



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

## COUNTRY REPORT 2007

### Poland

by Łukasz Bojarski<sup>1</sup>

State of affairs up to 29 February 2008

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  
Hooghiemstraplein 155  
3514 AZ 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)

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<sup>1</sup> The 2006 Polish Country report was written by Monika Mazur Rafał and has been amended and updated by Łukasz Bojarski.



## 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 between 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 (*ustawy*) and ratified international agreements and ordinances/regulations (*rozporządzenia*). Legislative power is exercised jointly by the Sejm and the Senate, the two chambers of the Parliament. The legislative initiative, in most cases, is exercised by the government, which addresses Parliament with draft acts (the Deputies, the Senate, the President and citizens' groups of at least 100,000 are also eligible to propose legislation). In order to adopt a piece of legislation 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 official journal. The Council of Ministers, President of the Council of Ministers and ministers themselves are authorised to enact executive ordinances when there is a specific legal basis (delegation) in an act issued by the Parliament. Legislative acts (acts and ordinances) can be subjected to constitutional control exercised by the Constitutional Court. Citizens are empowered to lodge an individual constitutional complaint with the court (challenging the constitutionality of a law which formed the basis of the individual final decision or verdict). They may also refer to the Commissioner for Civil Rights Protection (Ombudsperson) who may act on their behalf, for instance requesting to lodge or joining court proceedings.

### 0.2 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.*

*Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?*

The overall situation in respect of the implementation of the EU Racial Equality and Employment Equality Directives can only be assessed ambiguously as far as the enactment of appropriate legislation is concerned. Undoubtedly, Poland made an effort to comply with EU law at the point of accession. The two substantive amendments to the Labour Code of 24 August 2001 and 14 November 2003 brought Polish labour law in general in line with the respective equality directives. There are, however, at least three problems with Polish anti-discrimination legislation.

Firstly, there is no single act comprising a general ban on discrimination on all grounds and provisions are scattered across many different legal acts (although in 2007-2008 a draft Law on Equal Treatment was prepared – with a number of consecutive versions).

Secondly, the level of protection against discrimination is uneven in a number of areas. In the field of occupation and employment the directives are generally implemented, however, the adopted solutions are not free of weak points which are mentioned later in the report (e.g. regarding reasonable accommodation). When it comes to legislation in the field of combating discrimination outside employment, there are, depending on interpretation, either significant gaps or provisions which are difficult to use in any court proceedings.

Thirdly, it is difficult to assess the practical dimension of existing implemented laws. In its major substance, this legislation entered into force on 1 January 2004 (amendment to the Labour Code) and there have as yet been very few cases based on it.

There are several areas in which the EU Directives have not been implemented or where Polish anti-discrimination legislation displays some deficiencies when compared to the EU Directives.

- The Racial Equality Directive must be transposed in all fields beyond employment (social security matters, education and access to goods and services). Although the Constitution entails a general principle of equal treatment, the corresponding provisions regarding anti-discrimination outside employment are, on the one hand, scattered across several legal acts and, on the other, do not include important elements of the Directives (e.g. definitions of direct or indirect discrimination, harassment, burden of proof, victimisation). In the fields of civil law (sales, leasing, tenancy, lending for use or exchange, contracts of services) and administrative law (education, health care and social welfare), discrimination is not explicitly banned.
- Direct and indirect discrimination are defined only by the Labour Code and only partially comply with the definitions provided by the Directives. The provision of Article 18<sup>3a</sup>§3 of the Labour Code defining direct discrimination is erroneous. 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 (as in the Labour Code).
- In the case of indirect discrimination, Article 18<sup>3a</sup>§4 of the Labour Code allows disproportions if “they can be justified by other objective reasons” while, according to the Directive (Article 2.2b), inequality may be justified only “by a legitimate aim and the means of achieving that aim [must be] appropriate and necessary”.
- Self-employment and “independent professions”<sup>2</sup>: the provisions of the Labour Code only regulate labour contract relations and do not apply to self-employment or independent professions. This still needs to be addressed by the legislator and currently we can only report on the general provisions of the Constitution and relevant acts.

<sup>2</sup> “Independent professions” is a special term used in Poland for self-regulatory professions. The other terms used are “free professions” or “professions of public trust” (Article 17 of the Constitution).

- There is no single officially designated “specialised body” in the sense of the Racial Equality Directive. Of those described below under Section 7, none appear to meet the competency criteria set out in Article 13.2 of the Directive. Some do meet the second and third requirements (independent surveys and independent reports and recommendations), but not together with the first one (providing independent assistance in pursuing discrimination complaints).
- This also relates to the new post, created in March 2008 (the Council of Ministers Ordinance has been in force since 30 April 2008), that is the Government Plenipotentiary for Equal Treatment. On the whole, the Commissioner for Civil Rights Protection seems to be the body which comes closest to meeting the criteria set out in the Directive. However, the Commissioner does not have an obligation to accept a complaint or case referred to them and deal with it; the Commissioner is left free to accept or reject any complaint immediately.
- Provisions on shifting the burden of proof apply only to the area of employment and occupation, which is a too narrow interpretation of the Racial Equality Directive.
- Under Polish legislation there is no adequate and specific protection against victimisation. No definition of victimisation has yet been introduced into the legal system. The existing mechanisms protect only direct complainants against retaliation by the employer in the form of the termination of a labour contract. Such protection does not extend to other people, e.g. witnesses (for further details, see Section 6.4).
- In addition, 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 the administrative court (following two out-of-court administrative instances). But reviewing an administrative decision in court is limited to an evaluation of its compliance with the law only and not its merits (cassation character).
- Polish anti-discrimination law does not entail any specific system of sanctions and it refers only to penalties and punishments set out by the Penal Code and the Code of Minor Offences. Compensation claims for material and non-material damages are possible under the Civil and Labour Codes. There is, however, no legal basis for compensation claims in the case of discrimination outside employment between private parties.
- There are no provisions concerning assumed and associated discrimination.
- The Act on National and Ethnic Minorities and on Regional Language relates only to national and ethnic minorities and not to all people subjected to discrimination on ethnic or racial grounds.
- The general wording of the Labour Code (Article 94.2b) imposing an obligation on the employer to counteract discrimination on grounds of (among others) disability is not equal to the duty to provide reasonable accommodation for disabled people.

- The anti-discrimination clause in the Act on the Social Security System<sup>3</sup>, which is a “framework statute” for the area of social security, limits the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status.<sup>4</sup>

### 0.3 Case-law

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

- Name of the court*
- Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.*
- Name of the parties*
- Brief summary of the key points of law (no more than several sentences)*

➔ *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 concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)*

- Regional Court in Warsaw
- Case lodged on 6 May 2008
- Jolanta K. v. Carrefour Polska Sp.z.o.o.
- Jolanta K. is blind and was not allowed into the Carrefour supermarket with her guide dog, although the dog was adequately marked. She sued the defendant for damages to be paid to a given charity. She based her claim on civil law (since there is no anti-discrimination law covering access to services, she based her claim on the general civil “protection of personal goods” clause as set out by Article 23-24 of the Civil Code, see more in Section 6.1 below). It is the first case of this type and therefore deserves attention. The outcome may be interesting in view of the new horizontal anti-discrimination directive being prepared by the EC. Also, work is underway on an amendment to Polish law in relation to access specifically for blind people with guide dogs to public institutions.

- Regional Court in Warsaw, District Court in Warsaw
- 31 March 2008 judgment of the Regional Court in Warsaw, 5 June 2007 judgment of the District Court in Warsaw
- Mirosław S. v. Minister of National Education
- Mirosław S., Director of the National In-Service Teacher Training Centre (*Centralny Ośrodek Doskonalenia Nauczycieli*), brought a case to the District Court in Warsaw 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 – education on human rights*.

<sup>3</sup> Act of 13 October 1998 on the Social Security System (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).

<sup>4</sup> Article 2a.1 Act on the Social Security System.

- a) 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.

The District Court in Warsaw found discrimination in employment and unfair dismissal and awarded Mirosław S. damages (approx. 5,700 Euro – 4,800 Euro for discriminatory treatment on the basis of political views and 900 Euro 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 defined by the court – the reason for dismissal was even related to homosexuality – was the different approaches of Mirosław S. and the Minister of National Education to the vision of education in Polish schools – 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 the Regional Court in Warsaw which upheld the discrimination ruling, but lowered the amount of compensation to approximately 1,800 Euro (the amount of compensation awarded for discriminatory treatment was reduced from 4,800 to 900 Euro and the amount awarded for unfair dismissal was upheld (900 Euro). 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, so the situation had 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).

- a) Constitutional Tribunal
- b) 23 October 2007 (Sygn. akt P 10/07)<sup>5</sup>
- c) Legal question to the Constitutional Tribunal of the Regional Court in Łódź (case of Marek R. v. Zakład Ubezpieczeń Społecznych)
- d) Article 29.1 of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund<sup>6</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 regular retirement age is 60 for women and 65 for men. However, women could be entitled to so-called “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.

<sup>5</sup> <http://www.trybunal.gov.pl/OTK/teksty/otk/2007/Ts001r07.doc>

<sup>6</sup> Ustawa z 17 grudnia 1998r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych.



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.

- α) Supreme Administrative Court
  - β) 15 November 2006 (I OSK 1217/06)
  - χ) Marek F. v. Wójt Gminy w S.
  - δ) Every community (represented by the vogt<sup>7</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 child and guardian) should be reimbursed.
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- α) Local Court in Poznań
  - β) 4 September 2006 (sygn. akt XXIII K 20/05/11)
  - χ) Inga K., Agnieszka K., Sandra R., Joanna R. v. Przemysław Alexandrowicz and Jacek Tomczak
  - δ) The parties concluded the case through plea bargaining. 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 that the wording from the press conference in November 2004 could suggest that such a comparison was made.”
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- a) District Court in Legnica
  - b) 20 June 2006 (sygn. akt: V Pa 101/06)
  - c) Zbigniew M. v. Komenda Powiatowa Policji w G.
  - d) There was discrimination in the recruitment process of the Police Headquarters due to the wrong interpretation of the Act on Disabled Persons and formulating an additional requirement in the form of a “certificate” on the possibility of working overtime and at night.
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- a) District Court in Plock
  - b) 16 March 2006 (sygn. akt IV P 353/05)
  - c) Bolesław K. v. “x” limited liability Co. in P. T.
  - d) 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 the technical error of the ex officio attorney he lost the opportunity to have his case examined by the court of second instance (right of appeal).

<sup>7</sup> The highest representatives of local government.





- α) Supreme Court
- β) 21 April 1999 (OSNP 2000/13/505)
- χ) Alicja P. v. Zespół Opieki Zdrowotnej w K.
- δ) Dismissal based on the fact that reaching retirement age and the right to old age pension by a woman cannot be considered as discrimination on the grounds of age or gender.
  
- α) Supreme Court
- β) 5 February 1998 (OSNP 1999/4/115)
- χ) Genowefa C. v. Zespół Opieki Zdrowotnej w R.
- δ) The principle of equal treatment and non-discrimination in terms of employment does not apply to the equal treatment of the employer and employee.

*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 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, even despite the fact that there are reasonable possibilities of obtaining free legal advice and assistance. As a consequence there are no figures available. Both the Ministry of Interior and the Ombudsperson 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.

In 2000 the Ministry of Interior initiated a project to collect data on a monthly basis from the General Headquarters of the Police relating to cases of 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.

## 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>8</sup> This principle does not specify the criteria for the prohibited forms of discrimination.<sup>9</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.

In addition, the Constitution bans political parties and other organisations which include or allow racial hatred in their programme or activities.<sup>10</sup> It also guarantees people the freedom to preserve and develop their own language, preserve customs and traditions and develop their own culture.<sup>11</sup> Furthermore, national and ethnic minorities have the right to establish their own educational, cultural and religious institutions.<sup>12</sup> Freedom of conscience and religion, freedom of expression, freedom of association and the right of access to public services are equally safeguarded for all Polish citizens, including members of national and ethnic minorities.<sup>13</sup> With regard to disability, the Constitution stipulates that public authorities shall provide, in accordance with statutes, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication.<sup>14</sup> Furthermore, the Constitution declares that both women and men have equal rights in family, political, social and economic life<sup>15</sup> and, in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.<sup>16</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>17</sup> and also protection for veterans of the struggle for independence, especially war invalids,<sup>18</sup> children<sup>19</sup> and consumers.<sup>20</sup>

<sup>8</sup> Article 32 Constitution of the Republic of Poland [henceforth: Constitution].

<sup>9</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 distinction may occur” – from the judgment of the Constitutional Tribunal of 16 December 1997 K. 8/97.

<sup>10</sup> Article 13 Constitution.

<sup>11</sup> Article 35.1 Constitution.

<sup>12</sup> Article 35.2 Constitution.

<sup>13</sup> Article 53, 54.1, 58.1 and 60 Constitution.

<sup>14</sup> Article 69 Constitution.

<sup>15</sup> Article 33.1 Constitution.

<sup>16</sup> Article 33.2 Constitution.

<sup>17</sup> Article 25 Constitution.

<sup>18</sup> Article 19 Constitution.

<sup>19</sup> Article 72 Constitution.

<sup>20</sup> Article 76 Constitution.

The Constitution does not mention sexual minorities among the protected groups.<sup>21</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>22</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>23</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 precedence of invoking constitutional provisions directly, in particular, 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 courts are of the opinion that it is impossible to bring the case to court solely on the basis of constitutional provisions.<sup>24</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 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.

<sup>21</sup> According to sexual minority rights organisations, the rejection of a version of a founding draft bill that clearly contained a prohibition on 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>22</sup> Article 67.1 Constitution.

<sup>23</sup> Article 8.2 Constitution.

<sup>24</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 the 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”.

In the provisions of the Labour Code there are several grounds listed, 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 remains open because of the wording of this Article: “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>25</sup>

The Council of Ministers Ordinance of 22 April 2008 (in force since 30 April 2008) on the Government Plenipotentiary for Equal Treatment also uses the expression “all possible grounds of discrimination” but lists several of them “in particular: gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, sexual orientation, civil (marital) and family status”. “Disability” is not explicitly mentioned.

<sup>25</sup> Passed on 6 January 2005 and entered into force on 1 May 2005.

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

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at national level and how does it compare with the concept adopted by the European Court of Justice 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”?*

There are several definitions of disability at national level, which relate to certain legal acts. The Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons contains a legal definition of a disabled person.<sup>26</sup> The definition stipulates that a disabled person is someone whose disability has been confirmed by a competent medical authority.<sup>27</sup> Furthermore, 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>28</sup> There are three levels of disability: low-level, medium level and high-level disability.<sup>29</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 Act on Disabled Persons 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 even 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 Act on Disabled Persons, 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, “Public authorities shall provide, in accordance with statutes, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication”. The commentary to the Constitution points out the open character of the term “disability”<sup>30</sup>. In particular, it says that the drafters of the Constitution took into account in relation to the meaning of “disability” the recommendations of the Committee of Ministers of the Council of Europe of 1992 as well as the Act on Disabled Persons.

<sup>26</sup> The Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*) [henceforth: Act on Disabled Persons].

<sup>27</sup> Article 1 Act on Disabled Persons.

<sup>28</sup> Compare Article 2.10 Act on Disabled Persons.

<sup>29</sup> Article 3.1 Act on Disabled Persons.

<sup>30</sup> Garlicki L., (eds.), Commentary to the Polish Constitution (*Komentarz do Konstytucji RP*), Wydawnictwo Sejmowe, Volume III, Warsaw 2003.

The former document provides a much broader definition of “disability” than the latter. 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 above-mentioned 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 of limitations: “damage” at the constitutional level and “disturbance of the performance of a human organism” in the Act on Disabled Persons. 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 Act on Disabled Persons: “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 Act on Disabled Persons, disability must be confirmed by a competent medical authority, which is not required in the view of ECJ definition. However, the Polish court, as mentioned above, when determining whether discrimination took place is not bound by the definition from the Act on Disabled Persons. 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”.

The definition of an ethnic minority and the definition of 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 directed at 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>31</sup>

The Act then continues to enumerate the recognised national minorities: Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish.<sup>32</sup>

<sup>31</sup> Article 2.1 Act of 6 January 2005 on National and Ethnic Minorities and on Regional Language (*Ustawa z 6 stycznia 2005r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*) [henceforth: Act on Minorities].

<sup>32</sup> Article 2.2 Act on Minorities.



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;
- 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>33</sup>

Then, as above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.<sup>34</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 membership of a minority. This provision clearly refers 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 covered by Polish anti-discrimination laws. 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>35</sup>.

Poland ratified the International Convention on the Elimination of All Forms of Racial Discrimination on 5 December 1968. Under the Polish Constitution, the ratified international agreements have priority over acts of Parliament. International agreements may also be a source of reference when interpreting laws. For example, the Polish courts quite often refer to the European Convention of Human Rights and jurisprudence of the Strasbourg Court.

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

There are no definitions related to race, religion, belief, age or sexual orientation in Polish anti-discrimination legislation.

