



**REPORT ON MEASURES TO COMBAT DISCRIMINATION  
Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT 2012**

**POLAND**

**ŁUKASZ BOJARSKI<sup>1</sup>**

**State of affairs up to 1 January 2013**

This report has been drafted for the **European Network of Legal Experts in the Non-discrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

Human European Consultancy  
Maliestraat 7  
3581 SH Utrecht  
Netherlands  
Tel +31 30 634 14 22  
Fax +31 30 635 21 39  
[office@humanconsultancy.com](mailto:office@humanconsultancy.com)  
[www.humanconsultancy.com](http://www.humanconsultancy.com)

Migration Policy Group  
Rue Belliard 205, Box 1  
1040 Brussels  
Belgium  
Tel +32 2 230 5930  
Fax +32 2 280 0925  
[info@migpolgroup.com](mailto:info@migpolgroup.com)  
[www.migpolgroup.com](http://www.migpolgroup.com)

All reports are available on the website of the European network of legal experts in the non-discrimination field:

<http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>

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<sup>1</sup>In 2007, the 2006 report was written by Monika Mazur-Rafał and Magdalena Pająk.



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## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.*

Law-making power in Poland is centralised. The basic law is the 1997 Constitution. Other sources of universally binding law include: acts/statutes of Parliament (*ustawy*), ratified international agreements that after ratification become part of domestic law,<sup>2</sup> as well as ordinances/regulations (*rozporządzenia*) issued by a Minister or the Council of Ministers. Legislative power is exercised jointly by the Sejm and the Senate, the two chambers of Parliament. Legislative initiative, in most cases, is exercised by the Government, which addresses Parliament with draft acts (deputies, the Senate, the President and groups of at least 100,000 citizens are also eligible to propose legislation). In order for a piece of legislation to be adopted, both chambers must consent and the President – who is empowered to employ the veto right (which may be rejected in Parliament) – must sign it. The act must then be promulgated in the Journal of Laws. The Council of Ministers, Prime Minister and ministers themselves are authorised to enact executive ordinances when there is a specific legal basis (delegation) in an act issued by Parliament. Legislative acts (acts, international agreements ratified and ordinances) can be subjected to constitutional review by the Constitutional Tribunal. Citizens are empowered to lodge an individual constitutional complaint with the Tribunal (challenging the constitutionality of a law which formed the basis of an individual final decision or verdict).

### 0.2 Overview/State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

*This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

<sup>2</sup> So, for instance, the recently ratified UN Convention on the Rights of Persons with Disabilities after ratification (September 2012) and publication in the Journal of Laws (October 2012) became part of the binding domestic law.



*Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.*

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

A very significant change in terms of the implementation of the Directives took place in 2010. The 2010 Equal Treatment Act – the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (hereafter the ‘ETA’) – entered into force on 1 January 2011.<sup>3</sup>

It finally minimised the gaps in the implementation of Directives 2000/43 and 2000/78. However, it still raises some concerns, especially in regard to the equality body (see below).

Poland had previously made a limited effort to comply with EU law at the point of accession. The three substantive amendments to the Labour Code (2001, 2003, 2008) brought Polish labour law (Labour Code) generally into line with the respective equality directives. However, the provision of Article 18<sup>3a</sup>§3 of the Labour Code defining direct discrimination is still erroneous, probably due to a technical translation error (however, this has no practical consequences; see more in Section 2.2 below).

For many years there was, however, no single act comprising a general ban on discrimination on all grounds, and relevant provisions were scattered across many different legal acts.

Before the enactment of the 2010 Act, several versions of the draft Equal Treatment Act had been elaborated (first in 2006). Starting from quite a wide scope, subsequent versions limited the Act’s scope, narrowing it to an almost verbatim implementation of the Directives.

In the meantime the draft law also changed its name – which is quite symptomatic – from the ‘Equal Treatment Act’ to the ‘Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment’.

Even if the 2010 ETA seems to finally fully implement Directives 2000/43 and 2000/78 (as described in the report below), it raises some doubts and discussions.

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<sup>3</sup> Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment [hereafter ‘the Equal Treatment Act’ or ‘ETA’], *Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*; Dz.U. 2010 nr 254 poz. 1700.





The most important doubts refer to the new equality body – the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment – finally designates as an equality body the existing Ombud's Office (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*).<sup>4</sup> The law appropriately amended the existing Ombud Act, imposing on the Ombud new competences. But according to the Polish Constitution and the 2010 ETA, those competences are limited where conflicts between private parties are concerned. The other hot topic of debate is the fact that even though the ETA obliged the Ombud to take on a number of new responsibilities, it did not envisage any additional funds. Therefore the role of the Ombud as an equality body is limited.

Another problematic issue underlined by the Ombud in its first report published in June 2012 is related to the compensation claim introduced by the ETA. The Equal Treatment Act refers to compensation only (*odszkodowanie*), which covers material damage (and not immaterial) and therefore limits the protection. The compensation claim under the Act should be widened and include immaterial damages as well.

Other doubts are of a constitutional character. The Polish Constitution, as well as labour law, does not contain an exhaustive list of grounds of discrimination. However, the ETA, being in fact an almost verbatim implementation of the Directives, in contrast to labour law, provides for an exhaustive list of grounds of discrimination, thus potentially limiting protection of certain groups. Interestingly, this decision was made despite a number of voices urging the Polish Government to widen the scope of protection – both at local level (expressed by NGOs) as well as international level.

For instance, the Concluding Observations of the UN Human Rights Council adopted on 26 October 2010 were announced on 29 October 2010, exactly the same day as the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment was adopted by the Sejm for the first time. The Council expressed its concern that the draft Equal Treatment Act was not exhaustive and did not cover discrimination based on sexual orientation, disability, religion or age in the fields of education, healthcare, social protection and housing. Therefore the Committee recommended that Poland should further amend the Equal Treatment Act

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<sup>4</sup> Latest report by the Ombud: *Information on the activities of the Civil Rights Commissioner in the year 2012 and on the observance of human rights and freedoms. Part two: Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2012, and on the observance of the rule of equal treatment in the Republic of Poland*, Warsaw 2013 [hereafter 'Ombud Annual Report 2013'] – the version quoted in this report was published by the Polish Senate on 22 April 2013: [http://www.senat.gov.pl/gfx/senat/userfiles/\\_public/k8/dokumenty/druki/300/345.pdf](http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/dokumenty/druki/300/345.pdf) ; in June 2013 the Ombud published the final version on its website, with the same content but different format and page numbering: <http://rpo.gov.pl/pl/content/informacje-roczne-o-dzialalnosci-rpo> ; *Informacja o działalności Rzecznika Praw Obywatelskich w roku 2012 oraz o stanie przestrzegania wolności i praw człowieka i obywatela. Część 2. Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2012 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa 2013.

so that discrimination based on all grounds and in all areas would be adequately covered.<sup>5</sup>

Despite the fact that a number of previous draft laws were wider in their scope, the government's final decision to limit the law to a simple implementation of the Directives was interpreted as caused by lack of government commitment to counteracting discrimination and as the result of the fear generated by some infringement procedures initiated by the European Commission in the European Court of Justice (one of them ended with the verdict of the ECJ described in Annex 3).

The critique of the 2010 Act put forward by NGOs and by the Ombud led to the elaboration of two draft laws amending and largely widening the scope of the Act. The first draft law was prepared within the Office of the Government Plenipotentiary for Equal Treatment, and was mentioned in its annual report, although it has not been made public and official yet.<sup>6</sup> The second complex draft law amending the Act was prepared in 2012 by independent experts and was lodged in October 2012 in Parliament by the group of Members of Parliament representing two opposition parties<sup>7</sup> – the Palikots Movement and Democratic Left Alliance – as well as some individual MPs.<sup>8</sup>

### 0.3 Case-law

*Provide a list of any important case-law in 2012 within the national legal system relating to the application and interpretation of the Directives. (The older case-law mentioned in the previous report should be moved to Annex 3). This should take the following format:*

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (no more than several sentences)

<sup>5</sup> The UN HRC site including Concluding Observations and third party submissions:

<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

<sup>6</sup> *Report on activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012*, Warsaw 2013 [hereafter 'Plenipotentiary Annual Report 2013'], p.14-17.

<sup>7</sup> The draft law (*Druk Sejmowy nr 1051 z 10.10.2012*) is available at:

<http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

<sup>8</sup> Its first reading took place in Parliament on 20 June 2013 and the draft was sent to the Parliamentary Commission for further work, see:

<http://sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?id=4C12B53EB4CAC3A8C1257AFC003AA7EB>.





→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law falling under both anti-discrimination Directives (Please note that you may include case-law going beyond discrimination in the employment field for grounds other than racial and ethnic origin)

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

**Name of the court:** Appellate Court of Poznań

**Date of decision:** 29 February 2012

**Name of the parties:** A.G. v. K. L.-B.

**Reference number:** sygn. akt I ACa 1162/11

**Address of the webpage:** <http://gpl.exdat.com/docs/455/index-26597.html>

**Brief summary:** Two men of Roma origin (including A.G.) were asked to leave a night club on 10 December 2010. A week later (on 17 December) A.G. and some other persons of Roma origin, accompanied by a journalist,<sup>9</sup> tried to enter the club and were not let in (which they recorded on a hidden camera). Both the club's security guards (from an external company hired by the owner) as well as its owner (in a conversation that took place later on) admitted that the owner had asked the security guards not to accept Roma customers.

A.G. filed a lawsuit against the owner of the club, K.L.-B., asking for a published apology and compensation to be paid to the Roma Association (10,000 PLN, circa 2,500 EUR).<sup>10</sup> At first instance, Poznań Regional Court (on 24 October 2011) dismissed the claim. The Court recognised that discrimination as well as infringement of personal rights<sup>11</sup> had taken place, but found that the club's owner did not bear responsibility because she had hired a professional company specialising in security.

The appellate court reversed the ruling of the first instance court and ruled that limitation of access to the club based on ethnic origin constituted infringement of the right to personal dignity that is protected by the Civil Code. The Court also stated that even though the club's security was provided by an external company, the club's owner bore responsibility for the actions and harm caused by these persons. The Court obliged the club's owner to publish an apology (on the club's website as well as

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<sup>9</sup> The court verdict does not provide details of the journalist's origins.

<sup>10</sup> According to Polish civil procedure, the claimant may request the court that compensation be awarded to a social cause. Usually claimants ask for compensation to be awarded to an association or foundation with which they are affiliated or just support (it is the claimant's request, and the association is not party to the case). Claimants underline in this way that they are fighting in the public interest and not because of their own pecuniary interest.

<sup>11</sup> See Section 6.1.a of this report for a fuller explanation of the concept of 'personal rights' in Polish law.

in two newspapers), to pay compensation to the Roma Association (10,000 PLN, circa 2,500 EUR) and to pay the claimant's court and legal costs.<sup>12</sup>

**Name of the court:** Supreme Administrative Court, cassation ruling on the ruling of the Regional Administrative Court

**Date of decision:** 20 March 2012

**Name of the parties:** K. F. v. Director of the Izba Skarbowa of Gdańsk (Internal Revenue Service / Tax Chamber)

**Reference number:** II FSK 1704/10

**Address of the webpage:** <http://orzeczenia.nsa.gov.pl/doc/2EF9087094>

**Brief summary:** The Tax Office (Urząd Skarbowy) refused to recognise cohabiting same sex partners as a close family in a case regarding tax deduction. According to the 28 July 1983 Act on the Taxation of Inheritance and Gifts, (Dz.U.2009.93.768) when a person receives movable goods from close family (a spouse, ancestor or descendant, stepchild, sibling or stepparent) the tax is waived after completion of some conditions (Article 4.a). In the case described, the Tax Office refused this waiver to a same sex couple who had lived together for years as a family. The claimant argued that same sex cohabitation should be treated in the same way as a formal marriage and partners as spouses. Neither the court of first instance nor the Supreme Administrative Court agreed, and they upheld the Tax Office's decision.

The courts decided that the tax waiver is an exception from the general tax obligation and should not be extended by analogy but should be interpreted strictly. The tax waiver, according to the law, was given to married spouses as defined by Article 18 of the Constitution (union of a man and a woman) and the Family Code.<sup>13</sup>

**Name of the court:** Supreme Court

**Date of decision:** 28 November 2012

**Name of the parties:** A.K. v. City of Warsaw

**Reference number:** SC case III CZP 65/12, filed on 27 July 2012

**Address of the webpage:**

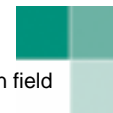
<http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf>

**Brief summary:** A.K. v. City of Warsaw, application for succession to a tenancy after the death of a partner.

A.K. had lived with his partner Y. in a same sex relationship since 2000 until Y.'s death in 2010, in the municipal flat rented by Y. They lived in a common household, raised A.K.'s son, and had strong emotional, physical and economic ties. After Y.'s death, A.K. applied to the City of Warsaw to succeed to the tenancy. The municipality denied his application. A.K. challenged this decision in Warsaw's Mokotów District Court, which stated (13 October 2011) that the law on *de facto* cohabitation (*konkubinat*) does not cover homosexual relations. The verdict was appealed to the

<sup>12</sup> The full text of the Appellate Court verdict: <http://gpl.exdat.com/docs/455/index-26597.html> (22.08.2013), see also Ombud Annual Report 2013, p. 427.

<sup>13</sup> Ombud Annual Report 2013, p. 433.



Regional Court of Warsaw which (on 27 February 2012) decided to formulate a legal question to the Supreme Court – whether the law on *de facto* cohabiting partners (Article 691 § 1 Civil Code, ‘osoba, która pozostawała faktycznie we wspólnym pożyciu z najemcą’) also covers factual partners of same sex.

In its ruling (28 November 2012), the Supreme Court declared that ‘A person *de facto* cohabiting with the tenant – in the meaning of Article 691 § 1 of the Civil Code – is a person who is tied to the tenant with emotional, physical and economic bonds, including a person of the same sex’. The Regional Court that asked the legal question is bound by the position of the Supreme Court.

According to most current jurisprudence, the sex of partners in ‘*de facto* cohabitation (konkubinat)’ does not matter (see, for instance, the judgment of Białystok Appellate Court dated 23 February 2007, I ACa 590/06, judgment of Poznań Regional Court dated 19 April 2011, II Ca 284/11, judgments of Wrocław-Śródmieście District Court dated 4 May 2011, I C 667/10 and 11 October 2011, I C 485/11). However, despite the fact that the majority of rulings follow the *Kozak v. Poland* case (in which the ECtHR, in a slightly different legal situation, found a breach of Article 14 in conjunction with Article 8 in a situation where the applicant had been denied the right to succeed to a tenancy after the death of his partner; decision of 2 March 2010, application no. 13102/02), the court in the case described still ruled otherwise. The Supreme Court decision clarified the legal situation.

*Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.*

There are no trends or patterns to report, as there have been almost no cases brought by Roma. In fact, it might actually be said that the only perceivable pattern is the lack of such cases. They are extremely rare (one case regarding access to a club is described above), even despite the fact that there are reasonable opportunities to obtain free legal advice and assistance. As a consequence there are no figures available. Both the Ministry of the Interior and the Ombud regret the lack of such cases and do encourage Roma organisations and individuals to bring actions. However, the reasons that Roma do not bring cases are most probably lack of legal awareness, lack of trust in the police, the prosecutor’s office and the courts, fear and the absence of any tradition of action in this area.



According to the Ombud's first report as equality body, there have been some individual complaints regarding Roma, in the majority of cases referring to social care and housing.<sup>14</sup>

In 2000 the Ministry of the Interior initiated a project to collect data on a monthly basis from the General Headquarters of the Police relating to acts of violence against Roma. However, the project was not a success and was discontinued.

On one occasion, additional research was undertaken: the police searched their files (documents written by police personnel) using the key word 'gypsies' and the programme generated several hundred records where Roma appeared – but as possible perpetrators rather than victims.

In 2012 the Ombud in its report *Counteracting violence motivated by race, ethnic origin and nationality (Przeciwdziałanie przemocy motywowanej rasą, pochodzeniem etnicznym i narodowością)* recommended that the police create a single database that would register violent 'discrimination crimes' and that they conduct relevant research.<sup>15</sup>

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<sup>14</sup> *Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2011, and on the observance of the rule of equal treatment in the Republic of Poland*, Warsaw, June 2012, Bulletin 2012, no 2 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa, czerwiec 2012, Biuletyn Rzecznika Praw Obywatelskich 2012, nr 2, Źródła) [hereafter 'Ombud Bulletin 2012/2'], p. 13-14.

<sup>15</sup> Ombud Annual Report 2013, p. 374.



## 1 GENERAL LEGAL FRAMEWORK

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

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The 1997 Polish Constitution contains a general anti-discrimination clause which reads: '(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. (2) No-one shall be discriminated against in political, social or economic life for any reason whatsoever.'<sup>16</sup> This principle does not specify the criteria for the prohibited forms of discrimination.<sup>17</sup> Thus, the constitutional provision is more general than the Directives, since it does not mention expressly any grounds but prohibits any discrimination. The prohibition of discrimination goes beyond the material scope indicated in Article 3.1 of the Racial and Employment Equality Directives, encompassing political, social and economic life in their entirety, both in the public and the private sectors. However, it is worth mentioning that ECRI in its second and third report on Poland recommended 'that possible grounds of discrimination, including those related to race and ethnic origin be included as examples in the non-exhaustive list contained in Article 32 of the Polish Constitution'. Since the recommendation from the second report was not adopted, ECRI reiterated it in the third report recommending that the 'Article 32 of the Constitution contains a non-exhaustive list of possible grounds for discrimination, such as race, colour, language, religion, nationality, national or ethnic origin' and recalled it in the fourth report in 2010.<sup>18</sup>

In addition, the Constitution bans political parties and other organisations which include or allow racial hatred in their programme or activities.<sup>19</sup> It also guarantees people the freedom to preserve and develop their own language, preserve customs and traditions and develop their own culture.<sup>20</sup> Furthermore, national and ethnic minorities have the right to establish their own educational, cultural and religious institutions.<sup>21</sup> Freedom of conscience and religion, freedom of expression, freedom of

<sup>16</sup> Article 32 Constitution of the Republic of Poland [hereafter 'the Constitution'].

<sup>17</sup> 'This means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of distinction which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which a distinction may occur' – from the judgment of the Constitutional Tribunal of 16 December 1997, K. 8/97.

<sup>18</sup> ECRI Third report on Poland, Adopted on 17 December 2004, CRI(2005)25, p.8; ECRI Fourth report on Poland, Adopted on 28 April 2010, CRI(2010)18, p.12.

<sup>19</sup> Article 13 Constitution.

<sup>20</sup> Article 35.1 Constitution.

<sup>21</sup> Article 35.2 Constitution.

association and the right of access to public services are equally safeguarded for all Polish citizens, including members of national and ethnic minorities.<sup>22</sup>

With regard to disability, the Constitution stipulates that public authorities must provide, in accordance with statutes, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication.<sup>23</sup> Furthermore, the Constitution declares that both women and men have equal rights in family, political, social and economic life<sup>24</sup> and, in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.<sup>25</sup> Finally, the Constitution contains specific provisions which provide additional protection of the interests of selected social groups, including introducing the principles of the equal rights of religious associations<sup>26</sup> and also protection for veterans of the struggle for independence, especially war invalids,<sup>27</sup> children<sup>28</sup> and consumers.<sup>29</sup>

Persons unable to work due to illness or disability and people who have reached the age of retirement are guaranteed the right to social security by the Constitution.<sup>30</sup>

The Constitution does not mention sexual minorities among the protected groups.<sup>31</sup>

*b) Are constitutional anti-discrimination provisions directly applicable?*

The Constitution stipulates that its provisions are directly applicable unless the Constitution itself states otherwise.<sup>32</sup> Thus the presumption is in favour of the direct applicability of constitutional provisions. However, to a great extent, this remains theoretical. It is not easy to put the concept of direct applicability into operation before a court, because in judicial proceedings it is necessary to use the existing legal and procedural framework and adjust the constitutional argument to it. In Poland there is little precedent for invoking constitutional provisions directly in particular, and the courts are not used to doing so. As a result, some lawyers working with clients who have experienced discrimination and trying to bring these kinds of cases to court are

<sup>22</sup> Article 53, 54.1, 58.1 and 60 Constitution.

<sup>23</sup> Article 69 Constitution.

<sup>24</sup> Article 33.1 Constitution.

<sup>25</sup> Article 33.2 Constitution.

<sup>26</sup> Article 25 Constitution.

<sup>27</sup> Article 19 Constitution.

<sup>28</sup> Article 72 Constitution.

<sup>29</sup> Article 76 Constitution.

<sup>30</sup> Article 67.1 Constitution.

<sup>31</sup> According to sexual minority rights organisations, the rejection of a version of a founding draft bill that clearly contained a prohibition of discrimination based on sexual orientation indicates that there is a strong tendency in Poland to deny the principle of equality for homosexuals before the law (*Report on discrimination based on sexual orientation in Poland*, Stowarzyszenie Lambda, Warsaw 2001, p. 32).

<sup>32</sup> Article 8.2 Constitution.



of the opinion that it is impossible to bring a case solely on the basis of constitutional provisions.<sup>33</sup>

There also exists a special procedure described in Article 193 of the Constitution which reads:

Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue currently before such a court.

This possibility is used by Polish judges when they face the problem of the constitutionality of a law being the legal basis for the verdict in a particular case.

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

In principle, the equality principle can be invoked against both state and private actors but any legal action should have a specific legal basis.

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<sup>33</sup> From the interviews conducted to update this report.



## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

As stated above, the Polish Constitution lays down a general provision on non-discrimination and equal treatment. It does not specify any grounds, stating in Article 32 'No-one shall be discriminated against in political, social or economic life for any reason whatsoever'.

The 2010 Equal Treatment Act (Article 1) contains an exhaustive list of grounds of discrimination: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation.

The Labour Code (Article 18<sup>3a</sup> § 1) lists several grounds, such as gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation and employment for a definite or indefinite period of time, part-time or full-time employment. The grounds are listed as examples only, the list remaining open because of the Article's wording: 'any discrimination (...) in particular on the grounds of ...'. This means that other grounds of discrimination could equally be taken into consideration by the courts when applying this provision.

The Act on National and Ethnic Minorities and on Regional Language prohibits discrimination on the ground of belonging to such a minority, thus reinforcing the principle pronounced by the Constitution and the Labour Code.<sup>34</sup>

The Council of Ministers Ordinance of 22 April 2008 (in force since 30 April 2008, amended on 30 June 2010) on the Government Plenipotentiary for Equal Treatment provides (para. 2.1.1) that the Plenipotentiary is to implement government policies on equal treatment, 'including counteracting discrimination in particular because of gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status'. 'Disability', originally not explicitly mentioned, was added in 2010.

The Social Security Act<sup>35</sup> (Article 2a.1), amended by the 2010 Equal Treatment Act, lists gender, race, ethnic origin, nationality, family and marital status.

<sup>34</sup> Passed on 6 January 2005 and entered into force on 1 May 2005.

<sup>35</sup> Act of 13 October 1998 on the Social Security System, as amended (*Ustawa z 13 października 1998 r. o systemie ubezpieczeń społecznych*).

The Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market<sup>36</sup> (Article 2a), amended by the 2010 Equal Treatment Act, lists gender, race, ethnic origin, nationality, religion or beliefs, political convictions, disability, age or sexual orientation.

The Capital-based Pensions Act<sup>37</sup> (Article 2), amended by the 2010 Equal Treatment Act, lists gender, race, ethnic origin, nationality, state of health, family and marital status.

### 2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)*

There is no law on discrimination, including the 2010 Equal Treatment Act, which defines the concepts mentioned. There are no definitions related to racial or ethnic origin, religion or belief, disability, age or sexual orientation in Polish anti-discrimination legislation.

- i) *racial or ethnic origin,*

No definition in the national law on discrimination.

- ii) *religion or belief,*

No definition in the national law on discrimination.

- iii) *disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

No definition in the national law on discrimination.

- iv) *age,*

<sup>36</sup> Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market, as amended [hereafter 'Employment Act'] (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*).

<sup>37</sup> Act of 21 November 2008 on Capital-based Pensions (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).



No definition in the national law on discrimination.

v) *sexual orientation?*

No definition in the national law on discrimination.

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

Recital 17 of Directive 2000/78/EC is not reflected in the national legislation against discrimination.

i) *racial or ethnic origin*

The definition of an ethnic minority and the definition of a national minority are included in the Act on National and Ethnic Minorities and on Regional Language:

A national minority is a group of Polish citizens which fulfils all the following conditions:

- 1) is less numerous than the remaining part of the Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;
- 4) has awareness of its historic national community and is focused on its expression and protection;
- 5) has inhabited the territory of the Republic of Poland for at least 100 years; and
- 6) identifies itself with a nation organised in its own state.<sup>38</sup>

The Act then continues to enumerate the recognised national minorities: Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish.<sup>39</sup>

An ethnic minority is a group of Polish citizens which fulfils all the following conditions:

- 1) is less numerous than the remaining part of Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;

<sup>38</sup> Article 2.1 Act of 6 January 2005 on National and Ethnic Minorities and on Regional Language (*Ustawa z 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*) [hereafter 'Minorities Act'].

<sup>39</sup> Article 2.2 Minorities Act.



- 4) has awareness of its historic national community and is directed at its expression and protection;
- 5) has inhabited the territory of the Republic of Poland for at least 100 years;
- 6) does not identify itself with a nation organised in its own state.<sup>40</sup>

Then, as above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.<sup>41</sup>

The above definitions are criticised for two reasons. First of all they exclude some significant national or ethnic groups in Poland (e.g. so-called new immigrants such as the Vietnamese). Furthermore, the definitions are restricted to Polish citizens and therefore do not refer, for example, to migrant workers originating from neighbouring countries (e.g. Ukrainians).

The aim of the Act on National and Ethnic Minorities and on Regional Language is, however, to provide certain rights, mostly linguistic and cultural rights, to national and ethnic minorities, as well as to protect them by state actions. Article 6 of the Act on National and Ethnic Minorities and on Regional Language prohibits discrimination based on belonging to a minority. This provision clearly refers only to the national and ethnic minorities provided for in the law.

It must, however, be emphasised that this limited scope of definition of national and ethnic minorities does not mean that people who do not belong to them are not protected. Under Article 37 of the Polish Constitution, every person who is within the jurisdiction of Poland may exercise freedoms and rights provided for in the Constitution. Article 32, Section 2 of the Constitution prohibits discrimination for any reason whatsoever in political, social and economic life. It is clear that the grounds of prohibited discrimination include race, skin colour, ethnic origin or belonging to a national or ethnic minority.<sup>42</sup>

Polish anti-discrimination law does not provide a definition of racial discrimination, or of race or ethnic origin. When interpreting the meaning of racial discrimination, the Polish courts may, however, look at the definitions contained in international treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) ratified by Poland.

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<sup>40</sup> Article 2.3 Minorities Act.

<sup>41</sup> Article 2.4 Minorities Act.

<sup>42</sup> Garlicki L. (ed.), 'Commentary on Article 32 of the Constitution', in: Garlicki L., *Commentary on the Polish Constitution (Komentarz do Konstytucji RP)*, Wydawnictwo Sejmowe, Volume III, Warsaw, 2003.



The 2008 amendment to the Act on granting protection to aliens on the territory of the Republic of Poland,<sup>43</sup> which transposed the Qualification Directive<sup>44</sup> and the Asylum Procedures Directive,<sup>45</sup> is not part of anti-discrimination legislation, but it also includes some definitions new to the Polish legal order. Article 14 of the Act includes some definitions useful in ‘assessing the grounds of persecution’ of people who apply for refugee status. According to the Act in this context: ‘The concept of race includes in particular colour of skin, descent, or membership of a particular ethnic group’ and ‘the concept of nationality is not limited to a citizenship or its absence, but shall in particular include membership of a group defined by: a) cultural, ethnic or linguistic identity or b) common geographical or political origin or c) linkage with the population of another country [...]’

- ii) *religion or belief (e.g. the interpretation of what is a ‘religion’ for the purposes of freedom of religion, or what is a “disability” sometimes defined only in social security legislation)?*

The Act on Guarantees of the Freedom of Conscience and Religion,<sup>46</sup> which regulates the establishment of churches and other religious organisations (*związki wyznaniowy*), does not define religion or belief.

According to the 2008 amendment to the Act on granting protection to aliens on the territory of the Republic of Poland,<sup>47</sup> mentioned above, ‘the concept of religion shall in particular include: a) having theistic, non-theistic or atheistic beliefs, b) participation, or refraining from participation, in religious rituals, performed in public or in private, individually or collectively, c) other acts of religious character, beliefs expressed or form of individual or collective behaviour as a result of religious beliefs or related to them’ (Article 14).

- iii) *disability*

There are several definitions of disability at national level, which relate to certain legal acts (the 2010 ETA does not define disability). The Act on the Vocational and Social

<sup>43</sup> Act of 18 March 2008 on the amendment of the Act on granting protection to aliens on the territory of Poland [...], in force since 29 May 2008, Journal of Laws 2008, no 70, item 416 (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*).

<sup>44</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted.

<sup>45</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>46</sup> The Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (*Ustawa z 17 maja 1989 r. o gwarancjach sumienia i wyznania*).

<sup>47</sup> Act of 18 March 2008 on the amendment of the Act on granting protection to aliens on the territory of Poland [...], in force since 29 May 2008, Journal of Laws 2008, no 70, item 416 (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*).



Rehabilitation and Employment of Disabled Persons contains a legal definition of a disabled person<sup>48</sup> stipulating that a disabled person is someone whose disability has been confirmed by a competent medical authority.<sup>49</sup> Elsewhere, disability is defined as a permanent or temporary inability to carry out social functions due to a permanent or long-term disturbance of performance of the human organism, in particular, resulting in incapacity to work.<sup>50</sup> There are three levels of disability: slight, moderate and severe.<sup>51</sup>

The above definition may be of some help in clarifying what disability means for the purposes of the Labour Code (which itself does not contain a definition of disability). It is important to stress that the Disabled Persons Act refers only to those disabilities which are declared by medical authorities. A case could come before the Polish courts involving an individual with some kind of disability not certified by the relevant authority for various reasons. In the event of this, the court must decide itself whether the person concerned is disabled or not. The court may take into account the definition contained in the Disabled Persons Act, but it may go beyond this definition. There could be disabilities which do not qualify as disability under the Act, but whereby people may nevertheless be subject to discrimination or may feel themselves to be disabled.

According to Article 69 of the Polish Constitution (1997), 'Public authorities shall provide, in accordance with statutes, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication'. A commentary on the Constitution points out the open character of the term 'disability'.<sup>52</sup> In particular, it says that, in relation to the meaning of 'disability', the drafters of the Constitution took into account the recommendations of the Committee of Ministers of the Council of Europe of 1992 as well as the Disabled Persons Act. The Constitution provides a much broader definition of 'disability' than the Disabled Persons Act. It states that 'disability' is 'any impairment or lack, resulting from damage, of the possibility to exercise certain activities in a way or means regarded as normal for human beings'. This means that under the Constitution a 'disability' has an independent meaning, not restricted by any decision of the medical authorities.

The term under the Labour Code has a similar independent meaning, not restricted to the meaning contained in the Disabled Persons Act. Thus there are some differences between the concepts of disability adopted by the ECJ in case C-13/05, *Chacón Navas*, and Polish definitions. Polish law defines more generally the causes

<sup>48</sup> The Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*) [hereafter 'Disabled Persons Act'].

<sup>49</sup> Article 1 Disabled Persons Act.

<sup>50</sup> Compare Article 2.10 Disabled Persons Act.

<sup>51</sup> Article 3.1 Disabled Persons Act.

<sup>52</sup> Garlicki L. (ed.), *Commentary on the Polish Constitution (Komentarz do Konstytucji RP)*, Wydawnictwo Sejmowe, Volume III, Warsaw, 2003.

of limitations: ‘damage’ in the Constitution and ‘disturbance of the performance of a human organism’ in the Disabled Persons Act. The effect of disability, in the ECJ concept, ‘hinders the participation of the person concerned in professional life’, which corresponds to the definition from the Disabled Persons Act: ‘permanent or temporary inability to carry out social functions (...) in particular, resulting in incapacity to work’.

The key difference is that, according to the definition in the Polish Disabled Persons Act, disability must be confirmed by a competent medical authority, which is not required according to the ECJ definition. However, the Polish court, as mentioned above, when determining whether discrimination has taken place is not bound by the definition from the Disabled Persons Act. No case law determining this issue has been identified.

It should be noted that Polish legislation also uses other terms in characterising people with disabilities. For instance the Constitution refers in Article 67 to ‘invalidism’.

Finally, the Ministry of Labour has plans (but not in the form of a formal draft law yet) to change the definition of disability and bring it into line with the definition contained in the UN Convention on the Rights of Persons with Disabilities (the Convention was ratified on 6 September 2012). However, one may already refer to the guidance in the UN CRPD on the concept of disability before a court or administrative body (an international treaty once ratified becomes a source of domestic law and may be relied on in court and administrative proceedings).

*iv) age*

There is no relevant definition of age.

*v) sexual orientation*

The 2008 amendment to the Act on granting protection to aliens on the territory of the Republic of Poland,<sup>53</sup> mentioned above, also refers to sexual orientation, stating that ‘depending on the conditions prevailing in the country of origin, a particular social group might include a group whose members share a common sexual orientation, but sexual orientation cannot include acts which, according to Polish law, constitute crimes’ (Article 14.2).

*c) Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

<sup>53</sup> Act of 18 March 2008 on the amendment of the Act on granting protection to aliens on the territory of Poland [...], in force since 29 May 2008, Journal of Laws 2008, no 70, item 416 (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*).



There are no such restrictions related to the scope of age provided by law. There are, nevertheless, certain differences in treatment in respect of age, justified by different needs and social roles. They may occur in relation to a person reaching retirement age or, on the contrary, not having reached the minimum age for employment, which is not treated as discrimination but protection of minors.

## 2.1.2 Multiple discrimination

- a) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*

*Would, in your view, national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

There are no legal rules or case law dealing with multiple discrimination. However, in both draft laws mentioned in Section 0.2 above (Overview/State of implementation) the multiple discrimination concept has been introduced.<sup>54</sup>

The law mentions that discrimination might happen because of one or more grounds but does not treat differently the situation of multiple discrimination (the anti-discrimination provisions of the Labour Code, for example, provide definitions of direct and indirect discrimination that refer to 'one or several grounds'). However, the 2010 Equal Treatment Act does not mention the category of 'several grounds', listing the grounds of discrimination separately. During work on the ETA, the Coalition of NGOs recommended including the concept of multiple discrimination but without success. None of the draft laws on equal treatment included the notion of multiple discrimination.

Neither the equality body nor other bodies relevant to non-discrimination that are described in Chapter 7 have tackled multiple discrimination in any special way so far.

Cases of discrimination because of more than one reason might be adjudicated under the law in force even lacking a definition of multiple discrimination. However, they are not treated in any special way and in fact in most cases it is enough for the court to identify one reason of discrimination. Legislation dealing with multiple discrimination would therefore be definitely useful.

- b) *How have multiple discrimination cases involving one of Article 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of*

<sup>54</sup> See Plenipotentiary Annual Report 2013, p. 14-17, and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

*proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

First of all it must be mentioned that discrimination cases are still rare in Poland, therefore the body of cases to draw conclusions from is quite small. Also access to judgments of courts of lower instances is very limited and it is possible that there are discrimination cases which pass unnoticed – this might change in the near future as the Ministry of Justice plans to introduce a rule that all court verdicts (with some exceptions) must be published on the internet, including their reasoning, which would make it possible to search the jurisprudence of all Polish courts.

Until 2010 the burden of proof was shifted only in employment cases (Labour Code); from 1 January 2011, according to the Equal Treatment Act (Article 14.3) the burden of proof shifts in all cases governed by the Act.

The law does not provide for higher damages in cases of discrimination because of more than one reason. There is also no such judicial practice.

Usually in cases of discrimination because of gender plus other reasons, courts tend to focus on the gender discrimination, and once this has been proved, do not devote their attention to other causes of discrimination. A good example to illustrate this issue is discrimination in cases of ‘forced retirement’ when employees are fired when they reach retirement age. Since the retirement age for women is lower than for men (as a general rule 60 for women and 65 for men),<sup>55</sup> cases of forced retirement of women were treated by courts as gender discrimination and the issue of age discrimination never attracted attention (gender discrimination prevailed over age discrimination). However, the same kind of cases involving men were treated as age discrimination. Only in 2009 did the Supreme Court state in a resolution<sup>50 5</sup> that such a case raises two kinds of discrimination – indirect discrimination because of gender and direct discrimination because of age.<sup>56</sup>

### **2.1.3 Assumed and associated discrimination**

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

<sup>55</sup> In May 2012, the retirement age was changed by Parliament. The normal retirement age for both men and women will be 67 (to be reached step by step, finally attained in the case of men in 2020 and in the case of women in 2040; every year, starting from 2013, three months will be added to the retirement age).

<sup>56</sup> Supreme Court resolution of 21 January 2009, case described in Annex 3 below.



There is no legal definition of imputed discrimination provided by Polish legislation. In work on the draft Equal Treatment Act, NGOs recommended including this concept but without success. However, when ruling on discrimination cases, judicial bodies should take into consideration the objectives of the provisions and the reasons specified by national legislation. As mentioned above, for example the scope of discrimination prohibited by labour law is not limited to the listed grounds. Thus, it may be assumed that if the question of imputed discrimination should arise, this could also be treated as discrimination. This is, however, a strictly theoretical consideration since no case of this type has been identified.

Both draft laws elaborated in 2012 and mentioned in Section 0.2 above (Overview/State of implementation) introduce the concept of assumed discrimination.<sup>57</sup>

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

Associated discrimination should be treated in the same way as imputed discrimination, since there are no special law provisions or case law defining this particular type of discrimination. However, this concept is not mentioned in the laws and the development of such a concept rests with the courts. As yet no such case has been identified.

