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# Country report

## Non-discrimination

Poland  
2015

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# **Country report**

# **Non-discrimination**

# **Poland**

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Reporting period 1 January 2014 – 31 December 2014

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## EXECUTIVE SUMMARY

### 1. Introduction

Modern Poland does not have a long tradition and experience of combating discrimination. The process of implementing EU anti-discrimination laws concerning race, ethnic origin, religion, age, disability and sexual orientation into the legal system was initiated as a result of EU membership and not in order to improve the existing laws or to ease social pressures.

The process has not been free of tensions. Due to a number of factors, including the low level of legal awareness in Polish society, people's passivity (and sometimes fear) around seeking to uphold their rights, certain features of the judicial system and a lack of systematic research, it is impossible to assess the real scale of discrimination in Poland. For this reason, raising the legal awareness of the public and improving access to justice in Poland seem to require systemic activities on a large scale. Until very recently, the burden of these activities rested to a large degree on NGOs, and the Polish Government seemed to lack any strategic approach to counteracting discrimination. However, the situation in this respect is gradually improving. In December 2013 for the first time the Council of Ministers adopted a National Programme of Activities for Equal Treatment 2013-2016.<sup>1</sup> In addition, collaboration with NGOs is developing and NGOs are taking part in a number of government fora and activities.

Discrimination on the ground of age received more attention only recently in the Polish context. In the last couple of years, the activities of the Ombud<sup>2</sup> have resulted in more research and reports. The concept of 'age discrimination' has found its place and awareness among older people is growing slowly but surely. In 2013, the Minister of Labour appointed a Council for Older People's Policy which prepared the guidelines for long-term policy on older people for 2014-2020. These were adopted by the Council of Ministers and include references to age discrimination.

Discrimination against people with disabilities (12.2% of the population) has traditionally been tackled in numerous ways (and the ratification in September 2012 of the Convention on the Rights of Persons with Disabilities creates new possibilities). Even though people with disabilities are still largely invisible in public, due to a variety of barriers, their role is increasing and the NGO movement has become strong and influential.

LGBTI minorities are in a very difficult position in Poland, since they are the group most often attacked. Many initiatives, both at national and international level (such as the draft EU Horizontal directive) have been presented by some politicians and journalists as the promotion of and an assault by homosexuality. Recently, various draft laws on civil partnerships have been debated but with no visible results. However, at the end of 2014 the Government Plenipotentiary for Equal Treatment decided to establish two thematic teams devoted to the problems of the LGBTI community (one to deal with legal and legislative issues and the second to deal with education and awareness-raising).

In general, national and religious minorities are small in Poland (1.46% of the population declare that they are members of a national/ethnic minority). However, new immigrants are appearing (such as people from countries of the former Soviet Union and Vietnam). National and ethnic minorities as well as religious minorities are being supported by different positive action programmes aiming at cultivating their culture, heritage and language. There are also special support programmes for the Roma population.<sup>3</sup>

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<sup>1</sup> Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2016.

<sup>2</sup> The current Ombud chose 'age' as one of her three priorities; the two others are 'persons with disabilities' and 'migrants'.

<sup>3</sup> Government Roma Programme 2004-2013; Programme for the Integration of the Roma Community in Poland 2014-2020 (*Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warsaw 2014,

## 2. Main legislation

According to the general anti-discrimination clause in the Polish Constitution (Article 32):<sup>4</sup> all people are equal before the law and have the right to equal treatment by the public authorities, and no-one may be discriminated against in political, social or economic life for any reason whatsoever. This principle does not specify criteria for prohibited forms of discrimination.

By 2010 Poland had transposed the equality directives, mainly in the employment field. Existing gaps, which resulted in some referrals to the European Court of Justice, mobilised the Polish Government to finally adopt the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (ETA), which entered into force on 1 January 2011.<sup>5</sup>

Until 2010, the Labour Code was the main element in Polish anti-discrimination legislation (amended in 2004 and in 2008 in order to transpose the directives).<sup>6</sup> The Labour Code regulates employment under labour contracts and lists several grounds of discrimination but only as examples. The list remains open. The new ETA aims to implement five directives: 1986/613/EEC; 2000/43/EC; 2000/78/EC; 2004/113/EC and 2006/54/EC. The Act, in contrast to the Labour Code, contains an exhaustive list of grounds of discrimination: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. In addition to broad protection from discrimination in the employment field (extended to civil contracts, self-employment and independent professions), the new law provides protection from discrimination in all fields outside employment, but only in relation to race, ethnic origin and nationality (also gender, but only in access to social protection, goods and services, including housing, and not in healthcare and education). The Act designated the Ombud's Office (*Rzecznik Praw Obywatelskich*) as the equality body.

In order to implement the equality directives, the Code of Civil Procedure was amended in 2004.<sup>7</sup> It gives legal standing to NGOs, who may institute actions on behalf of citizens and join the proceedings at any stage thereof.

Generally speaking, the implemented law is enforced, especially in labour relations. However, outside employment it is a rather slow process. There are some reasons behind this. On the one hand there is a lack of awareness among people who are victims of discrimination. On the other hand it is due to continuing gaps in the law (for instance, the new compensation claim that covers only material and not non-material damage is not being used in practice). In fact, claims under the ETA are incidental (five claims during the four years the Act has been in force). But generally, the body of discrimination cases being brought to the courts is growing, albeit slowly, and numerous activities aimed at raising awareness are bringing about change.

## 3. Main principles and definitions

The 2010 Equal Treatment Act introduced several legal definitions which were previously included only in the Labour Code and related only to the employment field (currently, definitions from the Labour Code are also binding, but sometimes they are slightly different from those in the ETA).

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also in English, available at <http://mniejszosci.narodowe.mac.gov.pl/mne/romowie/program-integracji-spol> (last accessed 15 May 2015).

<sup>4</sup> Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.

<sup>5</sup> Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.

<sup>6</sup> Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy.

<sup>7</sup> Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego.



*Direct discrimination* takes place when a natural person, because of their 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. *Indirect discrimination* is defined as a situation in which an unfavourable difference or particular disadvantage occurs or could occur for a person because of their gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, due to an apparently neutral provision, criterion used or practice/action undertaken, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

*Harassment* is defined as any unwanted conduct with the purpose or effect of violating the dignity of a natural person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The ETA also treats as unequal treatment and prohibits less favourable treatment of persons caused by rejection of harassment or submission to harassment. The 2010 ETA prohibits *instruction to discriminate*, both incitement/encouragement and ordering to discriminate. The Act also introduces a general *prohibition of victimisation* and provides that a person exercising their rights in order to defend themselves against unequal treatment must not be the basis for adverse treatment, and must not cause any negative consequences for the person. This protection extends to a person who in any way supports another person exercising their rights.

The 2010 ETA implemented the *duty to provide reasonable accommodation*, stating that an employer is obliged to provide the necessary reasonable accommodation for a disabled person who is in an employment relationship with them, participating in the recruitment process or undergoing vocational or professional training, apprenticeship or practice. 'Necessary reasonable accommodation' means introducing, where needed in a particular case, necessary changes and adjustments in line with the specific needs reported to the employer, stemming from somebody's disability, unless the introduction of such changes or adjustments would impose a disproportionate burden on the employer. The burden is not disproportionate when it is sufficiently remedied by public funds.

The 2010 ETA extends protection for *legal persons* on the grounds of the race, ethnic origin and nationality of its members. All forms of discrimination are prohibited, and the right to compensation also extends to legal persons.

*Multiple discrimination*, *assumed* and *associated discrimination* are not regulated and still remain new concepts. However, they were included in the draft laws prepared in 2012 and 2013 aiming to amend the ETA (see more at point 7., below). In 2014 associated discrimination was recognised by a court for the first time.<sup>8</sup>

The 2010 ETA introduces an exception regarding *genuine and determining occupational requirements*. The exception covers 'opportunities and conditions for undertaking and conducting occupational activities as well as training (including higher education)'. The test of the proportionality of measures and legitimate aim was also introduced. Similarly, other exceptions as provided in directives are mirrored in the ETA and, in fact, the relevant provisions are an almost verbatim translation of the directives. This refers to employers with an ethos based on religion or belief, as well as discrimination on the ground of age. The ETA also provides *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres, nor does it cover freedom of contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality.

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<sup>8</sup> PTPA on behalf of XY v. Company Z; the District Court Warszawa Śródmieście, decision 9 July 2014, sygn. VI C 402/13, the court verdict is not final.

#### 4. Material scope

According to the Labour Code, in the field of *employment* any discrimination is forbidden, in particular with regard to concluding and terminating an employment relationship and the terms of employment, promotion and access to vocational training aimed at upgrading professional qualifications. The prohibition of discrimination also applies to all the institutions of the labour market, such as employment agencies and employment advice services as well as training courses for the unemployed. The rules apply equally to the public and private sectors. Since the enactment of the 2010 ETA, the prohibition of discrimination extends to civil contracts, self-employment and the independent professions (also regulated to a large extent by their self-regulatory bodies, for instance, advocates and legal advisors).<sup>9</sup>

The ETA prohibits discrimination in *membership of, and involvement in, trade unions, organisations of employers*, or any organisation whose members carry on a particular profession, including the benefits provided for members of such organisations (all grounds are covered). Until 2010, the directives were not transposed in any other field outside employment and the 2010 Act widens the protection to the fields included in the directives.

The 2010 ETA prohibits *discrimination in social protection*, on the grounds of gender, race, ethnic origin or nationality and discrimination in relation to *healthcare* on the grounds of race, ethnic origin and nationality. The Act does not use the term *social advantages* but the definition of social protection (not legal but elaborated by legal scholars) traditionally covers it. There is also the anti-discrimination clause in the Social Security Act, which is the basic statute for the *social security* sphere. This provision, which before 2010 limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status, was extended (from 2011) to the grounds of race, ethnic origin and nationality. The Capital-based Pensions Act, amended by the ETA, prohibits discrimination in calculating pension levels on the grounds of gender, race, ethnic origin, nationality, state of health, family and marital status. The ETA *expressis verbis* prohibits discrimination in *education and higher education*, but only on the grounds of race, ethnic origin and nationality. Similarly, the Act *expressis verbis* prohibits discrimination in *access to goods and services*, including *housing, goods and purchasing rights and energy* if they are *offered to the public*, on the grounds of sex, race, ethnic origin and nationality.

#### 5. Enforcing the law

The 2010 ETA introduced a general compensation claim stating that anyone (natural and legal persons) who suffers from an infringement of the principle of equal treatment is entitled to compensation (Article 13). However, only five such cases were brought to the courts over four years. One of the reasons, as pointed out by the Ombud in its annual reports, is the fact that the new ETA refers to compensation only (*odszkodowanie*) which covers material (and not non-material) damage and therefore limits the protection. The compensation claim under the Act should be widened to include non-material damages as well.

On the other hand, recourse could be made to general civil provisions. The Civil Code (Article 23-24)<sup>10</sup> provides compensation claims for material and non-material damages, but there is no shift of the burden of proof in general civil procedure. In addition, in matters not covered by the ETA, another form of civil protection can be used – protection of ‘personal rights’ such as health, freedom and honour etc. According to the Constitution, the inherent and inalienable dignity of the person constitutes a source of freedoms and rights for people and citizens. It is inviolable. An individual whose personal rights are endangered by another’s actions can: demand that the action cease, unless it is not

<sup>9</sup> Independent professions’ is a special term used in Poland for self-regulated professions. The other term used is ‘professions of public trust’ (Article 17 of the Constitution).

<sup>10</sup> Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny.

unlawful; demand that the effects of the violation be rectified (in particular, that a statement of appropriate content and form be made); and demand pecuniary satisfaction or payment of an appropriate sum to a designated social cause. If the infringement of personal rights results in material damage, the victim may demand reinstatement under general law terms. These provisions on personal rights became a more popular basis for discrimination claims than the ETA, the dedicated Act.

Claims arising from an employment relationship can be determined either by a labour court or by a conciliation committee. The special employment claim for compensation was introduced into the Labour Code in 2004. Anyone who suffers from an infringement of the principle of equality in employment is entitled to start judicial proceedings and to seek *compensation* not lower than the minimum monthly salary.

There are no administrative remedies laid down specifically to deal with discrimination issues. However, the ETA introduced a new possibility into administrative procedure, stating that, if there has been a court ruling finding an infringement of the rule of equal treatment and this infringement influenced the final administrative decision, an administrative re-trial may be demanded.

In terms of non-judicial measures, a complaint to the Ombud may prove to be an effective tool.

In Poland, in principle, legal representation may be provided by an advocate or legal advisor. In labour cases, a representative of a trade union, a labour inspector or another employee of the enterprise may also act as the legal representative of an employee. Furthermore, civil society organisations whose official objectives include equality protection and counteracting discrimination may institute actions on behalf of citizens and join proceedings. Civil society organisations are also entitled to institute or join administrative proceedings, and their representatives may be admitted to criminal proceedings. In reality, many of the discrimination cases outside employment are cases being brought on behalf of victims (or joined) by NGOs like the Polish Society of Antidiscrimination Law or the Helsinki Foundation for Human Rights.

In Polish anti-discrimination law there is no explicit mention of the use of *statistical evidence* or of '*situation testing*'. This does not mean that their use is theoretically excluded (both concepts are discussed by both NGOs and in judicial circles). In both cases it can be presumed that statistical evidence or evidence collected in the course of situational testing could be admitted by a court in civil, administrative or criminal proceedings. However, this is not obvious and would be a risky strategy (there are also theoretical arguments against accepting evidence from situation testing). Therefore in reality, so far, people who bring cases which are in fact based on situation testing do not admit this in court; rather, they argue that they were simply discriminated against.

Since the amendment of the Labour Code (2004), the *burden of proof* has shifted from the complainant to the respondent, but only in employment cases. The new 2010 ETA introduces a shift of the burden of proof in all compensation proceedings relating to infringement of the principle of equal treatment governed by the Act, therefore it does not extend to claims based on civil law (with the exception of 'personal rights' where there is also an autonomous mechanism of shifting the burden of proof). According to the Labour Code and the ETA, the complainant must substantiate the probability of a violation (however, courts also expect a particular ground of discrimination to be demonstrated),<sup>11</sup> and the respondent is obliged to show that they did not commit the violation.

Regarding *sanctions* under Polish anti-discrimination law, there is no specific system of sanctions (apart from compensation under the Civil Code and Labour Code described

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<sup>11</sup> See, for instance, Supreme Court verdicts: 3 June 2014, III PK 126/13 and 18 April 2012, II PK 196/11.

above), but only penalties and punishments set out by the Penal Code and the Code of Petty Offences. On the basis of the Civil Code and the Labour Code, it is possible to claim compensation for material and non-material damages. It is questionable whether this sanction meets the criteria of the directives (effective, proportionate and dissuasive) because this system generally only redresses the damage and most often does not include a serious punitive element.

Positive action and special programmes are traditionally targeted at national minorities (such as special subsidies for minority schools), the Roma community (special programmes since 2003 covering education, healthcare and housing) and people with disabilities (in education and employment). In recent years, however, some actions have also been undertaken for older people (50+).

Public bodies responsible for counteracting discrimination do undertake consultations on their policies and there are possibilities for NGOs and social partners to take part in the public debate as well as in formal forums, such as Committees and working groups. However, many of the social partners' expectations are not being fulfilled (such as the amendment of the ETA which has been the subject of discussion for years now).

## **6. Equality bodies**

Until 2010, no institution or body was officially designated as the specialised body as required by Directive 2000/43/EC. The 2010 ETA designated the Ombud's Office as the equality body. The law appropriately amended the existing Act by granting the Ombud new competences (in addition to its very broad mandate of protecting human rights and freedoms; no grounds are listed in the Ombud's mandate and therefore it can deal with any ground, including but not limited to those listed in the ETA).<sup>12</sup> To date, the Ombud has created a discrimination team within the Office, which has started research activities (and also compilation of existing data on some issues), launched a new section of the website dedicated to equality issues, collected information on jurisprudence relating to discrimination, established some thematic teams of external experts supporting the Ombud and set up a telephone hotline (dealing with all cases, including discrimination), etc.

The 2010 ETA provides that, in implementing the principle of equal treatment, the Ombud should: analyse, monitor and support the equal treatment of everyone; conduct independent surveys of discrimination; prepare and publish independent reports; and issue recommendations regarding discrimination issues.

The problem of providing independent assistance to victims is more complicated, since according to the Polish Constitution and the new ETA, these competences refer to a vertical understanding of human rights (relation between a public authority and an individual) and are limited when it comes to conflicts between private parties. In such a case, according to the law, the Ombud must limit its actions to providing the victim with information on rights and possible actions. The Ombud is not a quasi-judicial body.

The second institution that has a mandate to promote the equal treatment of everyone without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment. This post was created in April 2008 within the Chancellery of the Prime Minister (the 2010 ETA provided a new legal basis for its operation).<sup>13</sup> The Office's main task is to execute government policy in the field of equal treatment. The Plenipotentiary does not have its own office or budget and uses the office of the Prime Minister.

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<sup>12</sup> Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich.

<sup>13</sup> Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania.

As far as the rights of national and ethnic minorities are concerned, the Act on National and Ethnic Minorities and on Regional Languages of 2005<sup>14</sup> created a *Joint Committee of the Government and Ethnic and National Minorities*. It is composed of representatives of selected ministries and minorities and its remit includes issuing opinions regarding: the rights and needs of minorities, programmes and draft laws in the field, and the principles of allocation and levels of resources from the state budget directed to preserving the cultural identity of minorities. It is also tasked with taking action in the field of combating discrimination. In 2008, the Roma Issues Team was created within the Committee. In 2013 Prime Minister signed an Ordinance which created an additional body – the new Council for counteracting racial discrimination, xenophobia and related intolerance.

The body responsible for disability policy is the Government Plenipotentiary for Disabled People. The Plenipotentiary, formally a part of the Ministry of Labour and Social Policy, is primarily responsible for implementing the Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons.<sup>15</sup>

## **7. Key issues**

The critique of the 2010 Act produced by the Ombud and NGOs (several shortcomings of the ETA were mentioned above, including the concept of damages and the limitations in regard to the shift of the burden of proof) led to the development of two draft laws (prepared in 2012 and 2013) aiming to amend and significantly widen the scope of the ETA. One of these was lodged in October 2012 in the Parliament. However, parliamentary procedures are not rapid and, considering the fact that there are parliamentary elections in autumn 2015, there are almost no chances of the amendments being adopted. The Government Plenipotentiary for Equal Treatment is also of the opinion that it is better to wait and pass a completely new law (taking into consideration the new horizontal directive) than make partial amendments to the existing ETA.

The most serious problem is obviously the fact that the ETA is so under-used. There are very limited statistics on the number of cases related to discrimination brought to justice (and those which do exist are erroneous and not wholly reliable). However, what little is known clearly shows that victims of discrimination very rarely use the ETA, with only a few cases during the course of four years. In addition, the number of cases based on the Labour Code, covering discrimination in employment, is relatively low (50-100 cases a year).

