



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

**COUNTRY REPORT 2010**

**POLAND**

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**State of affairs up to 1 January 2011**

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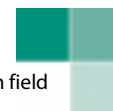
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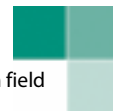
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## TABLE OF CONTENTS

INTRODUCTION.....	4
0.1 The national legal system .....	4
0.2 Overview/State of implementation .....	4
0.3 Case-law .....	8
1 GENERAL LEGAL FRAMEWORK.....	19
2 THE DEFINITION OF DISCRIMINATION .....	22
2.1 Grounds of unlawful discrimination.....	22
2.1.1 Definition of the grounds of unlawful discrimination within the Directives.....	23
2.1.2 Assumed and associated discrimination .....	29
2.2 Direct discrimination (Article 2(2)(a)) .....	30
2.2.1 Situation Testing.....	32
2.3 Indirect discrimination (Article 2(2)(b)) .....	37
2.3.1 Statistical Evidence.....	39
2.4 Harassment (Article 2(3)) .....	42
2.5 Instructions to discriminate (Article 2(4)) .....	44
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78) .....	45
2.7 Sheltered or semi-sheltered accommodation/employment .....	55
3 PERSONAL AND MATERIAL SCOPE.....	57
3.1 Personal scope.....	57
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) .....	57
3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43).....	58
3.1.3 Scope of liability .....	58
3.2 Material Scope .....	59
3.2.1 Employment, self-employment and occupation .....	59
3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector? .....	60
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c)).....	61
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)) .....	62
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)) .....	62

3.2.6	Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43).....	63
3.2.7	Social advantages (Article 3(1)(f) Directive 2000/43).....	64
3.2.8	Education (Article 3(1)(g) Directive 2000/43) .....	65
3.2.9	Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43) .....	71
3.2.10	Housing (Article 3(1)(h) Directive 2000/43) .....	73
4	EXCEPTIONS .....	76
4.1	Genuine and determining occupational requirements (Article 4).....	76
4.2	Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78) .....	76
4.3	Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78) .....	78
4.4	Nationality discrimination (Art. 3(2) .....	79
4.5	Work-related family benefits (Recital 22 Directive 2000/78).....	80
4.6	Health and safety (Art. 7(2) Directive 2000/78).....	82
4.7	Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78) .....	82
4.7.1	Direct discrimination .....	82
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities .....	84
4.7.3	Minimum and maximum age requirements .....	84
4.7.4	Retirement .....	86
4.7.5	Redundancy.....	88
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) .....	89
4.9	Any other exceptions .....	90
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78) .....	91
6	REMEDIES AND ENFORCEMENT .....	98
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78) .....	98
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78) .....	105
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78).....	110
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78).....	111
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78) .....	112
7	SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43).....	116



8	IMPLEMENTATION ISSUES.....	123
8.1	Dissemination of information, dialogue with NGOs and between social partners .....	123
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78).....	128
9	CO-ORDINATION AT NATIONAL LEVEL .....	131
	ANNEX.....	132
	ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION .....	133
	ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS .....	137



## INTRODUCTION

### 0.1 The national legal system

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

Law-making power in Poland is centralised. The basic law is the 1997 Constitution. Other sources of universally binding law include: acts/statutes (*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).

### 0.2 Overview/State of implementation

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

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

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

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

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



A very significant change in terms of the implementation of the directives took place in 2010. New law on equal treatment – ‘Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment’ – enacted by the *Sejm* (lower house of Parliament) on October 29<sup>th</sup>, 2010, was then amended by the *Senat* (upper house of Parliament), finally enacted by the *Sejm* on December 3<sup>rd</sup>, 2010, signed by the President, published on December 30<sup>th</sup> and entered into force on January 1<sup>st</sup>, 2011.<sup>2</sup>

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

Before, Poland made a limited 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 (Labour Code) in general in line with the respective equality directives (additionally labour law was amended on 21 November 2008 in order to improve number of deficiencies from the previous implementation, including improvement of the definition of indirect discrimination, broadening the scope of protection from instruction to discriminate and victimisation, correction of the definition of harassment). However still 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 which reads:

“§ 3 Direct discrimination takes place when an employee, for one or more reasons listed in § 1, was, is, or may be treated, in a comparable situation, less favourably than other employees” (see more in section 2.2 below).

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

In the field of occupation and employment the directives were generally implemented, however, the adopted solutions were not free of weak points that are mentioned later in the report (e.g. regarding reasonable accommodation). The provisions of the Labour Code only regulate labour contract relations and therefore do not apply to self-employment or “independent professions”<sup>3</sup>.

<sup>2</sup> Act of December 3<sup>rd</sup>, 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment’ [henceforth: Act on Equal Treatment], *Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*; Dz.U. 2010 nr 254 poz. 1700.

<sup>3</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).



When it comes to legislation in the field of combating discrimination outside employment, there were, depending on interpretation, either significant gaps or provisions which were difficult to use in any court proceedings. To give some examples.

The Racial Equality Directive was not implemented beyond employment (social security, education, access to goods and services).

There was no single officially designated “specialised body” in the sense of the Racial Equality Directive.

Provisions on shifting the burden of proof applied only to the area of employment and occupation.

Victimisation was prohibited only in the area of employment and occupation.

Over the last years (starting in 2006) there were several versions of the draft law on equal treatment elaborated. What is more, successive versions of the draft law significantly differed. Starting from quite wide scope subsequent versions limited the scope of the Act, narrowing it to an almost verbatim implementation of the Directives. The initial published 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 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). The 2009 version of the draft law (October 2009) came back to the original wide scope. But the version presented in May 2010 was again very narrow in scope and limited to the verbatim implementation of directives.<sup>4</sup> This version became the basis for the final law.

In the meantime the draft law also changed its name – which is quite symptomatic – from “law on equal treatment” to the “law on implementation of certain provisions of the European Union in the field of equal treatment”.

<sup>4</sup> Draft law from 21<sup>st</sup> of May 2010, see at: [http://bip.kprm.gov.pl/kprm/dokumenty/61\\_3646.html](http://bip.kprm.gov.pl/kprm/dokumenty/61_3646.html) (01.06.2010).





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

The most important doubts refer to the new equality body – the “Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment” finally designates as an equality body the existing Ombudsperson office (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*). The law adequately amended existing Law on the Ombudsperson imposing on the Ombudsperson new competences. But according to the Polish Constitution and new law those competences are limited when it concerns conflicts between private parties. The other hot topic of the debate is the fact that even though the new law obliged the Ombud to take a number of new responsibilities, it did not envisage any additional funds. Therefore the role of the Ombud as an equality body remains illusory.

Other doubts have constitutional character. Polish Constitution, as well as labour law, does not contain an exhaustive list of grounds of discrimination. However the new law, being in fact almost verbatim implementation of the directives, in contrast to the labour law, provides for an exhaustive list of grounds of discrimination, thus limiting protection of certain groups.

What is interesting is that this decision was made despite number of voices urging Polish Government to widen the scope of the protection – both from the local (expressed by NGOs) as well as international level. For instance the Concluding Observations of the UN Human Rights Council adopted on 26 October 2010 were announced on 29 October 2010, exactly the same day as ‘The Act on implementation of certain provisions of the European Union in the field of equal treatment’ was adopted by the *Sejm* for the first time.

The Committee expressed its concerned that the draft Law on Equal Treatment was not exhaustive and did not cover discrimination based on sexual orientation, disability, religion or age in the fields of education, health care, social protection and housing. Therefore the Committee recommended that Poland should further amend the Law on equal treatment so that discrimination based on all grounds and in all areas would be adequately covered.<sup>5</sup>

Despite the fact that the number of previous draft laws were wider in their scope the final decision of the government of limiting the law to simple implementation of the directives was interpreted as caused by lack of government commitment to counteracting discrimination, as well as result of fear from the infringement procedures initiated by the European Commission in the European Court of Justice.

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<sup>5</sup> The UN HRC site including Concluding Observations and third party submissions:  
<http://www2.ohchr.org/english/bodies/hrc/hrcs100.htm>





Finally another initially very promising piece of legislation should be mentioned – that is “the draft act on equal opportunities for persons with disabilities”. It was prepared in 2008 by the coalition of Polish NGOs assisted by the British Embassy in Poland and British experts. In fact the Coalition of Polish NGOs followed the British example of activities of RADAR<sup>6</sup> and the way it was advocating for the British Disability Discrimination Act (DDA). The “draft act on equal opportunities for people with disability” was officially presented to Prime Minister on December 2<sup>nd</sup>, 2008.<sup>7</sup> As he received the draft Act, Prime Minister thanked for the work that was done and promised to put the Act on the government agenda in 2009. According to government officials the Act was supposed to be passed to the Parliament in September 2009 and enacted before December 3<sup>rd</sup> 2009.

The draft act, as prepared by the Coalition of NGOs, was very comprehensive piece of legislation that included all obligations stemming from the directive 2000/78 and more. It covered the rule of equal treatment and prohibition of discrimination in i.a. employment, public service, access to goods and services, education, administration of justice, electoral rights, health care, social protection. It put on the public organs number of obligations regarding information policy, awareness raising, training of public servants. It envisaged an obligation to remove different kinds of barriers (architectural, in transport etc.) and provided time limit for doing so. However, despite the promise to enact this act in 2009 the Government prepared “a draft framework for a draft law on equal opportunities of disabled persons” (October 2009) and till now never prepared the final draft law.

What may surprise is the fact that in the public debate both draft laws (law on equal treatment and law on disability discrimination) were not discussed together even they in part deal with the same issues.

### 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**

**Name of the parties**

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

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

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

<sup>6</sup> RADAR. The disability rights people. See at: <http://www.radar.org.uk/>

<sup>7</sup> See for instance the website of the British Embassy at <http://ukinpoland.fco.gov.uk/en/newsroom/?view=News&id=10204616> (03.06.2009).



→ 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 (also beyond employment on the grounds of Directive 2000/78/EC), 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)

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

**Name of the court:** European Court of Human Rights

**Date of decision:** 15 June 2010

**Name of the parties:** *Grzelak v. Poland*

**Reference number:** application no. 7710/02

**Address of the webpage:** the ECHR judgment at HUDOC database:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Grzelak%20%7C%20Poland%20%7C%20v.&sessionid=87358689&skin=hudoc-en>

**Brief summary:** In Poland religion is taught in schools as voluntary subject. Pupils who do not wish to take part in religious classes may request organizing class on ethics (the will of at least 7 pupils should be expressed).

The applicants were U. Grzelak, C. Grzelak, and their son, Mateusz Grzelak. Relying in particular on Article 14 (prohibition of discrimination) in conjunction with Article 9 (freedom of thought, conscience and religion), the applicants alleged that the school authorities failed to organise a class in ethics for Mateusz, failed to give him a mark in his school report in the place reserved for "religion/ethics", and that Mateusz was harassed and discriminated against for not following religious education classes.

The parents systematically requested the school authorities to organise a class in ethics for their son, as provided for in the relevant Ordinance.<sup>8</sup> However, no such class was organised for the third applicant between the 1998/1999 school year and the 2008/2009 school year, that is to say, throughout his entire schooling at primary and secondary level. It appears that the reason was the lack of sufficient numbers of pupils interested in following such a class, in accordance with the requirements set out in the Ordinance. As no ethics class was provided throughout the third applicant's schooling, his school reports and leaving certificates contained a straight line instead of a mark for "religion/ethics" (para.91 of the ECHR judgment).

On 15 June 2010 the ECHR passed judgment in which it ruled that there has been a violation of Article 14 taken in conjunction with Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of one of the applicants – Mateusz Grzelak.

<sup>8</sup> The Ordinance of the Minister of Education on the organisation of religious instruction in State schools (14.04.1992) (*Rozporządzenie w sprawie warunków i sposobu organizowania nauki religii w szkołach publicznych*).



The Court found that the absence of a mark for “religion/ethics” on the successive school reports of the third applicant falls within the ambit of the negative aspect of freedom of thought, conscience and religion protected by Article 9 of the Convention as it may be read as showing his lack of religious affiliation (para. 88).

The Court limited its examination of the alleged difference in treatment between the third applicant, a non-believer who wished to follow ethics classes, and those pupils who followed religion classes to the latter aspect of the complaint, namely the absence of a mark (para. 90).

The Court found that the absence of a mark for “religion/ethics” on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant (para 99).

In terms of “just satisfaction” the Court ruled that the finding of a violation is sufficient just satisfaction.

Similar problem was already considered by the Polish Constitutional Court (CC), however with different decision (see below)<sup>9</sup>.

**Name of the court:** European Court of Human Rights

**Date of decision:** 2 March 2010

**Name of the parties:** *Kozak v. Poland*

**Reference number:** application no. 13102/02

**Address of the webpage:** the ECHR judgment at HUDOC database:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kozak%20%7C%20poland%20%7C%20v.&sessionid=87358749&skin=hudoc-en>

**Brief summary:** The applicant Piotr Kozak alleged, in particular, a breach of Article 14 taken in conjunction with Article 8 of the European Convention of Human Rights, submitting that he had been discriminated against on the ground of his homosexual orientation in that he had been denied the right to succeed to a tenancy after the death of his partner.

The applicant had lived together with his partner for several years in a same-sex relationship in the municipality flat rented by his partner. After his partner died in April 1998, the applicant applied to the municipality to succeed to the tenancy. The municipality denied his application.

In 2000 the applicant brought a claim against the municipality relying on the Lease of Dwellings and Housing Allowances Act and seeking to have his succession to the tenancy acknowledged. Applicant argued that he had a right to succession, as he has lived in a “common household” and in “*de facto* marital cohabitation” with his life-partner (*konkubent*).

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<sup>9</sup> 2 December 2009, sygn. akt U 10/07.



The District Court dismissed the claim holding that Polish law recognised “*de facto* marital relationships” between partners of different sex only (decision of February 22<sup>nd</sup>, 2001). The regional court upheld the judgment (decision of June 1<sup>st</sup>, 2001).

The ECtHR ruled that the Polish authority’s decision to reject the applicant’s claim on the basis of his sexual orientation was not proportionate to the aims sought (namely the protection of the family founded on a “union of man and women” as enshrined in Article 18 of the Polish Constitution) and therefore violated Article 14 taken in conjunction with Article 8 of the Convention. The Court dismissed claims for damages, non-pecuniary damages and costs. The judgment was announced on March 2<sup>nd</sup> 2010 and became final on June 2<sup>nd</sup> 2010 (none of the parties applied to Grand Chamber of the ECtHR).

The relevant amendments of the Civil Code (2001) replaced the provisions of section 8(1) and removed the difference between marital and other forms of cohabitation. According to current jurisprudence the sex of partners in “*de facto* cohabitation (konkubinat)” does not matter (see for instance judgment of the Białystok Appellate Court from 23 February 2007, I ACa 590/06).

**Name of the court:** Constitutional Tribunal

**Date of decision:** 2 December 2009

**Name of the parties:** group of Members of Parliament – motion for constitutional review

**Reference number:** sygn. akt U 10/07

**Address of the webpage:**

[http://trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A\\_11.pdf](http://trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A_11.pdf) (pages 1755-1795)

[www.trybunal.gov.pl/Rozprawy/2009/Dz\\_Ustaw/u\\_10s07.htm](http://www.trybunal.gov.pl/Rozprawy/2009/Dz_Ustaw/u_10s07.htm)

**Brief summary:** In Poland religion (of any church but in fact it is mainly catholic church) or ethics is taught in public schools as an optional subject. For students who do not want to participate in religion classes, course on ethics should be organized.

Group of MPs motioned for constitutional review of the Ordinance of the Minister of National Education of 13 July 2007 amending the Regulation on the conditions and manner of assessing and promoting students and learners, and conducting tests and examinations in public schools (Journal of Laws No. 130, item. 906). The Ordinance provides that, from fourth grade primary school, the grade for religion or ethics the student attended in a given year is included in the average grade. In addition, the classification from religion or ethics is also included in the final classification of students graduating from primary school, secondary school, or upper secondary school.

According to the applicants, the regulation is inconsistent with the constitutional principle of government neutrality in matters of religious beliefs. Public authorities shall in no way promote any religious doctrine. Meanwhile, among the objectives of the Ordinance is motivating students for extra effort and appreciation of the work resulting from participation in activities such as religion or ethics.



Regulation is inconsistent with the constitutional principle of equality before the law – in this case, the right of students to equal treatment by public authorities and non-discrimination for any reason. Indeed, the Ordinance introduces different ways of calculating the average assessments for students enrolled in ethics or religion, and students not involved in these activities.

Ordinance aim is also to discipline students participating in religion classes. The object of assessment is not only knowledge (like in religious studies) but also the attitude presented in the classroom.

The Court held that the Ordinance is consistent with the Constitution. The Court stressed that including the grade for religion or ethics in the annual or final average grade is the consequence of placing grade for religion or ethics on the school certificates.

The consequence of including grades for religion at the school certificate is also an equal opportunity with other learning subjects of including the grades for religion and ethics to the average annual or final grade.

Allegation of infringement of the principle of secularism and neutrality of the state due to the inclusion or grades for religion to the final average grade should be considered in the context of placing grades for religion on school certificates, due to the introduction of religion in public schools.

The difference in the assessment criteria for religion, indicated by the applicant, is inevitable; since the subject taught is religion, and not religious studies. Teaching religion is one of the manifestations of freedom of religion in the light of contemporary standards of a pluralistic democratic society. It is not the role of the state to impose religious education program and limit it to religious studies. This would mean a breach of the constitution, as the state interfering in this way would not maintain neutrality in matters of religious beliefs and freedom of its expression within public life.

The decision was taken by majority 12:1 (one *votum separatum*).

**Name of the court:** Constitutional Tribunal

**Date of decision:** 14 December 2009

**Name of the parties:** group of Members of Parliament – motion for constitutional review

**Reference number:** sygn. akt K 55/07

**Address of the webpage:**

[http://trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A\\_11.pdf](http://trybunal.gov.pl/OTK/teksty/OTKZU/2009/2009A_11.pdf) (pages 1848-1868)

[www.trybunal.gov.pl/Rozprawy/2009/Dz\\_Ustaw/k\\_55s07.htm](http://www.trybunal.gov.pl/Rozprawy/2009/Dz_Ustaw/k_55s07.htm)

**Brief summary:** Group of MPs motioned for constitutional review of the three acts of Parliament on financing from the state budget of Pontifical Faculty of Theology in Warsaw, Pontifical Faculty of Theology in Wrocław and High School of Philosophy and Pedagogy "Ignatianum" in Kraków.



According to the applicants, mentioned Acts are contrary to the constitutional principle of religious equality. Legislature created a special preference for funding religious education at the university level only for the Catholic Church, on the same basis as public schools, except for financing construction projects. However, legislator did not foresee the possibility of funding from the state budget the higher seminaries of other churches. The Acts challenged, according to the applicants, are incompatible with the principle of equality before the law of non-public schools and the principle of non-discrimination. The legislature has provided financial support for selected colleges and probably this was motivated by religious reasons.

The Court held that the Acts challenged are consistent with the Constitution.

According to the Court subsidized universities not only educate the clergy, but also lay people. State subsidies received are associated with the implementation of certain tasks in the education of students in the framework of courses recognized by the State on the same basis as in public schools.

The Court emphasized however that the principle of impartiality requires the establishment of statutory regulations to ensure access to state subsidies to all churches and religious associations that run universities, which meet the objective criteria established by law.

The decision was taken by majority 4:1 (one *votum separatum*).

**Name of the court:** Regional Court in Warsaw

**Date of decision:** 28 January 2009

**Name of the parties:** Jolanta K. v. Carrefour Polska Sp.z.o.o.

**Reference number:** sygn. I C 498/08

**Address of the webpage:** not available in Internet

**Brief summary:** 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 was 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).

On January 28<sup>th</sup> the parties reached a settlement before the Regional Court in Warsaw. Carrefour expressed regret at the incident and undertook to pay ten thousand zlotys (2500 euro) for the Foundation "Vis Maior" assisting persons with disabilities, whose President is Mrs. Jolanta K.

It was the first case of this kind lodged in Polish courts and has a precedent character. The Carrefour also announced that the company has changed its negative internal rules for people with disabilities.

It also caused the amendment to Polish law in relation to access specifically for blind people with guide dogs to grocery stores, restaurants and similar (in force since June 2009).





**Name of the court:** Supreme Court

**Date of decision:** 21 January 2009

**Name of the parties:** no parties, special procedure: "legal question" lodged by Commissioner for Civil Rights Protection (ombudsperson)

**Reference number:** sygn. II PZP13/08

**Address of the webpage:** [http://www.sn.pl/orzecznictwo/2\\_3.html](http://www.sn.pl/orzecznictwo/2_3.html)

**Brief summary:** The jurisprudence of the Supreme Court of the Republic of Poland regarding cases in which reaching the retirement age and entitlement to a pension were the reasons of the termination of the labour contract differed. In a number of cases the Supreme Court adopted different decisions (one such case is listed below). The Ombudsman lodged in the Supreme Court a "legal question" (this is a special procedure which may be initiated by the Ombudsman in situations where differences in the interpretation of law in courts judgements exist; the legal question is not based on any particular case). The resolution is taken by a special panel of 7 Justices.

The question as formulated by the Ombudsman reads: "Whether reaching retirement age and entitlement to a pension may be the sole reason for the termination of a labour contract with employee - a woman or a man - and whether this does not imply discrimination against an employee based on sex and age (Article 11<sup>3</sup> of the Labour Code)".

The Supreme Court adopted a following resolution: "Reaching the retirement age and entitlement to a pension may not be the sole cause of termination of the contract of employment by the employer (Article 45 § 1 of Labor Code)".

In the justification the Supreme Court stressed that the termination of employment with the employee - women or men - just because they reached a certain retirement age and are being entitled to a pension constitutes discrimination: indirect discrimination because of gender (in case of women employee since the retirement age of women is lower) and direct discrimination because of age (in case of women and men employee).