Inclusion of this concept was also recommended by NGOs in work on the draft Equal Treatment Act, but without success.

Finally both draft laws elaborated in 2012 and mentioned in Section 0.2 above (Overview/State of implementation) introduce the concept of discrimination by association.<sup>58</sup>

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

- a) *How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.*

The 2010 Equal Treatment Act (Article 3.1) defines direct discrimination in line with the Directives. It stipulates that direct discrimination takes place when 'a natural person because of gender, race, ethnic origin, nationality, religion, belief, political

<sup>57</sup> See Plenipotentiary Annual Report 2013, p. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

<sup>58</sup> See Plenipotentiary Annual Report 2013, p. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.



opinion, disability, age or sexual orientation, is treated less favourably than another is, has been or would be treated in a comparable situation’.

Parallel to this definition, the definition of the Labour Code is still in force. This is slightly different and erroneous, most probably due to a translation error. In Article 2.2a of Directive 2000/43, the ‘hypothetical’ nature refers to the behaviour to which the discriminatory treatment is being compared (treatment of another person in a comparable situation) and not the discrimination itself, in contrast with the Labour Code which reads: ‘§ 3. Direct discrimination takes place when an employee, for one or more reasons listed in § 1, was, is, or may be treated, in a comparable situation, less favourably than other employees.’ However, this erroneous translation has had no practical consequences so far and remains rather an academic issue.

b) *Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

Discriminatory public statements and job vacancy announcements may constitute discrimination and are prohibited by the general discrimination prohibition clauses (such as Article 11.3 Labour Code). However, unlike in the ECJ *Firma Feryn* judgment, in order to bring a case to court the victim should be identified. The claim can be brought only on behalf of a particular complainant who applied for or enquired about the job and in such a case compensation may be sought.

There is also one special relevant situation as described in the Act on the Promotion of Employment and the Institutions of the Labour Market. According to the Act, an employment agency cannot discriminate against people for whom it seeks employment or paid work (including self-employment), on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>59</sup>

The Act provides also that a person operating an employment agency who violates the prohibition of discrimination may be fined with a fine of not less than 3,000 PLN (750 EUR).<sup>60</sup>

The same Act also provides that employers must supply district labour offices with information concerning available jobs or pre-employment training positions. The district labour office may not accept the job offer if it formulates any requirements that discriminate against candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>61</sup>

<sup>59</sup> Article 19.c of the Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market, amended [hereafter ‘Employment Act’].

<sup>60</sup> Article 123 Employment Act.

<sup>61</sup> Article 36.5e Employment Act.



In 2009 the Polish Association of Anti-discrimination Law (*PTPA - Polskie Towarzystwo Prawa Antydyskryminacyjnego*) conducted a study of job announcements and advertisements. They analysed more than 60,000 posts. It was found that over a third of them included a discriminatory element (mostly gender but also age, nationality and disability discrimination).<sup>62</sup>

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The 2010 Equal Treatment Act does not permit justification of direct discrimination generally, or in relation to particular grounds as such. The particular exceptions are discussed below in Section 4 of this report (including the test that must be satisfied).

Apart from these exceptions (transposed from the Directives), the Equal Treatment Act provides *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres (Article 5.1), and nor does it cover freedom to choose a party to a contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality (Article 5.3).

However, Polish law<sup>63</sup> permits justification of both direct and indirect discrimination in respect of all grounds in the field governed by the Labour Code. In accordance with the Code, in order to justify different treatment that leads to a breach of the principle of equal treatment in employment, the employer must prove the existence of 'objective reasons' for his/her actions.<sup>64</sup> As regards the specified 'exclusion' situations see below, Section 2.3.

- d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

The law does not specify this and, since these regulations are quite new to Polish legislation and very little jurisprudence relating to them could be found, it is difficult to predict how the courts will respond to this question and what criteria they will adopt for making this comparison.

<sup>62</sup> *Equal treatment in employment. Provisions v. Reality. Report from the monitoring of job advertisements*, ed. K. Kędziora, K. Śmiszek, M. Zima, Warsaw 2009 (*Równe traktowanie w zatrudnieniu. Przepisy a rzeczywistość. Raport z monitoringu ogłoszeń o pracę*); available in Polish at: [www.ptpa.org.pl](http://www.ptpa.org.pl) (1.05.2013).

<sup>63</sup> Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>64</sup> Article 18<sup>3b</sup> para. 1 *in fine*, Labour Code.



## 2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of ‘situation testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

Polish law does not specifically mention ‘situation testing’. One could argue that this kind of evidence could be admissible, but since there have been almost no relevant cases before the courts (i.e. cases officially adjudicated on the basis of situation testing) this is rather only a theoretical assumption.<sup>65</sup>

Both the Civil Code (Article 5) and the Labour Code (Article 8) include exactly the same provision which states that ‘Nobody can use his/her right in a way which contradicts the social or economic meaning of this right or the rules of social co-existence. This kind of action (or non-action) is not treated as the execution of a right and is not protected’. Experts interviewed express their opinion that this provision could form the basis for a rejection of a claim that relies on situation testing as evidence.

Moreover, there is a theoretical possibility that the court would not accept a claim based on situation testing, arguing that there was not any damage to any particular person since the testers acted more like actors than victims of discrimination. It might therefore be important to organise testing in such a way that the real victim is present in a case.

In civil law proceedings a party claiming the existence of a certain fact must present evidence supporting his/her claims. Besides that, the court may accept *ex officio* evidence not provided by the party.<sup>66</sup> Courts do not use this opportunity very often, as they maintain the position that civil law proceedings should be adversarial and the role of the courts as regards the collection of evidence is secondary to the role of the parties. A party is not obliged to prove facts that are commonly known, as well as facts that are admitted by the opposing party. The submission of evidence, as well as its assessment, is subject to a decision made by the court. It may happen that the court refuses to accept certain evidence in court proceedings (e.g. if the court considers certain facts as already proven). The most commonly used means of

<sup>65</sup> See similar, more detailed argumentation, in: K. Wencel, ‘Fruit of the poisonous tree? Situation testing as a proof in discrimination cases’, in: *Neighbours or intruders. Discrimination against foreigners in Poland*, Warsaw 2010, (‘Owoc zatrutego drzewa? Situation testing jako dowód w sprawach o dyskryminację’, w: *Sąsiedzi czy intruzi. O dyskryminacji cudzoziemców w Polsce*, Stowarzyszenie Interwencji Prawnej, Warszawa 2010 <http://www.interwencjaprawna.pl/publikacje-do-pobrania.html> (1.05.2013).

<sup>66</sup> Article 232 of the Code of Civil Procedure.



evidence in civil law proceedings are documents, witness testimonies, expert opinions and hearing of the parties.

According to Article 308 of the Code of Civil Procedure, the court may admit evidence in the form of a film, television programme, photocopy, photography, plans, drawings, phone records or tapes, as well as other means of recording images or sound. This rule may have significant value for evidence collected during situation testing, as implementation of various scenarios requires the use of video cameras, tape recorders or even witnesses serving as comparators to the victims of discrimination.

The general rule under Polish civil procedure law is that the party raising a certain claim should prove all the facts supporting it. In accordance with the anti-discrimination directives, this rule does not apply to discrimination cases where the burden of proof shifts to the defendant.

In administrative proceedings the administrative body should accept as evidence anything which may contribute to explaining the case and which is not contrary to the law. In particular, the evidence may consist of documents, witness testimonies, expert opinions or visual inspection by the administrative body. This list is not exhaustive, and the body may accept other sources of evidence. The administrative body may accept the evidence presented or requested by a party, if such evidence concerns facts which have significance for the case. According to Article 77 of the Code of Administrative Procedure, an administrative body is obliged to collect evidence exhaustively and to review the whole sum of evidence. This means that the main responsibility for collecting evidence rests on the administrative body and not the party. The body must in many instances act *ex officio* to collect all the evidence.

In criminal proceedings, the rules on evidence are different (mostly Articles 7, 167-174 of the Criminal Procedure Code). It is the prosecutor who must prove the facts raised in the bill of indictment. The defendant may present evidence that supports his/her innocence. The following major sources of evidence are accepted: explanations by the accused, witness testimonies, documents, expert testimonies, opinions of specialists, visual inspection by a court, forensic examination, psychiatric examination of the accused, recording of phone conversations, etc. This list is not exhaustive. The court may accept evidence submitted by the parties or requested *ex officio*. A party requesting the admission of evidence should indicate the source of evidence as well as the facts or other circumstances they wish to prove with it. The court may refuse the evidence if: the given fact is already proved, is not significant to the case or may not be proved with the given evidence; it is not possible to take the requested evidence; an application for evidence aims to prolong proceedings; or when submission of certain evidence is contrary to the law.

In this context it is worth mentioning that, in the case of a private bill of indictment (e.g. in defamation cases), the burden of proof is on the person submitting the bill.

For instance, if this person is a victim of hate speech, they will be obliged to prove the occurrence of hate speech.

b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc.).*

Although the testing method has not been officially used in order to prepare evidence for a court case, it is known and has been used in a number of situations, mainly by NGOs and the media, especially with regard to people with disabilities – for instance, testers attempt to enter public and other buildings in wheelchairs. However, it has been used more as an awareness-raising or PR tool rather than for legal purposes.

On one occasion when working on a media report journalists phoned a number of employers who were recruiting staff and mentioned during the conversation that they belonged to specific minorities (gay). In most cases, with some minor exceptions, they encountered an appropriate reaction – the fact of sexual orientation was not considered to be an issue.

Another case, this time very negative, was that of a woman in a wheelchair who, accompanied by a journalist, tried to find employment in state schools as a teacher and in most cases was treated as not being an appropriate person for the job.

There was also an attempt to use the testing method (and film it for TV) to demonstrate a case of people of non-Polish ethnic origin being refused entry to a disco (they claimed that they had been refused entry on a previous occasion), but it did not succeed as the testers were allowed entry without any problem. In a recent case in 2012 (please see Section 0.3 above), the court did accept a video recording as one piece of evidence among others proving that persons of Roma origin were refused entry to a club.

The author of this report is also familiar with four cases where ‘situation testing’ was used. One case involved discrimination on the grounds of disability (and was planned by a disabled person; the case was settled before the court) and three cases involved sex and age discrimination (and were planned by an individual who phoned employers who were recruiting employees of a certain sex and age – one case was won, one was settled; the outcome of the third is unknown). However, the plaintiffs did not wish to reveal the fact that they used situation testing and in fact they did not admit this in court.

Finally, in recent years, situation testing has become more popular among NGOs (although without its results being used in court) and there were a couple of projects focusing on testing (including research on testing as well as testing itself).

In 2009, the Institute for Structural Research (*Instytut Badań Strukturalnych*, IBS) conducted a test to check discrimination in access to employment because of age. IBS checked discrimination by responding to 1,000 job offers using fictitious CVs of

two women and two men (in both pairs, one person was aged 40 years, and the second was aged 54 years); for each job offer, four applications were sent. The study covered 10 different occupations.<sup>67</sup>

In 2010 the Institute of Public Affairs (*Instytut Spraw Publicznych*) conducted a pilot study on discrimination against foreigners. The survey consisted of sending, in response to recruitment advertisements, two equivalent CVs, the only differentiating factor being the origin of the candidate (decoded using the name, surname and place of birth).<sup>68</sup> In 2011 the Institute of Public Affairs continued the tests, this time on a larger scale.

In March 2010 for the first time in Poland the international project 'Night of Tests' took place<sup>69</sup> – testers tested access to night clubs by persons of different ethnic origin.

In December 2011, the Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*, [interwencjaprawna.pl](http://interwencjaprawna.pl)) together with INPRIS (the Institute for Law and Society, *Instytut Prawa i Społeczeństwa*, [inpris.pl](http://inpris.pl)) conducted a seminar for Polish judges on situation testing in the American legal system (presented by US experts), and a discussion on the possibilities for its use in Polish courts followed.

c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

The reluctance comes from the legal arguments mentioned above. Because of the lack of relevant legal rules, parties who bring claims do not admit that the case is a result of situation testing, even if it is.

It should be pointed out that situation testing cannot be used as a cover for 'provocation', which is forbidden by the Polish Criminal Code; Article 24 states that a person is responsible of incitement when s/he induces somebody to commit a criminal act in order to bring criminal proceedings against him/her. Situation testing must not involve provocation.

It is a very fine line and the main difference is between incitement to commit a criminal act and exposure of an individual's prohibited actions. Keeping in mind the difference between provocation and situation testing, it would nevertheless be

<sup>67</sup> M. Bukowski (ed.) (2010) *Zatrudnienie w Polsce 2008: praca w cyklu życia*, Warszawa: Instytut Badań Strukturalnych, p. 99-102, at:

[http://ibs.org.pl/site/upload/publikacje/ZWP2008/Zatrudnienie\\_w\\_Polsce\\_2008.pdf](http://ibs.org.pl/site/upload/publikacje/ZWP2008/Zatrudnienie_w_Polsce_2008.pdf) (1.05.2013).

<sup>68</sup> K. Wysińska, 'Nguyen, Serhij, czy Piotr. Pilotażowe badanie audytowe dyskryminacji cudzoziemców w rekrutacji' (Nguyen, Serhij or Piotr. Pilot research auditing discrimination against foreigners in recruitment), in: *Neighbours or intruders. Discrimination against foreigners in Poland*, Warsaw, 2010, *op. cit.*

<sup>69</sup> In Poland tests were organised by Instytut Spraw Publicznych, Forum na Rzecz Różnorodności Społecznej and Stowarzyszenie Interwencji Prawnej.



conceivable to attempt to use situation testing as evidence in court. But since it does not happen in practice the issue is only theoretical for the time being.

d) *Outline important case law within the national legal system on this issue.*

There are no examples of relevant case law.

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

a) *How is indirect discrimination defined in national law? Please indicate whether the definition complies with those given in the Directives.*

The 2010 Equal Treatment Act defines indirect discrimination, in general, in line with the Directives (see point c. below) and provides as follows (Article 3.2) – a situation in which unfavourable differences or particular disadvantage occur or could occur for a person because of his/her gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, due to an apparently neutral provision, criterion used or practice/action undertaken, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Simultaneously the definition of indirect discrimination formulated in the Labour Code, and amended in 2008, is still valid in the employment field.<sup>70</sup> According to the Labour Code indirect discrimination takes place when, due to an apparently neutral provision, criterion used or practice/action undertaken unfavourable differences or particular disadvantage occur or could occur in terms of establishment and termination of employment, conditions of employment, promotion, and access to training for raising professional qualifications, for all or a large number of employees who are members of a group distinguished on one or more of the grounds referred to in § 1, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>71</sup>

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

The definition of indirect discrimination as quoted above is new and in force only since 1 January 2011 (definition from the Equal Treatment Act) and since 18 January 2009 (definition from the Labour Code). Both the concepts of a 'legitimate aim' and

<sup>70</sup> Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>71</sup> Article 18<sup>3a</sup> § 4 (amended), Labour Code.



‘appropriate and necessary measures’ are also new, therefore it is difficult to say – due to the lack of relevant case law – how they would be treated by the courts (before, disproportional treatment could be justified just by ‘other objective reasons’).

However, in relation to both direct and indirect discrimination, an additional amended provision could be applied that specifies under what circumstances certain conduct cannot be considered as discrimination. The following differentiating measures, if proportional to achieving a legitimate aim, do not amount to a violation of the principle of equal treatment:<sup>72</sup>

- 1) failure to employ an individual on the basis of one or more grounds listed in the definition of discrimination, if the type of work or working conditions mean that the reason or reasons for different treatment are genuine and determining occupational requirements;
- 2) changing of the employee’s employment conditions in respect of working time, if this is justified by reasons not related to employees, and without reference to the grounds of discrimination listed in the definition of discrimination;
- 3) applying measures that make a distinction in the legal situation of an employee on account of protection of the employee’s parenthood status or disability;
- 4) using the criterion of length of service in setting the terms of employment and dismissal, remuneration and promotion and access to vocational training, which justifies different treatment because of age.

In addition,<sup>73</sup> measures taken as positive discrimination are allowed under Polish legislation.

c) *Is this compatible with the Directives?*

The 2010 Equal Treatment Act is in line with the Directives. However, the definition lacks a direct mention of the comparator (‘compared with other persons’, as the Directives put it). One has to interpret therefore that ‘unfavourable differences or particular disadvantage’ includes implied ‘other persons’ with whom a comparison can be made.

Concerning the Labour Code, even if after the 2008 amendment the definition of indirect discrimination is better than before, it still seems not to be finally compatible with the Directives. Specifically, the definition refers to disadvantage for ‘all or a large number of employees who are members of a group [...]’. This is not a requirement found in the Directives and it is problematic. For example, an indirectly discriminatory measure in relation to a disabled person might only affect a small number of persons with that specific disability, rather than a large number of disabled persons.

<sup>72</sup> Article 18<sup>3b</sup> § 2 (amended), Labour Code.

<sup>73</sup> Article 18<sup>3b</sup> § 3, Labour Code.

- d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

The law does not specify how to make a comparison in relation to age discrimination.

- e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

No such case has yet been reported.

### 2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

Although in Polish law, including the 2010 Equal Treatment Act, there is no explicit mention of the use of statistical evidence to establish indirect discrimination, this does not mean that it is not possible. Under the Code of Civil Procedure there are no restrictions regarding the sources or forms of evidence. The Code lists the most common ones and provides principles concerning their admission, but does not exclude the possibility of other forms of evidence, such as statistics. Article 233 of the Code of Civil Procedure provides that the court is to assess the evidence according to its own convictions, on the basis of a comprehensive examination of the collected material.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

There have not been any cases involving either direct or indirect discrimination where statistics were used in order to prove discrimination.<sup>74</sup> Thus, it is not possible to judge whether or not there might be any potential reluctance. Influence from developments in other countries is rarely seen.

- c) *Please illustrate the most important case law in this area.*

There is no case law in the field.

- d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

<sup>74</sup> From the interviews conducted to update this report.

On the one hand there is constitutional protection of scientific research (Article 73). But on the other hand, according to the Constitution, everyone has the right to legal protection of his or her private life and family life, honour and good reputation and to make decisions about their personal life.<sup>75</sup> Furthermore, no one may be obliged, except on the basis of an Act of Parliament, to disclose personal information.<sup>76</sup>

Article 27.1 of the Personal Data Protection Act<sup>77</sup> introduces a prohibition of the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade union membership, as well as the processing of data concerning health, genetic code, addictions or sex life and data relating to convictions, decisions on penalties, fines and other decisions issued in court or administrative proceedings.

The processing of the data referred to in paragraph 1 does not constitute a breach of the Act where:

- 1) the data subject has given his/her written consent, unless the processing involves erasing personal data;
- 2) the specific provisions of other statutes provide for the processing of such data without the data subject's consent and provide for adequate safeguards;
- 3) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his/her consent until the establishment of a guardian or a curator;
- 4) processing is necessary for the purposes of carrying out the official objects of churches and other religious unions, associations, foundations and other non-profit-making organisations or institutions with a political, scientific, religious, philosophical or trade union aim, and provided that the processing relates solely to the members of those organisations or institutions or to persons who have regular contact with them in connection with their activity and subject to the provision of appropriate safeguards for the processed data;
- 5) processing relates to data necessary to pursue a legal claim;
- 6) processing is necessary for the purposes of carrying out the obligations of the data controller with regard to the employment of his/her employees and other persons and the scope of processing is provided for by the law;
- 7) processing is required for the purposes of preventive medicine or the provision of care or treatment, where the data are processed by health professionals involved in treatment or provision of other healthcare services or the management of healthcare services if full safeguards of personal data protection are provided;
- 8) the processing relates to data which were made publicly available by the data subject;

<sup>75</sup> Article 47 of the Constitution.

<sup>76</sup> Article 51.1 of the Constitution.

<sup>77</sup> Act of 29 August 1997 on Personal Data Protection [amended] (*Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych*).

- 9) it is necessary to conduct scientific research, including in preparation of a thesis required for graduating from university or receiving a degree; results of scientific research must not be published in a way which allows data subjects to be identified;
- 10) data processing is conducted by a party in order to exercise the rights and duties resulting from decisions issued in court or administrative proceedings.

It should be noted that, in the light of Article 27.1 of the Personal Data Protection Act (points 5 and 6), it is possible to collect sensitive data in order to substantiate a case of discrimination.

In accordance with the general framework set out in the Personal Data Protection Act, the Public Statistics Act<sup>78</sup> makes research on discrimination possible only when information on race, religion or belief, personal life and psychological and political opinions is gathered with the consent of the individual involved.<sup>79</sup> This is why, in the current legal framework, sensitive personal data regarding discrimination on the grounds of sex, age, disability, racial or ethnic origin, nationality, religion, political beliefs, membership of trade unions and sexual orientation can only be collected by the Ministry of Justice (or other state bodies) on a voluntary basis.

If people choose not to disclose one of the above-mentioned characteristics, the real context of a particular crime/offence might never be discovered. This in part explains the low numbers of discrimination crimes/offences in Polish statistics.

Thus far there has been no tradition or examples of data being collected solely for litigation purposes. However, if any research exists, it may be submitted as additional evidence.

An exceptional situation occurs when a national census is organised – in such a case providing information might be obligatory but that requires a special Act of Parliament as a legal basis.<sup>80</sup> The results of the national census are a major source of statistical data, although not a very detailed one. The last two national censuses took place in 2002 and 2011 and their results show for instance the ethnic composition of society (questions relate for instance to citizenship, nationality, affiliation to another nation or ethnic group, country of birth and country of birth of both parents, mother tongue and language spoken at home), religion and beliefs, and numbers of persons with disabilities.

Generally speaking, positive action measures are not often taken. Therefore the use of statistical data to support positive action is still rare. However, there are some exceptions.

<sup>78</sup> Act of 29 June 1995 on Public Statistics [amended], (*Ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej*).

<sup>79</sup> Article 8 Public Statistics Act.

<sup>80</sup> Article 9.1 Public Statistics Act.

When designing positive action, there are also ways of obtaining more detailed information and statistics: via schools' administrations (for instance, the number of Roma pupils in order to organise a system of Roma education assistants or the number of pupils from ethnic minorities in order to plan special subsidies for schools); or via public information stemming, for instance, from the payment of special allowances (people with disabilities), employers who apply for special subsidies or organisations dealing with particular grounds of discrimination (for instance disability) in order to create positive action for people with disabilities. Generally data on people with disabilities is quite detailed due to the number of programmes devoted to this group. For instance, in 2012 the Central Statistical Office published research findings and data regarding *Persons with disabilities on the labour market (Osoby niepełnosprawne na rynku pracy)* and organised research on the participation of persons with disabilities in sport and physical recreation.<sup>81</sup>

In recent years, the government has designed special positive action for people aged over 50 in order to include them in the labour market. This action was planned on the basis of statistical data showing that a vast number of people aged over 50 are excluded from the labour market. In 2012 the Central Statistical Office published data regarding *Persons aged 50+ on the labour market (Osoby powyżej 50. Roku życia na rynku pracy)*.<sup>82</sup>

Finally, it is worth mentioning that the Government Plenipotentiary for Equal Treatment decided to task the Central Statistical Office with collecting data on discrimination. It was agreed in 2012 that the Plenipotentiary would work with experts to elaborate the statistical indicators that are needed in order to effectively monitor the phenomenon of discrimination.<sup>83</sup>

## 2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Does this definition comply with those of the directives? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

The 2010 Equal Treatment Act (Article 3.3) defines harassment in line with the Directives as any unwanted conduct with the purpose or effect of violating the dignity of a natural person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The Act also treats as unequal treatment and prohibits less favourable treatment of persons caused by rejection of harassment or submission to harassment as well as

<sup>81</sup> Ombud Annual Report 2013, p. 448.

<sup>82</sup> Ombud Annual Report 2013, p. 448.

<sup>83</sup> Plenipotentiary Annual Report 2013, p. 20.

prohibiting instructions to discriminate/harass; both encouraging and ordering to discriminate/harass (Article 3.5, Article 9).

The same definition (corrected and significantly broader than before), in relation to employees, was introduced into the Labour Code in 2008.<sup>84</sup> The amended provision defines harassment as unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>85</sup>

A new provision was also added stating that ‘Submission of an employee to harassment or sexual harassment, as well as the taking of actions rejecting (counteracting) harassment or sexual harassment, may not result in any adverse consequences for the employee’.<sup>86</sup>

In addition, both the Equal Treatment Act and the Labour Code describe sexual harassment as a specific form of harassment.

The provisions of Polish criminal law do not contain a separate type of offence which could be described as ‘harassment’ in the meaning of the two Directives. However, the Penal Code does include some crimes covered by the concept of harassment. Such offences include, in particular:

- the use of violence or unlawful threat towards a group of people or an individual person on account of their national, ethnic, racial, political or religious affiliation or because of their lack of religious belief;<sup>87</sup>
- restricting the rights of an individual on account of his/her religious affiliation or lack of religious belief;<sup>88</sup>
- malicious or persistent violation of an employee’s rights stemming from an employment contract or social security;<sup>89</sup>
- refusal to re-employ a person whose reinstatement was decided by the appropriate institution;<sup>90</sup>
- public propagation of fascism or other totalitarian regime or incitement to hatred based on national, ethnic, racial or religious differences or lack of religious belief;<sup>91</sup>
- public insulting of a group of people or an individual person on account of his/her national, ethnic, racial or religious affiliation or because of his or her lack

<sup>84</sup> Act of 21 November 2008 on amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>85</sup> Article 183a § 5 point 2 (amended), Labour Code.

<sup>86</sup> Article 183a § 7, Labour Code.

<sup>87</sup> Article 119.1 Penal Code.

<sup>88</sup> Article 194 Penal Code.

<sup>89</sup> Article 218.1a Penal Code.

<sup>90</sup> Article 218.2 Penal Code.

<sup>91</sup> Article 256 Penal Code.



of religious belief, or infringement of the physical integrity of another person on these grounds.<sup>92</sup>

Existing offences belonging to the category of hate speech and hate crime (like Articles 119.1, 256, 257 of the Penal Code, mentioned above) do not cover the grounds of sexual orientation, gender, disability or age (and these cannot be read into the list by a court of law). Sexual minority rights organisations are campaigning for the scope of these offences to be broadened. A draft proposal for appropriate changes to the Penal Code was prepared by them (additionally, sexual identity was added to grounds mentioned). The campaign convinced politicians from two opposition parties, who in 2012 submitted to Parliament two separate draft laws aiming at amending Articles 119.1, 256 and 257 of the Penal Code (parliamentary documents nos. 340 and 383).<sup>93</sup> The opinion of the government was negative, but the governing party decided to propose its own draft law.<sup>94</sup>

*b) Is harassment prohibited as a form of discrimination?*

Both sexual harassment and harassment are treated as forms of discrimination and thus are prohibited in both the Equal Treatment Act and the Labour Code.

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

The concept of harassment (unlike the concept of sexual harassment) is still new in Poland and rarely well understood. There are numerous different 'codes of conduct' within different professions, corporations, institutions and organisations. Most often they include general anti-discrimination clauses and prohibition of discrimination on different grounds. They do not, however, define different forms of discrimination including harassment. Nevertheless, sometimes they in fact partially describe and cover harassment without using this term.

To give an example – there is no definition of harassment in the rules of judicial ethics enacted by the National Council of the Judiciary.<sup>95</sup> However, the rules clearly state that a judge should approach all persons with respect and kindness, avoid unpleasant situations, etc. It also states (in § 12.3) that a judge should react appropriately in the event of misconduct by individuals taking part in the proceedings, in particular in the event of such people expressing prejudices based on race, sex, belief, nationality, disability, age or social and economic status, or any other reason.

<sup>92</sup> Article 257 Penal Code.

<sup>93</sup> See all relevant documents at: <http://www.spr.org.pl/2012/10/21/rz%C4%85d-i-bas-przeciwne-zmianie-kodeksu-karnego-%C5%BCenuj%C4%85ce-opinie-poddane-analizie/> (1.05.2013).

<sup>94</sup> Parliament document no.1078, that was finally (in February 2013) voted against, see at [http://sejmometr.pl/legislacja\\_projekty\\_ustaw/1082](http://sejmometr.pl/legislacja_projekty_ustaw/1082) (1.05.2013).

<sup>95</sup> *Uchwała Nr 16/2003 Krajowej Rady Sądownictwa z dnia 19 lutego 2003 r. w sprawie uchwalenia zbioru zasad etyki zawodowej sędziów.*

General rules for respectful behaviour, kindness and respect for the dignity of individuals are also included in other acts regulating the obligations of different kinds of public servants.

d) *What is the scope of liability for discrimination)? Specifically, can employers or (in the case of racial or ethnic origin, but please also look at the other grounds of discrimination) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

The general Labour Code rule (Article 120) provides that in the case of damage caused to a third party by an employee when performing occupational duties, solely the employer is obliged to remedy the damage. In such a case the employer has recourse against the employee.

A compensation claim as introduced by the 2010 Equal Treatment Act (Article 13) is governed by the general rules of the Civil Code and Code of Civil Procedure. No specific provisions are included in the Equal Treatment Act.

On the general basis of civil law (Article 430) a person who on his own account entrusts the performance of an act to another person, who in the performance of that act is subject to his control and under a duty to conform to his instructions, is liable for any damage caused through the fault of that person in the course of his performance.

Additionally the State Treasury is responsible for actions causing damage perpetrated by a public servant while working in this capacity.<sup>96</sup>

In the case of damage caused by discriminatory acts – most probably non-material damage – the employer (the State, its representatives) bears responsibility for the acts of its employees. For example, a state hospital is responsible for the actions of a doctor employed by it (there are, of course, specific conditions to be fulfilled for this provision to apply – for example, there must be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the issue of the employer's responsibility for the actions of their employees.

Similarly, a legal entity is responsible for the damage caused by its governing body (Article 416 Civil Code).

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<sup>96</sup> Article 417 Civil Code.



## 2.5 Instructions to discriminate (Article 2(4))

- a) *Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

The 2010 Equal Treatment Act prohibits instructions to discriminate, both encouraging (*zachęcanie*) and ordering (*nakazywanie*) to discriminate (Article 9).

Instructions to discriminate are also prohibited in employment. The provision of the Labour Code regarding instructions to discriminate was broadened in 2008,<sup>97</sup> and now covers both encouraging (which existed before) and ordering (which was added) infringement of the principle of equal treatment with respect to another person.<sup>98</sup>

There are no specific provisions regarding the liability of legal persons for such actions.

- b) *Does national law go beyond the Directives' requirement? (e.g. including incitement)*

Both the 2010 Equal Treatment Act and the Labour Code (since 2008) within the prohibition of instructions to discriminate cover encouraging (*zachęcanie*) and ordering (*nakazywanie*) to discriminate.

- c) *What is the scope of liability for discrimination)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

The general Labour Code rule (Article 120) provides that in the case of damage caused to a third party by an employee when performing occupational duties, solely the employer is obliged to remedy the damage. In such a case the employer has recourse against the employee. The direct possibility for the employer to be held liable for the actions of employees exists in the event of instructions to discriminate.

A compensation claim as introduced by the 2010 Equal Treatment Act (Article 13) is governed by the general rules of the Civil Code and Code of Civil Procedure. No specific provisions are included by the Act: a person who has incurred damage due

<sup>97</sup> Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>98</sup> Article 18<sup>3a</sup> § 5 point 1 (amended) in relation to Article 11<sup>3</sup> Labour Code.

to instructions to discriminate can seek compensation according to general principles.<sup>99</sup>

On the general basis of civil law (Article 430), a person who on his own account entrusts the performance of an act to another person, who in the performance of that act is subject to his control and under a duty to conform to his instructions, is liable for any damage caused through the fault of that person in the course of his performance.

An interesting case is presented in Section 0.3 above – liability of a club’s owner for the discriminatory actions of the club’s security guards who were not employees but a separate company hired by the owner.

Additionally, the State Treasury is responsible for actions causing damage perpetrated by a public servant while working in this capacity.<sup>100</sup>

In the case of damage caused by discriminatory acts – most probably non-material damage – the employer (the State, its representatives) bears responsibility for the acts of its employees. For example, a state hospital is responsible for the actions of a doctor employed by it (there are, of course, specific conditions to be fulfilled for this provision to apply – for example, there must be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the issue of the employer’s responsibility for the actions of their employees.

Similarly, a legal entity is responsible for the damage caused by its governing body (Article 416 Civil Code).

According to general penal rules, if instructions to discriminate lead a person to commit a crime, the person who issued such instructions may be held criminally responsible for directing or instructing the perpetration of the crime, or aiding or instigating it.<sup>101</sup>

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

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. For example, does national law define what would be a “disproportionate burden” for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

<sup>99</sup> Article 13 Equal Treatment Act, Article 415 Civil Code.

<sup>100</sup> Article 417 Civil Code.

<sup>101</sup> Article 18.1-3 Penal Code.

The 2010 Equal Treatment Act finally implemented the duty to provide reasonable accommodation. The Disabled Persons Act (amended by the Equal Treatment Act) provides in its Article 23a (1-3) that:

- an employer is obliged to provide the necessary reasonable accommodation for a disabled person with whom he is in an employment relationship, participating in a recruitment process or undergoing vocational or professional training, apprenticeship or practice;
- necessary reasonable accommodation means introducing, where needed in a particular case, necessary changes and adjustments in line with the specific needs reported to the employer, stemming from somebody's disability, unless the introduction of such changes or adjustments would impose a disproportionate burden on the employer;
- the burden is not deemed disproportionate when it is sufficiently remedied by public funds;
- failure to provide necessary reasonable accommodation is deemed an infringement of the principle of equal treatment in employment within the meaning of Article 18<sup>3a</sup> § 2-5 of the Labour Code.

Since the ETA entered into force on 1 January 2011 there has been very little jurisprudence on the issue. However, some provisions and practice from before implementation might still be of significance for a proper understanding of the whole picture.

Generally Article 94.2b of the Labour Code specifies that an employer is obliged to combat discrimination in employment on the ground, among others, of disability. If the employer already employs people with disabilities, appropriate measures should be undertaken as outlined below.

The Ordinance of the Minister of Labour and Social Policy on general provisions on health and safety at work,<sup>102</sup> issued on the basis of the Labour Code,<sup>103</sup> provides that 'workstations shall be organised according to the psychological and physical features of employees'<sup>104</sup> as well as requiring that 'an employer who employs people with disabilities shall ensure the adjustment of workstations and routes to them in accordance with the needs and abilities of disabled employees, resulting from their reduced ability/mobility'.<sup>105</sup>

Improvement of the employment and working conditions of disabled persons is also promoted through economic incentives under the system of quotas and penalties contained in the 1997 Disabled Persons Act. Employers who, for at least 36 months,

<sup>102</sup> Ordinance of 26 September 1997, as amended. (*Rozporządzenie ministra pracy i polityki socjalnej z dnia 26 września 1997 r. w sprawie ogólnych przepisów bezpieczeństwa i higieny pracy*)

<sup>103</sup> Article 237 (15), Labour Code.

<sup>104</sup> Para. 45.1, Ordinance on general provisions on health and safety at work.

<sup>105</sup> Para. 48, Ordinance on general provisions on health and safety at work.



employ disabled people (who were unemployed or seeking work while not holding a job and were directed to work by a district labour office, or whose disability occurred while working for the employer, except if this disability was caused by the fault or infringement of regulations by the employer or by the employee) may receive from the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych* – hereafter ‘PFRON’) reimbursement for adapting existing workstations to the needs of disabled people and creating new workstations, for adapting or buying equipment to facilitate the functioning of a person with a disability in the workplace, and for the identification by occupational health services of the relevant needs of persons with disabilities.<sup>106</sup>

The amendment of 20 December 2002 of the Disabled Persons Act introduced the definition of a work station adapted to the needs of a disabled person. This is a work station which is suitably equipped and adapted to the needs arising from the type and degree of disability of the individual.<sup>107</sup>

In one of its judgments, the Supreme Court underlined that the obligation to provide reasonable accommodation should be interpreted in line with recital 20 of the preamble to Directive 2000/78/EC and extends beyond accommodating the premises or equipment but also covers accommodating working time and distribution of duties.<sup>108</sup>

Furthermore, an employer who employs disabled people is entitled to receive a monthly subsidy for the remuneration of disabled employees.<sup>109</sup> The amount of the subsidy is related to the level of impairment of the disabled people employed and is currently 180%, 100% or 40% of ‘minimum salary’ depending on the level of disability.<sup>110</sup> An employer may also receive a refund of the cost of a co-worker who helps a person with a disability in adapting to work and communicating.<sup>111</sup>

In addition, the Disabled Persons Act establishes a number of rights designed to accommodate disabled people in the workplace. These include:

- limitations as to maximum working time: eight hours a day, 40 hours a week for slight disability and seven hours a day, 35 hours a week for moderate and severe disability;<sup>112</sup>

<sup>106</sup> Article 26, Disabled Persons Act.

<sup>107</sup> Article 2.8 Disabled Persons Act.

<sup>108</sup> Judgment of 12 May 2011 r.; II PK 276/10. The whole case is not presented in this report since this opinion of the SC was formulated as an aside, in the very last sentence of the justification. The case started in 2008, some years before the introduction of the reasonable accommodation duty in Poland by the ETA (in force since 1 January 2011). But the Supreme Court ruled in 2011, four months after the change of law, and it simply decided to point out the new legal situation for future reference.

<sup>109</sup> Article 26a Disabled Persons Act.

<sup>110</sup> May 2013.

<sup>111</sup> Article 26d Disabled Persons Act.

<sup>112</sup> Article 15.1-2 Disabled Persons Act.



- a disabled person cannot be employed for night shifts and cannot work overtime;<sup>113</sup>
- a disabled person has the right to an additional break of 15 minutes which should be treated as his/her working time;<sup>114</sup>
- people with moderate and severe disabilities have the right to additional holiday of 10 working days;<sup>115</sup>
- people with moderate and severe disabilities have the right to a leave of absence from work of up to 21 days per year whilst retaining their right to remuneration.<sup>116</sup>

One may wonder to what extent the above-mentioned measures could themselves constitute discrimination. They are targeted at the whole group of persons with disabilities and not at individual persons. Thus a disabled person may sometimes receive better working conditions even though s/he does not need them, e.g. freedom from night shifts and overtime work.