In 2014 a coalition of NGOs contacted all the Polish courts requesting, in the official formula of access to public information, data on discrimination cases brought under the ETA. All 287 courts responded. Only five cases brought to the courts under the ETA over the course of four years were identified (some of them had been brought by the organisations undertaking the research). This clearly proves that claims based on the 2010 Act are not being brought to the courts.

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<sup>14</sup> Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym.

<sup>15</sup> Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych.

## RÉSUMÉ

### 1. Introduction

La Pologne moderne ne possède ni tradition ni expérience de longue date en matière de lutte contre la discrimination. Le processus de transposition dans l'ordre juridique interne de la législation européenne interdisant les discriminations fondées sur la race, l'origine ethnique, la religion, l'âge, le handicap et l'orientation sexuelle a été impulsé par l'adhésion du pays à l'UE, et non par le désir d'améliorer les dispositions législatives existantes ou d'apaiser les tensions sociales.

Le processus ne s'est pas déroulé sans heurts. Un certain nombre de facteurs, parmi lesquels le faible degré de sensibilisation de la société polonaise à l'égard des questions juridiques, la passivité (voire la crainte) des gens vis-à-vis de la défense de leurs droits, certaines caractéristiques du système judiciaire et l'absence d'études systématiques, font qu'il est impossible d'évaluer l'ampleur réelle de la discrimination en Pologne. Il apparaît donc que des activités à grande échelle s'imposent pour sensibiliser le peuple polonais aux questions juridiques et pour améliorer son accès à la justice. Jusqu'à une date récente, ces activités incombaient largement à des ONG et le gouvernement polonais ne semblait pas s'être doté de la moindre approche stratégique en matière de lutte contre les discriminations. La situation s'améliore néanmoins progressivement à cet égard. Le conseil des ministres a adopté pour la première fois en décembre 2013 un programme national d'activités en faveur de l'égalité de traitement, lequel couvre les années 2013 à 2016.<sup>16</sup> La collaboration avec les ONG tend en outre à s'intensifier, et ces organisations participent désormais à une série d'activités et de forums d'initiative gouvernementale.

La discrimination fondée sur l'âge bénéficie depuis peu seulement d'une attention plus marquée dans le contexte polonais. Les activités menées ces dernières années par le Médiateur<sup>17</sup> ont donné lieu à la publication d'études et de rapports plus nombreux. Le concept de «discrimination fondée sur l'âge» a trouvé sa place, et la sensibilisation croît lentement mais sûrement parmi les personnes âgées. Le ministre du Travail a désigné en 2013 un conseil en matière de politique des seniors, lequel a élaboré les lignes directrices de cette politique à long terme (2014-2020); adoptées par le conseil des ministres, celles-ci contiennent des références à la discrimination fondée sur l'âge.

La discrimination à l'encontre de personnes handicapées (12,2 % de la population) a traditionnellement été gérée de différentes façons (et la ratification de la Convention relative aux droits des personnes handicapées en septembre 2012 ouvre de nouvelles possibilités). Si des barrières diverses font que ces personnes restent largement invisibles aux yeux du public, leur rôle s'intensifie tandis que l'action et l'influence des ONG défendant leurs intérêts vont grandissantes.

Les minorités LGBTI se trouvent dans une situation extrêmement difficile en Pologne, étant le groupe les plus souvent visé par des attaques. De nombreuses initiatives tant au niveau national qu'international (le projet de directive horizontale entre autres) ont été présentées par des politiciens et des journalistes comme une promotion, voire une démarche agressive, de l'homosexualité. Plusieurs projets de loi en matière de partenariats civils ont été discutés récemment, mais sans résultats visibles. Fin 2014, toutefois, le Plénipotentiaire officiel pour l'égalité de traitement a décidé de la création de deux équipes thématiques spécifiquement chargées de la problématique de la communauté LGBTI (l'une se consacrant aux questions juridiques et législatives, et l'autre à l'éducation et à la sensibilisation).

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<sup>16</sup> *Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2016.*

<sup>17</sup> L'actuelle médiatrice a fait de l'âge l'une de ses trois priorités, les deux autres étant les personnes handicapées et les migrants.

Les minorités nationales et religieuses sont, de manière générale, de petite taille en Pologne (1,46 % de la population déclare appartenir à une minorité nationale/ethnique), mais de nouveaux immigrants (en provenance des pays de l'ex-Union soviétique ou du Viêt Nam notamment) commencent à affluer. Les minorités nationales et ethniques, de même que les minorités religieuses, sont soutenues par différents programmes d'action positive visant à entretenir leur culture, leur héritage et leur langue. Il existe également des programmes spéciaux en faveur de la population rom.<sup>18</sup>

## 2. Législation principale

En vertu de la clause générale de lutte contre la discrimination contenue dans la Constitution polonaise (article 32),<sup>19</sup> toutes les personnes sont égales devant la loi et ont droit à une égalité de traitement de la part des pouvoirs publics; elles ne peuvent faire l'objet d'aucune manière et pour quelque raison que ce soit d'une discrimination dans la vie politique, sociale ou économique. Ce principe ne précise pas de critères pour les formes interdites de discrimination.

La Pologne avait transposé en 2010 les directives «égalité», principalement dans le domaine de l'emploi. L'existence de certaines lacunes a donné lieu à plusieurs renvois devant la Cour de justice européenne, ce qui a poussé le gouvernement polonais à adopter la «Loi sur la mise en œuvre de certaines dispositions de l'Union européenne dans le domaine de l'égalité de traitement» (ci-après «la loi sur l'égalité de traitement»), qui est entrée en vigueur au 1<sup>er</sup> janvier 2011.<sup>20</sup>

Le code du travail était jusqu'en 2010 l'élément central de la législation polonaise en matière de lutte contre les discriminations (modifié en 2004 et en 2008 afin de transposer les directives européennes).<sup>21</sup> Le code du travail régit l'emploi dans le cadre de contrats de travail et énumère plusieurs motifs de discrimination, mais uniquement à titre d'exemples. Cette liste reste ouverte. La nouvelle loi sur l'égalité de traitement vise à mettre en œuvre cinq directives, à savoir les directives 1986/613/CEE, 2000/43/CE, 2000/78/CE, 2004/113/CE et 2006/54/CE. Contrairement au code du travail, elle contient une liste exhaustive de motifs de discrimination: le genre, la race, l'origine ethnique, la nationalité, la religion, les convictions, l'opinion politique, un handicap, l'âge et l'orientation sexuelle. Outre la large protection contre les discriminations dans le domaine de l'emploi (étendue aux contrats dans la fonction publique, à l'emploi indépendant et aux professions libérales), la nouvelle loi garantit une protection dans tous les autres domaines également, mais uniquement en rapport avec la race, l'origine ethnique et la nationalité (elle offre aussi une protection contre les discriminations fondées sur le genre, mais celle-ci se limite à l'accès à la protection sociale, aux biens et aux services, y compris le logement, mais pas aux soins de santé et à l'éducation). La loi désigne le Bureau du Médiateur (*Rzecznik Praw Obywatelskich*) en tant qu'organisme pour la promotion de l'égalité.

Le code de procédure civile a été modifié en 2004 dans le but de transposer les directives sur l'égalité.<sup>22</sup> Il habilite désormais les ONG à ester en justice: celles-ci peuvent engager des poursuites au nom des citoyens concernés et intervenir à n'importe quel stade de la procédure.

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<sup>18</sup> Programme gouvernemental pour la communauté rom 2004-2013; Programme d'intégration de la communauté rom en Pologne 2014-2020 (*Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Varsovie 2014, disponible (en anglais également) sur <http://mniejszosci.narodowe.mac.gov.pl/mne/romowie/program-integracji-spol> (consulté en dernier lieu le 15 mai 2015).

<sup>19</sup> *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*

<sup>20</sup> *Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.*

<sup>21</sup> *Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy.*

<sup>22</sup> *Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego.*

La législation de transposition est, de manière générale, appliquée, en particulier en matière de relations du travail. Le processus s'avère cependant assez lent en dehors du domaine de l'emploi. Plusieurs raisons sous-tendent cette situation : d'une part, on constate une sensibilisation insuffisante parmi les personnes qui sont victimes de discrimination ; d'autre part, des lacunes persistent dans la législation (ainsi par exemple, le nouveau recours en indemnisation, qui couvre uniquement le préjudice matériel et non le préjudice moral, n'est pas utilisé dans la pratique). En réalité, les recours invoquant la loi sur l'égalité de traitement restent occasionnels (cinq seulement au cours des quatre années écoulées depuis l'entrée en vigueur de la loi). Dans l'ensemble toutefois, le nombre d'affaires portées en justice augmente, fût-ce lentement, et diverses actions de sensibilisation commencent à porter leurs fruits.

### **3. Principes généraux et définitions**

La loi de 2010 sur l'égalité de traitement a introduit plusieurs définitions juridiques qui figuraient uniquement jusque-là dans le code du travail et concernaient exclusivement le domaine de l'emploi (les définitions du code du travail restent, à l'heure actuelle, également contraignantes mais sont parfois légèrement différentes de celles qui figurent dans la loi sur l'égalité de traitement).

*Une discrimination directe* se produit lorsque, en raison de son genre, de sa race, de son origine ethnique, de sa nationalité, de sa religion, de ses convictions, de ses opinions politiques, d'un handicap, de son âge ou de son orientation sexuelle, une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable.

*Une discrimination indirecte* est définie comme une situation dans laquelle une personne fait ou pourrait faire l'objet d'une différence en sa défaveur ou d'un désavantage particulier en raison de son genre, sa race, son origine ethnique, sa nationalité, sa religion, ses convictions, ses opinions politiques, un handicap, son âge ou son orientation sexuelle par suite de l'application d'une disposition, d'un critère ou d'une pratique/action apparemment neutre, à moins que cette disposition, ce critère ou cette action ne soit objectivement justifié par un but légitime et que les moyens d'atteindre ce but ne soient appropriés et nécessaires.

*Le harcèlement* se définit comme toute forme de comportement indésirable qui a pour objet ou pour effet de porter atteinte à la dignité d'une personne physique et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant. La loi sur l'égalité de traitement qualifie également de traitement inégal et condamne tout traitement défavorable envers des personnes par suite de leur rejet du harcèlement ou de leur soumission à celui-ci. La loi de 2010 sur l'égalité de traitement interdit *l'injonction de pratiquer une discrimination*, qu'il s'agisse d'inciter/d'encourager à la discrimination ou de donner instruction de discriminer. La loi instaure également une *interdiction générale de rétorsions* et dispose que l'usage par une personne de ses droits de défense contre l'inégalité de traitement ne peut ni constituer la base d'un traitement hostile à son égard ni avoir de conséquences négatives pour elle. Cette protection s'étend à toute personne qui soutient, d'une manière ou d'une autre, celui ou celle qui exerce ses droits.

La loi de 2010 sur l'égalité de traitement met en œuvre l'obligation de prévoir des *aménagements raisonnables*, déclarant qu'un employeur est tenu de fournir ceux-ci à toute personne handicapée avec laquelle il est lié par une relation d'emploi, qui participe à une procédure de recrutement ou qui suit une formation professionnelle, un apprentissage ou un stage. Les «aménagements raisonnables nécessaires» désignent la mise en place, dans un cas particulier s'il y a lieu, des changements ou ajustements requis pour répondre aux besoins spécifiques signalés à l'employeur et découlant du handicap de la personne concernée, sauf si ces changements ou ajustements imposent à l'employeur une charge



disproportionnée. Cette charge n'est pas considérée comme disproportionnée lorsqu'elle est suffisamment couverte par des fonds publics.

La loi de 2010 sur l'égalité de traitement étend aux *personnes morales* la protection contre les discriminations fondées sur la race, l'origine ethnique et la nationalité de leurs membres. Toutes les formes de discrimination sont interdites et le droit à réparation s'étend aux personnes morales également.

*La discrimination multiple, la discrimination présumée et la discrimination par association* ne sont pas réglementées et restent encore des concepts nouveaux. Elles ont néanmoins été incluses dans les projets de loi élaborés en 2012 et 2013 en vue de l'amendement de la loi sur l'égalité de traitement (pour plus de précisions, voir le point 7 ci-après). La discrimination par association a été reconnue pour la première fois par un tribunal en 2014.<sup>23</sup>

La loi de 2010 sur l'égalité de traitement introduit une exception en ce qui concerne les *exigences professionnelles essentielles et déterminantes*. Elle couvre les «possibilités et conditions d'entreprise et d'exercice d'une activité professionnelle ainsi que la formation (y compris l'enseignement supérieur)». Le critère de la proportionnalité des mesures et du but légitime a également été introduit. De façon analogue, d'autres exceptions visées par les directives sont reproduites dans la loi sur l'égalité de traitement et les dispositions pertinentes sont, en fait, une traduction quasiment littérale des directives. Ces dérogations concernent les employeurs dont l'éthique est fondée sur la religion ou les convictions, ainsi que la discrimination fondée sur l'âge. La loi sur l'égalité de traitement dispose *expressis verbis* qu'elle ne couvre ni les sphères de la vie privée et familiale ni les actions en justice y afférentes, ni la liberté de contrat pour autant que le contrat en question ne se fonde pas sur un motif lié au genre, à la race, à l'origine ethnique ou à la nationalité.

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

Le code du travail interdit toute discrimination *dans le domaine de l'emploi*, en particulier pour ce qui concerne la conclusion et la résiliation d'une relation de travail ainsi que les conditions d'emploi, de promotion et d'accès à une formation professionnelle visant au relèvement du niveau de qualification. L'interdiction de discrimination s'étend à toutes les institutions du marché de l'emploi telles que les bureaux de placement et d'orientation professionnelle, de même qu'aux formations destinées aux chômeurs. Ces règles s'appliquent aussi bien au secteur public qu'au secteur privé. Depuis la promulgation de la loi de 2010 sur l'égalité de traitement, l'interdiction de discrimination s'étend aux contrats dans la fonction publique, aux emplois indépendants et aux professions libérales (lesquelles sont largement réglementées aussi par leurs propres organes d'autorégulation; tel est notamment le cas des avocats et conseillers juridiques).<sup>24</sup>

La loi sur l'égalité de traitement interdit la discrimination fondée sur l'*affiliation* ou l'*adhésion à des syndicats, des organisations patronales* ou toute organisation dont les membres exercent une profession particulière, y compris les avantages fournis aux membres de ces organisations (tous les motifs sont couverts). Jusqu'en 2010, les directives n'étaient transposées dans aucun autre domaine que l'emploi, mais la loi sur l'égalité de traitement élargit la protection aux domaines couverts par les directives.

La loi de 2010 sur l'égalité de traitement interdit la *discrimination en matière de protection sociale* fondée sur le genre, la race, l'origine ethnique ou la nationalité ainsi que la discrimination en matière de *soins de santé* fondée sur la race, l'origine ethnique et la

<sup>23</sup> PTPA au nom de XY c. Société Z; tribunal d'arrondissement de Warszawa Śródmieście, arrêt du 9 juillet 2014, sygn. VI C 402/13; ce verdict n'est pas définitif.

<sup>24</sup> «Professions libérales» est un terme spécifiquement utilisé en Pologne pour désigner les professions auto-réglementées. Le terme «professions de confiance publique» est également utilisé (article 17 de la Constitution).

nationalité. La loi n'utilise pas le terme «*avantages sociaux*», mais la définition (non pas la définition légale, mais celle élaborée par des juristes) de la protection sociale s'étend traditionnellement à cette matière. Une clause antidiscrimination figure aussi dans la loi sur la *sécurité sociale*, qui constitue la loi fondamentale dans ce domaine. La disposition qui limitait jusqu'en 2010 le principe de l'égalité de traitement de tous les assurés sociaux aux motifs liés au genre, à l'état matrimonial et à la situation familiale a été élargie (avec effet au 1<sup>er</sup> janvier 2011) aux motifs de la race, de l'origine ethnique et de la nationalité. La loi sur les régimes de retraites par capitalisation, modifiée par la loi sur l'égalité de traitement, interdit toute discrimination consistant à prendre en compte le genre, la race, l'origine ethnique, la nationalité, l'état de santé, la situation familiale et l'état matrimonial pour calculer le montant de la pension. La loi sur l'égalité de traitement interdit *expressis verbis* la discrimination dans *l'enseignement et l'enseignement supérieur*, mais uniquement lorsqu'elle est fondée sur la race, l'origine ethnique et la nationalité. De même, la loi interdit *expressis verbis* la discrimination en termes d'*accès aux biens et aux services*, y compris le *logement*, les *biens* et les *droits d'achat*, ainsi que d'*accès à l'énergie*, lorsqu'ils sont mis à la disposition du public, pour des motifs fondés sur le sexe, la race, l'origine ethnique et la nationalité.

## 5. Mise en application de la loi

La loi de 2010 sur l'égalité de traitement introduit une clause générale d'indemnisation précisant que toute personne (physique ou morale) victime d'un non-respect du principe de l'égalité de traitement a droit à réparation (article 13). Toutefois, cinq affaires seulement de ce type ont été portées en justice en quatre ans – l'une des raisons étant, comme le souligne le Médiateur dans ses rapports annuels, le fait que la nouvelle loi sur l'égalité de traitement fait uniquement référence à une réparation (*odszkodowanie*) qui couvre le préjudice matériel (et non le préjudice moral), et limite donc la protection. Le recours en indemnisation prévu par la loi devrait être élargi au préjudice moral également.

Par ailleurs, le recours peut invoquer des dispositions civiles générales. Le code civil (articles 23-24)<sup>25</sup> prévoit des recours en indemnisation pour préjudice matériel et préjudice moral, mais la procédure civile générale ne prévoit pas le renversement de la charge de la preuve. Il est possible en outre, lorsqu'il s'agit de matières non couvertes par la loi sur l'égalité de traitement, de recourir à une autre forme de protection civile, à savoir la protection des «droits personnels» tels que la santé, la liberté et l'honneur, etc. Selon la Constitution, la dignité inhérente et inaliénable de la personne humaine constitue une source de libertés et de droits pour le peuple et les citoyens. Elle est inviolable. Une personne dont les droits personnels sont menacés par les actions d'une autre personne peut exiger qu'il soit mis fin à celles-ci, à moins que les actions en question soient légales; exiger qu'il soit remédié aux effets découlant des actions en cause (et notamment une déclaration au contenu et à la forme appropriés); et exiger une indemnisation financière ou le paiement d'une somme adéquate en faveur d'une cause sociale spécifique. Si le non-respect des droits personnels occasionne un préjudice matériel, la victime peut exiger un redressement en vertu des conditions générales fixées par la loi. Ces dispositions relatives aux droits personnels sont aujourd'hui plus fréquemment invoquées que la loi spécialisée, à savoir la loi sur l'égalité de traitement, en tant que fondement d'une allégation de discrimination.