**Name of the court:** District Court in Warsaw, Regional Court in Warsaw

**Date of decision:** 21 May 2008 (DC), 7 May 2009 (RC), 29 June 2010 (DC)

**Name of the parties:** Małgorzata K.D. v. Polskie Radio S.A.

**Reference number:** VII P 937/07

**Brief summary:** Due to the change of the Polish government in 2005 the management of the Polskie Radio (Public Radio) was also changed and initiated in 2006 a preparation of the process of collective redundancies. The lists of the employees were created according to unclear criteria (however a number of them were listed under the general term of the need of "rationalization of employment structure"). The process was accompanied with statements of the members of the management declaring that radio staff is too old (additional factor behind that was that elder employees worked in the radio during communist era).





A number of employees were dismissed and several of them lodged claims. The labour contract of the claimant with Polish Radio was dissolved by agreement of the parties. However, according to the claimant it was forced by permanent pressure related to the fact that the claimant was included in the list of persons for dismissal. The claimant argued that the planned dismissal was in fact discriminatory because of age, political beliefs and membership in the trade unions (the claimant was active unions' leader criticizing the collective redundancies policy).

The court found indirect discrimination in dismissal. According to the court, an apparently neutral provision in the regulations concerning dismissal of employees (listing several criteria for dismissal) in fact discriminated because of age, and this was apparent in the age structure of persons to be dismissed (the list of persons to be dismissed included 295 names; only 21 persons were younger than 40 years). According to the court, the Polish Radio S.A. did not prove that the reasons indicated for the dismissal were objectively justified by a legitimate aim and that the means of achieving that aim were appropriate and necessary.

On 7 May 2009 the Warsaw Regional Court quashed the District Court decision and sent it back for additional considerations.

The court took into account ex officio the invalidity of the court proceedings. The reason was the change/replacement during the trial of the first instance of one of lay judges on the panel.

On 29 June, 2010 the District court in Warsaw, after re-examination of the case, ruled in favour of complainant and confirmed that her dismissal was discriminatory. The complainant was awarded compensation in the amount of 1126 PLN (ca. 270 euro) – equal to official minimum wage.

**Name of the court:** Regional Court in Warsaw, District Court in Warsaw

**Date of decision:** 31 March 2008 judgement of the Regional Court, 5 June 2007 judgement of the District Court

**Name of the parties:** Mirosław S. v. Minister of National Education

**Reference number:** sygn. akt: VIII P 1028/06

**Brief summary:** Mirosław S., Director of the National In-Service Teacher Training Centre (Centralny Ośrodek *Doskonalenia Nauczycieli*), brought a case to the 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*.

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 in fact related to homosexuality – was the different approaches of Mirosław S. and the Minister of National Education to the vision of education in Polish schools – 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).

**Name of the court:** Constitutional Tribunal

**Date of decision:** 23 October 2007

**Name of the parties:** Marek R. v. Zakład Ubezpieczeń Społecznych

**Reference number:** Sygn. akt P 10/07

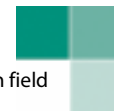
**Address of the webpage:**

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

**Brief summary:** Legal question to the Constitutional Tribunal of the Regional Court in Łódź (case of Marek R. v. Zakład Ubezpieczeń Społecznych)

Article 29.1 of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund<sup>10</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”.

<sup>10</sup>Ustawa z 17 grudnia 1998r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych.



The regular retirement age is 60 for women and 65 for men. However, women were 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.

The case was considered as a matter of sex discrimination, although the issue might also be seen as age discrimination concerning the age difference for men and women in granting them particular rights to retirement.

**Name of the court:** Supreme Administrative Court

**Date of decision:** 15 November 2006

**Name of the parties:** Marek F. v. Wójt Gminy w S.

**Reference number:** I OSK 1217/06

**Brief summary:** Every community (represented by the vogt<sup>11</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.

**Name of the court:** District Court in Poznań

**Date of decision:** 4 September 2006

**Name of the parties:** Inga K., Agnieszka K., Sandra R., Joanna R. v. Przemysław Alexandrowicz and Jacek Tomczak

**Reference number:** sygn. akt XXIII K 20/05/11

**Brief summary:** The parties 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.”

**Name of the court:** Regional Court in Legnica

**Date of decision:** 20 June 2006

**Name of the parties:** Zbigniew M. v. Komenda Powiatowa Policji w G.

**Reference number:** sygn. akt: V Pa 101/06

**Brief summary:** There was discrimination in the recruitment process of the Police Headquarters due to 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.

**Name of the court:** District Court in Płock

**Date of decision:** 16 March 2006

**Name of the parties:** Bolesław K. v. “x” limited liability Co. in P. T.

**Reference number:** sygn. akt IV P 353/05

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<sup>11</sup>The highest representatives of local government.



**Brief summary:** The plaintiff claimed that he was discriminated against in the workplace because of his sexual orientation. The court did not find evidence of discrimination and dismissed the action. The plaintiff, who was represented by a legal aid lawyer appointed ex officio, wished to file an appeal which was, however, rejected for technical reasons (failure by the lawyer to pay the court fee). The plaintiff filed a constitutional complaint, but this was related not to discrimination but to the fact that, due to 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).

**Name of the court:** Supreme Court

**Date of decision:** 21 April 1999

**Name of the parties:** Alicja P. v. Zespół Opieki Zdrowotnej w K.

**Reference number:** OSNP 2000/13/505

**Brief summary:** Dismissal based on the fact 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.

**Name of the court:** Supreme Court

**Date of decision:** 5 February 1998

**Name of the parties:** Genowefa C. v. Zespół Opieki Zdrowotnej w R.

**Reference number:** OSNP 1999/4/115

**Address of the webpage:** not available in Internet

**Brief summary:** The principle of equal treatment and non-discrimination in terms of employment does not apply to the equal treatment of the employer and employee.

*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>12</sup> This principle does not specify the criteria for the prohibited forms of discrimination.<sup>13</sup> Thus, the constitutional provision is more general than the Directives, since it does not mention expressly any grounds but prohibits any discrimination. The prohibition of discrimination goes beyond the material scope indicated in Article 3.1 of the Racial and Employment Equality Directives, encompassing political, social and economic life in their entirety, both in the public and the private sectors. However, it is worth mentioning that ECRI in its second and third report on Poland recommended “that possible grounds of discrimination, including those related to race and ethnic origin be included as examples in the non-exhaustive list contained in Article 32 of the Polish Constitution”. Since the recommendation from the second report was not adopted ECRI reiterated it in the third report recommending that the “Article 32 of the Constitution contains a non-exhaustive list of possible grounds for discrimination, such as race, colour, language, religion, nationality, national or ethnic origin.”<sup>14</sup>

In addition, the Constitution bans political parties and other organisations which include or allow racial hatred in their programme or activities.<sup>15</sup> It also guarantees people the freedom to preserve and develop their own language, preserve customs and traditions and develop their own culture.<sup>16</sup> Furthermore, national and ethnic minorities have the right to establish their own educational, cultural and religious institutions.<sup>17</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>18</sup>

<sup>12</sup>Article 32 Constitution of the Republic of Poland [henceforth: Constitution].

<sup>13</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>14</sup> ECRI Third report on Poland, Adopted on 17 December 2004, CRI(2005)25, p.8.

<sup>15</sup>Article 13 Constitution.

<sup>16</sup>Article 35.1 Constitution.

<sup>17</sup>Article 35.2 Constitution.

<sup>18</sup>Article 53, 54.1, 58.1 and 60 Constitution.



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>19</sup> Furthermore, the Constitution declares that both women and men have equal rights in family, political, social and economic life<sup>20</sup> and, in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.<sup>21</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>22</sup> and also protection for veterans of the struggle for independence, especially war invalids,<sup>23</sup> children<sup>24</sup> and consumers.<sup>25</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>26</sup>

The Constitution does not mention sexual minorities among the protected groups.<sup>27</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>28</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>29</sup>

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

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<sup>19</sup>Article 69 Constitution.

<sup>20</sup>Article 33.1 Constitution.

<sup>21</sup>Article 33.2 Constitution.

<sup>22</sup>Article 25 Constitution.

<sup>23</sup>Article 19 Constitution.

<sup>24</sup>Article 72 Constitution.

<sup>25</sup>Article 76 Constitution.

<sup>26</sup>Article 67.1 Constitution.

<sup>27</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>28</sup>Article 8.2 Constitution.

<sup>29</sup>From the interviews conducted to update this report.





“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.





## 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”.

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

In the provisions of the Labour Code (Art. 183a § 1) 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>30</sup>

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

The Act on Social Security System<sup>31</sup> (Art. 2a.1), amended by the 2010 Law on Equal Treatment, lists: gender, race, ethnic origin, nationality, family and marital status.

<sup>30</sup>Passed on 6 January 2005 and entered into force on 1 May 2005.

<sup>31</sup> Act of 13 October 1998 on the Social Security System, amended (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).



The Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market<sup>32</sup> (art. 2a), amended by the 2010 Law on Equal Treatment, lists: gender, race, ethnic origin, nationality, religion or beliefs, political convictions, disability, age or sexual orientation.

The Act on Capital-based pensions<sup>33</sup> (Art. 2), amended by the 2010 Law on Equal Treatment, lists: gender, race, ethnic origin, nationality, health condition, family and marital status

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

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the 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"?*

First of all it should be underlined that there is no law on discrimination, including new 2010 Act on Equal Treatment, which would define the concepts mentioned. There are no definitions related to race, religion, belief, age or sexual orientation in Polish anti-discrimination legislation.

The only defined concepts (however also not in the anti-discrimination legislation) are disability and national and ethnic minorities.

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>34</sup>

The definition stipulates that a disabled person is someone whose disability has been confirmed by a competent medical authority.<sup>35</sup>

<sup>32</sup> Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market, amended [henceforth: Act on Employment] (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*).

<sup>33</sup> Act of 21 November 2008 on capital-based pensions (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).

<sup>34</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>35</sup> Article 1 Act on Disabled Persons.



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>36</sup> There are three levels of disability: low-level, medium level and high-level disability.<sup>37</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 event of this, the court must decide itself whether the person concerned is disabled or not. The court may take into account the definition contained in the 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>38</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.

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”.

<sup>36</sup>Compare Article 2.10 Act on Disabled Persons.

<sup>37</sup>Article 3.1 Act on Disabled Persons.

<sup>38</sup>Garlicki L., (eds.), *Commentary to the Polish Constitution (Komentarz do Konstytucji RP)*, Wydawnictwo Sejmowe, Volume III, Warsaw 2003.



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>39</sup>

The Act then continues to enumerate the recognised national minorities: Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish.<sup>40</sup>

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

- 1) is less numerous than the remaining part of Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;
- 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>41</sup>

<sup>39</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>40</sup>Article 2.2 Act on Minorities.

<sup>41</sup>Article 2.3 Act on Minorities.



Then, as above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.<sup>42</sup>

The above definitions are criticised for two reasons. First of all they exclude some significant national or ethnic groups in Poland (e.g. so-called new immigrants such as the Vietnamese).

Furthermore, the definitions are restricted to Polish citizens and therefore do not refer, for example, to migrant workers originating from neighbouring countries (e.g. Ukrainians). The aim of the Act on National and Ethnic Minorities and on Regional Language is, however, to provide certain rights, mostly linguistic and cultural rights, to national and ethnic minorities, as well as to protect them by state actions.

Article 6 of the Act on National and Ethnic Minorities and on Regional Language prohibits discrimination based on belonging to a minority. This provision clearly refers only to the national and ethnic minorities provided for in the law. It must, however, be emphasised that this limited scope of definition of national and ethnic minorities does not mean that people who do not belong to them are not protected. Under Article 37 of the Polish Constitution, every person who is within the jurisdiction of Poland may exercise freedoms and rights provided for in the Constitution. Article 32 Section 2 of the Constitution prohibits discrimination for any reason whatsoever in political, social and economic life. It is clear that the grounds of prohibited discrimination include race, skin colour, ethnic origin or belonging to a national or ethnic minority<sup>43</sup>.

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

- 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' for the purposes of freedom of religion, or what is a "disability", sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

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.

<sup>42</sup>Article 2.4 Act on Minorities.

<sup>43</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.



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.

The new situation in terms of legal definitions evolved in the year 2008 with the amendment of the Act on granting protection to aliens on the territory of the Republic of Poland<sup>44</sup>.

The amendment transposed the Qualification Directive<sup>45</sup> and the Asylum Procedures Directive<sup>46</sup>. The Act concerns the protection of aliens and relevant asylum procedures and is not part of anti-discrimination legislation however it includes also some definitions new in Polish legal order.

Article 14 of the Act includes some definitions useful in „assessing the grounds of persecution” of the person who apply for adequate refugee status. According to the Act in this context:

1. „The concept of race includes in particular colour of skin, descent, or membership of a particular ethnic group,
2. the concept of religion shall in particular include: a) having theistic, non-theistic or atheistic beliefs, b) participation, or refraining from engaging in religious rituals, performed in public or in private, individually or collectively, c) other acts of religious character, beliefs expressed or form of individual or collective behaviour as a result of religious beliefs or related to them;
3. the concept of nationality is not limited to a citizenship or its absence, but shall in particular include membership in a group defined by: a) cultural, ethnic or linguistic identity or b) common geographical or political origin or c) linkage with the population of another country [...]”

The Act also refers to the sexual orientation stating that „depending on the conditions prevailing in the country of origin a particular social group might include a group whose members share a common sexual orientation, but sexual orientation can not include acts which, according to Polish law constitute crimes” (art. 14.2).

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

<sup>44</sup> Act of 18 March 2008 on the change of Act on granting protection to aliens on the territory of Poland..., in force since 29 May 2008, Journal of Law 2008, no 70, item 416 (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*).

<sup>45</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted.

<sup>46</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.





- 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. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*  
*- Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

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

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

Equality body, as well as other organs relevant to the discrimination described in chapter 7 do not tackle multiple discrimination in any special way so far, it is not currently on their agenda.

However the notion of the multiple discrimination is better known and more popular, also thanks to the fact that it was on the agenda of awareness raising campaigns within European Year of Equal Opportunities and Campaign All Different All Equal.

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

- e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*





First of all it must be mentioned that discrimination cases are still very rare in Poland therefore the body of cases to draw conclusions from is quite small. Also access to court judgements of courts of lower instances is very limited and it is possible that there are discrimination cases which pass unnoticed.

Until 2010 the burden of proof was shifted only in employment cases (labour code), from January 1, 2011, according to new Act on Equal Treatment (Art. 14.3) burden of proof shifts in all cases governed by the law.

The law does not provide for higher damages in case of discrimination because of more than one reason. There is also no such a judicial practise. Usually in cases of discrimination because of gender and other reason courts tend to focus on gender discrimination, and once it is proved, do not devote their attention to other discrimination reasons.

The good example to picture this issue could be cases of discrimination because of "forced retirement" when employees are being fired when they reach retirement age. Since the retirement age for women is lower than for man (as a general rule 60 for women and 65 for man) the cases of forced retirement of women were treated by courts as gender discrimination and the issue of age discrimination never brought attention (the gender discrimination precede the age discrimination). However the same kind of cases regarding men were treated as age discrimination. Only lately in its resolution the Supreme Court stated that in such a case we face two kinds of discrimination – indirect discrimination because of gender and direct discrimination because of age.<sup>47</sup>

### 2.1.2 Assumed and associated discrimination

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

There is no legal definition of imputed discrimination provided by Polish legislation. In the works on draft Law on Equal Treatment NGOs recommended including this concept, but without success. 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, for example the scope of discrimination prohibited by labour law is not limited to the listed grounds. Thus, it may be assumed that if the question of imputed discrimination should arise, this could also be treated as discrimination. It is however strictly theoretical consideration since no case of this type was identified.

<sup>47</sup> The Supreme Court resolution of 21 Jan. 2009, case described in part 0.3 above.



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

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

Also this concept was recommended by NGOs in the works on draft Law on Equal Treatment, but without success.

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

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

New Act on Equal Treatment (Art. 3.1) defines direct discrimination in line with the Directives. It stipulates that direct discrimination takes place when "a natural person because of gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, is treated less favourably than another is, has been or would be treated in a comparable situation".

Parallel to this definition there is still in force the definition of the Labour Code, which only partially complies with the definitions provided by the Directives and which still refers to the employment field governed by the Labour Code.

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 which reads:

"§ 3 Direct discrimination takes place when an employee, for one or more reasons listed in § 1, was, is, or may be treated, in a comparable situation, less favourably than other employees."

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

Discriminatory public statements and job vacancies announcements may constitute discrimination and are prohibited by the general discrimination prohibition clauses (art. 11.3 Labour Code). However unlike in the ECJ *Firma Feryn* judgement in order to bring a case to the court the victim should be identified. The claim could be brought only on behalf of particular complainant who did apply or enquired for the job and in such a case a compensation might be sought.

There is also one special relevant situation as described in the Act on the Promotion of Employment and the Institutions of Labour Market.

According to the Act an employment agency cannot discriminate against people for whom it seeks employment or paid work (including self-employment), on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>48</sup>

The Act provides also that person operating employment agency, who breaks the prohibition of discrimination, might be fined with the fine not less than 3.000 PLN (750 euro).<sup>49</sup>

The same Act provides also that all 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>50</sup>

In 2009 the Polish Association of Antidiscrimination Law (*PTPA - Polskie Towarzystwo Prawa Antydyskryminacyjnego*) conducted a study of job announcements and advertisements. They analyzed more than 60,000 posts.

<sup>48</sup> Article 19.c Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market, amended [henceforth: Act on Employment].

<sup>49</sup> Article 123 Act on Employment

<sup>50</sup> Article 36.5e Act on Employment.



It was found that over a third of them included a discriminatory element (mostly gender but also age, nationality and disability discrimination).<sup>51</sup>

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

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

Apart from those exceptions (transposed from the Directives) Act on Equal Treatment provides *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres (art. 5.1) as well as it does not cover the freedom of choice of the party to the contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality (art. 5.3).

However Polish law<sup>52</sup> permits justification of both direct and indirect discrimination in respect of all grounds in the field governed by the Labour Code. In accordance with the Code, in order to justify different treatment that leads to the breach of the principle of equal treatment in employment, the employer must prove the existence of “objective reasons” for his/her actions.<sup>53</sup> As regards the specified “exclusion” situations see below, Section 2.3.

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

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

### 2.2.1 Situation Testing

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

<sup>51</sup> Equal treatment in employment. Provisions v. Reality. Report from the monitoring of job advertisements, ed. K. Kędziora, K. Śmiszek, M. Zima, Warsaw 2009 (*Równe traktowanie w zatrudnieniu. Przepisy a rzeczywistość. Raport z monitoringu ogłoszeń o pracę*); available in Polish at: [http://www.ptpa.org.pl/index.php?option=com\\_content&view=article&id=115&Itemid=64](http://www.ptpa.org.pl/index.php?option=com_content&view=article&id=115&Itemid=64)

<sup>52</sup> Act of 21 November 2008 on amendment of the Act – Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>53</sup> Article 18<sup>3b</sup> para. 1 in fine, Labour Code.



In Polish law there is no explicit mention of 'situation 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 situation testing) it is only a theoretical assumption.<sup>54</sup>

Both the Civil Code (Article 5) and the Labour Code (Article 8) include exactly the same provision which states that, "Nobody can use his/her right in a way which contradicts the social or economic meaning of this right or the rules of social co-existence. This kind of action (or no 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 situation 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.

In civil law proceedings a party claiming the existence of a certain fact must present evidence supporting his/her claims<sup>55</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 situation testing, as implementation of various scenarios requires the use of video cameras, tape recorders or even witnesses serving as comparators to the victims of discrimination.

<sup>54</sup> See similar, more detailed argumentation, in : K. Wencel, "Fruit of the poisonous tree" *Situation testing as a proof in discrimination cases*, in: Neighbours or intruders. About discrimination of foreigners in Poland, Warsaw 2010, „Owoc zatrutego drzewa? Situation testing jako dowód w sprawach o dyskryminację”, w: Sąsiedzi czy intruzy. O dyskryminacji cudzoziemców w Polsce, Stowarzyszenie Interwencji Prawnej, Warszawa 2010 (<http://www.interwencjaprawna.pl/publikacje-do-pobrania.html>).

<sup>55</sup> Article 232 of the Code of Civil Procedure.



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

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 situation testing in Polish courts in discrimination cases. In fact, the Helsinki Foundation for Human Rights has used situation 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.

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

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

There was also an attempt to use the testing method (and film it for TV) to demonstrate a case of people of 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.

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

Finally in the last two years, situation testing, however without using its results in courts is becoming more popular among NGOs, there were, and are currently running, couple of projects focusing on testing (including research on testing as well as testing itself).





In 2009, the Institute for Structural Research (*Instytut Badań Strukturalnych*, IBS) conducted a test to check discrimination in access to employment because of age. IBS checked discrimination by responding to 1.000 job offers using fictitious CVs of two women and two men (in both groups one aged 40 years, second in the age of 54 years), for each job offer four applications were sent. The study covered 10 different occupations.<sup>56</sup>

In 2010 the Institute of Public Affairs (*Instytut Spraw Publicznych*) conducted a pilot study on discrimination against foreigners. The survey consisted of sending, in response to recruitment advertisements, two equivalent CVs, the only differentiating factor was the origin of the candidate (decoded using the name, surname and place of birth).<sup>57</sup> In 2011 the Institute of Public Affairs continues the tests, this time on a larger scale.

In March 2010 for the first time in Poland the international project „Night of tests” took place<sup>58</sup> – testers were testing access to night clubs of persons of different ethnic origin.<sup>59</sup>

Currently<sup>60</sup>, The Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*, [interwencjaprawna.pl](http://interwencjaprawna.pl)) together with INPRIS – Institute for Law and Society (*INPRIS – Instytut Prawa i Społeczeństwa*, [inpris.pl](http://inpris.pl)) is planning a training for 30 Polish judges to explore possibilities of using data from situation testing in Polish courts.

