the Convention.

Finally, the Court also examined the complaint of two more applicants, Ms Ladele, an officer at the national registry of births and Ms McFarlane, a relationship counsellor. Their employers dismissed both applicants, because, during their public service, they had promoted their catholic values, which do not condone homosexuality. The national authorities struck a fair balance between the applicants' right to manifest their religious beliefs and the employer's policy of non-discrimination against service-users. In conclusion, the Court found no violation of Article 14, taken in conjunction with Article 9 in the case of Ms Ladele and no violation of Article 9, taken alone or in conjunction with Article 14 of the Convention as regards Ms McFarlane.

III The right to a pension free from discrimination

Many cases concern the prejudice suffered by people who are victims of discriminatory treatment in the area of pensions and social benefits.

The issue of discrimination in the context of social pension payments was raised in the case of *Gaygusuz v. Austria (17371/90).* In this case, the complainant did not receive the emergency unemployment pension because of his foreign nationality. The Court found this to be in violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention.

The entitlement to a pension cannot itself be made dependent on the applicant's place of residence, resulting in a situation in which the applicant, having worked for many years in his own country and having contributed to the pension scheme there, had been deprived of it altogether, on the sole ground that he was no longer living in his own country, *Pichkur v. Ukraine (no. 10441/06)* and *Carson and others v. United Kingdom (no. 42184/05).*

Examples:
- In *Stummer v. Austria* (*no. 37452/02*), the Court examined the right of the applicant, who worked at a prison, to contribute to a general pension scheme. According to the applicant, this lack of affiliation was discriminatory and deprived the applicant of the right to a pension. The affiliation of the prisoners to the pension scheme is within the margin of appreciation of the State. There was no violation of Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention.

- In *Fábián v. Hungary* (*no. 78117/13*), the Grand Chamber recently agreed to examine some aspects of the right to a pension under Article 14 and Article 1 of Protocol No. 1 to the Convention, in particular the suspension of the right to an old-age pension and the difference in the amount of this pension awarded in the framework of private and public service employment.

PART II – PROHIBITION OF EMPLYOMENT DISCRIMINATION IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Human rights were first enshrined in EU Law under the Maastricht Treaty, which was signed on 7 February 1992, and entered into force on 1 November 1993. The following dispositions of the Maastricht Treaty cover human rights:

- "Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law…" (Preamble)
- Article 130u (…) "2. Community Policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."
- Article J.1 (…) "2. The Objectives of the common foreign and security policy shall be: to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."
- Article K.2 "1. The matters referred to in Article K.1 (for example judicial cooperation, asylum and immigration policy etc.) shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds."

The Treaty of Amsterdam amended the founding treaties on the European Union. In December 2000, the Member States of the European Union (EU) proclaimed the EU Charter of Fundamental Rights. Although the Charter is

not a binding document, it covers human rights, explicitly non-discrimination provisions in Article 21 (1): "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

Finally, Article 10 of the Treaty on the European Union and the Treaty on the Functioning of the European Union (2012/C, 326/01) states that: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

In 2000, the EU Member States adopted two directives, which they were obligated to incorporate into the national law. The first one is the Employment Equality Framework Directive (2000/78) which establishes a general framework for equal treatment in employment and occupation. It protects everybody from discrimination on grounds of age, disability, sexual orientation and religion or belief in the workplace.

The second directive is a Racial Equality Directive (2000/43) which prohibits discrimination in the workplace on grounds of racial or ethnic origin, as well as in other areas of life such as education, social security and access to goods and services.

In the context of employment, the main areas of discrimination are race or ethnic origin, sex or pregnancy, sexual orientation, religion or belief, disability (physical or mental, including HIV status), and age.

I Employment discrimination based on race or ethnic origin

In many cases, ethnic minorities have a lower education level, a higher level of unemployment and poorer living conditions than other people in society. In many cases, ethnic minorities are unaware that they have a right not to be subject to discrimination.

Article 21 of the Charter of Fundamental Rights of the European Union and the Racial Equality Directive (2000/43/EC) protect against discrimination in the European Union based on racial or ethnic origin.