Les recours liés à une relation de travail peuvent être traités par une juridiction du travail ou par une commission de conciliation. Une demande spéciale d'indemnisation liée à l'emploi a été introduite dans le code du travail en 2004: toute personne victime d'un non-respect du principe de l'égalité de traitement dans l'emploi peut engager des poursuites judiciaires et réclamer *une indemnisation* au moins égale au salaire mensuel minimum.

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<sup>25</sup> Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny.

Aucun recours administratif n'est spécifiquement prévu pour traiter les questions de discrimination. La loi sur l'égalité de traitement introduit toutefois une nouvelle possibilité dans la procédure administrative: elle dispose en effet que si une décision de justice a établi un non-respect de la règle de l'égalité de traitement et que ce non-respect a influencé la décision administrative finale, une réouverture de la procédure administrative peut être exigée.

Du côté des mesures non judiciaires, il peut s'avérer efficace de déposer plainte auprès du Médiateur.

En Pologne, la représentation en justice peut être assurée en principe par un avocat ou un conseiller juridique. Dans les conflits du travail, un salarié peut également se faire représenter en justice par un délégué syndical, un inspecteur du travail ou un autre salarié de l'entreprise. Les organisations de la société civile dont les objectifs officiels incluent la protection de l'égalité et la lutte contre les discriminations sont habilitées, elles aussi, à engager des poursuites judiciaires au nom des citoyens ou à y prendre part. Les organisations de la société civile ont également le droit d'engager une procédure administrative ou d'y prendre part, et leurs représentants peuvent être admis dans des procédures pénales. En réalité, bon nombre de cas de discrimination en dehors du domaine de l'emploi sont introduits au nom des victimes (ou rejoins) par des ONG telles que l'Association polonaise du droit antidiscrimination (PTPA) ou la Fondation polonaise Helsinki pour les droits de l'homme.

La législation antidiscrimination polonaise ne mentionne pas explicitement le recours à des *preuves statistiques* ou à un *test de situation* – ce qui ne signifie pas que leur utilisation soit exclue en théorie (les deux concepts sont actuellement examinés à la fois par des ONG et par les milieux judiciaires). On peut présumer qu'une juridiction considérerait comme recevables, lors de procédures civiles, administratives ou pénales, des preuves statistiques ou des preuves recueillies dans le cadre d'un *test de situation*. Il s'agit toutefois d'une stratégie potentiellement risquée et loin d'être évidente (il existe également des arguments théoriques qui s'opposent à la recevabilité de preuves issues de tests de situation); aussi jusqu'ici ceux qui portent en justice des affaires se fondant en réalité sur des tests de situation se refusent-ils de l'admettre devant les tribunaux et préfèrent invoquer un simple traitement discriminatoire à leur égard.

Depuis la modification du code du travail en 2004, la *charge de la preuve* a été déplacée de la partie requérante vers la partie défenderesse, mais uniquement dans le cadre d'affaires relatives au droit du travail. La nouvelle loi de 2010 sur l'égalité de traitement introduit un renversement de la charge de la preuve dans toutes les procédures en réparation invoquant une violation de la règle de l'égalité de traitement visée par ses propres dispositions, ce qui signifie qu'elle ne l'étend pas aux recours fondés sur le droit civil (hormis en ce qui concerne les «droits personnels» pour lesquels un mécanisme autonome de renversement de la charge de la preuve a également été mis en place). En vertu du code du travail et de la loi sur l'égalité de traitement, la partie requérante doit étayer la probabilité d'un non-respect (les tribunaux attendant néanmoins aussi la démonstration de l'existence d'un motif particulier de discrimination)<sup>26</sup> et la partie défenderesse est tenue de montrer qu'elle n'a pas commis l'infraction.

En ce qui concerne les *sanctions*, la législation polonaise de lutte contre les discriminations ne prévoit aucun régime spécifique (hormis la réparation en vertu du code civil et du code du travail, qui a été décrite plus haut), et seules des amendes et des peines fixées par le code pénal et le code des infractions mineures s'appliquent. Le code civil et le code du travail permettent de réclamer une indemnisation pour préjudice matériel et moral. On peut se demander si ce régime de sanctions répond aux critères précisés dans les directives

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<sup>26</sup> Voir notamment les arrêts de la Cour suprême III PK 126/13 du 3 juin 2014 et II PK 196/11 du 18 avril 2012.

(«les sanctions doivent être effectives, proportionnées et dissuasives») dans la mesure où, de manière générale, il permet seulement d'obtenir une indemnisation du préjudice sans prévoir le plus souvent le moindre élément punitif sérieux.

Des actions positives et des programmes spéciaux sont traditionnellement axés sur les minorités nationales (subventions spécifiquement allouées à leurs écoles, par exemple), sur la communauté rom (programmes spéciaux couvrant depuis 2003 l'éducation, les soins de santé et le logement) et sur les personnes handicapées (dans les domaines de l'éducation et de l'emploi). Plus récemment toutefois, des actions ont également été entreprises en faveur des personnes âgées (50 ans et plus).

Les instances publiques en charge de la lutte contre les discriminations organisent des consultations concernant leurs politiques, et la possibilité est offerte aux ONG et aux partenaires sociaux de prendre part à des débats publics ainsi qu'à des forums officiels tels que des commissions et des groupes de travail. Il n'en reste pas moins que beaucoup d'attentes des partenaires sociaux ne sont pas satisfaites (un exemple à cet égard étant l'amendement de la loi sur l'égalité de traitement, en discussion depuis plusieurs années).

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

Jusqu'en 2010, aucune institution ni organe n'était officiellement désigné en tant qu'organisme spécialisé exigé par la directive 2000/43/CE. La loi de 2010 sur l'égalité de traitement désigne le Bureau du Médiateur en tant qu'organisme pour l'égalité. Ladite loi de 2010 a modifié en conséquence la loi existante en dotant le Médiateur de nouvelles compétences (en complément d'un mandat déjà très large, en l'occurrence la défense des droits de l'homme et des libertés fondamentales; aucun motif n'étant cité dans le mandat du Médiateur, il peut s'occuper de n'importe quel motif, y compris, sans s'y limiter, les motifs énumérés dans la loi sur l'égalité de traitement).<sup>27</sup> À ce jour, le Médiateur a créé une équipe «discrimination» au sein de son Bureau, laquelle a notamment entrepris des études (de même qu'une compilation des données existantes sur certaines questions), inauguré une nouvelle rubrique sur le site web consacré aux questions d'égalité, rassemblé des informations concernant la jurisprudence en matière de discrimination, mis en place plusieurs équipes thématiques formées d'experts externes en soutien du Médiateur, et ouvert une permanence téléphonique (traitant tout type de cas, y compris de discrimination).

La loi de 2010 sur l'égalité de traitement doit, en application du principe de l'égalité de traitement, analyser, contrôler et soutenir l'égalité de traitement de tous; procéder à des études indépendantes concernant la discrimination; préparer et publier des rapports indépendants; et formuler des recommandations sur les questions de discrimination.

Le problème de la fourniture d'une aide indépendante aux victimes est plus complexe, étant donné qu'en vertu de la Constitution polonaise et de la nouvelle loi sur l'égalité de traitement, ces compétences d'assistance relèvent d'une approche verticale des droits de l'homme (relation entre une autorité publique et un particulier) et sont limitées lorsqu'il s'agit d'un conflit entre personnes privées. Dans ce dernier cas, le Médiateur doit, selon la loi, limiter son intervention à la fourniture à la victime d'informations sur ses droits et les recours possibles. Le Médiateur n'est pas un organisme quasi-judiciaire.

La seconde institution chargée de promouvoir l'égalité de traitement de tous sans distinction de race ou d'origine ethnique (entre autres motifs) est le Plénipotentiaire officiel pour l'égalité de traitement. Il s'agit d'une fonction créée en avril 2008 au sein de la chancellerie du Premier ministre (la loi de 2010 sur l'égalité de traitement fournissant une nouvelle base juridique pour son fonctionnement).<sup>28</sup> Le Plénipotentiaire a pour mission

<sup>27</sup> *Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich.*

<sup>28</sup> *Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania.*

principale de mettre en œuvre la politique gouvernementale en matière d'égalité de traitement. Il n'a ni bureau ni budget propre et utilise les locaux du Premier ministre.

En ce qui concerne les droits des minorités nationales et ethniques, la loi de 2005 sur les minorités nationales et ethniques et sur les langues régionales<sup>29</sup> a institué un *Comité conjoint du gouvernement et des minorités ethniques et nationales*. Composé de représentants d'une sélection de ministères et de minorités, ce Comité a pour mandat de formuler des avis sur les droits et les besoins des minorités; sur les programmes et les projets de loi en la matière; et sur le principe et le niveau des ressources allouées par l'État à la préservation de l'identité culturelle des minorités. Il est également chargé d'agir dans le domaine de la lutte contre la discrimination. Un groupe spécial sur la question des Roms a été créé en son sein en 2008. Le Premier ministre a signé en 2013 une ordonnance portant création d'un organisme supplémentaire, à savoir le nouveau Conseil pour la lutte contre la discrimination raciale, la xénophobie et l'intolérance qui y est associée.

L'organisme responsable de la politique en matière de handicap est le Plénipotentiaire officiel pour les personnes handicapées. Faisant officiellement partie du ministère du Travail et de la politique sociale, ce Plénipotentiaire est avant tout responsable de la mise en œuvre de la loi sur la réadaptation sociale et professionnelle et l'emploi des personnes handicapées.<sup>30</sup>

## **7. Points essentiels**

Les critiques formulées à l'égard de la loi de 2010 par le Médiateur et des ONG (plusieurs lacunes de cette loi ont été mentionnées plus haut, parmi lesquelles la notion de préjudice et les limites en matière de renversement de la charge de la preuve) ont conduit à l'élaboration de deux projets de loi (préparés en 2012 et 2013) destinés à modifier et à étendre considérablement le champ d'application de la loi sur l'égalité de traitement. L'un de ces projets de loi a été soumis au Parlement en octobre 2012. Mais les procédures parlementaires ne sont guère rapides et, étant donné les élections parlementaires prévues au cours de l'automne 2015, il n'y a pratiquement aucune chance que les amendements soient adoptés. Le Plénipotentiaire officiel pour l'égalité de traitement estime lui aussi qu'il vaut mieux attendre et voter une toute nouvelle loi (prenant en compte la nouvelle directive horizontale) plutôt que de modifier partiellement la loi existante.

La question la plus préoccupante est manifestement la sous-utilisation de la loi sur l'égalité de traitement. Les statistiques relatives au nombre d'affaires de discrimination portées en justice sont très limitées (sans compter que les statistiques disponibles sont entachées d'erreurs et ne sont pas totalement fiables). Le peu que l'on sait montre toutefois que les victimes de discrimination invoquent très rarement la loi sur l'égalité de traitement (on ne recense que quelques cas en quatre ans). Le nombre d'affaires invoquant le code du travail, couvrant la discrimination en matière d'emploi, est lui aussi relativement peu élevé (entre 50 et 100 cas par an).

En 2014, une coalition d'ONG a pris contact avec toutes les juridictions polonaises en leur demandant, selon la procédure officielle d'accès à l'information publique, des données concernant les cas de discrimination qu'elles ont été appelées à traiter au titre de la loi sur l'égalité de traitement. Les 287 juridictions ont répondu. Seules cinq affaires ont été portées en justice en quatre ans en vertu de cette loi (certaines d'entre elles par les organisations effectuant l'étude), ce qui démontre clairement que les tribunaux ne sont pas saisis de recours fondés sur la loi de 2010.

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<sup>29</sup> Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym.

<sup>30</sup> Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych.

## ZUSAMMENFASSUNG

### 1. Einleitung

Das moderne Polen hat keine lange Tradition und kaum Erfahrung im Kampf gegen Diskriminierung. Die Umsetzung des Antidiskriminierungsrechts der EU in Bezug auf Rasse, ethnische Zugehörigkeit, Religion, Alter, Behinderung und sexuelle Ausrichtung in das Rechtssystem des Landes war das Ergebnis der EU-Mitgliedschaft und nicht Ausdruck einer Bestrebung, die bestehenden Gesetze zu verbessern oder soziale Probleme zu entschärfen.

Der Prozess verlief auch nicht ohne Spannungen. Viele Faktoren, wie das fehlende Rechtsbewusstsein in der polnischen Gesellschaft, die Passivität (und auch Angst) der Menschen bei der Durchsetzung ihrer Rechte, bestimmte Merkmale des Rechtssystems und das Fehlen systematischer Forschung tragen dazu bei, dass sich nur schwer abschätzen lässt, wie häufig Diskriminierung in Polen tatsächlich vorkommt. Aus diesem Grund sind systematische und umfassende Maßnahmen erforderlich, um das rechtliche Bewusstsein in der Öffentlichkeit sowie den Zugang zur Justiz in Polen zu verbessern. Bis vor kurzem lastete die Bürde derartiger Maßnahmen zum größten Teil auf NRO, weil der polnischen Regierung ein strategischer Ansatz für den Kampf gegen Diskriminierung fehlte. Diese Situation verbessert sich allmählich. Im Dezember 2013 verabschiedete der Ministerrat zum ersten Mal ein Nationales Maßnahmenprogramm für Gleichbehandlung 2013-2016.<sup>31</sup> Die Regierung arbeitet inzwischen auch häufiger mit NRO zusammen und beteiligt diese an zahlreichen Foren und Maßnahmen.

Diskriminierung aufgrund des Alters gelangte erst vor kurzer Zeit in den Fokus der polnischen Öffentlichkeit. In den letzten Jahren hat die Tätigkeit der Ombudsstelle<sup>32</sup> entsprechende Studien und Berichte angestoßen. Der Begriff „Altersdiskriminierung“ hat sich etabliert und das Bewusstsein für dieses Problem nimmt im älteren Teil der Bevölkerung langsam, aber sicher zu. Im Jahr 2013 ernannte der Minister für Arbeit einen „Rat für Alterspolitik“, der Richtlinien für eine langfristige Alterspolitik für den Zeitraum 2014-2020 erarbeitet. Die Richtlinien wurden vom Ministerrat verabschiedet und thematisieren auch das Problem der Altersdiskriminierung.

Gegen die Diskriminierung von Menschen mit Behinderungen (12,2 % der Bevölkerung) wird auf verschiedene Weise vorgegangen (und die Ratifizierung des Übereinkommens über die Rechte von Menschen mit Behinderungen im September 2012 hat weitere Möglichkeiten eröffnet). Obwohl Menschen mit Behinderung aufgrund vieler Barrieren immer noch kaum in der Öffentlichkeit zu sehen sind, spielen sie eine wichtige Rolle und werden inzwischen von mächtigen und einflussreichen NRO vertreten.

LGBTI-Personen sind in Polen in einer sehr schwierigen Position und gehören zu der Minderheit, die am häufigsten angegriffen wird. Initiativen auf nationaler und internationaler Ebene (wie der Entwurf der horizontalen Gleichbehandlungsrichtlinie) werden von manchen Politikern und Journalisten als Förderung von Homosexualität und Angriff von Homosexuellen dargestellt. In letzter Zeit wurden mehrere Entwürfe zu Gesetzen über eingetragene Partnerschaften ohne klare Ergebnisse diskutiert. Ende 2014 setzte der Regierungsbevollmächtigte für Gleichbehandlung jedoch zwei thematische Gruppen ein, die sich mit den Problemen der LGBTI-Gemeinschaft beschäftigten (eine Gruppe ist für rechtliche und gesetzgeberische Fragen zuständig und die andere für Bildung und Aufklärung).

Es gibt in Polen nur wenige und kleine nationale und religiöse Minderheiten (1,46 % der Bevölkerung bezeichnen sich selbst als Angehörige einer nationalen bzw. religiösen Minderheit). Allerdings gibt es einen Zuzug neuer Immigranten (z. B. Menschen aus der

<sup>31</sup> Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2016.

<sup>32</sup> Die derzeitige Ombudsstelle machte das „Alter“ neben „Menschen mit Behinderungen“ und „Migranten“ zu einem ihrer drei Prioritätsfelder.

ehemaligen Sowjetunion und aus Vietnam). Nationale und ethnische Minderheiten und religiöse Minderheiten werden mit unterschiedlichen Förderprogrammen unterstützt, mit denen ihre Kultur, Sprache und ihre kulturelles Erbe bewahrt werden sollen. Es gibt auch spezielle Unterstützungsprogramme für die Roma-Bevölkerung.<sup>33</sup>

## 2. Wichtigste Gesetze

Das allgemeine Diskriminierungsverbot der polnischen Verfassung (Artikel 32) lautet:<sup>34</sup> Alle sind vor dem Gesetz gleich und alle haben das Recht, von der öffentlichen Gewalt gleich behandelt zu werden. Niemand darf aus welchem Grund auch immer im politischen, gesellschaftlichen oder wirtschaftlichen Leben diskriminiert werden. Dieser Grundsatz enthält keine Kriterien für verbotene Formen der Diskriminierung.

Bis 2010 hatte Polen die Gleichbehandlungsrichtlinien vor allem im Bereich Beschäftigung umgesetzt. Klagen gegen die Schutzlücken vor dem Europäischen Gerichtshof brachten die polnische Regierung schließlich dazu, das Gesetz zur Umsetzung bestimmter Rechtsvorschriften der Europäischen Union im Bereich der Gleichbehandlung (GBG) zu verabschieden, das am 1. Januar 2011 in Kraft trat.<sup>35</sup>

Bis 2010 war das Arbeitsgesetz das wichtigste Element des polnischen Antidiskriminierungsrechts (das Gesetz wurde 2004 und 2008 an die Richtlinien angepasst).<sup>36</sup> Das Arbeitsrecht reguliert Beschäftigungsverhältnisse mit Arbeitsvertrag und zählt beispielhaft einige verbotene Diskriminierungsgründe auf, d. h. die Liste ist nicht abgeschlossen. Das neue GBG dient zur Umsetzung der folgenden fünf Richtlinien: 1986/613/EWG, 2000/43/EG, 2000/78/EG, 2004/113/EG und 2006/54/EG. Anders als das Arbeitsgesetz enthält dieses Gesetz eine abgeschlossene Liste von Diskriminierungsgründen: Geschlecht, Rasse, ethnische Zugehörigkeit, Nationalität, Religion, Weltanschauung, politische Überzeugung, Behinderung, Alter und sexuelle Ausrichtung. Als Ergänzung zu dem weit gefassten Schutz vor Diskriminierung im Bereich Beschäftigung (der abhängige Beschäftigte, Selbständige und freie Berufe umfasst) bietet das neue Gesetz Schutz für alle anderen Lebensbereiche, jedoch nur in Bezug auf die Gründe Rasse, ethnische Zugehörigkeit und Nationalität (und Geschlecht, jedoch nur beim Sozialschutz, beim Zugang zu Gütern und Dienstleistungen, einschließlich von Wohnraum, jedoch nicht beim Zugang zu Gesundheitsdiensten und Bildung). Mit dem Gesetz wurde außerdem das Büro der Ombudsstelle (*Rzecznik Praw Obywatelskich*) als Gleichbehandlungsstelle eingerichtet.