<sup>33</sup> Article 2.3 Act on Minorities.

<sup>34</sup> Article 2.4 Act on Minorities.

<sup>35</sup> Garlicki L., (eds.), Commentary to Article 32 of the Constitution, in: Garlicki L., Commentary to the Polish Constitution (*Komentarz do Konstytucji RP*), op.cit.



- b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' or a 'disability', sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

As indicated above, neither Polish law nor case law defines the majority of the grounds listed in the Directive. On the definition of disability, see above.

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*), which regulates the establishment of churches and other religious organisations (*związek wyznaniowy*), does not define religion or belief.

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

- 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)?*

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.

- d) *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.*

There are no legal rules or case-law dealing with multiple discrimination.

### **2.1.2 Assumed and associated discrimination**

- a) *Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

There is no legal definition of imputed discrimination provided by Polish legislation. However, judicial bodies, while ruling on discrimination cases, should take into consideration the objectives of the provisions and the reasons included in national legislation. As mentioned above, 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 should also be treated as discrimination.

- b) *Does national law or case law prohibit discrimination based on association with people with particular characteristics (e.g. association with people from a particular ethnic group)? If so, how?*

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' decisions. As yet no such case has been identified.

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

- a) *How is direct discrimination defined in national law?*

The definition of direct discrimination is defined only by the Labour Code and only partially complies with the definitions provided by the Directives. The provision of Article 18<sup>3a</sup>§3 of the Labour Code defining direct discrimination is erroneous. 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 as in the Labour Code: “§ 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.” The new draft law on equal treatment includes a new definition of direct discrimination which is a verbatim translation of the definition included in the Directives.

The erroneous definition limits the scope of protection – usage of a comparator is limited to the past and present (and not the future).

In addition, the above-mentioned erroneous element of the definition cannot be used in practice – it is difficult to imagine that somebody under Polish law would bring a claim about possible future hypothetical discrimination (may be treated) – no court would accept this claim.

There are, however, no cases known which would in reality limit the protection of an individual due to the wrong implementation of the Directive (which was in fact most probably a technical translation error).

- b) *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).*

Polish law permits justification of both direct and indirect discrimination in respect of all grounds covered by the Labour Code. In accordance with the Code, in order to justify different treatment that leads to the breach of the principle of equal treatment in employment, the employer must prove the existence of “objective reasons” for his/her actions.<sup>36</sup> As regards the specified “exclusion” situations see below, Section 2.3.

<sup>36</sup> Article 18<sup>3b</sup> para. 1 in fine, Labour Code.

- c) *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.

### 2.2.1 Situational testing

- a) *Does national law permit the use of 'situational 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 situational testing permitted? If all grounds are not included, what are the reasons given for this limitation?*

In Polish law there is no explicit mention of 'situational testing'. Nevertheless one could argue that this kind of evidence could be admissible. However, since there have been no relevant cases before the courts (officially declared as a result of situational testing) it is only a theoretical assumption.

In civil law proceedings a party claiming the existence of a certain fact must present evidence supporting his/her claims<sup>37</sup>. Besides that, the court may accept *ex officio* the evidence not provided by the party. 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 evidence in civil law proceedings are: documents, witness testimonies, expert opinions or 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 recording images or sound. This rule may have significant value for evidence collected during situational 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. The body may accept other sources of evidence.

<sup>37</sup>

Article 232 of the Code of Civil Procedure.

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. 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; it is not significant for the case; it may not be proved with the given evidence; it is not possible to perform a requested proof; an evidence motion aims at the prolongation of 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 it is a victim of hate speech, they will be obliged to prove the occurrence of hate speech.

*b) Is there any reluctance to use situational 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)? Important case-law within the national legal system on this issue.*

The court may admit evidence in the form inter alia of photocopies, photography, phone records or tapes as has been mentioned above.<sup>38</sup> Influence from developments in other countries is rarely seen.

It should be pointed out that situational 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 direct criminal proceeding against him/her. Situational 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 situational testing, it would nevertheless be conceivable to attempt to use situational testing as evidence in court. But since it does not happen in practice the issue is only theoretical for the time being.

In the context of situational testing one more legal provision should be mentioned. 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 no

<sup>38</sup> Article 308 Code of Civil Procedure.

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 the claim.

Moreover, there is a theoretical possibility that the court would not accept a claim based on situational testing, arguing that there was not any damage to any particular person since the testers acted more like actors than victims of discrimination.

Therefore it might be important to organise testing in such a way that the real victim is present in a case. However, as mentioned above, this is only a theoretical note since there is a lack of appropriate case-law on the issue.

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

There are no examples of relevant case-law.

*d) Outline how situational testing is used in practice and by whom (e.g. NGOs)*

Some of the experts interviewed confirmed that they are familiar with this method. However, they were not able to report having used it. They were not familiar with any cases concerning the use of situational testing in Polish courts in discrimination cases. In fact, the Helsinki Foundation for Human Rights has used situational testing, but only in order to obtain a legal ground for further legal action. For example, the Foundation tried to test, relying on the Constitution, whether proceedings before the bar disciplinary courts may be public. The Foundation testers were not allowed to attend the disciplinary court hearing and, following this incident, the Foundation submitted a constitutional complaint, claiming that the provisions excluding the public from disciplinary court hearings are unconstitutional (the claim did not succeed). The method has also been used in other types of cases to test the right to public trial.

Although the testing method has not been used so far 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 wheel chairs. However, it has been used more as an awareness-raising or PR tool rather than for legal purposes.

In another case 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 the woman in a wheelchair who, accompanied by a journalist, tried to find employment in a state school 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 other ethnic origins 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.

Finally, the author of the report is familiar with four cases where “situational testing” was used. One case involved discrimination on the grounds of disability (and was planned by a disabled person, the case is pending before the courts) and three cases involved sex and age discrimination (and were planned by an individual who phoned employers who were

recruiting for employees of a certain sex and age (one case was won, one was settled and one is still pending). However, the plaintiffs do not wish to reveal the fact that they used situational testing.





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

### a) *How is indirect discrimination defined in national law?*

“Indirect discrimination takes place when, due to an apparently neutral decision, criterion or action, based on one or more grounds mentioned in Para. 1, inequalities in the scope of terms of employment occur to the employee’s disadvantage, unless they can be justified by other objective reasons.”<sup>39</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?*

In the case of indirect discrimination, Article 18<sup>3a</sup>§4 of the Labour Code allows disproportions if “they can be justified by other objective reasons” while, according to the Directive (Article 2.2b) inequality may be justified only when there is “a legitimate aim and the means of achieving that aim are appropriate and necessary”. Therefore there is no definition of appropriate and necessary measures or legitimate aim.

However, in relation to both direct and indirect discrimination, an additional provision could be applied that specifies under what circumstances certain conduct cannot be considered as discrimination. The following do not amount to a violation of the principle of equal treatment<sup>40</sup>:

- failure to employ an individual on the basis of one or more grounds listed in the definition of discrimination, if the decision is justified on account of the type of work, working conditions or occupational requirements laid down for employees;
- changing of the employee’s employment conditions in respect of working time, if this is justified by reasons not related to employees;
- applying measures that make a distinction in the legal situation of an employee on account of protection of the employee’s parenthood status, age or disability;
- setting the terms of employment and dismissal, remuneration and promotion and access to vocational training – with consideration of length of service.

In addition, measures taken as positive discrimination are allowed under Polish legislation<sup>41</sup> as well as distinctions among employees on account of their religion or belief, if the employee’s religion or beliefs constitute significant and justified occupational requirements in relation to the activities carried out within churches or other religious associations.<sup>42</sup>

<sup>39</sup> Article 18<sup>3b</sup> para 4, Labour Code.

<sup>40</sup> Article 18<sup>3b</sup> para 2, Labour Code.

<sup>41</sup> Article 18<sup>3b</sup> para 3, Labour Code.

<sup>42</sup> Article 18<sup>3b</sup> para 4, Labour Code.

c) *Is this compatible with the Directives?*

The most significant difference is that related to objective reasons versus legitimate aim, necessity and appropriateness. In this respect the Polish definition appears not to be in line with the Directive and may cause practical problems when it is applied.

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

No specific provisions concerning discrimination based on age have been identified in the course of this research.

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

No such case has yet been reported.

### 2.3.1 Statistical evidence

*α) 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 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 popular ones, provides principles concerning their admission, but does not exclude the possibility of other forms of evidence, such as statistics. The subjects of proof in civil proceedings are facts that may have a significant meaning for resolving the case. Article 233 of the Code of Civil Procedure provides that the court assesses the evidence according to its own convictions, on the basis of a comprehensive examination of the collected material. This general principle indicates the role of statistical evidence. It seems that in discrimination cases, statistical evidence may serve the purpose of proving *prima facie* discrimination, i.e. convincing the court that discrimination was probable. In such a case, the burden of proof shifts to the defendant. However, statistical evidence cannot be the only proof. In civil proceedings it can only support the facts or issues that stem from other evidence.

The Code of Civil Procedure does not contain an exclusive list of sources or forms of evidence. Theoretically, statistical evidence may be admitted as separate evidence or as part of an expert opinion. However, criminal trials aim to prove without doubt whether or not the accused is guilty. Statistical evidence may help in understanding the context of the case, its social significance, but taken alone, without any other evidence, it cannot form the basis of a conviction.

- β) Is the use of such evidence commonly used? 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>43</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.

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

There is no case-law in the field.

- δ) Are there national rules which permit data collection? Please answer in respect of all five grounds. The aim of this question is 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?*

On the one hand there is constitutional protection of scientific research (Article 73). But on the other hand, according to the Constitution, everyone shall have the right to legal protection of their private life and family life, honour and good reputation and to make decisions about their personal life.<sup>44</sup> Furthermore, no one may be obliged, except on the basis of a statute, to disclose personal information.<sup>45</sup>

Article 27.1 of the Act on the Protection of Personal Data<sup>46</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.

<sup>43</sup> From the interviews conducted to update this report.

<sup>44</sup> Article 47 of the Constitution.

<sup>45</sup> Article 51.1 of the Constitution.

<sup>46</sup> Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych.

The processing of the data referred to in paragraph 1 shall 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 statutory objectives 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 providing appropriate safeguards for the processed data;
- 5) processing relates to the 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 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, the provision of care or treatment, where the data are processed by a health professionals involved in treatment, or providing other health care services, or the management of health care services if there are full safeguards of personal data protection being provided;
- 8) the processing relates to those data which were made publicly available by the data subject;
- 9) it is necessary to conduct scientific research, including in preparation of a thesis required for graduating from university or receiving a degree; any results of scientific research shall 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 the Article 27.1 of the Act on the Protection of Personal Data (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 Act on the Protection of Personal Data, the Act on Public Statistics<sup>47</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>48</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.

<sup>47</sup> *Ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej.*

<sup>48</sup> Article 8 Act on Public Statistics.

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 reasons. However, if any research exists, it may be submitted as additional evidence.

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. When designing positive action there are ways of obtaining information and statistics: via schools' administrations (for instance, the number of Roma pupils in order to organise the 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), from 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.

Recently, the government has been planning special positive action for people aged over 50 in order to include them in the labour market. This action is planned on the basis of statistical data showing that a vast number of people aged over 50 are excluded from the labour market.

## 2.4 Harassment (Article 2(3))

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

The Labour Code introduces a general definition of harassment as a form of discrimination. Any behaviour, the aim or result of which is injury to dignity or humiliation or abasement of an employee, is considered to constitute harassment (Article 18<sup>3a</sup> para 5 point 2 Labour Code). In addition, the Labour Code describes sexual harassment: it is understood to be any unwanted behaviour of a sexual nature or behaviour related to an employee's gender, the aim or result of which is injury to dignity or humiliation or abasement of an employee; this behaviour may consist of physical, verbal or non-verbal elements (Article 18<sup>3a</sup> para 6 Labour Code).

The provisions of Polish criminal law do not contain a separate type of an offence which could be described as "harassment" in the meaning of the two Directives.

However, the Penal Code does include some serious acts covered by the concept of harassment. Such offences include, in particular:

- the crime of genocide and its preparation<sup>49</sup>;
- 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>50</sup>; or public incitement to commit these offences<sup>51</sup>;
- restricting the rights of an individual on account of his/her religious affiliation or lack of religious belief<sup>52</sup>;
- compelling another person to take part in sexual intercourse by using violence, unlawful threat or deceit<sup>53</sup> or – in the same way – making another person submit to any other sexual act or to perform such an act<sup>54</sup>;
- compelling another person to take part in sexual intercourse or to submit to or to perform other sexual acts by abusing a relationship of dependency or by exploiting the critical situation of that person<sup>55</sup>;
- malicious or persistent violation of an employee's rights stemming from an employment contract or social security<sup>56</sup>;
- refusal to re-employ a person whose reinstatement was decided by the appropriate institution<sup>57</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>58</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 of religious belief, or infringement of physical integrity of another person on these grounds.<sup>59</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 (Article 11<sup>3</sup> Labour Code).

<sup>49</sup> Article 118 Penal Code.

<sup>50</sup> Article 119.1 Penal Code.

<sup>51</sup> Article 119.2 Penal Code.

<sup>52</sup> Article 194 Penal Code.

<sup>53</sup> Article 197.1 Penal Code.

<sup>54</sup> Article 197.2 Penal Code.

<sup>55</sup> Article 199 Penal Code.

<sup>56</sup> Article 218.1 Penal Code.

<sup>57</sup> Article 218.2 Penal Code.

<sup>58</sup> Article 256 Penal Code.

<sup>59</sup> Article 257 Penal Code. Existing offences belonging to the category of hate speech and hate crime do not cover the grounds of "sexual orientation". Sexual minority rights organisations are campaigning for the scope of these offences to be broadened.

In addition to the general prohibition contained in the Labour Code, the Act on the Promotion of Employment and the Institutions of the Labour Market specifies two offences:

- non-compliance, by an individual running an employment agency, with the prohibition of discrimination based on gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religious beliefs or membership of a trade union. Such an individual can be fined a minimum of 3,000 PLN;<sup>60</sup>
- refusal – on the same grounds – to employ a candidate in a vacant post or to accept an individual for vocational training. The same sanction can be imposed, that is, a minimum fine of 3,000 PLN.<sup>61</sup>

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

Existing “codes of conduct” apply mainly to corporations and international organisations, such as the United Nations. The obligation to behave in a particular manner is also included in the provisions of contracts entered into between the latter and Polish NGOs.

For example, the code of professional ethics of the national newspaper, *Rzeczpospolita* contains a recommendation that information about an individual’s age, race, skin colour, disability or sexual orientation should be printed only when it has significance for the story.<sup>62</sup> In the Principles of Professional Ethics for Polish Radio, the section concerning standards of conduct towards audiences and participants in broadcasts bans discrimination on the grounds of gender, disability, race, religion, nationality, political opinions, union membership, ethnic origin, faith, sexual orientation, cultural or customary distinctness.<sup>63</sup> Age is not included. According to the Principles of Journalistic Ethics for Polish Television, a journalist must not discriminate against anyone on account of his or her gender, age, disability, race, nationality or ethnic origin, religion or belief, political opinions, organisational membership, cultural or customary distinctness or sexual orientation.<sup>64</sup>

<sup>60</sup> Article 121.3, Act on the Promotion of Employment and the Institutions of the Labour Market (*Ustawa z 20 kwietnia 2004*

*o promocji zatrudnienia i instytucjach rynku pracy*) [henceforth: Act on Employment].

<sup>61</sup> Article 123, Act on Employment.

<sup>62</sup> Code of Professional Ethics of *Rzeczpospolita*, p. 1.

<sup>63</sup> Point 6, Principles of Professional Ethics for Polish Radio S.A., an attachment to resolution no 64 of the Board of Polish Radio S.A. of 9 September 2004.

<sup>64</sup> Point 11, paragraph 2, of the Principles of Journalistic Ethics for Polish Television S.A.- Information, Commentary, Report,

Document, Education, an attachment to the resolution of the Board of Polish Television of 6 January 2006.



There is no definition of harassment in the rules of the judicial ethics enacted by the National Council of the Judiciary<sup>65</sup>. However, the rules clearly state that the judge should approach all persons with respect and kindness, avoid unpleasant situations etc. It also states (in § 12.3) that the judge should react adequately in the event of misconduct by individuals taking part in 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.

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.

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

### *Does national law prohibit instructions to discriminate?*

When indicating the forms of discrimination, the Labour Code prohibits any action consisting of inciting (encouraging) other people to infringe the principle of equal treatment in employment.<sup>66</sup> One may argue that by referring to “incitement” (encouragement) Polish legislation goes beyond what is required by the Equality Directive, since the notion of “incitement” appears to be broader than the notion of “instruction”.