For employers, there is a supplementary – this time negative – incentive to employ disabled people. That is, an employer who employs at least 25 employees is obliged to pay a monthly sum to the PFRON unless s/he employs at least six per cent disabled people.<sup>117</sup> This amount is determined according to a formula where 40.65% of the average remuneration is multiplied by the theoretical number of employees who should be taken on in order to reach the threshold of 6% disabled individuals among all those employed by a specific employer.

In addition to the above-described instruments to motivate employers to hire more disabled people, if an employee becomes unable to continue to work in their current position due to an accident at work or occupational disease, the employer is obliged to arrange a suitable place for that individual to work.<sup>118</sup>

- b) *Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

<sup>113</sup> Article 15.3 Disabled Persons Act. This limitation does not include night watch services (security) and a situation where a disabled person applies to work night shifts or overtime and the competent medical doctor consents, see Article 16 of the Act.

<sup>114</sup> Article 17 Disabled Persons Act.

<sup>115</sup> Article 19.1 Disabled Persons Act. This entitlement does not operate if an individual already has the right to holiday of more than 26 working days or is entitled to other additional holiday.

<sup>116</sup> Article 20.1 Disabled Persons Act.

<sup>117</sup> See Article 21.1-2 Disabled Persons Act.

<sup>118</sup> Article 14 Disabled Persons Act.

As mentioned above (Section 2.1.1 a), it seems that in most cases people with disabilities would be identified on the basis of the definition provided by the same Disabled Persons Act (three levels of disability which must be confirmed by medical authorities). Theoretically one may imagine this being challenged by somebody who is/feels disabled and does not have this medical confirmation but since no cases of this kind have been identified, it is difficult to predict the outcome (even though under both the Constitution and the Labour Code a wider approach to disability is possible – see more in 2.1.1.a).

- c) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

The 2010 ETA limits the obligation to provide reasonable accommodation to the employment field.

After becoming the Polish equality body, the Ombud formulated a number of recommendations regarding ‘reasonable accommodation’ beyond employment in its three thematic reports. They cover issues of public infrastructure, electoral law and access to education (and have no relation to Article 5 of the Directive):

*The rule of equal treatment – law and practice. Accessibility of public infrastructure for persons with disabilities. Analysis and recommendations (2011);*  
*The rule of equal treatment – law and practice. Guarantees of active participation in elections (active usage of electoral law) by the elderly and persons with disabilities. Analysis and recommendations (2012);*  
*The rule of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations (2012).*<sup>119</sup>

There are also some provisions spread out in other Acts that might be mentioned in this context.

The special Ordinance of the Minister of National Education on conditions for the organisation of education, developmental support and care for disabled and socially maladapted children and young people in mainstream and integrated pre-school facilities, schools and classes<sup>120</sup> creates a number of obligations for schools,

<sup>119</sup> *Zasada równego traktowania – prawo i praktyka. Dostępność infrastruktury publicznej dla osób z niepełnosprawnościami. Analiza i zalecenia (2011); Zasada równego traktowania – prawo i praktyka. Gwarancje korzystania z czynnego prawa wyborczego przez osoby starsze i osoby z niepełnosprawnościami. Analiza i zalecenia (2012); Zasada równego traktowania – prawo i praktyka. Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia (2012);* all three available at [www.rpo.gov.pl](http://www.rpo.gov.pl)

<sup>120</sup> Dz.U.10.228.1490.

including providing appropriate conditions to learn, specialised equipment, support to parents, etc. It is, however, general in nature and it does not deal with the issues of 'reasonableness'.

The ordinance of the Minister of Culture on conditions in regard to marking, classifying, promotion and testing in public schools<sup>121</sup> gives the possibility to organise special exams for pupils with disabilities in a separate room or at the pupil's home according to the pupil's needs if justified.

According to the Ordinance of the Minister of National Education and Sport on health and safety in public and non-public schools [...],<sup>122</sup> places for practical learning should be appropriately accommodated to the needs of disabled children. The needs of people with disabilities should also be taken into consideration when planning activities outside the school.

In relation to access to and supply of goods and services (housing, public spaces and infrastructures) there is no general obligation to provide reasonable accommodation.

*d) Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

The failure to meet the duty of reasonable accommodation counts as discrimination – as provided by law: failure to provide necessary reasonable accommodation is deemed an infringement of the principle of equal treatment in employment within the meaning of Article 18<sup>3a</sup> § 2-5 of the Labour Code<sup>123</sup> (which prohibits and defines direct discrimination, indirect discrimination, harassment and instructions to discriminate).<sup>124</sup>

*e) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)*

Neither the legislation nor case law formulate the general duty to provide reasonable accommodation in respect of other grounds.

*i) race or ethnic origin*

<sup>121</sup> Dz.U.08.65.400.

<sup>122</sup> Dz.U.03.6.69.

<sup>123</sup> Article 23.a.3 Disabled Persons Act.

<sup>124</sup> The 2010 ETA introduced the concept of reasonable accommodation, but it put it into another act of law – the Disabled Persons Act. Since reasonable accommodation covers employment, the Disabled Persons Act refers to the Labour Code and not the ETA.

Neither the legislation nor case law formulate the general duty to provide reasonable accommodation in respect of race or ethnic origin.

*ii) religion or belief*

Neither the legislation nor case law formulate the general duty to provide reasonable accommodation in respect of religion or belief.

An interesting discussion took place regarding reasonable accommodation in access to a profession. The Ombud requested the Minister of Justice to change the practice of organising state exams for entrance to the legal professions and professional training/apprenticeships on Saturdays, since it contradicts rules observed by the Seventh-day Adventist Church and makes it impossible for believers to pass exams and exercise legal professions (advocates, legal advisors, notaries public, bailiffs). The Ombud's arguments were based on the Constitution as well as EU law, namely the *Vivien Prais* case (130-75, ECJ ruling of 27 October 1976). The Minister of Justice did not agree to change the date of the exams. Previously, the relevant change had been introduced by the Minister of Health in respect of exams for medical doctors.<sup>125</sup>

*iii) Age*

Neither the legislation nor case law formulate the general duty to provide reasonable accommodation in respect of age.

*iv) sexual orientation*

Neither the legislation nor case law formulate the general duty to provide reasonable accommodation in respect of sexual orientation.

*f) Please specify whether this is within the employment field or in areas outside employment*

*i) race or ethnic origin*

Not relevant.

*ii) religion or belief*

Not relevant.

*iii) Age*

<sup>125</sup> Ombud Annual Report 2013, p. 401-403, 466.

Not relevant.

*iv) sexual orientation*

Not relevant.

*g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?*

No, it is not common practice to provide for reasonable accommodation for grounds other than disability in the public or private sector.

*h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

The law does not mention the shift of the burden of proof exactly when dealing with reasonable accommodation, but since it refers to the Labour Code, the rule from the Labour Code applies (see Section 6.3 below on the shift of the burden of proof).

*i) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

The general Construction Act requires that public buildings and multi-family residences should be planned and constructed so as to ensure the necessary conditions for disabled people to use them (since 1995).<sup>126</sup> This is not, however, an obligation to reconstruct existing properties and in many instances public buildings are still not easily accessible to persons with disabilities. Also, this obligation may be waived if this can be justified. The relevant Ordinance of the Minister of Infrastructure on technical conditions with which buildings must comply<sup>127</sup> sets out in some detail a number of technical standards. In addition, the Ordinance underlines and mentions only one group of people – wheelchair users – and, as a consequence, people identify adjustments for people with disabilities with access for wheelchair users only.

This problem was highlighted, for instance, in the *Audit report on the accessibility of government buildings and central offices for the disabled* (2008),<sup>128</sup> which showed that the majority of ministries and central government offices were not accessible. The report, however, inspired a number of positive reactions in different institutions and several buildings were made accessible.

<sup>126</sup> Article 5.1 point 4, Act of 7 July 1994 on Construction (*Ustawa z 7 lipca 1994 Prawo budowlane*).

<sup>127</sup> (Dz.U.02.75.690).

<sup>128</sup> Report prepared by the Plenipotentiary on Disabled Persons (*Raport z badania na temat dostępności budynków administracji rządowej i urzędów centralnych dla osób niepełnosprawnych*).



The Ordinance of the Minister of Industry and Labour on hotels and other similar buildings<sup>129</sup> specifies in some detail particular requirements regarding the needs of disabled people (including the number of adapted rooms, parking spaces, accessible phones, etc.). However, all the requirements but one (elevator buttons) relate to access for wheelchairs. There are also a number of exceptions, for instance historical buildings, mountain shelters, etc.

Many other specialised acts have similar regulations. For instance, local government should provide at least one polling station in a district which is accessible for disabled people (different laws govern different elections); public transport timetables should include information about accessibility for disabled people (Ordinance on Timetables: Dz.U. 2012.451); conditions of movement/transport in cemeteries should take into account the needs of disabled people (Ordinance on Cemeteries: Dz.U.2008.48.284); pharmacies should be accessible for disabled people (Pharmaceutical Act: Dz.U.2008.45.271); when building highways, public roads, railway buildings, bridges and tunnels, the construction firm should take into account the needs of disabled people (four separate ordinances); and in trams at least one entrance should be accessible for disabled people (relevant ordinance). Similar provisions can be found in, for instance, the telecommunications law and the law on postal services.

Other acts establish the possibility of receiving public funds in order to make adjustments to the needs of disabled people, for instance: the Ordinance on financial support for buying and modernising trains, the Ordinance on financial support for establishing night shelters and houses for the homeless and so on.

Finally, in a number of acts on professional training (for instance, for architects, nurses, sailors, etc.) the 'minimum curriculum' covers issues relating to the needs of disabled people.

Despite the fact that there are several provisions spread out in a number of acts, as mentioned above, the reality is often different and some obligations stay on paper. It is also impossible to bring a case regarding a failure to comply with the above legislation and rely upon legislation transposing Directive 2000/78.

In 2012 both the Ombud and Plenipotentiary for Equal Treatment started to advocate for the introduction in Poland of the principles of universal design, including the introduction of the definition of universal design into the law, elaboration of the appropriate guidelines and standards and the introduction of universal design principles into vocational education curricula for the relevant occupations. These activities have not brought about any concrete results yet since the relevant Ministries (those responsible for construction law and for education) seem to be

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<sup>129</sup> (Dz.U.06.22.169).



defending the existing situation as satisfactory.<sup>130</sup> The Ombud has approached directly the rectors of technical higher schools and is planning a meeting with them. The Ombud has also focused on the issue of the accommodation of train stations, platforms and trains as well as hotel facilities.<sup>131</sup>

- j) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

There is no such general duty expressed by national law except general constitutional provisions.

In relation to social security and healthcare, the following constitutional provisions should be mentioned:

‘A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism...’ (Article 67);

‘Public authorities shall ensure special healthcare [...] to handicapped people...’ (Article 68);

‘Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication’ (Article 69).

However, the anti-discrimination clause in the Social Security Act,<sup>132</sup> which is the ‘mother statute’ for the area of social security, limits the principle of equal treatment of all socially insured people to grounds of sex, race, ethnic origin, nationality, marital status, and family status.<sup>133</sup>

- k) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Apart from the many laws mentioned above there are numerous acts of law which refer to disability, although this is not their main subject. Therefore, these provisions are dispersed across a number of texts. The acts of law listed in electronic databases of Polish law or on websites of NGOs specialising in disability issues are long. The

<sup>130</sup> Ombud Annual Report 2013, p. 381, Plenipotentiary Annual Report 2013, p.11-12.

<sup>131</sup> Ombud Annual Report 2013, p. 385-388.

<sup>132</sup> Act of 13 October 1998 on the System of Social Security (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).

<sup>133</sup> Article 2a.1 Social Security Act. Grounds of race, ethnic origin, and nationality were added in December 2010 (in force since 01.01.2011) by the Equal Treatment Act.



list prepared by the Plenipotentiary for Disabled Persons lists dozens of Acts and Regulations (and this is a 'selection', not the complete list).

The Polish Constitution of 1997 provides some rights for people with disabilities:

'A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism...' (Article 67);

'Public authorities shall ensure special healthcare for [...] disabled people...' (Article 68);

'Public authorities shall provide, in accordance with statutes, aid to disabled persons to ensure their subsistence, adaptation to work and social communication' (Article 69).

Besides the Equal Treatment Act and the Labour Code, which are the basic legislation prohibiting discrimination, the main Act is the Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons.<sup>134</sup> The Act establishes the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*) (PFRON)<sup>135</sup> – a fund which distributes money and grants for various activities which aim to support and integrate disabled people. The act does not create an obligation to provide reasonable accommodation beyond employment but creates certain mechanisms which might have a similar effect. It includes, for instance, a refund for eliminating physical barriers, organising training and many other possible activities and projects. The funds are provided for institutions but also individuals (for example, for wheelchair users).

Another document, not of a binding character, is the Charter of Rights of Disabled People (*Karta Praw Osób Niepełnosprawnych*), a resolution of the Polish Sejm<sup>136</sup> in which it also confirmed the right to live in an environment free from functional barriers. It does not have binding character but it influences policies. The Government prepares annual information (i.e. a report) on the fulfilment of the Charter (based on information compiled from different governmental ministries and agencies by the Government Plenipotentiary for Disabled, accepted by the Council of Ministers and presented to the Parliament).<sup>137</sup>

Finally, in 2012 Poland also ratified the UN Convention on the Rights of Persons with Disabilities. But on the occasion of the ratification, the Polish Commissioner for Civil

<sup>134</sup> Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*).

<sup>135</sup> Chapter 10 of the Disabled Persons Act.

<sup>136</sup> Sejm Resolution of 1 August 1997 Charter of Rights of Disabled People (*Uchwała Sejmu z 1 sierpnia 1997 Karta Praw Osób Niepełnosprawnych*).

<sup>137</sup> See for instance: *Information of the Government of the Republic of Poland on activities carried out in 2008 regarding implementation of the resolution of the Sejm of the Republic of Poland from 1 August 1997 'Charter of Rights of Disabled People'*. The Information for the year 2010 was accepted by Parliament on 2 March 2012, and the Information for 2011 on 22 February 2013.

Rights Protection (Ombud), who would be responsible for monitoring the Convention's implementation, expressed, apart from satisfaction, her fear that the Office would not be able to secure adequate resources to fulfil its monitoring role.

The Ombud has already created the Expert Committee on People with Disabilities<sup>138</sup> that has undertaken a number of research and advocacy activities, including the publication *Protection of the rights of persons with disabilities – main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities. Analysis and Recommendations*<sup>139</sup> that touches upon a number of issues (disability and the disabled – from medical to social models of disability; equality of the disabled before the law – legal situation of incapacitated persons; universal design – equal rights through accessibility; equal access to education for persons with disabilities; digital inclusion of persons with disabilities; employment and promotion of occupational activity among persons with disabilities; social security of persons with disabilities; participation of the disabled in elections; access of persons with disabilities to justice).

An important regulation is the ordinance which sets out the criteria according to which a person is entitled to be issued with an official document confirming their status as a disabled person and the level of disability – Ordinance of the Minister of Industry, Labour and Social Policy with regard to the method of confirming disability and level of disability.<sup>140</sup>

In relation to education, the public authorities have the obligation to ensure that all citizens have a universal and equal access to education. According to the Education Act<sup>141</sup> discrimination in education is prohibited. The Education Act guarantees the possibility of education to pupils with disabilities in all kinds of schools (Article 1) as well as special care for them, a personalised learning process and special forms of learning. The special forms of learning may be organised in ordinary schools, in integrated schools or special schools. Disabled pupils may also apply for special material help. According to the Education Act, every local government has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in cases when parents or guardians transport a child, the costs of public transport (of a child and a guardian) should be reimbursed.

According to the Higher Education Act,<sup>142</sup> public universities may receive special funds for activities aiming at the education and rehabilitation of persons with

<sup>138</sup> <http://rpo.gov.pl/en/content/expert-committee-people-disabilities>.

<sup>139</sup> The report includes a summary in English (pp. 90-93) and is available on the Ombud's website: rpo.gov.pl – *Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia* (2012).

<sup>140</sup> *Rozporządzenie Ministra gospodarki, pracy i polityki społecznej z dnia 15 lipca 2003 r. w sprawie orzekania o niepełnosprawności i stopniu niepełnosprawności*.

<sup>141</sup> Act of 7 September 1991 on the Education System, as amended (*Ustawa z 7 września 1991 r. o systemie oświaty*, Dz.U.04.256.2572), [hereafter 'Education Act'].

<sup>142</sup> Dz.U.2012.572.

disabilities. The law provides special state stipends for disabled students (and PhD students) which they may apply for.

In relation to access to and supply of goods and services (housing, public spaces and infrastructures) there are a number of acts that provide for an obligation to take into account the needs of people with disabilities or to fulfil certain obligations (as listed in point i. above). However, in practice it appears that these are not absolute and often depend on good will. In many cases they have the character of incentives rather than of a legal obligation to grant accessibility in a general and anticipatory manner.

There are a number of other specialised regulations executing acts of parliament and aimed specifically at disabled people.

There are different forms of special rights for disabled people. They relate, for instance, to the integration of people with disabilities into the labour market (a number of them are mentioned in this report) and on public transport (price reduction, person accompanying the disabled person travels free), there are also a number of waivers of various costs and charges, and different tax reductions.

Disabled people may also find accommodation in special institutions established for them and, if they are evicted from their homes, they must be provided with social housing if they apply for it. The law on social care treats people with disabilities as a special category and provides for special treatment as well as financial benefits or the possibility to be placed in a special institution. The law requires public authorities to help persons with disabilities, and sets the standards that must be complied with when establishing special institutions for persons with disabilities. However, it should be noted that the concept of 'special institutions' might be seen as controversial and suggests segregation and institutionalised living, which is regarded as a form of discrimination by some (and goes against e.g. the UN Convention on the Rights of Persons with Disabilities).

## 2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

There is a set of conditions which must be fulfilled by an employer in order for them to qualify as an employer running a sheltered employment enterprise:

- 1) s/he should run the enterprise for at least 12 months, employ not less than 25 employees full-time (the calculation should be done on the basis of full-time equivalents) and reach one of the following rates of employment of disabled people: a) at least 50 per cent, with 20 per cent of all employees having a moderate or significant level of disability; b) at least 30 per cent of blind people

- or people with learning difficulties who have a moderate or significant level of disability;
- 2) buildings and premises used by the enterprise must be adapted to meet the needs of disabled people and conform with the rules and principles of health and safety at work;
  - 3) first aid and specialist medical care, counselling and rehabilitation services are provided;
  - 4) s/he has applied to be qualified as such an employer.<sup>143</sup>

In 2009, employers running a sheltered employment enterprise received an additional possibility for support – the possibility of compensation of additional costs incurred due to construction or expansion of the enterprise’s facilities or premises and administration and transport costs incurred in connection with the employment of disabled people. This assistance, however, is addressed to employers running enterprises in which the proportion of disabled people employed is at least 50%.<sup>144</sup> The relevant provisions that were issued on the basis of Article 32 of the Disabled Persons Act and describe this possibility in detail, will be valid until 30 June 2014.<sup>145</sup>

- b) *Would such activities be considered to constitute employment under national law - including for the purposes of application of the anti-discrimination law?*

Sheltered employment is regarded as employment in Polish law including for the purposes of application of the anti-discrimination law.

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<sup>143</sup> Article 28 Disabled Persons Act, latest amendment of this article in force since 01.01.2012.

<sup>144</sup> Article 32 Disabled Persons Act. Theoretically in force since 01.01.2009 but due to the lack of implementing regulations in fact in force since May 2009.

<sup>145</sup> Dz.U.2009.70.603.



### 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)

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

The 2010 Equal Treatment Act includes a provision transposing the Directives. Article 5.9 provides that the ETA does not cover differences of treatment based on nationality, especially in relation to entry into and residence in Poland and in relation to the legal status of natural persons who are citizens of countries other than EU member states, member states of EFTA, or the Swiss Confederation.

At the same time, however, in principle, the provisions of the Polish Labour Code are applied to all employees and employers without any distinction on the basis of their nationality or citizenship.<sup>146</sup>

There is a wide range of possible categories which allow the individuals belonging to them to be covered by the provisions of Labour Code.

In respect of aliens, they are required to obtain a work permit in most cases. Those who do not need such permits are:

- 1) citizens of the Member States of the European Union;
- 2) citizens of the countries with which EU has signed agreements on free movement of people;
- 3) those granted refugee status or subsidiary protection status on the territory of Poland (as well as asylum seekers with some time limits);
- 4) those granted a tolerated stay permit or who have temporary protection on Polish territory;
- 5) those granted a permit to settle on Polish territory;
- 6) those granted a permit for temporary residence in Poland;
- 7) other aliens, according to certain special provisions or international agreements.

Within the above groups, no distinction as to nationality or citizenship is included. The only relevant criterion is the legality of residence on the territory of the Republic of Poland.

With regard to citizens of the Member States of the European Union, a number of changes were introduced into the Polish Aliens Act with regard to the necessary

<sup>146</sup> See Articles 1-3, Labour Code, which do not include any criteria related to nationality or citizenship.



adoption of the *acquis communautaire*.<sup>147</sup> On the date of Poland's accession to the EU, a new legal status of EU resident was introduced. Following this, Polish law was amended in 2005 again in order to harmonise it with the changes in this area within the EU. Since then it has been possible for EU citizens to acquire long-term resident status in Poland, after fulfilling certain conditions, and to enjoy all the rights connected with this status.<sup>148</sup>

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

- a) *Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

Recital 16 was transposed into the 2010 Equal Treatment Act. It provides (Article 10) protection for legal persons on the grounds of race, ethnic origin and nationality of its members. All forms of discrimination are prohibited, and the right to compensation relates also to legal persons (Article 12.2, Article 13).

- b) *Is national law applicable to both private and public sector including public bodies?*

National law is applicable to both the private and public sector, including public bodies.

### 3.1.3 Scope of liability

*Are there any liability provisions than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)*

There are no liability provisions other than those based on the general civil law rules described above, under Sections 2.4 and 2.5.

<sup>147</sup> Act of 13 June 2003 on Aliens (<http://isip.sejm.gov.pl/DetailsServlet?id=WDU20082231460>) and Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (both amended significantly in 2008), Act of 27 July 2002 on the terms and conditions of the entry into and residence in the territory of the Republic of Poland for citizens of the EU Member States and the members of their families.

<sup>148</sup> Act of 22 April 2005 amending the Act on Aliens and the Act on Granting Protection to Aliens within the Territory of the Republic of Poland as well as some other Acts (Journal of Laws of 2005 No. 94 item 788).



## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

Until 2010 national legislation applied to all sectors of public and private employment and occupation, but only work performed under a labour contract. The most relevant act in this context was and still is the Labour Code.

The 2010 Equal Treatment Act widened the protection and covers (Article 8) any other form of employment like civil contracts (i.e. contract work), self-employment, and independent professions.<sup>149</sup>

*In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.*

### **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)). Is the public sector dealt with differently to the private sector?**

The Labour Code expresses the rule of equal treatment and the prohibition of discrimination and covers conditions for access to employment, including selection criteria, recruitment conditions and promotion. The same legal regime applies to both the public and private sector. All grounds are covered.<sup>150</sup>

The 2010 Equal Treatment Act widens the protection and covers (Article 8) any other form of employment like civil contracts (i.e. contract work), self-employment, and independent professions and covers all grounds. However, it does not mention promotion.

The institutions of the labour market, such as employment agencies, are also obliged to behave in a non-discriminatory manner. According to the Act on the Promotion of Employment and the Institutions of the Labour Market [the Employment Act], an employment agency cannot discriminate against people for whom it seeks employment or paid work (including self-employment), on the grounds of gender,

<sup>149</sup> 'Independent professions' is a special term used in Poland for self-regulated professions. The other terms used are 'free professions' or 'professions of public trust' (Article 17 of the Constitution).

<sup>150</sup> Article 18<sup>3a</sup>-18<sup>3b</sup>, Labour Code.

age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>151</sup>

Similarly, other labour market institutions – such as employment services for the unemployed and those seeking work – must also operate in the non-discriminatory manner specified by law. The Employment Act clearly determines that such services should be provided free of charge to everyone in accordance with the principle of equality. This means they should be provided irrespective of a person's gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs and membership or non-membership of a trade union.<sup>152</sup>

Likewise, employers providing district labour offices with current information concerning available jobs cannot formulate any requirements that discriminate against candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>153</sup>

Correspondingly, district labour offices and the centres for information and career planning run by regional (voivodship) labour offices must dispense career advice in accordance with the principle of equality in use of vocational advice services, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion and religion or for reasons of trade union membership.<sup>154</sup>

In 2012, the Ombud took up the matter (in response to a concrete complaint) of accommodating the needs of persons with disabilities during professional exams organised by the state (both entry exams for professional apprenticeships as well as final professional exams that are the condition for performing a given profession). The Ombud approached the Minister of Justice regarding exams for advocates, legal advisors, notaries public, sworn translators and candidates for general apprenticeships (organised by the National School of the Judiciary and Public Prosecution) and asked for amendments to the laws that would create the possibility to prolong exams and to introduce alternative means of familiarisation with the questions for those who cannot read and answering them for those who cannot write. The Minister of Justice generally agreed but also underlined that some legal professions (like that of judge, for instance) require certain characteristics and the ability to personally read, listen to testimony or take a statement. The Minister prepared draft amendments to the relevant regulations, two of which have already been passed – regarding the professional exam for advocates and legal advisors.<sup>155</sup> The ordinances create the possibility to prolong the time of an exam by 50% for people with disabilities if they have a certificate of disability issued by the relevant medical authorities (based on the Act on the Vocational and Social Rehabilitation and

<sup>151</sup> Article 19 c Employment Act.

<sup>152</sup> Article 36.4 item 3, Employment Act.

<sup>153</sup> Article 36.5 e Employment Act.

<sup>154</sup> Article 38.2 item 3 Employment Act.

<sup>155</sup> Ordinance of the Minister of Justice dated 12 December 2012 (Dz.U. 2012.1453-1454).



Employment of Disabled Persons that contains a legal definition of a disabled person)<sup>156</sup> and have an additional statement by a doctor.

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

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

Employment and working conditions, including pay and dismissals, are covered by the prohibition of discrimination in the Labour Code (all grounds protected by Directives are covered).<sup>157</sup>

Although occupational pensions are regulated by the Retirement Act and Disability Pensions from the Social Insurance Fund,<sup>158</sup> the anti-discrimination clause regarding occupational pensions is included in the Social Security Act,<sup>159</sup> which is the framework legislation for the social security sector. This clause until 2010 limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status, but since 01.01.2011 it has also covered the grounds of race, ethnic origin and nationality.<sup>160</sup>

The 2010 Equal Treatment Act that widens protection and also covers self-employment and civil contracts (i.e. contract work) (all grounds are covered) refers to the general prohibition of discrimination in the context of work/employment (including on the basis of labour contracts, civil contracts, self-employment, etc.) but does not mention *expressis verbis* pay or dismissal.

<sup>156</sup> The Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*) [referred to in this report as the Disabled Persons Act].

<sup>157</sup> Article 18<sup>3a</sup>-18<sup>3b</sup>, Labour Code.

<sup>158</sup> Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund (*Ustawa z 17 grudnia 1998r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) [hereafter Retirement Act].

<sup>159</sup> Act of 13 October 1998 on the Social Security System (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).

<sup>160</sup> Article 2a.1 Social Security Act amended by the 2010 Equal Treatment Act.

### 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))

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category.*

*Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?*

The Labour Code anti-discrimination provision which covers access to vocational training (all grounds are protected) is not that detailed and uses the general term ‘access to vocational training increasing qualifications’.<sup>161</sup> However, taking into consideration labour law as a whole, it should be interpreted widely to cover all elements as listed by the Directives. Since relevant case law is not available it is difficult to assess the interpretation of this provision in practice. The Labour Code provisions apply to training organised by the employer only. Other kinds of training, provided outside employment, are governed by different laws on education that generally lack clear anti-discrimination clauses in relation to different kinds of vocational training (more in Section 3.2.8).

The 2010 Equal Treatment Act that widens protection and covers also self-employment and civil contracts (i.e. contract work) (all grounds are covered) prohibits discrimination in access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 8.1.1).

The *Starosta* (a local government organ) is the public organ which initiates, organises and finances training for the unemployed in order to improve their chances of finding employment or other form of paid work or to upgrade their vocational qualifications. When sending such a person for training, the principle of equality in access to training must be complied with, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religion or trade union membership.<sup>162</sup>

<sup>161</sup> Article 18<sup>3a</sup> para 1, Labour Code.

<sup>162</sup> Article 40.6 Employment Act.



### **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))**

Freedom to establish and join trade unions as well as organisations of employers is protected by the Constitution (Article 59).

The 2010 Equal Treatment Act (Article 8.1.3) prohibits discrimination in membership of and involvement in trade unions, organisations of employers, or any organisation whose members carry on a particular profession, including the benefits provided for members of such organisations (all grounds are covered).

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

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

The 2010 Equal Treatment Act prohibits discrimination in social protection on the grounds of gender, race, ethnic origin or nationality (Article 6) and discrimination in relation to healthcare on the grounds of race, ethnic origin and nationality (Article 7).

There is also, as already mentioned, the anti-discrimination clause in the Social Security Act,<sup>163</sup> which is the basic statute for the social security area. Until 2010, this provision limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status, and family status but it has been extended (as of 01.01.2011) to the grounds of race, ethnic origin and nationality.<sup>164</sup>

The Capital-based Pensions Act<sup>165</sup> (Article 2), amended by the Equal Treatment Act (Article 30), prohibits discrimination in calculating the amount of pension on the grounds of gender, race, ethnic origin, nationality, state of health, family and marital status.

The Medical Treatment Act provides that, when determining access to medical services and, in particular, ‘waiting lists’ (some medical services are not accessible immediately – in such cases a person must sign up to a list and wait for their turn which may take a few weeks or months), such lists should be drawn up in line with

<sup>163</sup> Act of 13<sup>th</sup> October 1998 on System of Social Security (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).

<sup>164</sup> Article 2a.1 Social Security Act as amended by the 2010 Equal Treatment Act.

<sup>165</sup> Act of 21 November 2008 on capital-based pensions (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).





the principle of just, equal, anti-discriminatory and fair access to medical treatment.<sup>166</sup> In this way, the Act prohibits discrimination, though the specific grounds of racial or ethnic origin are not mentioned.

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

National legislation does not rely on the exception from the Directive.

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

*This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities.*

*It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.*

The 2010 Equal Treatment Act prohibits discrimination in social protection, on the grounds of gender, race, ethnic origin or nationality (Article 6). It does not use the term social advantages but the definition of social protection (not legal, but elaborated by academic writings) traditionally extends to the issues of social advantages.<sup>167</sup>

In order to draw a conclusion from the complex combination of provisions pertaining to a number of different fields, it may be said that discrimination related to social advantages is unlawful.

There is a rather complex system of different allowances and grants. Most of them are not discriminatory, such as a childbirth grant, which is payable to the mother, father or legal guardian of a child. It can also belong to a *de facto* guardian of a child up to the age of one, if it has not been granted to the mother, father or legal guardian.<sup>168</sup>

<sup>166</sup> Article 20.5, Act of 27 August 2004 on Medical Treatment Financed from Public Resources (*Ustawa z 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*).

<sup>167</sup> See for instance: Piotrowski, Jerzy. *Zabezpieczenie społeczne. Problematyka i metody*, Wydawnictwo KiW, Warszawa 1966, p. 28; *Polityka Społeczna*, ed. A. Rajkiewicz, Wydawnictwo PWE, Warszawa 1979, s. 432 as well as the Constitutional Tribunal ruling in the case TK K 17/92.

<sup>168</sup> Article 9 Act of 28 November 2003 on Family Benefits (*Ustawa z 28 listopada 2003r. o świadczeniach rodzinnych*).

The death allowance is payable to any person who covers the costs of a funeral.<sup>169</sup> However, a same-sex partner, unlike a spouse, would have to supply documentary evidence of the costs incurred.<sup>170</sup>

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

*This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education are favoured and supported.*

The 2010 Equal Treatment Act finally *expressis verbis* prohibited discrimination in education and higher education, but only on the grounds of race, ethnic origin or nationality (Article 7).

Generally, discrimination in education is prohibited – the Education Act refers to major international human rights instruments (1948 Universal Declaration, 1966 International Covenant on Civil and Political Rights and 1989 Convention on the Rights of the Child). However, in this Act there is no separate and explicit anti-discrimination provision listing protected grounds.

Similarly, there is no general non-discrimination provision in the statute on higher education. But access to higher education institutions is granted to all Polish citizens and foreigners equally (with some exceptions).<sup>171</sup>

In the field of education, schools must ensure that each pupil has the conditions necessary for his/her development, and prepare him/her to fulfil family and civic responsibilities based on the principles of solidarity, democracy, tolerance, justice and freedom. According to Article 13 of the Education Act, the duties of schools and public facilities include enabling pupils to uphold a sense of national, ethnic, linguistic and religious identity, especially learning their own language, history and culture. In their teaching and pastoral work, schools are also obliged to uphold regional cultures and traditions.<sup>172</sup>

<sup>169</sup> Article 78.1 Retirement Act.

<sup>170</sup> Article 79.1 Retirement Act.

<sup>171</sup> Article 43 Act of 27 July 2005 on Higher Education, as amended (*Ustawa z 27 lipca 2005 r. prawo o szkolnictwie wyższym*, Dz.U.05.164.1365).

<sup>172</sup> See the Ordinance of the Minister of National Education of 14 November 2007 on the conditions and means of realisation by nurseries, schools and public institutions of public duties in a way which enables the upholding of the national, ethnic and linguistic identity of pupils belonging to national and ethnic minorities [...] (Dz.U.2007, Nr 214, poz. 1579 and Dz.U. 2010 Nr 109 poz. 712).

The right of every citizen of the Republic of Poland to an education is enshrined in the Constitution.<sup>173</sup> Education to the age of 18 is obligatory and free in state schools (Article 15, Education Act).<sup>174</sup>

Parents have the freedom to choose schools other than state schools for their children. Citizens and institutions have the right to establish primary, secondary and tertiary schools and educational establishments.

Public authorities have the obligation to ensure that all citizens have universal and equal access to education. For this purpose, they are obliged to establish and support systems of individual financial and organisational aid for schoolchildren and students.

In the field of education, the Polish government has invested serious efforts in guaranteeing full equality and non-discrimination of members of national minorities. Children of minority origin have equal access to all schools on the same terms as other pupils.<sup>175</sup> Access to institutions of higher education is also granted equally.<sup>176</sup>

However, in practice, the implementation of the right to education in the case of Roma children still raises some concerns. A serious problem for the education of Roma children remains their inadequate knowledge of the Polish language, as well as cultural barriers, resulting in problems at school from the very beginning of school education.<sup>177</sup> This often leads to failure at school, marks much below average, low attendance, dropping out of school or transfer to special schools for children with learning disabilities.

The problems in the education of Roma children are also connected with the economic situation of Roma families and the indifferent attitude which some Roma families exhibit towards education, as well as the state's previous low level of activity in terms of ensuring suitable conditions for the education of Roma in schools. On the one hand, the state has undertaken too little action to encourage and facilitate education for Roma children. On the other hand, it has tolerated and still tolerates to some extent the fact that Roma parents often do not fulfil the obligation to send their children to school.

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<sup>173</sup> Article 70 Constitution.

<sup>174</sup> The manner of fulfilling the education obligation is defined by the 1991 Education Act.

<sup>175</sup> Article 1.1 Education Act.

<sup>176</sup> Article 43 Act of 27 July 2005 on Higher Education.

<sup>177</sup> See annual reports on the Programme for the Roma Community in Poland, available at [www.mac.gov.pl](http://www.mac.gov.pl).

The problem of over-representation of Roma children in special schools was known for number of years and the government promised to improve the situation.<sup>178</sup> Despite this, the problem remained for a long time, but might now have been finally resolved due to serious promises followed by action of the Minister of Education in August 2008 (accompanying the decision to abolish segregated Roma classes in schools – see below) and the activities of the ‘Roma Issues Team’<sup>179</sup> within the Joint Committee of the Government and Ethnic and National Minorities.

The decision was taken to double check whether Roma children currently attending special schools do really qualify for this or whether they should attend mainstream schools (the appropriate agencies were asked to verify all decisions in this matter). In relation to the procedure used for placement in a special school, the Minister of Education formulated additional conditions to be fulfilled in order to make sure that placement in a special school is needed (previously, only a test in the Polish language was used, causing problems for some Roma children. The Minister recommended use of other methods, not based on the level of comprehension of Polish).<sup>180</sup> However, still in 2011 circa 20% of Roma pupils received a decision that they should attend special schools (the number of those who actually attend special schools is not known).<sup>181</sup>

The gradual improvement in Roma education has also been made possible to some extent by a clear change in state policy, aiming to eliminate Roma classes and favour the mainstream education system. However, despite promises given by governmental agencies, and clear recommendations formulated for instance in the ECRI 2004 report on Poland, segregated Roma classes existed for a long time (in 2008, there were still seven such classes). Only at the end of 2008 did the Minister of Education make a final decision: a. to stop the creation of new Roma classes and b. to abolish existing Roma classes within two years (2009-2010).<sup>182</sup> As of 2011, no Roma classes have existed. There is also some improvement regarding the pre-schooling of Roma children due to new pre-schools opening up in areas with significant Roma populations. Additionally, the data on school attendance by Roma show an increase from previous estimates from a level of around 70% to 84.3% in the school year 2005/2006 and 86.5% in 2006/2007. It dropped to 82% in 2009/2010, but increased again in 2010/2011 to 84.6% and in 2011/2012 to 86.8%.<sup>183</sup> Finally, there are some initiatives addressed at certain groups of Roma children (e.g.