Zur Umsetzung der Gleichbehandlungsrichtlinien wurde 2004 auch die Zivilprozessordnung überarbeitet.<sup>37</sup> Es erlaubt NRO, im Namen von Bürgern zu klagen und sich in jeder Phase eines Verfahrens zu beteiligen.

Grundsätzlich wird das Gesetz auch durchgesetzt, insbesondere im Arbeitsleben. In anderen gesellschaftlichen Bereichen erfolgt die Durchsetzung wesentlich langsamer. Dafür gibt es mehrere Gründe. Zum einen kennen viele Opfer von Diskriminierung ihre Rechte noch viel zu wenig. Zum anderen gibt es immer noch Gesetzeslücken (zum Beispiel wird der neue Entschädigungsanspruch, der auch nur für finanzielle Schäden gilt, in der Praxis nicht genutzt). Tatsächlich gibt es so gut wie keine Entschädigungsklagen auf der Grundlage des GBG (fünf Klagen seit Inkrafttreten des Gesetzes vor vier Jahren). Allerdings

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<sup>33</sup> Regierungsprogramm für die Roma 2004-2013, Programm für die Eingliederung der Roma-Gemeinschaft in Polen 2014-2020 (*Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warschau 2014, auch in englischer Sprache verfügbar unter <http://mniejszosci.narodowe.mac.gov.pl/mne/romowie/program-integracji-spol> [letzter Zugriff 15. Mai 2015]).

<sup>34</sup> Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.

<sup>35</sup> Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.

<sup>36</sup> Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy.

<sup>37</sup> Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego.

werden immer mehr Diskriminierungsfälle vor Gericht gebracht und es laufen derzeit mehrere Aufklärungskampagnen, die die Rechtsdurchsetzung verbessern sollen.

### 3. Wichtigste Grundsätze und Begriffe

Das Gleichbehandlungsgesetz von 2010 führte mehrere rechtliche Definitionen ein, die vorher nur im Arbeitsgesetz in Bezug auf das Arbeitsleben galten (diese Begriffsbestimmungen im Arbeitsgesetz sind immer noch gültig und unterscheiden sich in manchen Fällen geringfügig von denen des GBG).

Eine *unmittelbare Diskriminierung* liegt vor, wenn eine natürliche Person wegen ihres Geschlechts, ihrer Rasse, ethnischen Zugehörigkeit, Nationalität, Religion, Weltanschauung, politischer Überzeugung, Behinderung, ihres Alters oder ihrer sexuellen Ausrichtung eine weniger günstige Behandlung erfährt, als eine andere Person in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde. *Mittelbare Diskriminierung* ist definiert als Situation, in der dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren eine Person wegen ihres Geschlechts, ihrer Rasse, ethnischen Zugehörigkeit, Nationalität, Religion, Weltanschauung, politischer Überzeugung, Behinderung, ihres Alters oder ihrer sexuellen Ausrichtung in besonderer Weise benachteiligt, es sei denn, diese Entscheidungen, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich.

*Belästigung* ist definiert als unerwünschte Verhaltensweise, die bezweckt oder bewirkt, dass die Würde der betroffenen Person verletzt oder ein einschüchterndes, feindseliges, entwürdigendes, beleidigendes oder demütigendes Umfeld für eine natürliche Person geschaffen wird. Das GBG behandelt auch die Benachteiligung von Personen aufgrund der Ablehnung einer Belästigung oder der Unterwerfung unter eine Belästigung als verbotene Ungleichbehandlung. Außerdem verbietet das GBG von 2010 die *Anweisung zur Diskriminierung*, worunter sowohl die Hetze bzw. Ermutigung als auch der Befehl zur Diskriminierung verstanden wird. Das Gesetz führt ein allgemeines *Verbot von Viktimisierung* ein, nach dem eine Person, die ihre Rechte zum Schutz vor Diskriminierung ausübt, nicht benachteiligt und anderen negativen Konsequenzen ausgesetzt werden darf. Dieser Schutz gilt auch für Personen, die Dritte bei der Ausübung ihrer Rechte in irgendeiner Weise unterstützen.

Das GBG von 2010 sieht auch eine *Pflicht zu angemessenen Vorkehrungen* vor, nach der Arbeitgeber verpflichtet sind, Menschen mit Behinderungen, die in einem Beschäftigungsverhältnis zum Arbeitgeber stehen, durch die notwendigen angemessenen Vorkehrungen den Zugang zu Bewerbungsverfahren, zur beruflichen Aus- und Weiterbildung und zu Praktika zu ermöglichen. „Notwendige angemessene Vorkehrungen“ bedeutet die Einführung von notwendigen Veränderungen und Anpassungen an die dem Arbeitgeber bekannten besonderen Bedürfnisse des Arbeitnehmers aufgrund seiner Behinderung, wo in einem konkreten Fall erforderlich, sofern diese Veränderungen und Anpassungen keine unverhältnismäßige Belastung des Arbeitgebers darstellen. Die Belastung ist nicht unverhältnismäßig, wenn sie durch öffentliche Fördermittel ausreichend ausgeglichen wird.

Das GBG von 2010 dehnt den Schutz auf *juristische Personen* aus, die aufgrund der Rasse, ethnischen Zugehörigkeit und Nationalität ihrer Mitglieder diskriminiert werden. Diskriminierung jeder Form ist verboten und auch juristische Personen haben Anspruch auf Schadensersatz.

*Mehrfachdiskriminierung*, *Diskriminierung aufgrund mutmaßlicher Eigenschaften* und *Diskriminierung aufgrund von Assoziierung* sind nicht reguliert und als Rechtsbegriffe noch sehr neu. Sie waren jedoch in den Entwürfen für eine Neufassung des GBG aus den Jahren



2012 und 2013 enthalten (mehr hierzu unter Punkt 7). Im Jahr 2014 erkannte ein Gericht erstmalig eine Diskriminierung aufgrund von Assoziierung an.<sup>38</sup>

Das GBG von 2010 führt eine Ausnahmeregelung in Bezug auf *wesentliche und entscheidende berufliche Anforderungen* ein. Die Ausnahme gilt für „Möglichkeiten zu und Bedingungen für berufliche Tätigkeiten und die berufliche Bildung (einschließlich der höheren Bildung)“. Auch die Bedingung, dass die Mittel verhältnismäßig und zur Erreichung eines rechtmäßigen Ziels notwendig sein müssen, wurde eingeführt. Entsprechend sind auch andere in den Richtlinien vorgesehenen Ausnahmen im GBG wiedergegeben, tatsächlich sind die einschlägigen Bestimmungen eine fast wortwörtliche Übersetzung der Richtlinien. Sie gelten für Arbeitgeber, deren Ethos auf einer Religion oder Weltanschauung beruht, und für Diskriminierung aufgrund des Alters. Das GBG enthält auch die *ausdrückliche* Formulierung, dass das Gesetz nicht für das Privat- und Familienleben bzw. für Rechtsbeziehungen in diesen Bereichen gilt und auch die Vertragsfreiheit nicht einschränkt, sofern sich die Vertragsklauseln nicht auf Geschlecht, Rasse, ethnische Zugehörigkeit oder Nationalität beziehen.

#### 4. Sachlicher Anwendungsbereich

Nach dem Arbeitsgesetz ist im Bereich *Beschäftigung* jede Art von Diskriminierung verboten, insbesondere bei Einstellung und Kündigung, Beschäftigungsbedingungen, Beförderung und beim Zugang zur beruflichen Weiterbildung, mit denen die berufliche Qualifikation verbessert werden kann. Das Diskriminierungsverbot gilt auch für alle Institutionen des Arbeitsmarkts, wie Arbeitsvermittlungen und Arbeitsberatungsstellen und für Weiterbildungsangebote für Arbeitssuchende. Die Vorschriften gelten sowohl für den öffentlichen als auch den privaten Sektor. Seit der Einführung des GBG im Jahr 2010 wurde das Verbot von Diskriminierung auf zivilrechtliche Verträge, selbständige Beschäftigung und freie Berufe ausgedehnt (auch solche, die zum größten Teil durch Einrichtungen der Selbstverwaltung geregelt sind, z. B. Anwälte und Rechtsberater).<sup>39</sup>

Das GBG verbietet Diskriminierung bei der *Mitgliedschaft und Mitwirkung in einer Gewerkschaft oder Arbeitgeberorganisation* oder einer Organisation, deren Mitglieder einer bestimmten Berufsgruppe angehören, einschließlich der Inanspruchnahme der Leistungen solcher Organisationen für ihre Mitglieder (in Bezug auf sämtliche Diskriminierungsgründe). Bis 2010 waren die Richtlinien außerhalb des Bereichs Beschäftigung nicht umgesetzt, das Gesetz von 2010 dehnte den Schutz auf alle in den Richtlinien vorgegebenen Lebensbereiche aus.

Das GBG von 2010 verbietet *Diskriminierung beim Sozialschutz* aufgrund von Geschlecht, Rasse, ethnischer Zugehörigkeit oder Nationalität sowie Diskriminierung bei den *Gesundheitsdiensten* aufgrund von Rasse, ethnischer Zugehörigkeit oder Nationalität. Das Gesetz verwendet nicht den Begriff *soziale Vergünstigungen*, dieser ist jedoch in der Definition des Begriffs Sozialschutz traditionell enthalten (nicht rechtlich, sondern nach der Auslegung von Rechtswissenschaftlern). Auch das Gesetz über soziale Sicherheit, die wichtigste Rechtsnorm für den Bereich der *sozialen Sicherheit*, enthält ein Diskriminierungsverbot. Dieses Verbot, das vor 2010 nur die Gleichbehandlung aller Menschen bei der Sozialversicherung aufgrund von Geschlecht, Ehe- und Personenstand vorschrieb, dehnt diesen Schutz inzwischen (seit 2011) auch auf die Diskriminierungsgründe Rasse, ethnische Zugehörigkeit und Nationalität aus. Mit dem GBG wurde auch in das Gesetz über kapitalgedeckte Alterssicherung ein Verbot von Diskriminierung bei der Berechnung des Rentenniveaus aufgrund von Geschlecht, Rasse, ethnischer Zugehörigkeit, Nationalität, Gesundheitszustand, Familien- und Personenstand eingeführt. Das GBG verbietet *ausdrücklich* Diskriminierung *in der allgemeinen und*

<sup>38</sup> PTPA im Namen von XY gegen Unternehmen Z, Amtsgericht Warszawa Śródmieście, Urteil vom 9. Juli 2014, Rechtssache VI C 402/13, das Urteil ist noch nicht rechtskräftig.

<sup>39</sup> Freie Berufe werden in Polen Berufe genannt, die sich durch eigene Körperschaften selbst regulieren. Ein anderer gängiger Begriff ist „Berufe des öffentlichen Vertrauens“ (Artikel 17 der Verfassung).

*höheren Bildung*, jedoch nur aufgrund der Rasse, ethnischen Zugehörigkeit und Nationalität. Entsprechend verbietet das Gesetz *ausdrücklich* Diskriminierung beim *Zugang zu Gütern und Dienstleistungen*, einschließlich von *Wohnraum, beim Zugang zu Gütern, Kaufrechten und Energie*, wenn diese *der Öffentlichkeit zur Verfügung stehen*, aufgrund von Geschlecht, Rasse, ethnischer Zugehörigkeit und Nationalität.

## 5. Rechtsdurchsetzung

Das GBG von 2010 führte einen allgemeinen Entschädigungsanspruch ein, der jeder (natürlichen und juristischen) Person zusteht, deren Recht auf Gleichbehandlung verletzt wurde (Artikel 13). Allerdings wurden in mehr als vier Jahren nur fünf Fälle vor Gericht gebracht. Wie die Ombudsstelle in ihrem Jahresbericht erläutert, liegt dies zum Teil sicher daran, dass das neue GBG nur ein Anrecht auf Schadensersatz (*odszkodowanie*) gewährt, d. h. die Erstattung materieller Schäden ermöglicht, jedoch nicht ideeller Schäden, was den rechtlichen Schutz einschränkt. Der vom GBG gewährte Entschädigungsanspruch sollte auch auf Nichtvermögensschäden ausgedehnt werden.

Natürlich sind auch Klagen nach dem allgemeinen Zivilrecht möglich. Das Bürgerliche Gesetzbuch (Artikel 23-24)<sup>40</sup> regelt die Zahlung von Schadensersatz und Schmerzensgeld, allerdings sieht die Zivilprozessordnung keine Umkehr der Beweislast vor. In Rechtssachen, die unter das GBG fallen, kann außerdem eine weitere Form des Rechtsschutzes genutzt werden, der Schutz der „persönlichen Rechte“ wie Gesundheit, Freiheit, Ehre usw. Nach der Verfassung besitzt jeder Mensch eine angeborene und unveräußerliche Würde, die die Rechte und Freiheiten von Menschen und Bürgern begründet. Diese Würde ist unantastbar. Menschen, deren persönliche Rechte durch Handlungen Dritter gefährdet sind, können: auf die Beendigung der Handlung klagen, sofern diese rechtswidrig ist, auf eine Richtigstellung der Folgen der Rechteverletzung klagen (insbesondere auf eine Erklärung, deren Form und Inhalt angemessen sind) und auf eine finanzielle Entschädigung oder die Zahlung eines angemessenen Betrags an eine gemeinnützige Einrichtung ihrer Wahl. Wenn die Verletzung der persönlichen Rechte materielle Schäden verursacht, hat das Opfer nach allgemeinen rechtlichen Bestimmungen Anspruch auf Wiederherstellung. Diese Bestimmungen über persönliche Rechte werden viel häufiger für Diskriminierungsklagen genutzt als das einschlägige Gesetz, d. h. das GBG.

Klagen, die sich auf ein Beschäftigungsverhältnis beziehen, können entweder von einem Arbeitsgericht oder einem Vermittlungsausschuss entschieden werden. Der Entschädigungsanspruch bei Diskriminierungsfällen wurde 2004 ins Arbeitsgesetz aufgenommen. Jeder, dessen Recht auf Gleichbehandlung in einem Beschäftigungsverhältnis verletzt wurde, kann Klage einreichen und eine *Entschädigung* fordern, die mindestens einem Monatsgehalt entspricht.

Es gibt keine speziellen verwaltungsrechtlichen Rechtsmittel für Diskriminierungsfälle. Allerdings führt das GBG eine neue Möglichkeit für Verwaltungsverfahren ein. Wenn ein Gericht feststellt, dass das Gleichbehandlungsgebot verletzt wurde und diese Verletzung eine behördliche Entscheidung beeinflusst, hat der Betroffene Anspruch auf eine erneute Überprüfung der Entscheidung.

Als außergerichtliches Rechtsmittel ist auch eine Beschwerde bei der Ombudsstelle ein wirksames Verfahren.

In Polen dürfen grundsätzlich nur Anwälte oder Rechtsberater Dritte vor Gericht vertreten. In arbeitsrechtlichen Fällen kann sich der Arbeitnehmer auch von einer Gewerkschaft, der Arbeitsaufsichtsbehörde oder einem anderem Mitarbeiter des betreffenden Unternehmens rechtlich vertreten lassen. Außerdem können Organisationen der Zivilgesellschaft, zu deren offiziellen Zielen die Förderung der Gleichbehandlung und der Kampf gegen

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<sup>40</sup> Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny.

Diskriminierung gehören, im Namen von Bürgern klagen und sich an entsprechenden Verfahren beteiligen. Zivilgesellschaftliche Organisationen dürfen auch Verwaltungsverfahren einleiten oder sich an diesen beteiligen und ihre Vertreter können sich gegebenenfalls an Strafverfahren beteiligen. In der Praxis werden viele Diskriminierungsfälle, die nicht den Bereich Beschäftigung betreffen, von NRO, wie der Polnischen Gesellschaft für Antidiskriminierungsrecht oder der Helsinki-Stiftung für Menschenrechte, im Namen von Opfern (oder gemeinsam mit diesen) vor Gericht gebracht.

Im polnischen Antidiskriminierungsrecht ist die Verwendung von *statistischen Beweisen* oder „*Situationstests*“ nicht ausdrücklich geregelt. Das heißt nicht, dass ihre Verwendung theoretisch ausgeschlossen ist (beide Konzepte werden von NRO und in juristischen Kreisen diskutiert). Es ist anzunehmen, dass statistische Daten oder Beweise, die im Rahmen von Situationstests ermittelt wurden, in Zivil-, Verwaltungs- oder Strafverfahren vom Gericht als Beweise zugelassen werden können. Dies ist jedoch nicht offensichtlich und womöglich eine riskante Strategie (es gibt theoretische Argumente gegen die Zulassung von durch Situationstests gewonnenen Beweisen). Deshalb geben Diskriminierungsopfer, die die Diskriminierung durch Situationstests beweisen können, dies bisher vor Gericht nicht zu, sondern machen nur ganz allgemein eine Diskriminierung geltend.

Seit der Überarbeitung des Arbeitsgesetzes (2004) lag die *Beweislast* nicht mehr beim Kläger, sondern beim Beklagten; dies galt jedoch nur für arbeitsrechtliche Fälle. Das neue GBG von 2010 führte eine Umkehrung der Beweislast für alle Entschädigungsklagen aufgrund einer Verletzung des Gleichbehandlungsgebots ein, sofern auf der Grundlage des Gesetzes geklagt wird. Das heißt, die umgekehrte Beweislast gilt nicht für Klagen auf der Grundlage des Zivilrechts (mit Ausnahme von Verletzungen der „persönlichen Rechte“, für die ein eigenständiger Mechanismus zur Umkehrung der Beweislast gilt). Nach dem Arbeitsgesetz und dem GBG muss der Kläger Tatsachen vorlegen, die eine Verletzung wahrscheinlich erscheinen lassen (wobei die Gerichte erwarten, dass ein konkreter Diskriminierungsgrund bewiesen wird),<sup>41</sup> und der Beklagte muss dann beweisen, dass er keine Verletzung begangen hat.

Das polnische Antidiskriminierungsrecht sieht kein spezielles System von *Sanktionen* vor (abgesehen von Entschädigungen nach dem Bürgerlichen Gesetzbuch und dem Arbeitsgesetz), sondern die üblichen Geld- und Haftstrafen, die im Strafgesetzbuch und dem Gesetzbuch für Ordnungsstrafen geregelt sind. Auf der Grundlage des Bürgerlichen Gesetzbuchs und des Arbeitsgesetzes können Opfer auf Schadensersatz und Schmerzensgeld klagen. Allerdings ist fraglich, ob diese Sanktionen die Kriterien der Richtlinien erfüllen (wirksam, verhältnismäßig und abschreckend), weil dieses System in der Regel nur die entstandenen Schäden ausgleicht und kein wirksames strafendes Element enthält.