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

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

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

<sup>56</sup> M. Bukowski (ed.) (2010) *Zatrudnienie w Polsce 2008: praca w cyklu życia*, Warszawa: Instytut Badań Strukturalnych, p. 99-102, at:

[http://ibs.org.pl/site/upload/publikacje/ZWP2008/Zatrudnienie\\_w\\_Polsce\\_2008.pdf](http://ibs.org.pl/site/upload/publikacje/ZWP2008/Zatrudnienie_w_Polsce_2008.pdf) (13.03.2011).

<sup>57</sup> K. Wysieńska, „Nguyen, Serhij, czy Piotr. Pilotażowe badanie audytowe dyskryminacji cudzoziemców w rekrutacji”, in: *Neighbours or intruders. About discrimination of foreigners in Poland*, Warsaw 2010 op. cit.

<sup>58</sup> In Poland tests were organized by Instytut Spraw Publicznych, Forum na Rzecz Różnorodności Społecznej and Stowarzyszenie Interwencji Prawnej.

<sup>59</sup> <http://wiadomosci.dziennik.pl/wydarzenia/artykuly/324917,czarnoskorzy-goscie-mieli-problem-z-wejsciem-do-lokali-w-warszawie.html>

<sup>60</sup> September 2011.



It is a very fine line and the main difference is between incitement to commit a criminal act and exposure of an individual's prohibited actions. Keeping in mind the difference between provocation and situation testing, it would nevertheless be conceivable to attempt to use situation testing as evidence in court. But since it does not happen in practice the issue is only theoretical for the time being.

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

There are no examples of relevant case-law.

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

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

In the new 2010 Act on Equal Treatment indirect discrimination is defined as follows (art.3.2) – situation in which for a person because of his/her gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, due to an apparently neutral provision, criterion used or practise/action taken, unfavourable disproportions or particular disadvantage occur or could occur, unless that decision, criterion or action is objectively justified by a legitimate aim and when the means of achieving that aim are appropriate and necessary.

Simultaneously the definition of the indirect discrimination formulated in the Labour Code, and amended in 2008<sup>61</sup>, is still valid in employment field.<sup>61</sup>

According to Labour Code indirect discrimination takes place when, due to an apparently neutral provision, criterion used or practise/action taken unfavourable disproportions or particular disadvantage occur or could occur in terms of establishing and termination of employment, conditions of employment, promotion, and access to training for raising professional qualifications, for all or large number of employees being members of the group distinguished due to one or more of the grounds referred to in § 1, unless that decision, criterion or action is objectively justified by a legitimate aim and when the means of achieving that aim are appropriate and necessary.”<sup>62</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?*

<sup>61</sup> Act of 21 November 2008 on amendment of the Act – Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>62</sup> Article 18<sup>3b</sup> § 4 (amended), Labour Code.



The definition of indirect discrimination as quoted above is new and in force only since January 1<sup>st</sup>, 2011 (definition from the Act on Equal Treatment) and since January 18<sup>th</sup>, 2009 (definition from the Labour Code). Both concepts of a “legitimate aim” and “appropriate and necessary measures” are new therefore it is difficult to say – due to the lack of relevant case law – how that would be treated by courts (before, disproportional treatment could be justified just by “other objective reasons”).

However, in relation to both direct and indirect discrimination, an additional amended provision could be applied that specifies under what circumstances certain conduct cannot be considered as discrimination. The following differentiating measures if proportional to reaching legitimate aim do not amount to a violation of the principle of equal treatment<sup>63</sup>:

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

In addition, measures taken as positive discrimination are allowed under Polish legislation<sup>64</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>65</sup>

*c) Is this compatible with the Directives?*

2010 Act on Equal Treatment is in line with the Directives. However the definition lacks direct mentioning of the comparator (“compared with other persons” as Directives put it). One has to interpret therefore that “unfavourable disproportions or particular disadvantage” includes implied “other persons” to compare with.

Concerning the Labour Code even if after the 2008' amendment the definition of indirect discrimination is better than before it still seems not to be finally compatible with the Directives.

<sup>63</sup>Article 18<sup>3b</sup> § 2 (amended), Labour Code.

<sup>64</sup>Article 18<sup>3b</sup> § 3, Labour Code.

<sup>65</sup>Article 18<sup>3b</sup> § 4, Labour Code.



Specifically, the definition refers to disadvantage for 'all or large number of employees being members of the group ...'. This is not a requirement found in the Directive and it is problematic.

For example, an indirectly discriminatory measure in relation to a disabled person might only affect a small number of persons with that specific disability, rather than a large number of disabled persons.

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

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

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

No such case has yet been reported.

### 2.3.1 Statistical Evidence

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

Although in Polish law, including new Act on Equal Treatment, 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. 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.

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

There have not been any cases involving either direct or indirect discrimination where statistics were used in order to prove discrimination.<sup>66</sup> Thus, it is not possible to judge whether or not there might be any potential reluctance. Influence from developments in other countries is rarely seen.

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

There is no case-law in the field.

<sup>66</sup>From the interviews conducted to update this report.



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

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>67</sup> Furthermore, no one may be obliged, except on the basis of a statute, to disclose personal information.<sup>68</sup>

Article 27.1 of the Act on the Protection of Personal Data<sup>69</sup> introduces a prohibition of the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade union membership, as well as the processing of data concerning health, genetic code, addictions or sex life and data relating to convictions, decisions on penalties, fines and other decisions issued in court or administrative proceedings.

The processing of the data referred to in paragraph 1 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;

<sup>67</sup>Article 47 of the Constitution.

<sup>68</sup>Article 51.1 of the Constitution.

<sup>69</sup> Act of 29 August 1997 on personal data protection [amended] (*Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych*).



- 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>70</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>71</sup> The exceptional situation takes place when a national census is organized – in such a case providing information might be obligatory but that requires a special Act of Parliament as a legal basis.<sup>72</sup> This is why, in the current legal framework, sensitive personal data regarding discrimination on the grounds of sex, age, disability, racial or ethnic origin, nationality, religion, political beliefs, membership of trade unions and sexual orientation can only be collected by the Ministry of Justice (or other state bodies) on a voluntary basis.

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

Thus far there has been no tradition or examples of data being collected solely for litigation 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.

<sup>70</sup> Act of 29 June 1995 on public statistics [amended], (*Ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej*).

<sup>71</sup> Article 8 Act on Public Statistics.

<sup>72</sup> Article 9.1 Act on Public Statistics.





Big source of statistical data, however not very detailed ones, are results of national census. The last two national censuses took place in 2002 and 2011 (IV-VI) and their results show for instance the ethnic composition of society (questions relate for instance to citizenship, nationality, affiliation to other nation or ethnic group, country of birth and country of birth of both parents, mother tongue and language spoken at home), religion or beliefs, number of persons with disabilities.

When designing positive action there are also ways of obtaining more detailed information and statistics: via schools' administrations (for instance, the number of Roma pupils in order to organise 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. Generally data on people with disabilities is quite detailed due to number of programs devoted to this group.

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

## 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.*

New 2010 Act on Equal Treatment (Art. 3.3) defines harassment as any unwanted conduct with the purpose or effect of violating the dignity of a natural person and of creating intimidating, hostile, degrading, humiliating or offensive environment.

The Act also treats as unequal treatment and prohibits less favourable treatment of persons caused by rejection of harassment or submission to harassment as well as prohibits instruction to discriminate/harass; both encouraging and ordering to discriminate/harass (Art. 3.5), Art. 9).

Same definition (corrected and significantly broadened than before), in relation to employees, was introduced to the Labour Code in 2008.<sup>73</sup> The amended provision defines harassment as unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating intimidating, hostile, degrading, humiliating or offensive environment.<sup>74</sup>

<sup>73</sup> Act of 21 November 2008 on amendment of the Act – Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>74</sup> Article 183a § 5 point 2 (amended), Labour Code.



New provision was also added stating that „Submission of the employee to the harassment or sexual harassment, as well as taking actions rejecting (counteracting) the harassment or sexual harassment may not result in any adverse consequences for an employee”.<sup>75</sup>

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

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

- the use of violence or unlawful threat towards a group of people or an individual person on account of their national, ethnic, racial, political or religious affiliation or because of their lack of religious belief<sup>76</sup>;
- restricting the rights of an individual on account of his/her religious affiliation or lack of religious belief<sup>77</sup>;
- malicious or persistent violation of an employee’s rights stemming from an employment contract or social security<sup>78</sup>;
- refusal to re-employ a person whose reinstatement was decided by the appropriate institution<sup>79</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>80</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>81</sup>

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

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

<sup>75</sup>Article 183a § 7, Labour Code.

<sup>76</sup>Article 119.1 Penal Code.

<sup>77</sup>Article 194 Penal Code.

<sup>78</sup>Article 218.1 Penal Code.

<sup>79</sup>Article 218.2 Penal Code.

<sup>80</sup>Article 256 Penal Code.

<sup>81</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, gender, disability or age. Sexual minority rights organisations are campaigning for the scope of these offences to be broadened. Draft proposal for adequate changes of the penal code was prepared by them (additionally sexual identity was added to grounds mentioned) – see at: <http://www.spr.org.pl/nowelizacja/> (15.09.2011).



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

The concept of harassment (unlike the concept of sexual harassment) is still new in Poland and rarely well understood. There are numbers of different “codes of conduct” within different professions, corporations, institutions and organisations. They include more often general anti discrimination clauses and prohibition of discrimination because of different grounds. They do not however define different forms of discrimination including harassment. Nevertheless, sometimes they in fact partially describe and cover harassment not using this term.

To give an example - there is no definition of harassment in the rules of the judicial ethics enacted by the National Council of the Judiciary<sup>82</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 the proceedings, in particular in the event of such people expressing prejudices based on race, sex, belief, nationality, disability, age or social and economic status, or any other reason.

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

New 2010 Act on Equal Treatment prohibits instruction to discriminate, both encouraging (*zachęcanie*) and ordering (*nakazywanie*) to discriminate (Art. 9).

Also in the employment field instruction to discriminate is prohibited. The provision of the labour code regarding instruction to discriminate was broadened in 2008<sup>83</sup>, and is now covering both encouraging (which existed before) and ordering (which was added) infringement of the principle of equal treatment against other person.<sup>84</sup>

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

<sup>82</sup> Uchwała Nr 16/2003 Krajowej Rady Sądownictwa z dnia 19 lutego 2003 r. w sprawie uchwalenia zbioru zasad etyki zawodowej sędziów.

<sup>83</sup> Act of 21 November 2008 on amendment of the Act – Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>84</sup> Article 18<sup>3a</sup> § 5 point 1 (amended) in relation to Article 11<sup>3</sup> Labour Code.

According to the general penal rules if instructions to discriminate lead a person to commit a crime, the person who issued such instructions might be held criminally responsible for directing or instructing the perpetration of or aiding or instigating the crime.<sup>85</sup>

On the basis of 2010 Act on Equal Treatment and civil law, a person who has incurred damages due to instructions to discriminate can seek compensation according to general principles.<sup>86</sup>

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

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*  
*Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

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

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

<sup>85</sup> Article 18.1-3 Penal Code.

<sup>86</sup> Article 13 Act on Equal Treatment, Article 415 Civil Code.



As mentioned above (point 2.1.1 a) it seems that in most cases people with disabilities would be identified on the basis of definition provided by the same Act on disabled persons (3 levels of disability which must be confirmed by medical authorities). Theoretically one may imagine challenging this by somebody who is/feels disabled and do not have this medical confirmation but since there were no cases of this kind identified it is difficult to predict the outcome (even under both constitution and labour code wider approach to disability is possible – see more in 2.1.1.a).

Since the new law entered into force on 1 January 2011 there is no jurisprudence yet. However some provisions and practise from before implementation might be still of significance for the good understanding of the whole picture.

Generally article 94.2b of the Labour Code specifies that an employer is obliged to combat discrimination in employment on the ground, among others, of disability.

If the employer already employs people with disabilities, appropriate measures should be undertaken as outlined below.

The Ordinance of the Minister of Labour and Social Policy on general provisions on health and safety at work<sup>87</sup>, issued on the basis of the Labour Code<sup>88</sup>, provides that “workstations shall be organised according to the psychological and physical features of employees”<sup>89</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>90</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.

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 or buying equipment to facilitate the functioning of a person with disability in the workplace, for identifying by the departments of occupational medicine the relevant needs of persons with disability.<sup>91</sup>

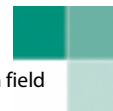
<sup>87</sup>Ordinance of 26 September 1997, amended.

<sup>88</sup>Article 237 (15), Labour Code.

<sup>89</sup>Para. 45.1, Ordinance on general provisions on health and safety at work.

<sup>90</sup>Para. 48, Ordinance on general provisions on health and safety at work.

<sup>91</sup>Article 26, Act on Disabled Persons.



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>92</sup>

Furthermore, an employer who employs disabled people is entitled to receive a monthly subsidy for the remuneration of disabled employees.<sup>93</sup> The amount of the subsidy is related to the level of impairment of the disabled people employed and is currently 180, 100 or 40% of “minimum salary” depending on the level of disability.<sup>94</sup> Employer may also receive refund of cost of the co-worker who helps a person with disability in adaptation to work and communication.<sup>95</sup>

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>96</sup>
- a disabled person cannot be employed for night shifts and cannot work overtime;<sup>97</sup>
- a disabled person has the right to an additional break of 15 minutes which should be treated as his/her working time;<sup>98</sup>
- people with medium or high-level disability have the right to additional holiday of 10 working days;<sup>99</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>100</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.

<sup>92</sup>Article 2.8 Act on Disabled Persons.

<sup>93</sup>Article 26a Act on Disabled Persons.

<sup>94</sup>September 2011.

<sup>95</sup>Art. 26d Act on Disabled Persons.

<sup>96</sup>Article 15.1-2 Act on Disabled Persons.

<sup>97</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>98</sup>Article 17 Act on Disabled Persons.

<sup>99</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>100</sup>Article 20.1 Act on Disabled Persons.





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>101</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.

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>102</sup>

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

The new law limits the obligation to provide reasonable accommodation to the employment field, however there are provisions spread out in number of Acts that might be mentioned in this context.

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)

“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>103</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.

<sup>101</sup>See Article 21.1-2 Act on Disabled Persons.

<sup>102</sup>Article 14 Act on Disabled Persons.

<sup>103</sup>Sejm Resolution of 1 August 1997 Charter of Rights of Disabled People (*Uchwała Sejmu z 1 sierpnia 1997 Karta Praw Osób Niepełnosprawnych*).



However it influences policy of the government, which also prepares for the Parliament annual information on activities carried out regarding implementation of the “Charter of rights of Disabled People”.<sup>104</sup>

As mentioned above in section 0.2 there was a draft law being prepared - “the draft act on equal opportunities for persons with disabilities” – which included a duty to provide a reasonable accommodation, also in number of fields outside employment, however this draft is still not final and is at the stage of governmental work.

The very important piece of legislation is Act on Vocational and Social Rehabilitation and Employment of Disabled Persons (Act on Disabled Persons) which creates the National Disabled Rehabilitation Fund (PFRON)<sup>105</sup> that supports financially different activities aimed at integration and support for persons with disabilities. The act does not oblige to provide reasonable accommodation beyond employment but creates certain mechanism which might have similar effect. It includes for instance refund for eliminating physical barriers, organizing training and many other possible activities and projects. The funds are provided for institutions but also individuals (ex. for wheelchairs).

There are also number of laws that specify different conditions of educational process including issues related to persons with disabilities. Following are the most important ones.

Special Ordinance of the Minister of National Education in regard to conditions of organizing education and assistance for children and youth with disabilities and problems with adaptation in nurseries, schools and integration divisions<sup>106</sup> provides number of obligations of schools including providing adequate conditions to learn and specialised equipment, support for parents etc. It is however general in nature and it does not deal with the issues of “reasonableness”.

Ordinance of the Minister of Culture on conditions in regard to marking, classifying, promotion and testing in public schools<sup>107</sup> gives the possibility to organize special exams for pupils with disabilities in separate room or home of pupil according to pupils needs if justified.

<sup>104</sup> See for instance: Information of the Government of The Republic of Poland on activities carried out in 2008 regarding implementation of the resolution of the Sejm of the Republic of Poland from 1 August 1997 “Charter of rights of Disabled People”, Warsaw 19 August 2009 (print no 2287) available at [sejm.gov.pl](http://sejm.gov.pl) (*Informacja Rządu Rzeczypospolitej Polskiej o działaniach podejmowanych w 2008 roku na rzecz realizacji postanowień uchwały Sejmu RP z dnia 1 sierpnia 1997 r. “Karta praw osób niepełnosprawnych”; druk nr 2287*).

<sup>105</sup> Chapter 10 of the Act on Disabled Persons.

<sup>106</sup> Dz.U.10.228.1490

<sup>107</sup> Dz.U.04.214.2179



According to Law on Education<sup>108</sup> every local government has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in case when parents or guardians transport a child, the costs of public transport (of a child and a guardian) should be reimbursed.

According to Ordinance of the Minister of National Education and Sport on safe conditions and hygiene in public and non-public schools...<sup>109</sup> the places for practical learning in case of disabled pupils should be adequately accommodated to their needs. Also in planning activities outside the school needs of the persons with disabilities should be taken into consideration.

Law on higher education<sup>110</sup> provides special state stipends for disabled students (and phd students) they may apply for.

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

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

The failure to meet the duty of reasonable accommodation counts as discrimination – as provided by law: failure to provide necessary reasonable accommodation shall be deemed an infringement of the principle of equal treatment in employment within the meaning of art. 18<sup>3a</sup> § 2-5 of the Labour Code<sup>111</sup> (which prohibits and defines direct discrimination, indirect discrimination, harassment and instruction to discriminate).

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

Both the legislation and case law do not formulate the general duty to provide reasonable accommodation in respect of other grounds. But when analysing different provisions and activities of the public authorities one could argue that some duties relate to providing reasonable accommodation.

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>112</sup>

<sup>108</sup> Dz.U.04.256.2572, amended.

<sup>109</sup> Dz.U.03.6.69

<sup>110</sup> Dz.U.05.164.1365, amended.

<sup>111</sup> Art. 23.a.3 Act on Disabled Persons.

<sup>112</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*).



Since there is a religion as part of the curriculum in Polish schools different churches may teach their religion if there are pupils who wish to do so; for those not interested courses on ethics should be organized (see also point 4.2.c below).

Some obligations of the schools towards Roma pupils (employing Roma education assistants, assistant teachers, additional classes and support for Roma pupils, as described under section 5 of this report) might be also seen as a duty to provide reasonable accommodation.

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

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

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

The General Construction 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 (since 1995).<sup>113</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<sup>114</sup> regulates in some detail a number of technical standards.

The problem discussed was shown for instance in the *The audit report on the accessibility of government buildings and central offices for the disabled* (2008)<sup>115</sup> The audit did show that majority of ministries and central offices were not accessible. The report however inspired number of positive reactions in different institutions and several buildings were made accessible.

The Ordinance of the Minister of Industry and Labour on hotels and other similar buildings<sup>116</sup> specifies in some detail particular requirements regarding the needs of disabled people (including the number of adapted rooms, parking spaces, accessible phone etc.).

<sup>113</sup> Article 5.1 point 4, Act of 7 July 1994 Construction Law (*Ustawa z 7 lipca 1994 Prawo budowlane*).

<sup>114</sup> (Dz.U.02.75.690)

<sup>115</sup> Report prepared by the Plenipotentiary on Disabled Persons (*Raport z badania na temat dostępności budynków administracji rządowej i urzędów centralnych dla osób niepełnosprawnych*), see at:

<sup>116</sup> (Dz.U.06.22.169)



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<sup>117</sup> 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.

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.

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

The draft act on equal opportunities for people with disability, if enacted, would change this situation since it includes number of obligations regarding availability of services, access to buildings, infrastructure etc. and provides time limits for adequate adaptations of existing buildings (information on the draft see in overview section of this report – 0.2).

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<sup>117</sup> (Dz.U.06.56.397)



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

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

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

“A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism...” ( Art. 67).

“Public authorities shall ensure special health care [...] handicapped people..” (Art. 68)

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

However the anti-discrimination clause in the Act on the System of Social Security<sup>118</sup>, which is a “mother-statutory” for social security area, limits the principle of equal treatment of all socially insured to grounds of sex, race, ethnic origin, nationality, marital status, and family status.<sup>119</sup>

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

Apart from many laws mentioned above 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. The acts of law listed in electronic databases of Polish law or on websites of NGOs specialising in disability issues are long. The list prepared by the Plenipotentiary for Disabled Persons lists 72 Acts and Regulations (and it is “selection”, not the complete list).

Besides the Act on Equal Treatment and Labour Code which are the basic legislation prohibiting discrimination 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*).

<sup>118</sup>Act of 13<sup>th</sup> October 1998 on System of Social Security (Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych).

<sup>119</sup>Art. 2a.1 Act on System of Social Security. Grounds of race, ethnic origin, nationality were added in December 2010 (in force since 01.01.2011) by new Act on Equal Treatment.





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. It does not have binding character but it influences policies. The Government prepares annual report on the fulfilment of the Charter (which is information compiled from different governmental ministries and agencies by the Government Plenipotentiary for Disabled, accepted by the Council of Ministers and presented to the Parliament).<sup>120</sup>

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>121</sup>

In relation to education public authorities have the obligation to ensure that all citizens have a universal and equal access to education. According to the Law on Education discrimination in education is prohibited<sup>122</sup>. Law on Education guarantees possibility of education of pupils with disabilities in all kinds of schools (art. 1) as well as special care for them, individual process of learning and special forms of learning. The special forms of learning might be organised in ordinary schools, in integrating schools or special schools. Disabled pupils may also apply for special material help.

According to Law on higher education<sup>123</sup> public universities may receive special funds for activities aiming at education and rehabilitation of persons with disabilities.

Ordinance of the Minister of Labour and Social Policy<sup>124</sup> on conditions and procedure of refund of costs of training for employees with disabilities provides for possibility to receive adequate refund for different kind of cost (for instance translation).