Equality bodies have been created in almost every European Union State, and they have often been given even more power than is required under European Union law: to hear victims and to issue decisions, e.g. in Austria, Denmark, Hungary and the Netherlands; to conduct investigations if there is suspicion of discrimination, e.g. in France and Sweden; to bring cases to court on behalf of the victims, e.g. Belgium, Hungary and Ireland.

The lack of statistics is an important problem for solving the problems and making progress in the field of racial or ethnic discrimination (Available at: http://fra.europa.eu/sites/default/files/fra_uploads/1915-FRA_Factsheet _RED_EN.pdf, visited 14 October 2016).

In a Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV (C-54/07),* the Court clarified the principle of prohibition of discrimination based on racial or ethnic origin because it is established by Directive 2004/43/EC. In this case, the director of a company was looking to recruit fitters, but he indicated that he did not wish to employ immigrants. He claimed later that his clients did not wish to give housing to immigrants. The Court pointed out that the fact that an employer publicly chose not to recruit employees of a certain ethnic or racial origin constituted in itself direct discrimination in respect of recruitment. The

Court found that the sanctions for non-respect of the principle of discrimination have to be effective, proportionate and dissuasive. These sanctions should benefit from an adequate level of publicity, take a form of injunction ordering the employer to cease the violation, and a fine or a payment of damages to a person who had suffered from discrimination.

European Union Equality Directives (2000/43/EC and 2000/78/EC) are applicable to employers, employees and self-employed persons. They provide entitlement to equal pay for work of equal value, and prohibit discrimination on all grounds, including race and origin (nationals or foreigners legally residing in the country). In conclusion, the above-mentioned Directives prohibit providing lower salaries to immigrants than to nationals for similar work (the so called: "pay gap").

On 3 July 2013, in the case of the *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden (no. 85/2012)*, the European Committee of Social Rights determined the existence of a pay gap concerning foreign workers legally employed in Sweden, who earned less than the average of Swedish employees.

The "pay gap" concerning foreign workers posted from one State (Poland) to another (Finland) was clarified by the Court of Justice of the European Union in the judgment *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna* (*C-396/13*) delivered on 12 February 2015. Directive 96/71/EC of the European Parliament and of the Council on posting of workers in the framework of the provision of services provides that, as regards minimum rates of pay, the terms and conditions of employment guaranteed to posted workers are to be defined by the law of the host Member State and/or, in the construction industry, by collective agreements which have been declared universally applicable in the host Member State.

On 15 May 2014, the European Parliament and the Council adopted the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

II Employment discrimination based on sex or pregnancy

Sex discrimination in employment is an unjustified difference of treatment, which results in unfavourable treatment in the area of employment because of the sex the person. This unequal treatment concerns: hiring, firing, pay, job assignment, promotions, layoff, training, fringe benefits and other terms of employment.

Sex discrimination in employment is closely linked with pregnancy discrimination, which results in unfavourable treatment of women because of pregnancy, childbirth or medical conditions related to pregnancy or childbirth.

Examples:
- In a judgment of 8 April 1976, *Defrenne II* (*Case 43/75*), the Court recognised direct effect of the principle of equal pay for men and women established in Article 119 of the EEC Treaty, and it covers the actions of public authorities as well as all agreements which regulate paid labour collectively.

- In a judgment of 13 May 1986, *Bilka* (*Case 170/84*), the Court found that part-time employees excluded from an occupational pension scheme were indirectly discriminated against in the light of former Article 119, because this exclusion concerned a greater number of women than men. At the same time, there was no objectively justified factor unrelated to gender discrimination for this exclusion.

- In a judgment of 17 May 1990, *Barber* (*Case 262/88*), the Court decided the principle of equal treatment applied to all forms of occupational pension which should be considered as pay in the meaning of Article 119: "it is contrary to that provision to impose an age condition which differs according to sex for the purposes of entitlement to a pension under a private occupational scheme which operates in part as a substitute for the statutory scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme".

- In a judgment of 11 November 1997, *Marschall (Case C-409/95),* the Court found that there must be a priority given to the promotion of female candidates in cases where there were fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability on the condition that the advantage is not automatic and that male candidates are not excluded *a priori* from applying.