Positive Maßnahmen und spezielle Programme richten sich in der Regel an nationale Minderheiten (z. B. Subventionierung von Minderheitenschulen), die Roma-Gemeinschaft (spezielle Programme seit 2003 für die Bereiche Bildung, Gesundheit und Wohnraum) und an Menschen mit Behinderungen (in den Bereichen Bildung und Beschäftigung). In den letzten Jahren gab es jedoch auch spezielle Maßnahmen für Ältere (50+).

Öffentliche Stellen, die für die Bekämpfung von Diskriminierung zuständig sind, führen Anhörungsverfahren durch, und NRO und die Sozialpartner sind an der öffentlichen Debatte und an formalen Foren, z. B. an Ausschüssen und Arbeitsgruppen, beteiligt. Allerdings können die Sozialpartner ihre Forderungen häufig nicht durchsetzen (beispielsweise eine Überarbeitung des GBG, die seit Jahren diskutiert wird).

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<sup>41</sup> Siehe zum Beispiel die Urteile des Obersten Gerichtshofs: 3. Juni 2014, III PK 126/13 und 18. April 2012, II PK 196/11.

## 6. Gleichbehandlungsstellen

Bis 2010 gab es keine Institution oder Stelle, die gemäß den Vorgaben der Richtlinie 2000/43/EG offiziell für die Verwirklichung des Gleichbehandlungsgrundsatzes zuständig war. Das GBG von 2010 richtete das Büro der Ombudsstelle als Gleichbehandlungsstelle ein. Mit dem Gesetz erhielt die Ombudsstelle neue Zuständigkeiten (ihr Mandat ist mit dem Schutz der Menschenrechte und Grundfreiheiten nicht nur sehr weit gefasst, es werden auch keine einzelnen Diskriminierungsgründe aufgezählt, weshalb die Ombudsstelle für sämtliche Gründe zuständig ist, einschließlich der im GBG aufgezählten Diskriminierungsgründe).<sup>42</sup> Heute gibt es ein spezielles Diskriminierungsteam im Büro der Ombudsstelle, das unter anderem eigene Studien durchführt (und die vorliegenden Daten zu bestimmten Themen zusammenträgt), einen neuen Bereich auf der Website des Büros speziell zu Diskriminierungsthemen betreut, Daten zur einschlägigen Rechtsprechung erfasst, thematische Teams aus externen Experten zusammenstellt, die die Arbeit der Ombudsstelle unterstützen, und eine Telefonhotline unterhält (für alle Beschwerdefälle, einschließlich von Diskriminierungsfällen) usw.

Nach dem GBG von 2010 hat die Ombudsstelle zur Durchsetzung des Gleichbehandlungsgrundsatzes die folgenden Aufgaben: die Gleichbehandlung aller Menschen analysieren, überwachen und fördern, unabhängige Studien über Diskriminierung durchführen, unabhängige Berichte erstellen und veröffentlichen und Empfehlungen zu Diskriminierungsthemen aussprechen.

Die unabhängige Unterstützung von Diskriminierungsopfern ist etwas komplizierter, weil sich die entsprechende Zuständigkeit nach der polnischen Verfassung und dem neuen GBG auf ein vertikales Verständnis der Menschenrechte bezieht (Verhältnis zwischen einer staatlichen Stelle und einer Einzelperson) und nur sehr eingeschränkt auf Konflikte zwischen zwei privaten Parteien. In diesen Fällen kann die Ombudsstelle das Opfer nach dem Gesetz nur über seine Rechte und Handlungsmöglichkeiten informieren. Die Ombudsstelle ist keine außergerichtliche Stelle.

Als zweite Institution ist der Regierungsbevollmächtigte für Gleichbehandlung für die Förderung der Gleichbehandlung ungeachtet der Rasse oder ethnischen Zugehörigkeit (und weiterer Gründe) zuständig. Diese Stelle wurde im April 2008 innerhalb der Kanzlei des Ministerpräsidenten eingerichtet (das GBG von 2010 stellte ihre Arbeit auf eine neue Rechtsgrundlage).<sup>43</sup> Wichtigste Aufgabe dieser Stelle ist die Umsetzung der Regierungspolitik im Bereich der Gleichbehandlung. Der Bevollmächtigte hat keine eigenen Mittel oder Räumlichkeiten, sondern nutzt die Kanzlei des Ministerpräsidenten.

Zum Schutz der Rechte von nationalen und ethnischen Minderheiten wurde mit dem Gesetz über nationale und ethnische Minderheiten und regionale Sprachen von 2005<sup>44</sup> ein *Gemeinsamer Ausschuss der Regierung und der ethnischen und nationalen Minderheiten* eingerichtet. Er besteht aus Vertretern mehrerer Ministerien und den Vertretern von Minderheiten und soll zu den folgenden Themenbereichen Stellungnahmen abgeben: die Rechte und Bedürfnisse von Minderheiten, einschlägige Programme und Gesetzesentwürfe und die Grundsätze der Verteilung und Höhe staatlicher Mittel, die für den Erhalt der kulturellen Identität von Minderheiten veranschlagt werden. Außerdem ist der Ausschuss für Maßnahmen zur Bekämpfung von Diskriminierung zuständig. 2008 wurde innerhalb des Ausschusses ein Team für Roma-Politik eingerichtet. Im Jahr 2013 richtete der Ministerpräsident durch eine Verordnung eine zusätzliche Stelle ein, den neuen Rat zur Bekämpfung von Rassendiskriminierung, Fremdenfeindlichkeit und damit zusammenhängender Intoleranz.

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<sup>42</sup> Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich.

<sup>43</sup> Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania.

<sup>44</sup> Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym.

Für Behindertenpolitik ist der Regierungsbevollmächtigte für Menschen mit Behinderungen zuständig. Zur Zuständigkeit des Bevollmächtigten, der formal beim Ministerium für Arbeit und Soziales angesiedelt ist, gehört vorwiegend die Umsetzung des Gesetzes für die berufliche und soziale Rehabilitation und Beschäftigung von Menschen mit Behinderungen.<sup>45</sup>

## **7. Wichtige Punkte**

Aufgrund der Kritik an dem Gesetz von 2010 durch die Ombudsstelle und NRO (mehrere Schwächen des GBG, wie die Entschädigungsregelung und die Einschränkungen bei der Umkehr der Beweislast wurden oben erwähnt) wurden zwei Neufassungen erarbeitet (2012 und 2013), mit denen das GBG verbessert und sein Geltungsbereich wesentlich erweitert werden sollten. Einer der Entwürfe wurde im Oktober 2012 dem Parlament vorgelegt. Leider sind parlamentarische Prozesse nicht besonders schnell und da im Herbst 2015 Parlamentswahlen stattfinden, gibt es so gut wie keine Chance, dass die Neufassung vorher angenommen wird. Nach Ansicht des Regierungsbevollmächtigten für Gleichbehandlung wäre es besser, die Wahl abzuwarten und ein völlig neues Gesetz zu verabschieden (das die neue Richtlinie zur Umsetzung des Grundsatzes der Gleichbehandlung berücksichtigt), anstatt das bestehende GBG zu überarbeiten.

Das größte Problem besteht aber offensichtlich darin, dass das GBG so extrem selten genutzt wird. Es gibt kaum Zahlen zu den Diskriminierungsfällen, die vor Gericht verhandelt werden (und die vorliegenden Zahlen sind fehlerhaft und nicht völlig zuverlässig). Dennoch zeigen die begrenzten Daten eindeutig, dass Opfer von Diskriminierung das GBG nur sehr selten nutzen und das Gesetz innerhalb von vier Jahren nur in einigen Fällen geltend gemacht wurde. Auch die Zahl der Fälle, die nach dem Arbeitsgesetz verhandelt werden und Diskriminierung im Arbeitsleben betreffen, ist relativ gering (50-100 Fälle im Jahr).

Im Jahr 2014 forderte eine Koalition aus mehreren NRO von allen polnischen Gerichten gemäß dem offiziellen Verfahren zur Einsicht in öffentliche Daten Informationen über alle Diskriminierungsfälle gemäß dem GBG. Alle 287 Gerichte legten Daten vor. Dabei wurde festgestellt, dass in vier Jahren nur fünf Klagen auf der Grundlage des GBG eingereicht worden waren (und davon in mehreren Fällen durch die Organisation, die die Studie durchführt). Dies zeigt deutlich, dass die Menschen das GBG von 2010 nicht zur Durchsetzung ihrer Rechte nutzen.

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<sup>45</sup> Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych.

## INTRODUCTION

### The national legal system

Legislative power in Poland is centralised. The basic law is the 1997 Constitution. Other sources of universally binding law include acts/statutes of Parliament (*ustawy*), ratified international agreements that become part of domestic law after ratification,<sup>46</sup> as well as ordinances/regulations (*rozporządzenia*) issued by a Minister or the Council of Ministers. Legislative power is exercised jointly by the Sejm and the Senate, the two chambers of Parliament. In order for a piece of legislation to be adopted, both chambers must consent and the President – who is empowered to employ the right of veto (which may be rejected in Parliament) – must sign it. The act must then be promulgated in the Journal of Laws.

### List of main legislation transposing and implementing the directives

Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment<sup>47</sup> (ETA)

Date of adoption: 3 December 2010

Latest amendments: 17 June 2013

Entry into force: 1 January 2011

Protected grounds: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation

Material scope: full scope as covered by Directives 2000/43/EC and 2000/78/EC: employment, access to goods and services (including housing), social protection, social advantages, education

Act on the Labour Code<sup>48</sup> (implementation amendment)

Date of adoption: 14 November 2003

Latest amendments: 4 March 2014

Entry into force: 1 January 2004

Protected grounds: gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a definite or indefinite period of time, employment part-time or full-time; the list remains open

Material scope: Employment

Act on the Commissioner for Civil Rights Protection<sup>49</sup> (implementation amendment)

Date of adoption: 3 December 2010

Latest amendments: 18 November 2011

Entry into force: 1 January 2011

Protected grounds: no grounds mentioned

Material scope: full scope (but between natural persons and the state/public institutions, not between private parties)

The Council of Ministers Ordinance on the Government Plenipotentiary for Equal Treatment<sup>50</sup> (the ordinance was the legal basis for the appointment of the Plenipotentiary prior to the adoption of the ETA; since its adoption, the ETA has become the legal basis, but the ordinance has not been repealed)

Date of adoption: 22 April 2008

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<sup>46</sup> For instance, the recently ratified UN Convention on the Rights of Persons with Disabilities, after ratification (September 2012) and publication in the Journal of Laws (October 2012), became part of binding domestic law.

<sup>47</sup> *Ustawa z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania* (hereafter as 'Equal Treatment Act' or 'ETA').

<sup>48</sup> *Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy* (hereafter 'Labour Code').

<sup>49</sup> *Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*.

<sup>50</sup> *Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania*.

Latest amendments: 30 June 2010

Entry into force: 30 April 2008

Protected grounds: gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status

Material scope: designation and competences of the Government Plenipotentiary for Equal Treatment (as described later on by the ETA)

## **1 GENERAL LEGAL FRAMEWORK**

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

The Polish Constitution includes the following article dealing with non-discrimination.

Article 32: '(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by the public authorities. (2) No-one shall be discriminated against in political, social or economic life for any reason whatsoever.'

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

'This means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of distinction which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which a distinction may occur'.<sup>51</sup>

The constitutional anti-discrimination provisions are directly applicable. The Constitution stipulates that its provisions are directly applicable unless the Constitution itself states otherwise.<sup>52</sup> Thus the presumption is in favour of the direct applicability of constitutional provisions. However, to a significant extent, this remains theoretical. It is not easy to put the concept of direct applicability into operation before a court, because in judicial proceedings it is necessary to use the existing legal and procedural framework and adjust the constitutional argument to it. In Poland there is little precedent for invoking constitutional provisions directly, in particular, and the courts are not used to doing so.

There also exists a special procedure described in Article 193 of the Constitution which reads: 'Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue currently before such a court.' This possibility is used by Polish judges when they face the problem of the constitutionality of a law being the legal basis for the verdict in a particular case.

The constitutional equality clauses can 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.

In addition to the general clause, the Constitution includes the following relevant provisions:

- Article 13: bans political parties and other organisations which include or allow racial hatred in their programme or activities;
- Article 25: principle of the equal rights of religious associations;
- Article 33.1, 33.2: both women and men have equal rights in family, political, social and economic life and, in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.;
- Article 35.1: guarantees people the freedom to preserve and develop their own language, preserve customs and traditions and develop their own culture;
- Article 35.2: national and ethnic minorities have the right to establish their own educational, cultural and religious institutions;
- Article 53, 54.1, 58.1 and 60: freedom of conscience and religion, freedom of expression, freedom of association and the right of access to public services are

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<sup>51</sup> Judgment of the Constitutional Tribunal of 16 December 1997, K. 8/97.

<sup>52</sup> Article 8.2 of the Constitution of the Republic of Poland as adopted by the National Assembly on 2nd April 1997 (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku).



equally safeguarded for all Polish citizens, including members of national and ethnic minorities;

- Article 67.1: people unable to work due to illness or disability and people who have reached the age of retirement are guaranteed the right to social security;
- Article 69: public authorities must provide, in accordance with statutes, assistance to people with disabilities to ensure their subsistence, adaptation to work and social communication.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law.

The 2010 Equal Treatment Act (Article 1) contains an exhaustive list of grounds of discrimination: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. In the description of the competences of the Government Plenipotentiary for Equal Treatment (see below) it uses the phrase 'in particular' before listing grounds, therefore not limiting it to those mentioned.

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

The Act on National and Ethnic Minorities and Regional Languages prohibits discrimination on the ground of belonging to such a minority, thus reinforcing the principle contained in the Constitution and the Labour Code.<sup>53</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 (paragraph 2.1.1) that the Plenipotentiary shall implement government policies on equal treatment, 'including counteracting discrimination in particular because of gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status'. However, it should be mentioned that the ordinance was the legal basis for the appointment of the Plenipotentiary prior to the adoption of the ETA; since its adoption, the ETA has become legal basis, but the ordinance has not been repealed (the two list of grounds differ slightly, as the ordinance also includes civil /marital/ and family status).

The Social Security Act<sup>54</sup> (Article 2a.1) lists as protected grounds gender, race, ethnic origin, nationality, family and marital status.

The Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market<sup>55</sup> (Article 2a) lists as protected grounds gender, race, ethnic origin, nationality, religion or beliefs, political convictions, disability, age or sexual orientation.

The Capital-based Pensions Act<sup>56</sup> (Article 2) lists gender, race, ethnic origin, nationality, state of health, family and marital status.

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<sup>53</sup> Act on National and Ethnic Minorities and Regional Languages, passed on 6 January 2005 and entered into force on 1 May 2005 (last amendment 30 May 2014, entered into force 9 July 2014, see Section 12.1 below), Articles 1 and 6, (*Ustawa z 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*) [hereafter 'Minorities Act'].

<sup>54</sup> Poland, Act of 13 October 1998 on the Social Security System, as amended (*Ustawa z 13 października 1998 r. o systemie ubezpieczeń społecznych*) [hereafter 'Social Security Act'].

<sup>55</sup> Poland, Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market, as amended [hereafter 'Employment Act'] (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*).

<sup>56</sup> Poland, Act of 21 November 2008 on Capital-based Pensions (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).

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

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

There are, however, some definitions in other Acts of law.

#### Ethnic origin

The definition of an ethnic minority and the definition of a national minority that could be used in disputes under anti-discrimination law are included in the Act on National and Ethnic Minorities and Regional Languages:

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

- 1) is less numerous than the rest of the Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;
- 4) has awareness of its historic national community and is focused on its expression and protection;
- 5) has inhabited the territory of the Republic of Poland for at least 100 years; and
- 6) identifies itself with a nation organised in its own state.<sup>57</sup>

The Act then goes on to enumerate the recognised national minorities: Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish.<sup>58</sup>

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

- 1) is less numerous than the rest of the Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;
- 4) has awareness of its historic national community and is focused on its expression and protection;
- 5) has inhabited the territory of the Republic of Poland for at least 100 years;
- 6) does not identify itself with a nation organised in its own state.<sup>59</sup>

Then, as above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.<sup>60</sup>

The above definitions are criticised for two reasons. First, 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 Regional Languages is, however, to provide certain rights, mostly linguistic and cultural rights, to national and ethnic minorities, as well as to protect them through state action (in 2014 social integration was added as a goal, see more in Section 12.1 below). Article 6 of the Act on National and Ethnic Minorities and Regional Languages prohibits discrimination based on membership of

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<sup>57</sup> Article 2.1 Minorities Act.

<sup>58</sup> Article 2.2 Minorities Act.

<sup>59</sup> Article 2.3 Minorities Act.

<sup>60</sup> Article 2.4 Minorities Act.

a minority. This provision clearly refers only to the national and ethnic minorities provided for in the law.

#### Race

Polish anti-discrimination law does not provide a definition of racial discrimination or of race or ethnic origin.

The 2008 amendment to the Act on granting protection to aliens on the territory of the Republic of Poland,<sup>61</sup> which transposed the Qualification Directive<sup>62</sup> and the Asylum Procedures Directive,<sup>63</sup> is not part of anti-discrimination legislation, but it also includes some definitions new to the Polish legal order (although their usage in anti-discrimination law is only theoretical since no cases using these definitions have been identified). Article 14 of the Act includes some definitions useful in 'assessing the grounds of persecution' of people who apply for refugee status:

- 'the concept of race includes in particular colour of skin, descent, or membership of a particular ethnic group' and 'the concept of nationality is not limited to a citizenship or its absence, but shall in particular include membership of a group defined by: a) cultural, ethnic or linguistic identity or b) common geographical or political origin or c) linkage with the population of another country [...]';
- 'the concept of religion shall in particular include: a) having theistic, non-theistic or atheistic beliefs, b) participation, or refraining from participation, in religious rituals, performed in public or in private, individually or collectively, c) other acts of a religious character, beliefs expressed or form of individual or collective behaviour as a result of religious beliefs or related to them';
- 'depending on the conditions prevailing in the country of origin, a particular social group might include a group whose members share a common sexual orientation, but sexual orientation cannot include acts which, according to Polish law, constitute crimes'.

#### Disability

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 people with disabilities,<sup>64</sup> stipulating that they are people whose disability has been confirmed by a competent medical authority.<sup>65</sup> Elsewhere, disability is defined as a permanent or temporary inability to carry out social roles due to a permanent or long-term disturbance of performance of the human organism, in particular, resulting in incapacity to work.<sup>66</sup> There are three levels of disability: slight, moderate and severe.<sup>67</sup>

The above definition may be of some help in clarifying what disability means for the purposes of the Labour Code (which itself does not contain a definition of disability). It is important to stress that the Disabled Persons Act refers only to those disabilities which are

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<sup>61</sup> Poland, Act of 18 March 2008 on the amendment of the Act on granting protection to aliens on the territory of Poland and other Acts of Parliament, in force since 29 May 2008, Journal of Laws 2008, no 70, item 416 (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*).