In the context of conducting employment services, the ban on discrimination on the grounds listed, among others, in the two Directives encompasses both public employment services and private agencies.<sup>67</sup> The penalty for not observing the anti-discrimination rule is a minimum fine of 3,000 PLN.<sup>68</sup> Vacancy information (on available jobs or pre-employment training positions) announced by the employer cannot contain 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>69</sup>

If instructions to discriminate lead a person to commit a criminal offence or crime, the person who issued such instructions is held criminally responsible for directing or instructing the perpetration of or aiding or instigating the crime.<sup>70</sup> A person publicly inciting the committal of a crime is held responsible for its perpetration.<sup>71</sup> On the basis of civil law, a person who has incurred damages due to instructions to discriminate can seek compensation according to general principles.<sup>72</sup>

<sup>65</sup> Uchwała Nr 16/2003 KRAJOWEJ RADY SĄDOWNICTWA z dnia 19 lutego 2003 r. w sprawie uchwalenia zbioru zasad etyki zawodowej sędziów.

<sup>66</sup> Article 18<sup>3a</sup> para 5 point 1 in relation to Article 11<sup>3</sup> Labour Code.

<sup>67</sup> Article 18a.4 Act on Employment.

<sup>68</sup> Article 121.3 Act on Employment.

<sup>69</sup> Article 36.5 Act on Employment.

<sup>70</sup> Article 18.1-3 Penal Code.

<sup>71</sup> Article 18.1 in relation to Article 280 Penal Code.

<sup>72</sup> Article 415 Civil Code.

## 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'. e.g. 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?*

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. This provision is too general to infer specific reasonable accommodation duties. The provisions of the Labour Code do not oblige the employer directly to provide reasonable accommodation in order to employ a specific disabled person. Only in the draft law on equal treatment is this duty specifically envisaged. Since the concept of “reasonable accommodation” does not exist in Polish law there are no criteria for assessing the duty, and the terms “reasonable” and “disproportionate burden” are not defined either.

However, if the employer already employs people with disabilities, appropriate measures should be undertaken. The Ordinance of the Minister of Labour and Social Policy on general provisions on health and safety at work<sup>73</sup>, issued on the basis of the Labour Code<sup>74</sup>, provides that “workstations shall be organised according to the psychological and physical features of employees”<sup>75</sup> as well as requiring that “the 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 lower proficiency/mobility”<sup>76</sup>.

Improvement of the employment and working conditions of disabled persons is also promoted through economic incentives under the so-called system of quotas and penalties contained in the 1997 Act on Disabled Persons.<sup>77</sup> This system might be considered to be a limited form of reasonable accommodation in Polish law (however, it is not a duty of the employer to respond to created incentives – the employer is encouraged but not obliged to adopt certain measures which aim to include people with disabilities). 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 from the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych* – hereafter PFRON) reimbursement for adapting existing working stations to the needs of disabled people and creating new working stations, for adapting workplace premises, for adapting or buying equipment to facilitate the functioning of a person with disability in the workplace, for

<sup>73</sup> Ordinance of 26 September 1997, amended.

<sup>74</sup> Article 237 (15), Labour Code.

<sup>75</sup> Para. 45.1, Ordinance on general provisions on health and safety at work.

<sup>76</sup> Para. 48, Ordinance on general provisions on health and safety at work.

<sup>77</sup> On the divergence of opinions between those who are in favour of the system of economic incentives and those of the human rights approach, see the World Bank report *Disability and Employment in Poland* (Niepełnosprawność a praca w Polsce), December 2000, p. 36 and next. The report recommends a harmonious combination of both systems.

identifying by the departments of occupational medicine the relevant needs of persons with disability.<sup>78</sup>

The amendment of 20 December 2002 of the Act on Disabled Persons 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>79</sup>

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<sup>78</sup> Article 26, Act on Disabled Persons.

<sup>79</sup> Article 2.8 Act on Disabled Persons.

Furthermore, an employer who employs disabled people is entitled to receive a monthly subsidy for the remuneration of disabled employees.<sup>80</sup> The amount of the subsidy is related to the level of impairment of the disabled people employed and the proportion of disabled persons employed in the specific workplace.

In addition, the Act on Disabled Persons 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 low-level disability and seven hours a day, 35 hours a week for medium and high-level disability;<sup>81</sup>
- a disabled person cannot be employed for night shifts and cannot work overtime;<sup>82</sup>
- a disabled person has the right to an additional break of 15 minutes which should be treated as his/her working time;<sup>83</sup>
- people with medium or high-level disability have the right to additional holiday of 10 working days;<sup>84</sup>
- people with medium or high-level disability have the right to a leave of absence from work of up to 21 days per year whilst retaining their right to remuneration.<sup>85</sup>

One may wonder to what extent the above-mentioned measures could themselves constitute discrimination. They are targeted at the whole group of the disabled 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 working.

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>86</sup> This amount is determined according to the formula in which 40,65 per cent of an 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 those employed by the specific employer.

<sup>80</sup> Article 26a Act on Disabled Persons.

<sup>81</sup> Article 15.1-2 Act on Disabled Persons.

<sup>82</sup> Article 15.3 Act on Disabled Persons. This limitation does not include night watch services (security) and the 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>83</sup> Article 17 Act on Disabled Persons.

<sup>84</sup> Article 19.1 Act on Disabled Persons. 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>85</sup> Article 20.1 Act on Disabled Persons.

<sup>86</sup> See Article 21.1-2 Act on Disabled Persons.

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>87</sup> However, it should be noted that the Act on Disabled Persons has been amended more than 40 times since its adoption in 1997, which brings a certain element of uncertainty regarding the assistance of the state for this group of people.

In Polish law there is no definition of a “disproportionate burden” for employers.

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

There is no duty in Polish law to provide reasonable accommodation, therefore there is no justification defence.

It is difficult to assess how far the non-implementation of the duty to provide reasonable accommodation for disabled people can be counted as discrimination, since the Directive leaves the Member States a wide margin for action. The Directive requires employers to adopt measures “under national legislation”.

The Polish Labour Code explicitly prohibits discrimination based on disability. There is, however, no specific provision that would place an obligation on the employer to provide appropriate accommodation for a specific, individual disabled person. The system of incentives described above is not sufficient and, as a consequence, the majority of disabled people are excluded from the labour market. It is nevertheless difficult to judge the situation, since not many disabled people apply for positions and, if they do apply and are not accepted (though there is no data on this), they do not file a claim. There is no relevant case law in this field.

*β) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?*

In respect of discrimination on the ground of religion or belief the provision enabling members of any churches and any religious association to obtain days off from work or study during religious holidays might be interpreted as a form of providing reasonable accommodation.<sup>88</sup>

*χ) 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 Polish Constitution of 1997 provides some rights for disabled people:

“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 health care for [...] disabled people..” (Article 68)

<sup>87</sup> Article 14 Act on Disabled Persons.

<sup>88</sup> Article 42 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*).

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

The Polish Sejm adopted the Charter of Rights of Disabled People<sup>89</sup> in which it also confirmed the right to live in an environment free from functional barriers. This act remains a non-binding resolution only and does not have a direct binding effect.

The General Construction Law requires that public utility buildings and multi-family houses should be planned and constructed so as to ensure that disabled people have the necessary conditions to use them.<sup>90</sup> This is not, however, an obligation to reconstruct existing properties and in many instances many public buildings are still not easily accessible to the disabled. Also this obligation may be waived if it can be justified. The relevant Ordinance of the Minister of Infrastructure on technical conditions with which buildings must comply (Dz.U.02.75.690) regulates in some detail a number of technical standards.

According to the Law on Physical Culture (Dz.U.07.226.1675), all citizens (including inter alia people with various kinds and levels of disability) exercise an equal right to different forms of physical culture (meaning physical education and sport). According to the Law (Article 51), when designing a building site or the renovation of sport facilities, the security requirements and conditions must be included to enable the use of these facilities by people with disabilities. A special law of the Council of Ministers defines a procedure for providing opinions on the compliance of plans with these requirements.

The Ordinance of the Minister of Industry and Labour on hotels and other similar buildings (Dz.U.06.22.169) specifies in some detail particular requirements regarding the needs of disabled people (including the number of adapted rooms, parking spaces, accessible phone 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.

The Ordinance of the Minister of Health on the technical conditions for places where nursing and midwifery care is provided (Dz.U.06.56.397) stipulates that access to rooms for disabled people should be ensured. Similarly, the Ordinance on sanatoriums requires accessibility for wheelchairs.

Many other specialised acts have similar regulations. For instance, local government should provide at least one election point in the 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); conditions of movement/transport in cemeteries should take into account the needs of disabled people (Ordinance on cemeteries); pharmacies should be accessible for disabled people (Pharmaceutical Law); when building highways, public roads, railway buildings and 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.

<sup>89</sup> Sejm Resolution of 1 August 1997 Charter of Rights of Disabled People (*Uchwała Sejmu z 1 sierpnia 1997 Karta Praw Osób Niepełnosprawnych*).

<sup>90</sup> Article 5.1 point 4, Act of 7 July 1994 Construction Law (*Ustawa z 7 lipca 1994 Prawo budowlane*).



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 so-called “minimum curriculum” includes the issues of the needs of disabled people.

*δ) 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?*

There are numerous acts of law which refer to disability, although this is not the main subject of the text. Therefore, these provisions are dispersed across a number of texts (several were mentioned in point d) above). The acts of law listed in electronic databases of Polish law or on websites of NGOs specialising in disability issues are long.

The main Act is the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment for Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*). The Act establishes the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych* (PFRON) – a fund which distributes money and grants for various activities which aim to support and integrate disabled people.

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 of 1 August 1997.

An important piece of 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 (15 July 2003) with regard to the method of confirming disability and level of disability.<sup>91</sup>

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

Ordinance of the Minister of Sport (29 December 2005) with regard to sports stipends for members of the national team of disabled sports people and members of the paralympic team.

Ordinance of the Minister of Labour and Social Policy (13 September 2005) changing the ordinance on specific conditions for the provision of assistance *de minimis* to entrepreneurs running sheltered employment.

Ordinance of the Minister of Labour and Social Policy (24 May 2005) changing the Ordinance on financial subsidies for salaries of employees with disabilities.

<sup>91</sup> Rozporządzenie Ministra gospodarki, pracy i polityki społecznej z dnia 15 lipca 2003 r. w sprawie orzekania o niepełnosprawności i stopniu niepełnosprawności.



Ordinance of the Minister of National Education and Sport (18 January 2005) with regard to conditions for organising education and assistance for children and young people with disabilities and issues of adaptation in nurseries, schools and integration departments.

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) – regulated by the Act (20 June 1992) on the right to price relief on public transport.<sup>92</sup> There are also a number of waivers of various costs, 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.

## 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??*
- b) *Would such activities be considered to constitute employment under national law?*

Sheltered employment is regarded as employment in Polish law. 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 40 per cent, with 10 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 rooms used by the enterprise are 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>93</sup>

<sup>92</sup> Ustawa z dnia 20 czerwca 1992 r. o uprawnieniach do ulgowych przejazdów środkami publicznego transportu zbiorowego.

<sup>93</sup> Article 28 Act on Disabled Persons.

### 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 issue of citizenship and nationality requirements is often misunderstood by reason of the meaning of these terms in different contexts and in different countries. In Poland there is a very clear distinction between the term ‘citizenship’ (*obywatelstwo*), which is applied to specify the legal bond between an individual and the state, and the term ‘nationality’ (*narodowość*), which is applied to identify the national origin or affiliation of an individual.

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>94</sup> These regulations apply to all people working legally on the basis of an employment contract within Polish jurisdiction, which is basically equivalent to Polish territory, with some territorial exceptions (e.g. diplomatic missions<sup>95</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. First, there is the group of Polish citizens who have access to the labour market despite their nationality (national origin). Currently, representatives of 13 national or ethnic minority groups are considered to be living within the territory of the Republic of Poland.

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

- citizens of the Member States of the European Union;
- citizens of the countries with which EU has signed agreements on free movement of people;
- those granted refugee status on the territory of Poland;
- those granted so called “tolerated status” or who have temporary protection on Polish territory;
- those granted a permit to settle on Polish territory;
- those granted a permit for temporary residence in Poland;
- 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 criteria are the legality of the residence on the territory of the Republic of Poland.

<sup>94</sup> See Article 1-3, Labour Code, which do not include any criteria related to nationality or citizenship.

<sup>95</sup> See Article 6, Labour Code.

With regard to citizens of the Member States of the European Union, a number of changes were introduced into the Polish Act on Aliens with regard to the necessary adoption of the *acquis communautaire*.<sup>96</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>97</sup>

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

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

The research conducted for the purpose of drafting the current report has not indicated the existence of such a distinction.

### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? 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?*

According to Polish labour law, the possibility for the employer to be held liable for the actions of employees exists in the event of the instruction to discriminate. There are no direct provisions in labour law, particularly in relation to penal provisions, as to other types of employer responsibility in this context.

On the general basis of civil law, the State Treasury is responsible for actions causing damage perpetrated by a public servant while working in this capacity.<sup>98</sup> In the case of damage caused by discriminatory acts – mostly 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 responsibility of the employer for the actions of their employees.

<sup>96</sup> [Act of 13 June 2003 on Aliens, Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, 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>97</sup> Act of 22 April 2005 amendment to 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).

<sup>98</sup> Article 417 Civil Code.

There is, however, no legal basis for compensation claims against discrimination outside employment between private parties (only general civil regulations may be used)

## 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?*

National legislation applies to all sectors of public and private employment and occupation. The most relevant act in this context, the Labour Code, contains legal provisions for most issues related to employment and education. There are several additional pieces of legislation that lay down rules for specific issues of labour law.

With regard to private and public employment, any discrimination – in particular that based on any of the grounds listed in Polish legislation – is forbidden. This provision is rooted in the very principle of equal treatment, which is currently one of the most fundamental principles in labour law.

With respect to employees:

- all employees must be treated equally in respect of: concluding and terminating employment relations; and the terms of employment, promotion and access to vocational training aimed at upgrading professional qualifications. Employees must be treated equally, irrespective of, among other things, gender, age, disability, race, religion, nationality, political opinions, trade union membership, ethnic origin, religion and sexual orientation, as well as irrespective of whether a person is employed for an indefinite or definite period of time, full-time or part-time.<sup>99</sup>
- equal treatment in employment shall mean no discrimination in any manner whatsoever, direct or indirect, for any of the reasons listed above.<sup>100</sup>
- employees have the right to equal pay for equal work or for work of the same value.<sup>101</sup> The term “pay” encompasses all elements of remuneration, irrespective of their name or character, as well as other benefits or services related to employment that are granted to employees in pecuniary or non-pecuniary form.<sup>102</sup>

<sup>99</sup> Article 18<sup>3a</sup> para 1 Labour Code.

<sup>100</sup> Article 18<sup>3a</sup> para 2 Labour Code.

<sup>101</sup> Art 18<sup>3c</sup> para 1 Labour Code.

<sup>102</sup> Article 18<sup>3c</sup> para 2 Labour Code.

In self-employment the principle of non-discrimination is not explicitly mentioned at a statutory level. However, the principle of equal treatment in self-employment is also provided for: everyone has the right to undertake, conduct and terminate economic activity with equal rights and pursuant to conditions determined by law. A public administration body cannot require or make its decision related to undertaking, conducting or terminating economic activity by the person concerned conditional on compliance with any additional requirements, in particular those on submitting documents or disclosing data, that are not foreseen by law.<sup>103</sup>

There is also a stipulation concerning non-discrimination in access to public financial aid. The State shall provide entrepreneurs with public aid on the terms and in the form provided for in separate provisions, with due respect of the principles of equality and fair competition.<sup>104</sup>

**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 from the private sector?**

Without prejudice to certain discriminatory conduct that is nevertheless justified (see Section 2.3 (b)), the violation of the principle of equal treatment in employment is understood as different treatment by the employer of the employee for one or more prohibited reasons, resulting in, inter alia:

- 1) refusal to conclude or terminate an employment contract;
- 2) disadvantageous conditions related to remuneration or other terms of employment or failure to grant a promotion or other benefits related to employment;
- 3) failure to select an individual for vocational training aimed at upgrading professional qualifications;
- 4) unless the employer can demonstrate that s/he was driven by objective reasons.<sup>105</sup>

This provision contained in Labour Code specifies the scope of anti-discrimination provisions with regard to specified aspects of employment. It is worth emphasising again that, as far as the principles of anti-discrimination law are concerned, Polish law is in line with the Directives. There is no differentiation between the public and private sector. However, when it comes to ‘escape clauses’, that is, the exceptions which allow the employer to take discriminatory actions, then Polish legislation determines them in a broader way in comparison with those adopted by EU law.

The provisions of the Labour only regulate labour contract relations and do not apply to self-employment or independent professions. This is something which still needs to be addressed by the legislator. As yet we can report only on the general provisions of the Constitution and relevant acts. According to Article 65 of the Constitution, everyone shall have the freedom to choose and to pursue their occupation and to choose their place of work.

<sup>103</sup> Art 6, Act of 2 July 2004 on Freedom of Economic Activity (*Ustawa z 2 lipca 2004 o swobodzie działalności gospodarczej*).