<sup>178</sup> As a result of many protests by Roma leaders and NGOs, the Ministry of National Education and Sport recommended that educational facilities pay greater attention to this problem and ordered verification of the decisions to send Roma children to these schools by psychological-pedagogical clinics. See *Roma in public education*, Raxen, National Focal Point for Poland, Helsinki Foundation for Human Rights, <http://www.hfhrpol.waw.pl>, p. 6.

<sup>179</sup> For more on the Team, see Section 8.1.d.

<sup>180</sup> See minutes from the fourth meeting of the Roma Issues Team.

<sup>181</sup> Information received from Ministry of Internal Affairs.

<sup>182</sup> See minutes from the fourth meeting of the Roma Issues Team.

<sup>183</sup> See reports from the implementation of the Programme for the Roma Community in Poland in consecutive years, at [www.mac.gov.pl](http://www.mac.gov.pl).

scholarships for children with outstanding artistic talent or for Roma students in higher education) which aim to establish equal opportunities (see more in Section 5 on positive action).

These positive changes were possible due to: a joint effort of the Polish public administration in the form of the implementation of the Programme for the Roma Community in Poland which was initiated in 2004 and is due to be completed in 2013 (there is already a draft programme for the years 2014-2020);<sup>184</sup> alarming reports from the Commissioner for Civil Rights Protection, the Group for National Minorities within the Ministry of the Interior and Administration and relevant Commissions of the Sejm; and the involvement of Roma representatives and organisations. In this context the positive role of 'Roma education assistants'<sup>185</sup> and 'assistant teachers'<sup>186</sup> should be pointed out.

Poland does not limit itself to a guarantee of non-discrimination, it also carries out positive action. National and ethnic minorities have the right to create their own educational institutions.<sup>187</sup>

Moreover, there are state schools in which instruction is provided in minority languages, bilingual schools with equal instruction in two languages (Polish and a minority language) and schools with additional teaching of a minority language.<sup>188</sup> The schools for national minorities receive an extra 20 per cent subsidy in comparison with other schools. Nevertheless, there are some problems due to the lack of a sufficient number of textbooks for teaching minority languages, the need to update textbooks and insufficient financial resources (despite the extra 20 per cent subsidy).

According to Article 13 of the Education Act, schools and public institutions have an obligation to enable schoolchildren to maintain their sense of national, ethnic, linguistic and religious identity and, in particular, to study their language and their own history and culture. On request from parents, language tuition may take place in separate groups, sections or schools; in groups, sections or schools with additional lessons in a particular language and on their own history and culture; or in inter-school teaching groups.<sup>189</sup>

<sup>184</sup> See at: <https://mac.gov.pl/wp-content/uploads/2011/12/PROGRAM-2014-20-wersja-16-kwietnia-2013.pdf>.

<sup>185</sup> They are responsible, among other things, for contact with parents, monitoring school attendance and assisting with homework.

<sup>186</sup> They assist teachers by making use of their special training in intercultural pedagogy and experience with bilingual children.

<sup>187</sup> Article 35.2 Constitution.

<sup>188</sup> The legal ground for these schools is Article 13 of the Education Act and the relevant ordinance issued on its basis.

<sup>189</sup> The conditions and manner for carrying out these tasks were defined in an ordinance issued by the Minister of National Education (Dz.U. 2007 nr 214 poz. 1579 and Dz.U. 2010 nr 109 poz. 712).



In a study covering a number of minorities and based, among other things, on interviews with representatives of these minorities,<sup>190</sup> the problems most frequently mentioned by national minorities were the lack of curricula, textbooks (the process of approving a textbook is quite complicated and takes too much time), teachers who speak the minority language and funds.

The situation of individual national minority groups in the field of education varies widely for different reasons, including historical and geographical, and as a result of different levels of activity by particular groups. However, none of the groups officially claimed that these differences constitute discrimination.

The best organised is Lithuanian education, largely due to the activities of the members of this minority, covering all the levels of teaching, as well as to the fact that this group is concentrated in one place, making it easier for them to organise education. The Lithuanians have also developed the largest number of textbooks. The situation of the Ukrainian community, in contrast, is more difficult, since it is not geographically concentrated and, in order to go to a school with Ukrainian as the first language, pupils often need to board.

In the case of the Roma community, a teaching system which exists for other minorities under the Education Act (schools with the minority language as the first language or second language) has not been established, but it should be pointed out that the obligation of the authorities to establish such a system depends on the will of the national minority group (they need to lodge an application). Representatives of the Roma community have different views on whether the Romani language should be used in schools. Part of the community is of the opinion that it should not be.<sup>191</sup> However, a number of measures have been taken in order to convince parents to send children to school (see Section 5 on positive action below).

In July 2007 the first textbook in Romani was produced and published (500 copies) (*Miri szkoła. Romano elementaro*). Prepared as a local initiative (and funded by the Ministry of the Interior and Administration), it attracted the attention of the Roma community.

As far as the education of people with disabilities is concerned, the public authorities have the obligation to ensure that all citizens have universal and equal access to education. The Education Act guarantees the possibility of education to pupils with disabilities in all kinds of schools (Article 1)<sup>192</sup> as well as special care for them, a personalised learning process and special forms of learning.

<sup>190</sup> *Right to education*. Monitoring report, Helsinki Foundation for Human Rights, Warsaw 2002, Appendix: Right to education enjoyed by national minorities, pp. 135-160.

<sup>191</sup> See for instance minutes from the eighth meeting (09.09.2009) of the Roma Issues Team.

<sup>192</sup> Article 1, Act of 7 September 1991 on the Education System, as amended (*Ustawa z 7 września 1991 r. o systemie oświaty*, Dz.U.04.256.2572), [referred to in this report as the 'Education Act'].



The special forms of learning may be organised in ordinary schools, in integrated schools or special schools. Pupils with disabilities may also apply for special financial help.

According to the Higher Education Act, public universities may receive special funds for actions aiming to educate and rehabilitate persons with disabilities.

There are a number of laws that specify different conditions for the educational process, including for persons with disabilities. The most important ones are described in the following paragraphs.

The special Ordinance of the Minister of National Education on conditions for the organisation of education, developmental support and care for disabled and socially maladapted children and young people in mainstream and integrated pre-school facilities, schools and classes<sup>193</sup> places a number of obligations on schools, including providing appropriate learning conditions, specialised equipment, support for parents, etc.

According to the Education Act (Article 17), every local government has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in cases where parents or guardians transport a child, the costs of public transport (of a child and a guardian) should be reimbursed.

According to Ordinance of the Minister of National Education and Sport on health and safety in public and non-public schools [...],<sup>194</sup> places for practical learning should be adequately accommodated to the needs of disabled pupils. Their needs should also be taken into consideration when planning out-of-school activities.

The Higher Education Act provides special state stipends for disabled students (and PhD students) which they may apply for.

In its National Health Programme for the years 2007-2015,<sup>195</sup> the Council of Ministers declared that it would create, amend and execute regulations in the fields of:

- assistance for families of children and young people with disabilities and chronic diseases;
- elimination of barriers in access to education and out-of-school activities, and continuing rehabilitation for children and young people with disabilities.

Judging from the legal documents, the situation of students with disabilities could seem to be good. In fact, however, children and their families face a number of problems in access to mainstream education (although the situation with regards to

<sup>193</sup> Current ordinance in force since 01.01.2011 (Dz.U. 2010.228.1490).

<sup>194</sup> (Dz.U.03.6.69).

<sup>195</sup> Resolution of the Council of Ministers nr 90/2007, 15 May 2007.

special education is much better). Mainstream schools are not ready and not adequately prepared, their staff are not appropriately trained, and teachers and school administrations are afraid and prefer to refuse access to schools instead of solving the problem. In a number of cases of this kind, the Commissioner for Civil Rights Protection (Ombud) has intervened as well as trying to draw attention to this problem in addresses to the Government.<sup>196</sup>

In 2012, the Ombud published a special report:<sup>197</sup> *The rule of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations (2012)*<sup>198</sup> and formulated a number of recommendations regarding inclusive education (as opposed to special education and integrated education), a system for financing education (the money should follow the student), and relating to specific kinds of disability. The report also analyses the state of affairs in terms of appropriate textbooks for pupils with disabilities as well as the system of support for parents, students and teachers.<sup>199</sup> The Expert Committee on People with Disabilities<sup>200</sup> established by the Ombud<sup>201</sup> undertook collaboration with the Ministry of Education in order to advocate for the implementation of these recommendations. The Committee additionally prepared the publication *Protection of the rights of persons with disabilities – main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities. Analysis and Recommendations*,<sup>202</sup> which also covers the issue of equal access to education.

Finally, there are special grant programmes conducted by PFRON supporting the education of pupils with disabilities: ‘Students in rural areas – assistance in access to education for people with disabilities living in rural communes and urban-rural communes’,<sup>203</sup> and the programmes ‘Pitagoras’ and ‘Student’.

<sup>196</sup> See letters: to the Minister of Education summarising problems of children with disabilities in access to education and calling for action, 25 January 2008, RPO – 572275 – 1/07/JS/AB; to the Minister of Health on access to schools and equal treatment of children with haemophilia, 31 July 2008, RPO – 588895 - X/08/JS; to the Minister of Education on text books for blind or visually impaired pupils, 08 Sept. 2008, RPO – 571999 – 1/07/KJ; all documents may be found at <http://www.rpo.gov.pl>.

<sup>197</sup> Ombud Annual Report 2013, p. 418.

<sup>198</sup> *Zasada równego traktowania – prawo i praktyka. Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia (2012)*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>199</sup> Ombud Annual Report 2013, p. 420-421.

<sup>200</sup> <http://rpo.gov.pl/en/content/expert-committee-people-disabilities>.

<sup>201</sup> Ombud Annual Report 2013, p 421.

<sup>202</sup> The report includes a summary in English (pp. 90-93) and is available on the Ombud's website: <http://www.rpo.gov.pl> – *Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia (2012)*.

<sup>203</sup> *Uczeń na wsi – pomoc w zdobyciu wykształcenia przez osoby niepełnosprawne zamieszkujące gminy wiejskie oraz gminy miejsko-wiejskie*.



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

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The 2010 Equal Treatment Act finally *expressis verbis* prohibits discrimination in access to goods and services. The relevant provision (Article 6) prohibits unequal treatment in access to services, including housing, goods, purchasing rights and energy if they are offered to public, on the grounds of sex, race, ethnic origin and nationality.

There is no law regulating the operation of private clubs, etc. They do exist (for instance membership clubs) but they operate on the basis of general legal provisions and use their freedom of economic activity to establish their own internal rules. There is no body which ensures that these internal rules are constitutional and comply with anti-discrimination law or the Directives. Since there have been no cases in this area, it is difficult to judge on what ground discrimination of this kind could be challenged. There are theoretical possibilities, but judicial interpretation would be required.

The Code of Petty Offences contains two provisions regarding access to and supply of goods and services in Chapter XV – Offences against the interest of consumers.

The first one stipulates that anyone involved in selling goods in a retail or catering business who hides goods meant for sale or deliberately refuses to sell them without a well-founded reason is liable to a fine.<sup>204</sup> According to a resolution of the Supreme Court, this kind of misconduct may be committed by any person involved in selling goods and it is of no account whether it is the owner of a company, an individual carrying out a managerial function, an employee or an estate agent.<sup>205</sup>

The second lays down that any professional service provider who demands or collects payment higher than that in force or deliberately refuses to provide the service without a well-founded reason is liable to a fine.<sup>206</sup>

Although these provisions stem from the communist regime and were enacted in order to prevent stockpiling of commercial goods during periods of shortage of commodities, they could also be used to prohibit discrimination with regard to the

<sup>204</sup> Article 135 Code of Petty Offences of 20 May 1971 (*Kodeks wykroczeń z 20 maja 1971r.*)

<sup>205</sup> Resolution of the Supreme Court of 17 March 2005, no. I KZP 3/05.

<sup>206</sup> Article 138 Code of Petty Offences.

access and supply of goods and services which are available to the public.<sup>207</sup> Both articles can be used to counteract discrimination, even though the intention of the legislators was different.

b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

The law does not mention differences in treatment in the provision of financial services.

In the case of both groups – elderly people and people with disabilities – a variety of waivers and discounts are available from a number of public, state and municipal services.

Negative differences in the treatment of older people do exist, however, in practice. According to the report prepared by the team of experts under the auspices of the Ombud,<sup>208</sup> the most common are found in access to health and life insurance. However, the authors of the report state that generally discrimination in access to financial services is difficult to spot and prove.

In 2012, the Government Plenipotentiary for Equal Treatment received a complaint stating that car insurance companies, when entering into obligatory civil liability insurance contracts, differentiate between clients based on their age. The Plenipotentiary asked for the position of the Polish Chamber of Insurance and received a response stating that differentiation based on age may not be treated as discriminatory but reflects the calculation of risk.<sup>209</sup>

There are also cases of limited access to credit, loans, etc. There was a case in Poland when a famous professor (Jerzy Jedlicki) published a newspaper article describing a story of discrimination based on age. He was approached by his bank a number of times with an offer to apply for a credit card (he had been the client of this bank for over 15 years, and also deposited his savings there). However, when he actually applied for the card he was refused with the explanation that he was over 70 years old. In reaction to this case, the Ombud, Professor A. Zoll, sent a letter to the Union of Polish Banks criticising discrimination against pensioners. Despite these

<sup>207</sup> Liegl B., Perchinig B., and Weyss B., Brochure on Anti-discrimination Legislation and Policies in Poland. Produced in the framework of the Twinning Project Poland – Austria 'Strengthening Anti-discrimination Policies' (PL 02/IB/SO/06, FM No. 2002/000-605.01.02), July 2004, p. 12.

<sup>208</sup> *The state of realisation of rights of elderly people in Poland. Analysis and recommended activities*, ed. B. Szatur-Jaworska, Warsaw, October 2008 (*Stan przestrzegania praw osób starszych w Polsce. Analiza i rekomendacje zmian. Warszawa 2008*).

<sup>209</sup> Plenipotentiary Annual Report 2013, p. 65.

allegations of discrimination, most banks continue to apply age restrictions when deciding to grant a credit card. However, they do not put the appropriate information on leaflets advertising the bank, and so clients are not aware.

A similar situation occurred in 2012. The Government Plenipotentiary for Equal Treatment received a complaint from a person who was refused a credit card by a bank based on age. In response to the Plenipotentiary's inquiry, the bank's representative admitted that the refusal was based on the calculation of risk but the relevant internal rules are not public and may not be revealed.<sup>210</sup>

In regard to people with disabilities, very few cases of discrimination in access to financial services have been reported. In the report *Polish Road to the UN Convention on the Rights of Persons with Disabilities*<sup>211</sup> prepared by a coalition of a number of organisations and covering different fields of discrimination and problems faced by people with disabilities, access to financial services is not mentioned as a separate issue (but, for instance, 'economic violence' and limited access to commercial private insurance schemes are reported). One of the problem that has been raised in public debate is limited access to cash machines by people in wheelchairs or with visual impairments. The law on banking does not oblige banks to build cash machines in an accessible way, and the banks usually state that the client should visit the branch instead of using a cash machine. No cases have been brought to court on this issue. This also comes from the low awareness of possible victims of discrimination that different treatment in access to financial services might be discriminatory and illegal.

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

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

The 2010 Equal Treatment Act finally *expressis verbis* (Article 6) prohibits unequal treatment in access to services, including housing, if they are offered to public, on the grounds of sex, race, ethnic origin and nationality. The law does not formulate any exceptions.

According to Article 75.1 of the 1997 Constitution, public authorities are obliged to establish policies enabling them to meet the housing needs of citizens and in

<sup>210</sup> Plenipotentiary Annual Report 2013, p. 66-67.

<sup>211</sup> *Polish Road to the UN Convention on the Rights of Persons with Disabilities*, Fundacja Instytut Rozwoju Regionalnego, Kraków 2008, (released on 15 January 2009) (*Polska droga do Konwencji o prawach osób niepełnosprawnych*).



particular to counteract homelessness, support the development of social building projects and support the efforts of citizens to secure their own housing.

Access to housing is regulated by the following legislation: the Housing Allowances Act<sup>212</sup> and the Act on the Protection of Tenants' Rights.<sup>213</sup> They contain no provisions of a discriminatory nature.<sup>214</sup>

The actual situation in Poland as far as housing is concerned cannot be taken as satisfactory. The housing needs of the population and especially of its poorer element are not met. The government and local government do not allocate adequate financial resources to solve housing problems.

The situation of a considerable number of Roma in terms of housing and living conditions is drastic<sup>215</sup> (especially Bergitka/Carpathian Roma)<sup>216</sup> and even though the level of renovation and other activities is increasing, it is not satisfactory. There are still flats with no toilets, kitchens or running water.

The access of Roma to housing allowances (2001 Housing Allowances Act) is very limited, since one of the conditions for receiving the allowance is to pay the rent on time and many Roma are in a debt spiral (90 per cent rate of unemployment). The access of Roma to social housing is also limited, but since they do not challenge decisions on the allocation of social housing it is difficult to estimate the scale of this problem.

Despite the fact that the level of renovation has increased, at times local governments fail to deal with the drastic situation and often argue that many people suffer from poor living conditions and there is no need to treat Roma preferentially.

One interesting discrimination case in this respect could be mentioned. A number of Roma in Limanowa municipality had no access to running water. Within the Programme for Roma, special funds were allocated to install a water supply in the shape of a pipe. However, it reached a number of other households and excluded

<sup>212</sup> Act of 21 June 2001 on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*).

<sup>213</sup> Act of 21 June 2001 on the Protection of Tenants' Rights, Municipal Housing Resources and Amendments to the Civil Code (*Ustawa z 21 czerwca 2001 o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie kodeksu cywilnego*).

<sup>214</sup> However, please see the information on the *Kozak* case in Annex 3, below: *Kozak v. Poland* (application no. 13102/02; judgment of 2 March 2010).

<sup>215</sup> See, for instance, *Information from the Commissioner for Civil Rights Protection: 2001*, p. 348.

<sup>216</sup> It is hard to estimate the overall number of Bergitka Roma suffering from poor living conditions since even the total number of Roma in Poland varies between different sources of information: according to the 2002 Nationwide Census there were 12,731 Roma, according to 2011 census there were 16,000 Roma (including both Roma as the only identity and as one of two identities), Roma organisations sometimes claim that there are around 30,000 Roma in Poland, and international sources even give the number of 50-60,000.



some of the Roma (they only had access to wells) who were the original project beneficiaries. Three grant allocations were made in the years 2004, 2005 and 2007 respectively. The argument was that the legal status of the buildings was not regulated (i.e. they had been built without permission) but this did not interfere in getting the project accepted and funded from government sources.

There are no patterns of segregated housing of minorities. The situation of Roma is different from other groups, but nevertheless it does not constitute a 'pattern of segregated housing'. There are no 'ghettos' as are found in other countries.

People of Roma origin live in various places (quite often in groups of at least several families). The situation of Bergitka Roma is nevertheless special on account of their poor living conditions, as described above.

In relation to housing accessible for people with disabilities and older people, the general provisions stated above should be mentioned, directed to the public authorities. There is a system of general social housing<sup>217</sup> for all people with financial problems (although access to social housing is very limited and in a number of municipalities the waiting lists are long and the waiting time might last years). There is no general obligation to grant housing to people with disabilities (or older people), but there are some special means of protection. First of all, persons with disabilities (as well as older people) may find place in special institutions (funded or co-funded from public and municipal resources). This might be either an institution providing full-time care or a 'sheltered flat' (*mieszkanie chronione*).<sup>218</sup> Secondly, if a person with a disability is evicted from his/her flat, s/he must be provided with social housing if s/he applies for it.

In practice there are a number of problems with access to the special housing and special institutions mentioned above. The vast majority of elderly people who need permanent care remain outside the system as the number of places is very limited (18,000 places and 1,000,000 people who are eligible).<sup>219</sup>

As already mentioned, the general Construction Act requires that public buildings and multi-family housing should be planned and constructed so as to ensure that disabled people can use them (since 1995).<sup>220</sup> This is not, however, an obligation to reconstruct existing properties and in many instances public buildings are still not easily accessible to persons with disabilities.

<sup>217</sup> Article 4.2 Act on the Protection of Tenants' Rights, Municipal Housing Resources.

<sup>218</sup> Article 53.1 Social Protection Act (12 March 2004), as amended (*Ustawa o pomocy społecznej*).

<sup>219</sup> All information on the elderly comes from the report *The observance of the rights of elderly people in Poland. Analysis and recommended actions*, ed. B. Szatur-Jaworska, Warsaw, October 2008, pp. 69-77.

<sup>220</sup> Article 5.1 point 4, Act of 7 July 1994 on Construction (*Ustawa z 7 lipca 1994 r. Prawo budowlane*).



## 4 EXCEPTIONS

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

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

The 2010 Equal Treatment Act (Article 5.6) introduces an exception as provided in Article 4 of the Directives and it does comply with the Directives. In fact, it is almost a verbatim translation from the text of the Directives. The exception covers ‘possibilities and conditions of undertaking and conducting occupational activities as well as training (including higher education)’.

The 2008 amendment to the Labour Code<sup>221</sup> had already put national legislation regarding employment based on labour contracts in line with the Directives. The notions of proportionality, legitimate aim and genuine and determining occupational requirements were added. According to the Labour Code, one may refuse to employ an individual on the basis of one or more grounds listed in the definition of discrimination, if the type of work or working conditions mean that the reason or reasons for different treatment are genuine and determining occupational requirements. There is no list of those genuine and determining occupational requirements given by law so it is left to the evaluation of the judge. The test of proportionality of measures and legitimate aim was also introduced.<sup>222</sup>

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

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

The 2010 Equal Treatment Act (Article 5.7) introduces an exception as provided in Article 4(2) of the Directive and it does comply with the Directive. In fact, it is almost a verbatim translation of the text of the Directive. It covers limiting access to and performing occupational activities.

The 2010 Equal Treatment Act also amends the Labour Code introducing the same exception in relation to access to employment.<sup>223</sup>

b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and*

<sup>221</sup> Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>222</sup> Article 18<sup>3b</sup> para 2 point 1 (amended), Labour Code.

<sup>223</sup> Article 18<sup>3b</sup> para 4, Labour Code amended by Article 25 of the Equal Treatment Act.

*other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

The research has not identified any provisions or case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination.

- c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

In Poland ‘religion’ (of any registered faith or religious organisation)<sup>224</sup> is taught in schools. Alternatively, for pupils not willing to take part in religion instruction classes, a course on ethics should be organised, which, however, exists more in theory than in practice (since there are very few applications for courses on ethics and most students participate in religion instruction courses, schools tend not to organise courses on ethics), and causes a number of problems – some cases have already reached the European Court of Human Rights (see for instance the ruling in the *Grzelak* case<sup>225</sup> in Annex 3 below).<sup>226</sup> The *Grzelak* case ruling has not been implemented and the Ombud has repeatedly alerted the Government to this fact.<sup>227</sup>

Based on the Ordinance of the Minister of Education on the conditions and manner of organising courses on religion in public nurseries and schools,<sup>228</sup> teachers of religion are appointed to schools by their management only if they have an appropriate permit from the relevant authorities of the particular faith or religious organisation. The authorities of particular faiths are listed in the Act on relations between the state and specific religions. Currently the religion of the following denominations is taught:

<sup>224</sup> The Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (*Ustawa z 17 maja 1989 r. o gwarancjach sumienia i wyznania*), sets out the registration procedure for churches and other religious organisations (*związek wyznaniowy*), and sets out the criteria for registering churches or other religious organisations (*wyznanie*). Criteria include application for registration by a minimum of 100 persons and information describing the most important elements of the new church – its name, goals, etc. There are currently 175 registered churches or other religious organisations (*związek wyznaniowy*), please see the list at: [http://bip.msw.gov.pl/porta1/bip/247/15644/Rejestr\\_kosciolow\\_i\\_innych\\_zwiazkow\\_wyznaniowych.html](http://bip.msw.gov.pl/porta1/bip/247/15644/Rejestr_kosciolow_i_innych_zwiazkow_wyznaniowych.html) (1.05.2013).

<sup>225</sup> Application no. 7710/02, *Grzelak v. Poland* (Lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools); ECtHR ruling 15 June 2010.

<sup>226</sup> See also: application no. 32932/02 by Danuta Nowak and Michał Krynicki against Poland lodged on 23 August 2002 (freedom of religion); date of decision to communicate 1 February 2008; ECtHR decided to strike the application due to the lack of response from the applicant, decision taken 23 June 2009.

<sup>227</sup> Ombud Annual Report 2013, p. 400, 465.

<sup>228</sup> Issued on 14 April 1992, the relevant part amended in 1999 (Dz.U.1992.36.155).

Catholic, Orthodox, Protestant, Adventist, Baptist, Pentecostal, Polish Catholic, Mariavite, Judaism and Islam.<sup>229</sup> In relation to the Catholic Church, this provision also comes from the agreement with the Holy See (Concordat, 28 July 1993), which states in Article 12.3 that teachers of religion need a permit from the bishop (*mission canonica*) in order to be appointed.

The employment contract for teachers of religion has a dual character – it is a lay contract (the state school pays the salary) but it also reflects the autonomy of particular faiths. In the event that permission is revoked by the particular religious organisation, the teacher automatically loses the right to teach religion. Depending on the status of the teacher, this means either automatic termination of the employment contract or termination according to labour law (within a given paid notice period).<sup>230</sup>

If the teacher is changed during the academic year because church permission was revoked, the relevant church is obliged to cover the cost of employing a new teacher until the end of the year. The teacher is paid a salary by the school but the school may request repayment from the church.

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

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

The 2010 Equal Treatment Act does not refer to armed forces.

The specific legislation relating to employment in some services (the army, police, special services, border guards, etc.) establishes certain physical and mental requirements for employment in these services. These special criteria are justified on account of the character of the armed services and their duties.

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

The 2010 Equal Treatment Act does not refer to the police, prison or emergency services.

However, specific laws contain exceptions relating to employment in other services that are similar to those applying to professional soldiers. Police officers must demonstrate the physical and mental capability to undertake service in the armed forces.<sup>231</sup> If they are held by a medical commission to be permanently incapable of

<sup>229</sup> <http://orka2.sejm.gov.pl/IZ6.nsf/main/6B1AA405> (01.05.2013), information from 2008.

<sup>230</sup> Article 23.2 point 6 the Act of 26 January 1982 the Teachers' Charter (*Ustawa z 26 stycznia 1982r. Karta Nauczyciela*); Article 52 para. 1 Labour Code.

<sup>231</sup> Article 25.1, Act of 6 April 1990 on the Police (*Ustawa z 6 kwietnia 1990 r. o Policji*).

continuing their service, they are required to leave the service.<sup>232</sup> Similar provisions have been laid down for officers of the internal security agency, foreign intelligence agency, border guards, government security office, emergency fire service and the prison service.

Police officers and officers of the other above-mentioned services are entitled to a police retirement pension after 15 years of service<sup>233</sup> but can continue their employment after reaching that age.

#### 4.4 Nationality discrimination (Art. 3(2))

*Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).*

- a) *How does national law treat nationality discrimination? Does this include stateless status?  
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?  
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well)?*

There is no general provision in Polish law prohibiting discrimination based on nationality (meaning citizenship). However, under Article 37 of the Polish Constitution anyone who is within the jurisdiction of Poland may exercise the freedoms and rights provided for in the Constitution. Article 32, Section 2 of the Constitution prohibits discrimination for any reason whatsoever in political, social and economic life. It is clear that the grounds of prohibited discrimination include race, skin colour, ethnic origin or belonging to a national or ethnic minority, citizenship and stateless status.

Similarly, the anti-discrimination provisions of the Labour Code cover all persons, no matter what their nationality (or stateless status), but it does not contain the term stateless person.

A positive example of directly stated protection of foreigners and stateless persons is the Act of 17 May 1989 on Guarantees of the Freedom of Conscience and

<sup>232</sup> Ibidem, Article 41.1 point 1.

<sup>233</sup> Article 12, Act of 18 February 1994 on the Retirement Scheme for Police Officers, Officers of the Internal Security Agency, Foreign Intelligence Agency, Military Counter-Intelligence Service, Military Intelligence Service, Central Anti-Corruption Office, Border Guard, Government Protection Office, State Fire Departments, Prison Service and their Families (*Ustawa z 18 lutego 1994 r. o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin*).





Religion,<sup>234</sup> which provides in Article 7.1 that ‘foreigners when in Poland exercise freedom of conscience and religion equally with Polish citizens’, and in Article 7.2 that Article 7.1 also covers stateless persons.

Polish law does not provide a definition of racial discrimination, race or ethnic origin. When interpreting what racial discrimination means, Polish courts may look at the definitions contained in the international treaties, such as the CERD.

There are no definitions related to race, ethnic origin or stateless status in Polish anti-discrimination legislation.

There is no relevant case law dealing with nationality and ethnicity and the possible overlap of these two grounds.

*b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

The 2010 Equal Treatment Act includes a provision relying on Article 3(2). Article 5.9 of the Equal Treatment Act provides that the law does not cover differences in treatment based on nationality, especially in relation to entry into and residence in Poland, and in relation to the legal status of natural persons who are citizens of countries other than EU member states, member states of EFTA, or the Swiss Confederation.

Apart from the specific provisions related to legal residence on Polish territory and the legal employment of foreign nationals (see above, Section 3.1.1), there are some additional exceptions in respect of electoral rights and the obligation to do military service, as well as limitations in holding public office. Finally, there are some restrictions in purchasing real estate and stocks.

Holding Polish citizenship is also, for instance, an obligatory condition for a number of public posts, including all civil servants, public servants, professional soldiers, police forces, special forces and judges.

Similarly, one must be a Polish citizen in order to become a member of certain professions. This relates, for instance, to public notaries, medical doctors (with the exception of other EU nationals) and two categories of teachers – appointed and certified (*mianowany, dyplomowany*) – with the exception of nationals of other EU and EFTA Member States.

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<sup>234</sup> *Ustawa o gwarancjach wolności sumienia i wyznania* (Dz.U.2005.231.1965.t.j.).





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

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

- a) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?*

There are no rules that would address this issue directly, but the general constitutional prohibition of discrimination could apply. For instance, the Act on the Employers' Social Fund<sup>235</sup> does not cover this issue but employers' internal regulations on the distribution of social funds should take into consideration the general prohibition of discrimination and include not only marriages but also informal partnerships (there is no law on partnerships in Poland).

- b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

In principle, the majority of social benefits granted by reason of belonging to an employee's family are governed by the definition of the family contained in the Family Code.

This means that under Polish legislation the family is understood as the union of a man and a woman together with their children (the Constitution also provides in Article 18 that marriage is a union of a man and a woman and as such is protected by the state).

However, the Labour Code prohibits discrimination based on sexual orientation and this also covers employers' benefits. There was one interesting case in 2009 regarding Polish Public Television (TVP), which offered a family health insurance scheme to employees. All employees received an insurance offer (from the insurance company) which clearly stated that the right to insurance relates to those whose partner (it covered marriages but also informal partnerships) 'is of the opposite sex'.

<sup>235</sup> Ustawa z 4 marca 1994 r. o zakładowym funduszu świadczeń socjalnych (Dz.U.2012.592 j.t.).

In reaction to complaints by the NGO Campaign Against Homophobia (KPH), the Plenipotentiary for Equal Treatment and the Ombud,<sup>236</sup> TVP declared that it did not influence the wording of the offer and that the definition of 'partner' would be changed. KPH and its lawyer looked for examples of this kind of discrimination and announced it on their portal offering legal assistance (no cases were reported to them).<sup>237</sup>

It should be also noted that there have been so far very few cases before Polish employment courts where the ground of sexual orientation was raised in the claim. One of the reasons is the fear of LGBT persons of disclosing their sexual orientation. The vast majority of LGBT persons claim that they do not reveal their sexual orientation in the workplace.<sup>238</sup>

#### 4.6 Health and safety (Art. 7(2) Directive 2000/78)

- a) *Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

The 2010 Equal Treatment Act does not refer to health and safety but Article 11 provides generally that the adoption of specific measures that are aimed to prevent or compensate for unequal treatment linked with inequality does not constitute a breach of the rule of equal treatment (all grounds protected by law).

The Labour Code covers the employment field and introduces the possibility of different treatment of people with disabilities (in order to protect them), but does not mention health and safety issues verbatim (Article: 18<sup>3b</sup> § 2 point 3).

- b) *Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc.)?*

According to the Constitution any exceptions from the prohibition of discrimination may only be justified by reasons of public security, public order, health, morality or the rights and freedoms of other people (Constitution, Article 31.3). This clause creates a very broad scope of guarantee which aims to eliminate any possible discrimination.

<sup>236</sup> Letter of the Ombud of 3 July 2009, RPO-622579-1/09/MK available at <http://www.rpo.gov.pl/pliki/12466292490.pdf> (01.05.2013).

<sup>237</sup> See the relevant announcement at: <http://www.kph.org.pl/en/allnews/15-kph/186-dyskryminacja-w-pracy-prawnicy-kph-prosz-o-kontakt> (1.05.2013).

<sup>238</sup> See: *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Poland*, Danish Institute for Human Rights (March 2009); A. Rzeplinski (2008) *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation in Poland*, FRALEX; M. Abramovicz (ed.) (2007) *The Situation of Bisexual and Homosexual Persons in Poland 2005 and 2006 report*, Campaign Against Homophobia and Lambda Warsaw Association, Warsaw.

In accordance with the principles of the Polish political and legal regime, freedom of religion and freedom of expression are safeguarded for everyone; any discriminatory limitations impeding the free enjoyment of these rights are prohibited by law. Any potential conflict between the individual's freedom of expression, which may also take the form of dress or personal appearance (turbans, hair, beards, jewellery, etc.), and health and safety, would, under Polish law, be decided on an individual basis, taking into consideration the values of the above-mentioned rights and freedoms on the one hand and the weight of opposing values – public security, public order, public morality, health, rights of others – on the other hand. However, since there have been no cases of this kind, it is so far theoretical.

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

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

*Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 Kucukdeveci?*

The 2010 Equal Treatment Act transposed Article 6 using the same test as the Directive. It justifies different treatment of natural persons because of age if it is objectively and reasonably justified by a legitimate aim, in particular by vocational training objectives, if the means of achieving that aim are appropriate and necessary (Article 5.8.a).

The Labour Code has also introduced (2008 amendment) one exception – the principle of equal treatment in employment is deemed not to be breached by actions of the following kind, provided that they are proportionate to achieving a legitimate aim: applying the criterion of length of service in determining the conditions for hiring and firing, pay and promotion rules, and rules on access to training for improvement of professional qualifications, which may indirectly justify the different treatment of employees based on age.

At the moment the above-mentioned case of *Mangold* has not been directly invoked. It could be used, but the particular issue it refers to was decided in Poland in a different way – in fixed-term labour contracts the same protection exists no matter what the age of employee.

There is also no age discrimination in Polish law regarding a service-related statutory minimum notice period, as there was in the *Kucukdeveci* case.

- a) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

Differences in treatment based on age are permitted under Polish legislation in some situations. For details see Sections 4.7.2, 4.7.3 and 4.7.4. See also Annex 3, below, noting the ruling of the Constitutional Tribunal which found the law on pensions discriminatory.<sup>239</sup>

b) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2)?*

The 2010 Equal Treatment Act transposed Article 6(2). It justifies different treatment of natural persons because of age in the fixing for occupational social security schemes of different rules for granting or entitlement to benefits, including different age criteria for calculation of the level of benefits. In the case of occupational social security schemes, different treatment is permitted provided this does not result in discrimination on the grounds of sex (Article 5.8.b).

According to Polish law, individuals (women and men equally) are obliged to contribute to pensions once they commence employment.<sup>240</sup> There are fixed ages for entitlement to benefits.<sup>241</sup> Nevertheless, some labour groups have special preferences, e.g. miners, teachers, professional soldiers, police officers, etc.

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

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

Polish legislation provides certain requirements in regard to the employment and training of younger workers, especially those aged under 18 years:

- education is compulsory to the age of 18; an employer is obliged to allow employees under the age of 18 to attend classes and to grant him/her leave from work for this purpose;
- working hours cannot exceed six hours per day for people under 16 and eight hours per day for those under 18;
- time spent at school taking part in compulsory classes is counted as working time;
- a young person may not be employed on night shifts or to work during the night from 22.00 to 06.00;
- a list of jobs which may not be undertaken by young people is also provided.<sup>242</sup>

<sup>239</sup> 23 October 2007 (Sygn. akt P 10/07).

<sup>240</sup> Article 6 Social Security Act.

<sup>241</sup> Article 24 and 27 Retirement Act.

<sup>242</sup> See Article 190-204 Labour Code.

Polish legislation provides for some benefits for people with caring responsibilities: maternity leave, parental leave, care allowance, and some provisions for people caring for disabled people (e.g. free transportation as the accompanying carer of a disabled person).

#### 4.7.3 Minimum and maximum age requirements

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

According to the provisions of labour law, the minimum age of 18 is, in general, required for engagement as an employee. There are some exceptions regarding minors over 16 (employment of a minor under 16 years old is generally forbidden).

Those who have graduated from, at least, gymnasium,<sup>243</sup> may become employed if they obtain medical approval for the specific kind of work and any occupational qualifications that may be required for the offered position.

Those who do not have any vocational training may be employed only for the reasons of undertaking this training.

In principle, there are no restrictions in respect of access to training; anyone may benefit from such training. Some limitation may be provided in terms of existing educational qualifications, depending on the type of training.

There are age requirements in relation to the status of unemployed people. This status and the rights derived from it (unemployment benefit, training, public career advice, etc.) may be obtained only by people between the age of 18 and retirement age.