- On 10 November 2010, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of *Dita Danosa v LKB Lizings SIA* (*C-232/09*). After having been dismissed by the general meeting of shareholders, the former sole member of the board of directors of a public limited company argued in court that, due to her pregnancy, the dismissal was illegal in the light of EU secondary law. The Court found that: "Even if the Board Member concerned is not a 'pregnant worker' within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a Board of Directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and (7) and Article 3(1)(c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002."

- In a judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres* (*C-236/09*), the Court of Justice ruled that the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals in order to respect the principle of equal treatment between men and women in the field of insurance, contained in Directive 2004/113/EC.

The European Union Equality Directives (76/207/EEE and 2000/78/EC) applying to employers, employees and self-employed persons, providing the entitlement to equal pay for work of equal value, and prohibiting discrimination on any ground, include also gender as such a protected ground. The European Commission defines a pay gender gap as the average difference between men's and women's aggregate hourly earnings. This pay gender gap still exists in European countries. It was at stake in the case examined by the Court of Justice of the European Union *Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage (C-270/97 and C-271/97)* and the European Committee of Social Rights *University of Women of Europe (UWE) v. 15 States (no. 124-138/2016).*

III Employment discrimination based on sexual orientation

Sexual orientation refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender" (available at http://www.yogyakartaprinciples.org/principles_en.htm visited on 14 October 2016).

Refusal of employment or exclusion from applying for a job when this exclusion is not related to the requirements for the vacant position, but based on sexual orientation, is considered as discrimination based on sexual orientation in the area of employment.

Examples:
- In the judgment of 17 February 1998, *Lisa Jacqueline Grant v. South-West Trains Ltd.* (*Case C-249/96*), the Court examined the principle of equal treatment of men and women and the legality of a refusal of travel concessions to cohabitees of the same sex.

According to the Court's interpretation of the Article 119 of the Treaty or Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, there is no discrimination if an employer refuses to allow travel concessions to a person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to a person of the opposite sex with whom a worker has a stable relationship outside marriage. Firstly, the granting of the right to travel concessions of same-sex and different-sex partners is not directly based on sex, as the female partner and male partner of the worker in a same-sex relationship are treated in the same way. Secondly, European law does not require that the legislators treat a same-sex relationship in the same way as a marriage or a different-sex relationship outside of marriage.

- In a judgment of 31 May 2001, *D and Kingdom of Sweden v. Council of the European Union* (*C-122/99 P and C-125/99 P*), the Court examined the right to equal treatment with regards to the household allowance of a spouse and same-sex partner in a registered partnership.

The Court commented that the principle of equal treatment applies only to persons in comparable situations. Beyond that, the Court noted that there is no consensus within the Council of Europe Member States as regards

recognition of partnerships between persons of the same sex or of the opposite sex. The lack of uniform legislation or of legislative consensus in Europe, and the absence of any general assimilation of marriage and other forms of statutory union in the case of a same-sex partner, does not allow for the consideration of a situation in which a person in a registered partnership can be considered comparable to a situation in which a married person is covered by a staff regulation.

- In a judgment of 14 October 2010, *W v. European Commission* (*Case F-86/09*), a civil service tribunal examined the right to the extension of entitlement to household allowance to officials registered as stable, non-marital partners, including those of the same sex. This right should not be theoretical or illusory, but practical and effective.

The Preamble to Regulation No. 723/2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities establishes that this regulation should be implemented in compliance with: Article 19(1) TFEU and Article 21(1) of the Charter of Fundamental Rights of the European Union. Article 19(1) TFEU states the obligation to develop a staff policy ensuring equal opportunities for all, regardless of their sexual orientation and marital status enshrines the principle of non-discrimination. Article 21(1) of the Charter of Fundamental Rights of the European Union provides for the prohibition of any discrimination based on sexual orientation.

Furthermore, the right to respect for family and private life of the officials registered as stable, non-marital partners, including those of the same sex, as recognised in Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights should be protected and free from discrimination based on sexual orientation.

The right to the extension of entitlement to household allowance to officials registered as stable, non-marital partners, including those of the same sex

becomes theoretical or illusory if it depends on an obligation to marry, but access to a legal marriage in a Member State is not practical and effective. It was the case in W. v European Commission, because of nationality of the defendants, not living in the State of which they are nationals, and who would be criminally sentenced for an eventual same-sex marriage by this State.