<sup>104</sup> Article 7, Act on Freedom of Economic Activity.

<sup>105</sup> Article 18<sup>3b</sup> para 1, Labour Code.

Exceptions shall be specified by statute.

In the case of self-employment, provisions of the Act on Freedom of Economic Activity (2004) apply which state in Article 6. 1 that the exercising of economic activities is free to everyone on an equal basis, under the conditions defined by legal regulations.

In Poland there are also a number of “independent professions”. To a great extent, their self-regulatory bodies control access to the profession (for instance advocates, legal advisors and architects). Access to these professions depends on the fulfilment of various requirements which are set out by acts of parliament regulating particular professions as well as regulations of professional self-government bodies. The acts of law establishing particular professions do not include general anti-discrimination clauses but in cases where a person feels discriminated against by a self-government council regarding access to a certain profession, he or she may appeal to the Administrative Court (which determines the legality of the particular admission decision), claiming that a particular law as well as the right to freedom of profession (Article 65 of the Constitution) has been violated.

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

- a) *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.*

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 Labour Market, 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>106</sup>

Similarly, other institutions of the labour market – employment services for the unemployed and those seeking work – must also operate in a non-discriminatory manner specified by law. The Act on Employment 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>107</sup>

Likewise, employers are obliged to provide district labour offices with current information concerning the available jobs or pre-employment training positions. While carrying out these duties they 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>108</sup>

<sup>106</sup> Article 18a.4 Act on Employment.

<sup>107</sup> Article 36.4 item 3, Act on Employment.

<sup>108</sup> Article 36.5 Act on Employment.



Correspondingly, the employment counselling provided by district labour offices and centres for information and professional career planning of the regional voivodship labour offices (a voivodship is one of the 16 administrative regions in Poland) shall be carried out according to the following principles:

- 1) accessibility to professional counselling for the unemployed and those seeking work and for employers;
  - 2) voluntary character of using professional counselling services;
  - 3) equality in using professional counselling services, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion and religion or for reasons of trade union membership.<sup>109</sup>
- b) *In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78?*

Although occupational pensions are regulated by the Act on Retirement and Disability Pensions from the Social Insurance Fund<sup>110</sup>, the anti-discrimination clause regarding occupational pensions is included in the Act on the Social Security System<sup>111</sup>, which is the framework legislation for the social security sector. This clause limits the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status.<sup>112</sup> According to the Ministry of Labour and Social Policy, the anti-discrimination clause ought to be broadly interpreted, but the listing of these three criteria is due to the fact that they may play an important role in the area of social security.<sup>113</sup> On the other hand, experts are of the opinion that Article 2a of the Act on the Social Security System has proved to be an “empty norm”, which is hardly ever applied by judges.<sup>114</sup> All the other grounds of discrimination should be included in the field of social security and, in this way, also in respect of occupational pensions.

In Section 0.3 above there is a summary of a case in which the Constitutional Tribunal found particular provisions of law discriminatory and unconstitutional.

<sup>109</sup> Article 38.2 Act on Employment.

<sup>110</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*) [henceforth: Act on Retirement].

<sup>111</sup> Act of 13 October 1998 on the Social Security System (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).

<sup>112</sup> Article 2a.1 Act on the Social Security System.

<sup>113</sup> Mazur-Rafał M. and Zienkiewicz E., Report on measures to combat discrimination in the 13 candidate countries(VT/2002/47). Country report Poland. May 2003, MEDE European Consultancy and Migration Policy Group [henceforth: Mazur-Rafał, Zienkiewicz, Report... 2003], p. 6.

<sup>114</sup> Weyss B., Analysis of the status quo of Polish Anti-Discrimination Legislations and Policies, Conducted 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) January 2004 [henceforth: Weyss, Analysis of... 2004], p. 37.



### **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 *Starosta* (a local government organ) initiates, organises and finances training for the unemployed, for people receiving a training grant and for reserve soldiers, in order to improve their chances of employment or other form of paid work, upgrade their vocational qualifications or improve professional activity. When sending such a person for training, the principle of equality in access to training shall be complied with, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religion or trade union membership.<sup>115</sup>

With regard to access to vocational training and vocational guidance in employment relationships, the anti-discrimination provisions are generally included in most provisions concerning this issue. This part of legislation is in line with the provisions of the Directive.

There is no special anti-discrimination provision regarding vocational training outside the employment relationship.

<sup>115</sup> Article 40.6 Act on Employment.



### **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).

In general, there is an extensive body of legislation concerning trade unions. It does not include any general non-discrimination clause. The law on trade unions provides that the right to establish and join trade unions is vested in all employees, irrespective of the type of their employment relationship, as well as members of agricultural co-operative societies and people employed by way of agency contracts, unless they are employers.<sup>116</sup> No possible discriminatory grounds are mentioned.

As for the employers' associations, the Act on Employers' Organisations<sup>117</sup> does not include any anti-discriminatory provisions. It states merely that all employers have the right to create such organisations.

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

*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. There are no specific provisions that would lead to restrictions of an individual's rights to social assistance, social security or health care on the grounds of religion or belief, age, disability or sexual orientation. There are some provisions concerning the need for special treatment of disabled people, but they provide for positive discrimination in relation to such people.

<sup>116</sup> Article 2.1, Act on Trade Unions.

<sup>117</sup> Act of 23 May 1991 on Employers' Organisations (*Ustawa z 23 maja 1991 r. o organizacjach pracodawców*).

The Act on Medical Treatment, when determining access to medical services and, in particular, so-called ‘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), provides that such lists should be conducted in line with the principle of just, equal, anti-discriminatory and fair access to medical treatment.<sup>118</sup> In this way, the Act prohibits discrimination, though the specific grounds of racial or ethnic origin are not mentioned. However, this does not exclude them, since this anti-discrimination provision is of a general nature.

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

*This covers a broad category of benefits which may be provided by either public or private actors and which are granted 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.*

To draw a conclusion from a complex combination of provisions pertaining to a number of different fields, it may be said that discrimination related to social advantages is unlawful. For example, in the field of access to health care by non-citizens, all foreigners whose stay in Poland is on the basis of an employment visa, temporary residence permit, permission to settle, tolerated status or who are recognised as refugees in Poland or are provided with temporary protection are eligible for free health care. These provisions are very broad indeed and cover the majority of foreigners whose stay in Poland is longer than on the basis of a tourist visit.

There is a rather complex system of different allowances and grants. Most of them are not discriminatory, such as a child birth 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>119</sup>

The death allowance is payable to any person who covers the costs of a funeral.<sup>120</sup> However, a same-sex partner, unlike a spouse, would have to supply documentary evidence of the costs incurred.<sup>121</sup>

As far as possible distinctions arising from the ground of age are concerned, there are no specific provisions that would regulate this issue.

<sup>118</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>119</sup> Article 9 Act of 28 November 2003 on Family Benefits (*Ustawa z 28 listopada 2003r. o świadczeniach rodzinnych*).

<sup>120</sup> Article 78.1 Act on Retirement.

<sup>121</sup> Article 79.1 Act on Retirement.

### 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. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

Generally, discrimination in education is prohibited – the Act on Education 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, 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. However, access to higher education institutions is granted to all Polish citizens equally and also foreigners (with some exceptions).<sup>122</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 Act on Education, 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>123</sup> The education system must ensure that disabled children or children with behavioural problems have the possibility of receiving education in all types of schools, in accordance with their individual developmental and educational needs and predispositions. In addition, care must be provided for pupils with significant or complex disorders through the possibility of creating individually tailored learning processes, methods and programmes of teaching and rehabilitation activities.<sup>124</sup>

The right of every citizen of the Republic of Poland to an education is a constitutional right.<sup>125</sup> Education to the age of 18 is obligatory and free in state schools.<sup>126</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.<sup>127</sup>

<sup>122</sup> Article 43 Act of 27 July 2005 on Higher Education (*Ustawa z 27 lipca 2005r. prawo o szkolnictwie wyższym*).

<sup>123</sup> The circumstances and manner of realising these goals were described in the Ordinance of the Minister of National Education of 24 March 1992 as relating to the organisation of education in a way which enables the upholding of the national, ethnic and linguistic identity of pupils belonging to national minorities.

<sup>124</sup> Article 1, Act of 7 September 1991 on the Education System (*Ustawa z 7 września 1991 r. o systemie oświaty*) [henceforth: Act on Education].

<sup>125</sup> Article 70 Constitution.

<sup>126</sup> The manner of fulfilling the education obligation is defined by the 1991 Act on Education. The regulations for the functioning of higher education institutions were defined by the 1990 Act on Higher Education.

<sup>127</sup> Ordinance of the Minister of National Education of 1997 relating to specific regulations and conditions for providing and withdrawing permission to establish a state school by a legal or physical person; Ordinance of the Minister of National Education of 2001 relating to outline statutes for state pre-schools and state schools.

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.<sup>128</sup>

In the field of education, the Polish government has invested serious efforts into guaranteeing full equality and non-discrimination of members of national minorities. Children of minority origin have equal access to all schools in the same way as other pupils.<sup>129</sup> Also, access to institutions of higher education is granted to all Polish citizens equally.<sup>130</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>131</sup> This often leads to failure at school, dropping out or even to transfer to special schools for children with learning disabilities.<sup>132</sup>

<sup>128</sup> Ordinance of the Council of Ministers of 1993 relating to the conditions, form and mode of granting and dispensing, as well as the amount of, material assistance to schoolchildren; Ordinance of the Minister of National Education and Sport of 2001 relating to regulations for the division of the general education subsidy for units of local government in 2002.

<sup>129</sup> Article 1.1 Act on Education.

<sup>130</sup> Article 43 Act of 27 July 2005 on Higher Education.

<sup>131</sup> *Information from the Commissioner for Civil Rights Protection: 2001*, p. 349 and ff.

<sup>132</sup> Although there is no state-wide data regarding the number of Roma students attending special schools, the numbers available from the Malopolska Voivodship for the school year 2002/2003 show an over-representation of Roma children in these schools (Roma constituted 20 per cent of all the children). Roma children with learning difficulties were sent to psychological-pedagogical clinics to test their intellectual development. Some children were unable to perform properly in the tests, not because they had learning difficulties, but because of their poor command of Polish. 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.

The problems in the education of Roma children are connected with the economic situation of Roma families and the indifferent attitude which some Roma families present towards education,<sup>133</sup> as well as a low level of activity on the part of the state in terms of ensuring suitable conditions for the education of Roma in schools in the past.<sup>134</sup> 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 tolerates even now to some extent the fact that Romani parents often do not fulfil the obligation to send their children to school.

It should, however, be noted that the situation of Roma education is gradually improving. It is to some extent possible due to a clear change in state policy, which aims at eliminating Roma classes and favours the regular education system. Several sources confirm that the overall number of segregated 'Romani classes' or 'remedial classes' has significantly dropped to around 10-20 with around 200 pupils.<sup>135</sup> Secondly, there is also some improvement regarding pre-schooling of Roma children due to new pre-schools opened up in areas with significant Roma populations.<sup>136</sup> Thirdly, the only available data on school attendance by Roma (for the Malopolska Voivodship) show an increase from previous estimates on a level of around 70% to 80% in the school years 2001/2002 and 2002/2003.<sup>137</sup> Fourthly, there are some initiatives addressed at certain groups of Roma children (e.g. scholarships for children with outstanding artistic talent or for Roma students) which aim to establish equal opportunities.<sup>138</sup>

These positive changes were possible due to a joint effort of the Polish public administration (implementation of the Programme for the Roma Community in Poland which was initiated in 2004 and should be realised to 2013, alarming reports from the Commissioner for Civil Rights Protection, the Group for National Minorities within the Ministry of Interior and Administration and relevant Commissions of the Sejm), as well as the involvement of Roma representatives and organisations. In this context the positive role of 'Roma education assistants',<sup>139</sup> and 'assistant teachers',<sup>140</sup> should be pointed out. The changes should, however, be seen as the beginning of a long-term process. More information on this issue is provided in Section 5 below (positive action).

Poland does not only limit itself to a guarantee of non-discrimination, it also carries out some positive actions. National and ethnic minorities have the right to create their own educational institutions.<sup>141</sup>

<sup>133</sup> *Raport – Romowie o edukacji swoich dzieci (na przykładzie Cyganów Karpackich)*[Report: the Roma on the education of their children (based on the example of the Carpathian Roma)], Oświęcim 1997, p. 11, 17 and next. Report published by the Association of Roma in Poland, commissioned by the Minister for National Education.

<sup>134</sup> *Information from the Commissioner for Civil Rights Protection: 2001*, p. 349 and next., Mirga A. (2001) *Addressing the challenges of Romani children's education in Poland – past and current trends and possible solutions*, [http://www.osce.org/documents/odihr/2003/01/1505\\_en.pdf](http://www.osce.org/documents/odihr/2003/01/1505_en.pdf)

<sup>135</sup> Poland, Ministry of Interior and Administration (2003), *Programme for the Roma Community in Poland (Program na rzecz społeczności romskiej w Polsce)*, [http://www.mswia.gov.pl/index\\_a.html](http://www.mswia.gov.pl/index_a.html)

<sup>136</sup> *Roma in public education*, op. cit., pp. 19-20.

<sup>137</sup> *Roma in public education*, op. cit., p. 6.

<sup>138</sup> *Roma in public education*, op. cit., p. 19.

<sup>139</sup> They are responsible, among other things, for contacting parents, supervising school attendance and assisting with homework.

<sup>140</sup> They assist 'normal' teachers by making use of their special education in intercultural pedagogy and of experience with bilingual children.

<sup>141</sup> Article 35.2 Constitution.



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>142</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 the teaching of minority languages, the up-dating of textbooks and insufficient financial resources (despite the extra 20 per cent subsidy). According to Article 13 of the Act on the Education System, schools and public institutions have an obligation to enable schoolchildren to maintain their sense of national, ethnic, linguistic and religious identity and, in particular the study of their language and their own history and culture. On a motion 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>143</sup>

Polish domestic law relating to the education of people who belong to national minorities should be recognised as consistent with international and European standards. An assessment of the state of education for national and ethnic minorities is made difficult by the lack of precise data on this issue. In the study covering a number of minorities and based, among other things, on interviews with representatives of these minorities,<sup>144</sup> the problems most frequently mentioned by national minorities are 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 and from this point of view it is 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 Act on the Education System (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). The representatives of the Roma community have different views on whether the Roma language should be used in schools. Part of the community is of the opinion that it should not be. However, a number of measures have been

<sup>142</sup> The legal ground for these schools is Article 13 of the Act on Education and, issued on its basis, the statutory ordinance of 24 March 1992 of the Minister of National Education on the organisation of training enabling the upholding of national,

ethnic and language identity of pupils belonging to national minorities.

<sup>143</sup> The conditions and manner for carrying out these tasks were defined in an ordinance from the Minister of National Education of 1992 relating to the organisation of education enabling the national, ethnic and linguistic identity of schoolchildren belonging to national minorities to be sustained.

<sup>144</sup> Right to education. Monitoring report, Helsinki Foundation for Human Rights, Warsaw 2002, Appendix: Right to education enjoyed by national minorities, pp. 135-160.





taken in order to convince parents to send children to school (see Section 5 on positive action below).

In July 2007 a first textbook in Roma was prepared and published (500 copies) (*Miri szkoła. Romano elementaro*). Prepared as a local initiative (and funded by the Ministry of Interior and Administration), it attracted the attention of Roma community and might also be translated into other Roma dialects in the future.

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

*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.*

It must be noted that the relevant part of the Directive has not been implemented into Polish law. However, the draft law on equal treatment provides for appropriate protection in not distinguishing between goods and services available to the public, as formulated in the above question.

There is no law regulating the operation of private clubs etc. They do exist (for instance membership clubs) but they operate on a general basis and use freedom of economic activity (establishing different internal rules). There is no body which oversees that these internal rules are constitutional and comply with anti-discrimination law or the directives. Since there were no cases of this kind 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 access to and supply of goods and services available to the public is not related to any discriminatory criteria. It does not mean that everyone in all circumstance can have access to them – access can be limited by, for example, financial capacity to pay for certain goods or services. In some cases, the law expressly prohibits discrimination in granting access. For example, the Energy Law stipulates that any enterprise engaged in the transfer or distribution of gaseous fuel or electrical energy is obliged to ensure that this transfer or distribution service is provided to all recipients on the basis of equal treatment.<sup>145</sup>

The Code of Minor 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 sale or catering business who hides the goods meant for sale or deliberately refuses to sell them without a well-founded reason is liable to a fine.<sup>146</sup> According to the 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 in charge of supervision, an employee or an estate agent.<sup>147</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>148</sup>

<sup>145</sup> See Article 4.2, Act of 10 April 1997 Energy Law (*Ustawa z 10 kwietnia 1997 Prawo energetyczne*).

<sup>146</sup> Article 135 Code of Minor Offences of 20 May 1971 (*Kodeks wyroczeń z 20 maja 1971r.*)

<sup>147</sup> Resolution of the Supreme Court of 17 March 2005, signature I KZP 3/05.