<sup>62</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>63</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>64</sup> Poland, Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*) [hereafter 'Disabled Persons Act'].

<sup>65</sup> Article 1 Disabled Persons Act.

<sup>66</sup> Compare Article 2.10 Disabled Persons Act.

<sup>67</sup> Article 3.1 Disabled Persons Act.

registered by the 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 this event, the court must decide itself whether the person concerned is disabled or not. The court may take into account the definition contained in the Disabled Persons Act, but it may go beyond this definition. There may be disabilities which do not qualify as disability under the Act, but whereby people may nevertheless be subject to discrimination or may feel themselves to be disabled.

According to Article 69 of the Polish Constitution (1997), 'Public authorities shall provide, in accordance with statutes, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication'. A commentary on the Constitution points out the open character of the term 'disability'.<sup>68</sup> In particular, it says that, in relation to the meaning of 'disability', the drafters of the Constitution took into account the recommendations of the Committee of Ministers of the Council of Europe of 1992 as well as the Disabled Persons Act. The Constitution provides a much broader definition of 'disability' than the Disabled Persons Act, which provides that 'disability' is 'any impairment or lack, resulting from damage, of the ability to perform certain activities in a way regarded as normal for human beings'. This means that under the Constitution 'disability' has an independent meaning, not restricted by any decision of the medical authorities.

Similarly, under the Labour Code the term is also defined independently, not restricted to the meaning contained in the Disabled Persons Act.

Thus there are differences between the concepts of disability adopted by the CJEU and Polish definitions. While the CJEU focuses on the interaction between impairments and environmentally created barriers, Polish definitions focus exclusively on impairments.

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

Finally, the definition contained in the UN Convention on the Rights of Persons with Disabilities (the Convention was ratified on 6 September 2012) may be used. In fact, reference may already be made to the guidance in the UNCRPD on the concept of disability before a court or administrative body (once ratified, an international treaty becomes a source of domestic law and may be relied on in court and administrative proceedings).

### **2.1.2 Multiple discrimination**

In Poland prohibition of multiple discrimination is not included in the law.

However some Polish laws stipulates that discrimination might occur on the basis of one or more grounds but does not treat the situation of multiple discrimination differently (the anti-discrimination provisions of the Labour Code, for example, provide definitions of direct and indirect discrimination that refer to 'one or several grounds'). However, the 2010 Equal Treatment Act does not mention the possibility of 'several grounds', listing the grounds of discrimination separately. In recent draft laws (2012) (see more in Section 12.1 below) the multiple discrimination concept has been introduced.<sup>69</sup>

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<sup>68</sup> Garlicki L. (ed.) (2003), *Komentarz do Konstytucji RP* (Commentary on the Polish Constitution), Wydawnictwo Sejmowe, Volume III, Warsaw.

<sup>69</sup> Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012, Warsaw, 2013, (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.*, Warszawa 2013) (hereafter 'Plenipotentiary Annual Report 2013'), p. 14-17, and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

In Poland the cases of discrimination on more than one ground may be adjudicated under the law in force, despite the lack of a definition of multiple discrimination. However, they are not treated in any special way and, in fact, in most cases it is enough for the court to identify one ground of discrimination. Legislation dealing with multiple discrimination would therefore definitely be useful.

Usually, in cases of discrimination on the ground of gender plus other grounds, courts tend to focus on the gender discrimination and once this has been proved do not devote any attention to other causes of discrimination. A good example to illustrate this issue is discrimination in cases of 'forced retirement' when employees are dismissed on reaching retirement age. Since the retirement age for women was for many years lower than for men (as a general rule 60 for women and 65 for men),<sup>70</sup> cases of forced retirement for women were treated by the courts as gender discrimination and the issue of age discrimination never attracted any attention (gender discrimination prevailed over age discrimination). However, similar cases involving men were treated as age discrimination. Only in 2009 did the Supreme Court state in a resolution that such cases involve two kinds of discrimination – indirect discrimination because of gender and direct discrimination on the ground of age.<sup>71</sup>

Occasionally, cases do occur where more than one ground of discrimination is identified. In one case, for instance, the district and regional courts identified discrimination on the grounds of sexual orientation and of harassment (mainly on the grounds of sexual orientation and obesity).<sup>72</sup>

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

#### **a) Discrimination by assumption**

In Poland the national law does not prohibit discrimination based on perception or assumption of what a person is.

In recent draft laws (2012) (see more in Section 12.1 below) the assumed discrimination concept has been introduced.<sup>73</sup>

#### **b) Discrimination by association**

In Poland national law does not prohibit discrimination based on association with people with particular characteristics.

One court ruling has thus far been identified (2014) that introduced the concept of discrimination by association<sup>74</sup> (see Section 12.2 below). This is the verdict of a district court and is not yet final.

In draft amendments (never passed) to the ETA (2012) (see more in Section 12.1 below) the concept of discrimination by association has been introduced.<sup>75</sup>

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<sup>70</sup> In May 2012, the retirement age was changed by Parliament. The normal retirement age for both men and women will be 67 (to be introduced incrementally – for men by 2020 and for women by 2040; every year, starting from 2013, three months are to be added to the retirement age).

<sup>71</sup> Supreme Court resolution of 21 January 2009.

<sup>72</sup> See Słubice District Court judgement, 18 June 2012, sygn. akt IV P 30/11 and Gorzów Wielkopolski Regional Court judgement, 27 November 2012, VI Pa 56/12 (not published).

<sup>73</sup> See Plenipotentiary Annual Report 2013, p. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

<sup>74</sup> The District Court Warszawa Śródmieście, 9 July 2014; PTPA on behalf of XY v. Company Z, sygn. VI C 402/13, not published.

<sup>75</sup> See Plenipotentiary Annual Report 2013, p. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

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

### a) Prohibition and definition of direct discrimination

In Poland, direct discrimination is defined and prohibited in national law.

The 2010 Equal Treatment Act (Article 3.1) defines direct discrimination in line with the EU Equality Directives. It stipulates that direct discrimination takes place when 'a natural person because of their 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, the definition in the Labour Code is still in force. This is slightly different and erroneous, most probably due to a translation error. In Article 2.2a of Directive 2000/43/EC, the 'hypothetical' nature refers to the behaviour to which the discriminatory treatment is being compared (treatment of another person in a comparable situation) and not the discrimination itself, in contrast with the Labour Code which reads (Article 18<sup>3a</sup>(3)): 'Direct discrimination takes place when an employee, for one or more reasons listed in paragraph 1, was, is, or may be treated, in a comparable situation, less favourably than other employees'. However, this erroneous translation has had no practical consequences so far and remains rather an academic issue.

### b) Justification of direct discrimination

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

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

However, Polish law<sup>76</sup> permits justification of both direct and indirect discrimination in respect of all grounds in the field governed by the Labour Code. In accordance with the Code, in order to justify different treatment that leads to a breach of the principle of equal treatment in employment, the employer must prove the existence of 'objective reasons' for his/her actions.<sup>77</sup> As regards the specified 'exclusion' situations, see below, Section 2.3.b.

### 2.2.1 Situation testing

#### a) Legal framework

In Poland the law is silent regarding situation testing.

#### b) Practice

In Poland situation testing is sometimes (not officially) used in practice.

Polish law does not specifically mention 'situation testing'. It could be argued that, based on the general provisions for court procedures, this kind of evidence could be admissible,

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<sup>76</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code (*Dz.U. Nr 223, poz. 1460, 18 December 2008*), in force since 18 January 2009.

<sup>77</sup> Article 18<sup>3b</sup> (1) in fine, Labour Code.

but since there have been almost no relevant cases before the courts (i.e. cases officially adjudicated on the basis of situation testing), this is only a theoretical assumption – judicial interpretation of the civil and criminal procedure codes is needed.<sup>78</sup>

Although the testing method has not been officially used in order to prepare evidence for a court case, it is known and has been used in a number of situations, mainly by NGOs<sup>79</sup> and the media, especially with regard to people with disabilities. For instance, testers attempt to enter public and other buildings in wheelchairs. However, it has been used more as an awareness-raising or public relations tool rather than for legal purposes.

In one case in 2012,<sup>80</sup> the court did accept a video recording as one piece of evidence among others proving that people of Roma origin were refused entry to a club.

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

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

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

In Poland, indirect discrimination is defined and prohibited in national law.

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

It may be noted that the above definition lacks a direct mention of the comparator ('compared with other persons', as the Directives put it). It must therefore be interpreted that 'unfavourable differences or particular disadvantage' includes implied 'other persons' with whom a comparison can be made.

Simultaneously, the definition of indirect discrimination formulated in the Labour Code, and amended in 2008, is still valid in the employment field.<sup>81</sup> According to the Labour Code

<sup>78</sup> See similar, more detailed argumentation, in: K. Wencel (2010), 'Owoc zatrutego drzewa? Situation testing jako dowód w sprawach o dyskryminację', in *Sąsiedzi czy intruzy. O dyskryminacji cudzoziemców w Polsce* ('Fruit of the poisonous tree? Situation testing as a proof in discrimination cases', in: *Neighbours or intruders. Discrimination against foreigners in Poland*, Stowarzyszenie Interwencji Prawnej, Warsaw [www.interwencjaprawna.pl/publikacje-do-pobrania.html](http://www.interwencjaprawna.pl/publikacje-do-pobrania.html) (last accessed 1 May 2015).

<sup>79</sup> In April 2014 the Polish Association of Anti-discrimination Law (*Polskie Towarzystwo Prawa Antydyskryminacyjnego*) launched a project called Situation Testing Academy (*Akademia Testów Dyskryminacyjnych*). Between June and December 2014, 15 NGO activists were trained in how to use testing. This may bring noticeable changes in the future use of this tool. See more at <http://ptpa.org.pl/public/files/Zaproszenie.pdf> and <http://ptpa.org.pl/archiwum/?2014-03-25-akademia-testow-dyskryminacyjnych&nid=436&p=1> (last accessed 15 April 2015).

<sup>80</sup> Case A.G. v. K. L.-B., Poznań Appellate Court, 29 February 2012, sygn. Akt I ACA 1162/11.

<sup>81</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.



indirect discrimination takes place when, due to an apparently neutral provision, criterion used or practice/action undertaken unfavourable differences or particular disadvantage occur or could occur in terms of the establishment and termination of employment, conditions of employment, promotion, and access to training for enhancing professional qualifications, for all or a large number of employees who are members of a group distinguished on one or more of the grounds referred to in § 1, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>82</sup>

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

#### b) Justification test for indirect discrimination

The definition of indirect discrimination as quoted above has only been in force since 1 January 2011 (definition from the Equal Treatment Act) and since 18 January 2009 (definition from the Labour Code). Both the concepts of a 'legitimate aim' and 'appropriate and necessary measures' are also new, therefore it is difficult to say – due to the lack of relevant case law – how they would be treated by the courts (previously, disproportionate treatment could simply be justified 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 proportionate to achieving a legitimate aim, do not amount to a violation of the principle of equal treatment:<sup>83</sup>

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

In addition, measures taken as positive discrimination are allowed under Polish legislation.<sup>84</sup>

#### c) Comparison in relation to age discrimination

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

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<sup>82</sup> Article 18<sup>3a</sup>(4) (amended), Labour Code.

<sup>83</sup> Article 18<sup>3b</sup>(2) (amended), Labour Code.

<sup>84</sup> Article 18<sup>3b</sup>(3), Labour Code.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Poland there are national rules permitting data collection.

On the one hand there is constitutional protection for scientific research (Article 73), but on the other hand, according to the Constitution, everyone has 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>85</sup> Furthermore, no one may be obliged, except on the basis of an Act of Parliament, to disclose personal information.<sup>86</sup>

Article 27.1 of the Personal Data Protection Act<sup>87</sup> introduces a prohibition of the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, political 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 Article 27.1 does not constitute a breach of the Act where:

- 1) the data subject has given their 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 their consent until the appointment of a guardian or a curator;
- 4) processing is necessary for the purposes of carrying out the official 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 the provision of appropriate safeguards for the processed data;
- 5) processing relates to data necessary to pursue a legal claim;
- 6) processing is necessary for the purposes of carrying out the obligations of the data controller with regard to the employment of their employees and other persons and the scope of processing is provided for by the law;
- 7) processing is required for the purposes of preventive medicine or the provision of care or treatment, where the data are processed by health professionals involved in treatment or provision of other healthcare services or the management of healthcare services if full safeguards of personal data protection are provided;
- 8) the processing relates to data which were made publicly available by the data subject;
- 9) it is necessary to conduct scientific research, including in preparation of a thesis required for graduating from university or receiving a degree; results of scientific research must not be published in a way which allows data subjects to be identified;
- 10) data processing is conducted by a party in order to exercise the rights and duties resulting from decisions issued in court or administrative proceedings.

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<sup>85</sup> Article 47 of the Constitution.

<sup>86</sup> Article 51.1 of the Constitution.

<sup>87</sup> Poland, Act of 29 August 1997 on Personal Data Protection [amended] (*Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych*).

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

In accordance with the general framework set out in the Personal Data Protection Act, the Public Statistics Act<sup>88</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 individuals involved.<sup>89</sup> This is why, in the current legal framework, sensitive personal data regarding discrimination on the grounds of sex, age, disability, racial or ethnic origin, nationality, religion, political beliefs, membership of trade unions and sexual orientation can only be collected by the Ministry of Justice (or other state bodies) on a voluntary basis.

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

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

An exceptional situation occurs when a national census is organised – in such a case providing information might be obligatory but requires a special Act of Parliament as a legal basis.<sup>90</sup> The results of the national census are a major source of statistical data, although not a very detailed one. The last two national censuses took place in 2002 and 2011 and their results show, for instance, the ethnic composition of society (questions relate, for example, to citizenship, nationality, affiliation to another nation or ethnic group, country of birth and country of birth of both parents, mother tongue and language spoken at home), religion and beliefs, and numbers of persons with disabilities.

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

When designing positive action, there are also ways of obtaining more detailed information and statistics: via schools' administrations (for instance, the number of Roma pupils in order to organise a system of Roma education assistants or the number of pupils from ethnic minorities in order to plan special subsidies for schools); or via public information stemming, for instance, from the payment of special allowances (people with disabilities), employers who apply for special subsidies or organisations dealing with particular grounds of discrimination (for instance disability) in order to create positive action for people with disabilities. Generally, data on people with disabilities is quite detailed due to the number of programmes catering for this group. For instance, in 2012 the Central Statistical Office published research findings and data regarding *People with disabilities on the labour market* (*Osoby niepełnosprawne na rynku pracy*) and organised research on the participation of people with disabilities in sport and physical recreation.<sup>91</sup>

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<sup>88</sup> Poland, Act of 29 June 1995 on Public Statistics [amended] (*Ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej*).

<sup>89</sup> Article 8 Public Statistics Act.

<sup>90</sup> Article 9.1 Public Statistics Act.

<sup>91</sup> Information on the activities of the Civil Rights Commissioner in the year 2012 and on the observance of human rights and freedoms. Part two: Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2012 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw 2013 (*Informacja o działalności Rzecznika Praw Obywatelskich w roku 2012 oraz o stanie przestrzegania wolności i praw człowieka i obywatela. Część 2. Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2012 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa 2013), available at <http://www.senat.gov.pl/gfx/senat/userfiles/public/k8/dokumenty/druki/300/345.pdf> (last accessed 15 May 2015), [hereafter 'Ombud Annual Report 2013'], p. 448.

In recent years, the government has designed special positive action for people aged over 50 in order to include them in the labour market. This action was planned on the basis of statistical data showing that a large number of people aged over 50 are excluded from the labour market. In 2012 the Central Statistical Office published data regarding *Persons aged 50+ on the labour market (Osoby powyżej 50. Roku życia na rynku pracy)*.<sup>92</sup>

Finally, it is worth mentioning that the Government Plenipotentiary for Equal Treatment decided to task the Central Statistical Office with collecting data on discrimination. It was agreed in 2012 that the Plenipotentiary would work with experts to develop the statistical indicators that are needed in order to effectively monitor the phenomenon of discrimination.<sup>93</sup>

In 2013 the Central Statistical Office published research findings on national and ethnic minority civil society organisations (*Stowarzyszenia narodowościowe i etniczne*). This is regular research, but this time it also included data on discrimination. Out of 133 associations that took part in the research, 24 (18%) declared that they were approached by people alleging they had been treated unequally because of their nationality or ethnic origin.<sup>94</sup>

According to the National Programme of Activities for Equal Treatment (adopted in 2014), the Central Statistical Office together with the Government Plenipotentiary for Equal Treatment are tasked with developing more statistical indicators for discrimination.<sup>95</sup> In future data collection more indicators should be included and therefore more data on discrimination should be available.

In Poland statistical evidence is not verbatim permitted by national law in order to establish indirect discrimination.

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

## b) Practice

In Poland statistical evidence in order to establish indirect discrimination is not used in practice.

There have not been any cases involving either direct or indirect discrimination where statistics were used in order to prove discrimination.<sup>96</sup>

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<sup>92</sup> Ombud Annual Report 2013, p. 448.

<sup>93</sup> Plenipotentiary Annual Report 2013, p. 20.

<sup>94</sup> Report on the activity of the Human Rights Defender in the area of the equal treatment in 2013 and the observance of the principle of equal treatment in the Republic of Poland, Warsaw 2014 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2013 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa 2014) [hereafter 'Ombud Annual Report 2014'], p. 87.

<sup>95</sup> Report on the execution of the National Programme of Activities for Equal Treatment for 2014 (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2014 r.*), May 2015, [hereafter 'Report on the National Programme 2015'], p. 14-15.

<sup>96</sup> From the interviews conducted to update this report.

## 2.4 Harassment (Article 2(3))

### a) Prohibition and definition of harassment

In Poland, harassment is defined and prohibited in national law.

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

The Act also treats as unequal treatment and prohibits less favourable treatment of people caused by rejection of harassment or submission to harassment and, in addition, prohibits instructions to discriminate/harass – both encouraging and ordering discrimination/harassment (Article 3.5, Article 9).

The same definition (corrected and significantly broader than before), in relation to employees, was introduced into the Labour Code in 2008.<sup>97</sup> The amended provision defines harassment as unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>98</sup>

A new provision was also added stating that, 'Submission of an employee to harassment or sexual harassment, as well as the taking of actions rejecting (counteracting) harassment or sexual harassment, may not result in any adverse consequences for the employee'.<sup>99</sup>

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

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

- the use of violence or unlawful threat towards a group of people or an individual person on account of their national, ethnic or racial origin, political or religious affiliation or because of their lack of religious belief;<sup>100</sup>
- restricting the rights of an individual on account of their religious affiliation or lack of religious belief;<sup>101</sup>
- malicious or persistent violation of an employee's rights stemming from an employment contract or social security;<sup>102</sup>
- refusal to re-employ a person whose reinstatement was decided by the appropriate institution;<sup>103</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>104</sup>
- public insulting of a group of people or an individual person on account of their national, ethnic or racial origin or religious affiliation or because of their lack of

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

<sup>98</sup> Article 183a(5) point 2 (amended), Labour Code.