- In a judgment of 1 April 2008, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (Case C-267/06)*, the Court (GC), examined the principle of equal treatment in employment and occupation as regards survivors' benefits under a compulsory occupational pension scheme. The concept of 'pay' and, because they were same-sex partners, the refusal to pay out on the pension scheme because the persons concerned were not married, is what they considered as discrimination based on sexual orientation (Directive 2000/78/EC).

The Directive applies to the deriving from employment retirement pensions, which are classified as 'pay', because the survivors' pensions concern only particular categories of workers and, moreover, their amounts are dependent on the period of the workers' memberships and how much they have paid in contributions. In a case in which marriage is restricted to different-sex couples, and life partnership to same-sex couples, restriction only to surviving spouses of the entitlement to a survivor's pension is considered as direct discrimination on grounds of sexual orientation and whether the situation of the partners is comparable with that of the spouses.
In the case of *Parris v. Trinity College Dublin and others (C-443/15)*, the Advocate General's Opinion delivered her opinion to the Court of Justice of the European Union on 30 June 2016 in relation to the case regarding the refusal of same-sex partners' survivor's pension in case of partnership contacted before the 60th birthday of the affiliated person. The case is still pending.

- In a judgment of 10 May 2011, *Jürgen Römer v. Freie und Hansestadt Hamburg* (*Case C-147/08*), the Court (GC) examined the principle of treatment in employment and occupation free from discrimination based on sexual orientation, and an occupational pension scheme in the form of a supplementary retirement pension for former employees of a local authority and their survivors, as well as the method of calculating that pension which favoured married recipients over those living in a registered life partnership.

Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 establishes a general framework for equal treatment in employment and occupation.

If marriage is reserved for persons of different gender and exists alongside a registered life partnership for persons of the same gender, pensioners who have entered into registered life partnerships and receive supplementary retirement pensions lower than that granted to a married, not permanently separated, pensioners, will be considered as directly discriminated against on grounds of sexual orientation if, under national law, a life partner is in a legal and factual situation comparable to that of a married person as regards pensions.

- In a judgment of 12 December 2013, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (*Case C-267/12*), the Court examined the principle of equal treatment in which a collective agreement that restricted a benefit with respect to pay and working conditions to employees who had married, excluded partners who had entered into a civil solidarity pact. It concluded that there had been discrimination based on sexual orientation (Directive 2000/78/EC).

A homosexual person without accessible and effective right to marry in his/her country of residence, because the national rules permit only same-sex civil partnerships, can be considered as in a comparable situation to those of a married spouse. If it is the case, in the light of Article 2(2)(a) of Directive

2000/78 establishing a general framework for equal treatment in employment and occupation, a same-sex partner should therefore obtain the same benefits – such as special leave days and a salary bonus – as those granted to employees on the occasion of their marriage.

Only measures restricting this right (Article 2(5) of the Directive), and strictly interpreted, must be necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

- A judgment of 25 April 2013, *Asociația Acceptv Consiliul Național pentru Combaterea Discriminării* (*Case C-81/12*), concerned equal treatment in employment and occupation free from discrimination on grounds of sexual orientation as regards the recruitment of a footballer presented as being homosexual.

Article 17 of Directive 2000/78 establishing a general framework for equal treatment in occupation and employment must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

IV Employment discrimination based on religion or belief

The protection guaranteed under EU law is more limited than freedom of conscience, religion and beliefs protected under the ECHR. A description of religion or belief has not been defined extensively by the ECHR or the CJEU. It stays 'personal and subjective' and does not need to relate to any institution. One of the most important aspects of the freedom of religion is the right to manifest someone's beliefs in the workplace: "In contemporary Europe people often wish to exercise, share, or display their faith at the workplace, so it is perhaps unsurprising that this is an area where the manifestation of religion or belief frequently generates controversy" (Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights" p. 434). The eventual restrictions of this right have to respect the principle of proportionality.

Examples:
- In *Prais v. Council* (*Case 130/75*), the Court of Justice of the European Union acknowledged for the first time that the right to non-discrimination on religious grounds is a fundamental right to be protected by the law in the European Union.

- In *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* (*Case C-157/15*), Advocate General Kokott submitted her opinion of 31 May 2016, which states: "1) The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive. 2) Such

discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard. In that connection, the following factors in particular must be taken into account: the size and conspicuousness of the religious symbol, the nature of the employee's activity, the context in which she has to perform that activity, and the national identity of the Member State concerned."