<sup>148</sup> Article 138 Code of Minor Offences.

Although these provisions stem from the communist regime and were released 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 access and supply of goods and services which are available to the public<sup>149</sup>. Both articles can be used to counteract discrimination, even though the intention of the legislators was different.

### 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 of the Roma and other minorities or groups.*

There is no law on non-discrimination in housing (apart from the general constitutional prohibition of discrimination (Article 32) and policy directions on housing (Article 75)).

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 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 Act on Housing Allowances<sup>150</sup> and the Act on the Protection of Tenants' Rights.<sup>151</sup> They contain no provisions of a discriminatory nature. At the same time, Polish domestic legislation seems not to have any particular mechanisms for combating discrimination in housing.

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 Civil Code, regulating the succession of lease relationships, refers to people who lived in de facto cohabitation with the lessee.<sup>152</sup> This raises the question of what constitutes de facto cohabitation and whether it applies to homosexual partners. There is no legal definition of this term and no clear answer to this question.

The situation of a considerable number of Roma in terms of housing and living conditions is drastic<sup>153</sup> (especially Bergitka/Carpathian Roma<sup>154</sup>) and even though the level of renovation and other activities is increasing, it is still just the beginning. There are still numerous flats with no toilets, kitchens or running water.

<sup>149</sup> Liegl B., Perchinig B., and Weyss B., Brochure on Anti-discrimination Legislation and Policies in Poland. Conducted 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>150</sup> Act of 21 June 2001 on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*).

<sup>151</sup> Act of 21 June 2001 on Protections 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>152</sup> Article 691 Civil Code.

<sup>153</sup> See, for instance, *Information from the Commissioner for Civil Rights Protection: 2001*, p. 348.

<sup>154</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 differs depending on sources of information: according to the 2002 Nationwide Census there were 12,731 Roma, Roma organisations claim that there are around 30,000 Roma in Poland, international sources give the number of 50-60,000.

The access of Roma to housing allowances (2001 Act on Housing Allowances) is very limited, since one of the conditions of 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 the decisions on the granting of social housing it is difficult to estimate the scale of this problem.

Despite the fact that the level of renovation has increased, in many cases local governments are still failing to deal with the drastic situation and often argue that many people suffer from poor living conditions and there is no need for preferential treatment of Roma.

One interesting discrimination case in this respect should be mentioned. A number of Roma in Limanowa municipality have no access to running water. Within the Programme for Roma special funds were allocated to install a water supply (water pipe). However, it reached a number of other households and excluded some of the Roma (they only have access to wells) who were the original beneficiaries of the project (three grant allocations in the years 2004, 2005 and 2007). The argument was that the legal status of buildings was not regulated (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, considering the poor living conditions they face, as described above.



## 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?*

As a rule, all people should be treated equally in matters of employment and access to the labour market, since the constitutional provision and other provision of Polish legislation confirm the general principle of non-discrimination. There are, however, some exceptions laid down, according to which there is the possibility of distinction among employees. The Labour Code states that the principle of equal treatment in employment is not violated by non-employment of a person on the basis of one or more grounds listed in the discrimination definition, if it is justified on account of the type of work, working conditions or occupational requirements laid down for employees.<sup>155</sup>

Polish law does not transpose the requirements of the Directive exactly, especially in relation to the criteria of different treatment – “the objective is legitimate and the requirement is proportionate”. The Polish Labour Code only mentions “justifiability”. This leads to the conclusion that, in this context, national legislation does not comply with the Directive and to rectify the situation, the “escape clause” should be more narrowly defined.

Furthermore, the additional qualifiers referring to occupational requirements (“genuine and determining”) were not included in the respective provision of the Labour Code. Instead, the legislator introduced a more general concept of “occupational requirements” without any further specification. This is clearly less favourable and thus less protective of an employee allegedly discriminated against.

### 4.2 Employers with an ethos based on religion or belief

*α) 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 Labour Code stipulates that different treatment of employees on the ground of religion or belief does not amount to a violation of the principle of equal treatment in employment, if the employee’s religion or belief constitutes a significant and justified occupational requirement in relation to the type and character of the activity carried out within the church or other religious associations, as well as organisations whose activities are directly related to religion or belief.<sup>156</sup>

<sup>155</sup> Article 18<sup>3b</sup> para 2 point 1, Labour Code.

<sup>156</sup> Article 18<sup>3b</sup> para 4, Labour Code.

- β) 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 other rights to non-discrimination?*

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.

### **4.3 Armed forces and other specific occupations**

- 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 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 tasks.

Members of the armed forces who are employed as professional soldiers (*żołnierze zawodowi*) are compelled to retire when they reach the age of 60 irrespective of their gender, or when they are held by a military medical commission to be unable to continue their service.<sup>157</sup> There has not yet been any public debate as to whether this restriction is compatible with Directive 2000/78.

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

Similarly to the situation of professional soldiers, there are exceptions relating to employment in other services. Police officers must demonstrate the physical and mental capability to undertake service in the armed forces.<sup>158</sup>

<sup>157</sup> Article 111 point 3 and 5, Act of 11 September 2003 on Military Service of Professional Soldiers (*Ustawa z dnia 11 września 2003 r. o służbie wojskowej żołnierzy zawodowych*). In general, at the age of 60 professional soldiers are entitled to a retirement pension (they must show a record of 15 years in the army), see Article 12, Act of 10 December 1993 on Retirement Scheme for Professional Soldiers and Their Families (*Ustawa z dnia 10 grudnia 1993 r. o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin*).

<sup>158</sup> Article 25.1, Act of 6 April 1990 on the Police (*Ustawa z 6 kwietnia 1990 r. o Policji*).

If they are held by a medical commission to be permanently incapable of continuing their service, they are required to leave the service.<sup>159</sup> Similar provisions were laid down for officers of the internal security agency, foreign intelligence agency,<sup>160</sup> border guards,<sup>161</sup> government security office,<sup>162</sup> emergency fire service<sup>163</sup> and the prison service.<sup>164</sup> Police officers and officers of the other above-mentioned services are entitled to a police retirement pension after 15 years of service<sup>165</sup> but can continue their employment after reaching that age.

- c) *Are there cases where religious institutions can 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 (example: the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? 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 organization) is taught in schools. Alternatively, for pupils not willing to take part in religious studies classes, a course on ethics should be organised, which, however, exists more in theory than in practice and causes a number of problems – some cases have already reached the European Court of Human Rights and have been communicated to the Polish Government (the case of Krynicki<sup>166</sup> and the case of Grzelak<sup>167</sup>).

Based on the Ordinance of the Minister of Education on conditions and ways of organising courses on religion in public nurseries and schools (14 April 1992, the relevant part amended in 1999), 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 of parliament on relations between the state and specific religions). 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.

<sup>159</sup> Ibidem, Article 41.1 point 1.

<sup>160</sup> See Article 44 point 5 and Article 60.1 point 1, Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency (*Ustawa z 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu*).

<sup>161</sup> See Article 31.1, and Article 45.1. point 1, Act of 12 October 1990 on the Border Guard (*Ustawa z 12 października 1990 r. o Straży Granicznej*).

<sup>162</sup> See Article 20.1 and 35.1 point 1, Act of 16 March 2001 on the Government Security Office (*Ustawa z 16 marca 2001 r. o Biurze Ochrony Rządu*).

<sup>163</sup> Article 28 and Article 43.2 point 1, Act of 24 August 2001 on State Fire Emergency Service (*Ustawa z 24 sierpnia 1991 r. o Państwowej Straży Pożarnej*).

<sup>164</sup> Article 24.1 and Art 39.2 point 1, Act of 26 April 1996 on the Prison Service (*Ustawa z 26 kwietnia 1996 r. o Służbie Więziennej*).

<sup>165</sup> Article 12.1, Act of 18 February 1994 on 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*).

<sup>166</sup> 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.

<sup>167</sup> Application no. 7710/02, GRZELAK against Poland (Lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools: communicated.)



The employment contract for teachers of religion has a double character – it is a lay contract (the state school pays the salary) but it also mirrors the autonomy of particular faiths. In the event that permission is taken back from the particular religious organization, the teacher automatically loses the right to teach religion. Depending on the status of the teacher this means automatic termination of the employment contract or termination according to labour law (within a given paid period).<sup>168</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.

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<sup>168</sup> Article 23.2 point 6 Act of 26 January 1982 Teachers' Charter (*Ustawa z 26 stycznia 1982r. Karta Nauczyciela*); Article 52 para. 1 Labour Code.

#### 4.4 Nationality discrimination

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

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

The 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 Religion 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 provision 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 definition contained in the international treaties, such as 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)?*

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, the obligation to do military service, limitations in holding public office or restrictions in purchasing real estate (which do refer to nationality/citizenship). Holding Polish citizenship is, for instance, an obligatory condition for a number of public posts, including all civil servants, public servants, professional soldiers, police forces and special forces and judges. Also, 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 – nominated and certified (*mianowany, dyplomowany*) with the exception of nationals of other EU and EFTA Member States.

## 4.5 Work-related family benefits

*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 employee and their partner. Certain employers limit these benefits to the married partners 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) *Does national law permit an employer to provide benefits that are limited to those employees who are married?*

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. According to the provisions of the Act on Social Insurance in the case of Accidents in the Workplace and Occupational Diseases<sup>169</sup> there are certain social benefits provided to the family of a deceased individual. In addition, there is a special pension provided for orphans.

There are also some family benefits guaranteed by the state for parents or other people bringing up children regardless of their marital status under the condition that their income is lower than a certain threshold.<sup>170</sup>

- b) *Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

No such exceptions have been identified in the course of research undertaken for this report.

## 4.6 Health and safety

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

*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)?*

In respect of health and safety, any exceptions may only be justified by reasons of public security, public order, health, morality or the rights and freedoms of other people. This clause creates a very broad scope of guarantee which aims to eliminate any possible discrimination.

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

<sup>169</sup> Act of 30 October 2002 on Social Insurance in the case of Accidents in the Workplace and Occupational Diseases (Ustawa z 30 października 2002 o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych).

<sup>170</sup> Article 4 and 5, Act of 28 November 2003 on Family Benefits (Ustawa z dnia 28 listopada 2003 r. o świadczeniach rodzinnych).

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.

## 4.7 Exceptions related to discrimination on the ground of age

### 4.7.1 Direct discrimination

- a) *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 European Court of Justice in the Case C-144/04, Mangold ?*

Situations in which there is direct discrimination based on age are allowed under the Polish legal system but in clearly specified situations (for details see next sections below). Generally, they match the exemptions referred to in the Directive and pass the test provided therein. At the moment the above-mentioned case has not been taken into account in a direct way.

- b) *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 Section 0.3 noting the case of the Constitutional Tribunal which found the law on pensions discriminatory<sup>171</sup>.

<sup>171</sup> 23 October 2007 (Sygn. akt P 10/07).

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

According to Polish law, individuals (women and men equally) are obliged to contribute to pensions once they commence employment<sup>172</sup>. There are fixed ages for entitlement to benefits.<sup>173</sup> The basic retirement age for men is 65 and for women 60. Nevertheless, some labour groups have special preferences, e.g. miners<sup>174</sup>, railway workers, teachers, regular soldiers, police officers and officers of other state enforcement agencies, judges and prosecutors.

#### **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 of 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 22.00-06.00;
- a list of jobs which may not be undertaken by young people is also provided.<sup>175</sup>

Polish legislation provides for some benefits for people with caring responsibilities: maternity leave<sup>176</sup>, parental leave<sup>177</sup>, care allowance<sup>178</sup>, some provisions for people caring for disabled people (e.g. free transportation as the accompanying carer of a disabled person).

<sup>172</sup> Article 6 Act on Social Security.

<sup>173</sup> Article 24 and 27 Act on Retirement.

<sup>174</sup> Miners achieved favorable legislative changes, in particular amending the retirement age to 55: Chapter 3a Act on Retirement came into force on 1 January 2007.

<sup>175</sup> See Article 190-204 Labour Code.

<sup>176</sup> Article 180 Labour Code and Chapter 6 Act on Pecuniary Indemnity from Social Insurance in Case of Disease or Maternity of 25 July 1999 [henceforth: Act on Indemnity in Case of Disease] (Dz.U. 1999.60.636).

<sup>177</sup> Article 186 Labour Code.

<sup>178</sup> Chapter 7 Act on Indemnity in Case of Disease.

### 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 to be considered 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>179</sup> may become employed if they obtain medical approval for the specific kind of work and occupational qualifications that could 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 for by educational requirements, depending on the type of training.

With respect to retirement age, the legal system considers the occupational pension as a right and not as an obligation. This means that a person may continue to work after reaching retirement age; under certain circumstances the fact of continuing work or employment may lead to a restriction of the amount of pension being paid out.

There are age requirements in relation to the status of an unemployed people. Such status and the rights derived from it (unemployment benefit, training, public job counselling, etc.) may be obtained only by people between the age of 18 and 65 (60 for women).<sup>180</sup>

There are specific age limits concerning some parts of the public sector. Minimum age limits exist e.g. within the judiciary. According to the Law on the Organisation of the Judiciary, in order to become a judge of the first instance court, a person must be more than 29 years old.<sup>181</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 the second instance and to the Supreme Court requires a certain length of practice and therefore this is an indirect age limit.<sup>182</sup> As regards administrative courts, there is an age limit for judges at regional administrative courts who must be 35 or over.<sup>183</sup> To become a judge of the Head Administrative Court, the minimum age is 40 years, unless the candidate has been a judge at the regional administrative court for at least three years.<sup>184</sup> Furthermore, there is a minimum age limit of 30 to become an assistant judge (assessor) at the regional administrative court.<sup>185</sup> The minimum age for becoming

<sup>179</sup> In 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>180</sup> Article 2.1 point 2 items (a) and (b), Act on Employment.

<sup>181</sup> Article 61.1 point 5 Act of 27 July 2001 Law on the Organisation of the Judiciary (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*).

<sup>182</sup> Article 63.1, Article 64.1 Law on the Organisation of the Judiciary, and Article 22.1 point 6 Act of 23 November 2002 on the Supreme Court (*Ustawa z 23 listopada 2002 o Sądzie Najwyższym*).

<sup>183</sup> Article 6.1 point 5 Act of 25 July 2002 Law on the Organisation of the Administrative Judiciary (*Ustawa z dnia 25 lipca 2002 Prawo o ustroju sądów administracyjnych*).

<sup>184</sup> Article 7.1 Law on the Organisation of the Administrative Judiciary.

<sup>185</sup> Article 26.1 point 2 Law on the Organisation of the Administrative Judiciary.

prosecutor is 26 years.<sup>186</sup> Under the Law on Notaries, one of the conditions of becoming a notary is to be at least 26.<sup>187</sup>

Members of certain professions can retire after 15 years of service. However, they cannot be compelled to retire upon completing this period of service and may continue to work. This affects in particular police officers, fire fighters, officers of the Government Security Office, officers of the internal security agency, border guards and prison officers. However, a police officer may be compelled to retire upon completing 30 years of so-called retirement-counted time (i.e. time which counts for the calculation of the retirement pension)<sup>188</sup>. Similar rules apply to members of the other above-mentioned uniformed professions.

There are special age limits for members of a number of professions:

- judges – judges retire at the age of 65, unless the National Judiciary Council agrees on an individual continuing to act as a judge. However, they cannot continue beyond the age of 70.<sup>189</sup> Similar rules apply to prosecutors<sup>190</sup>;
- professional soldiers – professional soldiers are compelled to retire when they reach the age of 60 irrespective of their gender<sup>191</sup>;
- teachers – teachers' employment contracts expire when they reach the age of 65. If a teacher has not obtain the right to retirement by that time, the head teacher may prolong the length of employment, but not beyond the age of 67<sup>192</sup>;
- notaries – the Minister of Justice may compel notaries to retire when they reach the age of 70.<sup>193</sup>

Furthermore, there are special rules concerning retirement age stemming from the special character of the profession (e.g. due to the risk to health):

- miners may retire upon reaching the age of 55, provided that they were employed for at least 20 years (women) or 25 years (men) as miners or performed equivalent work. This concerns miners born before 1949. For other miners the retirement age is 50, provided the above conditions are met.<sup>194</sup>
- railway workers may retire at the age of 55 (women) or 60 (men), provided they were born before 1949 and have served, for the purposes of retirement calculation, for longer than 20 years (women) or 25 years (men).<sup>195</sup>

<sup>186</sup> Article 14.1 point 5 Act of 20 June 1985 on Public Prosecutor's Office (*Ustawa z dnia 20 czerwca 1985r. o prokuraturze*).

<sup>187</sup> Article 11 point 7 Act of 14 February 1991 Law on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*).

<sup>188</sup> Article 41 Section 2 Point 4 of the Police Act.

<sup>189</sup> Article 69.1 Law on the Organisation of the Judiciary.

<sup>190</sup> Article 62a.1 Act on the Public Prosecutor's Office.