In relation to access to and supply of goods and services (housing, public spaces and infrastructures) there are number of acts that provide obligation to take into account the needs of people with disabilities or to fulfil certain obligations (as listed in point f) above).

<sup>120</sup> See for instance: Information of the Government of The Republic of Poland on activities carried out in 2008 regarding implementation of the resolution of the Sejm of the Republic of Poland from 1 August 1997 "Charter of rights of Dissabled People", Warsaw 19 August 2009 (print no 2287) available at [sejm.gov.pl](http://sejm.gov.pl) (*Informacja Rządu Rzeczypospolitej Polskiej o działaniach podejmowanych w 2008 roku na rzecz realizacji postanowień uchwały Sejmu RP z dnia 1 sierpnia 19997 r. "Karta praw osób niepełnosprawnych"; druk nr 2287*).

<sup>121</sup> *Rozporządzenie Ministra gospodarki, pracy i polityki społecznej z dnia 15 lipca 2003 r. w sprawie orzekania o niepełnosprawności i stopniu niepełnosprawności.*

<sup>122</sup> Dz.U.04.256.2572, amended.

<sup>123</sup> Dz.U.05.164.1365, amended.

<sup>124</sup> Dz.U.08.18.116.



However from practice it appears that they seem not to have absolute character and often depend on good will. In many cases they have the character of incentives rather than legal obligation to grant accessibility in a general and anticipatory manner.

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

There are different forms of special rights for disabled people. They relate, for instance, to the integration of people with disabilities into the labour market (a number of them are mentioned in this report) and on public transport (price reduction, person accompanying the disabled person travels free), there are also a number of waivers of various costs, 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. Law on social care treats people with disabilities as a special category and provides for special treatment as well as financial benefits or possibility to be placed in a special institution. Law requires public authorities to help persons with disabilities as well as sets the standards that must be complied with by subjects establishing special institutions for persons with disabilities. However it should be noted that the concept of "special institutions" might be seen as controversial and suggests segregation and institutionalised living, which is regarded as a form of discrimination by some (and goes against e.g. UN Convention on the Rights of Persons with Disabilities).

## 2.7 Sheltered or semi-sheltered accommodation/employment

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

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

- 1) s/he should run the enterprise for at least 12 months, employ not less than 25 employees full-time (the calculation should be done on the basis of full-time equivalents) and reach one of the following rates of employment of disabled people a) at least 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>125</sup>

In 2009 Employers running a sheltered employment enterprise received additional possibility of support - the possibility of compensation for additional costs incurred due to construction or expansion of facilities or premises of the enterprise and administration and transport costs incurred in connection with the employment of disabled people. This assistance, however, is addressed to the employer running the enterprise in which the index employment of disabled people is at least 50%.<sup>126</sup>

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

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

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<sup>125</sup> Article 28 Act on Disabled Persons.

<sup>126</sup> Article 32 Act on Disabled Persons. Theoretically in force since 01.01.2009 but due to the lack of the implementing regulations in fact in force since May 2009.



### 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?*

New 2010 Act on Equal Treatment includes the provision transposing mentioned Directives. Art. 5.9 provides that new law do not cover differences of treatment based on nationality, especially in relation to the entry into and residence in Poland and in relation to the legal status of natural persons being citizens of countries other than EU member states, member states of EFTA or Swiss Confederation.

Same time however, in principle, the provisions of the Polish Labour Code are applied to all employees and employers without any distinction on the basis of their nationality or citizenship.<sup>127</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>128</sup>). There is a wide range of possible categories which allow the individuals belonging to them to be covered by the provisions of Labour Code.

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

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

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

<sup>127</sup>See Article 1-3, Labour Code, which do not include any criteria related to nationality or citizenship.

<sup>128</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>129</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>130</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?*

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

### 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?*

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

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

<sup>129</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 (both amended significantly in 2008), Act of 27 July 2002 on the terms and conditions of the entry into and residence in the territory of the Republic of Poland for citizens of the EU Member States and the members of their families.

<sup>130</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).



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

Additionally the State Treasury is responsible for actions causing damage perpetrated by a public servant while working in this capacity.<sup>131</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.

Similarly legal entity is responsible for the damage caused by its organ (art. 416 Civil Code).

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

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

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

The new 2010 Act on Equal Treatment widens the protection and covers (art. 8) any other form of employment like civil contracts, self-employment, and independent professions.<sup>132</sup>

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

<sup>131</sup>Article 417 Civil Code.

<sup>132</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).





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

Labour code expressing the rule of equal treatment and the prohibition of discrimination does cover in employment relations conditions for access to employment, including selection criteria, recruitment conditions and promotion. The same legal regime applies to both public and private sector. All grounds are covered.<sup>133</sup>

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

The institutions of the labour market, such as employment agencies, are also obliged to behave in a non-discriminatory manner.

According to the Act on the Promotion of Employment and the Institutions of 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>134</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>135</sup>

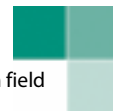
Likewise, employers are obliged to provide district labour offices with current information concerning the available jobs or pre-employment training positions. While carrying out these duties they cannot formulate any requirements that discriminate against candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>136</sup>

<sup>133</sup>Article 18<sup>3a</sup>-18<sup>3b</sup>, Labour Code.

<sup>134</sup>Article 19 c Act on Employment.

<sup>135</sup>Article 36.4 item 3, Act on Employment.

<sup>136</sup>Article 36.5 e 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 principle: 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>137</sup>

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

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

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

Employment and working conditions, including pay and dismissals are covered by the prohibition of discrimination in the labour code (all grounds protected by directives are covered).<sup>138</sup>

Although occupational pensions are regulated by the Act on Retirement and Disability Pensions from the Social Insurance Fund<sup>139</sup>, the anti-discrimination clause regarding occupational pensions is included in the Act on the Social Security System<sup>140</sup>, which is the framework legislation for the social security sector. This clause until 2010 limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status, since 01.01.2011 it also covers grounds of race, ethnic origin and nationality.<sup>141</sup>

New Act on Equal Treatment that widens protection and covers also self-employment and civil contracts (all grounds are covered) refers to the general prohibition of discrimination in performing of somebody's activity (including labour contract, civil contract, self-employment etc.) but does not mentions expressis verbis pay or dismissal.

<sup>137</sup> Article 38.2 item 3 Act on Employment.

<sup>138</sup> Article 18<sup>3a</sup>-18<sup>3b</sup>, Labour Code.

<sup>139</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>140</sup> Act of 13 October 1998 on the Social Security System (*Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych*).

<sup>141</sup> Article 2a.1 Act on the Social Security System amended by 2010 Act on Equal Treatment.



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

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

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

The labour code anti-discrimination provision which covers access to vocational training (all grounds are protected) is not that detailed and uses the general term "access to the vocational training increasing qualifications".<sup>142</sup> However, taking into consideration labour law as a whole, it should be interpreted widely to cover all elements as listed by the directives. Since relevant case law is not available it is difficult to assess the interpretation of this provision in practise. The labour code provisions apply to the training organized by the employer only. Other kinds of training, outside the employment, are governed by different laws on education generally lacking clear anti-discrimination clauses in relation to different kinds of vocational training (more in section 3.2.8).

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

The *Starosta* (a local government organ) is the public organ which 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>143</sup>

### **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).

<sup>142</sup> Article 18<sup>3a</sup> para 1, Labour Code.

<sup>143</sup> Article 40.6 Act on Employment.



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

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

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

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

There is also the anti-discrimination clause in the Act on the System of Social Security<sup>144</sup>, which is a basic statute for social security area. This provision limiting until 2010 the principle of equal treatment of all socially insured to grounds of sex, marital status, and family status was extended (in force since 01.01. 2011) to grounds of race, ethnic origin and nationality.<sup>145</sup>

The Act on Capital-based pensions<sup>146</sup> (Art. 2), amended by the Law on Equal Treatment (art. 30) prohibits discrimination in calculating the amount of pension on the grounds of gender, race, ethnic origin, nationality, health condition, family and marital status.

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>147</sup> In this way, the Act prohibits discrimination, though the specific grounds of racial or ethnic origin are not mentioned.

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

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

<sup>144</sup> Act of 13<sup>th</sup> October 1998 on System of Social Security (Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych).

<sup>145</sup> Art. 2a.1 Act on System of Social Security as amended by Act on Equal Treatment.

<sup>146</sup> Act of 21 November 2008 on capital-based pensions (Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych).

<sup>147</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).



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

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

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

New 2010 Act on Equal Treatment prohibits discrimination in social protection, on the grounds of gender, race, ethnic origin or nationality (art. 6). It does not use the term social advantages but the definition of the social protection (not legal but elaborated by doctrine) traditionally extends to the issues of social advantages.<sup>148</sup>

In order 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 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>149</sup>

The death allowance is payable to any person who covers the costs of a funeral.<sup>150</sup> However, a same-sex partner, unlike a spouse, would have to supply documentary evidence of the costs incurred.<sup>151</sup>

<sup>148</sup> See for instance: J. Piotrowski Jerzy, *Zabezpieczenie społeczne. Problematyka i metody*, Wydawnictwo KiW, Warszawa 1966, p. 28; *Polityka Społeczna*, ed. A. Rajkiewicz, Wydawnictwo PWE, Warszawa 1979, s. 432 as well as Constitutional Court ruling in the case TK K 17/92.

<sup>149</sup> Article 9 Act of 28 November 2003 on Family Benefits (*Ustawa z 28 listopada 2003r. o świadczeniach rodzinnych*).

<sup>150</sup> Article 78.1 Act on Retirement.

<sup>151</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 and people with disabilities. If these cases and/or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

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

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, in this Act there is no separate and explicit anti-discrimination provision listing protected grounds.

Similarly, there is no general non-discrimination provision in the statute on higher education. But access to higher education institutions is granted to all Polish citizens and also foreigners equally (with some exceptions).<sup>152</sup>

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

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>153</sup>

The right of every citizen of the Republic of Poland to an education is a constitutional right.<sup>154</sup> Education to the age of 18 is obligatory and free in state schools.<sup>155</sup>

<sup>152</sup>Article 43 Act of 27 July 2005 on Higher Education (*Ustawa z 27 lipca 2005r. prawo o szkolnictwie wyższym*).

<sup>153</sup> See the Ordinance of the Minister of National Education of 14 November 2007 on the conditions and means of realization by nurseries, schools and public institutions of the public tasks in a way which enables the upholding of the national, ethnic and linguistic identity of pupils belonging to national and ethnic minorities... (Dz.U.2007, Nr 214, poz. 1579).

<sup>154</sup>Article 70 Constitution.

<sup>155</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 (currently 2005 Act on Higher Education).





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

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

In the field of education, the Polish government has invested serious efforts 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>156</sup> Also, access to institutions of higher education is granted equally.<sup>157</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>158</sup> This often leads to failure at school, marks much below average, low attendance, dropping out of school or transfer to special schools for children with learning disabilities. The problem of over representation of Roma children in special schools was known for number of years and promises were given by government to improve the situation.<sup>159</sup>

Unfortunately the problem remained. The situation might be however finally resolved due to the serious promises followed by action of the Minister of Education in the August 2008 (accompanying the decision of abolishing segregated Roma classes in schools – see below) and activities of the 'Team on Roma Issues'<sup>160</sup> within the Joint Committee of the Government and Ethnic and National Minorities.<sup>161</sup>

<sup>156</sup>Article 1.1 Act on Education.

<sup>157</sup>Article 43 Act of 27 July 2005 on Higher Education.

<sup>158</sup> See annual reports on 'the Programme for the Roma Community in Poland' as well as minutes from the meetings of the 'Team on Roma Issues' at [www.mswia.gov.pl](http://www.mswia.gov.pl); see also *Information from the Commissioner for Civil Rights Protection: 2001*, p. 349 and ff.

<sup>159</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.

<sup>160</sup> More on the Team see in section 8.1.d.

<sup>161</sup> Minutes from all meetings of the Team can be found at: [http://www.mswia.gov.pl/portal/pl/473/Zespol\\_do\\_Spraw\\_Romskich\\_Komisji\\_Wspolnej\\_Rzadu\\_i\\_Mniejszosci\\_Narodowych\\_i\\_Etnic.html](http://www.mswia.gov.pl/portal/pl/473/Zespol_do_Spraw_Romskich_Komisji_Wspolnej_Rzadu_i_Mniejszosci_Narodowych_i_Etnic.html)



The decision was taken in order to double check whether Roma children currently attending special schools do really qualify for this or may be should rather attend regular schools (appropriate agencies were asked to verify all decisions in that matter). In relation to the procedure used for the placement in the special school Minister of Education formulated additional conditions to be fulfilled in order to make sure that placement in the special school is needed (before only test in Polish language was used causing problems for some Roma children, Minister recommended usage of other methods, not based on level of apprehension of Polish language)<sup>162</sup>. However still in 2011 circa 20 % of Roma pupils received a decision that they should attend special schooling (the number of those who actually attend special schools is not known).<sup>163</sup>

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, 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. 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 Roma parents often do not fulfil the obligation to send their children to school.

It should 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. However despite promises given by governmental agencies and clear recommendations formulated for instance in the ECRI 2004' report on Poland the segregated Roma classes still existed (in the year 2008, 7 such classes existed in Poland). Only at the end of 2008 the Minister of Education made final decision: a/ to stop creation of new Roma classes and b/ to abolish existing Roma classes within two years (2009-2010)<sup>164</sup>. As of 2011 no Roma classes exist anymore. 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. Thirdly, the data on school attendance by Roma show an increase from previous estimates on a level of around 70% to 84,3% in the school years 2005/2006 and 86,5% in the school year 2006/2007, however it drops to 82 % in the year 2009/2010.<sup>165</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 (see more in section 5 on positive action).

<sup>162</sup> See minutes from the 4<sup>th</sup> meeting of the Team on Roma Issues (see previous footnote).

<sup>163</sup> Information received from Ministry of Internal Affairs.

<sup>164</sup> See minutes from the 4<sup>th</sup> meeting of the 'Team on Roma issues' at: [http://www.mswia.gov.pl/portal/pl/473/Zespol\\_do\\_Spraw\\_Romskich\\_Komisji\\_Wspolnej\\_Rzadu\\_i\\_Mniejszosci\\_Narodowych\\_i\\_Etnic.html](http://www.mswia.gov.pl/portal/pl/473/Zespol_do_Spraw_Romskich_Komisji_Wspolnej_Rzadu_i_Mniejszosci_Narodowych_i_Etnic.html)

<sup>165</sup> See reports from the realization of the Programme for the Roma Community in Poland in 2007 and in 2010, at

[http://www.mswia.gov.pl/portal/pl/181/Program\\_na\\_rzecz\\_spolecznosci\\_romskiej\\_w\\_Polsce.html](http://www.mswia.gov.pl/portal/pl/181/Program_na_rzecz_spolecznosci_romskiej_w_Polsce.html)



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>166</sup> and 'assistant teachers'<sup>167</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>168</sup>

Moreover, there are state schools in which instruction is provided in minority languages, bilingual schools with equal instruction in two languages (Polish and a minority language) and schools with additional teaching of a minority language.<sup>169</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>170</sup>

<sup>166</sup>They are responsible, among other things, for contacting parents, supervising school attendance and assisting with homework.

<sup>167</sup>They assist 'normal' teachers by making use of their special education in intercultural pedagogy and of experience with bilingual children.

<sup>168</sup>Article 35.2 Constitution.

<sup>169</sup>The legal ground for these schools is Article 13 of the Act on Education and the relevant ordinance issued on its basis.

<sup>170</sup>The conditions and manner for carrying out these tasks were defined in an ordinance from the Minister of National Education and Sport (Dz.U. 2007 nr 114 poz. 1579 and Dz.U. 2010 nr 109 poz. 712)..



In the study covering a number of minorities and based, among other things, on interviews with representatives of these minorities,<sup>171</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.<sup>172</sup> However, a number of measures have been taken in order to convince parents to send children to school (see Section 5 on positive action below).

In July 2007 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.

As far as education of people with disabilities is concerned public authorities have the obligation to ensure that all citizens have a universal and equal access to education. Law on Education guarantees possibility of education of pupils with disabilities in all kinds of schools (art. 1)<sup>173</sup> as well as special care for them, individual process of learning and special forms of learning.

<sup>171</sup>Right to education. Monitoring report, Helsinki Foundation for Human Rights, Warsaw 2002, Appendix: Right to education enjoyed by national minorities, pp. 135-160.

<sup>172</sup> See for instance minutes from the 8<sup>th</sup> meeting (09.09.2009) of the Team on Roma issues, at: [http://www.mswia.gov.pl/portal/pl/473/Zespol\\_do\\_Spraw\\_Romskich\\_Komisji\\_Wspolnej\\_Rzadu\\_i\\_Mniejszosci\\_Narodowych\\_i\\_Etnic.html](http://www.mswia.gov.pl/portal/pl/473/Zespol_do_Spraw_Romskich_Komisji_Wspolnej_Rzadu_i_Mniejszosci_Narodowych_i_Etnic.html)

<sup>173</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].



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

According to Law on higher education public universities may receive special funds for activities aiming at education and rehabilitation of persons with disabilities.

There are number of laws that specify different conditions of educational process including issues related to persons with disabilities. Following are the most important ones.

Special Ordinance of the Minister of National Education and Sport in regard to conditions of organizing education and assistance for children and youth with disabilities and problems with adaptation in nurseries, schools and integration divisions (Dz.U.05.19.167)<sup>174</sup> provides number of obligations of schools including providing adequate conditions to learn and specialised equipment, support for parents etc.

According to Law on Education (Dz.U.04.256.2572, amended) every local government has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in case when parents or guardians transport a child, the costs of public transport (of a child and a guardian) should be reimbursed.

According to Ordinance of the Minister of National Education and Sport on safe conditions and hygiene in public and non-public schools... (Dz.U.03.6.69) the places for practical learning in case of disabled pupils should be adequately accommodated to their needs. Also in planning activities outside the school needs of the disabled should be taken into consideration.

Law on higher education (Dz.U.05.164.1365, amended) provides special state stipends for disabled students (and phd students) they may apply for.

Also Council of Ministers in its National Health Program for years 2007-2015<sup>175</sup> declared creating, amending and execution of the regulation in the field of:

- assistance for families of children and youth with disabilities and chronic diseases,
- elimination of barriers in access to education, out of school activities and constant rehabilitation for children and youth with disabilities.

Therefore if one would like to draw conclusions from the legal documents the situation could seem to be good.

<sup>174</sup> New ordinance in force since 01.01.2011 (Dz.U. 2010.228.1490).

<sup>175</sup> Resolution of the Council of Ministers nr 90/2007, 15 May 2007.



In fact however children and their families face number of problems in access to mainstream education. Schools are not ready and not adequately prepared, their staff is not adequately trained, teachers and school administration are afraid and prefer to refuse access to school instead of solve the problem. The situation in special education is much better but access to mainstream education is limited. In number of cases of this kind Commissioner for Civil Rights Protection (Ombudsperson) intervened as well as tried to bring attention to this problem in its addresses to the Government.<sup>176</sup>

Finally there are special donation programs conducted by PFRON supporting the education of pupils with disabilities: "Pupil in the village – assistance in obtaining of education by pupils living in the villages"<sup>177</sup>, programs "Pitagoras" and "Student".

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

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

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

There is no law regulating the operation of private clubs etc. They do exist (for instance membership clubs) but they operate on 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 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.

<sup>176</sup> See letters: to Minister of Education summarizing problems of children with disabilities in access to education and calling for action, 25 January 2008, RPO – 572275 – 1/07/JS/AB; to Minister of Health on access to schools and equal treatment of children with haemophilia, 31 July 2008, RPO – 588895 – X/08/JS; to Minister of Education on text books for blind or vision impaired pupils, 08 Sept. 2008, RPO – 571999 – 1/07/KJ; all docs. might be found at [www.rpo.gov.pl](http://www.rpo.gov.pl)

<sup>177</sup> The student in the rural areas - assistance in gaining education for people with disabilities living in rural communes and urban-rural communes (*Uczeń na wsi – pomoc w zdobyciu wykształcenia przez osoby niepełnosprawne zamieszkujące gminy wiejskie oraz gminy miejsko-wiejskie*).





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>178</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>179</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>180</sup>

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>181</sup> Both articles can be used to counteract discrimination, even though the intention of the legislators was different.

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

Law does not speak about differences in treatment in provision of financial services.

In the case of both groups - people of age and with disabilities there are number of waivers and discounts in number of public, state and municipal services.

The negative differences in treatment of people of age do exist however in practise. According to the report prepared by the team of experts under the auspices of the Ombudsperson<sup>182</sup> the most common have place in access to health and life insurance. The authors of the report however state that generally discrimination in access to financial services is difficult to spot and prove.

There are also cases of limited access to credits, loans etc. There was a case in Poland when a famous professor published a newspaper article describing the story of discrimination based on age.

<sup>178</sup>Article 135 Code of Minor Offences of 20 May 1971 (*Kodeks wykroczeń z 20 maja 1971r.*)

<sup>179</sup>Resolution of the Supreme Court of 17 March 2005, signature I KZP 3/05.

<sup>180</sup>Article 138 Code of Minor Offences.

<sup>181</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>182</sup> The state of realization of rights of people of age in Poland. Analyses and recommended activities, ed. B. Szatur-Jaworska, Warsaw, October 2008 (*Stan przestrzegania praw osób starszych w Polsce. Analiza i rekomendacje zmian. Warszawa 2008*).



He was approached by the bank number of times with the offer to apply for a credit card (he was the client of this bank for over 15 years, deposited there also his savings). However when he actually applied for the card he was refused with the explanation that he is over 70 years old. In reaction to that case ombudsman prof. A. Zoll sent a letter to the Union of Polish Banks criticizing the discrimination of pensioners. Despite the allegations of discrimination, most banks continue to apply age restrictions, when deciding to grant a credit card. However they do not put adequate information on a leaflets advertising the bank therefore clients are not familiar with that.