There are specific age limits concerning some parts of the public sector. Minimum age limits exist e.g. within the judiciary. According to the Judiciary Act, in order to become a judge in a first instance court, a person must be more than 29 years old.<sup>244</sup> This age limit is not problematic from the point of view of age discrimination, as it usually takes up to the age of 29 years to complete the whole course of education and training to become a judge. Nomination to the courts of second instance and to the Supreme Court requires a certain length of practice and therefore this is an

<sup>243</sup> General education includes the following stages: (a) primary/basic education: 7-13 years old; (b) lower secondary education (gymnasium): 13-16 years old; (c) upper secondary education (lyceum): 16-19 years; and (d) higher education (higher schools, universities, etc.): from 19 years.

<sup>244</sup> Article 61.1 point 5 Act of 27 July 2001 Judiciary Act (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*).

indirect age limit.<sup>245</sup> As regards administrative courts, there is an age limit for judges at regional administrative courts, who must be 35 or over.<sup>246</sup>

To become a judge of the Supreme Administrative Court, the minimum age is 40 years, unless the candidate has been a judge at a regional administrative court for at least three years.<sup>247</sup>

Furthermore, there is a minimum age limit of 30 to become an assistant judge (assessor) at a regional administrative court.<sup>248</sup>

The minimum age for becoming a prosecutor is 26 years.<sup>249</sup> Under the Notaries Act, one of the conditions of becoming a notary is to be at least 26.<sup>250</sup>

#### 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

*For these questions, please indicate whether the ages are different for women and men.*

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can a person collect a pension and still work?*

As a rule, collection of the state pension is a right, not an obligation (see in Annex 3, below, for a recent resolution of the Supreme Court that finally decided this issue).

- b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be*

<sup>245</sup> Article 63.1, Article 64.1 Judiciary Act, and Article 22.1 point 6 Act of 23 November 2002 on the Supreme Court (*Ustawa z 23 listopada 2002 o Sądzie Najwyższym*).

<sup>246</sup> Article 6.1 point 5 Act of 25 July 2002 on the Organisation of the Administrative Judiciary (*Ustawa z dnia 25 lipca 2002 Prawo o ustroju sądów administracyjnych*).

<sup>247</sup> Article 7.1 Act on the Organisation of the Administrative Judiciary.

<sup>248</sup> Article 26.1 point 2 Act on the Organisation of the Administrative Judiciary.

<sup>249</sup> Article 14.1 point 5 Act of 20 June 1985 on the Public Prosecutor's Office (*Ustawa z dnia 20 czerwca 1985r. o prokuraturze*).

<sup>250</sup> Article 11 point 7 Act of 14 February 1991 on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*).



*deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

There is no requirement for employees to retire when they reach retirement age. The general retirement age was, until the end of 2012, 60 for women and 65 for men. In May 2012, however, the retirement age was changed by Parliament. The normal retirement age for both men and women will be 67 (to be reached step by step and finally attained in the case of men in 2020 and in the case of women in 2040; every year, starting from 2013, three months will be added to the retirement age).<sup>251</sup>

The retirement age is treated as a right not as an obligation and it is left to employees' discretion whether to retire.<sup>252</sup> On the one hand, it is only the employee himself/herself who can apply to the social security agency to be issued with a decision granting a pension. On the other hand, entitlement to a retirement pension is not subject to resignation from employment.

It is possible, as a rule, for people who have reached normal retirement age to combine employment with receipt of a pension without any restriction. However, if people of retirement age do not terminate their employment contract and continue to work for the same employer (this applies equally to women and men), their pension is suspended. This provision was introduced on 1 July 2000 in response to the dramatic situation in the Polish labour market and the high unemployment rate.<sup>253</sup> It was considered to be an incentive for employers to hire younger workers in the place of those who have become entitled to a retirement pension and thus possess financial resources to cover their living expenses.

Different rules apply to payments from Employees' Pension Programmes, a system of voluntary collection of pension contributions. Individuals begin receiving payments in the following cases: 1) upon a decision by the individuals once they reach the age of 60; 2) upon presentation of a decision granting the right to a state pension when the individual reaches the age of 55; 3) when the individual reaches the age of 70 under two conditions: if the individual has not applied to receive payments previously and if his/her employment has been terminated by the employer running the Employees' Pension Programme.<sup>254</sup>

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

<sup>251</sup> Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund (Article 24, 27, amended 11.05.2012, in force since 01.01.2013).

<sup>252</sup> Art 24 and 27 Retirement Act.

<sup>253</sup> Article 103.2a Retirement Act (since 01.01.2011 Article 103a).

<sup>254</sup> Article 42 Para 1 and 2, Act of 20 April 2004 on Employees' Pension Programmes (*Ustawa z 20 kwietnia 2004 r. o pracowniczych programach emerytalnych*).



There is neither a specific regulation allowing employers to terminate the employment contract on account of an employee reaching retirement age, nor mandatory retirement ages for any sector. There have not been any recent changes in this respect and no debate is currently on going.

However, an interesting problem arose in 2012 (initiated by a complaint of an affected party) that engaged both the Ombud and the Plenipotentiary for Equal Treatment. The Pharmaceutical Act limited the possibility of being a manager of a pharmacy to those who are below 65 or 70 (if prolonged using the special procedure). This provision was criticised by the Ombud and Plenipotentiary in their representations to the Minister of Health as discriminatory. The process of amendment of the law relating to retirement was taking place at the same time, and the questionable provision was changed (with effect from 1 January 2013).<sup>255</sup>

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

No, it is impossible to set retirement ages by contract, collective bargaining or unilaterally with regard to pensions paid from the Social Security Fund. The Retirement Act stipulates that a person is entitled to a pension if s/he meets conditions set out in the Act. Only the legislator has the right to set the conditions for receiving pensions from the Social Security Fund. Apart from this, there is also the possibility to take out private, voluntary insurance within the ‘third pillar’. In this case, employers (or insurance companies) have more freedom to set and agree upon the rules, including the minimum age at which an insured person will be entitled to receive the part of his/her pension coming from the third pillar.

The Labour Code distinguishes four kinds of contracts of employment: for a probationary period,<sup>256</sup> for a definite time period, for the period needed to perform a particular task, and for an indefinite time period.<sup>257</sup>

It is impossible to set the date of termination of an indefinite term contract of employment at a fixed age, but an employer may employ someone for a definite time period and thus possibly connect the set time period with the employee’s age (however, if a third contract for a definite period is concluded, this is treated by law as a contract for an indefinite period).

e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in*

<sup>255</sup> Ombud Annual Report 2013, p. 394-395; Plenipotentiary Annual Report 2013, p.65-66. Act of 6 September 2001, Pharmaceutical Act, as amended (relevant amendment: Dz.U. 2012.1544, Article 10.1).

<sup>256</sup> Article 25.2 Labour Code.

<sup>257</sup> Article 25.1 Labour Code.

*employment or are these rights lost on attaining pensionable age or another age (please specify)?*

The employer can terminate employment on the basis of general rules governing the termination of labour relations.

The law protects all employees irrespective of age (with the exception described below aiming at the protection of people close to retirement age). According to a 2009 resolution of the Supreme Court (see Annex 3, below), reaching retirement age may not be the sole reason for dismissal – this would be discrimination. However, if there is another reason behind the need for dismissal (for instance, reductions in staff), it is acceptable to dismiss people who have a right to a pension in the first place.

In addition, employees are protected against dismissal in the four years before they reach retirement age, if the period for which they have been employed gives them the right to a retirement pension on reaching retirement age.<sup>258</sup> No distinction is made between women and men in this respect.

Of course in practice many problems occur which eventually end up in court. Employees quite often feel that they are being put under pressure to resign from their job when reaching retirement age, or that they are supposedly being dismissed for reasons other than reaching retirement age (but in fact the sole reason is their age). It is probable that many of them do not challenge their employers due to lack of legal awareness, but the cases mentioned in Annex 3, below (Supreme Court rulings) and their publication are most probably raising this awareness.

- f) *Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009], C-45/09, Rosenblatt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011] regarding compulsory retirement.*

Polish law would appear to be in line with CJEU case law on age regarding compulsory retirement.

#### **4.7.5 Redundancy**

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

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<sup>258</sup> Article 39 Labour Code.

The general provision states that an employer may not terminate the employment contract of an employee who has less than four years to go before they reach retirement age, unless such a person is being granted a pension on the grounds of incapacity to work.<sup>259</sup>

In this period of special protection against termination of the employment contract, the employer is allowed only to change the existing working and remuneration conditions but, additionally, only in respect of certain groups of employees enumerated in the legislation.<sup>260</sup> Even in the latter case, when such a change would lead to a reduction in remuneration, the employer is obliged to pay a special allowance to compensate for this reduction of pay.<sup>261</sup> There is an exemption in the case of bankruptcy or liquidation of the employer; in such cases the above-mentioned provision does not apply.

b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

If the above-mentioned employee who is protected in the period before they reach retirement age is somehow made redundant, s/he has a right to special compensation. This compensation is provided in the event of a collective redundancy; such a person has the right to be re-employed or compensated.

#### **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)**

*Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?*

The 2010 Equal Treatment Act transposed Article 2(5). It justifies different treatment of natural persons on the grounds of religion, belief, political opinion, disability, age or sexual orientation, in undertaking measures necessary in a democratic society, for public security and the maintenance of public order, for the protection of health and for the protection of the rights and freedoms of others as well as the prevention of criminal offences, to the extent specified in other provisions (Article 8.2).

The Polish Constitution also stipulates generally that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals or the freedoms and rights of

<sup>259</sup> Article 39 and 40 Labour Code.

<sup>260</sup> Article 5.5, Act of 13 March 2003 on the Special Conditions of Termination of Employment Relations for Reasons not related to Employees (*Ustawa z 13 marca 2003 r. o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników*).

<sup>261</sup> Ibidem, Article 5.6.

other persons. Such limitations must not violate the essence of freedoms and rights.<sup>262</sup>

On the basis of this provision, a number of limitations were introduced, especially in the area of protecting state security (visa regime, legalisation of residence, military service, etc.).

#### 4.9 Any other exceptions

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

Apart from the above mentioned exceptions (transposed from the Directives), the Equal Treatment Act provides *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres (Article 5.1), and that it does not cover freedom to choose a party to a contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality (Article 5.3).

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<sup>262</sup> Article 31, Constitution.



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

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic*

The 2010 Equal Treatment Act provides generally (Article 11) that adopting specific measures that are aimed to prevent or compensate unequal treatment linked with inequality does not constitute a breach of the rule of equal treatment (all grounds protected by law).

The 2003 amendment of the Labour Code that took effect on 1 January 2004 introduced a clear and general stipulation allowing for positive action in employment relations.<sup>263</sup> This provision covers positive action not only for racial or ethnic origin, religion or belief, disability, age and sexual orientation but equally for some additional grounds: gender, political opinion and membership of a trade union.

According to the Labour Code, positive action can take the form of specific measures introduced for a limited period of time in order to equalise opportunities for all or a significant number of employees who are distinguished by at least one of the grounds named above. These measures must be aimed at compensating the disadvantages experienced by such employees.

There is no significant case law concerning this issue.

The only serious debates (both within the government as well as public debates) have concerned positive action directed at persons with disabilities (it was a matter of common agreement for years that positive action is desirable and that a number of positive measures should be established in order to assist full integration by persons with disabilities).

In recent years (since 2008), a new debate and campaign have started concerning the 50+ generation, resulting in a governmental programme and changes to the law.

There are examples of positive action (but out of the labour context described above, and not stemming from particular general provision on positive action) in relation to race and ethnic minorities (especially Roma) as well as religion; they are listed in the following paragraphs.

There are no debates or examples of positive action in the case of, for instance, sexual orientation.

<sup>263</sup> Article 18<sup>3b</sup> para. 3 Labour Code.



b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored.*

*Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

In respect of positive action for members of **national minorities**, there is a collection of measures for preferential treatment in Poland.

At the political level, a very important privilege (preference) is granted to national minorities in that their party lists are exempted from the requirement to obtain a threshold of five per cent of votes cast in order to be taken into account in the distribution of seats in the Sejm (lower chamber of Parliament).

Much affirmative action takes place in the field of education and culture. In order to compensate for their higher operating costs, schools for national minorities receive an extra 20 per cent subsidy in comparison to other schools (and even 150% in the case of small schools). The state budget also invests in schools and subsidises the production and publication of textbooks. Furthermore, the Ministry of Culture subsidises the minority press and other publications and sponsors cultural events organised by national and ethnic minorities.<sup>264</sup> Also finally on 13 June 2008 the Polish Parliament ratified the Council of Europe's Charter for Regional or Minority Languages of 1992. The President signed the Act, and the Charter entered into force on 22 August 2008.

In 2001 the government, taking into account the alarming situation of the Roma community, agreed to launch a pilot programme in 2001-2003 for the Malopolska Region to promote Roma in the fields of education, employment, healthcare, living conditions, security and culture. Despite the programme's comprehensive nature, it was not implemented in this form, due to the country's difficult budgetary situation. In addition, programme execution did not go according to plan because local governments were given the power to decide on its implementation and as a result some localities virtually suspended its realisation. Nevertheless, some important conclusions were drawn which were integrated into the next government programme for Roma for 2004-2013.<sup>265</sup>

<sup>264</sup> Information on particular programmes may be found on the website of the Ministry of Administration and Digitisation; as far as problems related to these programmes are concerned, please see minutes from the meetings of the Joint Committee of the Government and Ethnic and National Minorities at [www.mac.gov.pl](http://www.mac.gov.pl) (1.05.2013).

<sup>265</sup> Currently (May 2013) the new draft programme is being prepared to cover years 2014-2020.

The implementation of the current government programme was secured with a budget of six million PLN for 2004, and which was subsequently increased (to around 14 million PLN in the year 2008, around 13 million PLN – ca. 3 million EUR – in 2010, and 13 million PLN in 2012). Unlike the first programme, this second one aims to provide assistance to Roma living in the whole country (approximately 20,000 people) and not to a selected group of Roma from one region.

The programme is implemented on an annual basis and reports on its implementation are published annually by the Ministry of the Interior (from 2012 by the Ministry of Administration and Digitisation).<sup>266</sup> The data given below (in brackets) comes from reports for 2006 (first figure), 2007 (second figure), 2008 (third figure), 2010 (fourth figure), and 2012 (last figure, **in bold**), if not stated otherwise.

The programme has a large and growing budget and consists of actions taken in different fields and by different actors – mainly by local government (214, 209, 239, 197, **154**) and non-public institutions (67, 106, 122, 116, **104**) including Roma organisations (34, 85, 94, 77, **64**).

The programme is divided into the following eight fields:

- Education as a priority (274, 286, 358, 499, **480** actions/activities)
- Living conditions (39, 65, 69, 83, **51** activities)
- Employment (10, 14, 18, 11, **10** activities)
- Healthcare (20, 22, 28, 22, **15** activities)
- Culture and preserving Roma identity (63, 93, 109, 87, **49** activities)
- Roma and civil society (15, 14, 15, 42, **34** activities)
- Personal security (occasional)
- Knowledge about Roma (dissemination of information) (occasional, 26, 27, 29, **15**)

All funds coming from the Roma Programme (i.e. from central government) represent extra money for local government and communities. Some activities are designed especially to address the issue of Roma exclusion, but other activities in fact constitute fulfilment of the existing normal legal obligations of local government in relation to all citizens. Since many local authorities neglect these duties, they may simply receive extra money in order to assist them and the additional funding is an attempt to ensure that they address Roma needs. Central government does not assess the use of the funds adequately; instead of evaluation, there is a more statistical reporting system showing the number of activities, their subject matter and the region where they take place. Meetings of the ‘Roma Issues Team’ prove that

<sup>266</sup> In November 2011 the former Ministry of Interior and Administration was divided into two: the Ministry of Interior ([msw.gov.pl](http://msw.gov.pl)) and the Ministry of Administration and Digitisation ([mac.org.pl](http://mac.org.pl)). Matters related to national and ethnic minorities as well as religions have been since November 2012 within the competences of the Ministry of Administration and Digitisation.

there are a number of problems in the realisation of the programme (to give an example – local government and schools sometimes do not use additional funds from the Roma Programme to support the Roma community specifically, but for instance to renovate a school; quite often the Roma community is not even consulted by the local government when the local government applies for money from the Roma Programme).<sup>267</sup>

It is not easy to make a clear division between actions taken into ‘broad social policy measures’ and ‘treatment narrowly tailored’ (there are no quotas). All actions taken within the Roma Programme are in a sense tailored narrowly, as they are dedicated specifically to Roma. However, they obviously have a wider social context and in this sense the beneficiaries are all citizens, not just Roma.

Examples of positive action include:

- larger subsidies for schools with Roma pupils (up to 150 per cent more money per pupil) if the school applies (which is not the rule) for different activities;
- including extra classes;
- employing Roma education assistants to assist the teachers of integrated classes (they assist and help Roma pupils in their integration at school and support and maintain parents’ relationships with the school); in the 2005/2006 school year 108 assistants were contracted (in 2006/2007 – 89; in 2007/2008 – 87; in 2009/2010 – 96; in 2010/2011 – 89; and in **2011/2012 – 89 assistants**), which means one assistant for 26, 29, 31, 29, 34, **31** pupils (Roma education assistants are themselves from the Roma community);
- employing assistant teachers (66 in 2006, 63 in 2007, 63 in 2008, 141 in 2010, 145 in 2011 and **145 in 2012**);
- additional educational and other activities for Roma children and parents, psychological and pedagogical advice, organising holidays and camps, material help (purchasing school textbooks, etc.);
- special stipends for Roma students (in higher education) and Roma children with artistic talent (in 2010, 83 students and 18 pupils; in 2012, 61 students and 19 pupils);
- improving living conditions (renovation of flats (237, 453, 434, 535, 247 in 2011, and **175 in 2012**); building of new flats (15, 3, 16, 0, **8 in 2012**); providing water, sewage systems and electricity (to 56, 91, 48, 69, **10** flats in **2012**);
- preventative health examination and vaccination (1056; 1441, 1258, 2098, **1719** persons)
- employing special nurses to assist with medical problems (31 in 2006, 14 additional in 2007, 35 in 2008, 23 in 2010, **34 in 2012**);
- organising ‘white days’ with free medical advice provided by doctors from different specialisations (20, 44, 40, 18, **8** activities in 2012);

<sup>267</sup> See minutes from all the meetings of the Roma Issues Team (14 meetings have already taken place) at: <http://mac.gov.pl/mniejszosci-i-wyznania/> (1.05.2013).

- supporting employment of Roma by subsidising job creation (86, 63, 44, 39, 32 in 2011 and **9 persons in 2012**);
- organising various kinds of cultural events

One more programme dedicated to the Roma community is the 'Roma Component' of the Human Capital Operational Programme financed by the European Social Fund (2007-2013).<sup>268</sup> It began with some delay in late 2008. It includes money for employment and labour activation, education, social integration and health protection of the Roma community. The first tranche of the programme was distributed in 2009.

On the one hand, all those activities mentioned are slowly changing the landscape – the living conditions of Roma are improving, healthcare is promoted, more children are going to school, and assistant teachers as well as educational assistants are provided, etc. But on the other hand, there are still serious gaps in the state policy. Part of the Roma population lives in poverty, the general level of education is low, and the rate of unemployment high. In 2011 and 2012, the Ombud issued some letters regarding the situation of Roma and the need for action, namely to the Minister of Education (letters advocating for awareness raising and fighting stereotypes) and to the Government Plenipotentiary for Equal Treatment (letter of 13 September 2011 raising the general issue of the need to protect the Roma community).<sup>269</sup>

The First Job programme was an example of positive action with respect to **age**. It started in 2002 with the goal of facilitating the employment of young people up to the age of 25 and graduates up to the age of 27. Several measures were introduced to increase their chances of finding their first job. This included financial incentives for employers to encourage them to employ young people as well as assistance (financial and advice) for young people in order to help them start independent economic activity, including preferential interest rates on loans to graduates. Additional funds were provided to support NGO activity with the aim of facilitating the employment of graduates.

The second example in this field was the First Business programme which was launched in 2005 and based on the experiences of the implementation of the First Job programme in 2002-2005. The aim of the programme was to assist the same group of young unemployed people to start up their own businesses through self-employment by providing theoretical training and practical guidance as well as subsidies and loans.

<sup>268</sup> <http://www.mac.gov.pl> (1.05.2013).

<sup>269</sup> *Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2011, and on the observance of the rule of equal treatment in the Republic of Poland*, Warsaw, June 2012, Bulletin 2012, no 2 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa, czerwiec 2012, Biuletyn Rzecznika Praw Obywatelskich 2012, nr 2, Źródła, [referred to in this report as 'Ombud Bulletin 2012/2'], p. 13-14; Ombud Annual Report 2013, p. 380.



In March 2008 the government announced a new programme called ‘Solidarity between the Generations’ which aimed to activate the over-fifty generation. In Poland only 28 per cent of people over 50 worked, the lowest figure in the EU. The programme included a number of actions, including lowering employment costs for employers, organising special skills training courses, adjusting working conditions and changing the law (to limit early retirement), etc. As a result the number of people over 50 on the employment market has increased significantly.

The problems of elderly people are also the subject of special attention by the equality body. The Ombud identifies them as one of three priorities (the other two are persons with disabilities and migrants). As a consequence, the Ombud has established a special Expert Committee on the Rights of Elderly People, commissioned research and published analyses and recommendations (*Strategies for action in an ageing society. Propositions and recommendations*, 2012,<sup>270</sup> in which the authors pointed out the need for changes and adaptations in various areas of life), as well as practical guidelines for elderly people: *Human rights. Handbook for elderly people* (2012),<sup>271</sup> *Labour. Handbook for elderly people* (2012),<sup>272</sup> and *Financial services. Handbook for elderly people* (2012).<sup>273</sup>

A number of measures can be considered as positive action in the field of **disability** (many of them are mentioned in the report above). The Disabled Persons Act 1997 contains the ‘System of Quotas and Penalties’, a system of incentives and penalties for employers which aims to support the employment of the disabled. Employers who, for at least 36 months, employ disabled people (who were unemployed or seeking work while not holding a job and were directed to work by a district labour office, or whose disability occurred while working for the employer, except if this disability was caused by the fault or infringement of regulations by the employer or by the employee) may receive reimbursements from the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*, PFRON) for adapting existing and creating new work stations to the needs of disabled persons, adapting or buying equipment to help disabled people to function at work, and having the needs of persons with disabilities identified by occupational health services.<sup>274</sup>

Furthermore, an employer who employs a disabled person is entitled to receive a monthly subsidy for the remuneration of this employee.<sup>275</sup> The amount of the subsidy is related to the level of impairment of the disabled person concerned.<sup>276</sup>

<sup>270</sup> *Strategie działania w starzejącym się społeczeństwie. Tezy i rekomendacje* (2012), available at [www.rpo.gov.pl](http://www.rpo.gov.pl), English summary p. 148-154.

<sup>271</sup> *Prawa człowieka. Poradnik dla osób starszych* (2012), available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>272</sup> *Praca. Poradnik dla osób starszych* (2012), available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>273</sup> *Usługi finansowe. Poradnik dla osób starszych* (2012), available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>274</sup> Article 26, Disabled Persons Act.

<sup>275</sup> Article 26a Disabled Persons Act.

<sup>276</sup> Article 26.1, Disabled Persons Act.



For employers, there is a supplementary – this time negative – incentive to employ disabled people. That is, an employer who employs at least 25 employees is obliged to pay a monthly sum to the PFRON unless s/he employs at least six per cent disabled people.<sup>277</sup> This amount is determined according to the formula in which 40.65 per cent of average remuneration is multiplied by the theoretical number of employees who should be taken on in order to reach the threshold of six per cent disabled individuals among all the people employed by the specific employer.

In addition, there are several programmes which aim to activate persons with disabilities on the labour market (financed by the PFRON).

As an example, the Junior Programme<sup>278</sup> might be mentioned, which is included under the aegis of the First Job programme. This is a programme to introduce disabled graduates into professional posts. It aims to do this by directing young disabled people<sup>279</sup> to undertake six to 18 month internships. Employers receive economic incentives in the form of a bonus for accepting a disabled graduate for an internship or employing him/her. There are also programmes dedicated to particular groups of people with disabilities, such as ‘Support for people with hearing impairments on the labour market’, ‘Support for blind persons on the labour market’ and similar. The PFRON also implements some other programmes for persons with disabilities.<sup>280</sup>

In addition, the Disabled Persons Act establishes a number of rights designed to accommodate disabled people in the workplace, including restrictions on maximum working time, employment on night shifts and overtime, and additional breaks, holiday and absence from work (for more on various positive action measures, see Section 2.6 above).

The problems of persons with disabilities were defined by the Ombud as one of the Office’s three priorities. The Ombud has established a special Expert Committee on People with Disabilities that advocates for a number of positive actions. In 2012, the Ombud published two important reports in this regard with a number of recommendations:

<sup>277</sup> See Article 21.1-2 Disabled Persons Act.

<sup>278</sup> [http://www.pfron.org.pl/portal/pl/105/106/Spis\\_tresci\\_programu\\_JUNIOR.html](http://www.pfron.org.pl/portal/pl/105/106/Spis_tresci_programu_JUNIOR.html) (1.05.2013).

<sup>279</sup> This applies to disabled people with a certified severe, moderate or mild degree of disability who, in the course of the 12 months after the date specified in their diploma or school leaving certificate, course completion certificate or other document conferring eligibility to carry out a profession, have not taken up further study or have not found employment.

<sup>280</sup> For more see [www.pfron.org.pl](http://www.pfron.org.pl) and especially *Information of the Government of The Republic of Poland on activities carried out in 2008 (as well as 2009) regarding implementation of the resolution of the Sejm of the Republic of Poland from 1 August 1997 ‘Charter of Rights of Disabled People’*



*Protection of the rights of persons with disabilities – main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities. Analysis and Recommendations;*<sup>281</sup>

*The rule of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations (2012).*<sup>282,283</sup>

In relation to **religious** groups there is a special ‘Church Fund’ (*fundusz kościelny*) administered by the Ministry of the Interior (since 2012 by the Ministry of Administration and Digitisation).<sup>284</sup> This fund provides subsidies and organises grant competitions. The list of activities financed includes church charitable activities, educational activities, social care activities, and initiatives related to combating social problems.<sup>285</sup> Grants awarded include donations towards care and special treatment institutions, ‘social care homes’, special facilities for profoundly disabled children and adults, educational institutions, orphanages, nurseries, kindergartens, primary and secondary schools, etc. The grants are intended primarily for the construction, expansion, renovation and modernisation of facilities, and sometimes the purchase of equipment. The Church Fund also provides grants for the renovation and preservation of sacred historic buildings.

<sup>281</sup> *Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia (2012)*, available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>282</sup> *Zasada równego traktowania – prawo i praktyka. Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia (2012)*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>283</sup> See more in Section 3.2.8 above.

<sup>284</sup> <http://mac.gov.pl/tag/fundusz-koscielny/> (01.05.2013).

<sup>285</sup> There is currently (May 2013) a public debate on-going on the draft proposal of the Government to replace the ‘Church Fund’ with a voluntary tax deduction from personal income tax (0.5% of the annual PIT) starting from 2014, see at: <https://mac.gov.pl/dzialania/robocza-propozycja-w-sprawie-zastapienia-funduszu-koscielnego-05-proc-odpisu-podatkowego-od-2014-r/> (01.05.2013).



## 6 REMEDIES AND ENFORCEMENT

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

*In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.*

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

Claims stemming from an employment relationship can be adjudicated either by a labour court or by a conciliation committee.<sup>286</sup>

The case can be referred to a conciliation committee by an employee only and not by an employer. The conciliation procedure is intended to be speedy; the Labour Code specifies a period of 14 days as the normal term within which the committee should adjudicate.<sup>287</sup>

Another conciliation mechanism is provided for in the Code of Civil Procedure and allows a court, acting through a single judge, to confirm an agreement reached between the parties before the court proceeding was commenced.<sup>288</sup>

The 2010 Equal Treatment Act introduced a compensation claim (Articles 12-13) stating that anyone (natural and legal persons) who suffers an infringement of the principle of equal treatment is entitled to compensation. The relevant general rules of the Civil Code and Civil Procedure Code apply (Article 13.2, Article 14.1).

Additionally, in matters not covered by the Equal Treatment Act, recourse may be made to civil law, which affords protection to 'personal rights' (Article 23-24 of the Civil Code). According to Article 30 of the Constitution, the inherent and inalienable dignity of the person is a source of freedoms and rights for persons and citizens. It is inviolable. The respect and protection thereof is the obligation of the public authorities. Article 23 of the Civil Code (which should be interpreted in line with the above-mentioned constitutional provision) provides general protection of 'personal rights'. According to this provision, personal rights, in particular health, freedom, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, and scientific and artistic work as well as inventions and improvements are protected by civil law without prejudice to protection provided by other regulations.

The provision quoted does not include dignity or, for instance, age, disability, ethnic

<sup>286</sup> Article 242 Labour Code.

<sup>287</sup> Article 251 Labour Code.

<sup>288</sup> See Article 184-186 Code of Civil Procedure.

origin, race or sexual orientation. But the list of 'personal rights' is not exhaustive. There is no doubt that personal dignity is protected (as stated in the Constitution and confirmed by a wealth of legal writings and jurisprudence). Therefore, if a person is discriminated against outside the labour context on the grounds of age, sexual orientation, race or any other reason, the dignity of that individual is obviously infringed and they may try to seek redress through this general civil clause. Two examples of the use of this general clause are given in the Annex 3, below (access of a blind person – Jolanta K. – to a supermarket with a guide dog and access by a wheelchair user with an assistance dog to a restaurant).

On the basis of Article 24 §1 of the Civil Code, an individual whose personal rights are endangered by another's actions can demand that the action cease, unless it is not unlawful. Furthermore, if personal rights have been infringed, the individual concerned can demand that the person who infringed them rectifies the effects of the violation, in particular that a statement of appropriate content and form be made. The claimant can also demand pecuniary satisfaction or payment of an appropriate sum to a designated social cause based on the rules of compensation laid down in the Civil Code. If the infringement of personal rights results in material loss, the victim may demand compensation on general legal terms (Article 24 §2).

Before 2011, a discrimination compensation complaint had been introduced only into the Labour Code, effective as of 1 January 2004 (Article 18<sup>3d</sup>). Anyone who suffers an infringement of the principle of equality in employment is entitled to commence judicial proceedings and seek compensation of at least the minimum monthly salary. The labour court which determines the compensation will take into consideration the type and gravity of the discriminatory measures applied in respect of the complainant.

Furthermore, the principle of equal treatment and non-discrimination is considered to be one of the fundamental obligations of the employer to the employee. Therefore, the employee is entitled to terminate his/her labour contract without prior notice on the basis of a grave infringement by the employer of fundamental obligations towards the employee (Labour Code, Article 55 para. 1<sup>1</sup>).

An employee is also entitled to initiate judicial proceedings in order to establish the existence of a labour relationship with a specific content, e.g. in order to determine appropriate remuneration when this has been lowered in a discriminatory manner.<sup>289</sup>

The law on petty crimes defines refusal to sell goods and provide services as a petty crime. These provisions stem from the communist era and had a different meaning at that time, but it would seem they might play a role to some extent in the prohibition of discrimination in access to goods and services (limited to the grounds of gender,

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<sup>289</sup> Proceedings on the basis of Article 189 of the Code of Civil Procedure, See K. Rączka, *Kodeks pracy. Komentarz* (ed.) Z. Salwa, 6th ed., Warsaw 2004, p.72.



race, ethnic origin and nationality). In such a case, victims should apply to the police, who act as prosecutors in petty crimes (district court).

The Code of Petty Crimes (minor offences) provides: (Article 135) 'Anyone who, carrying on the sale of goods in a retail or catering business, hides goods meant for sale or deliberately refuses to sell them without just cause shall be subject to a fine' and (Article 138) 'Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine.' The fine imposed by the court (Article 1.1) may be up to 5,000 PLN (around 1,250 EUR).

Discriminatory treatment may, in some circumstances, take the form of a criminal offence prosecuted under the Penal Code. In such situations, a criminal proceeding can be instituted by a public prosecutor *ex officio*, or sometimes by the victim themselves, in accordance with the Code of Criminal Procedure.

The Penal Code does not cover all cases of discrimination, but nevertheless, criminal proceedings may be instituted in more serious cases, such as: the use of force or an illegal threat towards individuals or groups of people because of their national, ethnic, racial, political or religious affiliation;<sup>290</sup> a public insult towards individuals or groups of people or the infringement of the personal integrity of another person on these same grounds;<sup>291</sup> or the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.<sup>292</sup>

In both criminal and civil procedure the possibility of mediation exists and is gradually becoming more popular.

There are no administrative remedies laid down specifically to deal with discrimination issues, although such issues can sometimes be present in administrative proceedings. However, the 2010 Equal Treatment Act (Article 24) introduced a new possibility into administrative procedure (amending the Administrative Procedure Code).<sup>293</sup> It provides that if there has been a court ruling that found an infringement of the rule of equal treatment and if this infringement influenced a final administrative decision, an administrative re-trial may be demanded.<sup>294</sup>

In addition, certain remedies may be applied by labour inspectors who supervise and control the observance of labour law (including anti-discrimination provisions). According to the National Labour Inspectorate Act, a labour inspector may issue

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<sup>290</sup> Article 119.1-2 Penal Code.

<sup>291</sup> Article 257 Penal Code.

<sup>292</sup> Article 256 Penal Code.

<sup>293</sup> Act of 14 June 1969 - Code of Administrative Procedure [amended], (*Ustawa z dnia 14 czerwca 1960 r. - Kodeks postępowania administracyjnego*).

<sup>294</sup> Article 145b.1 Code of Administrative Procedure.

orders or improvement notices, make submissions or bring claims to a labour court if the establishment of the existence of a labour relationship is at stake.<sup>295</sup>

The option of bringing an individual complaint before the European Court of Human Rights on the basis of an alleged violation of any rights or freedoms guaranteed by the European Convention or its additional Protocols in connection with Article 14 of the Convention cannot be ignored (see rulings of the ECtHR in Annex 3, below). The independent use of Article 14 (non-discrimination) will not be possible unless Poland ratifies Protocol No 12. To date, however, there is no sign that the government intends to accept the Protocol.

In terms of non-judicial measures, a complaint to the Polish Ombud's Office – the Commissioner for Civil Rights Protection (*Rzecznik Praw Obywatelskich*) – may prove to be an effective tool. Since 1 January 2011 the Ombud has been designated as an equality body. Though the Ombud cannot issue a legally binding decision, the Office can investigate a case and exert pressure on the bodies responsible for inappropriate conduct or it can take certain legal steps (see more under Section 7).<sup>296</sup>

As far as legal representation is concerned, some preferential treatment is allowed in labour cases. In Poland, in principle, legal representation may be provided by an advocate (attorney-at-law) or legal adviser,<sup>297</sup> but for an employee, a representative of a trade union, a labour inspector or another employee of the enterprise may also act as a legal representative.<sup>298</sup> In addition, in labour cases claims are automatically exempted from court costs.

*b) Are these binding or non-binding?*

An agreement reached before a conciliation committee should be voluntarily implemented by the employer. If the employer opposes this and does not put the agreement into operation, the agreement can be executed in accordance with civil procedure.<sup>299</sup>

Confirmation by a court of an agreement reached between parties is binding in the same way as a court verdict.

All court verdicts in any proceedings mentioned above are binding (obviously, first-instance verdicts may be appealed).

<sup>295</sup> Article 21-33, Act of 13 April 2007 on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*), Dz.U.2012.404 j.t. See also Article 63<sup>1</sup> Civil Procedure Code.

<sup>296</sup> See Article 11-14, Act of 15 July 1987 on the Commissioner for Civil Rights Protection (*Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*).

<sup>297</sup> Article 87.1 Code of Civil Procedure.

<sup>298</sup> Article 465.1 Code of Civil Procedure.

<sup>299</sup> Article 255.1 Labour Code.



If the court directs the case (criminal or civil) to mediation, its result (if agreement is reached) is confirmed by the court and as binding as a court verdict.

Measures taken by labour inspectors are binding, but the employer may challenge them in administrative court.

The Ombud cannot issue legally binding decisions.

*c) What is the time limit within which a procedure must be initiated?*

The time limits in the proceedings mentioned vary but generally speaking they do not act as deterrents to seeking redress as they are counted in years rather than months. The time limits in relation to discrimination proceedings are the same as general time limits in other labour or civil cases.

However, according to the 2010 Equal Treatment Act (Article 15) the statute of limitations in compensation claims based on infringement of the rule of equal treatment is three years from the moment when the person learns of the infringement, and no later than five years from the infringement itself, while the general rule in the Civil Code is 10 years (see more in point e) below). Both draft laws that aim to amend 2010 Act, prepared by the Government Plenipotentiary for Equal Treatment and opposition parties and mentioned in Section 0.2 above (Overview/State of implementation), apply general civil procedure rules to the Act.<sup>300</sup>

An application for an administrative re-trial (described under point a. above – if there has been a court ruling finding infringement of the rule of equal treatment, an administrative re-trial may be demanded if this infringement influenced the final administrative decision) may be filed within a month of the court ruling on which the claim is based, becoming final.<sup>301</sup> The administrative decision may be quashed within five years of it being served or announced.<sup>302</sup>

*d) Can a person bring a case after the employment relationship has ended?*

In Polish law it is possible to bring a case after the employment relationship has ended. Exercise by an employee of the rights arising from a violation of the principle of equal treatment cannot constitute a reason for the employer to terminate the employment relationship.<sup>303</sup> However, if the contract was terminated the employee can either (1) make a request to a court that the notice to quit be recognised as void;

<sup>300</sup> See Plenipotentiary Annual Report 2013, p. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>

<sup>301</sup> Article 145b.2 Administrative Procedure Code.

<sup>302</sup> Article 146.1 Administrative Procedure Code.

<sup>303</sup> Article 18<sup>3e</sup> Labour Code.



or (2) if the employment relationship has already ended, s/he has the right to demand to return to work under the previous conditions or to receive compensation.<sup>304</sup>

Moreover, an employee can terminate an employment contract without notice if the employer has severely violated his/her obligations towards the employee<sup>305</sup> and then bring a case against the employer.