<sup>191</sup> Article 111 point 5 Act on the Service of Professional Soldiers.

<sup>192</sup> Article 23.1 point 4 Act of 26 January 1982 Teachers' Charter (*Ustawa z 26 stycznia 1982r. Karta Nauczyciela*).

<sup>193</sup> Article 16.3 point 1 Law on Notaries Public.

<sup>194</sup> Article 50a Act on Retirement.

<sup>195</sup> Article 40 Act on Retirement.



It is worth mentioning in this context that, in the case of the reorganisation of public administration or local government, the retirement age for public administration and local government employees is reduced to 60 for men or 55 for women.<sup>196</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 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).*

*α) 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 an individual collect a pension and still work?*

As a rule, the collection of the state pension is a right not an obligation but the jurisprudence is not homogenous.

*β) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

There is no requirement for workers to retire at the moment they reach retirement age. The general retirement age is 60 for women and 65 for men. It is treated as a right not as an obligation and it is left to employees' discretion (obviously with the consent of the employer, since once an employee reaches retirement age the employer may in reality terminate the employment contract more easily – it is very rare for a person in such a situation to decide to lodge a claim against the employer).<sup>197</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 pension. On the other hand, entitlement to a retirement pension is not subject to resignation from employment.

It is possible as rule to combine employment with receipt of a pension without any restriction to people who have reached normal retirement age. However, in the case of people of retirement age who do not terminate their employment contract and continue to work for the same employer (this applies equally to women and men), the 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>198</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.

<sup>196</sup> Article 23.2 Act of 22 March 1990 on Employees of Local Government (*Ustawa z dnia 22 marca 1990r. o pracownikach samorządowych*).

<sup>197</sup> Art 24 and 27 Act on Retirement.

<sup>198</sup> Article 103.2a Act on Retirement.

Different rules apply to receiving payments from the so-called Employees' Pension Programmes, a system of voluntary collection of pensions contributions. Individuals begin receiving payments in the following cases: 1) upon a decisions by the individual once they reach the age of 60; 2) upon presentation of a decision on 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>199</sup>

*χ) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

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 of this is currently ongoing.

However, there has been an ongoing debate in Poland on reform of the pensions system since the middle of the 1990s. Although in 1999 a new pensions system was introduced, the debates are continuing on various issues. In particular, the issue of making the retirement age equal for men and women turned out to be very controversial.

It has been proved that under the new system payments from pension funds for women are significantly lower than those for men, because on average they work for less time and their contributions to pension funds are smaller.<sup>200</sup> This is why experts are in favour of making the retirement age equal for men and women.<sup>201</sup> In order to stop this discrimination, the previous social-democratic government proposed a plan to equalise the retirement age at the age of 65 (gradually, within 10 years) and introduce a right to partial pension for people retiring aged between 62 and 65 (known as Hausner's Plan). The proposal to make the retirement age for men and women equal met heavy criticism from the public and was eventually not implemented. It is difficult to convince Polish society that the former "privilege" for women in fact turned out to be discriminatory under the new pensions system. This approach can be explained by the fear of unemployment shortly before retirement. However, the discussion about equalising the retirement age for men and women is still ongoing and the relevant law could be changed in the future.

<sup>199</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*).

<sup>200</sup> According to the estimates of the Supreme Chamber of Control (*Najwyższa Izba Kontroli*), after 40 years of work a man can receive a pension at the level of 44-69% of his final salary/wage, whereas a woman after working for 35 years can draw a pension only at the level of 34-44% of her final salary/wage; Information on the results of monitoring the implementation of the act on the organisation and functioning of pension funds, Supreme Chamber of Control, 18 February 2002, p. 59.

<sup>201</sup> See the results of the work of various groups of experts appointed by the Ministry of Labour and Social Policy, <http://www.mpips.gov.pl/index.php?gid+785&>

- δ) *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 Act of 17 December 1998 on Retirement and Disability Pensions from the Social Security Fund 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 a private, voluntary insurance within the so-called 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 their pension.

The Labour Code distinguishes four kinds of contracts of employment: for a probationary period<sup>202</sup>, for a defined time period, for the period needed to perform certain action, for an undefined time period<sup>203</sup>. It is impossible to set the termination of an employment contract at a fixed age, but an employer may employ someone for a defined time period and thus possibly connect the set time period with the employee's age (however, the third contract for a defined time period is treated by law as concluding a contract for an indefinite time period).

- ε) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

The employer can terminate the employment on the basis of general rules governing the termination of labour relations. Employment contracts concluded for indefinite periods of time may, generally, be renounced.<sup>204</sup> The Labour Code lays down precise notice periods: (1) two weeks for employment lasting less than six months; (2) one month for employment lasting at least six months and (3) three months for employment lasting at least three years.<sup>205</sup> The right to terminate the employment contract concluded for a definite period of time is limited by a general clause that requires every termination to be justified.<sup>206</sup> This obligation rests primarily on the employer. In the case of an unjustified termination, the labour court may rule on its legal ineffectiveness or may reinstate the labour contract.

In addition, employees are protected against dismissal in the four years before they reach retirement age, if the employment period enables him/her to obtain the right to retirement pension at the moment of reaching retirement age.<sup>207</sup> No distinction is made between women and men in this respect.

*For these above questions, please indicate whether the ages are different for women and men.*

#### 4.7.5 Redundancy

<sup>202</sup> Article 25.2 Labour Code.

<sup>203</sup> Article 25.1 Labour Code.

<sup>204</sup> Article 32 Labour Code.

<sup>205</sup> Article 36.1 Labour Code.

<sup>206</sup> Article, 45.1 Labour Code.

<sup>207</sup> Article 39 Labour Code.

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

The general provision states that the employer shall 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>208</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>209</sup> Even in the latter case, when such 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>210</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 Framework Employment Directive?*

Regarding the exceptions to the rule of non-discrimination in the Labour Code, there are only those related to the direct and indirect discrimination (see Section 2.3 b).

In general, the Polish Constitution stipulates 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 other persons. Such limitations shall not violate the essence of freedoms and rights.<sup>211</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.).

<sup>208</sup> Article 39 and 40 Labour Code.

<sup>209</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>210</sup> Ibidem, Article 5.6.

<sup>211</sup> Article 31, Constitution.



#### 4.9 Any other exceptions

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

There appear not to be any other exceptions currently provided for under Polish legislation.

## 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.*
- b) *Do measures of 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 5 grounds, 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.*

The 2003 Amendment of the Labour Code that took effect on 1 January 2004 introduced a clear and general stipulation allowing for positive action. This provision (Article 18<sup>3b</sup> para. 3 Labour Code) 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.

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.

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 for the distribution of seats in the Sejm (lower chamber of Parliament).<sup>212</sup>

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. The State budget also invests in schools and subsidises the production and publishing of textbooks. Furthermore, the Ministry of Culture subsidises minority press and other publications and sponsors cultural events organised by national and ethnic minorities.

<sup>212</sup> Article 133.2, Act of 12 April 2001 on the Electoral System to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (*Ustawa z 12 kwietnia 2001 ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej*) [henceforth: Act on Elections].

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 its comprehensive nature it was not implemented in this form, due to the difficult budgetary situation of the country. In addition, its 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.

The implementation of the current government programme was secured with a budget of six million PLN for 2004 and around 10 million PLN for each of the following years.<sup>213</sup> 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 Interior. The report for 2007 is not yet available<sup>214</sup>, however, there are reports covering the years 2004 to 2006<sup>215</sup>. The data given below (in brackets) comes from the report for 2006, 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) and non-public institutions (67) including Roma organisations (34).

The programme is divided into the following eight fields:

- Education as a priority (274 actions/activities)
- Living conditions (39 activities)
- Employment (10 activities)
- Health care (20 activities)
- Culture and preserving Roma identity (63 activities)
- Roma and civil society (15 activities)
- Personal security (occasional)
- Knowledge about Roma (dissemination of information) (occasional)

All funds coming from the Roma Programme (from central government) is extra money for local government and communities. Part of the activities are designed especially to address the issue of Roma exclusion, but the rest in fact constitute fulfilment of the existing regular 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.

<sup>213</sup> Gazeta Wyborcza, 18 August 2004. See also [http://www.mswia.gov.pl/spr\\_oby\\_mn2.html](http://www.mswia.gov.pl/spr_oby_mn2.html)

<sup>214</sup> As of 12 May 2008.

<sup>215</sup> <http://www.mswia.gov.pl/>



It is not easy to make a clear division of the 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.

The 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 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, which means one assistant for 26 pupils (Roma education assistants are themselves from the Roma community);
- employing assistant teachers (66 in 2006; in 2005 it was 133, therefore the number of pupils per assistant teacher has increased from 21 to 43);
- additional educational and other activities for Roma children and parents, psychological and pedagogical advice, organising holidays and camps, material help (purchasing school text books etc.);
- special stipends for Roma students (in higher education) and Roma children with artistic talent (51 students and 13 pupils);
- improving living conditions (renovation of flats (237), building of new flats (15), providing water, sewage systems and electricity (to 56 flats);
- preventative health examination and vaccination (1,056 people);
- employing special nurses to assist with medical problems (31 in 2006), in general there is one nurse per 32 Roma;
- organising so called “white days” with free medical advice by doctors from different specialisations (20 activities);
- supporting employment of Roma by subsidising job creation (86 people);
- organising various kinds of cultural events

The First Job programme (and currently also First Business programme) is an example of positive action with respect to age. It was started in 2002 with the goal of facilitating the employment of young people up to the age of 25 and graduates up to 27. Several measures were introduced to increase their chances of gaining their first work experience. This includes financial incentives for employers in order to enhance them to employ young people as well as assistance (financial and consultative) for young people in order to start independent economic activity, including preferential interest rates on loans to graduates.<sup>216</sup> Additional funds were provided to support NGO activity, with the aim of facilitating the employment of graduates. The second example in the field is the First Business programme which was launched in 2005 and was based on the experiences of the implementation of the First Job programme in 2002-2005. The aim of the programme is 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>217</sup>

<sup>216</sup> [www.lpraca.gov.pl](http://www.lpraca.gov.pl) and the Annual Report of the Ministry of Labour and Social Policy, p.5, [www.mpips.gov.pl](http://www.mpips.gov.pl)

<sup>217</sup> <http://www.lpraca.gov.pl/index.php?id=9&tresc=2827&a=>

In March 2008 the government announced a new programme called Solidarity of Generations which aims to activate the over-fifty generation. In Poland only 28 per cent of people over 50 work. This is the lowest figure in the EU. The programme envisages a number of actions, including lowering the employment costs for employers, organising special qualification courses, adjusting working conditions etc.

Several measures can be considered as positive action in the field of disability. The Act on Disabled Persons contains a system of incentives for employers who aim to support the employment of disabled persons – the so-called System of Quotas and Penalties contained in the 1997 Act on Disabled Persons.<sup>218</sup> 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 from the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*) reimbursement for adapting existing and creating new work stations to the needs of disabled persons, adapting workplace premises, adapting or buying equipment to help disabled people to function at work, identifying by the departments of occupational medicine the relevant needs of persons with disability.<sup>219</sup>

The amendment of 20 December 2002 to the Act on Disabled Persons introduced the definition of an employment position adapted to the work needs of a disabled person. This is a position which is suitably equipped and adapted to the needs arising from the type and degree of disability of the individual.<sup>220</sup>

Furthermore, an employer who employs disabled people is entitled to receive a monthly subsidy for the remuneration of the disabled employee.<sup>221</sup> The amount of the subsidy is related to the level of impairment of the disabled person employed and the proportion of disabled people employed in the specific workplace.<sup>222</sup>

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>223</sup> This amount is determined according to the formula in which 40,65 per cent of an 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 is the Junior programme, which is included under the aegis of the First Job programme. This is a programme to introduce disabled graduates into professional posts.

<sup>218</sup> On the divergence of opinions between those who are in favour of the system of economic incentives and those of the human rights approach, see the World Bank report Disability and employment in Poland (*Niepełnosprawność a praca w Polsce*), December 2000, p. 36 and following. The report recommends a harmonious combination of both systems.

<sup>219</sup> Article 26, Act on Disabled Persons.

<sup>220</sup> Article 2.8 Act on Disabled Persons.

<sup>221</sup> Article 26a Act on Disabled Persons.

<sup>222</sup> Article 26.1, Act on Disabled Persons.

<sup>223</sup> See Article 21.1-2 Act on Disabled Persons.

It aims to do this by directing young disabled people<sup>224</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. PFRON also implements some other programmes for the disabled.<sup>225</sup>

In addition, the Act on Disabled Persons establishes a number of rights designed to accommodate disabled people in the workplace, including restrictions as to maximum working time; employment for night shifts and overtime; additional breaks; additional holiday; absence from work (for more on various positive action measures, see Section 2.6 above).

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<sup>224</sup> This applies to disabled people with a certified significant, moderate or mild degree of disability who, in the course of 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. [www.mps.gov.pl](http://www.mps.gov.pl)

<sup>225</sup> For more see [www.pfron.org.pl](http://www.pfron.org.pl)



## 6. REMEDIES AND ENFORCEMENT

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

- α) What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- β) Are these binding or non-binding?*
- χ) Can a person bring a case after the employment relationship has ended?*

*In relation to each, please note whether there are different procedures for employment in the private and public sectors.*

*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).*

*Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.*

There are no official statistics on the number of cases related to discrimination brought to justice.

Claims stemming from an employment relationship can be determined either by a labour court or by a conciliation committee.<sup>226</sup> The case can be referred to the 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 regular term to determine a case by the committee.<sup>227</sup> The agreement reached before the 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>228</sup>

Another conciliation mechanism is provided for in the Code of Civil Procedure and allows the court, acting through a single judge, to confirm an agreement reached between the parties before the court proceeding was commenced.<sup>229</sup>

A compensation complaint was introduced into the Labour Code and has been effective as of 1 January 2004 (Article 18<sup>3d</sup>). Anyone who suffers from infringement of the principle of equality in employment is entitled to commence a judicial proceeding 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 used in respect of the complainant. Since the Polish legal system is furnished with this anti-discrimination compensation provision, there is no longer any need to use more general legal

<sup>226</sup> Article 242 Labour Code.

<sup>227</sup> Article 252.1 Labour Code.

<sup>228</sup> Article 255.1 Labour Code.

<sup>229</sup> See Article 184-186 Code of Civil Procedure.

remedies, like Article 415 of the Civil Code (general compensation clause), although their use is not ruled out.

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 grave infringement by the employer of their fundamental obligations towards the employee (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. determination of appropriate remuneration when it was discriminatorily lowered.<sup>230</sup>

Civil protection – protection of “personal goods/values” (“personal welfare”) (Article 23-24 of the Civil Code). According to Article 30 of the Constitution, the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights for persons and citizens. It shall be inviolable. The respect and protection thereof shall be 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 so-called “personal values”. According to this provision, personal values, in particular health, freedom, reverence, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, academic, artistic, inventive and rationalising creativity 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 origin, race or sexual orientation. But the listing of “personal values” is not exhaustive. There is no doubt that personal dignity is protected (as stated in the Constitution and confirmed by a wealth of doctrine and jurisprudence). Therefore, if a person is being 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 being infringed and they may seek redress through this general civil clause.

On the basis of Article 24 §1 of the Civil Code, an individual whose personal values become endangered by another’s actions can demand that the action cease, unless it is not unlawful. Furthermore, if personal values have been infringed the individual concerned can demand from the person who infringed them that the effects of violation be removed, 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 for indicated social cause based on the rules of compensation laid down in the Civil Code. If the consequence of the infringement of personal values is material damage, the victim may demand reinstatement in general law terms (art. 24 §2).

Discriminatory treatment may, in some circumstance, 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, nevertheless, criminal proceedings may be instituted in more serious cases, such as the use of

<sup>230</sup> A proceeding 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.

force or illegal threat towards individuals or groups of people because of their national, ethnic, racial, political or religious affiliation<sup>231</sup>, public insult of such individuals or groups of people or the infringement of the personal integrity of such a person<sup>232</sup> or the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.<sup>233</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. 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 Act on the National Labour Inspectorate, a labour inspector may issue orders or protests, make submissions or bring claims to the labour court if the establishment of the existence of a labour relationship is at stake.<sup>234</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. 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 Commissioner for Civil Rights Protection (*Rzecznik Praw Obywatelskich*) may prove to be an effective tool. Though the Ombudsperson cannot issue a legally binding decision, the office can investigate the case and exert pressure on the bodies responsible for inappropriate conduct or it can take certain legal steps (see more under Section 7).<sup>235</sup> However, the Ombudsperson is free to accept or reject any case. Apart from dealing with individual complaints, the Office of the Ombudsperson may conduct more general studies on specific themes, including non-discrimination.

As far as legal representation is concerned, some preferential treatment is allowed in labour cases. In Poland, in principle, legal representation may be provided only by an advocate (attorney-at-law) or legal adviser,<sup>236</sup> but for an employee, a representative of a trade union, a labour inspector or other employee of the enterprise may also stand in for a legal representative.<sup>237</sup> In addition, in labour cases claims are automatically exempted from court costs.