In regard to people with disabilities there are very little cases of discrimination in access to financial services reported. In the report – Polish Road to the UN Convention on the rights of persons with disabilities<sup>183</sup> – prepared by the coalition of number of organizations and covering different fields of discrimination and problems people with disabilities face, access to financial services is not mentioned as a separate issue (but there is for instance 'economic violence' or limited access to commercial private insurance schemes reported). One of the problem that was raised in public debate was the limited access to cash machines of people on wheelchairs or with vision problems. Law on banking do not oblige them to built cash machines in accessible way and the answer of the banks usually is that the client should visit the office instead of using cash machine.

There are no cases being brought to the courts on this issue. That also comes from the low awareness of possible victims of discrimination that different treatment in access to financial services might be discriminatory and illegal.

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

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

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

According to Article 75.1 of the 1997 Constitution, public authorities are obliged to establish policies enabling them to meet the housing needs of citizens and in particular to counteract homelessness, support the development of social building projects and support the efforts of citizens to secure their own housing.

<sup>183</sup> Polish Road to the UN Convention on the rights of persons with disabilities, Fundacja Instytut Rozwoju Regionalnego, Kraków 2008, (released on 15<sup>th</sup> Jan. 2009) (*Polska droga do Konwencji o prawach osób niepełnosprawnych*).



Access to housing is regulated by the following legislation: the Act on Housing Allowances<sup>184</sup> and the Act on the Protection of Tenants' Rights.<sup>185</sup> They contain no provisions of a discriminatory nature.

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

The situation of a considerable number of Roma in terms of housing and living conditions is drastic<sup>186</sup> (especially Bergitka/Carpathian Roma<sup>187</sup>) and even though the level of renovation and other activities is increasing, it is not satisfactory. There are still flats with no toilets, kitchens or running water.

The access of Roma to housing allowances (2001 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, it happens that local governments are 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 could be mentioned. A number of Roma in Limanowa municipality had no access to running water. Within the Programme for Roma special funds were allocated to install a water supply (water pipe). However, it reached a number of other households and excluded some of the Roma (they only had 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.

<sup>184</sup> Act of 21 June 2001 on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*).

<sup>185</sup> Act of 21 June 2001 on Protection of Tenants' Rights, Municipal Housing Resources and Amendments to the Civil Code (*Ustawa z 21 czerwca 2001 o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie kodeksu cywilnego*).

<sup>186</sup> See, for instance, *Information from the Commissioner for Civil Rights Protection: 2001*, p. 348.

<sup>187</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.



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.

In relation to housing accessible for people with disabilities and older people the general provisions as stated above should be mentioned, directed to public authorities. There is system of general social housing<sup>188</sup> directed to all people with financial problems (however access to social housing is very limited and in number of municipalities the waiting lists are long and the waiting time might last years). There is no general obligation on granting housing to people with disabilities (as well as older people) however there are some special means of protection. First of all persons with disabilities (as well as older people) may find place in special institutions (funded or co-funded from public and municipal resources). This might be both institution with full time care as well as so-called 'protected flat' (*mieszkanie chronione*).<sup>189</sup> Secondly, if the person with disability is expelled from his/her flat s/he must be provided with social housing if apply for.

In practice there are number of problems with access to special housing and special institutions mentioned above. Vast majority of people of age who need permanent care stays out of the system as number of places is very limited (18.000 places and 1.000.000 those who qualify).<sup>190</sup>

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 (since 1995).<sup>191</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.

<sup>188</sup> Art. 4.2 Act on Protection of Tenants' Rights, Municipal Housing Resources...

<sup>189</sup> Art. 53.1 Act on Social Protection (12 March 2004, amended (*Ustawa o pomocy społecznej*)).

<sup>190</sup> All information on elderly comes from the report: The state of realization of rights of people of age in Poland. Analyses and recommended activities, ed. B. Szatur-Jaworska, Warsaw, October 2008, pp. 69-77.

<sup>191</sup> Article 5.1 point 4, Act of 7 July 1994 Construction Law (*Ustawa z 7 lipca 1994 Prawo budowlane*).



## 4 EXCEPTIONS

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

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

New 2010 Act on Equal Treatment (art. 5.6) introduces exception as provided in art. 4 of the Directives and it does comply with the directives. In fact it is almost verbatim translation from the text of the Directives. The exception covers “possibilities and conditions of undertaking and conducting occupational activities as well as training (including higher educations)”.

The 2008' amendment to the labour code<sup>192</sup> already put national legislation regarding employment based on labour contract in line with the Directives. Notions of proportionality, legitimate aim and genuine and determining occupational requirements were added. According to the Labour Code one may refuse to employ an individual on the basis of one or more grounds listed in the definition of discrimination, if the type of work, or working conditions cause that the reason or reasons of different treatment are genuine and determining occupational requirements. There is no list of those genuine and determining occupational requirements given by law so it is left to the evaluation of the judge. The test of the proportionality of measures and legitimate aim was also introduced.<sup>193</sup>

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

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

New 2010 Act on Equal Treatment (art. 5.7) introduces exception as provided in art. 4(2) of the Directive and it does comply with the directive. In fact it is almost verbatim translation from the text of the Directive. It covers limiting access to and performing occupational activities.

2010 Act on Equal Treatment also amends the Labour Code introducing same exception in relation to access to employment.<sup>194</sup>

*b) Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

<sup>192</sup> Act of 21 November 2008 on amendment of the Act – Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>193</sup> Article 18<sup>3b</sup> para 2 point 1 (amended), Labour Code.

<sup>194</sup> Article 18<sup>3b</sup> para 4, Labour Code amended by the art. 25 Act on Equal Treatment.



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

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

In Poland “religion” (of any registered faith or religious organization<sup>195</sup>) 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 (since there are very little applications for course on ethics and most students participate in religion courses, schools tend not to organize courses on ethics), and causes a number of problems – some cases have already reached the European Court of Human Rights (see for instance ruling in case Grzelak<sup>196</sup> in the section 0.3 above).<sup>197</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, currently religion of the following denominations is taught: Catholic, Orthodox, Protestant, Adventist, Baptist, Pentecostal, Polishcatholic, Mariawickiego, Judaism and Islam<sup>198</sup>). In relation to the Catholic Church, this provision also comes from the agreement with the Holy See (Concordat, 28 July 1993) which states in Article 12.3 that teachers of religion need a permit from the bishop (mission canonica) in order to be appointed.

<sup>195</sup> The Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (*Ustawa z 17 maja 1989 r. o gwarancjach sumienia i wyznania*), regulates the registration procedure for churches and other religious organisations (*związek wyznaniowy*), and sets the criteria for registering church or other religious organization (*wyznanie*). Criteria include application for registration of minimum 100 persons and information describing the most important elements of the new church – its name, goals etc. There are currently 174 registered church or other religious organizations (*związek wyznaniowy*), please see the list at:

[http://www.mswia.gov.pl/portal/pl/92/223/Koscioly\\_i\\_zwiazki\\_wyznaniowe\\_wpisane\\_do\\_rejestru\\_kosciolow\\_i\\_innych\\_zwiazkow\\_wy.html](http://www.mswia.gov.pl/portal/pl/92/223/Koscioly_i_zwiazki_wyznaniowe_wpisane_do_rejestru_kosciolow_i_innych_zwiazkow_wy.html)

<sup>196</sup> Application no. 7710/02, GRZELAK against Poland (Lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools); ECHR ruling 15 June 2010.

<sup>197</sup> See also: application no. 32932/02 by Danuta NOWAK and Michał KRYNICKI against Poland lodged on 23 August 2002 (freedom of religion); date of decision to communicate 1 February 2008; ECHR decided to strike the application due to the lack of response from the applicant, decision taken 23 June 2009.

<sup>198</sup> <http://orka2.sejm.gov.pl/IZ6.nsf/main/6B1AA405> (01.06.2010)





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 by 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>199</sup>

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

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

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

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

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

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

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

However in specific laws 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>200</sup>

If they are held by a medical commission to be permanently incapable of continuing their service, they are required to leave the service.<sup>201</sup>

<sup>199</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.

<sup>200</sup>Article 25.1, Act of 6 April 1990 on the Police (*Ustawa z 6 kwietnia 1990 r. o Policji*).

<sup>201</sup>*Ibidem*, Article 41.1 point 1.



Similar provisions were laid down for officers of the internal security agency, foreign intelligence agency, border guards, government security office, emergency fire service and the prison service.

Police officers and officers of the other above-mentioned services are entitled to a police retirement pension after 15 years of service<sup>202</sup> but can continue their employment after reaching that age.

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

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

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

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

<sup>202</sup> Article 12, 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*).



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)?*

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

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

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

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

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

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

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



There are no rules that would address this issue directly. However general constitutional prohibition of discrimination could apply. For instance “law on employers social fund”<sup>203</sup> does not cover this issue but employers internal regulations on distribution of social funds should take into consideration general prohibition of discrimination and include not only marriages but also informal partnerships (there is no law on partnerships in Poland).

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

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

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

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

In reaction to the complaints of NGO Campaign Against Homophobia (KPH), Plenipotentiary for Equal Treatment and Ombudsman<sup>204</sup>

TVP declared that it did not influence the wording of the offer and that the definition of the “partner” would be changed. KPH and its lawyer search for examples of this kind of discrimination and announce it on their portal offering legal assistance.<sup>205</sup>

It should be also noted that there have been so far very few cases before Polish employment courts where the ground of sexual orientation was raised in the claim. One of the reasons is a fear by LGBT persons about disclosing their sexual orientation. A vast majority of LGBT respondents do not reveal their sexual orientation in the workplace.<sup>206</sup>

<sup>203</sup> Ustawa z 4 marca 1994 r. o zakładowym funduszu świadczeń socjalnych (DzU z 1996 r. nr 70, poz. 335 ze zm.).

<sup>204</sup> Letter of Ombudsman of 3 July 2009, RPO-622579-1/09/MK available at <http://www.rpo.gov.pl/pliki/12466292490.pdf>

<sup>205</sup> See relevant announcement at: <http://www.kph.org.pl/en/allnews/15-kph/186-dyskryminacja-w-pracy-prawnicy-kph-prosz-o-kontakt>

<sup>206</sup> See: *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Poland*, Danish Institute for Human Rights (March 2009); A. Rzeplinski (2008) *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation in Poland*, FRALEX; M. Abramovicz (ed.) (2007) *The Situation of Bisexual and Homosexual Persons in Poland 2005 and 2006 report*, Campaign Against Homophobia and Lambda Warsaw Association, Warsaw.



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

*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)?*

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

According to Constitution any exceptions from prohibition of discrimination may only be justified by reasons of public security, public order, health, morality or the rights and freedoms of other people (Constitution, art. 31.3). 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 between the individual's freedom of expression, which may also take the form of dress or personal appearance (turbans, hair, beards, jewellery, etc.), and health and safety, would, under Polish law, be decided on an individual basis, taking into consideration the values of the above-mentioned rights and freedoms on the one hand and the weight of opposing values – public security, public order, public morality, health, rights of others – on the other hand. However since there are no cases of this kind it is so far theorising.

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

##### 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 ?*

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



Also the Labour Code introduced (2008 amendment) one exception - the principle of equal treatment in employment is not broken by the actions (proportionate to achieving a legitimate aim) of following kind: applying the criterion of length of service in determining the conditions for hiring and firing, pay and promotion rules, rules on access to training for improvement of professional qualifications, which justifies the different treatment of employees based on age.

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

- 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>207</sup>

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

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

According to Polish law, individuals (women and men equally) are obliged to contribute to pensions once they commence employment.<sup>208</sup> There are fixed ages for entitlement to benefits.<sup>209</sup> The basic retirement age for men is 65 and for women 60. Nevertheless, some labour groups have special preferences, e.g. miners<sup>210</sup>, railway workers, teachers, regular soldiers, police officers and officers of other state enforcement agencies, judges and prosecutors.

<sup>207</sup> 23 October 2007 (Sygn. akt P 10/07).

<sup>208</sup> Article 6 Act on Social Security.

<sup>209</sup> Article 24 and 27 Act on Retirement.

<sup>210</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.





#### 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>211</sup>

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

#### 4.7.3 Minimum and maximum age requirements

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

According to the provisions of labour law, the minimum age of 18 is, in general, required 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>212</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.

<sup>211</sup>See Article 190-204 Labour Code.

<sup>212</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.



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>213</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>214</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>215</sup> As regards administrative courts, there is an age limit for judges at regional administrative courts who must be 35 or over.<sup>216</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>217</sup> Furthermore, there is a minimum age limit of 30 to become an assistant judge (assessor) at the regional administrative court.<sup>218</sup>

The minimum age for becoming prosecutor is 26 years.<sup>219</sup> Under the Law on Notaries, one of the conditions of becoming a notary is to be at least 26.<sup>220</sup>

<sup>213</sup>Article 2.1 point 2 items (a) and (b), Act on Employment.

<sup>214</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>215</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>216</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>217</sup>Article 7.1 Law on the Organisation of the Administrative Judiciary.

<sup>218</sup>Article 26.1 point 2 Law on the Organisation of the Administrative Judiciary.

<sup>219</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>220</sup>Article 11 point 7 Act of 14 February 1991 Law on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*).



#### 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

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

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can a person collect a pension and still work?*

As a rule, the collection of the state pension is a right, not an obligation (see in section 0.3 recent resolution of the Supreme Court that finally decided on this issue).

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

There is no requirement for employees to retire 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.<sup>221</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 a 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>222</sup>

It was considered to be an incentive for employers to hire younger workers in the place of those who have become entitled to a retirement pension and thus possess financial resources to cover their living expenses.

Different rules apply to receiving payments from the so-called Employees' Pension Programmes, a system of voluntary collection of pensions contributions.

<sup>221</sup> Art 24 and 27 Act on Retirement.

<sup>222</sup> Article 103.2a Act on Retirement (since 01.01.2011 art. 103a).



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>223</sup>

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

There is neither a specific regulation allowing employers to terminate the employment contract on account of an employee reaching retirement age, nor mandatory retirement ages for any sector. There have not been any recent changes in this respect and no debate is currently ongoing.

- d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

No, it is impossible to set retirement ages by contract, collective bargaining or unilaterally with regard to pensions paid from the Social Security Fund. The 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 the part of his/her pension coming from the third pillar.

The Labour Code distinguishes four kinds of contracts of employment: for a probationary period<sup>224</sup>, for a definite time period, for the period needed to perform a particular task, for an indefinite time period.<sup>225</sup>

It is impossible to set the termination of an employment contract at a fixed age, but an employer may employ someone for a definite time period and thus possibly connect the set time period with the employee's age (however, the third contract for a definite time period is treated by law as concluding a contract for an indefinite time period).

<sup>223</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>224</sup>Article 25.2 Labour Code.

<sup>225</sup>Article 25.1 Labour Code.



- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in 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.

The law protects all employees irrespective of age (with the exception described below aiming at protection of people close to the retirement age). According to the new 2009' resolution of the Supreme Court (see section 0.3) reaching retirement age may not be a sole reason for dismissal – this would be discrimination. However if there is other reason behind the need of dismissal (for instance reductions) dismissal of people who have a right to the pension in a first place is acceptable.

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>226</sup> No distinction is made between women and men in this respect.

Of course in practice many problems happen which eventually end up in courts. Employees quite often feel that they are being put under pressure to resign from the job when reaching retirement age. Or they are being dismissed based on other reasons than reaching retirement age (but in fact the sole reason was reaching retirement age). Probably many of them do not challenge the decision of the employer due to lack of legal awareness, but cases mentioned in section 0.3 (Supreme Court rulings) and their publication are most probably raising this awareness.

#### **4.7.5 Redundancy**

- 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>227</sup>

<sup>226</sup>Article 39 Labour Code.

<sup>227</sup>Article 39 and 40 Labour Code.



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>228</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>229</sup> There is an exemption in the case of bankruptcy or liquidation of the employer; in such cases the above-mentioned provision does not apply.

b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

If the above-mentioned employee who is protected in the period before they reach retirement age is somehow made redundant, s/he has a right to special compensation. This compensation is provided in the event of a collective redundancy; such a person has the right to be re-employed or compensated.

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

*Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?*

2010 Act on Equal Treatment transposed the Article 2 (5). It justifies different treatment of natural persons on the grounds of religion, belief, political opinion, disability, age or sexual orientation, in undertaking measures necessary in a democratic society, for public security and the maintenance of public order, for the protection of health and for the protection of the rights and freedoms of others as well as the prevention of criminal offences, to the extent specified in other provisions (art. 8.2).

In general, also 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>230</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>228</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>229</sup>Ibidem, Article 5.6.

<sup>230</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.*

Apart from the above mentioned exceptions (transposed from the Directives) Act on Equal Treatment provides *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres (art. 5.1) as well as it does not cover the freedom of choice of the party to the contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality (art. 5.3).



## 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*

2010 Act on Equal Treatment provides generally (art. 11) that adopting specific measures that are aimed to prevent or compensate unequal treatment linked with inequality does not constitute breach of the rule of equal treatment (all grounds protected by law).

The 2003 Amendment of the Labour Code that took effect on 1 January 2004 introduced a clear and general stipulation allowing for positive action in employment relations. 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.

According to the Labour Code positive action can take the form of specific measures introduced for a limited period of time in order to equalise opportunities for all or a significant number of employees who are distinguished by at least one of the grounds named above. These measures must be aimed at compensating the disadvantages experienced by such employees.

There is no important case law concerning this issue.

The only serious debates (both within the government as well as public debates) concerned in the past positive action directed to persons with disabilities (it was common agreement for years that positive action is desirable and that number of positive measures should be established in order to assist full integration of the persons with disabilities). Lately new debate and campaign have started concerning generation +50 which resulted in the governmental program and changes of law. There are no debates or examples of positive action in the case of for instance sexual orientation.

There are examples of positive action (however out of the labour context described above, and not stemming from particular general provision on positive action) in relation to race and ethnic minorities (especially Roma) as well as religion, they are listed in the next paragraphs.

- b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored.*



*Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

In respect of positive action for members of national minorities, there is a collection of measures for preferential treatment in Poland.

At the political level, a very important privilege (preference) is granted to national minorities in that their party lists are exempted from the requirement to obtain a threshold of five per cent of votes cast in order to be taken into account for the distribution of seats in the Sejm (lower chamber of Parliament).

Much affirmative action takes place in the field of education and culture. In order to compensate for their higher operating costs, schools for national minorities receive an extra 20 per cent subsidy in comparison to other schools (and even 150% in case of small 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>231</sup> Also finally on 13 June 2008 the Polish Parliament ratified the Council of Europe Charter of Regional and Minority Languages of 1992. The President signed the Act and the Charter entered into force on 22 August 2008.

In 2001 the government, taking into account the alarming situation of the Roma community, agreed to launch a pilot programme in 2001-2003 for the Malopolska Region to promote Roma in the fields of education, employment, healthcare, living conditions, security and culture. Despite 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 increased (around 14 million PLN in the year 2008, around 13 million PLN – ca. 3 million Euros – in a year 2010).<sup>232</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.

<sup>231</sup>Information on particular programs might be found on the website of the Ministry of Internal Affairs, as far as problems related to these programs are concerned please see minutes from the meetings of the Joint Committee of the Government and Ethnic and National Minorities at [www.mswia.gov.pl](http://www.mswia.gov.pl)

<sup>232</sup>See <http://www.mswia.gov.pl/>



The programme is implemented on an annual basis and reports on its implementation are published annually by the Ministry of Interior.<sup>233</sup> The data given below (in brackets) comes from the report for 2006 (first figure), for 2007 (second figure) for 2008 (third figure) and for 2010 (fourth figure), if not stated otherwise.

The programme has a large and growing budget and consists of actions taken in different fields and by different actors – mainly by local government (214, 209, 239, 197) and non-public institutions (67, 106, 122, 116) including Roma organisations (34, 85, 94, 77).

The programme is divided into the following eight fields:

- Education as a priority (274, 286, 358, 499 actions/activities)
- Living conditions (39, 65, 69, 83 activities)
- Employment (10, 14, 18, 11 activities)
- Health care (20, 22, 28, 22 activities)
- Culture and preserving Roma identity (63, 93, 109, 87 activities)
- Roma and civil society (15, 14, 15, 42 activities)
- Personal security (occasional)
- Knowledge about Roma (dissemination of information) (occasional, 26, 27, 29)

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. Meetings of newly established 'Team on Roma Issues' prove that there are number of problems in realization of the program (to give an example – it happens that local government and schools do not use additional funds from Roma program to support specifically Roma community but for instance to renovate the school; also quite often Roma community is not even consulted by the local government when the local government applies for the money from the Roma program).<sup>234</sup>

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.

<sup>233</sup> [http://www.mswia.gov.pl/portal/pl/181/Program\\_na\\_rzecz\\_spolecznosci\\_romskiej\\_w\\_Polsce.html](http://www.mswia.gov.pl/portal/pl/181/Program_na_rzecz_spolecznosci_romskiej_w_Polsce.html)

<sup>234</sup> See minutes from all the meetings of the 'Team on Roma Issues' (12 meetings already took place) at: <http://www.mswia.gov.pl/portal/pl/473/>



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 (in the 2006/2007 – 89 assistants, in the 2007/2008 – 87, in the 2009/2010 – 96 assistants), which means one assistant for 26, 29, 31, 29 pupils (Roma education assistants are themselves from the Roma community);
- employing assistant teachers (66 in 2006, 63 in 2007, 63 in 2008, 141 in 2010);
- 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 (in 2010 83 students and 18 pupils);
- improving living conditions (renovation of flats (237, 453, 434, 535), building of new flats (15, 3, 16, 0), providing water, sewage systems and electricity (to 56, 91, 48, 69 flats);
- preventative health examination and vaccination (1056; 1441, 1258, 2098 persons)
- employing special nurses to assist with medical problems (31 in 2006, 14 additional in 2007, 35 in 2008, 23 in 2010);
- organising so called “white days” with free medical advice by doctors from different specialisations (20, 44, 40, 18 activities);
- supporting employment of Roma by subsidising job creation (86, 63, 44, 39 people);
- organising various kinds of cultural events

One more program dedicated to Roma Community is “Roma Component” of the Operational Program Human Capital within European Social Fund (2007-2013).<sup>235</sup> It begun with some delay in the late 2008. It includes money for employment and labour activation, education, social integration and health protection of Roma community. First tranche of the program was distributed in 2009.