*e) In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).*

A common problem faced by victims of discrimination (besides their fear of raising the issue of discrimination) is the lack of professional legal assistance. There is no system of free pre-litigation out-of-court legal advice for vulnerable groups in place (work on the Ministry of Justice draft law on access to legal aid has been on-going since 2005, and there have been several versions of it). In all court proceedings it is possible for an indigent claimant (or victim in a criminal case) to receive a waiver from court costs and a legal aid lawyer (paid for by the state). However, in reality access to an *ex officio* lawyer is limited and the quality of legal aid services is often poor.

In relation to administrative procedure, it should also be noted that the rights of victims of discrimination to access court and/or administrative procedures (as provided for by Article 7.1 of Directive 2000/43) applies only partially in Polish law since the right to state-guaranteed legal aid does not include administrative proceedings (and considerable numbers of administrative proceedings may concern discrimination). The right to legal aid arises only when a person decides to file a complaint with an administrative court (following two non-judicial administrative instances). But review of an administrative decision in court is limited to an evaluation of its compliance with the law only and not its merits (i.e. it is of cassational character).

In the case of the petty crimes described above (offences against consumers, Code of Petty Crimes, Article 135, 138, see point a) above) it is difficult to state with certainty whether this provision has already been successfully used in the discrimination context. On the one hand it has been given for years as an example of possible legal action in reports and publications and is quoted at conferences, seminars and training events by lawyers and activists as a good legal tool (that is used occasionally). However, no concrete successful example was identified during the research for this report. The only case found was the case of a man who sued the owners of the women-only restaurant 'Babie Lato' for refusal of service. The court

<sup>304</sup> Article 44-55 Labour Code.

<sup>305</sup> Article 55 Labour Code.

dismissed the claim.<sup>306</sup> However, limited access to information about these cases might be caused by the fact that these are petty crime proceedings: they are not published, and they do not attract public attention. In any case, it is not a special anti-discrimination provision and it has been identified as a possible source of legal action only because of the lack of appropriate procedures.

As already mentioned above, the statute of limitations in compensation claims based on infringement of the rule of equal treatment is three years from the moment when the person learns about the infringement, and no later than five years from the infringement itself. However, generally the statute of limitations in civil matters (including labour matters) is 10 years, and three years in cases of 'periodic services' or cases related to the 'professional activity of the party as an entrepreneur'.<sup>307</sup> This shortened three-year period may, however, cause problems. According to the research done in 2009 by the Polish Section of the International Commission of Jurists (ICJ),<sup>308</sup> a major source of obstacles in pursuing justice before the claim becomes time-barred is the situation of dependency between a person eligible to bring the lawsuit and the liable party. It has been observed that employees often do not seek to enforce their rights through fear of losing their jobs. As long as the employment relationship lasts, the employee is afraid of bringing claims against the employer. The short time-bar on claims for payment (three years), when combined with a lack of legal awareness and fear of losing livelihood, may create a serious obstacle to pursuing justice.<sup>309</sup>

The ICJ draft report describes, for instance, several civil cases against JMD<sup>310</sup> where most of the lawsuits for damages concerned payment for overtime work that was not recorded by the company in the register of working hours. Many of these claims arose earlier than three years before the case was brought to court and, therefore, were already time-barred. Employees had not brought their claims earlier because of fear of losing their jobs and the difficult situation prevailing on the job market at the time of the dispute. As the ICJ draft report points out: 'jurisprudence'<sup>311</sup> and legal scholarship allow the possibility of adjudicating a time-barred claim if rejecting such a

<sup>306</sup> Częstochowa District Court, 2006 (Sąd Rejonowy, Sąd Grodzki w Częstochowie), see at: <http://www.dyskryminacja.fora.pl/dyskryminacja,2/peruki-dla-panow-w-babim-lecie-sa-legalne,53.html> (01.05.2013).

<sup>307</sup> Article 118, Civil Code.

<sup>308</sup> See report *Access to Justice for Human Rights Abuse Involving Corporations*. A project of the International Commission of Jurists. Report for Poland. September 2009. Drafted by: K. Szymielewicz.

<sup>309</sup> *Rozpoczęcie biegu przedawnienia roszczenia pracowniczego*. (Commentary on the Supreme Court judgment of 3 February 2009 (I PK 156/08)), *Monitor Prawa Pracy* (6), 2009.

<sup>310</sup> JMD - Jeronimo Martins Dystrybucja S.A. is the owner of Poland's largest chain of retail stores that now operates over 1,500 stores and eight modern distribution centres; see: <http://www.biedronka.pl/> (01.05.2013).

<sup>311</sup> See: Supreme Court Judgment of 29 March 2007 (II PK 224/06); Supreme Court Judgment of 22 June 2005 (I PK 288/04); Supreme Court Judgment of 8 May 2008 (I PK 277/07); Supreme Court Judgment of 20 October 2004 (III UK 111/04).

claim would “violate the principles of social co-existence”.<sup>312</sup> In addition, the Labour Code provides that a judge can always decide to reject the time-bar argument raised by the employer (to block an employee’s claims) if the judge considers it to be an abuse of law.<sup>313</sup> This possibility tends to be applied to employee claims for compensation (e.g. following an accident at work treated as a tort under civil law or particularly blatant cases of discrimination, molestation or harassment).

As a consequence of the above, the law does create a mechanism for preventing injustice caused by a lapse of the prescription period in particular circumstances. However, the criteria for assessing whether a time-bar argument in a given case violates the principles of social co-existence or constitutes an abuse of law are vague since they need to be interpreted from these general principles. By definition, the application of such ‘general clauses’ depends on the interpretation adopted by the adjudicating court under the particular circumstances of the case.

One other factor which could act as a deterrent to people seeking redress is constituted by functional barriers. Some courts and other bodies involved in the administration of justice are not easily accessible to persons with disabilities. It is relatively difficult to find information in Braille.

- f) *Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.*

There are still no full and reliable official statistics on the number of cases related to discrimination brought to justice. Since the Equal Treatment Act came in force on 1 January 2011, the Polish Society of Anti-Discrimination Law has sent a letter (24 January 2011) to the Minister of Justice urging the Ministry to collect the relevant statistical data.<sup>314</sup> Both the Ombud and the Government Plenipotentiary for Equal Treatment supported the idea expressed in this letter, and the Ministry of Justice declared it would collect relevant data. As a result, the Ministry of Justice provided information for 2011 – the first year of the operation of the law. According to this information in 2011, 30 cases were brought to district and regional courts for compensation for discrimination based on the ETA. Out of 30 cases, 17 cases were decided and 13 were still pending in 2012. Out of the 17 cases decided, in nine cases claims were dismissed, three cases were returned, one was rejected and in two cases the lawsuit was discontinued (there is no information on what has happened to the two remaining cases since the report provides information only

<sup>312</sup> Compare e.g. Supreme Court Judgment of 17 September 1997 (I PKN 273/97); Supreme Court Judgment of 29 June 2005 (I PK 261/2004); Supreme Court Judgment of 19 March 2009 (IV CSK 492/2008).

<sup>313</sup> Article 8 of the Labour Code.

<sup>314</sup> <http://www.ptpa.org.pl/archiwum/?2011-01-24-ptpa-pyta-ministra-sprawiedliwosci-o-statystyki-dotyczace-dyskryminacji&nid=170&p=10> (1.05.2013).

about the result of 15 cases out of 17). It clearly shows that the victims of discrimination very rarely use the ETA.<sup>315</sup>

However, in the Ombud's annual report for 2013, numbers for 2012 were not given and the report states that despite its declarations, the Ministry of Justice has still not provided the relevant information.<sup>316</sup> What is more, the cases for 2011 mentioned above, listed by the Ministry of Justice, were reviewed by the Polish Association for Anti-Discrimination Law in the framework of a monitoring project and apparently they were not based on the 2010 Equal Treatment Act, as declared by the Ministry of Justice, but other laws (such as the Labour and Civil Codes).<sup>317</sup> This obviously proves that claims based on the 2010 Act are not being brought to courts.

There are, however, statistics covering court cases based on the Labour Code: sex discrimination in employment (528 cases heard in 2012), sexual harassment as discrimination in employment (14 cases), mobbing (324 cases), and discrimination in employment (93 cases heard in 2012, but no disaggregation by ground).<sup>318</sup>

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

*Please list the ways in which associations may engage in judicial or other procedures*

- a) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organisation, trade union, etc.).*

Civil, criminal and administrative laws use the very wide terms 'non-governmental organisations' (civil law) and 'social organisations' (criminal and administrative law) that include any associations and foundations, trade unions, professional organisations, etc.

- b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or*

<sup>315</sup> Ombud Bulletin 2012/2, p.79; see also Ombud Annual Report 2013, p. 404.

<sup>316</sup> Ombud Annual Report 2013, p. 451.

<sup>317</sup> See: *Anti-discrimination law in the practice of Polish common courts. Monitoring report*, Polish Association of Anti-Discrimination Law (2013), p.98-99; *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, Polskie Towarzystwo Prawa Antydyskryminacyjnego (2013), available at [www.ptpa.org.pl](http://www.ptpa.org.pl).

<sup>318</sup> Ombud Annual Report 2013, p. 450-451.

*any other requirement (please specify)? If the law requires entities to prove 'legitimate interest', what types of proof are needed? Are there legal presumptions of 'legitimate interest'?*

Different social organisations are governed by different laws. Most important in this context are non-governmental organisations (mainly associations and foundations) governed by the law on associations (membership organisations) and the law on foundations (non-membership organisations). In order to establish a registered association 15 persons are needed; in order to establish an 'ordinary association' (*stowarzyszenie zwykłe*) three persons are needed and notification instead of registration is sufficient.

A non-governmental organisation may act in support but sometimes also on behalf of the complainant.<sup>319</sup> This solution was adopted in the Code of Civil Procedure, which allows non-governmental organisations to file a claim on behalf of individuals or join such proceedings,<sup>320</sup> e.g. in alimony (maintenance) and consumer protection cases<sup>321</sup> or in labour law and social security cases.<sup>322</sup> If a non-governmental organisation does not participate in the proceedings, it may still present its opinion on the case to the court (acting *de facto* as an *amicus curiae* even if the law does not use this expression).<sup>323</sup>

Due to changes to the Code of Civil Procedure made in August 2004 (and in 2011, in force since 3 May 2012), organisations involved in combating discrimination may engage in judicial procedures in support of a complainant and on his/her behalf. Article 61 stipulates that organisations whose official objects include equality protection and non-discrimination protection from unfounded direct or indirect violation of the rights and duties of citizens may, in the case of claims in this field and with the written consent of citizens, institute actions on behalf of citizens and, with the written consent of the plaintiff, may join proceedings at any stage thereof (the court

<sup>319</sup> See more detailed analyses in: S. Spurek, 'Udział organizacji społecznej w postępowaniu karnym, cywilnym i administracyjnym' (Participation of the social organisation in criminal, civil and administrative proceedings), in: *Przeciwdziałanie dyskryminacji z powodu orientacji seksualnej w świetle prawa polskiego oraz standardów europejskich* (Counteracting discrimination on ground of sexual orientation in the light of Polish law and European standards), ed. K. Śmiszek, Warsaw 2006; K. Goner (Supreme Court Judge), 'Udział organizacji społecznych w postępowaniu sądowym jako gwarancja prawa do rzetelnego procesu' (Participation of the social organisation in court proceedings as a guarantee of the right to fair trial), and M. Bernatt, 'Opinia przyjaciela sądu (*amicus curiae*) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich' (The *amicus curiae* brief as an auxiliary legal institution in the jurisprudence of Polish courts), both in: *Sprawny sąd. Zbiór dobrych praktyk* (The efficient court. Collection of best practices) ed. Ł. Bojarski, C.H. Beck, Warsaw 2008 (p. 166-176 and 184-189).

<sup>320</sup> Article 8 Code of Civil Procedure.

<sup>321</sup> Article 61 Code of Civil Procedure.

<sup>322</sup> Article 462 Code of Civil Procedure.

<sup>323</sup> Article 63 Code of Civil Procedure.



verifies only the fulfilment of the formal criteria, such as the association's official object).<sup>324</sup>

Since May 2012, NGOs may also initiate or join proceedings on behalf of an individual person who is an entrepreneur (if that person is a member of the organisation and provides written consent) in a dispute with another entrepreneur.

Similarly, social organisations are entitled to bring or join administrative proceedings. Article 31.1 of the Code of Administrative Procedure reads: 'A social organisation may, in a case concerning another person, request: 1) to institute proceedings, 2) to be admitted to proceedings, if it is justified by the official objects of the organisation and when it is in the public interest'. It is up to the administrative organ to decide whether to admit the social organisation, but this decision may be appealed. But even if it is not taking part in proceedings as a party, an organisation, with the consent of the administrative organ, may still express its opinion (*amicus curiae* brief) (Article 31.2-5).

Representatives of social organisations may also be admitted to criminal proceedings. According to Articles 90 and 91 of the Code of Criminal Procedure, a representative of a social organisation may be admitted if 'there is a need to protect the public interest or an important individual interest falling within the official objects of the organisation, in particular the need to protect human rights and freedoms.' The decision whether to admit the representative rests with the court, which evaluates the importance of the public or individual interest. The application to admit representative should be submitted in writing and designate particular person/s as representative/s.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

Until 2012 there were no special provisions on victim consent in civil proceedings and it was a matter of judicial practice. In some cases, the victim's oral consent on the court record was enough. Since May 2012 the written consent of the party is always needed. There are no special additional provisions on victim consent.

In criminal proceedings, a written application would be needed (please see point b. above on criminal procedure).

d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

<sup>324</sup> Article 61, Act of 2 July 2004 amending the Code of Civil Procedure and some other acts, entered into force on 4 February 2005, latest amendment in force since 03.05.2012, (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*).



It is a voluntary decision by the organisation; no organisations have a legal duty to act. In fact this kind of activity is seen by NGOs as very professional and requiring special competences. The research done by the Polish Association of Anti-Discrimination Law has shown that not many NGOs engage in this kind of work: it is mostly those familiar with legal issues, especially large, strong NGOs based in the capital.<sup>325</sup>

- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

A non-governmental organisation may act in support but sometimes also on behalf of the complainant. This solution was adopted in the Code of Civil Procedure, which allows non-governmental organisations (whose official object is not to conduct economic activity) to bring a claim on behalf of individuals or join such proceedings,<sup>326</sup> e.g. in alimony (maintenance) and consumer protection cases<sup>327</sup> or in labour law and social security cases.<sup>328</sup> If a non-governmental organisation does not participate in the proceedings, it may still present its opinion on the case to the court (acting de facto as an *amicus curiae* even if the law does not use this expression).<sup>329</sup> There was also an important ruling of the Constitutional Tribunal (CT) which referred to an *amicus curiae* brief provided by an NGO in a case before the CT, thus in a way recognising use of an *amicus curiae* by courts even without clear legal provision allowing for this.<sup>330</sup>

Due to the changes to the Act on the Code of Civil Procedure made in August 2004 (last amendment in force since May 2012), organisations involved in combating discrimination may engage in judicial procedures in support of a complainant and on his/her behalf.

The Article 61 stipulates that organisations whose official objects include protection of equality and non-discrimination against unjustified direct or indirect violation of the rights and duties of citizens may, in the event of claims in this field and with the written consent of the citizens concerned, institute actions on behalf of the citizens and, with the written consent of the plaintiff, may join proceedings at any stage

<sup>325</sup> See: *Anti-discrimination law in the practice of Polish common courts. Monitoring report*, Polish Association of Anti-Discrimination Law (2013), p. 179-212; *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoring*, Polskie Towarzystwo Prawa Antydyskryminacyjnego (2013), available at [www.ptpa.org.pl](http://www.ptpa.org.pl).

<sup>326</sup> Article 8 Code of Civil Procedure.

<sup>327</sup> Article 61 Code of Civil Procedure.

<sup>328</sup> Article 462 Code of Civil Procedure.

<sup>329</sup> Article 63 Code of Civil Procedure.

<sup>330</sup> Constitutional Tribunal judgment of 16.01.2006 (SK 30/05), justification p. I.8. p. III 2.2.

thereof.<sup>331</sup> Shortly after this provision was introduced, the Helsinki Foundation for Human Rights made use of it and in both 2005 and 2006 engaged in a number of discrimination cases, both as an *amicus curiae* and on behalf of the complainant.<sup>332</sup> More NGOs currently use these opportunities but, as mentioned above, this is still not a popular type of activity as it is seen by NGOs as very difficult and requiring special legal skills.

Similarly, social organisations are entitled to bring or join administrative proceedings. Article 31.1 of the Code of Administrative Procedure reads: 'A social organisation may, in a case concerning another person, request: 1) to institute proceedings, 2) to be admitted to the proceedings, if it is justified by the statutory objectives of the organisation and when it is in the public interest'. It is up to the administrative organ to decide whether to admit the social organisation, although this decision may be appealed. If admitted, the organisation has the rights of a party. But even if not taking part in the proceedings, an organisation, with the consent of the organ, may express its opinion (*amicus curiae* brief) (Article 31.2-5). The Act on Procedure before Administrative Courts (a separate instrument from the Code of Administrative Procedure) also allows social organisations to take part in proceedings when this is justified by their official objects and in the cases specified by particular provisions (Articles 9; 25.4; 33.2).

Representatives of social organisations may also be admitted to criminal proceedings. According to Articles 90 and 91 of the Code of Criminal Procedure, a representative of a social organisation may be admitted if 'there is a need to protect the public interest or an important individual interest falling within the official objects of the organisation, in particular the need to protect human rights and freedoms.' The decision whether to admit the representative rests with the court which evaluate the importance of the public or individual interest. An application to admit representative should be submitted in writing and designate particular person/s as representative/s.

f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify*

If an organisation initiates civil proceedings on behalf of a party, it has the rights of a party to the proceedings and may seek and obtain any remedy including calling witnesses or appealing the ruling (this refers also to obligations of the party, like respecting court orders and compliance with deadlines) (Article 62, Code of Civil Procedure).

<sup>331</sup> Article 61, Act of 2 July 2004 amending the Code of Civil Procedure and some other acts, entered into force on 4 February 2005, latest amendment in force since 03.05.2012 (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*).

<sup>332</sup> See more at <http://www.hfhrpol.waw.pl>.

An organisation admitted to administrative proceedings has the rights of a party (with some limitations) (Article 31.3, Code of Administrative Procedure).

In criminal proceedings, the rights of a representative of a social organisation are limited to: participation in the hearing, expressing his/her opinion orally on the court record and submitting his/her opinion in writing (Article 91, Code of Criminal Procedure).

g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

There are no special rules on the shifting burden of proof where associations are engaged in proceedings. General rules apply.

h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Polish law does not allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Until 2010 there was no legislation on class action. This gap constituted a considerable restriction in pursuing justice. In general each single lawsuit brought before a court initiates separate court proceedings with all the obligatory elements like court fees, legal representation, correspondence and communication with the court, presentation of evidence, etc. There is a possibility for a court to decide to hear a number of related cases jointly, but this will not affect these obligatory elements of the procedure. The only practical benefit for the parties (and the court itself) may result from the fact that the process of gathering evidence (e.g. calling witnesses or obtaining documents) is more time and cost efficient.<sup>333</sup>

<sup>333</sup> *Access to Justice for Human Rights Abuse Involving Corporations*. A project of the International Commission of Jurists. Draft Report for Poland. September 2009. Drafted by: K. Szymielewicz.

In 2009, however, Parliament passed a law on class action which entered into force on 19 July 2010.<sup>334</sup> The European model of class action, as opposed to the American, was chosen – meaning that all parties interested in the case must join it personally.

Unfortunately at the very end of work on the draft act, when it had already been passed by the Sejm (the lower house of Parliament), the Senate introduced some changes that significantly narrowed the scope of the law and limited it to consumer protection claims and torts (with the exception of protection of ‘personal rights’). Therefore, it does not include, for instance, employment cases (although the issue is debated and in fact requires judicial interpretation since opinions have been voiced that some employment claims, for instance based on torts, could be filed as a collective claim).

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

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

Before 2004 in accordance with the fundamental principle of civil law, the burden of proof rested on the complainant.<sup>335</sup>

The 2003 amendment to the Labour Code (in force since 1 January 2004) brought a revolutionary change into the legal system. In anti-discrimination cases in employment matters, the burden of proof is partially shifted from the complainant to the respondent. Article 18<sup>3b</sup>, para. 1 *in fine* clearly states that it is the employer who should prove that there were objective reasons to apply discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred.

Until 2010 the shift of the burden of proof existed in the Labour Code only. The 2010 Equal Treatment Act (Article 14) introduced the shift of the burden of proof in all compensation proceedings regarding infringement of the rule of equal treatment, governed by the Act, which is an exception from the general rule for civil proceedings that the obligation to prove a fact falls on the person who derives legal effects from the fact (Article 6, Civil Code).

<sup>334</sup> Act of 17 December 2009 on pursuing claims in collective actions, in force from 19 July 2010 (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*, Dz.U. Nr 7, poz. 44 z 18 stycznia 2010).

<sup>335</sup> Article 6 Civil Code. In the field of labour relations the same principle applies, see Article 300 Labour Code.

But, since in reality parties do not base their claims on the 2010 Equal Treatment Act,<sup>336</sup> the usage of the shift of the burden of proof is limited to Labour Code cases and to discrimination cases based on the Civil Code (for instance, commonly occurring personal rights cases) the burden of proof is not shifted.

Also, since the 2010 Equal Treatment Act limits possible compensation sought to material damage only,<sup>337</sup> a compensation claim for immaterial damage would require following general civil rules – again without the shift of the burden of proof.

According to the Equal Treatment Act (Article 14.2), whoever (complainant) alleges infringement of the principle of equal treatment, has to substantiate the probability of a violation. If there is prima facie evidence (probability) of a violation of the principle of equal treatment, the respondent is obliged to show that he/she/it did not commit the violation (Article 14.3). This provision refers to all cases governed by law – that means all forms of discrimination (including harassment) on the grounds protected by the Act.

Obviously, as far as criminal proceedings are concerned, the burden of proof is not shifted and, in accordance with the presumption of innocence, it is for the public prosecutor to prove the charge. The accused has the right to provide evidence and to a defence but cannot be obliged to exercise these rights.

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

*What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint)*

The 2010 Equal Treatment Act introduced a general prohibition of victimisation (Article 17) on all grounds protected by the Act: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. The law provides that use of rights to defend against unequal treatment ('rights arising from a breach of the rule of equal treatment') must not be a basis for adverse treatment and must not cause any negative consequences for that person.<sup>338</sup> The protection extends to a person who in any way supports a person exercising his/her rights.<sup>339</sup> In the case of victimisation, the victim may file the same compensation claims as a victim of discrimination.<sup>340</sup>

<sup>336</sup> See point 6.1 above.

<sup>337</sup> See point 6.5.a. below.

<sup>338</sup> Article 17.1 Equal Treatment Act.

<sup>339</sup> Article 17.2 Equal Treatment Act.

<sup>340</sup> Article 17.3 and Article 13 Equal Treatment Act.



The Act also treats as unequal treatment and prohibits less favourable treatment on the basis of their rejection of harassment or submission to harassment.<sup>341</sup>

In the employment field, the previous provisions continue to exist simultaneously with the ETA. The prohibition of victimisation was widely broadened in the 2008 amendment to the Labour Code (in force since 18 January 2009).<sup>342</sup> Before, the Labour Code prohibited only the termination of a labour contract as the result of an employee having used their rights to defend themselves against unequal treatment. This provision was amended and currently any other adverse treatment and any other negative consequences are prohibited (Article 18<sup>3e</sup> § 1 Labour Code). This broadened Labour Code protection covers complainants but also extends to employees who in any way support a victim of discrimination (Article 18<sup>3e</sup> § 2).

Additionally in relation to harassment, the amended part of the Labour Code states that 'Submission of an employee to harassment or sexual harassment, as well as the taking of actions rejecting (counteracting) harassment or sexual harassment, may not result in any adverse consequences for the employee' (Article 18<sup>3a</sup> § 7).

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

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

The 2010 Equal Treatment Act introduces a general rule that everybody whose right to equal treatment was infringed has the right to compensation, and this extends beyond employment (Article 13). The right refers to both natural persons (on all grounds covered by the Act) and legal persons on the grounds of race, ethnic origin and nationality (Article 12). The Act does not introduce a new procedure but refers to the general rules of the Civil Code and Code of Civil Procedure.<sup>343</sup> However, the Equal Treatment Act refers to compensation only (*odszkodowanie*) which covers material damage (and not immaterial) and therefore limits protection. This was pointed out by the Ombud in June 2012 in its first report. In the Ombud's view, the compensation claim under the Act should be widened and include immaterial damage.<sup>344</sup> The relevant legislative amendments were proposed in both draft laws mentioned in Section 0.2 above.

The Civil Code provides for general compensation claims for material and immaterial damage. Article 415 *et seq.* set out the general terms of compensation for material

<sup>341</sup> Article 3.5, Equal Treatment Act.

<sup>342</sup> Act of 21 November 2008 on amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>343</sup> Article 13.2 and 14.1 Equal Treatment Act.

<sup>344</sup> Ombud Bulletin 2012/2, p. 78-79.



damage. The compensation should cover all damage that is a consequence of an unlawful act or failure to act of a person who discriminated against the claimant. Articles 445 and 448 of the Civil Code regulate pecuniary damages (punitive) and state that damages should be appropriate, which means that they should ensure effective redress of the damage suffered. Article 448 specifies that an appropriate sum may be paid to a designated social cause.

Additionally, if there are cases not covered by the provisions of the Equal Treatment Act, it is also possible to try to rely on the protection of personal rights described in Section 6.1. Among the actions that a claimant may demand are pecuniary satisfaction and payment to a social cause.

In the field of employment, Article 18<sup>3d</sup> of the Labour Code provides that a person who was a subject of discriminatory treatment by an employer is entitled to compensation not lower than the minimum wage defined in separate laws (in 2013, 1,600 PLN, around 400 EUR/month).

The Polish system of compensation of damage is rather based on the concept of redressing damage, and does not include a typical punitive element.

Under the provisions of the Labour Code, an employee whose contract was terminated without notice, in violation of the regulations for terminating labour contracts, has the right to seek reinstatement on the same terms as before or compensation. The choice of solutions lies with the employee, but the labour court rules on the advisability or possibility of the individual returning to work.<sup>345</sup>

An employee is entitled to terminate his/her labour contract without prior notice on the basis of a grave infringement by the employer of fundamental obligations towards the employee.<sup>346</sup> In such a case, the employee is entitled to compensation equal to his/her salary for the period of notice.

The Labour Code does not envisage any sanctions for violations of the employer's obligation to create an environment free from discrimination in the workplace, especially with respect to gender, age, disability, race, religion, nationality, political beliefs, membership of trade unions, ethnic origin, belief, and sexual orientation.<sup>347</sup> In light of this, the provision takes on the character of a mere declaration.

The Employment Act provides two sanctions in the case of conduct contrary to the Act. First, anyone running an employment agency who does not comply with the

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<sup>345</sup> Article 56.1 and 45.2 Labour Code. See also the Supreme Court ruling of 9 February 1999, I PKN 565/98, OSNAPIUS 2000/6/225, which stated that: 'The necessity of hiring new employees with appropriate qualifications, which the plaintiff does not hold, speaks to the inadvisability of returning him to his job (Article 45.2 Labour Code).'

<sup>346</sup> Article 55 para 1<sup>1</sup> Labour Code.

<sup>347</sup> Article 94 point 2b Labour Code.

prohibition of discrimination based on gender, age, disability, race, religion, ethnic origin, nationality, sexual orientation, political opinion, beliefs or membership of a trade union is liable to a minimum fine of 3,000 PLN (ca. 750 EUR).<sup>348</sup> Secondly, anyone who – on the same grounds – refuses to employ a candidate in a vacant post or to accept an individual for vocational training is liable to the same fine.<sup>349</sup>

In addition, criminal sanctions may apply if the discriminatory treatment constitutes a criminal offence, such as, for instance, the public insult of individuals or groups due to their national, ethnic or racial origin.

b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

Neither the compensation clause provided by the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Article 13) and the Civil Code that the Act refers to, envisage any ceiling on the maximum amount of compensation that can be awarded.

In the Labour Code, there is no maximum threshold for this compensation, and a court can award it according to its assessment of the type and gravity of the discriminatory treatment in a specific case. There is, however, a minimum compensation level which is at least equal to the minimum wage (in 2013 1,600 PLN, ca. 400 EUR per month).<sup>350</sup>

c) *Is there any information available concerning:*

- i) *the average amount of compensation available to victims?*
- ii) *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

There is no reliable information on the average amount of compensation available to victims. The number of cases where compensation was given is still small but generally courts tend to grant moderate compensation awards (see as examples the cases of Małgorzata K.D. and Mirosław S. described in Annex 3, below).

Generally in civil cases compensation awarded for ‘moral loss’ or ‘suffering’ which resulted from discrimination are rather low, there is no tradition of valuing this type of loss, and different judges use different methods to calculate it. There are Supreme Court rulings which give only general guidelines – the court should take into consideration the living conditions of the party, average standards of living, and the

<sup>348</sup> Article 121.3, Employment Act.

<sup>349</sup> Article 123, Employment Act.

<sup>350</sup> Every year the level of the minimal wage is set by the Regulations on the minimum wage.

state's level of economic development.<sup>351</sup> The law grants discretion to judges, stating that they should determine 'an appropriate amount'<sup>352</sup> for moral loss and suffering. This judicial independence is supported by the Supreme Court, which leaves the level of compensation awarded solely to the discretion of the judges deciding particular cases.<sup>353</sup> However, research conducted by the ICJ in 2009 revealed that the amount of compensation in civil matters awarded by the courts is 'steadily increasing (compensation exceeding PLN 100,000<sup>354</sup> is not uncommon, especially in cases of permanent and extensive bodily injury or long-term impairments to health). Nevertheless, there are continuing allegations that Polish courts, on average, award low compensation, making it incommensurate to the harm actually suffered by the victim'.<sup>355</sup>

It is also questionable whether the one and only special Labour Code sanction described above meets the criteria of the Directives (effective, proportionate and dissuasive), because this system redresses only the damage and does not include a punitive element (e.g. for a large company, being required to pay compensation at the level of the minimum wage is hardly dissuasive).

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<sup>351</sup> See e.g. Supreme Court Judgment of 29 May 2008 (II CSK 78/2008); Supreme Court Judgment of 12 July 2002 (V CKN 1114/2000).

<sup>352</sup> Article 445, Civil Code.

<sup>353</sup> Supreme Court Judgment of 4 February 2008 (III KK 349/2007).

<sup>354</sup> Ca. 25,000 EUR.

<sup>355</sup> *Access to Justice for Human Rights Abuse Involving Corporations*. A project of the International Commission of Jurists. Draft Report for Poland. September 2009. Drafted by: K. Szymielewicz.



## 7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

*When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

After years of a lack of an equality body in Poland, the 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment finally designated as an equality body the existing Ombud's Office (official name – Commissioner for Civil Rights Protection<sup>356</sup> – *Rzecznik Praw Obywatelskich*). The law appropriately amended the existing Ombud Act, imposing new competences on the Ombud.

However, although the law obliged the Ombud to take over a number of responsibilities, it did not envisage for 2011 any additional resources, funding, etc. for fulfilling new obligations, so the role of the Ombud as an equality body remained limited. In the explanatory memorandum to the draft law, the authors argued that additional funding was not needed and that the Ombud's Office could carry out its new competences within the existing structure and budget.

However, the current Ombud, Professor I. Lipowicz, publicly criticised this situation several times in 2011 (including during presentations to Parliament and before the Constitutional Tribunal) and even proposed that the law be suspended for two years since there were no funds for the equality body to properly fulfil its competences.<sup>357</sup> The budgetary situation changed in 2012 (see below in point b).

The Ombud took on new responsibilities on 1 January 2011. According to the law, the Ombud is obliged to prepare an annual report that should include information on its activities (and their results) in the capacity of equality body, information on the

<sup>356</sup> In 2011 the Office of Ombud changed its English name to Human Rights Defender, but the Commissioner for Civil Rights Protection is a more accurate translation of the Polish name - *Rzecznik Praw Obywatelskich*.

<sup>357</sup> In addition, since 2008 the Ombud has also been the National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (OPCAT). For this role the budget envisaged was also limited and in fact both new roles – acting as a National Prevention Mechanism and acting as a Equality Body – were mentioned by Professor Lipowicz.

implementation of the rule of equal treatment in Poland based on research, and conclusions and recommendations regarding activities that should be undertaken in order to fully secure the implementation of the rule of equal treatment.<sup>358</sup> The first annual report covering its operation as an equality body in 2011 was published in June 2012.<sup>359</sup> The second annual report was published in June 2013.<sup>360</sup> However, even before being designated equality body, the Office of the Ombud was engaged in a number of issues related to discrimination. Partially in the process of preparation for its new role, the Ombud's Office prepared and published in 2010 the 'White Book', which aimed to present the Ombud's activities regarding discrimination over the years.<sup>361</sup>

The second institution that has a mandate to promote the equal treatment of all persons without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment – a body in charge of non-discrimination policies and coordination of governmental efforts rather than an equality body.

According to the 2010 law, the Plenipotentiary should prepare general annual reports on its activities, by 31 March of the next year.<sup>362</sup>

<sup>358</sup> Article 19, Act on the Commissioner for Civil Rights Protection.

<sup>359</sup> Information on activities of the Civil Rights Commissioner in the field of equal treatment in 2011, and about observance of the rule of equal treatment in the Republic of Poland, Warsaw, June 2012, Bulletin 2012, no 2, p.79 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa, czerwiec 2012, Biuletyn Rzecznika Praw Obywatelskich 2012, nr 2, Źródła, available at: <http://rpo.gov.pl/index.php?md=10135&s=1> (1.06.2012) [referred to in this report as 'Ombud Bulletin 2012/2'].

<sup>360</sup> Information on the activities of the Civil Rights Commissioner in the year 2012 and on the observance of human rights and freedoms. Part two: Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2012, and on the observance of the rule of equal treatment in the Republic of Poland, Warsaw 2013 [referred to in this report as Ombud Annual Report 2013] – the version quoted in this report was published by the Polish Senate on 22 April 2013: [http://www.senat.gov.pl/gfx/senat/userfiles/\\_public/k8/dokumenty/druki/300/345.pdf](http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/dokumenty/druki/300/345.pdf); in June 2013 the Ombud published the final version on its website, with the same content but different format and page numbering: <http://rpo.gov.pl/pl/content/informacje-roczne-o-dzialalnosci-rpo>; *Informacja o działalności Rzecznika Praw Obywatelskich w roku 2012 oraz o stanie przestrzegania wolności i praw człowieka i obywatela. Część 2. Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2012 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa 2013.

<sup>361</sup> BIAŁA KSIĘGA. *Raport o wybranych działaniach Rzecznika Praw Obywatelskich V. kadencji w zakresie przeciwdziałania dyskryminacji w okresie od 15 lutego 2006 r. do 9 kwietnia 2010 r.* [WHITE BOOK. Report on the chosen activities of the Commissioner for Civil Rights Protection of the Fifth Term in the field of counteracting discrimination covering period 15 February 2006 – 9 April 2010].

<sup>362</sup> Article 23, Article 32 Equal Treatment Act.



The first report was due by 31 March 2012, but was published on 18 May 2012 and covered activities for two and a half years.<sup>363</sup> This resulted from the fact that previously, the Plenipotentiary had prepared only one internal report covering the first year of its operation (April 2008 – April 2009).<sup>364</sup> The second report, covering 2012, was published in March 2013.<sup>365</sup>

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

## Ombud

The Ombud (Commissioner for Civil Rights Protection) is an independent body appointed by the Sejm upon the approval of the Senate for a five-year term of office and accountable to Parliament.<sup>366</sup> The Ombud informs the Sejm and the Senate annually on his/her activities and this report is public.<sup>367</sup> Since 2012, the Ombud has prepared an additional report on activities related to equality and discrimination (mentioned above) as a part of this report.

The Ombud's Office is independent from other bodies of state administration and in reality performs its duties independently. The budget of the Office comes from the central state budget and is approved by Parliament. The total annual budget of the Ombud's Office was 34,645 000 PLN in 2011 (depending on the exchange rate, circa 8.25 million euro). Although the Ombud's Office became the Polish Equality Body in January 2011, there was no budget devoted for this function (a situation criticised by

<sup>363</sup> Report on activities of the Government Plenipotentiary for Equal Treatment for the period 1 May 2009 – 31 December 2011, *Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres 1 maja 2009 roku – 31 grudnia 2011 roku*, available at: <http://rownetraktowanie.gov.pl/aktualnosci/w-dniu-14-maja-2012-r-rada-ministrow-przyjela-w-trybie-obiegowym-sprawozdanie-z> (1.06.2012) [further as Plenipotentiary Annual Report 2012].

<sup>364</sup> *Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres 30 kwietnia 2008 r. – 30 kwietnia 2009 r.)*. This annual report was not published on the Office's internet site.

<sup>365</sup> *Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012*, Warsaw, 2013, [referred to in this report as 'Plenipotentiary Annual Report 2013'], (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.*, Warszawa 2013).

<sup>366</sup> Articles 3, 5, 7, Act on the Commissioner for Civil Rights Protection.

<sup>367</sup> Complete information about the activities of the Ombud is prepared annually for Parliament and is printed as well as available on its website [brpo.gov.pl](http://brpo.gov.pl); summary reports are also available in English, see: *Summary of Report on the Activity of the Human Rights Defender in 2011, Summary of Report on the Activity of the Human Rights Defender in 2010, Summary of Report on the Activity of the Human Rights Defender in 2009 with some Remarks on Observance of Human and Civil Rights and Freedoms, Summary of Report on the Activity of the Commissioner for Civil Rights Protection in 2008 with some Remarks on Observance of Human and Civil Rights and Freedoms*, at: <http://rpo.gov.pl/en/content/report> (1.06.2013).





the Ombud). The situation changed in 2012 – the general budget of the Ombud's Office increased to 38,019 000 PLN (circa 9 million EUR). The budget of the Ombud as Equality Body was estimated at 1,389,000 PLN (circa 330,000 EUR).