<sup>99</sup> Article 183a(7), Labour Code.

<sup>100</sup> Article 119.1 Penal Code.

<sup>101</sup> Article 194 Penal Code.

<sup>102</sup> Article 218.1a Penal Code.

<sup>103</sup> Article 218.2 Penal Code.

<sup>104</sup> Article 256 Penal Code.

religious belief, or infringement of the physical integrity of another person on these grounds.<sup>105</sup>

In Poland harassment does explicitly constitute a form of discrimination. Both sexual harassment and harassment are treated as forms of discrimination and thus are prohibited in both the Equal Treatment Act and the Labour Code.

b) Scope of liability for harassment

There is no significant case law on harassment in Poland.

Where harassment is perpetrated by an employee, in Poland the employer is liable.

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

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

In general, on the basis of the Civil Code (Article 430) a person who on their own account entrusts the performance of an act to another person, who in performing of that act is subject to their control and under a duty to comply with their instructions, is liable for any damage caused through the fault of that person in the course of them performing the act in question.

In addition, the State Treasury is responsible for actions causing damage which is perpetrated by a public servant in the course of their duties (Article 417).

In the case of damage caused by discriminatory acts – most probably non-material damage – the employer (the State or 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, such as the fact that there must be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the issue of the employer's responsibility for the actions of their employees.

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

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

a) Prohibition of instructions to discriminate

In Poland, instructions to discriminate (encouraging and ordering) are prohibited in national law. Instructions are defined as encouraging and ordering.

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

Instructions to discriminate are also prohibited in employment by the Labour Code. The provision of the Labour Code regarding instructions to discriminate was broadened in

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<sup>105</sup> Article 257 Penal Code.

2008,<sup>106</sup> and now covers both encouraging (which existed before) and ordering (which was added) infringement of the principle of equal treatment with respect to another person.<sup>107</sup>

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

In Poland instructions do explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

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

A compensation claim as introduced by the 2010 Equal Treatment Act (Article 13) is governed by the general rules of the Civil Code and Code of Civil Procedure. No specific provisions are included in the Act: a person who has incurred damage due to instructions to discriminate can seek compensation according to general principles.<sup>108</sup>

In general, on the basis of the Civil Code (Article 430), a person who on their own account entrusts the performance of an act to another person, who in performing that act is subject to their control and is under a duty to comply with their instructions, is liable for any damage caused through the fault of that person in the course of them performing the act in question.

An interesting case in this respect was decided by the Poznań Court of Appeal in 2012 in relation to the liability of a club owner for the discriminatory actions of the club's security guards who were not employees but a separate company hired by the owner. Both the security guards and the club owner admitted that the owner had asked the security guards not to admit Roma customers. The court of appeal reversed the ruling of the first instance court and ruled that restriction of access to the club based on ethnic origin constituted an infringement of the right to personal dignity as protected by the Civil Code. The Court also stated that even though the club's security was provided by an external company, the club's owner bore responsibility for the actions and harm caused by the security guards.<sup>109</sup>

In addition, the State Treasury is responsible for actions causing damage which is perpetrated by a public servant in the course of their duties.<sup>110</sup>

In the case of damage caused by discriminatory acts – most probably non-material damage – the employer (the State or 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, such as the fact that there must be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the issue of the employer's responsibility for the actions of their employees.

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

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<sup>106</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>107</sup> Article 18<sup>3a</sup> (5) point 1 (amended) in relation to Article 11<sup>3</sup> Labour Code.

<sup>108</sup> Article 13 Equal Treatment Act, Article 415 Civil Code.

<sup>109</sup> A.G. v. K. L.-B., Poznań Court of Appeal, 29 February 2012, sygn. Akt I ACA 1162/11).

<sup>110</sup> Article 417 Civil Code.

According to general penal rules, if instructions to discriminate lead a person to commit a crime, the person who issued the instructions may be held criminally responsible for directing or instructing the perpetration of the crime, or aiding or instigating it.<sup>111</sup>

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

- a) Implementation of the duty to provide reasonable accommodation in the field of employment

In Poland the duty to provide reasonable accommodation is defined and included in the law.

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

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

In addition, some provisions and practice from before the implementation of the duty may still be of significance for a proper understanding of the whole picture.

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>112</sup> issued on the basis of the Labour Code,<sup>113</sup> provides that, 'workstations shall be organised according to the psychological and physical characteristics of employees'<sup>114</sup> as well as requiring that 'an employer who employs people with disabilities shall ensure the adjustment of workstations and routes to them in accordance with the needs and abilities of disabled employees, resulting from their reduced ability/mobility'.<sup>115</sup>

Improvement of the employment and working conditions of disabled people is also promoted through economic incentives under the system of quotas and penalties contained in the 1997 Disabled Persons Act. Employers who, for at least 36 months, employ disabled person/people (who were unemployed or seeking work while not holding a job and were

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<sup>111</sup> Article 18.1-3 Penal Code.

<sup>112</sup> Poland, Ordinance of 26 September 1997, as amended (*Rozporządzenie ministra pracy i polityki socjalnej z dnia 26 września 1997 r. w sprawie ogólnych przepisów bezpieczeństwa i higieny pracy*).

<sup>113</sup> Article 237 (15), Labour Code.

<sup>114</sup> Section 45.1, Ordinance on general provisions on health and safety at work.

<sup>115</sup> Section 48, Ordinance on general provisions on health and safety at work.



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 workstations to the needs of disabled people and creating new workstations, for adapting or buying equipment to facilitate the functioning of people with disabilities in the workplace, and for the identification by occupational health services of the relevant needs of people with disabilities.<sup>116</sup>

The amendment of 20 December 2002 of the Disabled Persons Act introduced the definition of a workstation adapted to the needs of a disabled person. This is a workstation which is suitably equipped and adapted to the needs arising from the type and degree of disability of the individual.<sup>117</sup>

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

- limitations as to maximum working time: eight hours a day, 40 hours a week for slight disability and seven hours a day, 35 hours a week for moderate and severe disability;<sup>118</sup>
- a disabled person cannot be employed for night shifts and cannot work overtime;<sup>119</sup>
- a disabled person has the right to an additional break of 15 minutes which should be treated as working time;<sup>120</sup>
- people with moderate and severe disabilities have the right to additional holiday of 10 working days;<sup>121</sup>
- people with moderate and severe disabilities have the right to a leave of absence from work of up to 21 days per year whilst retaining their right to remuneration.<sup>122</sup>

It could be asked to what extent the above-mentioned measures could themselves constitute discrimination. They are targeted at the whole group of people with disabilities and not at individuals. Thus a disabled person may sometimes receive better working conditions even though they do not need them, e.g. exemption from night shifts and overtime work.

In addition, 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 alternative position for that individual.<sup>123</sup>

## b) Practice

Since the ETA entered into force on 1 January 2011 there has been very little jurisprudence on the issue.

In one of its judgments, the Supreme Court emphasised the fact that the obligation to provide reasonable accommodation should be interpreted in line with recital 20 of the

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<sup>116</sup> Article 26 Disabled Persons Act.

<sup>117</sup> Article 2.8 Disabled Persons Act.

<sup>118</sup> Article 15.1-2 Disabled Persons Act.

<sup>119</sup> Article 15.3 Disabled Persons Act. This limitation does not include night watch services (security) and a situation where a disabled person applies to work night shifts or overtime and the competent medical doctor consents, see Article 16 of the Act.

<sup>120</sup> Article 17 Disabled Persons Act.

<sup>121</sup> Article 19.1 Disabled Persons Act. This entitlement does not operate if an individual already has the right to holiday of more than 26 working days or is entitled to other additional holiday.

<sup>122</sup> Article 20.1 Disabled Persons Act.

<sup>123</sup> Article 14 Disabled Persons Act.

preamble to Directive 2000/78/EC and extends beyond accommodating the premises or equipment to cover accommodating working time and distribution of duties.<sup>124</sup>

Another rather important case that attracted a lot of attention and discussion was the Supreme Court judgement of 12 April 2012.<sup>125</sup> A junior prosecutor (*asesor*) was dismissed because, according to the regional prosecutor, as a disabled person she could not perform all the duties of a prosecutor. She challenged the dismissal and finally lost the case in the Supreme Court. The substance of the verdict was as follows:

1. the assessment of whether a prosecutor with a disability is able to perform the duties depends on the circumstances of the particular case, in which an important role is played by the degree of disability (limitation of physical fitness) and the terms of reference (scope of tasks) of the prosecutor;
2. health condition, at a level sufficient to perform all prosecution tasks in flexible working hours, is a genuine and determining occupational requirement for the district prosecutor (junior prosecutor);
3. the elimination from the scope of activities of the district prosecutor (junior prosecutor) of the duties performed outside the prosecutor's office and demanding physical effort, duties of the same importance for the proceedings as other prosecutorial activities, does not constitute reasonable accommodation.

c) Definition of disability and non-discrimination protection

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

d) Duties to provide reasonable accommodation outside the field of employment

In Poland, there is no duty to provide reasonable accommodation for people with disabilities outside the employment field.

The Disabled Persons Act (amended by the 2010 ETA) limits the obligation to provide reasonable accommodation to the employment field.

However, there are some developments in the sphere of education. 'Promotion of reasonable accommodation in education' is one of the activities described in the National Programme of Activities for Equal Treatment (for the years 2013-2016).<sup>126</sup> Various activities have been undertaken, such as financial support for students and PhD students with disabilities.

There are also some provisions in other Acts which could be mentioned in this context. For instance, the special Ordinance of the Minister of National Education on conditions for the organisation of education, developmental support and care for children and young people with disabilities and behavioural issues in mainstream and integrated pre-school facilities,

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<sup>124</sup> Judgment of 12 May 2011; II PK 276/10. But this opinion of the Supreme Court was formulated as an aside, in the very last sentence of the judgement. The case was initiated in 2008, some years before the introduction of the reasonable accommodation duty in Poland by the ETA (in force since 1 January 2011). However, the Supreme Court ruled in 2011, four months after the change in the law, and it simply decided to point out the new legal situation for future reference.

<sup>125</sup> Judgment of 12 April 2012; II PK 218/11 (<http://www.lexlege.pl/orzeczenie/228777/ii-pk-218-11-wyrok-sadu-najwyzszego-izba-pracy-ubezpieczen-spolecznych-i-spraw-publicznych/>).

<sup>126</sup> Report on the National Programme 2015, p. 95.

schools and classes<sup>127</sup> creates a number of obligations for schools, including providing appropriate conditions for learning, specialised equipment, support for parents, etc. It is, however, general in nature and does not deal with the issue of 'reasonableness'.

According to the Ordinance of the Minister of National Education and Sport on health and safety in state and non-state schools [...],<sup>128</sup> places for practical learning should be appropriately accommodated to the needs of disabled children. The needs of people with disabilities should also be taken into consideration when planning activities outside the school.

e) Failure to meet the duty of reasonable accommodation

In Poland failure to meet the duty of reasonable accommodation does count as discrimination.

The failure to provide necessary reasonable accommodation is deemed an infringement of the principle of equal treatment in employment within the meaning of Article 18<sup>3a</sup> (2-5) of the Labour Code<sup>129</sup> (which prohibits and defines direct discrimination, indirect discrimination, harassment and instructions to discriminate).<sup>130</sup>

In terms of sanctions in the field of employment, Article 18<sup>3d</sup> of the Labour Code provides that a person who was subject to discriminatory treatment by an employer is entitled to compensation not lower than the minimum wage defined in separate laws (in 2014, PLN 1,680, around EUR 400 per month).

As mentioned above, the body of jurisprudence regarding reasonable accommodation is still very small.

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

In Poland there is no duty to provide reasonable accommodation in respect of other grounds in the public and private sectors.

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

An interesting discussion took place regarding reasonable accommodation in access to a profession.<sup>131</sup> The Ombud requested the Minister of Justice to change the practice of organising state exams for entrance to the legal professions and professional training/apprenticeships on Saturdays, since it contradicts rules observed by the Seventh-day Adventist Church (members of the Church had requested the Ombud to take action) and makes it impossible for believers to pass exams and exercise legal professions (advocates, legal advisors, notaries public, bailiffs). The Ombud's arguments were based on the Constitution as well as EU law, namely the *Vivien Prais* case (130-75, ECJ ruling of 27 October 1976).

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<sup>127</sup> Amended in 2014, Dz.U. 2014, poz. 414 (*Rozporządzenie Ministra Edukacji Narodowej w sprawie warunków organizowania kształcenia, wychowania i opieki dla dzieci i młodzieży niepełnosprawnych oraz niedostosowanych społecznie w przedszkolach, szkołach i oddziałach ogólnodostępnych lub integracyjnych*).

<sup>128</sup> *Rozporządzenie Ministra Edukacji Narodowej i Sportu z dnia 31 grudnia 2002 r. w sprawie bezpieczeństwa i higieny w publicznych i niepublicznych szkołach i placówkach* (Dz.U.03.6.69).

<sup>129</sup> Article 23.a.3 Disabled Persons Act.

<sup>130</sup> The 2010 ETA introduced the concept of reasonable accommodation, but it put it into another act of law – the Disabled Persons Act. Since reasonable accommodation covers employment, the Disabled Persons Act refers to the Labour Code and not the ETA.

<sup>131</sup> Ombud Annual Report 2013, pp. 401-403, 466.

The Minister of Justice did not agree to change the date of the exams arguing that, according to law, the date (one day in the year) is decided by the Minister and once decided it may not be changed. As to the possibility of organising an additional exam in some regions, the Minister found it in breach of the equal treatment rule. In the opinion of the Ombud, the argumentation of the Minister of Justice showed his misunderstanding of European anti-discrimination law in respect to discrimination on the grounds of religion and belief. Previously, the relevant change had been introduced by the Minister of Health in respect of exams for medical doctors.<sup>132</sup>

g) Accessibility of services, buildings and infrastructure

In Poland national law partly requires services available to the public, buildings and infrastructure to be designed and built in an accessible way for people with disabilities.

The general Construction Act requires that public buildings and multi-household residences should be planned and constructed so as to ensure the necessary conditions for disabled people to use them (since 1995).<sup>133</sup> This is not, however, an obligation to reconstruct existing properties and in many instances public buildings are still not easily accessible for people with disabilities. Furthermore, the obligation may be waived if this can be justified. The relevant Ordinance of the Minister of Infrastructure on technical conditions with which buildings must comply<sup>134</sup> sets out in some detail a number of technical standards. In addition, the Ordinance mentions and highlights only one group of people – wheelchair users – and, as a consequence, people equate adjustments for people with disabilities only with access for wheelchair users.

This problem was highlighted, for instance, in the *Audit report on the accessibility of government buildings and central offices for the disabled* (2008),<sup>135</sup> which showed that the majority of ministries and central government offices were not accessible. However, the report inspired a 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>136</sup> specifies in some detail particular requirements regarding the needs of disabled people (including the number of adapted rooms, parking spaces, accessible phones, etc.). However, all the requirements but one (elevator buttons) relate to access for wheelchairs. There are also a number of exceptions, for instance historical buildings, mountain shelters, etc.

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

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<sup>132</sup> Ombud Annual Report 2013, pp. 401-403, 466.

<sup>133</sup> Article 5.1 point 4, Act of 7 July 1994 on Construction (*Ustawa z 7 lipca 1994 Prawo budowlane*).

<sup>134</sup> *Rozporządzenie Ministra Infrastruktury z dnia 12 kwietnia 2002 r. w sprawie warunków technicznych, jakim powinny odpowiadać budynki i ich usytuowanie* (Dz.U.02.75.690).

<sup>135</sup> Report prepared by the Plenipotentiary on Disabled Persons (*Raport z badania na temat dostępności budynków administracji rządowej i urzędów centralnych dla osób niepełnosprawnych*).

<sup>136</sup> *Obwieszczenie Ministra Gospodarki z dnia 24 stycznia 2006 r. w sprawie ogłoszenia jednolitego tekstu rozporządzenia Ministra Gospodarki i Pracy w sprawie obiektów hotelarskich i innych obiektów, w których świadczona są usługi hotelarskie* (Dz.U.06.22.169).

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 meet the needs of disabled people, for instance, the Ordinance on financial support for the procurement and modernisation of 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, ordinances on professional training for architects, on professional training for nurses, on professional training for sailors, etc.) the 'minimum curriculum' covers issues relating to the needs of disabled people.

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

According to the Ombud, the office receives a number of complaints regarding legal provisions which, in the opinion of the complainants, do not prevent de facto discrimination against people with disabilities, in terms of the accessibility of public spaces and facilities, and residential multi-dwelling buildings. The allegations formulated relate to passivity and the ineffectiveness of the architectural and construction control authorities in monitoring the implementation of the obligations imposed by the Construction Act and secondary legislation. As a consequence, in reality, many buildings, both new and following rebuilding and repairs, are not adapted to the needs of people with disabilities.<sup>137</sup>

In 2012 the Supreme Audit Office conducted an audit of access to public facilities in the Podlaskie region and published a report with findings and recommendations (Information on Supreme Audit Office audit results – access to public facilities for people with disabilities in the Podlaskie region, 2013).<sup>138</sup> The findings are very discouraging. For instance, 110 of 121 buildings surveyed (90.9%) were not adapted to the needs of people with disabilities (especially wheelchair users).<sup>139</sup> According to information provided by the General Building Control Inspectorate, the General Inspector decided to call on all province governors (the Voivode) to pay attention to the need for special supervision of construction projects with regard to accessibility of public facilities for people with disabilities. The General Inspector also called on all regional building control inspectors to oblige the provincial level authorities and district authorities to adhere to the recommendations contained in the above-mentioned Supreme Audit Office report.<sup>140</sup>

In 2012 both the Ombud and the Plenipotentiary for Equal Treatment started to advocate for the introduction in Poland of the principles of universal design, including the introduction of the definition of universal design into law, the development of appropriate guidelines and standards and the introduction of universal design principles into vocational education curricula for the relevant occupations. These activities have not yet brought about any concrete results, since the relevant ministries (those responsible for construction law and for education) seem to be defending the existing situation as satisfactory.<sup>141</sup> The Ombud

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<sup>137</sup> Ombud Annual Report 2014, pp. 42-43.

<sup>138</sup> *Informacja o wynikach kontroli NIK - Dostępność obiektów użyteczności publicznej dla osób niepełnosprawnych w województwie podlaskim* (2013), available at [www.nik.gov.pl/plik/id,4642,vp,5982.pdf](http://www.nik.gov.pl/plik/id,4642,vp,5982.pdf) (last accessed 15 April 2015).

<sup>139</sup> See pp. 7, 13-16 of the report.

<sup>140</sup> Ombud Annual Report 2014, pp. 42-43.

<sup>141</sup> Ombud Annual Report 2013, p. 381, Plenipotentiary Annual Report 2013, pp.11-12, Ombud Annual Report 2014, pp.43-44.

has approached the directors of technical colleges directly and is planning a meeting with them.