- In *Asma Bougnaoui Association de défense des droits de l'homme (ADDH) v. Micropole SA*, the Advocate General Sharpston, submitted an opinion on 31 July 2016 in which she concluded as follows: "I therefore propose that, in answer to the question referred, the Court should reply to the Cour de Cassation (Court of Cassation, France) as follows: (1) A rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is a fortiori the case when the rule in question applies to the wearing of the Islamic headscarf alone. (2) Where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim."

V Employment discrimination based on disability

The European Convention on Human Rights and the Equality Employment Directive do not determine the term of disability. However, since 2006 the EU has been a party to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) and according to article 1 of this Convention: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". The unjustified difference of treatment of persons with disabilities in the area of employment is considered as employment discrimination based on disability and is prohibited by EU and CoE human rights instruments and case law.

Examples:
- On 11 July 2006, in the first case relating to disability provisions of the Employment Equality Directive, *Chacón Navas* (C-13/05), the Court found that sickness could not be considered as discrimination. Therefore, a person dismissed for reasons of sickness does not have protection on grounds of having a disability. The Court referred to the definition of disability in the United Nations Convention on the Rights of Persons with Disabilities, which was signed and is applied by the European Union. In the light of this Convention, the term of disability has to be interpreted globally in an autonomous and uniform manner. These findings were confirmed in a judgment in two cases of 11 April 2013, *Jette Ring* (C-335/11) and *Werge* (C-337/11). In these two cases, the Court also found that reduced working hours may be an appropriate accommodation for disabled employees in order that they can continue to work.

- In the case of *Jette Ring* (C-335/11), the Court further examined the notion of disability. It looked into the notion of incurable and temporary illness and a reduction in functional capacity, which does not require any auxiliary aid and examined in which circumstances they can amount to disability in the

understanding of the UN Convention on the Rights of Persons with Disabilities.

- A judgment of 17 July 2008, *Coleman v. Attridge Law* (C-303/06) concerned a legal secretary employed in a law firm who was made redundant after giving birth to her son who is disabled. The Court found that the words "on grounds of disability" also referred to discrimination and harassment by association. It means that the Directive 2000/78/EC protects a person treated unfavourably on the basis of another person's protected characteristic, which, in this case, is disability.

- In a judgment of 18 December 2014, *Fag og Arbejde* (FOA) (C-354/13), the Court determined that obesity does not in itself constitute a disability according to Directive 2000/78. However, obesity can result in long-term physical, mental or psychological impairments, which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. Only if this condition is fulfilled according to the national court, discrimination based on obesity can be considered as disability discrimination in the light of the United Nations Convention on the Rights of Persons with Disabilities signed by the European Union.

- In a judgment of 18 March 2014, *Z* (C-363/12), the Court found that a female employee who, due to her biological situation was unable to bear a foetus and thus commissioned other women to give birth to her children, is not considered as being in a similar situation to that of a pregnant female who is going to give birth. Therefore, she cannot be considered as having been less favourably treated on grounds of sex or disability than other pregnant female employees enjoying their rights with relation to adoption or maternity leave. The health of a woman who is unable to bear a foetus and thus commissions other women to give birth to her children does not exclude or restrict that woman from professional life.

Therefore, the Court stated that gender equality Directive 2006/43/EC does not prohibit discrimination of female employees from enjoying their rights with relation to adoption or maternity leave, and who have arranged surrogate motherhood by commissioning other women. The concept of disability should be interpreted in the light of the UN Convention on the Rights of Persons with Disabilities and the Court case law in this field.

VI Employment discrimination based on age

Age is not an explicitly protected ground under the ECHR, but in accordance with ECHR interpretation, it is protected among "other grounds" by Article 14. In EU law, the age of a person is considered as a discriminatory ground in the Directive 2000/78/EC and it was an issue of many judgments of the Court of Justice of the European Union. The Court of Justice of the European Union clearly indicated in judgments *Mangold v. Helm (C-144/04), Félix Palacios de la Villa v. Cortefiel Servicios SA (Case C-411/05)* and *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform (C-388/07)* that age is one of the prohibited grounds of discrimination.