The First Job programme was the example of positive action with respect to age. It started in 2002 with the goal of facilitating the employment of young people up to the age of 25 and graduates up to 27. Several measures were introduced to increase their chances of gaining their first work experience.

<sup>235</sup> [http://www.mswia.gov.pl/portal/pl/451/Komponent\\_romski\\_PO\\_KL.html](http://www.mswia.gov.pl/portal/pl/451/Komponent_romski_PO_KL.html)



This included 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. Additional funds were provided to support NGO activity, with the aim of facilitating the employment of graduates.

The second example in the field was the First Business programme – starting an enterprise or self-employment 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 was to assist the same group of young unemployed people to start up their own businesses through self-employment by providing theoretical training and practical guidance as well as subsidies and loans.

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 worked. This is the lowest figure in the EU. The programme includes a number of actions, including lowering the employment costs for employers, organising special qualification courses, adjusting working conditions etc.

Number of measures can be considered as positive action in the field of disability (many of them are mentioned in the report above). 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.

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*, PFRON) reimbursement for adapting existing and creating new work stations to the needs of disabled persons, adapting or buying equipment to help disabled people to function at work, identifying by the departments of occupational medicine the relevant needs of persons with disability.<sup>236</sup>

Furthermore, an employer who employs disabled people is entitled to receive a monthly subsidy for the remuneration of the disabled employee.<sup>237</sup> The amount of the subsidy is related to the level of impairment of the disabled person employed.<sup>238</sup>

For employers, there is a supplementary – this time negative – incentive to employ disabled people.

<sup>236</sup>Article 26, Act on Disabled Persons.

<sup>237</sup>Article 26a Act on Disabled Persons.

<sup>238</sup>Article 26.1, Act on Disabled Persons.





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>239</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 are several programs which aim to activate persons with disabilities on the labour market (from the resources of the PFRON).

As an example the Junior programme<sup>240</sup> might be mentioned, which is included under the aegis of the First Job programme. This is a programme to introduce disabled graduates into professional posts. It aims to do this by directing young disabled people<sup>241</sup> to undertake six-to-18-month internships. Employers receive economic incentives in the form of a bonus for accepting a disabled graduate for an internship or employing him/her. There are also programs dedicated to particular groups of people with disabilities – “Support for people with hearing impairment on labour market”, “Support for blind persons on labour market” and similar. PFRON also implements some other programmes for the disabled.<sup>242</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).

In relation to religious groups there is a special “Church Fund” (*fundusz kościelny*) administered by the Ministry of Interior and Administration and its Department of Religious Denominations and National and Ethnic Minorities.<sup>243</sup> Fund provides subsidies and organizes grant competitions. The list of the activities financed includes: support for charitable activities of the churches, educational activities, social care activities as well as initiatives related to combating social problems.

<sup>239</sup>See Article 21.1-2 Act on Disabled Persons.

<sup>240</sup>[http://www.pfron.org.pl/portal/pl/105/106/Spis\\_tresci\\_programu\\_JUNIOR.html](http://www.pfron.org.pl/portal/pl/105/106/Spis_tresci_programu_JUNIOR.html)

<sup>241</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>242</sup>For more see [www.pfron.org.pl](http://www.pfron.org.pl) and especially *Information of the Government of The Republic of Poland on activities carried out in 2008 (as well as 2009) regarding implementation of the resolution of the Sejm of the Republic of Poland from 1 August 1997 “Charter of rights of Disabled People”, available at [http://www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach/sprawozdanie-z-realizacji-karty-\(Informacja\\_Rzadu\\_Rzeczypospolitej\\_Polskiej\\_o\\_dzialaniach\\_podejmowanych\\_w\\_2008\\_\(odpowiednio\\_2009\)\\_roku\\_na\\_rzecz\\_realizacji\\_postanowien\\_uchwaly\\_Sejmu\\_RP\\_z\\_dnia\\_1\\_sierpnia\\_1997\\_r.\\_Karta\\_praw\\_osob\\_niepelnosprawnych](http://www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach/sprawozdanie-z-realizacji-karty-(Informacja_Rzadu_Rzeczypospolitej_Polskiej_o_dzialaniach_podejmowanych_w_2008_(odpowiednio_2009)_roku_na_rzecz_realizacji_postanowien_uchwaly_Sejmu_RP_z_dnia_1_sierpnia_1997_r._Karta_praw_osob_niepelnosprawnych)”.*

<sup>243</sup><http://www2.mswia.gov.pl/portal.php?serwis=pl&dzial=78&id=121> (01.06.2010).



Grants awarded include donations on care and special treatment institutions, „social care homes”, specialized facilities for the profoundly disabled children and adults, educational institutions, orphanages, nurseries, kindergartens, primary and secondary schools etc. The grants are intended primarily for the construction, expansion, renovation and modernization of facilities, sometimes purchase of the equipment. Church Fund provides also grants for the renovation and preservation of sacred historic buildings.<sup>244</sup>

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<sup>244</sup> [http://www.mswia.gov.pl/portal/pl/92/221/Fundusz\\_koscielny.html](http://www.mswia.gov.pl/portal/pl/92/221/Fundusz_koscielny.html) (01.06.2010).



## 6 REMEDIES AND ENFORCEMENT

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

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

*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.*

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

There are no official statistics on the number of cases related to discrimination brought to justice. Since new Act on Equal Treatment came in force on 1<sup>st</sup> January 2011 Polish Society of Anti-Discrimination Law send the letter (24 January 2011) to the Minister of Justice urging the Ministry to collect relevant statistical data.<sup>245</sup> The idea expressed in the letter of PSAL was supported by both Ombud and Gov. Plenipotentiary for Equal Treatment, Ministry of Justice declared to collect relevant data.

Claims stemming from an employment relationship can be determined either by a labour court or by a conciliation committee.<sup>246</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>247</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>248</sup>

New 2010 act on Equal treatment introduced compensation claim (Art. 12-13) stating that anyone (civil and legal persons) who suffers from the infringement of the principle of equal treatment is entitled to compensation. The relevant general rules of civil code and civil procedure code apply (Art. 13.2, Art. 14.1).

<sup>245</sup> [http://www.ptpa.org.pl/index.php?option=com\\_content&view=article&id=170:ptpa-pyta-ministra-sprawiedliwosci-o-statystyki-dotyczce-dyskryminacji](http://www.ptpa.org.pl/index.php?option=com_content&view=article&id=170:ptpa-pyta-ministra-sprawiedliwosci-o-statystyki-dotyczce-dyskryminacji) (10.03.2011).

<sup>246</sup> Article 242 Labour Code.

<sup>247</sup> Article 251 Labour Code.

<sup>248</sup> See Article 184-186 Code of Civil Procedure.



Additionally, in the matters not covered by the Act on Equal Treatment, one can use 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 try to seek redress through this general civil clause. One example of the use of this general clause is given in section 0.3 above (access of blind person – Jolanta K. – to the supermarket with guide dog).

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).

Before 2010 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.

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>249</sup>

Offences against the interest of consumers. In the case of discrimination in access to goods and services one can try to use law on petty crimes defining refusal of selling goods and providing services as a petty crime. The provisions stem from the communist era and had different meaning but it seems that in the case of limited prohibition of discrimination in the access to goods and services (only because of gender, race, ethnic origin and nationality) they might play this role to some extent. In such a case one should turn to the Police who plays the role of the prosecutor in the case of petty crime (district court).

Code of petty crimes (minor offences) provides: (Art.135) *Whoever, dealing with selling goods in a retail sale or catering business, hides the goods meant for sale or deliberately refuses selling them without a founded reason, is subject to fine.* (Art. 138) *Whoever, being a professional service provider, demands or collects payment higher than one in force, or deliberately refuses to provide the service without a founded reason, is subject to fine.* The fine imposed by the court (Art. 1.1) might be up to 5.000 PLN (around 1250 euro).

It is difficult to state with certainty whether this provision has been already successfully used in discrimination context. On one hand it is given for years as an example of possible legal action in reports and publications and is being quoted during conferences, seminars and trainings by lawyers and activists as a good (and used occasionally) legal tool. However none concrete successful example was identified during the research for this report. The only case found was the case of man who sued the owners of the restaurant Babie Lato "for women only" for refusal to being served. The court dismissed the claim. However limited access to information about these cases might be caused by the fact that this is petty crime procedure and these cases are not published as well as they do not attract public attention. In any case it is not special anti-discrimination provision and it was identified as a possible source of legal action only because of lack of appropriate procedures.

Discriminatory treatment may, in some circumstances, take the form of a criminal offence prosecuted under the Penal Code. In such situations a criminal proceeding can be instituted by a public prosecutor ex officio, or sometimes, by the victim themselves, in accordance with the Code of Criminal Procedure.

<sup>249</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.



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 force or illegal threat towards individuals or groups of people because of their national, ethnic, racial, political or religious affiliation<sup>250</sup>, public insult of such individuals or groups of people or the infringement of the personal integrity of such a person<sup>251</sup> or the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.<sup>252</sup>

In both criminal and civil procedure the possibility of mediation exists and is gradually becoming more popular.

There are no administrative remedies laid down specifically to deal with discrimination issues, although such issues can sometimes be present in administrative proceedings. However new Act on Equal Treatment (Art. 24) introduced new possibility in the administrative procedure (amending Administrative Procedure Code).<sup>253</sup> It provides that if there was court ruling that found infringement of the rule of equal treatment one may demand resumption of the pre-trial administrative procedure, providing that this infringement influenced the final administrative decision.<sup>254</sup>

In relation to administrative procedure it should be also noted that the rights of victims of discrimination to access court and/or administrative procedures (as provided for by Article 7.1 of Directive 2000/43) applies only partially in Polish law since the right to state-guaranteed legal aid does not include administrative proceedings (and considerable numbers of administrative proceedings may concern discrimination). The right to legal aid arises only when a person decides to file a complaint with 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).

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>255</sup>

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<sup>250</sup> Article 119.1-2 Penal Code.

<sup>251</sup> Article 257 Penal Code.

<sup>252</sup> Article 256 Penal Code.

<sup>253</sup> Act of 14 June 1969 - Code of Administrative Procedure [amended], (*Ustawa z dnia 14 czerwca 1960 r. - Kodeks postępowania administracyjnego*).

<sup>254</sup> Art. 145b.1 Code of Administrative Procedure.

<sup>255</sup> Article 21-33, 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 Procedure Code.





The option of bringing an individual complaint before the European Court of Human Rights on the basis of an alleged violation of any rights or freedoms guaranteed by the European Convention or its additional Protocols in connection with Article 14 of the Convention cannot be ignored (see rulings of the ECHR in part 0.3 above). The independent use of Article 14 (non-discrimination) will not be possible unless Poland ratifies Protocol No 12. To date, however, there is no sign that the government intends to accept the Protocol.

In terms of non-judicial measures, a complaint to the Polish Ombud office – Commissioner for Civil Rights Protection (*Rzecznik Praw Obywatelskich*) may prove to be an effective tool. Ombud since 1 January 2011 became designated as an equality body. 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>256</sup>

As far as legal representation is concerned, some preferential treatment is allowed in labour cases.

In Poland, in principle, legal representation may be provided by an advocate (attorney-at-law) or legal adviser,<sup>257</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>258</sup> In addition, in labour cases claims are automatically exempted from court costs.

Common problem faced by victims of discrimination (despite their fear to raise the issue of discrimination) is lack of professional legal assistance. There is no system of free out of court legal advice for vulnerable groups in place (relevant works on the Ministry of Justice draft law on access to legal aid last for 6 years already and since 2005 there were several versions of the draft law). In all court procedures there is a possibility for an indigent claimant (or victim in criminal case) of receiving waiver from court cost and legal aid lawyer (paid by the state). However in reality access to *ex officio* lawyer is limited and the quality of legal aid services is often very poor.

One other factor 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.

b) *Are these binding or non-binding?*

<sup>256</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>257</sup>Article 87.1 Code of Civil Procedure.

<sup>258</sup>Article 465.1 Code of Civil Procedure.



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>259</sup>

Confirmation by the court of the agreement reached between parties is binding in the same way as court verdict.

All verdicts of the courts in any procedure mentioned above are binding (obviously the verdicts of first instance might be appealed).

If the court directs the case (criminal or civil) to the mediation procedure its result (if agreement is reached) is confirmed by the court and binding equally to the court verdict.

Measures taken by labour inspectors are binding however the employer may challenge them in administrative court.

Ombudsperson cannot issue a legally binding decisions.

c) *What is the time limit within which a procedure must be initiated?*

The time limits in procedures mentioned vary but generally speaking they do not act as deterrents to seeking redress, they are counted rather in years than months. The time limits in relation to discrimination procedures are the same as general time limits in other labour or civil cases.

According to the 2010 Act on Equal Treatment (art. 15) the statute of limitation in the compensation claims based on infringement of the rule of equal treatment is 3 years from the moment when person learns about the infringement, and no later than 5 years from the infringement itself.

Generally the statute of limitation in civil matters (that includes labour matters) is generally 10 years, and 3 years in cases of “periodic services” or cases related to “professional activity of the party as an entrepreneur”.<sup>260</sup> This shortened 3 years period may however cause problems. According to the research done in 2009 by International Commission of Jurists (ICJ), Polish Section<sup>261</sup> a major source of obstacles in pursuing justice before the claim becomes time-barred is the situation of dependency between a person eligible to bring the lawsuit and an obliged party. It has been observed that employees often do not seek their rights through fear of losing their jobs. As long as the employment relationship lasts, the employee is afraid of bringing claims against the employer.

<sup>259</sup> Article 255.1 Labour Code.

<sup>260</sup> Art. 118, Civil Code.

<sup>261</sup> See report *Access to Justice for Human Rights Abuse Involving Corporations*. A project of the International Commission of Jurists. Report for Poland. September 2009. Drafted by: K. Szymielewicz.



Short time-bar on claims for payment (3 years), when combined with the lack of legal awareness and fear of losing livelihood, may create a serious obstacle to pursuing justice.<sup>262</sup>

ICJ draft report describes for instance several civil cases against JMD<sup>263</sup> where most of the lawsuits for damages concerned payment for overtime work that was not disclosed by the company in the register of working hours. Many of these claims arose earlier than three years before bringing the case to the court and, therefore, were already time-barred. Employees had not brought their claims earlier because of the fear of losing their jobs and difficult situation prevailing on the job market at the time of the dispute. As ICJ draft report points out: '*jurisprudence<sup>264</sup> and legal doctrine allow the possibility of adjudicating on a time-barred claim if rejecting such claim would "violate the principles of social co-existence".<sup>265</sup> In addition, Labour Code provides that a judge can always decide to reject the time-bar argument raised by the employer (to block his employee's claims) if the judge considers it to be an abuse of law.<sup>266</sup> This possibility tends to be applied to employee claims for compensation (e.g. following an accident at work treated as a tort under civil law or particularly blatant cases of discrimination, molestation or harassment).*

*As stems from the above, the law does create a mechanism for preventing injustice caused by the lapse of prescription period in particular circumstances. However, the criteria of assessing whether a time-bar argument in a given case violates the principles of social co-existence or constitutes the abuse of law are vague since they need to be interpreted from these general principles. By definition, the application of so called "general clauses" depends on their interpretation adopted by the adjudicating court under particular circumstances of the case.'*

The claim for the resumption of the pre-trial administrative procedure (described under point a. above – if there was court ruling that found infringement of the rule of equal treatment one may demand resumption of the pre-trial administrative procedure, providing that this infringement influenced the final administrative decision ) may be brought within a month of the court ruling, on which the claim is based, becoming final.<sup>267</sup> The administrative decision might be quashed within five years of it being served or announced.<sup>268</sup>

<sup>262</sup> Rozpoczęcie biegu przedawnienia roszczenia pracowniczego. (Commentary to the Supreme Court judgment of 3 February 2009 (I PK 156/08)), *Monitor Prawa Pracy* (6), 2009.

<sup>263</sup> JMD - Jeronimo Martins Dystrybucja S.A. is the owner of Poland's largest chain of retail stores that now operates over 1500 stores and 8 modern Distribution Centres; see at: <http://www.biedronka.pl/str/2/e/5.php> (01.06.2010).

<sup>264</sup> See: Supreme Court Judgment of 29 March 2007 (II PK 224/06); Supreme Court Judgment of 22 June 2005 (I PK 288/04); Supreme Court Judgment of 8 May 2008 (I PK 277/07); Supreme Court Judgment of 20 October 2004 (III UK 111/04).

<sup>265</sup> Compare e.g. Supreme Court Judgment of 17 September 1997 r. (I PKN 273/97); Supreme Court Judgment of 29 June 2005 (I PK 261/2004); Supreme Court Judgment of 19 March 2009 (IV CSK 492/2008).

<sup>266</sup> Article 8 of the Labour Code

<sup>267</sup> Article 145b.2 Administrative Procedure Code.

<sup>268</sup> Article 146.1 Administrative Procedure Code.



d) *Can a person bring a case after the employment relationship has ended?*

In Polish law it is possible to bring a case after the employment relationship has ended. 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>269</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>270</sup>

Moreover, the employee can terminate the employment contract without notice if the employer has severely violated his/her obligations towards the employee<sup>271</sup> and then bring a case against the employer.

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

*Please list the ways in which associations may engage in judicial or other procedures*

a) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

The civil, criminal and administrative law use very wide term: social organizations, that includes any associations and foundations, trade unions, professional organizations etc.

b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?*

Different social organizations are governed by different laws. Most important in this context are non-governmental organizations (mainly associations and foundations) governed by the law on associations (membership organizations) and law on foundations (non-membership organizations). In order to establish registered association 15 persons are needed, in order to establish "common association" (stowarzyszenie zwykłe) 3 persons are needed and notification instead of registration is sufficient.

<sup>269</sup>Article 18<sup>3e</sup> Labour Code.

<sup>270</sup>Article 44-55 Labour Code.

<sup>271</sup>Article 55 Labour Code.



The non governmental organisation may act in support but sometimes also on behalf of the complainant.<sup>272</sup> This solution was adopted in the Code of Civil Procedure, which allowed non-profit social organisations (whose statutory task is not to conduct economic activity) to bring a claim on behalf of individuals or join such proceedings<sup>273</sup>, e.g. in alimony (maintenance) and consumer protection cases<sup>274</sup> or in labour law and social security cases.<sup>275</sup> If a social organisation does not participate in the proceeding, it may still present its opinion on the case to the court (acting de facto as *amicus curiae* even if the law does not use this expression).<sup>276</sup>

Due to the changes to the Law on the Code of Civil Procedure made in August 2004, organisations involved in combating discrimination may engage in judicial procedures in support of a complainant and on his/her behalf.

The 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 (the court controls only the fulfilment of the formal criteria, like statutory objective).<sup>277</sup>

Similarly, social organisations are entitled to bring or join administrative proceedings. 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”. It is up to the administrative organ to decide whether to admit the social organization, however this decision might be appealed. But even if not taking part in the proceedings as a party organization, with the consent of the administrative organ, may still express its opinion (*amicus curiae* brief) (art. 31.2-5).

<sup>272</sup> See more detailed analyses in: S.Spurek, *Udział organizacji społecznej w postępowaniu karnym, cywilnym i administracyjnym* (Participation of the social organization in criminal, civil and administrative proceedings), in: *Przeciwdziałanie dyskryminacji z powodu orientacji seksualnej w świetle prawa polskiego oraz standardów europejskich* (Counteracting discrimination on ground of sexual orientation in light of Polish law and European standards), ed. K. Śmiszek, Warsaw 2006; K. Gonera (Supreme Court Judge), *Udział organizacji społecznych w postępowaniu sądowym jako gwarancja prawa do rzetelnego procesu* (Participation of the social organization in the court proceedings as a warranty of the right to fair trial), and M. Bernatt, *Opinia przyjaciela sądu (amicus curiae) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich* (Amicus curiae brief as auxiliary legal institution in jurisprudence of Polish courts, both in: *Sprawny sąd. Zbiór dobrych praktyk* (Efficient court. Collection of best practices) ed. L.Bojarski, C.H.Beck, Warsaw 2008 (p. 166-176 and 184-189).

<sup>273</sup> Article 8 Code of Civil Procedure.

<sup>274</sup> Article 61 Code of Civil Procedure.

<sup>275</sup> Article 462 Code of Civil Procedure.

<sup>276</sup> Article 63 Code of Civil Procedure.

<sup>277</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*).



Representatives of social organisations may also be admitted to criminal proceedings. According to Article 90 and 91 of the Code of Criminal Procedure a representative of a social organisation may be admitted if “there is a need to protect the public interest or important individual interest falling within the statutory objectives of the organisation, in particular the need to protect human rights and freedoms.” The decision whether to admit the representative rests with the court which evaluate the importance of the public or individual interest. The motion to admit representative should be submitted in written and designate particular person/s as representative/s.

- c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

There are no special provisions on victim consent. It is the matter of practice. In some cases the consent to the protocol is enough, in some cases written consent would be needed (please see point b) above on criminal procedure).

- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

It is voluntary decision of the organization; no organizations have legal duty to act.

- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

The non governmental organisation may act in support but sometimes also on behalf of the complainant. This solution was adopted in the Code of Civil Procedure, which allowed non-profit social organisations (whose statutory task is not to conduct economic activity) to bring a claim on behalf of individuals or join such proceedings<sup>278</sup>, e.g. in alimony (maintenance) and consumer protection cases<sup>279</sup> or in labour law and social security cases.<sup>280</sup> If a social organisation does not participate in the proceeding, it may still present its opinion on the case to the court (acting de facto as amicus curiae even law does not use this expression).<sup>281</sup> There was also an important ruling of the Constitutional Court which referred to the amicus curiae provided by the NGO in the case before CC, but same time Constitutional Court in a way recognized the usage of the amicus curiae by court even without clear law provision allowing for this.<sup>282</sup>

<sup>278</sup> Article 8 Code of Civil Procedure.