One of the factors which could act as a deterrent to people seeking redress are functional barriers. Some courts and other bodies of the administration of justice are not easily accessible to the disabled. It is relatively difficult to find the information in Braille.

<sup>231</sup> Article 119.1-2 Penal Code.

<sup>232</sup> Article 257 Penal Code.

<sup>233</sup> Article 256 Penal Code.

<sup>234</sup> Article 21, Act of 6 March 1981 on the National Labour Inspectorate (*Ustawa z 6 marca 1981 r. o Państwowej Inspekcji Pracy*). See also Article 63<sup>1</sup> Civil Code.

<sup>235</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>236</sup> Article 87.1 Code of Civil Procedure.

<sup>237</sup> Article 465.1 Code of Civil Procedure.





In Polish law it is possible to bring a case after the employment relationship has ended in two cases. As a rule, if the principle of equal treatment was violated, it may not be the ground for the termination of the employment relationship by the employer.<sup>238</sup> However if the contract was terminated the employee can either (1) make a request through the court that the notice to quit be recognised as ineffective or (2), if the employment relationship has already ended, s/he has the right to demand to return to work under previous conditions or to receive compensation.<sup>239</sup>

Moreover, the employee can terminate the employment contract without notice if the employer has severely violated his/her obligations towards the employee.<sup>240</sup>

### 6.2.1 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*

- α) in support of a complainant*
- β) on behalf of one or more complaints (please indicate if class actions are possible)*

There are certain legal opportunities for social organisations to take part in judicial and administrative proceedings in support of claimants bringing cases of discrimination. Up to February 2005 these opportunities were not applied specifically for the purposes of combating discrimination and were more general in application. The role of organisations in such proceedings had more of a secondary character in comparison to the primary role of the claimant himself or herself.

The organisation may now act in support but sometimes also on behalf of the complainant. This solution was adopted in the Code of Civil Procedure, which allowed non-profit social organisations to bring a claim on behalf of individuals or join such proceedings<sup>241</sup>, e.g. in alimony (maintenance) and consumer protection cases<sup>242</sup> or in labour law and social security cases<sup>243</sup>. If a social organisation does not participate in the proceeding, it may still act as *amicus curiae* and present its opinion on the case to the court<sup>244</sup>.

<sup>238</sup> Article 18<sup>3e</sup> Labour Code.

<sup>239</sup> Article 44-55 Labour Code.

<sup>240</sup> Article 55 Labour Code.

<sup>241</sup> Article 8 Code of Civil Procedure.

<sup>242</sup> Article 61 Code of Civil Procedure. The list of the social organisations which can participate in court proceedings on the

basis of this article is set by the Minister of Justice. See Order of 1 July 1991 of the Minister of Justice on the list of social organisations entitled to act before courts on behalf of or to the benefit of citizens (*Zarządzenie Ministra Sprawiedliwości z 1 lipca 1991 r. w sprawie ustalenia wykazu organizacji społecznych uprawnionych do działania przed sądami w imieniu lub na rzecz obywateli*).

<sup>243</sup> Article 462 Code of Civil Procedure.

<sup>244</sup> Article 63 Code of Civil Procedure.

Due to the changes to the Law on the Code of Civil Procedure made in August 2004, some organisations involved in combating discrimination may engage in judicial procedures in support of a complainant and on his/her behalf. The new Article 61 § 4 stipulates that organisations whose statutory objectives include equality protection and non-discrimination protection by unfounded, direct or indirect violation of the rights and duties of citizens may, in the case of claims in this field and with the consent of the citizens, institute actions on behalf of the citizens and, with the consent of the plaintiff, may join proceedings at any stage thereof.<sup>245</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 *amicus curiae* and on behalf of the complainant.<sup>246</sup>

Similarly, social organisations are entitled to bring or join administrative proceedings<sup>247</sup> and representatives of social organisations may also be admitted to criminal proceedings.<sup>248</sup> More specifically, as regards labour relations, a labour inspector (*inspektor pracy*) may initiate court proceedings on behalf of citizens or join pending proceedings, but only in cases where the existence of an employment relationship is to be settled.<sup>249</sup>

The possibility of class action does not exist. However, there is a new draft amendment to the Code of Civil Procedure prepared by the Ministry of Justice Civil Law Codification Commission which provides for this kind of action (however, 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).

### 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).*

<sup>245</sup> Article 61 § 4, Act of 2 July 2004 amending of the Code of Civil Procedure and some other acts, entered into force on 4

February 2005 (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*).

<sup>246</sup> From the interviews undertaken for the project. <http://www.hfhrpol.waw.pl>

<sup>247</sup> Article 31.1 Code of Administrative Procedure reads: “A social organisation may, in a case concerning another person, request: 1) to institute a proceeding, 2) to be admitted to the proceeding, if it is justified by the statutory objectives of the organisation and when it is in the public interest”. Since there are no administrative procedures specifically devoted to combating discrimination, this provision can only have potential significance and may first be used in the future when such procedures are introduced into Polish legislation.

<sup>248</sup> Article 90 and 91 Code of Criminal Procedure. A representative of a social organisation may be admitted if “there is a need to protect the public interest or important individual interest falling within the statutory objectives of the organisation, in particular the need to protect human rights and freedoms.”

<sup>249</sup> Article 63<sup>1</sup> Code of Civil Procedure.

The 2003 amendment to the Labour Code (in force since 1 January 2004) brought a revolutionary change into the legal system. So far, in accordance with the fundamental principle of civil law – the burden of proof rested on the plaintiff.<sup>250</sup> Currently, in anti-discrimination cases 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 employ discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred. This solution is used in respect of any discrimination, in both direct and indirect discrimination cases; it also covers cases of instructing to discriminate and harassment.

However, regarding the burden of proof, the Polish Civil Code entails a 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). It implies that outside employment there is no possibility of shifting the burden of proof in Polish law.

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 may provide evidence and has the right to defence but cannot be obliged to do so.

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

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses or persons who help the victim of discrimination to present a complaint)*

A definition of victimisation with regard to discrimination does not exist in the Polish legal system. Thus, there is no general legal protection of victims against the risk of retaliation as a result of them claiming their right not to be discriminated against. It is very likely that in many cases victimisation plays an important negative role in a victim's decision about whether or not to use the remedies against discrimination.

Nevertheless, the Labour Code prohibits the termination of a labour contract as the result of an employee having used their rights to defend themselves against unequal treatment (Article 18<sup>3e</sup> Labour Code). This provision refers to complainants only and does not cover witnesses or other people. Furthermore, this provision does not prohibit other possible measures that can be implemented by the employer, such as down-grading, imposing a fine, etc. This is why some experts believe it would be advisable to introduce more effective protection against discrimination for complainants, witnesses and other people who help victims of discrimination<sup>251</sup> in the form of provisions fully compatible with the directives. It should not be forgotten, however, that such negative measures taken by an employer can be subjected to judicial control in respect of their justifiability, on the basis of general principles of judicial scrutiny in labour relations.

<sup>250</sup> Article 6 Civil Code. In the field of labour relations the same principle applies, see Article 300 Labour Code.

<sup>251</sup> B. Liegl, B. Perchinig, B. Weyss, *Legal and institutional aspects of counteracting discrimination in Poland (Prawne i instytucjonalne aspekty przeciwdziałania dyskryminacji w Polsce)*, Warsaw 2004, p. 24-25.

## 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.*
- b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*
- c) *Is there any information available concerning:*
  - *the average amount of compensation available to victims*
  - *the extent to which the available sanctions have been shown to be – or are likely to be – effective, proportionate and dissuasive, as is required by the Directives?*

The existing remedies and procedures were reported under Section 6.1 above. Of a range of possible “effective, proportionate and dissuasive” sanctions intended properly to put into effect the Racial Equality and Employment Equality Directives, the Polish legislator decided chiefly to use the one mentioned directly in the directives, that is, the payment of compensation. In the Labour Code there is no maximum threshold for this compensation and the 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 Poland currently 1,126 PLN per month<sup>252</sup>.

It is questionable whether this sanction meets the criteria of the Directives (effective, proportionate and dissuasive), because this system redresses only the damage and does not include a sanctioning element (e.g. for a large company, being required to pay compensation at the level of the minimum wage is hardly dissuasive). Apart from this there is no reliable information on the average amount of compensation available to victims.

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>253</sup>

<sup>252</sup> Every year the level of the minimal wage is set by the Act on the minimum wage, the amount cited here applies for the year 2008.

<sup>253</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).”

An employee is entitled to terminate their labour contract without prior notice on the basis of grave infringement by the employer of the fundamental obligations towards the employee (Article 55 para 1<sup>1</sup>). In such a case, the employee is entitled to compensation equal to his/her salary for the period of notice.

If there are cases not covered by the provisions described above, it is possible to seek compensation on the basis of the general compensation clause (Article 415 Civil Code). For example, according to a Supreme Court ruling, a candidate for a job who responds to an employer's specification which is discriminatory (Article 11<sup>3</sup> Labour Code) and who is not hired may seek compensation within the bounds of so-called unfavourable interest (*culpa in contrahendo*).<sup>254</sup>

According to civil law, a person whose personal interest, which includes inter alia health, freedom and dignity, has been threatened may demand that such actions be ceased. S/he can also demand that the person who committed such a violation undertake the actions necessary to remove its effects, in particular to make a declaration of appropriate form and content. If, as the result of a violation of personal welfare, property damage has occurred, the victim may demand its repair.<sup>255</sup>

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, racial or ethnic origin, religion, belief, and sexual orientation.<sup>256</sup> In light of this, the provision takes on the character of a mere declaration.

The Act on the Promotion of Employment and the Institutions of the Labour Market provides two sanctions in the case of conduct contrary to the Act. First, anyone running an employment agency who does not comply with the prohibition of discrimination based on gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religious beliefs or membership of a trade union is liable to a minimum fine of 3,000 PLN.<sup>257</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>258</sup> Such cases are decided by the municipal courts (*sądy grodzkie*).

A specific sanction was introduced in the Act on Trade Unions<sup>259</sup> for cases of discrimination against an employee on grounds of membership of a trade union, non-membership of a trade union or exercising a trade union function. Such acts of discrimination are treated as criminal offences, that is, they are determined by criminal courts which can impose a fine or a restriction of liberty.<sup>260</sup>

Should a civil servant speak or behave in a discriminatory manner, he or she would violate the Constitution and the Act on the Civil Service<sup>261</sup>. There is every prospect that his or her conduct would not be tolerated by superiors and disciplinary measures could be used in this

<sup>254</sup> Supreme Court ruling of 24 March 2000, IPKN 3114/99.

<sup>255</sup> Article 23, 24 and 415 Civil Code.

<sup>256</sup> Article 94 point 2b Labour Code.

<sup>257</sup> Article 121.3, Act on Employment.

<sup>258</sup> Article 123, Act on Employment.

<sup>259</sup> Act of 23 May 1991 on Trade Unions (*Ustawa z 23 maja 1991 r. o związkach zawodowych*).

<sup>260</sup> Article 35.1 Act on Trade Unions.

<sup>261</sup> Art 67.1 point 1, Act of 18 December 1998 on Civil Service (*Ustawa z 18 grudnia 1998 r. o służbie cywilnej*).

situation<sup>262</sup>. In addition, criminal sanctions might even apply, if the conduct in question constituted a criminal offence, such as the public insult of individuals or groups due to their national, ethnic or racial origin or an incitement to hatred based on these grounds. More generally, criminal sanctions may have a role to play in all situations where discrimination takes the form of a criminal offence.

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<sup>262</sup> Article 106.1 Act on the Civil Service.

## 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), 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?*

There is no single “specialised body” which would be able to fulfil all three functions in the sense of Article 13.2 of the Racial Equality Directive. No body or institution has been officially designated to comply with the Directive.

Nevertheless, there are several institutions which are of relevance in this context and which have the mandate to promote the equal treatment of all persons without discrimination based on racial or ethnic origins. These are:

- Ombudsperson
- Ministry of Interior
- Government Plenipotentiary for Equal Treatment
- Department of Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy

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.*

### **Ombudsperson**

The Commissioner is appointed by the Sejm upon approval of the Senate for a five-year term of office. The Commissioner informs the Sejm and the Senate annually on his/her activities and this report is public. The budget comes from the central budget and is approved by the parliament.<sup>263</sup> At the moment the office is neither equipped with sufficient resources to play the role described in the Directive nor does it have specific competence in the field.

<sup>263</sup> 2006 the Office of Commissioner for Civil Rights Protection had at its disposal approximately 7,416,918.04 Euro (28,768,000 PLN, exchange rate 1 Euro = 3.8787 PLN).



### Ministry of Interior

In 2002 a Team for National Minorities (*Zespół do Spraw Mniejszości Narodowych*) was established as an advisory body to the President of the Council of Ministers.<sup>264</sup> The Team comprised representatives of a number of ministries (e.g. public administration, internal affairs, finance, education, culture, labour and social policy, justice, foreign affairs and European integration). It established a number of sub-structures dealing with specific problems: in 2001 a Sub-Team on the Education of National Minorities and in 2002 a Sub-team on Roma issues.

The main tasks of the Team were (1) drafting projects for government actions in the field of national minorities; (2) coordinating the activities of various governmental agencies; (3) making assessments and formulating proposals on the enjoyment by national minorities of their rights and on their needs; (4) preventing violations of the rights of national minorities; (5) initiating surveys on the situation of national minorities in Poland; and (6) raising awareness and disseminating knowledge on national minorities. Of the competences listed in Article 13.2 of the Racial Equality Directive, the Team was involved in conducting surveys concerning discrimination, publishing reports and making recommendations. However, it did not have the crucial competency of providing independent assistance to victims of discrimination. With the new law described below the Team has ceased to operate.

The Act on National and Ethnic Minorities and on Regional Language reinforces the role of the Minister of the Interior and Administration<sup>265</sup> in implementing governmental policy towards ethnic and national minorities. In addition, the Act established the Joint Committee of the Government and Ethnic and National Minorities as a consultative body of the Prime Minister. It is composed of representatives of selected Ministers and representatives of minorities and meets periodically (so far ten meetings have taken place).<sup>266</sup>

### 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: Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment (in force since 30 April 2008).

The Plenipotentiary does not have its own office but uses the office of the Prime Minister, it does not have its own staff and its position is so far unclear even to government agencies. Employees of the Department of Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy, when interviewed and even during public debates, could not explain the division of tasks between the two offices or their relationship with each other.

<sup>264</sup> It succeeded the Inter-ministerial Team for National Minorities which operated between 1997 and 2001.

<sup>265</sup> As, currently, the minister responsible for religious beliefs and national and ethnic minorities, see Article 21 of the Act on Minorities.

<sup>266</sup> See Article 23 and 24 of the Act on Minorities.

### Department of Women, Family and Counteracting Discrimination

At the beginning of 2006 a Department of Women, Family and Counteracting Discrimination was established within the Ministry of Labour and Social Policy. The Department took over the responsibilities of the office of the Government Plenipotentiary for the Equal Status of Women and Men which was abolished.

- 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.*

### Ombudsperson

The Commissioner for Civil Rights Protection (Ombudsperson) is the institution which possesses the strongest instruments to intervene in cases of discrimination and can prove to be an effective tool.

According to the 1997 Constitution, everyone has the right to apply to the Ombudsperson for assistance in protecting their freedoms or rights infringed by organs of public authority.<sup>267</sup> The scope of activities of the Commissioner is very broad (protecting human rights and freedoms and the rights and freedoms of the citizen) and although the issue of the different dimensions of discrimination on all grounds is present in its activities, this has never been the priority issue. Within the office there is no unit dealing exclusively with discrimination cases. Such cases fall within the scope of various divisions responsible for labour law, social security or protection of disabled people's rights etc.

### Ministry of Interior

The Joint Committee of the Government and Ethnic and National Minorities is a consultative and advisory body to the Prime Minister. Its remit includes issuing opinions regarding the rights and needs of minorities, programmes and draft laws in the field, the principles of allocation and levels of resources from the state budget directed to preserving the cultural identity of minorities and it is also tasked with taking action in the field of combating discrimination.<sup>268</sup>

### Government Plenipotentiary for Equal Treatment

The task of the Plenipotentiary is to execute governmental policy with regard to equal treatment, including combating discrimination in particular on the grounds of gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, sexual orientation, civil (marital) and family status. Disability is not covered.

<sup>267</sup> Article 80, Constitution.

<sup>268</sup> Art 23.2 Act on Minorities.

### Department of Women, Family and Counteracting Discrimination

According to the government, the Department is the Polish “equality body” in the terms of Directive 2002/73. The English language site of the Ministry states directly that the Department is “Responsible for coordinating actions pertaining to the status of women and family in society and fulfils tasks pertaining to counteracting discrimination for any reasons in all domains of social, economic and political life, except for issues related to counteracting ethnic discrimination.”<sup>269</sup> (underlining by the author). However, the Polish site of the Ministry does not include this information.