The Court delivered eight significant judgments in the field of age discrimination. It is a considerably high number, because of the lack of legislation and national case law, which resulted in many questions referred by legal professionals to the Luxemburg Court.

The Court further confirmed in *Mangold v. Helm (C-144/04), Kücükdeveci v. Swedex GmbH & Co KG (C-555/07)* and *Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (C-427/06)* that age is a part of the general principle of equal treatment. The above-mentioned *Mangold* judgment is particularly important because it recognised that the principle of equal treatment should apply to all other protected discrimination grounds.

It results from *Bartsch* and *Kücükdeveci* that the national courts should disregard national legislation, which does not conform to this directive. The directive also has the horizontal application between private parties as it was recognized as one of the fundamental principles of EU law.

In the case of *Wolf v. Staat Frankfurt am Main (C-229/08),* the Court of Justice of the European Union explained the rules of interpretation of the term of "genuine occupational requirement exception" mentioned in Article 4 of the Directive 2000/78. Wolf applied for an "intermediate career" post in the Frankfurt fire service essentially a post as a professional fire-fighter on the ground. Their duties involved fighting fires, rescuing people, environmental protection tasks, helping animals and dealing with dangerous animals, as well as maintaining and controlling protective equipment and vehicles. The application to become a fire-fighter was refused because the applicant was over 30 years' old (he was 31). The Court stated that: "Member states may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate." Finally, the Court concluded that: "Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years."

In judgments *Palacios de la Villa (C 411/05)* and *Age Concern (C 388-07),* the CJEU ruled on the applicability of the directive 2000/78/EC to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.

In the case of *Hütter v. Technische Universität Graz (C-88/08),* the Court examined a complaint of a contractual public servant who had completed a period of apprenticeship as a laboratory technician. However, the experience he had acquired before he had reached 18 years old was not taken into account in his grading. A difference in treatment between two persons who had pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages established a difference in treatment directly based on the criterion of age, within the meaning of article 2 of the Directive. An aim could be considered legitimate within the meaning of the Directive, and thus appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, if it constituted a social policy objective, for example relating to employment policy, the labour market or vocational training. The age-related rule in the national legislation had no direct relationship with the legitimate aims invoked by the Member State to justify the differential treatment. Therefore, the legislation on the exclusion of professional experience acquired before the age of 18 constituted age discrimination which can't legitimately be justified and which is therefore contrary to Community law.

In the case of *Petersen v. Berufungsausschuss für Zähn für den Bezirk Westfalen-Lippe (C 341/08),* the Court of Justice of the European Union held that a maximum age limit of 68 for dentists to work in the German health service is potentially legitimate. The German Government argued before the CJEU that the age limit should be allowed under art. 2(5) of the Employment Framework Directive, which provides an exemption for national laws that are necessary for the protection of public health. The CJEU identified ensuring the competence of dentists and maintaining the financial stability of the system as legitimate aims. In relation to ensuring the competence of dentists, the rule could not be proportionate because it applied only to dentists working in the public sector and excluded those in the private sector. However, in relation to maintaining the financial stability of the system, the use of the age limit could be proportionate because it is a means of limiting the increasing number of dentists working within the German National

Health Service. It would be a matter for the German court to decide which of these aims were being pursued.

PART III - NATIONAL RULES AND EXPERIENCE AS REGARDS PROHIBITION OF EMPLOYMENT DISCRIMINATION IN MONTENEGRO

I Montenegrin employment discrimination legislation and national Ombudsperson competencies in this area

The European Convention on Human Rights has been binding since the ratification of the Convention by Montenegro in 2004. The European Social Charter has had legal force and effect since its entry into force in Montenegro in 2010. Since 29 June 2012, Montenegro has been negotiating its accession into the European Union; it is therefore obligated to implement the legal rules of the organisation in order to become a Member State.

According to Article 9 of the Constitution of 19 October 2007, ratified international legal instruments form an integral part of the Montenegrin internal legal system and they have supremacy over national legislation in the case of a difference in regulating relations.

The Ombudsperson institution, the so-called Protector of human rights and liberties of Montenegro, was established in Article 81 of the Constitution of 19 October 2007. The competencies of the Protector are further detailed in the Law on the Protector of Human Rights and Freedoms passed on 10 July 2003.