<sup>279</sup> Article 61 Code of Civil Procedure.

<sup>280</sup> Article 462 Code of Civil Procedure.

<sup>281</sup> Article 63 Code of Civil Procedure.

<sup>282</sup> Constitutional Court judgment of 16.01.2006 (SK 30/05), justification p. I.8., p. III 2.2





Due to the changes to the Law on the Code of Civil Procedure made in August 2004, organisations involved in combating discrimination may engage in judicial procedures in support of a complainant and on his/her behalf.

The 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 (the court controls only the fulfilment of the formal criteria, like statutory objective).<sup>283</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>284</sup>

Similarly, social organisations are entitled to bring or join administrative proceedings. 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”. It is up to the administrative organ to decide whether to admit the social organization, however this decision might be appealed. If admitted organization has the rights of the party. But even if not taking part in the proceedings organization, with the consent of the organ may express its opinion (*amicus curiae* brief) (art. 31.2-5). Law on procedure before administrative courts also provides for a possibility for social organizations to take part in the proceedings within its statutory activities and in cases provided by particular provisions (Article 9; 25.4; 33.2).

Representatives of social organisations may also be admitted to criminal proceedings. According to Article 90 and 91 of the Code of Criminal Procedure a representative of a social organisation may be admitted if “there is a need to protect the public interest or important individual interest falling within the statutory objectives of the organisation, in particular the need to protect human rights and freedoms.” The decision whether to admit the representative rests with the court which evaluate the importance of the public or individual interest. The motion to admit representative should be submitted in written and designate particular person/s as representative/s.

- f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify*

<sup>283</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>284</sup>See more at <http://www.hfhrpol.waw.pl>



If the organization is admitted to the civil proceedings it has the rights of the party to the proceedings and may seek and obtain any remedy including calling witnesses or appealing the ruling (this refers also to obligations of the party, like respecting court orders and compliance with deadlines) (art. 62 Code of Civil Procedure).

Organization admitted to the administrative proceedings has the rights of the party (with some limitations) (art. 31.3 Code of Administrative Procedure).

In criminal proceedings rights of the representative of social organization are limited to: participation in the hearing, expressing its opinion orally to protocol or submitting its opinion in writing (art. 91 Code of Criminal Procedure).

g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

There are no special rules on the shifting burden of proof where associations are engaged in proceedings. General rules apply.

h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Polish law do not allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Until 2010 there was no legislation on class action. This gap constituted a considerable restriction in pursuing justice. In general each single lawsuit brought before the court initiates a separate court proceeding with all obligatory elements like court fees, legal representation, correspondence and communication with court, presentation of evidence etc. There is possibility for the court to decide to hear a number of related cases jointly, however it will not affect these mentioned obligatory elements of the procedure. The only practical relief for the parties (and the court itself) may result from making the process of gathering evidence (e.g. calling witnesses or obtaining documents) more time and cost efficient.<sup>285</sup>

<sup>285</sup> Access to Justice for Human Rights Abuse Involving Corporations. A project of the International Commission of Jurists. Draft Report for Poland. September 2009. Drafted by: K. Szymielewicz.



In 2009 however the Parliament passed new law on class action which entered into force on 19 July 2010.<sup>286</sup> The European model of class action, as opposed to the American, was chosen – meaning that all parties interested in the case must join it personally.

Unfortunately at the very end of work on the draft act, when it was already passed by the Sejm – lower house of Parliament, the Senate introduced some changes narrowing significantly the scope of the law and limited it to the consumer protection claims and torts (with the exception of protection of “personal values/welfare”). Therefore it does not include for instance employment cases (however the issue is debated and in fact requires judicial interpretation since there are opinions voiced that some employment claims could be filed within collective claim).

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

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

Before 2004 in accordance with the fundamental principle of civil law – the burden of proof rested on the complainant.<sup>287</sup>

The 2003 amendment to the Labour Code (in force since 1 January 2004) brought a revolutionary change into the legal system. In anti-discrimination cases in employment matters the burden of proof is partially shifted from the complainant to the respondent. Article 18<sup>3b</sup> para. 1 in fine clearly states that it is the employer who should prove that there were objective reasons to employ discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred.

Until 2010 the shift of the burden of proof existed in labour code only. New Act on Equal Treatment (Art. 14) introduces shift of the burden of proof in all compensation proceedings regarding infringement of the rule of equal treatment governed by the Act which is an exception from the general rule for civil proceedings that the obligation to prove a fact falls on the person who derives legal effects from the fact (Article 6 Civil Code).

According to Act on Equal Treatment (Art. 14.2) whoever (complainant) alleges infringement of the principle of equal treatment, has to substantiate (pleas) the probability of violation.

<sup>286</sup> Act of 17 December 2009 on pursuing claims in collective actions, in force from 19 July 2010 (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*, Dz.U. Nr 7, poz. 44 z 18 stycznia 2010).

<sup>287</sup> Article 6 Civil Code. In the field of labour relations the same principle applies, see Article 300 Labour Code.



In the case of prima facie evidence (probability) of violation of the principle of equal treatment the respondent is obliged to show that respondent did not committed the violation (Art. 14.3).

This provision refers to all cases governed by law – that means all forms of discrimination (including harassment) on the grounds protected by the Act.

Obviously, as far as criminal proceedings are concerned, the burden of proof is not shifted and, in accordance with the presumption of innocence, it is for the public prosecutor to prove the charge. The accused 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 people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint)*

New 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment introduces general prohibition of victimisation (Art. 17) on all grounds protected by the Act: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. Law provides that using somebody's rights to defend against unequal treatment ("rights stemming from the breach of the rule of equal treatment") must not be the basis for adverse treatment, must not cause any negative consequences against the person.<sup>288</sup> The protection extends to a person who in any way supports the person exercising his/her rights.<sup>289</sup> In case of victimisation the victim of victimisation may use same compensation claims as the victim of discrimination.<sup>290</sup>

The Act also treats as unequal treatment and prohibits less favourable treatment of persons caused by rejection of harassment or submission to harassment.<sup>291</sup>

In the employment field simultaneously previous regulation exists, the prohibition of victimisation was widely broadened in the 2008' amendment to the labour code (in force since 18 January 2009).<sup>292</sup> Before, the Labour Code prohibited only the termination of a labour contract as the result of an employee having used their rights to defend themselves against unequal treatment. This provision was amended and currently any other adverse treatment, any other negative consequences are prohibited (Article 18<sup>3e</sup> § 1 Labour Code).

<sup>288</sup> Art. 17.1 Act on Equal Treatment.

<sup>289</sup> Art. 17.2 Act on Equal Treatment.

<sup>290</sup> Art. 17.3 and Art. 13 Act on Equal Treatment.

<sup>291</sup> Art. 3.5) Act on Equal Treatment.

<sup>292</sup> Act of 21 November 2008 on amendment of the Act – Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.



This broadened Labour Code protection covers complainants but is also extended to employees who in any way support the victim of discrimination (Article 18<sup>3e</sup> § 2).

Additionally in relation to harassment, amended part of the Labour Code states that „Submission of the employee to the harassment or sexual harassment, as well as taking actions rejecting (counteracting) the harassment or sexual harassment may not result in any adverse consequences for an employee” (Art. 18<sup>3a</sup> § 7).

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

New 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment introduces general rule that everybody whose right to equal treatment was infringed has the right to compensation, this extends beyond employment (Art. 13). The right refers to both natural persons (on all grounds covered by the Act) and legal persons on the grounds of race, ethnic origin and nationality (Art. 12). The Act does not introduce new procedure but refers to the general rules of Civil Code and Code of Civil Procedure.<sup>293</sup>

The Civil Code provides compensation claims for material and immaterial damages. Art. 415 and following, regulate general terms of compensation in case of material damage. The compensation should cover all damages being consequence of unlawful act or lack of acting of the person who discriminated the claimant.

Art. 445 and 448 of civil code regulate pecuniary damages (punitive) and state that damages should be appropriate which means that should ensure effective address of suffered damage.

Art. 448 regulates payment of an appropriate sum for indicated public interest.

Additionally if there are cases not covered by the provisions of Act on Equal Treatment, it is also possible to try to rely on the protection of personal goods described in p. 6.1. Among the actions claimant may demand are pecuniary satisfaction and payment for social cause.

In the field of employment Article 18<sup>3d</sup> of the Labour Code provides that a person who was the subject of discriminatory treatment by the employer is entitled to compensation not lower than the minimum wage defined in separate laws (in 2010 around 300 euro/month). Polish system of compensation of damages is rather based on the concept of redressing damages and does not include a typical sanctioning character.

<sup>293</sup> Art. 13.2 and 14.1 Act on Equal Treatment.



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>294</sup>

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.

The Labour Code does not envisage any sanctions for violations of the employer's obligation to create an environment free from discrimination in the workplace, especially with respect to gender, age, disability, race, religion, nationality, political beliefs, membership in trade unions, ethnic origin, belief, and sexual orientation.<sup>295</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, religion, ethnic origin, nationality, sexual orientation, political opinion, beliefs or membership in a trade union is liable to a minimum fine of 3,000 PLN (ca. 750 euro).<sup>296</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>297</sup>

In addition, criminal sanctions may apply, if the discriminatory treatment constitutes a criminal offence, such as, for instance, the public insult of individuals or groups due to their national, ethnic or racial origin.

*b) Is there any ceiling on the maximum amount of compensation that can be awarded?*

Both the compensation clause provided by Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Art. 13) and Civil Code that the Act refers to, do not envisage any ceiling on the maximum amount of compensation that can be awarded.

<sup>294</sup>Article 56.1 and 45.2 Labour Code. See also the Supreme Court ruling of 9 February 1999, I PKN 565/98, OSNAPiUS 2000/6/225, which stated that: "The necessity of hiring new employees with appropriate qualifications, which the plaintiff does not hold, speaks to the inadvisability of returning him to his job (Article 45.2 Labour Code)."

<sup>295</sup>Article 94 point 2b Labour Code.

<sup>296</sup>Article 121.3, Act on Employment.

<sup>297</sup>Article 123, Act on Employment.





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 in 2010 1,317 PLN (ca. 300 euro) per month<sup>298</sup>.

- 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?*

There is no reliable information on the average amount of compensation available to victims. The number of cases where compensation was given is still small but generally courts tend to decide on small compensation rather (see as examples cases of Małgorzata K.D. and Mirosław S. described under section 0.3).

Generally in civil cases compensation awarded for “moral loss” or “suffering” which resulted from discrimination are rather low, there is no tradition of valuing this type of damages and methods of its calculation base on different approaches used by judges.

There are Supreme Court rulings which give only general guidelines – court should take into consideration: living conditions of the party, average standard of life, level of economic development of the state.<sup>299</sup>

The law leaves discretion to judges stating that they should adjudicate “an adequate amount”<sup>300</sup> for moral loss and suffering.

This judicial independence is supported by the Supreme Court which leaves compensation awarded solely for the discretion of particular judges deciding different cases.<sup>301</sup>

However ICJ 2009’ research revealed that the amount of compensation in civil matters awarded by the courts is “steadily increasing (compensation exceeding PLN 100,000<sup>302</sup> is not uncommon, especially in cases of permanent and extensive bodily injury or long-term disturbance of health). Nevertheless, there are continuing allegations that Polish courts, on average, award low compensations, making them incommensurate to the harm actually suffered by the victim”<sup>303</sup>.

<sup>298</sup>Every year the level of the minimal wage is set by the Act on the minimum wage.

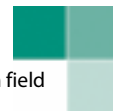
<sup>299</sup>See e.g. Supreme Court Judgment of 29 May 2008 (II CSK 78/2008); Supreme Court Judgment of 12 July 2002 (V CKN 1114/2000).

<sup>300</sup>Art. 455, Civil Code.

<sup>301</sup>Supreme Court Judgment of 4 February 2008 (III KK 349/2007).

<sup>302</sup>Ca. 25,000 EURO.

<sup>303</sup>Access to Justice for Human Rights Abuse Involving Corporations. A project of the International Commission of Jurists. Draft Report for Poland. September 2009. Drafted by: K. Szymielewicz.



It is also questionable whether the only one special labour code sanction described above meets the criteria of the Directives (effective, proportionate and dissuasive), because this system redresses only the damage and does not include a sanctioning element (e.g. for a large company, being required to pay compensation at the level of the minimum wage is hardly dissuasive).



## 7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

*When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that correspond to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

After years of lack of equality body in Poland, the 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment finally designates as an equality body the existing Ombudsperson office (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*). The law adequately amended existing Law on the Ombudsperson imposing on the Ombud new competences.

However, even if the new law obliged Ombud to take number of responsibilities it did not envisage any additional resources, funding etc. for fulfilling new obligations, therefore the role of the Ombud as an equality body remains illusory. In the explanatory memorandum part of the draft law authors argue that additional funding is not needed and that Ombudsperson office may conduct new competences within existing structure and budget. Current Ombudsperson, prof. I.Lipowicz publicly criticized this situation several times (including presentations before the Parliament and In the Constitutional Tribunal) and even proposed that the law was suspended for two years since there are no funds for proper fulfilment of the competences of the equality body.

Since Ombud took on new responsibilities on January 1<sup>st</sup> 2011, there are no statistics or reports on its operation as an equality body. However, even before being designated equality body, office of the Ombud was engaged in number of issues related to discrimination.

The second institution that have the mandate to promote the equal treatment of all persons without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment.

- 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.<sup>304</sup> Since 2011 the annual report will have to include information on activities (and their results) in the capacity of the equality body, information on the implementation of the rule of equal treatment in Poland based on research and conclusions and recommendations regarding activities that should be undertaken in order to fully secure the implementation of the rule of equal treatment).<sup>305</sup> Additionally, partially in the process of the preparation for its new role, the Ombudsperson office prepared and published in 2010 so called “white book” which aims to present Ombudsperson activities regarding discrimination over the years.<sup>306</sup> The budget of the office comes from the central state budget and is approved by the Parliament.<sup>307</sup> At the moment the office is not equipped with sufficient resources to play the role described in the Act on Equal Treatment. However the Office of the Ombudsperson currently employs more than 260 full time employees and is willing to take new responsibilities and play the role of the equality body in the future.

## 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). New 2010 Act on Equal Treatment became a new legal basis for the operation of the Plenipotentiary (on the level of the Act of Parliament), however the mentioned Ordinance is still valid law as well.

The office of the Plenipotentiary (within the Chancellery of the Prime Minister) was established in July 2008, and at the end of 2010 it employed around 20 persons.<sup>308</sup>

<sup>304</sup> Complete information about activities of the Ombudsperson is prepared annually for the Parliament and is printed as well as available on its website [brpo.gov.pl](http://brpo.gov.pl); summary reports are also available in English, see: *Summary of Report on the Activity of the Human Rights Defender in 2010*, *Summary of Report on the Activity of the Human Rights Defender in 2009 with some Remarks on Observance of Human and Civil Rights and Freedoms*, *Summary of Report on the Activity of the Commissioner for Civil Rights Protection in 2008 with some Remarks on Observance of Human and Civil Rights and Freedoms*, at: <http://rpo.gov.pl/index.php?md=8573&s=3> (15.06.2011).

<sup>305</sup> Article 19, Act on the Commissioner for Civil Rights Protection.

<sup>306</sup> BIAŁA KSIEGA. Raport o wybranych działaniach Rzecznika Praw Obywatelskich V. kadencji w zakresie przeciwdziałania dyskryminacji w okresie od 15 lutego 2006 r. do 9 kwietnia 2010 r. [WHITE BOOK. Report on the chosen activities of the Commissioner for Civil Rights Protection of the V. term in the field of counteracting discrimination covering period 15 February 2006 – 9 April 2010], available in Polish at: <http://www.rpo.gov.pl/pliki/12792051450.pdf> (01.09.2011).

<sup>307</sup> Generally the annual budget of the office is about 6-8 million euro (depending on the exchange rate), however it is not possible to assess which part of this sum was and currently is devoted to the discrimination issues, there is however no separate budget line for discrimination.

<sup>308</sup> See list of employees at <http://www.rownetraktowanie.gov.pl/pelnomocnik/biuro> (01.09.2011).



Plenipotentiary is appointed and recalled by the Prime Minister, is accountable to the Prime Minister as a secretary of state in the Chancellery of the Prime Minister and uses the premises of the Chancellery of the Prime Minister<sup>309</sup> (does not have separate budget as well).

According to the Act on Equal Treatment and Ordinance Plenipotentiary should execute the governmental policy in regard to equal treatment and counteracting discrimination.<sup>310</sup> Plenipotentiary should prepare and present to the Council of Ministers National Program of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*)<sup>311</sup> and then report on its execution annually (first report is due till 31 March 2013).<sup>312</sup> According to new law Plenipotentiary prepares also general annual reports on its activities, until 31 March, covering the last year (first report is due until 31 March 2012).<sup>313</sup> Until now Plenipotentiary prepared only one internal report covering the first year of its operation (IV 2008-IV 2009).<sup>314</sup>

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

### **Ombudsperson**

The Commissioner for Civil Rights Protection (Ombudsperson) is the institution which possesses the strongest instruments to intervene in cases of discrimination.

According to the 1997 Constitution, everyone has the right to apply to the Ombudsperson for assistance in protecting their freedoms or rights infringed by organs of public authority.<sup>315</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 was present in its activities, this has never been the priority issue.

The 2010 Act on Equal Treatment has changed the situation (by amending Act on Commissioner of Civil Rights Protection) and widen the scope of competences of the Ombudsperson office by adding that Ombud does protect also the execution of the rule of equal treatment, as well as listing new competences as required by the Directives (see below).

<sup>309</sup> Article 20 Act on Equal Treatment.

<sup>310</sup> Article 21 Act on Equal Treatment.

<sup>311</sup> Article 22 Act on Equal Treatment.

<sup>312</sup> Article 23.3), art. 32 Act on Equal Treatment.

<sup>313</sup> Article 23, art. 32 Act on Equal Treatment.

<sup>314</sup> Report on activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009 (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres 30 kwietnia 2008 r. – 30 kwietnia 2009 r.*). The annual report is not published on the internet site of the office.

<sup>315</sup> Article 80, Constitution.



Until 2010 there was no unit dealing exclusively with discrimination cases within the office. Such cases fall within the scope of various divisions responsible for labour law, social security or protection of disabled people's rights etc.

In its annual reports Ombudsperson distinguished problems of the protection of foreigners and national and ethnic minority rights (the information from the department dealing with rights of national and ethnic minorities in the annual reports was included on some (4-5) pages out of ca. 600).<sup>316</sup>

Matters concerning rights of national and ethnic minorities constituted a small percentage of cases sent to the Ombudsperson.<sup>317</sup> Cases regarding equal treatment were absolutely unique.<sup>318</sup>

The situation will probably change in 2011 since the Ombudsperson office became officially Polish equality body. There is still no separate unit dealing with its new role due to the lack of funds, but for instance on the Polish internet site of the Office there is new section devoted to the role of the Ombud as an equality body.<sup>319</sup>

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

The task of the Plenipotentiary is to execute governmental policy with regard to equal treatment, "including counteracting discrimination in particular because of gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status".<sup>320</sup> "Disability", originally not explicitly mentioned, was added in 2010. The competences of the Plenipotentiary include preparing draft laws related to equal treatment and preparing opinions about such drafts; different analytical and monitoring competences (see below); promotion of the equal treatment; international cooperation; implementing projects that support equal treatment and counteracting discrimination.<sup>321</sup>

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

<sup>316</sup> Annual Information of the Commissioner for Civil Rights Protection for the following years, [www.brpo.gov.pl](http://www.brpo.gov.pl)

<sup>317</sup> From the total number of complaints annually (50.000 - 60.000 cases) they were ca. 20 complaints/matters regarding national and ethnic minorities in the year 2007 (it differs slightly annually, as for instance in 2004 there were app. 30 new cases, whereas in 2005 only 7 new cases), Information of the Commissioner for Civil Rights Protection, [www.brpo.gov.pl](http://www.brpo.gov.pl)

<sup>318</sup> Number of cases concerning "equal treatment, fight against racism, discrimination and xenophobia" dealt by Ombudsperson office: 4 (2005), 3 (2006), 5 (2007), 4 (2008). All cases were initiated by individual complaints.

<sup>319</sup> <http://www.rpo.gov.pl/index.php?md=8886&s=1> (01.09.2011).

<sup>320</sup> Art. 21 Act on Equal Treatment.

<sup>321</sup> Art. 21 Act on Equal Treatment.





## Ombudsperson

New 2010 Act on Equal Treatment imposed new competences on the Ombud office. It provides that Ombudsperson in the implementation of the rule of equal treatment should: analyse, monitor and support equal treatment of all persons; conduct independent surveys of discrimination; prepare and publish independent reports, and issue recommendations regarding discrimination issues.<sup>322</sup>

The issue of providing independent assistance to victims is more complicated. As already mentioned according to the Polish Constitution and new Law on Equal Treatment those competences refer to the vertical understanding of the human rights (relation between public organ and a person) and are limited when it concerns conflicts in between private parties. In such a case according to law Ombud may limit its actions to providing to the victim the information on the rights and possible actions.<sup>323</sup>

In general 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>324</sup>

In carrying out an investigation the Ombudsperson has the right to examine every case on the spot even without prior notification. 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>325</sup>

Apart from examining individual cases, the Commissioner may also commission expertise and opinions as well as publish information about types of cases it deals with, including recommendations. The Commissioner may also establish thematic expert teams and ask them for the report on particular issue. There were created already teams of experts on the rights of elderly and persons with disabilities.

## Government Plenipotentiary for Equal Treatment

The competences of this new post as described by law 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.

<sup>322</sup> Article 17b, Act on the Commissioner for Civil Rights Protection.