In 2011, the Office was not equipped with sufficient resources to play the role described in the Equal Treatment Act. The Ombud has been the general human rights institution since 1998, and currently (June 2013) employs circa 300 employees. The Anti-discrimination Law Section, created in 2011, has nine employees. Also, the Ombud's position is that there are in fact more people dealing with equality and discrimination issues, i.e. employees working in other departments and sections who occasionally also deal with equality issues (in the answer to a query, the Ombud's Office declared that 25 persons work on equality and discrimination).

### **Government Plenipotentiary for Equal Treatment**

The Prime Minister announced on 8 March 2008 (International Women's Day) the appointment of a new plenipotentiary for equal treatment as a member of the cabinet at the rank of secretary of state. The relevant law was enacted by the Council of Ministers in Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment (in force since 30 April 2008). The 2010 Equal Treatment Act became the new legal basis for the operation of the Plenipotentiary (on the level of an Act of Parliament), but the Ordinance is still a valid law as well.

The Office of the Plenipotentiary (within the Chancellery of the Prime Minister) was established in July 2008, and in May 2013 it employed 20 persons.

The Plenipotentiary, being part of the executive and operating within the Chancellery of the Prime Minister, is not independent.

The Plenipotentiary is appointed and recalled by the Prime Minister, is accountable to the Prime Minister as a secretary of state in the Chancellery of the Prime Minister, and uses the premises of the Chancellery of the Prime Minister<sup>368</sup> (neither does it have a separate budget).

According to the Equal Treatment Act and the Ordinance, the Plenipotentiary should execute governmental policy in regard to equal treatment and counteracting discrimination.<sup>369</sup> The Plenipotentiary should prepare and present to the Council of Ministers the National Programme of Activities for Equal Treatment (*Krajowy*

<sup>368</sup> Article 20 Equal Treatment Act.

<sup>369</sup> Article 21 Equal Treatment Act.

*Program Działań na rzecz Równego Traktowania*)<sup>370</sup> and then report on its execution annually (the first report was due by 31 March 2013).<sup>371</sup>

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

## Ombud

The Commissioner for Civil Rights Protection (Ombud) is the institution which possesses the strongest instruments to intervene in cases of discrimination.

According to the 1997 Constitution, everyone has the right to apply to the Ombud for assistance in protecting their freedoms or rights infringed by public authorities.<sup>372</sup> The scope of activities of the Commissioner is very broad (protecting human rights and freedoms and citizens' rights and freedoms), and although the issue of the different dimensions of discrimination on all grounds was present in its activities from beginning, this was not the priority issue.

The 2010 Equal Treatment Act changed the situation (by amending the Act on the Commissioner of Civil Rights Protection) and widened the scope of competences of the Ombud's Office by adding that the Ombud must also protect the execution of the rule of equal treatment, as well as by listing new competences as required by the Directives. The competences of the Ombud in relation to equal treatment and individual complaints are the following.<sup>373</sup> The Ombud:

- Safeguards the observation of the equal treatment principle;
- Analyses, monitors and supports the equal treatment of all persons;
- Prepares and issues independent reports and recommendations regarding discrimination-related problems;
- Does not have the right of legislative initiative, but he/she can apply to competent authorities for a legislative initiative to be undertaken, or to have a legal act issued or amended;
- Cooperates with civil society, associations and foundations acting in the area of equal treatment;
- Provides support to the victims of discrimination;

<sup>370</sup> Article 22 Equal Treatment Act. As of May 2013 the programme is not ready yet but it is being elaborated.

<sup>371</sup> Article 23.3, Article 32 Equal Treatment Act. But since the programme was not presented there was also no report on its execution – according to the information provided in the 2012 report, the National Programme was drafted and in February 2013 was sent for governmental and public consultations; see Plenipotentiary Annual Report 2013, p. 37-38 and 85-86.

<sup>372</sup> Article 80, Constitution.

<sup>373</sup> See at: <http://rpo.gov.pl/en/content/what-does-human-rights-defender-do>; in more detail see Article 12 and following of the Ombud Act at: <http://rpo.gov.pl/en/content/Ombud-act> (1.5.2013).

- Examines facts described by a complainant;
- Can apply to another state audit institution for examination of a case if he/she establishes that the principle of equal treatment has been violated;
- Applies to competent authorities for the rectification of a violation and subsequently monitors the implementation of his/her recommendations;
- Can require that preparatory proceedings be initiated and participate in all ongoing civil or administrative proceedings;
- In cases where only private entities are involved, he/she can indicate the legal measures to which a given person is entitled.

Until 2010 there was no unit dealing exclusively with discrimination cases within the Office. Such cases fell within the scope of various divisions responsible for labour law, social security or protection of disabled people's rights, etc.

In its annual reports, the Ombud has singled out problems relating to the protection of foreigners and national and ethnic minority rights (information from the department dealing with rights of national and ethnic minorities in the annual reports was included on some (4-5) pages out of ca. 600).<sup>374</sup> Matters concerning the rights of national and ethnic minorities constituted a small percentage of cases sent to the Ombud.<sup>375</sup> Cases regarding equal treatment were rare.<sup>376</sup>

According to the first reports of the Ombud as the equality body, the number of all new complaints received by the Ombud's Office in 2011 was 27,491 (**in 2012 – 28,884**) and the number of discrimination complaints in 2011 was 1,033 (**in 2012 – 1,960**). The term 'complaint' can mean a complaint brought by an individual person, but many of the complaints are in fact identical letters sent to the Ombud by a number of people in order to protest against something – like public discriminatory statements.<sup>377</sup> So, for instance, the 90% increase in discrimination complaints in 2012 was caused by the almost 1,000 letters/complaints protesting against the decision of the Minister of Labour and Social Policy not to appoint any deaf persons as members of the Polish Council for Sign Language.<sup>378</sup> The Ombud's Office divides complaints into following categories (number of cases and their share as a percentage of the total number of cases – the first number refers to 2011, **the second number, in bold, to 2012**): rule of equality before the law – 42 (4.1%) [**40 – 2%**]; prohibition of unequal treatment/discrimination - 85 (8.2%) [**21 – 1.1%**];

<sup>374</sup> Annual Information of the Commissioner for Civil Rights Protection for the following years, [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>375</sup> From the total number of complaints annually (50.000 - 60.000 cases) they were ca. 20 complaints/matters regarding national and ethnic minorities in the year 2007 (it differs slightly annually, as for instance in 2004 there were app. 30 new cases, whereas in 2005 only 7 new cases), Information of the Commissioner for Civil Rights Protection, [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>376</sup> Number of cases concerning 'equal treatment, fight against racism, discrimination and xenophobia' dealt by Ombud's Office: 4 (2005), 3 (2006), 5 (2007), 4 (2008). All cases were initiated by individual complaints.

<sup>377</sup> Ombud Bulletin 2012/2, p. 9.

<sup>378</sup> Ombud Bulletin 2013, p. 390.

prohibition of unequal treatment/discrimination based on sex – 56 (5.4%) **[52 – 2.7%]**; prohibition of unequal treatment/discrimination based on religion or belief – 67 (6.5%) **[158 – 8%]**; prohibition of unequal treatment/discrimination based on sexual orientation – 334 (32.3%) **[21 – 1.1%]**; prohibition of unequal treatment/discrimination based on age – 58 (5.6%) **[57 – 2.9%]**; prohibition of unequal treatment/discrimination based on nationality – 42 (4.1%) **[54 – 2.8%]**; prohibition of unequal treatment/discrimination based on disability – 92 (8.9%) **[1097 – 56%]**; prohibition of unequal treatment/discrimination of social-occupational groups – 30 (2.9%) **[14 – 0.7%]**; prohibition of unequal treatment/discrimination related to taxes – 6 (0.6%) **[20 – 1%]**; prohibition of unequal treatment/discrimination of persons without registration of the place of permanent residence – 3 (0.3%) **[13 – 0.6%]**; prohibition of unequal treatment/discrimination based on race and ethnic origin – 25 (2.4%) **[16 – 0.8%]**; prohibition of unequal treatment/discrimination based on political opinions – 6 (0.6%) **[6 – 0.3%]**; prohibition of unequal treatment/discrimination based on sexual identity – 12 (1.2%) **[4 – 0.2%]**; prohibition of unequal treatment/discrimination related to legal and material/property status – 66 (6.4%) **[123 – 6.3%]**; prohibition of unequal treatment/discrimination based on education or occupation – 11 (1.0%) **[107 – 5.5%]**; prohibition of unequal treatment/discrimination based on social origin – 4 (0.4%) **[1 – 0.1%]**; prohibition of unequal treatment/discrimination based on other reasons – 94 (9.1%) **[150 – 7.6%]**.<sup>379</sup>

According to the report, in 376 **[458]** cases, out of 1,033 **[1,960]** matters, the Ombud simply informed the parties about other means of action and legal measures that a person is entitled to. Out of 676 **[582]** cases that were started by the Ombud (meaning an examination of the case and its facts) in 31% **[24%]** of cases the positive outcome expected by complainant was reached; in almost 50% **[34%]** of cases the charges/complaints were not confirmed. Additionally, the Ombud, based on complaints regarding equal treatment, issued 51 (2011) and 67 (2012) 'general statements' (*wystąpienia generalne*),<sup>380</sup> when the Ombud presents to the relevant agencies, organisations and institutions opinions and conclusions aimed at ensuring effective protection of the liberties and rights of a human and a citizen and facilitating the procedures that such cases may involve.<sup>381</sup>

### Government Plenipotentiary for Equal Treatment

The task of the Plenipotentiary is to execute governmental policy with regard to equal treatment, 'including counteracting discrimination in particular because of gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status'.<sup>382</sup> 'Disability', originally not explicitly mentioned, was added in 2010. The competences of the Plenipotentiary include preparing draft laws related to equal treatment and preparing opinions about

<sup>379</sup> Ombud Bulletin 2012/2, p. 90-91; Ombud Bulletin 2013, p.607-608.

<sup>380</sup> See Article 14.2 and 16, Act on the Commissioner for Civil Rights Protection.

<sup>381</sup> Ombud Bulletin 2012/2, p. 9, Ombud Bulletin 2013, p. 609.

<sup>382</sup> Article 21 Equal Treatment Act.

such drafts; various analytical and monitoring competences (see below); promotion of equal treatment; international cooperation; and implementing projects that support equal treatment and counteracting discrimination.<sup>383</sup>

- d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

## Ombud

The 2010 Equal Treatment Act imposed new competences on the Ombud's Office. It provides that the Ombud, in the implementation of the rule of equal treatment, should: analyse, monitor and support equal treatment of all persons; conduct independent surveys of discrimination; prepare and publish independent reports, and issue recommendations regarding discrimination issues.<sup>384</sup>

The issue of providing independent assistance to victims is more complicated. As already mentioned, according to the Polish Constitution and the 2010 Equal Treatment Act these competences refer to a vertical understanding of human rights (relation between a public authority and a person) and are limited when as concerns conflicts between private parties. In such a case, according to the law, the Ombud can only provide the victim with information on rights and possible actions.<sup>385</sup> In reality, the Ombud occasionally tries to intervene in cases between private parties (directly, for instance by sending a letter to the enterprise concerned, or indirectly, by contacting other relevant public agencies and urging them to intervene) but it does not have formal power to do this and therefore its actions are limited. In 2012, a complaint was sent to the European Commission by the Polish Association of Anti-discrimination Law regarding this issue, which started a formal EC investigation (the Polish Government was asked about its position on the matter). The Ombud itself criticises the limitation of its power and gaps in the implementation of the Directives, and advocates for changes to the law.<sup>386</sup>

In general, the Ombud's decision as to whether to provide assistance to an individual is discretionary. When accepting a case, the Ombud may carry out its own fact-finding investigation or request the competent institutions (supervisory bodies, prosecutor's offices, state bodies or occupational or social inspectorates) to examine the case or part of it. The Ombud can also request the Sejm (lower Chamber of the Parliament) to order the Supreme Audit Office (*Najwyższa Izba Kontroli*) to carry out an inspection in order to examine the case or part of it.<sup>387</sup>

<sup>383</sup> Article 21 Equal Treatment Act.

<sup>384</sup> Article 17b, Act on the Commissioner for Civil Rights Protection.

<sup>385</sup> Article 11, Act on the Commissioner for Civil Rights Protection.

<sup>386</sup> Ombud Bulletin 2012/2, p. 79.

<sup>387</sup> Article 12, Act on the Commissioner for Civil Rights Protection.



When carrying out an investigation, the Ombud has the right to examine every matter on the spot even without prior notification. The Office may request information and documentation on every matter conducted by public administrative bodies, social and occupational organisations and the governing bodies of organisational units which are legal persons. As far as court cases are concerned, the Ombud may request information on the stage of a case as well as requesting access to court and prosecution files.<sup>388</sup>

Apart from examining individual cases, the Ombud may also commission expert assessments and opinions as well as publishing information about the types of cases it deals with, including recommendations. Furthermore, the Ombud may also establish thematic expert teams and ask them for a report on particular issue. Expert Committees on People with Disabilities, on the Rights of Elderly People and on the Rights of Migrants have already been created.<sup>389</sup> In 2011, the Ombud also started commissioning some research (mainly desk research, not empirical), published some reports (the authors of these reports included recommendations). The Ombud also formulates recommendations, both in the process of daily work (usually within 'general statements') as well as in the annual reports.

Thematic reports published recently include:

*The rule of equal treatment – law and practice. Accessibility of public infrastructure for persons with disabilities. Analysis and recommendations (2011);*<sup>390</sup>

*The rule of equal treatment – law and practice. Guarantees of active participation in elections (active usage of electoral law) by the elderly and persons with disabilities. Analysis and recommendations (2012);*<sup>391</sup>

*The rule of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations (2012);*<sup>392</sup>

*The rule of equal treatment – law and practice. Counteracting violence motivated by race, ethnic origin and nationality. Analysis and recommendations (2012);*<sup>393</sup>

*The rule of equal treatment – law and practice. Enforcement of the rights of foreigners in Poland (2012);*<sup>394</sup>

<sup>388</sup> Article 13 Act on the Commissioner for Civil Rights Protection.

<sup>389</sup> Ombud Annual Report 2013, p 419-423.

<sup>390</sup> *Zasada równego traktowania – prawo i praktyka. Dostępność infrastruktury publicznej dla osób z niepełnosprawnościami. Analiza i zalecenia (2011);* available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>391</sup> *Zasada równego traktowania – prawo i praktyka. Gwarancje korzystania z czynnego prawa wyborczego przez osoby starsze i osoby z niepełnosprawnościami. Analiza i zalecenia (2012);* available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>392</sup> *Zasada równego traktowania – prawo i praktyka. Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia (2012);* available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>393</sup> *Zasada równego traktowania – prawo i praktyka. Przeciwdziałanie przemocy motywowanej rasą, pochodzeniem etnicznym i narodowością. Analiza i zalecenia (2012);* available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>394</sup> *Zasada równego traktowania – prawo i praktyka. Przestrzeganie praw cudzoziemców w Polsce (2012);* available at [www.rpo.gov.pl](http://www.rpo.gov.pl).



*Protection of the rights of persons with disabilities – main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities. Analysis and Recommendations (2012);*<sup>395</sup>  
*Action policies in an ageing society. Propositions and recommendations (2012).*<sup>396</sup>

## Government Plenipotentiary for Equal Treatment

The competences of this post, as described by law, include analysis and research, monitoring, collaboration with other bodies, local government and NGOs, the creation of draft laws, issuing opinions about laws drafted by other bodies, and taking action aiming to rectify or minimise the consequences of a violation of the rule of equal treatment.

The Plenipotentiary may establish special research teams, call for particular research or expert analysis and provide a report based on this research. It may also issue recommendations.

In the years 2011-2013, the Plenipotentiary is running a project co-financed by the European Social Fund 'Equal treatment as a standard of good governance' (*Równe traktowanie standardem dobrego rządzenia*)<sup>397</sup> in collaboration with the Jagiellonian University in Kraków and Warsaw School of Economics. Within the project, partners have conducted research and elaborated a number of strategic recommendations (in the process including contributions by different stakeholders). Three publications should be mentioned in this context:

- the survey report (2012);<sup>398</sup>
- the diversity policy for the central administration (2012);<sup>399</sup> and
- strategic recommendations for equal treatment (2012).<sup>400</sup>

The Plenipotentiary does not have the right to accept complaints and assist individual victims, but in fact it receives complaints, applications, and letters from victims of discrimination and NGOs. The first annual report prepared mentions 185 matters of

<sup>395</sup> *Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia (2012)*, available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>396</sup> *Strategie działania w starzejącym się społeczeństwie. Tezy i rekomendacje (2012)*, available at [www.rpo.gov.pl](http://www.rpo.gov.pl), English summary p. 148-154.

<sup>397</sup> Plenipotentiary Annual Report 2013, p. 31-38.

<sup>398</sup> P. Antosz, *Równe traktowanie standardem dobrego rządzenia Raport z badań sondażowych*, 2012; available at <http://rownetraktowanie.gov.pl/>.

<sup>399</sup> *Polityka Różnorodności w administracji centralnej*, ed. E.Lisowska, 2012; available at <http://rownetraktowanie.gov.pl/>.

<sup>400</sup> *Strategiczne rekomendacje na rzecz równego traktowania*, 2012; available at <http://rownetraktowanie.gov.pl/>.

this kind (on the basis of different grounds of discrimination);<sup>401</sup> the next report, covering 2.5 years, lists 907 matters;<sup>402</sup> and the last annual report, covering 2012, mentions 460 matters.<sup>403</sup> The Plenipotentiary takes mainly three kinds of action – it informs victims about the appropriate institution which they should turn to, it approaches different governmental agencies with questions and applications for explanations of their position, and it recommends changes to the law and practice stemming from the complaints received.

- e) *Are the tasks undertaken by the body / bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports)?*

## Ombud

The Equal Treatment Act (amending the Ombud Act) underlines (as quoted above) that activities related to equal treatment are to be undertaken independently.

## Government Plenipotentiary for Equal Treatment

The Government Plenipotentiary for Equal Treatment is part of the cabinet and its independence is limited; it executes the current policy of the government.

- f) *Does the body (or bodies) have legal standing to bring discrimination complaints, or to intervene in legal cases concerning discrimination?*

## Ombud

The Ombud, after examining a case, may *inter alia* request that civil and administrative proceedings be instituted, take part in any pending civil case or administrative proceedings, request the institution of preparatory proceedings by a competent prosecutor in the case of offences prosecuted *ex officio*, and apply to administrative bodies to implement measures laid down by law.<sup>404</sup> It may also lodge a constitutional complaint (review *in abstracto*) or join proceedings started by someone else filing an individual constitutional complaint.

<sup>401</sup> Report on activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009; pp 44-69.

<sup>402</sup> Plenipotentiary Annual Report 2012, p. 50-51.

<sup>403</sup> Plenipotentiary Annual Report 2013, p. 54.

<sup>404</sup> Article 14 Act on the Commissioner for Civil Rights Protection.



## Government Plenipotentiary for Equal Treatment

The Government Plenipotentiary for Equal Treatment does not have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination.

- g) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).*

Neither institution described has a quasi-judicial function; neither may impose sanctions.

- h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

## Ombud

Complaints against breaches of national minority rights constitute a small percentage of cases sent to the Ombud. However, the Ombud is definitely dedicated to Roma issues and over the years has reported the extremely complicated and clearly unfavourable situation faced by the Roma community.

In the last couple of years, the Ombud has organised, for instance, some on site visits to places where the Roma community live (notably Bergitka Roma, also called Carpathian Roma – the group of Roma in the most difficult situation in Poland) and to schools with Roma pupils, and formulated recommendations concerning their difficult situation.<sup>405</sup> In 2011, the Ombud dealt with a number of issues related to the situation of Roma population urging other bodies – like the Government Plenipotentiary for Equal Treatment and the Minister of Education – to focus on the protection of Roma rights and awareness raising that would combat negative stereotypes.<sup>406</sup> This work was continued in 2012 – for instance, the Ombud once again approached the Ministry of Education with proposals for supplementing school textbooks (and teaching materials) with basic information about Roma history and culture.<sup>407</sup>

## Government Plenipotentiary for Equal Treatment

After four years and a half of its operation (by the end of 2012), Roma issues do not seem to be one of the Office's priorities. In the course of two years (April 2008 – April

<sup>405</sup> Information of the Commissioner for Civil Rights Protection for the year 2008, pp. 470-474; [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>406</sup> Ombud Bulletin 2012/2, p. 13-14.

<sup>407</sup> Ombud Annual Report 2013, p. 379-381.



2010), the Plenipotentiary dealt with seven Roma-related cases (2% of all cases examined);<sup>408</sup> in the 2012 report, Roma issues are rarely mentioned.<sup>409</sup>

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<sup>408</sup> *Government Plenipotentiary for Equal Treatment. Competences, counteracting discrimination of Roma*, information written by W. Kostrzewa-Zorbas, 22 June 2010.

<sup>409</sup> See for instance: Plenipotentiary Annual Report 2013, p. 73.



## 8 IMPLEMENTATION ISSUES

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

Describe *briefly* the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

All legislative acts issued in Poland are published in an official journal, which fulfils the requirement of announcing legal norms publicly and enabling the community to be aware of what the law says. Usually, however, publication in an official journal does not mean much to the general public. Nevertheless, it should be noted that the awareness of equal treatment and the need to safeguard non-discrimination is slowly but surely increasing in Poland, although it cannot yet be deemed satisfactory. From this viewpoint it would be advisable to introduce issues of equal treatment and non-discrimination into school education.

The most important instrument for the effective dissemination of information related to the issues of discrimination in employment is Article 94<sup>1</sup> of the Labour Code. It imposes on all employers an obligation to enable employees to access, in the workplace, the legal provisions concerning equal treatment in employment. In this way it directly implements the option included in Article 12 of the Employment Equality Directive. The Labour Code recommends that the employer should meet this requirement by disseminating information in written form. The employer is, however, left free to choose other options and grant access to the information 'by another means accepted by a particular employer'. This provision has only been in force since 1 January 2004 (prior to that date, from 1 January 2002, it covered only equal treatment of men and women).

The options chosen to put this provision into operation may vary among different employers – it can take form of printed leaflets or brochures distributed in the workplace; it can also be developed as printed information given to the employee, upon which he or she is required to give his/her signature as proof of having taken note of it.<sup>410</sup> Such information can also be attached to labour contracts or workplace codes of conduct. The National Labour Inspectorate is responsible for the implementation of Article 94<sup>1</sup>.<sup>411</sup>

Some of the issues of equal treatment, and especially those related to sexual orientation, are politically sensitive in Poland. Thus, it is not easy to imagine a fully

<sup>410</sup> See, for example, P. Potocka, *Model information on equal treatment in employment*, Gdańsk 2004, (published by a private centre for consultancy and vocational training).

<sup>411</sup> See National Labour Inspectorate, Programme of Activities for 2004.  
[http://pip.bip.ornak.pl/pl/bip/program\\_2004/program\\_2004\\_4](http://pip.bip.ornak.pl/pl/bip/program_2004/program_2004_4) (1.05.2013).

successful information policy in this respect, a policy agreed upon by all major political forces. Bodies whose mandate includes equal treatment issues should demonstrate more initiative in promoting these issues.

Some of the activities of the Ombud attract public attention and are publicised, including the work of Expert Committees on People with Disabilities, on the Rights of Elderly People, and the Rights of Migrants.<sup>412</sup> In addition, since the Equal Treatment Act came in force on 1 January 2011, the Ombud internet site has included a section on the Role of the Ombud as the Equality Body (both in Polish and English, although limited).<sup>413</sup> The section may become a good source of information in the future. The Ombud has also printed leaflets and guidance on its role as equality body and is gradually becoming more involved in dissemination activities.

The Office of the Government Plenipotentiary for Equal Treatment has the obligation of 'promotion, dissemination and propagation of issues of equal treatment'.<sup>414</sup> The Office created a website at the end of 2008, which was quite limited in substance but is gradually becoming an interesting source of information.<sup>415</sup> The Office also engages in campaigns and organises some competitions (for school children and journalists) that may play a role in awareness raising.<sup>416</sup>

However, it should be also noted that in most cases over recent years, although information was provided on discrimination, it rarely focused on legal protection against discrimination and legal measures that could be taken by victims. This has changed with the Ombud's new role, as confirmed by the number of discrimination cases that the Ombud deals with (1,033 in 2011 and 1,960 in 2012). At the same time, the very limited number of cases that were brought to courts under the ETA (only 30 in 2011)<sup>417</sup> proves that awareness of this possibility is still very limited.

All European programmes are a good example of the dissemination of information on discrimination issues, although mainly by the different NGOs taking part in them. As examples, we can mention the following EU programmes: the EQUAL Community Initiative,<sup>418</sup> programmes and activities within the European Year of Equal Opportunities for All, and the Council of Europe campaign All Different, All Equal. Thanks to different European programmes, NGOs have become a good source of

<sup>412</sup> Ombud Annual Report 2013, p 419-423.

<sup>413</sup> In Polish at: <http://www.rpo.gov.pl/pl/rowne-traktowanie> and in English at: <http://www.rpo.gov.pl/en/content/equal-treatment> (1.05.2013).

<sup>414</sup> Article 21.2.6, Equal Treatment Act and Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, para. 2.1.7.

<sup>415</sup> In Polish at: <http://rownetraktowanie.gov.pl/> and in English at: <http://rownetraktowanie.gov.pl/en> (1.05.2013).

<sup>416</sup> Plenipotentiary Annual Report 2013, p. 42-46.

<sup>417</sup> This number was given by the Ministry of Justice, but after review by the Polish Association for Anti-Discrimination Law it appears that these cases were brought based on other acts of law, and not based on the 2010 Equal Treatment Act; see more in Section 6.1.

<sup>418</sup> See [www.equal.org.pl](http://www.equal.org.pl) (1.06.2012).



information for victims of discrimination, and a number of lawyers have been trained by them on legal protection against discrimination. However, there are still significant gaps in this field and appropriate activities by state bodies and the equality body are needed.

Within the project already mentioned that is co-financed by the European Social Fund ('Equal treatment as a standard of good governance'<sup>419</sup>), a number of activities related to dissemination were organised. This included training for public administration civil servants from around 90 institutions at both central and local level as well as the establishment of the Network of Coordinators for Equal Treatment – 51 Coordinators for Equal Treatment were appointed, one in each Ministry and in local government and other institutions.<sup>420</sup> A new equality internet portal was also established to promote the project, but it is limited in content.<sup>421</sup>

The Plenipotentiary has also joined in the European Commission initiative 'Diversity Charter' (*Karta Różnorodności*), and is promoting this idea in Poland. The Charter was officially signed in the Chancellery of the Prime Minister on 14 February 2012 by CEOs of several companies, initiators of the Charter in Poland.<sup>422</sup>

It must be emphasised that, more often than not, most information on equality issues and non-discrimination is not accessible to disabled people. However, it should be noted that some initiatives have been undertaken in this respect. The websites of a number of institutions include a version accessible to people with visual impairments. The Ombud's Office website contains more and more videos in sign language.

*b) 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) and*

According to the law, the Commissioner for Civil Rights Protection should cooperate with associations, civil society movements and other voluntary unions and foundations as well as foreign and international bodies and organisations.<sup>423</sup>

Moreover, the Government Plenipotentiary for Equal Treatment, according to the law, should in execution of its duties collaborate with NGOs, including trade unions and organisations of employers.<sup>424</sup>

<sup>419</sup> *Równe traktowanie standardem dobrego rządzenia*, see: Plenipotentiary Annual Report 2013, p. 31-42.

<sup>420</sup> Plenipotentiary Annual Report 2013, p. 39.

<sup>421</sup> <http://www.siecrownosci.gov.pl/>.

<sup>422</sup> Plenipotentiary Annual Report 2013, p. 51-52.

<sup>423</sup> Article 17a, Act on the Commissioner for Civil Rights Protection.

<sup>424</sup> Article 21.2.7), Act of Equal Treatment, Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, para. 3.3.

Both the above-mentioned institutions maintain dialogue with a number of non-governmental organisations. NGO representatives are invited to present their opinions and discuss issues of mutual concern.

However, over recent years a number of matters could have been better organised and NGOs have complained. To give some examples, 'social consultations' on the draft Equal Treatment Act took place in the early 2007 and NGOs had the opportunity to officially express their opinions about the law. However, the draft law was then amended significantly (in fact it became a different draft law) and subsequent versions of the draft did not go through the consultation procedure until the middle of 2010. In fact, some organisations took a position and formulated opinions but mainly on their own initiative. NGOs complained about limited access to information on the legislative process (this includes information on: who is in charge of the draft law, documents and opinions prepared within the legislative process, etc.). In order to receive the relevant information, NGOs were forced to use special mechanisms to access public information and formulate formal applications to receive information which should have been publicly available. The problem was partially solved when the last version of the draft law (21 May 2010) was sent out for consultation in late May 2010.

The situation in this respect is improving. Two draft laws aiming at amending the 2010 Act were elaborated in 2012 (as mentioned in Section 0.2 above: Overview/State of implementation). Both were inspired by the critique of the Ombud's Office but also by numerous statements and proposals from the Coalition of 47 NGOs led by the Polish Association for Anti-discrimination Law (the Coalition is mentioned in the justification for the draft law submitted to Parliament).<sup>425</sup>

The Plenipotentiary for Equal Treatment (who was in office from April 2008 until the end of November 2011) was perceived by the NGO community as a controversial figure. A number of them protested against her and her Office's lack of activity. There were official protests to the Prime Minister<sup>426</sup> as well as a letter of complaint to the European Commission.<sup>427</sup> There was also a great deal of criticism in the media and a Facebook group 'Radziszewska must leave' was even created with more than 7,700 'fans'.<sup>428</sup> Feminist organisations were among the Plenipotentiary's harshest critics. They did not take part in the working group established by the Plenipotentiary on counteracting discrimination against women. On the other hand, LGBT organisations asked the Plenipotentiary to create a working group on LGBT issues (23 March

<sup>425</sup> See Plenipotentiary Annual Report 2013, p. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf> (Justification, p. 6).

<sup>426</sup> See for instance a letter dated 3.12.2009 at <http://www.kph.org.pl/en/allnews/15-kph/285-damy-odwoania-minister-radziszewskiej> (1.05.2013).

<sup>427</sup> See at: <http://www.feminoteka.pl/news.php?readmore=4464> (1.05.2013).

<sup>428</sup> Name of the group: 'Radziszewska musi odejść'.

2009).<sup>429</sup> The answer was negative, based on the argument that another body, the Ombud, already meets with representatives of LGBT organisations.<sup>430</sup> However, these meetings were stopped by LGBT organisations, which refused to take part in them due to – according to them – the lack of concrete results of cooperation and controversial public statements by the Ombud (*inter alia* in relation to a court verdict that issued a fine for homophobic hate speech – when commenting on the verdict, the Ombud criticised it, stating that in fact ‘the court ordered the general public to undertake homophilic behaviour’ (*zachowania homofilne*, forced positive, friendly behaviour towards gays and lesbians) and breached the fundamental principle of freedom of speech).<sup>431</sup>

However, with the current Ombud and Plenipotentiary dialogue with NGOs is much better and closer.

Three special teams of experts have been established by the Ombud (who decided on three priorities during her term of office), namely, Expert Committees on People with Disabilities, on the Rights of Elderly People (since March 2011) and on the Rights of Migrants (since May 2011); some members represent NGOs.<sup>432</sup> There is also the Social Council (since December 2010), which is of a general advisory character.<sup>433</sup> But the Ombud also invites representatives of NGOs to take part in its activities and different events.

There were also nine working groups of advisory character established by the Plenipotentiary, three of them of relevance to this report: the Team to counteract discrimination against the elderly, the Team to support children with disabilities till school age (and their families) and the Team working to ensure full access to public buildings and spaces.<sup>434</sup> Their activities came to an end and the report covering 2012 does not mentioned them. It focuses on regular meetings of the Plenipotentiary with NGOs, including to co-organise conferences.<sup>435</sup>

- c) *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)*

<sup>429</sup> See at: <http://www.kph.org.pl/en/allnews/15-kph/116-kph-pisze-do-minister-radziszewskiej> (1.05.2013).

<sup>430</sup> See at: <http://www.kph.org.pl/en/allnews/15-kph/129-minister-radziszewska-odmawia-powoania-zespou-ds-lgbt> (1.05.2013).

<sup>431</sup> See at: <http://www.kph.org.pl/en/allnews/15-kph/253-oswiadczenie-organizacji-lgbt-> (1.05.2013).

<sup>432</sup> <http://www.rpo.gov.pl/> (1.05.2013), see also Ombud Bulletin 2012/2, p. 51-54 and Ombud Annual Report 2013, p 419-423.

<sup>433</sup> <http://www.rpo.gov.pl/pl/content/rada-spoleczna-rpo> (1.05.2013).

<sup>434</sup> Plenipotentiary Annual Report 2012, p. 7-8.

<sup>435</sup> Plenipotentiary Annual Report 2013, p. 81-83.

The Polish Constitution of 1997 contains a very general provision on dialogue and cooperation between the social partners as one of the foundations of the Polish economic system.<sup>436</sup>

In 2001, Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue.<sup>437</sup> The Committee is composed of representatives of the government, employers' organisations and employees' organisations. Any member of the Committee can put forward for discussion issues that, in its opinion, are important for preserving harmonious relations between the social partners. One of the most important competences of the Tripartite Committee is consultations in respect of the state budget.

Voivodship committees for social dialogue operate at regional (voivodship) level and can be established by a decision of medium-level governmental administration – voivods. They are deliberative bodies with consultative powers over issues dealt with by trade unions and employers' organisations. These committees can also examine social and economic issues that raise conflict between employees and employers.<sup>438</sup> After deliberating, they can issue opinions or nominate a mediator to settle the collective dispute.<sup>439</sup>

In 1995 the Ministry of Economy and Labour established the Centre for Social Partnership, known as the 'Dialogue Centre'. The Centre was intended to initiate and promote social dialogue, assist social partners and offer training.<sup>440</sup>

Hence, there are venues and possibilities for initiating dialogue between social partners in order to give effect to the principle of equal treatment. However, according to the research done for this report, the subject of combating discrimination has never been included on the Tripartite Committee's agenda.

d) *to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?*

In 2002 a special team on Roma issues was established within the Ministry of the Interior. Later the role of the team was taken over by the new Joint Commission of the Government and Ethnic and National Minorities (an advisory body established on the basis of the 2005 Act on National and Ethnic Minorities and Regional

<sup>436</sup> Article 20 Constitution.

<sup>437</sup> Act of 6 July 2001 on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue (*Ustawa z 6 lipca 2001 o Trójstronnej Komisji do Spraw Społeczno-Gospodarczych i wojewódzkich komisjach dialogu społecznego*) [hereafter Social Dialogue Act].

<sup>438</sup> Article 17a.1 Social Dialogue Act.

<sup>439</sup> Article 17b.1 Social Dialogue Act.

<sup>440</sup> For more information visit the Centre's website: <http://www.cpsdialog.pl/> (1.05.2013).

Languages). There are two Roma members on the Commission (out of 35 members).<sup>441</sup>

In June 2008 a special 'Roma Issues Team' was established by the Commission (three years after the decision to establish the Team was taken at the first meeting of the Joint Commission in September 2005). The Roma Issues Team consists of 20 leaders/representatives of the Roma community representing different NGOs and representatives of governmental bodies responsible for equality issues. In addition, it invites other persons if there is a need for any additional information, expertise, etc. It is a good platform for dialogue. Since its establishment in June 2008, it has met circa 15 times (its last meeting was in December 2012) and discussed a number of issues relevant to the Roma community, including general issues related to grant programmes for the Roma community, employment and education as well as individual cases (for instance, particular court cases). Minutes from the Team's meetings were publicly available until 2011 but after the split of the Ministry of the Interior and Administration into two ministries, information on the Team's activities has been limited and not easily accessible.<sup>442</sup>

Roma organisations also have the opportunity to receive funds from, among others, the Roma Programme (see Section 5 on positive action), and many of them are beneficiaries of such grants.

Roma issues are not on the agenda of the Tripartite Committee for Social and Economic Affairs (comprising government, employers' organisations and trade unions), the platform for social dialogue in Poland (it also has commissions at regional (voivodship) level). But one has to consider that, since the Roma population is very small and most Roma are unemployed, this is not an issue of concern for the Committee's members.

The dissemination of information has a local rather than a national character and is somewhat patchy. There were plans to include Roma issues in school curricula, together with teaching on tackling negative social stereotypes, but they have never been implemented.<sup>443</sup>

Finally, since the governmental Programme for the Roma Community in Poland for 2004-2013 is ending, the process of preparing the new draft programme has started (*draft Programme for the Integration of the Roma Community in Poland in the years*

<sup>441</sup> See at <https://mac.gov.pl/komisja-wspolna-rzadu-i-mniejszosci-narodowych-i-etnicznych/> (7.05.2013).

<sup>442</sup> See at <https://mac.gov.pl/dzialania/konsultacje-projektu-programu-integracji-spolecznosci-romskiej-w-polsce/> (1.06.2013).

<sup>443</sup> See Section 7.g. above on the activities of the Ombud in this respect.



2014-2020).<sup>444</sup> The main goal of the draft Programme is to improve the integration of Roma in four main fields – education (including, as a separate issue, cultural, historical and civic education), housing, health and employment. The draft follows the EU framework for national Roma integration strategies up to 2020, outlined in Council conclusions (2011/C 258/04). The priority within the Programme will be given to complex projects, based on the local analysis of needs and executed in partnerships with NGOs and local government. The draft Programme includes a diagnosis of the situation of the Roma minority – i.e. its demographic characteristics, main problems and needs. It describes activities undertaken so far (from 2001 until 2013) and formulates outcomes, indicators and measures for the period 2014-2020.