The Law on the prohibition of discrimination was adopted on 27 July 2010, and amended in April 2014 (Law on the prohibition of discrimination was adopted on 27 July 2010, available at http://www.legislationline.org/topics/

country/57/topic/84 visited 14 October 2016). According to this Law, the Protector of Human Rights and Freedoms of Montenegro is competent to act on complaints relating to discriminatory treatment committed by an authority, business entity, entrepreneur, natural or legal person, and can undertake measures and actions to eliminate discrimination and protect the rights of a discriminated person, if the court proceedings have not been initiated. The protector is further charged with providing advice to the complainant in this field; conciliating between parties; alerting the public about the appearances of severe discrimination; collecting data and keeping records of cases of discrimination and, finally, promoting equality and submitting reports to the Parliament of Montenegro on the activities conducted regarding protection from discrimination and promotion of equality.

For cases involving discrimination, the Ombudsperson analyses whether or not there is indeed evidence of discrimination. If there is *a priori* appearance of discrimination concerning more than one person, the Ombudsperson gets involved or initiates court proceedings with the consent of the complainants. The following groups are the most concerned by discrimination: persons with disabilities, women, LGBT persons as well as Roma and other minorities. The Ombudsperson has intervened successfully in many cases.

Discrimination may also result from the actions of public institutions. The Ombudsperson receives his legal personality from the State. In this situation he cannot initiate judicial proceedings against the national authorities, he can only get involved in it. In the past two years, the Ombudsperson has been involved in four such cases.

The Ombudsperson takes a case in charge *ex officio* or following a complaint by anyone who believes that his/her rights and freedoms have been violated (Article 28 of the Law). In the case of violations of the rights of a child, his/her parents, guardians or legal representatives may file the complaint (Article 30 of the Law).

The Ombudsperson refers complainants to the relevant institutions and provides legal advice. The Ombudsperson does not follow the cases of those persons referred to other institutions, as s/he does not have such jurisdiction. Point 2 of Article 21 of the Law on prohibition of discrimination forms the legal basis for the Ombudsperson to provide information to the complainant about his/her rights and duties, as well as about possibilities of court and other protection. It should be noted that the Ombudsperson's obligation to provide legal advice is not established by the Law on the Protector of Human Rights and Freedoms, and should be limited to cases involving discrimination.

According to Article 18 of the Law, the Protector may initiate the adoption of laws, other regulations and general acts for the purpose of harmonization with internationally recognized standards in the area of human rights and freedoms. The relevant authority shall be obliged to make a statement about this initiative. If he deems it necessary for the protection and promotion of human rights and freedoms, the Protector can recommend a legal proposal, other regulation or general act.

The Ombudsperson may initiate a proceeding before the Constitutional Court for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and laws (Article 19 of the Law).

II Montenegrin disability discrimination case law and practice

Montenegro is in the process of implementation of the European Convention on Human Rights. In Montenegro, discriminatory treatment in the area of employment involves LGBT people and the Roma community. Among many examples, there are for example dismissals of employees with

use of strong homophobic insults by the employers, which were reported by the NGO, Juventas.

Many cases pending before the civil courts concern gender discrimination and are connected with mobbing (for example workplace bullying). The Ombudsperson recently dealt with two gender discrimination cases. One of them concerned an old woman in poor health deprived of labour rights and harassed.

The people with disabilities are victims of discriminatory treatment in the area of employment in Montenegro. The Association of Youth with Disabilities in Montenegro initiated a set of three proceedings on discrimination of disabled persons deprived of right to education and employment due to the lack of access to public institutions (health centres, schools). The proceedings were lodged against the Montenegrin Parliament, Hypo Alpe Adria Bank Headquarters and the Montenegrin Directorate of Youth and Sport. On 5 June 2014, the High Court in Podgorica upheld the judgment of the basic court on behalf of the defendants. It ordered measures to be taken to prevent a repetition of discrimination in the future and it awarded €1,500 of non-pecuniary damages. The complaint was lodged to the Supreme Court in order to lodge a later complaint to the European Court of Human Rights.