<sup>323</sup> Article 11, Act on the Commissioner for Civil Rights Protection.

<sup>324</sup> Article 12, Act on the Commissioner for Civil Rights Protection.

<sup>325</sup> Article 13 Act on the Commissioner for Civil Rights Protection.



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.

The Plenipotentiary does not have the right to accept complaints and assist individual victims however in fact it receives complaints, motions, letters from victims of discrimination, NGOs. The only annual report prepared mentions 185 matters of this kind (on the basis of different grounds of discrimination)<sup>326</sup>, on the internet site of the office one may also find examples of activities taken divided by ground of discrimination, for instance race and ethnic origin.<sup>327</sup> Plenipotentiary takes mainly three kind of actions – it informs victims about appropriate institution they should turn to, it approaches different governmental agencies with questions and motions for explanations of their position (majority of cases) and also recommends changes of the law and practice stemming from the complaints received.

- 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>328</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.

### **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.

- f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions). Is the independence of the body / bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

None of both institutions being described have the quasi judicial function, none may impose sanctions.

<sup>326</sup> Report on activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009; pp 44-69.

<sup>327</sup> [http://www.rownetraktowanie.gov.pl/wystapienia\\_interwencje/dyskryminacja\\_ze\\_wzgledu\\_6](http://www.rownetraktowanie.gov.pl/wystapienia_interwencje/dyskryminacja_ze_wzgledu_6) (01.09.2011).

<sup>328</sup> Article 14 Act on the Commissioner for Civil Rights Protection.



Ombudsperson is an independent body, appointed for fixed 5 year term and accountable to the Parliament.<sup>329</sup> The Ombudsperson's office is independent from other bodies of state administration and in reality performs its duties independently.

The Plenipotentiary being part of the executive power and operating within the Chancery of the Prime Minister is not independent.

- g) *Are the tasks undertaken by the body / bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports)?*

### **Ombudsperson**

The Act on Equal Treatment underlines (as quote above) that activities related to the equal treatment are undertaken independently.

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

The Government Plenipotentiary for Equal Treatment is part of the cabinet and its independence is limited, it executes the current policy of the government.

- h) *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 (see above). However Ombudsperson is definitely dedicated to Roma issues and over the years reported the extremely complicated and clearly unfavourable situation of the Roma community.

In the last couple of years Ombudsperson organized for instance some on site visits to the places of living of Roma community (especially Bergitka Roma, also called Carpathian Roma – group of Roma in most difficult situation in Poland), to the schools with Roma pupils, and formulated recommendations concerning their difficult situation.<sup>330</sup>

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

After two years and a half of its operation (till the end of 2010) and preparing first annual report Roma issues do not seem to be a priority of the office. During two years (IV 2008 – IV 2010) Plenipotentiary undertook 7 Roma matters (2% of all matters undertook).<sup>331</sup>

<sup>329</sup> Article 3, 5, 7, Act on the Commissioner for Civil Rights Protection.

<sup>330</sup> Information of the Commissioner for Civil Rights Protection for the year 2008, pp. 470-474; [ww.brpo.gov.pl](http://ww.brpo.gov.pl)

<sup>331</sup> *Government Plenipotentiary for Equal Treatment. Competences, counteracting discrimination of Roma*, information written by W. Kostrzewa-Zorbas, 22 June 2010.



## 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>332</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>333</sup>

Some of the issues of equal treatment, and especially those related to sexual orientation are politically sensitive in Poland.

<sup>332</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>333</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)



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.

Some of the activities of Ombudsperson bring public attention and are publicized, including the work of teams on persons of age or persons with disabilities. Also since new Act on Equal Treatment came in force on 01 January 2011 the Ombud internet site (version in Polish) includes the section on the Role of the Ombud as Equality Body. The section is very modest for now (September 2011) however may become good source of the information in the future.

The office of the Government Plenipotentiary for Equal Treatment has the obligation of "promotion, dissemination and propagation of issues of equal treatment".<sup>334</sup> The office created at the end of 2008 its website which could become additional source of information. It is however (September 2011) quite limited in substance. The office engages in organizing some competitions (for school children, journalists) that may play the role in awareness raising.

It should be however also noted that in most cases even if there is information provided on discrimination issue it rarely focuses on the matters of legal protection against discrimination, legal measures that could be taken by victims of discrimination.

All European programs are good example of the disseminating information about discrimination issues, mainly however by different NGOs taking part in them. As examples we could mention following EU programs: Community initiative Equal,<sup>335</sup> programs and activities within European Year of Equal Opportunities for All or Council of Europe campaign All Different, All Equal. Thanks to different European programs NGOs have become good source of information for victims of discrimination, number of lawyers were trained by them on legal protection against discrimination. However there are still significant gaps in this field and appropriate activities on the side of the state organs and equality body are needed.

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) and*

<sup>334</sup> Article 21.2.6) Act on Equal Treatment and Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, para. 2.1.7).

<sup>335</sup> See [www.equal.org.pl](http://www.equal.org.pl)



According to law the Commissioner for Civil Rights Protection should cooperate with associations, civil society movements and other voluntary unions and foundations as well as foreign and international organs and organizations.<sup>336</sup>

Also Government Plenipotentiary for Equal Treatment according to law should in execution of its tasks collaborate with NGOs, including trade unions and organizations of employers.<sup>337</sup>

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

There are however number of issues that could be better organized and NGOs complain about. To give some examples. The so-called social consultations of the draft law on equal treatment took place in the early 2007. NGOs' could officially express their opinions about the law. However since then the draft law has changed significantly (in fact it became different draft law) and the subsequent versions of the draft until the middle of 2010 did not go through the procedure of consultations. In fact some organizations took their position and formulated opinions but mainly on its own initiative. The NGOs complained about limited access to information on legislative process (this includes information on: who is in charge of the draft law, documents and opinions prepared within the legislative process etc.). In order to receive relevant information NGOs are forced to use special mechanisms of access to public information and formulate formal motions to receive information which should be publicly available. The problem described was partially solved since the last version of the draft law (21<sup>st</sup> May 2010) was sent out for consultation in late May 2010.<sup>338</sup>

Current Plenipotentiary for Equal Treatment (in office since April 2008) is perceived by NGO community as a controversial figure.

Number of NGOs already protested against Plenipotentiary and lack of activities of her office. There were official protests to the Prime Minister<sup>339</sup>, also complaint letter to the European Commission<sup>340</sup> has been sent, there is lot of criticism in the media and even facebook group "Radziszewska must leave" was created with more than 7,700 "fans".<sup>341</sup>

<sup>336</sup> Article 17a, Act on the Commissioner for Civil Rights Protection.

<sup>337</sup> Article 21.2.7), Act of Equal Treatment, Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, para. 3.3.

<sup>338</sup> [http://bip.kprm.gov.pl/kprm/dokumenty/61\\_3646.html](http://bip.kprm.gov.pl/kprm/dokumenty/61_3646.html) (01.06.2010).

<sup>339</sup> See for instance a letter from 3.12.2009 at <http://www.kph.org.pl/en/allnews/15-kph/285-damy-odwoania-minister-radziszewskiej>

<sup>340</sup> See at: <http://www.feminoteka.pl/news.php?readmore=4464>

<sup>341</sup> Name of the group: "Radziszewska musi odejść".





There are three special teams of experts established by the Ombudsperson – regarding the issues of elderly and persons with disabilities (since March 2011) and regarding migrants (since May 2011), some members represent NGOs.<sup>342</sup> There is also Social Council (since December 2010) of general advisory character.<sup>343</sup> But Ombudsperson invites representatives of NGOs also to take part in its activities and different events.

There are seven working groups of advisory character established by the Plenipotentiary, one of them of relevance to the report: Team to counteract discrimination of elderly. There is also a team on counteracting discrimination of women, on mobbing, on discrimination of fathers and 3 teams on different children problems (counteracting of discrimination of juveniles in media, juveniles whose parents left Poland and juveniles who are chronically ill).<sup>344</sup> Even if the problems of juveniles are important NGO community is of the opinion that this is not the main mandate of the Plenipotentiary (additionally taking into account the fact that there is separate Commissioner for Children Rights in Poland).<sup>345</sup>

Organizations representing feminism movement are among strongest critics of the Plenipotentiary. They do not take part in the working group established by the Plenipotentiary on counteracting women discrimination. On the other hand, LGBT organizations asked Plenipotentiary to create working group on LGTB issues (23 March 2009).<sup>346</sup> The answer was negative with the argumentation that other organ - Ombudsperson already meets with representatives of LGBT organizations.<sup>347</sup> These meetings however were stopped by LGBT organizations, which refused to take part in them due to – according to their argumentation – lack of concrete results of cooperation and also due to the controversial public statements of the Ombudsperson (inter alia in relation to the court verdict regarding homophobic hate speech – when commenting on the court verdict fining for homophobic hate speech Ombudsman criticized it stating that in fact “the court ordered the general public to undertake the homophily behaviour” (*zachowania homofilne*, forced positive, friendly behaviour towards gay and lesbian) and breached the fundamental principle of freedom of speech).<sup>348</sup>

Generally speaking the dialogue could be much better organized and the information of its venues and channels should be publicly available to avoid situations in which some organization are taking part in dialogue and others do not realized the dialogue is taking place.

<sup>342</sup> <http://www.rpo.gov.pl/index.php?md=9061&s=1>

<sup>343</sup> <http://www.rpo.gov.pl/index.php?md=9060&s=1>

<sup>344</sup> [http://www.rownetraktowanie.gov.pl/pelnomocnik/zespoly\\_doradcze](http://www.rownetraktowanie.gov.pl/pelnomocnik/zespoly_doradcze)

<sup>345</sup> <http://www.brpd.gov.pl/>

<sup>346</sup> See at: <http://www.kph.org.pl/en/allnews/15-kph/116-kph-pisze-do-minister-radziszewskiej>

<sup>347</sup> See at: <http://www.kph.org.pl/en/allnews/15-kph/129-minister-radziszewska-odmawia-powoania-zespou-ds-lgbt>

<sup>348</sup> See at: <http://www.kph.org.pl/en/allnews/15-kph/253-oswiadczenie-organizacji-lgbt->



- 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>349</sup>

In 2001 the Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue.<sup>350</sup> 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>351</sup> After deliberating they can issue opinions or nominate a mediator to settle the collective dispute.<sup>352</sup>

In 1995 the Ministry of Economy and Labour established the Centre for Social Partnership, known as "Centre of Dialogue". The Centre was intended to initiate and promote social dialogue, assist social partners and offer training.<sup>353</sup>

Therefore there are venues and possibilities for initiating the dialogue between social partners in order to give effect to the principle of equal treatment. However the subject of combating discrimination according to the research done was never included in the agenda of the Tripartite Committee.

- d) *to specifically address the situation of 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).

<sup>349</sup>Article 20 Constitution.

<sup>350</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>351</sup>Article 17a.1 Act on Social Dialogue.

<sup>352</sup>Article 17b.1 Act on Social Dialogue.

<sup>353</sup>For more information visit the Centre's website: <http://www.cpsdialog.pl/>



There are two Roma members on the Commission.

In June 2008 a special 'Team on Roma issues' was established by the Commission (after 3 years since the decision to establish Team was taken at the first meeting of the Joint Commission in September 2005).

The Team on Roma Issues consist of 20 leaders/representatives of Roma community representing different NGOs and representatives of the governmental bodies responsible for equality issues, it does additionally invite other persons if there is a need for any additional information, expertise etc. It is a very good platform for the dialogue. Since its establishment in June 2008 it met 12 times (last meeting, March 2011) and discussed number of issues relevant to Roma community, including general problems related to grant programs for Roma community, employment issues, education as well as individual cases (for instance particular court cases). Protocols from the meetings of the Team are publicly available.<sup>354</sup>

Roma organisations also have the opportunity to receive funds from, among others the Roma Programme (see Section 5 on positive action) and many of them are beneficiaries of such grants.

Roma issues are not on the agenda of the Tripartite Committee for Social and Economic Affairs (comprising government, employers' organisations and trade unions), the platform for social dialogue in Poland (it also has commissions at regional (voivodship) level). But one has to consider that, since the Roma population is very small and most Roma are unemployed, this is not an issue of concern for the parties to the Committee.

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).*

<sup>354</sup> See at <http://www.mswia.gov.pl/portal/pl/473/>



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>355</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 new 2010 Act on Equal Treatment as well as Constitution.<sup>356</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>357</sup>

Moreover, as far as civil law contracts are concerned, since 2011 they are covered by Act on Equal Treatment, 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>358</sup>

Additionally internal rules of occupations, professions, associations etc. are also being controlled by courts on demand of the member or other controlling body like relevant ministry for instance. Usually any adopted rules or resolution might be controlled by the internal second instance organ, but than it might be challenged before administrative court. Generally from right to court (art. 45 of the Constitution, art. 6 of the ECHR) stems right to challenge any of rules violating constitutional prohibition of discrimination.

Polish legislation is based on a hierarchical system of law sources and one of the most important general principles is “lex superior derogat legi inferiori” (higher rules – rules with greater legal force – prevail over lesser rules). There are also the following principles: “lex specialis derogat legi generali” (special rules prevail over general rules) and “lex posterior derogat legi priori” (more recent rules prevail over less recent rules).

*b) Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

As already mentioned at the beginning of the report the new 2010 Act on Equal Treatment put Polish legislation in line with Directives. However limiting the protection to the verbatim implementation of the Directives raises serious doubts of the constitutional character. Polish Constitution, as well as labour law, does not contain an exhaustive list of grounds of discrimination. However the new law, being in fact almost verbatim implementation of the directives, in contrast to the labour law, provides for an exhaustive list of grounds of discrimination, thus limiting protection of certain groups.

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<sup>355</sup>Article 9.2 Labour Code.

<sup>356</sup>Article 32 Constitution.

<sup>357</sup>Article 18.2 Labour Code.

<sup>358</sup>Article 58.1 and 58.3 Civil Code.



But still the general Constitutional antidiscrimination clause is wide and if there are any laws that would be contrary to the principle of equality, 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.

Going beyond the scope of the directives one may argue that there are examples of discriminatory laws or regulations contrary to the principle of equality. The good example discussed lately are rights of the LGTB persons and lack of possibility of same sex marriages (civil unions or partnerships).

Generally speaking even if relevant provisions seem to be non-discriminatory and neutral their interpretation and implementation may result in discriminatory treatment. It is therefore rather the matter of practice – in fact there are provisions which have discriminatory character but it is difficult to identify them on theoretical basis, in order to challenge them particular case of their discriminatory application is needed.



## 9 CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

There is no single body responsible for the coordination at national level of all issues of equal treatment and non-discrimination based on all the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.

However the Government Plenipotentiary for Equal Treatment has the obligation to execute the Governmental policy in relation to the principle of equal treatment.<sup>359</sup>

*Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.*

According to the new law (in force since 01.01.2011) the Government Plenipotentiary for Equal Treatment should prepare and present to the Council of Ministers National Program of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*)<sup>360</sup> and then report on its execution annually (first report is due till 31 March 2013).<sup>361</sup>

The most important task the office of the Plenipotentiary took from the Racial Equality Directive perspective was taking the role of the monitoring body of the *National programme of counteracting racial discrimination, xenophobia and related intolerance 2004-2009*. The relevant decision of the Prime Minister establishing the monitoring team was adopted on 2 February 2009. The team met 3 times in 2009.<sup>362</sup> The office of the Plenipotentiary prepared the report on the execution of the mentioned programme published in 2010.<sup>363</sup> On 29 October 2009 Prime Minister decided about continuation of the program - *National programme of counteracting racial discrimination, xenophobia and related intolerance 2010-2013*. The office of the Plenipotentiary is responsible for coordination of the program. The Monitoring Team was dissolved in February 2011 and instead new body was established – Council for the matters of counteracting racial discrimination, xenophobia and related intolerance<sup>364</sup> that met once (June 2011). The members of the Council represent different ministries and other central institutions. The program mentioned for the years 2010-2013 is not ready yet.

<sup>359</sup> Art. 21.1 Act on Equal Treatment.

<sup>360</sup> Article 22 Act on Equal Treatment.

<sup>361</sup> Article 23.3), art. 32 Act on Equal Treatment.

<sup>362</sup> Information on the website of the Government Plenipotentiary

[http://www.rownetraktowanie.gov.pl/pelnomocnik/zespoly\\_doradcze/zespol\\_monitorujacy\\_krajowy](http://www.rownetraktowanie.gov.pl/pelnomocnik/zespoly_doradcze/zespol_monitorujacy_krajowy)

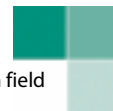
<sup>363</sup>

[http://www.rownetraktowanie.gov.pl/files/dokumenty/Sprawozdanie%20przyjete%20przez%20RM%207%20maja%20\(proram%20.pdf](http://www.rownetraktowanie.gov.pl/files/dokumenty/Sprawozdanie%20przyjete%20przez%20RM%207%20maja%20(proram%20.pdf) (01.09.2011).

<sup>364</sup>

[http://www.rownetraktowanie.gov.pl/pelnomocnik/zespoly\\_doradcze/zespol\\_monitorujacy\\_krajowy](http://www.rownetraktowanie.gov.pl/pelnomocnik/zespoly_doradcze/zespol_monitorujacy_krajowy) (01.09.2011)





## **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: 01 January 2011

Polish legislation on the internet

- Parliament website (Polish only): <http://isap.sejm.gov.pl/>
- Polish Law Server, a private company (Polish only): [lex.pl](http://lex.pl)

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption:</b>	<b>Date of entry in force from:</b>	<b>Grounds covered</b>	<b>Civil/Administra tive/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
This table concerns only key national legislation; please list the main 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 <a href="http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm">http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm</a>	02.04.1997	17 10 1997	General anti-discrimination clause		General application	General application
<b>Act on the Implementation of Certain Provisions of</b>	03.12.2010	01.01.2011	gender, race, ethnic origin, nationality,		Full scope as covered by Directives	Almost verbatim implementation of 5 Directives,

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption:</b>	<b>Date of entry in force from:</b>	<b>Grounds covered</b>	<b>Civil/Administra tive/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
<b>the European Union in the Field of Equal Treatment</b> <a href="http://www.rownetraktowanie.gov.pl/files/dokumenty/ustawa%20nasza%20Dz%20U.pdf">http://www.rownetraktowanie.gov.pl/files/dokumenty/ustawa%20nasza%20Dz%20U.pdf</a>			religion, belief, political opinion, disability, age and sexual orientation		2000/43 and 2000/78: employment, access to goods and services (including housing), social protection, social advantages, education	including 2000/43 and 2000/78: Prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation; - right to compensation for infringement of equal treatment; designation of Ombud as an equality body
Act on Labour Code (amended many times) <a href="http://www.przepisy.gofin.pl/przepisy,2,9,9,212,,,ustawa-z-dnia-26061974-r-kodeks-pracy.html">http://www.przepisy.gofin.pl/przepisy,2,9,9,212,,,ustawa-z-dnia-26061974-r-kodeks-pracy.html</a>	Amend- ments implemen- ting Directives: 14.11.2003; 21.11.2008; 03.12.2010	Originally 1 Jan. 1975 Entry of amend- ments mentioned: 01.01.2004; 18.01.2009; 01.01.2011	gender, age, disability, race, religion, nationality, political opinion, membership in a trade union, ethnic origin, belief, sexual		Labour relations	- Prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation; - right to compensation for infringement of

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administra tive/ Criminal Law	Material Scope	Principal content
			orientation, employment for definite or indefinite period of time, employment part time or full- time; the list remains open			equal treatment - obligation to inform about regulations on equal treatment
<b>Act on Commissioner for Civil Rights Protection</b> <a href="http://rpo.gov.pl/index.php?md=8497&amp;s=1">http://rpo.gov.pl/index.php?md=8497&amp;s=1</a>	Originally 15.07.1987 but amend- ment adopted on 03.12.2010	01.01.2011	gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation			Designation of Commissioner for Civil Rights Protection (Ombud) as an equality body
Council of Ministers Ordinance of 22 April 2008 on Government Plenipotentiary for Equal Treatment <a href="http://www.rownetrakto.wanie.gov.pl/files/dokumenty/Pe%C5%82nomocni">http://www.rownetrakto.wanie.gov.pl/files/dokumenty/Pe%C5%82nomocni</a>	22.04.2008 amended 30.06.2010	30 April 2008	gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual		Not given in detail, general statements	- Execution of government policy with regard to equal treatment - analysis and research, monitoring



<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption:</b>	<b>Date of entry in force from:</b>	<b>Grounds covered</b>	<b>Civil/Administra tive/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
kRz%C4%85dudo%E2%80%A6Dz_U_2008_75_450wersja2010_.pdf			orientation, civil (marital) and family status			<ul style="list-style-type: none"> <li>- collaboration with other bodies, local government and NGOs</li> <li>- creation of draft laws</li> <li>- taking actions which aim to eliminate or restrict the consequences of a violation of the rule of equal treatment</li> </ul>

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Poland

January 2011

<b>Instrument</b>	<b>Date of signature (if not signed please indicate)</b>	<b>Date of ratification (if not ratified please indicate)</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	26.11.1991	19.01.1993	No	Yes	Yes
Protocol 12, ECHR	Not signed	No	-	-	-
Revised European Social Charter	25.10.2005	No	No	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	02.03.1967	18.03.1977	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	20.12.2000	No	-	Yes
International Convention on	02.03.1967	18.03.1977	No	-	Yes



<b>Instrument</b>	<b>Date of signature (if not signed please indicate)</b>	<b>Date of ratification (if not ratified please indicate)</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Economic, Social and Cultural Rights					
Convention on the Elimination of All Forms of Racial Discrimination	07.03.1966	05.12.1968	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	29.05.1980	30.07.1980	No	-	Yes
ILO Convention No. 111 on Discrimination		08.05.1961	No	-	Yes
Convention on the Rights of the Child	29.01.1990	07.06.1991	No	-	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	No	Poland has not signed the Convention's Optional Protocol	-	-