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

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, *lex specialis derogat legi generali* (special rules prevail over general rules) and *lex posteriori derogat legi priori* (more recent rules prevail over less recent rules).*

The Labour Code stipulates that provisions of collective agreements and staff regulations must not be less beneficial to employees than the provisions of the Code and other legislative and governmental acts.<sup>445</sup> Thus, should the internal rules of an enterprise, a collective agreement or a private contract include discriminatory clauses, they would clearly be in violation of the 2010 Equal Treatment Act as well as Constitution.<sup>446</sup> In addition, according to the Labour Code, they would be null and void and appropriate provisions of the Labour Code would be applied in their place.<sup>447</sup>

Moreover, as far as civil law contracts are concerned, since 2011 they have been covered by the Equal Treatment Act, and the Civil Code stipulates that juristic acts contrary to the law are null and void. Nullity may be limited to a part of the juristic act (e.g. a single clause in a contract), if the conflict with the law concerns only that part of the act.<sup>448</sup>

Additionally, the internal rules of occupations, professions, associations, etc. are also reviewed by the courts on demand by a member or another controlling body, such as

<sup>444</sup> 'Programme Integracji Społeczności Romskiej w Polsce na lata 2014-2020', Warsaw 2013; See version from 16 April 2013 at: <https://mac.gov.pl/wp-content/uploads/2011/12/PROGRAM-2014-20-wersja-16-kwietnia-2013.pdf>.

<sup>445</sup> Article 9.2 Labour Code.

<sup>446</sup> Article 32 Constitution.

<sup>447</sup> Article 18.2 Labour Code.

<sup>448</sup> Article 58.1 and 58.3 Civil Code.





the relevant ministry for instance. Usually any rules or decisions adopted may be reviewed by an internal second instance body, but then may be challenged before an administrative court. Generally, the right to challenge any rules violating the constitutional prohibition of discrimination arises from the right to a court hearing (Article 45 of the Constitution, Article 6 of the ECHR).

Polish legislation is based on a hierarchical system of law sources and one of the most important general principles is *'lex superior derogat legi inferiori'* (higher rules – rules with greater legal force – prevail over lesser rules). There are also the following principles: *'lex specialis derogat legi generali'* (special rules prevail over general rules) and *'lex posterior derogat legi priori'* (more recent rules prevail over less recent rules).

b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

As already mentioned at the beginning of the report, the 2010 Equal Treatment Act put Polish legislation in line with the Directives. However, limiting protection to the verbatim implementation of the Directives raises serious doubts of constitutional character. Neither the Polish Constitution nor labour law contain an exhaustive list of grounds of discrimination. However, the ETA, being in fact an almost verbatim implementation of the Directives (in contrast to labour law), provides for an exhaustive list of grounds of discrimination, thus limiting protection of certain groups.

But still the general Constitutional anti-discrimination clause is wide and if there are any laws contrary to the principle of equality, it is primarily for the Constitutional Tribunal to declare their non-conformity with the Constitution and, as a consequence, such provisions will become void as soon as the Tribunal's judgment enters into force.

Going beyond the scope of the Directives, one may argue that there are examples of discriminatory laws and regulations contrary to the principle of equality. A good example discussed lately is the rights of LGBT persons and the lack of possibility of same sex marriages (or civil unions or partnerships).

Generally speaking, even if the relevant provisions seem to be non-discriminatory and neutral, their interpretation and implementation may result in discriminatory treatment. It is therefore rather a matter of practice – in fact there are provisions which have a discriminatory character but it is difficult to identify them on a theoretical basis; in order to challenge them, a particular case of their discriminatory application is needed.



## 9 CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

There is no single body responsible for the coordination at national level of all issues of equal treatment and non-discrimination based on all the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.

However, the Government Plenipotentiary for Equal Treatment has the obligation to execute governmental policy in relation to the principle of equal treatment.<sup>449</sup>

*Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.*

According to the ETA (in force since 01.01.2011), the Government Plenipotentiary for Equal Treatment should prepare and present to the Council of Ministers a National Programme of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*)<sup>450</sup> and then report on its execution annually (the first report was due by 31 March 2013<sup>451</sup> but the National Programme was not ready before that date).<sup>452</sup>

The most important task taken on by the Office of the Plenipotentiary from the perspective of the Racial Equality Directive was the role of the monitoring body for the *National programme for counteracting racial discrimination, xenophobia and related intolerance 2004-2009*. The relevant decision of the Prime Minister establishing the monitoring team was adopted on 2 February 2009. The team met three times in 2009. The Office of the Plenipotentiary prepared the report on the execution of this programme published in 2010. On 29 October 2009, the Prime Minister decided to continue the programme in the form of the *National programme for counteracting racial discrimination, xenophobia and related intolerance 2010-2013*, with the Office of the Plenipotentiary responsible for coordinating the programme. The Monitoring Team was dissolved in February 2011 and instead a new body was established – the Council for counteracting racial discrimination, xenophobia and related intolerance (established by the Ordinance of the Prime Minister dated 28 February 2011).<sup>453</sup> The members of the Council represent different ministries and other central institutions. For different reasons, including the split of the Ministry of the Interior, the work of the Council has in practice been

<sup>449</sup> Article 21.1 Equal Treatment Act.

<sup>450</sup> Article 22 Equal Treatment Act.

<sup>451</sup> Article 23.3), Article 32 Equal Treatment Act.

<sup>452</sup> See more in Section 7.b. above.

<sup>453</sup> Plenipotentiary Annual Report 2012, p. 7; Plenipotentiary Annual Report 2013, p. 54.



suspended.<sup>454</sup> The programme mentioned for the years 2010-2013 was never finally elaborated and published.

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<sup>454</sup> The new Ordinance of the Prime Minister that creates the new Council was published only in February 2013 – *Zarządzenie Nr 6 Prezesa Rady Ministrów z dnia 13 lutego 2013 r. w sprawie Rady do spraw Przeciwdziałania Dyskryminacji Rasowej, Ksenofobii i związanej z nimi Nietolerancji* at: <http://bip.kprm.gov.pl/kpr/bip-rady-ministrow/organy-pomocnicze/organy-pomocnicze-rady/144.dok.html>.



## ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**



## 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: Poland

Date: 01 January 2013

Polish legislation on the internet

- Parliament website (Polish only): <http://isap.sejm.gov.pl/>
- Polish Law Server, a private company (Polish only): [lex.pl](http://lex.pl)

Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Admin istrative/ Criminal Law	Material Scope	Principal content
Title of the law: Abbreviation: Date of adoption: Latest amendments; Entry into force: Where the legislation is available electronically, provide the webpage address.			<b>Please specify</b>	<b>Please specify</b>	e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instructions to discriminate or creation of a specialised body

Title of Legislation (including amending legislation)	Date of adoption: Day/month/year	Date of entry in force from: Day/month/year	Grounds covered	Civil/Administrative/Criminal Law	Material Scope	Principal content
<p>Title of the Law: Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment</p> <p>Abbreviation: ETA</p> <p>Date of adoption: 03.12.2010</p> <p>Latest amendments:</p> <p>Entry into force: 01.01.2011</p> <p><a href="http://rownetraktowanie.gov.pl/sites/default/files/us_tawa_nasza_dz_u_2.pdf">http://rownetraktowanie.gov.pl/sites/default/files/us_tawa_nasza_dz_u_2.pdf</a></p>	03/12/2010	01/01/2011	gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation		Full scope as covered by Directives 2000/43 and 2000/78: employment, access to goods and services (including housing), social protection, social advantages, education	<p>Almost verbatim implementation of 5 Directives, including 2000/43 and 2000/78: Prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation;</p> <p>- right to compensation for infringement of equal treatment; designation of Ombud as an equality body</p>
<p>Title of the Law: Act on the Labour Code (implementation</p>	Amendments implemented	Originally 1 Jan. 1975 Entry into	gender, age, disability, race, religion,		Employment	- Prohibition of direct and indirect discrimination,



Title of Legislation (including amending legislation)	Date of adoption: Day/month/year	Date of entry in force from: Day/month/year	Grounds covered	Civil/Administrative/Criminal Law	Material Scope	Principal content
amendment) Abbreviation: Date of adoption: 14.11.2003 Latest amendments: major amendment 21.11.2008; last amendment 03.12.2010 Entry into force: 01.01.2004 (18.01.2009) (01.01.2011) <a href="http://www.przepisy.gofin.pl/przepisy,2,9,9,212,,,ustawa-z-dnia-26061974-r-kodeks-pracy.html">http://www.przepisy.gofin.pl/przepisy,2,9,9,212,,,ustawa-z-dnia-26061974-r-kodeks-pracy.html</a>	ng Directives: 14/11/2003; 21/11/2008; 03/12/2010	force of amend- ments mentioned: 01/01/2004 ; 18/01/2009 ; 01/01/2011	nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a definite or indefinite period of time, employment part- time or full-time; the list remains open			instructions to discriminate harassment and victimisation; - right to compensation for infringement of equal treatment - obligation to provide information on equal treatment rules
Title of the Law: Act on the Commissioner for Civil Rights Protection Abbreviation: Date of adoption: amendment adopted on 03.12.2010	Originally 15/07/1987 but amend- ment adopted on 03/12/2010	01/01/2011	gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation		Full scope	Designation of Commissioner for Civil Rights Protection (Ombud) as an equality body

Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Admin istrative/ Criminal Law	Material Scope	Principal content
Latest amendments: Entry into force: 01.01.2011 <a href="http://rpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich">http://rpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich</a>						
Title of the Law: The Council of Ministers Ordinance on the Government Plenipotentiary for Equal Treatment Abbreviation: Date of adoption: 22.04.2008 Latest amendments: 30.06.2010 Entry into force: 30.04.2008 <a href="http://rownetraktowanie.gov.pl/sites/default/files/pe/lnomocnikrzadudo...dz_u">http://rownetraktowanie.gov.pl/sites/default/files/pe/lnomocnikrzadudo...dz_u</a>	22/04/2008 amended 30/06/2010	30/04/2008	gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status			Designation of existing Plenipotentiary as Government Plenipotentiary for Equal Treatment as described by the ETA. Competences: - Execution of government policy with regard to equal treatment - analysis and research, monitoring

Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Admin istrative/ Criminal Law	Material Scope	Principal content
<a href="#">_2008_75_450wersja2010.pdf</a>						<ul style="list-style-type: none"> <li>- collaboration with other bodies, local government and NGOs</li> <li>- creation of draft laws</li> <li>- taking actions which aim to eliminate or restrict the consequences of a violation of the rule of equal treatment</li> </ul>

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of Country: Poland

Date: 1 January 2013

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	26/11/1991	19/01/1993	No	Yes	Yes
Protocol 12, ECHR	Not signed	No	No	No	No
Revised European Social Charter	25/10/2005	No	No	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	02/03/1967	18/03/1977	No	Yes	Yes
Framework Convention for the Protection of National	01/02/1995	20/12/2000	No	N/A	Yes

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Minorities					
International Convention on Economic, Social and Cultural Rights	02/03/1967	18/03/1977	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	07/03/1966	05/12/1968	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	29/05/1980	30/07/1980	No	N/A	Yes
ILO Convention No. 111 on Discrimination		08/05/1961	No	N/A	Yes
Convention on the Rights of the	29/01/1990	07/06/1991	No	N/A	Yes

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Child					
Convention on the Rights of Persons with Disabilities	30/03/2007	06/09/2012	Reservations and interpretative declaration – please see below.	No Poland has not signed the Convention's Optional Protocol.	Yes

Convention on the Rights of Persons with Disabilities – reservations.

- 'The Republic of Poland understands that Article 23.1 (b) and Article 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto, unless that right is guaranteed by the national law.'
- Reservations to Article 23.1(a) of the Convention until relevant domestic legislation is amended. Until the withdrawal of the reservation a disabled person whose disability results from a mental illness or mental disability and who is of marriageable age, can not get married without the court's approval based on the statement that the health or mental condition of that person does not jeopardize the marriage, nor the health of prospective children and on condition that such a person has not been fully incapacitated. These conditions result from Article 12 § 1 of the Polish Code on Family and Guardianship.
- One interpretative declaration: 'The Republic of Poland declares that it will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.'





## ANNEX 3: PREVIOUS CASE LAW

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (no more than several sentences).

**Name of the court:** Supreme Court

**Date of decision:** 3 February 2011

**Name of the parties:** XY v. Prosecutor General

**Reference number:** III PO 9/10

**Address of the webpage:** not available

**Brief summary:** Lack of consent of the Prosecutor General for a prosecutor who is over 65 years of age to continue his employment due to 'necessity of the generational replacement of the prosecution staff' does not constitute discrimination based on age.

The Prosecutor General did not accept the application of a prosecutor in a regional prosecution office who had turned 65 to continue his employment. According to the Prosecutor General, retirement of prosecutors upon turning 65 should be treated as a rule. The opportunity to continue employment as a prosecutor after the age of 65 should be regarded an exception, justified by special circumstances dictated by the interests of the service or the circumstances of a particular prosecutor.

On appeal, the claimant argued that the contested decision was taken in an arbitrary manner and, moreover, that the stated ground, which was limited to the 'necessity of the generational replacement of the prosecution staff', may be regarded as discrimination on grounds of age.

The Supreme Court held that prosecutors retire (end their service) on the date that they turn 65 years. Hence, there is no justification for the claim of discrimination on grounds of age.

**Name of the court:** The Court of Justice of the EU

**Date of decision:** 17 March 2011

**Name of the parties:** European Commission v. Republic of Poland

**Reference number:** C326/09

**Address of the webpage:** <http://curia.europa.eu/>

**Brief summary:** The Court:

1. Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of

equal treatment between men and women in the access to and supply of goods and services, the Republic of Poland failed to fulfil its obligations under that directive;

2. Orders the Republic of Poland to pay the costs.

The CJEU delivered this verdict despite the fact that the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment was passed (and entered into force on 1 January 2011) that finally put Polish law in line with the Directive. Other cases on this point which were pending at that time before the Court were halted, but this case was concluded.

**Name of the court:** Court of Appeal, Warsaw

**Date of decision:** 28 September 2011

**Name of the parties:** Dominik Rymer v. XY, owner of the Sfinks restaurant

**Reference number:** I ACa 300/11

**Address of the webpage:** not available

**Brief summary:** The Court stated that refusal of access to a restaurant by a disabled person with an assistance dog violates the protection of 'personal rights' and violates the rule of equal treatment in access to services offered to the public.

The case concerned a wheelchair user accompanied by an assistance dog. According to the claimant, restaurant staff did not allow his dog to remain on the premises, explaining their concern about health and safety and the discomfort that the presence of the dog may cause to other customers (the situation took place in May 2009 in the Sfinks restaurant in Warsaw).

The claimant lost his case at first instance. The Regional Court decided – with quite an extraordinary justification – that his personal rights were not violated since he was an active person who enjoyed sport which was a kind of therapy for him, and was therefore strong psychologically and self-confident.

However, the Court of Appeal accepted that an order to leave the dog outside the restaurant was an unlawful restriction of the claimant's liberty (the personal right protected). The Court of Appeal stated that there was discrimination based on disability – according to the Court, discrimination takes place not only in the absence of objective justification for the differentiation, but also when an apparently neutral provision, criterion or practice is applied equally to all, but specifically affects a certain social group.

The court awarded 10,000 PLN (ca. 2,500 EUR) to the foundation Pomocna Łapa (the 'Helping Paw'). The claimant had requested 20,000 and an apology in a national daily newspaper.

It should be also noted that since the ETA does not cover access to services by persons with disabilities, the claimant used the general civil clause protecting 'personal rights'.



**Name of the court:** European Court of Human Rights

**Date of decision:** 15 June 2010

**Name of the parties:** *Grzelak v. Poland*

**Reference number:** application no. 7710/02

**Address of the webpage:** the ECHR judgment is available at HUDOC database

**Brief summary:** In Poland, religion is taught in schools as an optional subject. Pupils who do not wish to take part in religious instruction classes may request a class to be organised on ethics (at least seven pupils should express this wish).

The applicants were U. Grzelak, C. Grzelak, and their son, Mateusz Grzelak. Relying in particular on Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (prohibition of discrimination) in conjunction with Article 9 (freedom of thought, conscience and religion), the applicants alleged that the school authorities had failed to organise a class in ethics for Mateusz and failed to give him a mark in his school report in the space reserved for 'religion/ethics', and that Mateusz was harassed and discriminated against for not attending religious instruction classes.

The parents systematically requested the school authorities to organise a class in ethics for their son, as provided for in the relevant Ordinance.<sup>455</sup> However, no such class was organised for the third applicant between the 1998/1999 school year and the 2008/2009 school year, that is to say, throughout his entire schooling at primary and secondary level. It appears that the reason was the lack of sufficient numbers of pupils interested in following such a class, in accordance with the requirements set out in the Ordinance. As no ethics class was provided throughout the third applicant's schooling, his school reports and leaving certificates contained a straight line instead of a mark for 'religion/ethics' (para. 91 of the ECtHR judgment).

On 15 June 2010 the ECtHR passed a judgment in which it ruled that there had been a violation of Article 14 taken in conjunction with Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of one of the applicants – Mateusz Grzelak.

The Court found that the absence of a mark for 'religion/ethics' on the successive school reports of the third applicant fell within the ambit of the negative aspect of freedom of thought, conscience and religion, protected by Article 9 of the Convention, as it may be read as showing his lack of religious affiliation (para. 88).

The Court limited its examination of the alleged difference in treatment between the third applicant, a non-believer who wished to attend ethics classes, and those pupils who attended religious instruction to the latter aspect of the complaint, namely the absence of a mark (para. 90).

<sup>455</sup> The Ordinance of the Minister of Education on the organisation of religious instruction in State schools (14.04.1992) (*Rozporządzenie w sprawie warunków i sposobu organizowania nauki religii w szkołach publicznych*).



The Court found that the absence of a mark for 'religion/ethics' on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant (para 99).

In terms of 'just satisfaction', the Court ruled that the finding of a violation is sufficient just satisfaction.

A similar problem has already been considered by the Polish Constitutional Tribunal, but with a different decision (see below).<sup>456</sup>

**Name of the court:** European Court of Human Rights

**Date of decision:** 2 March 2010

**Name of the parties:** *Kozak v. Poland*

**Reference number:** application no. 13102/02

**Address of the webpage:** the ECHR judgment available at HUDOC database.

**Brief summary:** The applicant Piotr Kozak alleged, in particular, a breach of Article 14 taken in conjunction with Article 8 of the European Convention on Human Rights, submitting that he had been discriminated against on the ground of his homosexual orientation in that he had been denied the right to succeed to a tenancy after the death of his partner.

The applicant had lived together with his partner for several years in a same-sex relationship in the municipal flat rented by his partner. After his partner died in April 1998, the applicant applied to the municipality to succeed to the tenancy. The municipality denied his application.

In 2000 the applicant brought a claim against the municipality relying on the Lease of Dwellings and Housing Allowances Act and seeking to have his succession to the tenancy acknowledged. The applicant argued that he had a right to succession, as he has lived in a 'common household' and in '*de facto* marital cohabitation' with his life-partner (*konkubent*).

The District Court dismissed the claim, holding that Polish law recognised '*de facto* marital relationships' between partners of the opposite sex only (decision of 22 February 2001). The regional court upheld the judgment (decision of 1 June 2001).

The ECtHR ruled that the Polish authority's decision to reject the applicant's claim on the basis of his sexual orientation was not proportionate to the aims sought (namely the protection of the family founded on a 'union of man and women' as enshrined in Article 18 of the Polish Constitution) and therefore violated Article 14 taken in conjunction with Article 8 of the Convention. The Court dismissed claims for damages, non-pecuniary damages and costs. The judgment was announced on 2

<sup>456</sup> 2 December 2009, sygn. akt U 10/07.

March 2010 and became final on 2 June 2010 (none of the parties applied to the Grand Chamber of the ECtHR).

The relevant amendments to the Civil Code (2001) replaced the provisions of section 8(1) and removed the difference between marital and other forms of cohabitation. According to the majority of current jurisprudence, the sex of partners in 'de facto cohabitation (konkubinat)' does not matter (see, for instance, the judgment of Białystok Appellate Court dated 23 February 2007, I ACa 590/06, the judgment of Poznań Regional Court dated 19 April 2011, II Ca 284/11, judgments of Wrocław-Śródmieście District Court dated 4 May 2011, I C 667/10 and 11 October 2011, I C 485/11). However, despite the fact that the majority of rulings follow the *Kozak* case (even if without mentioning it), a court still ruled otherwise. In a similar case (Mokotów District Court, Warsaw, 13 October 2011) the court stated that the law on *de facto* cohabitation (konkubinat) does not cover homosexual relations.<sup>457</sup> The verdict was appealed to Warsaw Regional Court which (on 27 February 2012)<sup>458</sup> decided to formulate a legal question to the Supreme Court – whether the law on *de facto* cohabitation (Article 691 § 1, Civil Code) also covers factual partners of the same sex (SC case III CZP 65/12, filed on 27 July 2012). The case was selected by the Helsinki Foundation for Human Rights for its strategic litigation programme in March 2011.

**Name of the court:** Constitutional Tribunal

**Date of decision:** 2 December 2009

**Name of the parties:** group of Members of Parliament – application for constitutional review

**Reference number:** sygn. akt U 10/07

**Address of the webpage:**

[http://www.trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A\\_11.pdf](http://www.trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A_11.pdf) (pages 1755-1795) (1.06.2012),

[www.trybunal.gov.pl/Rozprawy/2009/Dz\\_Ustaw/u\\_10s07.htm](http://www.trybunal.gov.pl/Rozprawy/2009/Dz_Ustaw/u_10s07.htm) (1.06.2012).

**Brief summary:** In Poland religion (of any church, but in fact mainly Catholicism) or ethics is taught in public schools as an optional subject. For students who do not want to participate in religious instruction, a course on ethics should be organised.

A group of MPs applied for the constitutional review of the Ordinance of the Minister of National Education of 13 July 2007 amending the Ordinance on the conditions and manner of assessing, grading and promoting pupils and students, and conducting tests and examinations in public schools (Journal of Laws No. 130, item 906). The Ordinance provides that, from the fourth grade of primary school, the grade for the

<sup>457</sup> See information about the verdict at:

<http://www.hfhr.org.pl/dyskryminacja/program/aktualnosci/wyrok-w-sprawie-wstapienia-w-stosunek-najmu-po-zmarlym-partnerze-homoseksualnym-oddalenie-powodztwa> (1.09.2012).

<sup>458</sup> See at: <http://www.hfhr.org.pl/dyskryminacja/program/aktualnosci/sad-okregowy-skieruje-pytanie-prawne-do-sadu-najwyzszego-w-sprawie-wstapienia-w-stosunek-najmu-po-zmarlym-partnerze-homoseksualnym> (1.09.2012).





religion or ethics course that the student attended in a given year is included in his/her average grade. In addition, the grade for religion or ethics is also included in the final grade of students graduating from primary school, lower secondary school or upper secondary school.

According to the applicants, the regulation is inconsistent with the constitutional principle of government neutrality in matters of religious beliefs. The public authorities should in no way promote any religious doctrine. However, one of the objectives of the Ordinance is to motivate students to make an extra effort and appreciate the benefits resulting from participation in activities such as religion and ethics.

The applicants stated that the Ordinance is inconsistent with the constitutional principle of equality before the law – in this case, the right of students to equal treatment by the public authorities and non-discrimination for any reason. Indeed, the Ordinance introduces different ways of calculating the average assessments for students enrolled in ethics or religion classes, and students not involved in these activities. According to the applicants, the Ordinance's aim is also to discipline students participating in religion classes. Students are assessed not only for their knowledge (as in religious studies classes) but also their attitude in the classroom.

The Court held that the Ordinance is consistent with the Constitution. It stressed that including the grade for religion or ethics in the annual or final average grade is a consequence of placing a grade for religion or ethics on school certificates (on an equal footing with other academic subjects). The allegation of an infringement of the principle of secularism and neutrality of the state on the ground of the inclusion of grades for religion in the final average grade should be considered in the context of placing grades for religion on school certificates due to the introduction of religion into public schools.

The difference in the assessment criteria for religion indicated by the applicant is inevitable, since the subject taught is religion, and not religious studies. Teaching religion is one of the manifestations of freedom of religion in the light of the contemporary standards of a pluralistic democratic society. It is not the role of the state to impose a religious education programme and limit it to religious studies. This would mean a breach of the Constitution, as the state interfering in this way would not maintain neutrality in matters of religious beliefs and freedom of its expression within public life.

The decision was taken by majority of 12:1 (one dissenting opinion).

Only six months later, on 15 June 2010, the European Court of Human Rights in the *Grzelak v. Poland* ruling, described above, decided on a case involving the issue of grades. Therefore, even though the Ordinance was declared by the Constitutional Tribunal to be in line with the Constitution, the authorities in its application must take into consideration the *Grzelak* ruling and organise ethics classes for those interested (and consequently include grades for this subject).





**Name of the court:** Constitutional Tribunal

**Date of decision:** 14 December 2009

**Name of the parties:** group of Members of Parliament – application for constitutional review

**Reference number:** sygn. akt K 55/07

**Address of the webpage:**

[http://trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A\\_11.pdf](http://trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A_11.pdf) (pages 1848-1868) (1.06.2012), [www.trybunal.gov.pl/Rozprawy/2009/Dz\\_Ustaw/k\\_55s07.htm](http://www.trybunal.gov.pl/Rozprawy/2009/Dz_Ustaw/k_55s07.htm) (1.06.2012)

**Brief summary:** A group of MPs applied for constitutional review of three acts of Parliament on financing from the state budget for the Pontifical Faculty of Theology in Warsaw, the Pontifical Faculty of Theology in Wrocław and the Ignatianum Higher School of Philosophy and Pedagogy in Kraków.

According to the applicants, these Acts are contrary to the constitutional principle of religious equality. The legislature created a special preference for funding religious education at the university level only for the Catholic Church, on the same basis as public schools, except with regard to financing for construction projects. However, the legislature did not foresee the possibility of funding from the state budget for the higher seminaries of other churches. The Acts challenged, according to the applicants, were incompatible with the principle of equality before the law of non-public schools and the principle of non-discrimination. The legislature provided financial support for selected colleges, probably motivated by religious reasons.

The Court held that the Acts challenged were consistent with the Constitution.

According to the Court, the subsidised universities not only educate the clergy but also lay people. The state subsidies received are associated with the implementation of certain duties in the education of students in the framework of courses recognised by the State on the same basis as in public schools.

The Court emphasised, however, that the principle of impartiality requires the establishment of statutory regulations to ensure access to state subsidies to all churches and religious associations that run universities which meet the objective criteria established by law.

The decision was taken by a majority of 4:1 (one dissenting opinion).

**Name of the court:** Warsaw Regional Court

**Date of decision:** 28 January 2009

**Name of the parties:** Jolanta K. v. Carrefour Polska Sp.z.o.o.

**Reference number:** sygn. I C 498/08

**Address of the webpage:** not available on the internet

**Brief summary:** Jolanta K. is blind and was not allowed into the Carrefour supermarket with her guide dog, although the dog was appropriately marked. She sued the defendant for damages to be paid to a designated charity. She based her



claim on civil law (since there was no anti-discrimination law covering access to services, she based her claim on the general civil 'protection of personal rights' clause as set out by Article 23-24 of the Civil Code).

On 28 January 2009, the parties reached a settlement before the Warsaw Regional Court. Carrefour expressed regret at the incident and undertook to pay 10,000 PLN (2,500 EUR) to the Foundation 'Vis Maior', which assists persons with disabilities and whose President is Ms Jolanta K.

It was the first case of this kind lodged in Polish courts and sets a precedent. Carrefour also announced that the company has changed its negative internal rules on people with disabilities. In addition, the case resulted in an amendment to Polish law in relation to access specifically for blind people with guide dogs to grocery stores, restaurants and similar premises (in force since June 2009).

**Name of the court:** Supreme Court

**Date of decision:** 21 January 2009

**Name of the parties:** no parties, special procedure: 'legal question' lodged by Commissioner for Civil Rights Protection (Ombud)

**Reference number:** sygn. II PZP13/08

**Address of the webpage:**

<http://www.sn.pl/orzecznictwo/SitePages/Baza%20orzecze%C5%84.aspx?ItemID=4772&ListName=Orzeczenia1&DataWDniu=2009-01-21> (10.01.2013).

**Brief summary:** The jurisprudence of the Supreme Court of the Republic of Poland regarding cases in which reaching the retirement age and entitlement to a pension were the reasons for the termination of a labour contract varied. In a number of cases the Supreme Court adopted different decisions (one such case is listed below).

The Ombud lodged to the Supreme Court a 'legal question' (this is a special procedure which may be initiated by the Ombud in situations where differences in the interpretation of law in court judgments exist; the legal question is not based on any particular case). The resolution (ruling) was passed by a special panel of seven justices.

The question as formulated by the Ombud reads: 'Whether reaching retirement age and entitlement to a pension may be the sole reason for the termination of a labour contract with an employee – a woman or a man – and whether this does not imply discrimination against an employee based on sex and age (Article 11<sup>3</sup> of the Labour Code)'.

The Supreme Court adopted the following resolution: 'Reaching retirement age and entitlement to a pension may not be the sole cause of termination of a contract of employment by an employer (Article 45 § 1 of Labour Code)'.

In the justification, the Supreme Court stressed that the termination of the employment of an employee – a woman or a man – just because they reached a



certain retirement age and are entitled to a pension constitutes discrimination: indirect discrimination because of gender (in the case of women employee since the retirement age of women is lower) and direct discrimination because of age (in the case of women and men employees).

**Name of the court:** Warsaw District Court, Warsaw Regional Court

**Date of decision:** 21 May 2008 (DC), 7 May 2009 (RC), 29 June 2010 (DC)

**Name of the parties:** Małgorzata K.D. v. Polskie Radio S.A.

**Reference number:** VII P 937/07

**Brief summary:** Due to the change of the Polish government in 2005, the management of Polskie Radio (Public Radio) was also changed and in 2006 initiated preparation for a collective redundancy process. Lists of employees were drawn up according to unclear criteria (however, a number of them were listed under the general term of the need for 'rationalisation of the employment structure'). The process was accompanied by statements from members of the management that the radio staff were too old (an additional factor behind this was that older employees had worked on the station during the communist era).

A number of employees were dismissed, and several of them lodged claims. The claimant's labour contract with Polish Radio was dissolved by agreement of the parties. However, according to the claimant, this was forced by permanent pressure related to the fact that the claimant was included in the list of persons to be dismissed. The claimant argued that the planned dismissal was in fact discriminatory because of age, political beliefs and membership of trade unions (the claimant was an active union leader criticising the collective redundancy policy).

The Court found indirect discrimination in dismissal. According to the Court, an apparently neutral provision in the regulations concerning the dismissal of employees (listing several criteria for dismissal) in fact discriminated because of age, and this was apparent in the age structure of persons to be dismissed (the list of persons to be dismissed included 295 names; only 21 persons were under 40 years). According to the Court, Polish Radio S.A. did not prove that the reasons indicated for the dismissal were objectively justified by a legitimate aim and that the means of achieving that aim were appropriate and necessary.

On 7 May 2009. Warsaw Regional Court quashed the District Court decision and sent it back for additional considerations. The Court acted on its own initiative to declare the first instance proceedings invalid, due to the change/replacement during the first instance trial of one of the lay judges on the panel.

On 29 June 2010 Warsaw District Court, after re-examination of the case, ruled in favour of complainant and confirmed that her dismissal was discriminatory. The complainant was awarded compensation in the amount of 1,126 PLN (ca. 270 EUR) – equal to the official minimum wage.



**Name of the court:** Warsaw Regional Court, Warsaw District Court

**Date of decision:** Judgment of the Regional Court – 31 March 2008; Judgment of the District Court – 5 June 2007

**Name of the parties:** Mirosław S. v. Minister of National Education

**Reference number:** sygn. akt: VIII P 1028/06

**Brief summary:** Mirosław S., Director of the National In-Service Teacher Training Centre (Centralny Ośrodek *Doskonalenia Nauczycieli*), brought a case to the Warsaw District Court for unfair dismissal and discriminatory treatment in employment on the grounds of his political opinions.

Mirosław S. was dismissed by the Minister of National Education for publishing the Polish translation of the Council of Europe guide for teachers, *Compass – A manual on human rights education with young people*. The reason (expressed by the Minister) was that, in the opinion of the Ministry, the *Compass* manual included statements which could be regarded as promotion of homosexuality.

Warsaw District Court found discrimination in employment and unfair dismissal and awarded Mirosław S. damages (approx. 5,700 EUR – 4,800 EUR for discriminatory treatment on the basis of political views and 900 EUR for unfair dismissal). The sum awarded was almost exactly the sum claimed by the plaintiff and, taking into consideration Polish practice, it definitely underlined the importance of the case.

The ground for discrimination identified by the court – the reason for dismissal was in fact related to homosexuality – was the different approaches of Mirosław S. and the Minister of National Education to the vision of education in Polish schools, i.e. political beliefs. However, the case was decided on the basis of the Labour Code provisions introduced in order to implement Directives 2000/43/EC and 2000/78/EC.

The Minister of National Education appealed to Warsaw Regional Court, which upheld the discrimination ruling but lowered the amount of compensation to approximately 1,800 EUR: the amount of compensation awarded for discriminatory treatment was reduced from 4,800 to 900 EUR and the amount awarded for unfair dismissal was upheld (900 EUR).

Lowering the sum awarded has changed the significance of the case slightly, but this was the first case of this kind and it played an important role. It is difficult to judge whether damages were 'effective, proportionate and dissuasive'. The person responsible for the dismissal was the former Minister of Education, who was not in power at the time of the verdict. The situation had hence changed completely and the court decided that the lower level of damages awarded was sufficient.

The plaintiff did not apply for reinstatement, which was an additional possible claim (he had found another job in the meantime).



**Name of the court:** Constitutional Tribunal

**Date of decision:** 23 October 2007

**Name of the parties:** Marek R. v. Zakład Ubezpieczeń Społecznych

**Reference number:** Sygn. akt P 10/07

**Address of the webpage:**

<http://www.trybunal.gov.pl/OTK/teksty/otk/2007/Ts001r07.doc> (1.06.2012).

**Brief summary:** Legal question to the Constitutional Tribunal from the Łódź Regional Court (case of Marek R. v. Zakład Ubezpieczeń Społecznych)

Article 29.1 of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund<sup>459</sup> violates the constitutional rules of equality in law and the prohibition of discrimination (Articles 32 and 33). The law challenged made a distinction between the situation of men and women in terms of the right to 'early retirement'.

The normal retirement age is 60 for women and 65 for men. However, women were entitled to 'early retirement' at the age of 55 if they had at least 30 years of paid pension insurance, while men in a similar situation (35 years of insurance and 60 years of age) were not entitled to early retirement. Following the verdict of the Constitutional Tribunal, the law has been changed.

The case was considered as a matter of sex discrimination, although the issue might also be seen as age discrimination concerning the age difference for men and women in granting them particular rights to retirement.

**Name of the court:** Supreme Administrative Court

**Date of decision:** 15 November 2006

**Name of the parties:** Marek F. v. Wójt Gminy w S

**Reference number:** I OSK 1217/06

**Brief summary:** Every commune (represented by a Vogt<sup>460</sup>) has the duty to transport disabled pupils to school free of charge and to provide protection during this time. If parents or guardians transport a child, the costs of public transport (for the child and guardian) should be reimbursed.

**Name of the court:** Poznań District Court

**Date of decision:** 4 September 2006

**Name of the parties:** Inga K., Agnieszka K., Sandra R., Joanna R. v. Przemysław Alexandrowicz and Jacek Tomczak

**Reference number:** sygn. akt XXIII K 20/05/11

**Brief summary:** The parties reached a settlement. The respondents had to make a statement at a public conference that they '...did not compare and did not intend to compare homosexuality with either paedophilia, zoophilia or necrophilia. They regret

<sup>459</sup> *Ustawa z 17 grudnia 1998r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych.*

<sup>460</sup> The highest representatives of local government.





that the wording from the press conference in November 2004 could suggest that such a comparison was made.'

**Name of the court:** Legnica Regional Court

**Date of decision:** 20 June 2006

**Name of the parties:** Zbigniew M. v. Komenda Powiatowa Policji w G.

**Reference number:** sygn. akt: V Pa 101/06

**Brief summary:** There was discrimination in the recruitment process of the Police Headquarters due to a wrong interpretation of the Disabled Persons Act and the formulation of an additional requirement in the form of a 'certificate' on the possibility of working overtime and at night.

**Name of the court:** Płock District Court

**Date of decision:** 16 March 2006

**Name of the parties:** Bolesław K. v. 'X' limited liability Co. in P.T.

**Reference number:** sygn. akt IV P 353/05

**Brief summary:** The plaintiff claimed that he was discriminated against in the workplace because of his sexual orientation. The court did not find evidence of discrimination and dismissed the action. The plaintiff, who was represented by a legal aid lawyer appointed *ex officio*, wished to file an appeal which was, however, rejected for technical reasons (failure by the lawyer to pay the court fee). The plaintiff filed a constitutional complaint, but this was related not to discrimination but to the fact that, due to a technical error by an *ex officio* attorney he lost the opportunity to have his case examined by the court of second instance (right of appeal).

**Name of the court:** Supreme Court

**Date of decision:** 21 April 1999

**Name of the parties:** Alicja P. v. Zespół Opieki Zdrowotnej w K.

**Reference number:** OSNP 2000/13/505

**Brief summary:** Dismissal based on the fact of a woman's reaching retirement age and the right to an old age pension cannot be considered as discrimination on the grounds of age or gender.

**Name of the court:** Supreme Court

**Date of decision:** 5 February 1998

**Name of the parties:** Genowefa C. v. Zespół Opieki Zdrowotnej w R.

**Reference number:** OSNP 1999/4/115

**Address of the webpage:** not available on the internet

**Brief summary:** The principle of equal treatment and non-discrimination in terms of employment does not apply to the equal treatment of the employer and employee.