In the Act on the Divisions of Governmental Administration (4 November 1997, amended, Dz.U. 2007, nr 65, poz.437) as well as in the Statute of the Ministry, combating discrimination is not mentioned (apart from discrimination in a family).

However, the internal regulations of the Ministry, which are amended fairly frequently, provide much more detailed information. The last version (Ordinance no. 6 of the Minister of Labour and Social Policy of 25 March 2008 – Organisational Regulations of the Ministry of Labour and Social Policy) is very broad in its scope and provides for a number of competences of the Department. The Department is responsible for activities “to combat all forms of discrimination within the Minister’s ‘competences’” (§ 19.1). No grounds are explicitly mentioned.

- d) *Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*

### Ombudsperson

The Ombudsperson’s decision as to whether to provide assistance to an individual is discretionary. When accepting a case the Commissioner may carry out their own fact-finding investigation or request competent institutions (supervisory bodies, prosecutor’s offices, state bodies or occupational or social inspectorates) to examine the case or part of it. The Commissioner can also request the Sejm (lower Chamber of the Parliament) to order the Supreme Chamber of Control (*Najwyższa Izba Kontroli*) to carry out an inspection in order to examine the case or part of it.<sup>270</sup> In carrying out an investigation the Ombudsperson has the right to examine every case on the spot even without prior notification.<sup>271</sup> The office may request information and documentation of every case conducted by administrative bodies, social and occupational organisations and bodies of units which are legal persons. As far as court cases are concerned, the Commissioner may request information on the stage of a case as well as requesting access to court and prosecution files.<sup>272</sup> Apart from examining individual cases, the Commissioner may also commission expertise and opinions

### Ministry of Interior

The Joint Committee of the Government and Ethnic and National Minorities does not act as a permanent body but as a consultative body which meets periodically every couple of months, therefore its activities are rather limited. It may, however, issue recommendations as well as discuss any matter it wishes to, including individual cases.

<sup>269</sup> <http://www.mpips.gov.pl/index.php?gid=893>, [www.rodzina.gov.pl](http://www.rodzina.gov.pl), [www.kobieta.gov.pl](http://www.kobieta.gov.pl); last visited 25 July 2008.

<sup>270</sup> Article 12, Act on the Commissioner for Civil Rights Protection.

<sup>271</sup> The Commissioner receives between 50,000 and 60,000 complaints annually and only a few each year concern discrimination issues.

<sup>272</sup> Article 13 Act on the Commissioner for Civil Rights Protection.

**Government Plenipotentiary for Equal Treatment**

The competences of this new post include analysis and research, monitoring, collaboration with other bodies, local government and NGOs, the creation of draft laws, issuing of opinions about laws drafted by other bodies, taking action aimed to eliminate or minimise the consequences of a violation of the rule of equal treatment. The Plenipotentiary may establish special research teams and call for particular research or expertise and may provide a report based on this research.

It may also issue recommendations. However, the Plenipotentiary does not have the right to accept complaints and assist individual victims.

**Department of Women, Family and Counteracting Discrimination**

The Department's competences include: conducting analysis and issuing opinions regarding the legal situation of people who experience discrimination; coordination of activities which aim to ensure equal treatment; preparing draft policies and laws which aim to combat discrimination and commenting on laws being prepared by other bodies; preparing materials and reports on the execution of relevant international conventions; and other competences regarding cooperation with government and social partners and initiating government activities, educational and information activities. It even possesses competence in relation to legal assistance: "conducts tasks in terms of providing independent help to the victims of discrimination in pursuing their rights" (§ 19 p. 2.1-10).

- e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

### **Ombudsperson**

The Ombudsperson, after examining the 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>273</sup> It may also lodge a constitutional complaint (control in abstracto) or join the proceedings started by the filing of an individual complaint by someone else.

### **Ministry of Interior**

The Joint Committee of the Government and Ethnic and National Minorities does not have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination.

### **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.

### **Department of Women, Family and Counteracting Discrimination**

The Department “conducts tasks in terms of providing independent help to the victims of discrimination in pursuing their rights” but it does not have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination.

- f) *Is the work undertaken independently?*

### **Ombudsperson**

The Ombudsperson’s office is independent of other bodies of state administration and performs its duties independently.

### **Ministry of Interior**

The Joint Committee of the Government and Ethnic and National Minorities is independent in terms of its opinions. However, one half of the committee is composed of representatives of government agencies.

### **Government Plenipotentiary for Equal Treatment**

The Government Plenipotentiary for Equal Treatment is part of the cabinet.

### **Department of Women, Family and Counteracting Discrimination**

The Department is part of the Ministry of Labour and Social Policy.

<sup>273</sup> Article 14 Act on the Commissioner for Civil Rights Protection.

- g) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

### **Ombudsperson**

Complaints against breaches of national minority rights constitute a small percentage of cases sent to the Ombudsperson.<sup>274</sup> These cases do not indicate discrimination towards national minorities, but they do sometimes indicate intolerance by some sectors of society towards some minorities. In its opinions, the Office has been favourable in its assessment of both the law and state policy, though it reported the extremely complicated and clearly unfavourable situation of the Roma community.

### **Ministry of Interior**

It could be stated that Roma issues are a priority for the Ministry of Interior. Other national and ethnic minorities mainly receive support for cultural activities, while the special Roma Programme is much wider and has more funding (see Section 5 on positive action).

### **Government Plenipotentiary for Equal Treatment**

Since this position was created only recently it is impossible to evaluate its priorities.

### **Department of Women, Family and Counteracting Discrimination**

Roma issues are not a priority for the Department of Women, Family and Counteracting Discrimination.

<sup>274</sup> Of the total number of complaints indicated in the previous footnote, up to 2004 there were around 30 new cases each year concerning national and ethnic minorities, whereas in 2005, after the new law came into force, there were only seven new cases; *Information from the Commissioner for Civil Rights Protection*, under preparation.

## 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, such 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 – they can take form of printed leaflets or brochures distributed in the workplace; they 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 them.<sup>275</sup>

Such information can also be attached to the labour contract or the codes of conduct in the workplace. The National Labour Inspectorate is responsible for the implementation of Article 94<sup>1</sup>.<sup>276</sup>

Some of the issues of equal treatment, and especially those related to gender equality, sexual orientation or racial and ethnic origin, are politically sensitive in Poland. Thus, it is not easy to imagine a fully successful information policy in this respect, a policy agreed upon by all major political forces. Bodies whose mandate includes equal treatment issues should indicate more initiative in promoting these issues.

<sup>275</sup> See, for example, P. Potocka, Model information on equal treatment in employment, Gdansk 2004, (published by a private centre for consultation and vocational training).

<sup>276</sup> See National Labour Inspectorate, Programme of Activities in 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)



It can be expected that the implementation of the Community initiative, Equal, within the European Social Fund, may have a significant impact on Polish society. Its second phase (and the first one in Poland) began in November 2004. Almost 100 projects (out of 751 applications) were accepted for implementation.<sup>277</sup> Putting many of them into operation meant not only disseminating knowledge on equality issues but also, and more importantly, should bring about favourable changes for a number of people. The same applies to other programmes and actions, such as the European Year of Equal Opportunities for All and All Different, All Equal.

It must be emphasised that, more often than not, most of the 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. For example, the website of the Ministry of Interior and Administration was designed in a way that made it accessible to people with visual impairments using screen reading software. The Ministry uses the Intelligent Web Reader software.

*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)*

The encouragement of dialogue with NGOs can take two basic forms: first, enacting provisions that impose on certain bodies a duty to communicate and cooperate with NGOs (formal option), second, undertaking informal practical activities together with NGOs (substantive option). The best situation is to combine these two approaches which should be considered as being complementary. The first solution is the “easier” one in that it merely imposes a formal obligation; the second is rather more difficult and demanding, as it requires genuine initiative and political willingness to engage in an appropriate dialogue and effective cooperation with NGOs.

There are not many legal provisions on dialogue between public administration bodies and NGOs. The Government Plenipotentiary for Disabled People is obliged to cooperate with NGOs and foundations that perform activities for the benefit of disabled people.<sup>278</sup>

A more general provision applies to the Commissioner for Civil Rights Protection: on behalf of human and civil rights and freedoms, it should cooperate with associations, civil society movements and other voluntary unions and foundations.<sup>279</sup>

All the above-mentioned institutions maintain dialogue with a number of non-governmental organisations. The NGO representatives are regularly invited to present their opinions and discuss issues of mutual concern.

<sup>277</sup> See [www.equal.org.pl](http://www.equal.org.pl)

<sup>278</sup> Article 34.6 point 5, Act on Disabled Persons.

<sup>279</sup> Article 17a, Act on the Commissioner for Civil Rights Protection.

- 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)*

The Polish Constitution of 1997 contains a very general provision on dialogue and cooperation between social partners as one of the foundations of the economic system in Poland.<sup>280</sup> Obviously, employers' organisations and trade unions exist in Poland, collective agreements are concluded and codes of conduct are introduced in various enterprises, but they are usually intended specifically to deal with equal treatment issues.

In general, dialogue involves three parties: the government, employers' organisations and employees' trade unions, and its basic forms include exchange of information, consultations, pronouncing opinions and negotiations.

In 2001 the Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue.<sup>281</sup> The Tripartite Committee established by this Act replaced the previous Tripartite Committee created in 1994<sup>282</sup> that had not been functioning properly for some years, due to political tensions among the parties involved. The Committee is composed of representatives of the government, employers' organizations and employees' organisations. Any party of the Committee can put forward for discussion issues that, in its opinion, are important for preserving harmonious relations between 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 deliberating 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 among employees and employers.<sup>283</sup> After deliberating they can issue opinions or nominate a mediator to settle the collective dispute.<sup>284</sup>

In 1995 the Ministry of Economy and Labour established the Centre for Social Partnership, known as Dialog. The Centre was intended to initiate and promote social dialogue, assist social partners and offer training.<sup>285</sup>

<sup>280</sup> Article 20 Constitution.

<sup>281</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*) [henceforth: Act on Social Dialogue].

<sup>282</sup> Council of Ministers Resolution 7/94 of 15 February 1994 on the creation of the Tripartite Committee for Social and Economic Affairs (*Uchwała Rady Ministrów 7/94 z 15 lutego 1994 r. w sprawie powołania Trójstronnej Komisji do Spraw Społeczno-Gospodarczych*).

<sup>283</sup> Article 17a.1 Act on Social Dialogue.

<sup>284</sup> Article 17b.1 Act on Social Dialogue.

<sup>285</sup>

Centre's website: <http://www.cpsdialog.pl/>

d) *to specifically address Roma and Travellers*

In 2002 a special team on Roma issues was established within the Ministry of Interior. The role of the team has now been 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 Languages). There are two Roma members on the Commission (one post was vacant and the member was appointed just recently in 2008) and there is a plan to establish a special sub-commission on Roma issues consisting of 20 people (this would be one of three sub-commissions, the others being devoted to “culture and media” and “education”). However, the decision to establish sub-commissions was taken at the first meeting of the Joint Commission in September 2005 and by May 2008 it had not yet been set up. The activities of the Joint Commission are in part criticised by members of minorities – it lacks even a secretariat or its own office and communication between members of the Commission is difficult; they also complain about the fact that they are dominated by the government representatives on the Commission.

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 parties to the Commission.

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 approaching negative social stereotypes but they have never been implemented.

## 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>286</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 Constitution.<sup>287</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>288</sup> Moreover, as far as civil law contracts are concerned, the Civil Code stipulates that legal actions contrary to the law are null and void. Nullity may be limited to a part of the legal action (e.g. a single clause in a contract), if the conflict with the law concerns only that part of the action.<sup>289</sup>

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 contrary to the principle of equality still in force?*

Within the sphere of non-discrimination, there appear to be no examples of discriminatory provisions within the existing legal framework. If there were any, it is primarily for the Constitutional Court to declare their non-conformity with the Constitution and, as a consequence, such provisions will become ineffective as soon as the Court’s judgement enters into force.

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<sup>286</sup> Article 9.2 Labour Code.  
<sup>287</sup> Article 32 Constitution.  
<sup>288</sup> Article 18.2 Labour Code.  
<sup>289</sup> Article 58.1 and 58.3 Civil Code.

## 9. OVERVIEW

*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 (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

New draft Act on Equal Treatment (draft AET). On 2 April 2007, the Ministry of Labour and Social Policy introduced the draft AET and sent it for consultation with social partners (the list of 11 addressees included four trade unions and two NGOs – the newly established Association of Anti-discrimination Law and the Helsinki Foundation for Human Rights). The draft AET aims to implement four Directives: 2000/43; 2000/78; 2004/113 and 2006/54.

Over the last two years there have already been several versions of the draft law and yet the outcome remains uncertain. What is more, successive versions of the draft law limit the scope of the Act, narrowing it to an almost verbatim implementation of the Directives (amending the previous improper implementation of Directives 2000/43 and 2000/78, as well as correcting some mistakes of previous implementation). The initial draft law (April 2007) was much wider and went beyond the scope of Directives 2000/43 and 2000/78, it was in a sense anticipating the proposal of the new anti-discrimination directive discussed within the EC. It prohibited discrimination in access to social security, health care, education, access to publicly accessible goods and services (including housing), on the grounds of race and ethnic origin, nationality, gender, religion or beliefs, political beliefs, disability, age, sexual orientation, property, marital and family status. The draft of 21 January 2008 already limited the scope of the law, omitting the protection of all groups in terms of social security, health care and education and limiting the areas of protection in access to goods and services to gender, race and ethnic origin.

The final draft of 24 April 2008 has narrowed the scope still further, to simply implement the directives and not to go beyond them (to provide protection from discrimination in all fields outside employment only in relation to gender, race and ethnic origin).

If passed, the Act on Equal Treatment will be a huge step forward and will complete the final implementation of the Directives. However, narrowing its scope in consecutive versions is significant. According to the draft Act, the Minister of Labour is to play the role of equality body (however, legal assistance for victims of discrimination is to be provided by the Commissioner for Civil Rights).

## 10. 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. For a more comprehensive overview of a number of institutions see above, Section 7, on the equality body.



## Annex

1. Table of key national anti-discrimination legislation
2. Table of international instruments



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

Name of Country: Poland

Date: May 2008

Polish legislation on the internet: <http://isip.sejm.gov.pl/prawo/index.html> Parliament website (Polish only)

<http://prawo.lex.pl/>

Polish Law Server, a private company (Polish only)

Title of legislation (including amending legislation)	In force from:	Grounds covered	Civil/Adm ini- strative/ Criminal Law	Material scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			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, instruction to discriminate or creation of a specialised body
Constitution	17 October 1997	general anti-discrimination clause		general application	general application
Labour Code (amended many times)	originaly: 1 January 1975	gender, age, disability, race, ethnic origin, nationality, religion, political convictions, membership of a trade union, beliefs, sexual orientation, employment for definite/indefinite period, part-time/full-time		labour relations	- prohibition of direct and indirect discrimination, instructions to discriminate and harassment; - right to compensation for infringement of equal treatment - protection (partial) against victimisation - obligation to inform about regulations on equal treatment
Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market	1 June 2004	gender, age, disability, race, ethnic origin, nationality, religious beliefs, political convictions, sexual orientation, membership of a trade union		employment, pre-employment vocational training	- prohibition of discrimination by private employment agencies - prohibition of discrimination by public employment agencies - prohibition of discrimination by employers in informing about vacancies - equal treatment in vocational training - sanctions for discrimination (fine or restriction of liberty)
Act of 27 August 1997 on Vocational and Social Rehabilitation for the Disabled	1 January 1998	disability			- tasks of the Government Plenipotentiary for the Disabled

Act of 6 January 2005 on national and ethnic minorities and regional language	1 May 2005	ethnic origin, national origin		general prohibition of discrimination, lack of detailed provisions	<ul style="list-style-type: none"> <li>- one general article on prohibition of discrimination</li> <li>- some competences given to Ministry of Interior and local government</li> <li>- creates the Joint Commission of Government and National and Ethnic Minorities</li> </ul>
Council of Ministers Ordinance of 22 April 2008 on Government Plenipotentiary for Equal Treatment	30 April 2008	all possible grounds of discrimination, in particular: gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, sexual orientation, civil (marital) and family status		not given in detail, general statements	<ul style="list-style-type: none"> <li>- execution of government policy with regard to equal treatment</li> <li>- analysis and research, monitoring</li> <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: February 2007

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes
Protocol 12, ECHR	No	No	-	-	-
Revised European Social Charter	Yes	No	No	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes
Framework Convention for the Protection of National Minorities	Yes	Yes	No	-	Yes
International Covenant on Economic, Social and Cultural Rights	Yes	Yes	No	-	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	-	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No	-	Yes
Convention on the Rights of the Child	Yes	Yes	No	-	Yes
Convention on the Rights of Persons with Disabilities	Yes	No	Poland has not signed the Convention's Optional Protocol	-	-