In the case of Ms Marijana Mugosa, the defendant was a blind lawyer in the support service of the municipal Parliament, who was deprived of access to her workplace when she came, as usual, with her guide dog. At that time, national legislation allowed the use of guide dogs; therefore the lawyer lodged a complaint against the Mayor of Podgorica. In February 2012, the High Court of Montenegro upheld the judgment of the basic court and ordered the right of access to official premises in the workplace for the blind lawyer.

In the case of D.T., the complainant was lodged by a citizen of the Republic of Serbia, who had married a citizen of Montenegro who was employed

under a life-long working contract in Montenegro. D.T. was granted a one-year family reunification residency permit and applied for health insurance, which was refused because her residency permit was temporary and not permanent. Simultaneously, she applied for the status of an unemployed person in the Employment Agency of Montenegro. However, she received a response that the status of an unemployed person can be awarded only after obtaining a permanent residency permit. Since the Health Insurance Act provided the right to be insured, D.T. complained to the Ombudsperson Office. The Ombudsperson concluded that the new amendments to the Law on Health Insurance, which entered into force on 1 February 2016, stipulate that some of the family members might be insured, but only those who are citizens of Montenegro or hold the status of foreigners with a permanent residency permit. It is contrary to the previous provision, which permitted all spouses who were entitled to get health insurance on the basis of family reunification. Also, the Health Insurance Act stipulates that the status of the insured person may acquire those who are family members under the condition that they are not otherwise insured and that they are permanently residing or being granted that right through a permanent residency permit in Montenegro.

CONCLUSIONS

The rights related to employment are broadly protected by the European Convention on Human Rights, but the specific guarantees are established in Article 14 of the Convention and its Protocol No. 12. Among the EU legal instruments, Article 19 of the European Community Treaty, Article 21(1) of the EU Charter of Fundamental Rights and the Employment Equality Framework Directive 2000/78 and Racial Equality Directive 2000/43 specifically serve employment rights' protection.

In the context of employment, the main areas of discrimination are race or ethnic origin, sex or pregnancy, sexual orientation, religion or belief, disability (physical or mental, including HIV status), and age.

The analysed case law of the European Court of Human Rights has a direct and deep impact on the national legal reality. If the European Court of Human Rights finds a violation of the right protected by the Convention, the judgment is implemented by a legislative amendment (general measures) or by modification of the case law, for example by reopening the proceedings (individual measures).

The Court of Justice of the European Union (CJEU) delivers its interpretation of the law only within the limits of the provisions of European Union treaties and the general principles of EU law. This has a very strong impact on the application of national legislation, but it does not change its shape or content.

There are three main employment areas concerned by the case law of the European Court of Human Rights (ECHR) including: access to work (*Emel Boyraz v. Turkey*), the right to manifest religious beliefs at work (*Eweida and Others v. the United Kingdom*) and the right to a pension (*Stummer v. Austria*).

The Court of Justice of the European Union examined many cases involving employment and social rights discrimination as regards: LGBT people (*W. v. European Commission Case*); women (*Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage);* disabled persons (*Coleman v. Attridge Law*); race or origin (*Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*); religion (*Prais v. Council*) and age (*Mangold v. Helm*).

The European Convention on Human Rights (2004) and the European Social Charter (2010) are binding for Montenegro. Montenegro must implement EU rules in order to become a Member of the European Union. According to the Law on the prohibition of discrimination (2010), the Protector of Human Rights and Freedoms of Montenegro is competent to act on complaints relating to discriminatory treatment and to get involved in or to initiate the court proceedings, initiate adoption of laws, and proceed before the Constitutional Court for the assessment of conformity of laws with the Constitution. In Montenegro, according to antidiscrimination groups, the most concerning are: persons with disabilities, women, LGBT persons as well as Roma and other minorities.

For example, concerning disabled persons, there are cases of disabled persons being deprived of the right to education and employment owing to the lack of access to public institutions or of blind persons deprived of access to the workplace. Most of the cases pending before the civil courts concerning gender discrimination are connected with mobbing (for example workplace bullying). There are also issues as regards the right to be insured in the case of foreigners with residency permits in Montenegro.

The gap between established legislation in accordance with human rights standards and legal practice and case law still exists as regards employment discrimination. There is a problem of statistics and reporting of the breaches of the rights of the above-mentioned vulnerable groups. The national authorities have to follow closely the case law, and implement the standards established by the European Court of Human Rights.