The Ombud has also focused on the issue of accessibility in railway stations, platforms and trains, as well as hotel facilities.<sup>142</sup>

In 2013 the Central Statistical Office published the findings of research on access for people with disabilities to public transport. According to the report, in 2012, 122 railway stations (38% of the total number of stations) had been adapted (as compared to 35% in 2011).<sup>143</sup>

In 2014 a new Law on registration of civil status,<sup>144</sup> replacing an old Act from 1986, made provision for people with disabilities to register civil status at the place of residence of an individual whose participation in person at the registry office is not possible because of illness, disability or other obstacles which cannot be overcome, including the possibility of registering the birth of a child through a proxy.

New regulations were also adopted in 2014, including the Ordinance of the Minister of Administration and Digitisation on the detailed requirements for the provision of facilities for people with disabilities by providers of publicly available telephone services (by adapting their offers, services and websites).<sup>145</sup>

In addition, the President of UKE (Office of Electronic Communications), guided by the need for equal treatment and non-discrimination, maintains a telecommunications services certification program, in order to promote fair and effective competition in the provision of telecommunications services, as well as to provide users with maximum protection against abuse, including cyber-crime. The program includes three categories: Safe Internet, Senior and Offers Comparator.<sup>146</sup>

In Poland national law does not contain a general duty to provide accessibility by anticipation for people with disabilities. There is no such general duty expressed by national law except general constitutional provisions.

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

- a citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism... (Article 67);
- public authorities shall ensure special healthcare [...] for handicapped people... (Article 68);
- public authorities shall provide, in accordance with statutes, aid to people with disabilities to ensure their subsistence, adaptation to work and social communication (Article 69).

However, the anti-discrimination clause in the Social Security Act, which is the 'mother statute' for the area of social security, limits the principle of equal treatment of all socially

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<sup>142</sup> Ombud Annual Report 2013, pp. 385-388.

<sup>143</sup> Transport – Performance in 2012, (*Transport - wyniki działalności w 2012 r.*), Ombud Annual Report 2014, p. 87.

<sup>144</sup> *Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego* (Dz. U. poz. 1741, z późn. zm.).

<sup>145</sup> *Rozporządzenie Ministra Administracji i Cyfryzacji z 26 marca 2014 r. w sprawie szczegółowych wymagań dotyczących świadczenia udogodnień dla osób niepełnosprawnych przez dostawców publicznie dostępnych usług telefonicznych* (Dz. U. z 2014 r., poz. 464).

<sup>146</sup> Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2014 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, May 2015, (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2014 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*) [hereafter 'Ombud Annual Report 2015'], p. 107.

insured people to grounds of sex, race, ethnic origin, nationality, marital status, and family status.<sup>147</sup>

#### h) Accessibility of public documents

In 2011 (August), an Act of Parliament was passed (in force from 1 April 2012) which was entitled the Act on sign language and other means of communication.<sup>148</sup> The Act imposes on public authorities a duty to ensure solutions that aim to facilitate communication for deaf people and deafblind people (including free choice of method of communication, special services, the right to be assisted by an interpreter, preparation of documents in an accessible form, financial support etc.).

The Ombud received indications that not all entities were properly carrying out the obligations arising from the Act. The Ombud therefore decided to verify the status of the implementation of the Act and commissioned an anti-discrimination study entitled *Knowledge of officials of the obligations resulting from the Act on sign language and other means of communication*.<sup>149</sup> The report was published in 2014: *The principle of equal treatment – law and practice. Services for deaf and deafblind people in public administration offices. Analysis and recommendations*.<sup>150</sup> The study pointed out the inadequate fulfilment of the obligations imposed by law on public administration bodies in relation to deaf people and the minimal implementation of the obligations in relation to deafblind people. The report also contains conclusions and recommendations for appropriate changes in the practice of the functioning of public authorities, as well as the necessary changes in the law.

One of the problems, which has already been pointed out, is the fact that the Act on sign language is addressed to the public authorities. However, in the opinion of the Ombud, narrowing the range of entities obliged to implement the provisions of the Act to the category of public authorities resulted in the omission of other institutions which perform public functions, but are not part of the public administration. One example is a Provincial Road Traffic Centre (*Wojewódzki Ośrodek Ruchu Drogowego*), which is responsible for organising driving tests. The Act on sign language and other means of communication does not oblige traffic centres to provide the services of sign language interpreters. The obligation to provide a sign language interpreter when taking the driving test falls to the candidates. This obviously generates additional expenses on top of the cost of obtaining a driving licence. The Ombud has already raised these issues in statements to the ministries and is seeking to bring about a change in the law.<sup>151</sup>

In terms of blind people and people with visual impairments there is no general obligation for translation into Braille. However, translation is required on medical products and polling cards.<sup>152</sup>

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<sup>147</sup> Article 2a.1 Social Security Act. The grounds of race, ethnic origin and nationality were added in December 2010 (in force since 01.01.2011) by the Equal Treatment Act.

<sup>148</sup> *Ustawa z 19 sierpnia 2011 r. o języku migowym i innych środkach komunikowania się* (Dz. U. z 2011 r. Nr 209, poz. 1243).

<sup>149</sup> Ombud Annual Report 2014, p. 44.

<sup>150</sup> Rzecznik Praw Obywatelskich (2014), *Zasada równego traktowania. Prawo i praktyka. Obsługa osób głuchych i głuchoniewidomych w urzędach administracji publicznej. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>151</sup> Ombud Annual Report 2014, pp.47-48.

<sup>152</sup> On 26 March 2014 the Minister of Administration and Digitisation issued a Regulation laying down detailed requirements for the provision of facilities for people with disabilities by providers of publicly available telephone services (published on 9 April 2014) (*Rozporządzenie Ministra Administracji i Cyfryzacji z 26 marca 2014 r. w sprawie szczegółowych wymagań dotyczących świadczenia udogodnień dla osób niepełnosprawnych przez dostawców publicznie dostępnych usług telefonicznych*). The regulation sets out a number of requirements with specific deadlines (six, 12 or 24 months), including accessibility of important information in Braille and provisions of sign language interpreting.

In 2005 the Polish Parliament passed the Act on the computerisation of bodies with a public remit<sup>153</sup> which authorises the Council of Ministers (Article 18) to issue regulations regarding minimum requirements for ICT systems, bearing in mind the need to ensure access to information resources for people with disabilities.

In April 2012 the Council of Ministers issued a Regulation on the National Interoperability Framework, the minimum requirements for public records and the exchange of information in electronic form and the minimum requirements for ICT systems.<sup>154</sup> Regulation includes the obligation to adapt services by 31 May 2015 in accordance with the standard of Web Content Accessibility Guidelines WCAG 2.0.

In 2013 the Ombudsman published a report, *The principle of equal treatment – law and practice. Accessibility of the websites of public institutions for people with disabilities. Analysis and recommendations*.<sup>155</sup> The report is the result of a comprehensive study of the accessibility of 3 000 public administration websites, carried out in 2012 and 2013. The aim of the study was: to verify the accessibility status of public websites before the deadline for their adaptation (May 2015, as decided by the Council of Ministers in 2012) and to indicate the main challenges in this area. A study shows that none of the surveyed sites was 100% accessible for people with disabilities.<sup>156</sup>

According to the Ombud's recommendations, it is therefore necessary to provide systematic training in the creation and publishing of accessible public documents and electronic information and WCAG 2.0 standards for people involved in the dissemination of such information in the public administration and for those responsible for the operation and information exchange systems and websites. In addition, regular checks should be carried out with regard to the accessibility of websites of public authorities.<sup>157</sup>

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<sup>153</sup> Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne.

<sup>154</sup> Rozporządzenie Rady Ministrów z dnia 12 kwietnia 2012 r. w sprawie Krajowych Ram Interoperacyjności, minimalnych wymagań dla rejestrów publicznych i wymiany informacji w postaci elektronicznej oraz minimalnych wymagań dla systemów teleinformatycznych.

<sup>155</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Nr 11. Dostępność witryn internetowych instytucji publicznych dla osób z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>156</sup> Ombud Annual Report 2014, p. 44.

<sup>157</sup> Ombud Annual Report 2014, p. 44.



### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

In Poland, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

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

At the same time, however, in principle, the provisions of the Polish Labour Code are applied to all employees and employers without any distinction on the basis of their nationality or citizenship.<sup>158</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 the EU has signed agreements on free movement of people;
- 3) those granted refugee status or subsidiary protection status on the territory of Poland (as well as asylum seekers with some time limits);
- 4) those granted a tolerated stay permit or who have temporary protection on Polish territory;
- 5) those granted a permit to settle on Polish territory;
- 6) those granted a permit for temporary residence in Poland;
- 7) other aliens, according to certain special provisions or international agreements.

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

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

- a) Natural and legal persons

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

Recital 16 was transposed into the 2010 Equal Treatment Act. Both natural and legal persons are protected against discrimination (Article 2.1), however, Article 10 provides protection for legal persons only on the grounds of the race, ethnic origin and nationality of its members. All forms of discrimination are prohibited, and the right to compensation also applies to legal persons (Article 12.2, Article 13).

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

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<sup>158</sup> See Articles 1-3, Labour Code, which do not include any criteria related to nationality or citizenship.

In terms of liability, national law (Equal Treatment Act, Article 2.1) does not distinguish between natural and legal persons.

b) Private and public sector including public bodies

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

In Poland the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination.

National law (Equal Treatment Act, Article 2.1) is applicable to both the private and public sectors, including public bodies.

## **3.2 Material scope**

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

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

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

The 2010 Equal Treatment Act widened the protection and covers (in Article 8) any other form of employment, such as civil law contracts (i.e. contract work), self-employment and independent professions.<sup>159</sup>

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

In Poland, national legislation includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion (with limitations), whatever the branch of activity and at all levels of the professional hierarchy for the five grounds (later in the text five grounds refers to protected grounds described in the EU Equality Directives) in both the private and public sectors as described in the directives.

The Labour Code sets out the principle of equal treatment and the prohibition of discrimination and covers conditions for access to employment, including selection criteria, recruitment conditions and promotion. The same legal regime applies to both the public and private sectors. All grounds are covered.<sup>160</sup>

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

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<sup>159</sup> 'Independent professions' is a special term used in Poland for self-regulated professions (such as advocates, legal advisors, doctors). The other terms used are 'free professions' or 'professions of public trust' (Article 17 of the Constitution).

<sup>160</sup> Article 18<sup>3a</sup>-18<sup>3b</sup> Labour Code.

Nevertheless, there are certain practical limitations in the protection of those employed under civil law contracts. The National Labour Inspectorate may monitor the implementation of labour law but not the ETA. The Ombud has identified this problem and proposes relevant changes to the law.<sup>161</sup>

Labour market institutions, such as employment agencies, are also obliged to behave in a non-discriminatory manner. According to the Act on the Promotion of Employment and the Institutions of the Labour Market (the Employment Act), an employment agency cannot discriminate against people for whom it seeks employment or paid work (including self-employment) on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>162</sup>

Similarly, other labour market institutions, such as employment services for the unemployed and those seeking work, must also operate in a non-discriminatory manner as specified by the law. The Employment Act clearly determines that such services should be provided free of charge to everyone in accordance with the principle of equality. This means they should be provided irrespective of a person's gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs and membership or non-membership of a trade union.<sup>163</sup>

Likewise, employers providing district labour offices with current information concerning available jobs cannot formulate any requirements that discriminate against candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.<sup>164</sup>

Correspondingly, district labour offices and the centres for information and career planning run by regional (voivodship) labour offices must dispense career advice in accordance with the principle of equality, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion and religion or for reasons of trade union membership.<sup>165</sup>

In 2012, the Ombud, in response to a concrete complaint, took up the matter of accommodating the needs of persons with disabilities during professional exams organised by the state (both entry exams for professional apprenticeships as well as final professional exams which are a mandatory condition for exercising a particular profession).

The Ombud approached the Minister of Justice regarding exams for advocates, legal advisors, notaries public, sworn translators and candidates for general apprenticeships (organised by the National School of the Judiciary and Public Prosecution) and asked for amendments to the laws that would create the possibility of prolonging the duration of exams and introducing alternative means of familiarisation with the questions for those who cannot read and answering them for those who cannot write. The Minister of Justice generally agreed but also pointed out that some legal professions (like that of judge, for instance) require certain characteristics and the ability to personally read, listen to testimony or take a statement.

The Minister prepared draft amendments to the relevant regulations, two of which have been passed in 2012 – regarding the professional exam for advocates and legal advisors.<sup>166</sup> The ordinances created the possibility of prolonging the duration of an exam by 50% for

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<sup>161</sup> Ombud Annual Report 2015, p. 51.

<sup>162</sup> Article 19 c Employment Act.

<sup>163</sup> Article 36.4 item 3, Employment Act.

<sup>164</sup> Article 36.5 e Employment Act.

<sup>165</sup> Article 38.2 item 3 Employment Act.

<sup>166</sup> Ordinance of the Minister of Justice dated 12 December 2012 (Dz.U. 2012.1453-1454).

people with disabilities if they have a certificate of disability issued by the relevant medical authorities (based on the Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons that contains a legal definition of a disabled person)<sup>167</sup> and have an additional statement by a doctor. In December 2013 the Ombud continued its activities regarding exams and issued a statement addressed to Minister of Justice suggesting further changes.<sup>168</sup>

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

In Poland, national legislation covers working conditions, including pay and dismissals, in relation to all five grounds and for both private and public employment.

Employment and working conditions, including pay and dismissals, are covered by the prohibition of discrimination in the Labour Code.<sup>169</sup>

The 2010 Equal Treatment Act that widens protection and also covers self-employment and civil law contracts (i.e. contract work) (all grounds are covered) refers to the general prohibition of discrimination in the context of work/employment (including on the basis of labour contracts, civil contracts, self-employment, etc.) but does not mention *expressis verbis* pay or dismissal (Article 8).

An interesting case was decided by the Supreme Court<sup>170</sup> in relation to the pay of foreign employees of a company. The Court decided that paying more to Korean employees for the same work was discriminatory. The Court stressed that the need to "attract" employees of Korean nationality to work in Korean companies operating in Poland was vague and impossible to objectively verify, and does not constitute a justified criterion for the wage gap between Korean employees and Polish workers who perform the same or comparable work.

- Occupational pensions constituting part of pay

Although occupational pensions are regulated by the Act on Retirement and Disability Pensions from the Social Insurance Fund,<sup>171</sup> the anti-discrimination clause regarding occupational pensions is included in the Social Security Act, which is the framework legislation for the social security sector. Until 2010, this clause limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status, but since 1 January 2011 it has also covered the grounds of race, ethnic origin and nationality.<sup>172</sup>

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

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

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<sup>167</sup> Disabled Persons Act.

<sup>168</sup> Ombud Annual Report 2014, p. 52.

<sup>169</sup> Article 18<sup>3a</sup>-18<sup>3b</sup>, Labour Code.

<sup>170</sup> Supreme Court judgement, 22 November 2012 r. I PK 100/12.

<sup>171</sup> Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund (*Ustawa z 17 grudnia 1998r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) [hereafter Retirement Act].

<sup>172</sup> Article 2a.1 Social Security Act amended by the 2010 Equal Treatment Act.

The Labour Code anti-discrimination provision which covers access to vocational training (all grounds are protected) is not very detailed and uses the general term 'access to vocational training increasing qualifications'.<sup>173</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 very limited it is difficult to assess the interpretation of this provision in practice. The Labour Code provisions apply only to training organised by the employer. Other kinds of training, provided outside employment, are governed by different laws on education that generally lack clear anti-discrimination clauses in relation to different kinds of vocational training (more in Section 3.2.8).

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

The *Starosta* (a local government body) is the public body which initiates, organises and finances training for the unemployed in order to improve their chances of finding employment or other form of paid work or to upgrade their vocational qualifications. When sending someone for training, the principle of equality in access to training must be complied with, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religion or trade union membership.<sup>174</sup>

Two interesting cases can be mentioned in this context which were analysed by the Government Plenipotentiary for Equal Treatment in 2014.<sup>175</sup> One is the restriction of access to the National School of Public Administration for those over the age of 32 (this limitation stems directly from the 1991 Act on the National School of Public Administration). The issue is currently being debated. The second concerns the problem of access to different employability programmes that are targeted, for instance, at people below the age of 25 or over 50. The Plenipotentiary is analysing the justification presented by the Labour Offices.

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

In Poland national legislation includes membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

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

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

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<sup>173</sup> Article 18<sup>3a</sup> § 1, Labour Code.

<sup>174</sup> Article 40.6 Employment Act.

<sup>175</sup> Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2014 – 31 December 2014, Warsaw, 2015 (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2014 r. do 31 grudnia 2014 r.*, Warszawa 2015) [hereafter 'Plenipotentiary Annual Report 2015'], p. 42.

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

In Poland national legislation includes social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

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

There is also, as already mentioned, the anti-discrimination clause in the Social Security Act, which is the basic statute for the social security field. Until 2010, this provision limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status, but it has been extended (as of 1 January 2011) to the grounds of race, ethnic origin and nationality.<sup>176</sup>

The Capital-based Pensions Act<sup>177</sup> (Article 2), amended by the Equal Treatment Act (Article 30), prohibits discrimination in calculating pension levels on the grounds of gender, race, ethnic origin, nationality, state of health, family and marital status.

The Medical Treatment Act provides that, when determining access to medical services and, in particular, 'waiting lists' (some medical services are not accessible immediately – in such cases a person must sign up to a list and wait for their turn which may take a few weeks or months), such lists should be drawn up in line with the principle of just, equal, anti-discriminatory and fair access to medical treatment.<sup>178</sup> In this way, the Act prohibits discrimination, though the specific grounds of racial or ethnic origin are not mentioned.

- Article 3.3 exception

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

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

In Poland national legislation includes social advantages as formulated in the Racial Equality Directive, although the lack of definition of social advantages raises problems.

The 2010 Equal Treatment Act prohibits discrimination in social protection on the grounds of gender, race, ethnic origin or nationality (Article 6). It does not use the term social advantages but the definition of social protection (not legal, but developed in academic texts) traditionally extends to the issues of social advantages.<sup>179</sup>

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

There is a rather complex system of different allowances and grants. Most of them are not discriminatory, such as a childbirth grant, which is payable to the mother, father or legal

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<sup>176</sup> Article 2a.1 Social Security Act as amended by the 2010 Equal Treatment Act.

<sup>177</sup> Poland, Act of 21 November 2008 on Capital-based Pensions (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).

<sup>178</sup> Article 20.5, Act of 27 August 2004 on Medical Treatment Financed from Public Resources (*Ustawa z 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*).

<sup>179</sup> See for instance: Piotrowski, J. (1966), *Zabezpieczenie społeczne. Problematyka i metody*, Wydawnictwo KiW, Warsaw, p. 28; Rajkiewicz, A. (ed.) (1979) *Polityka społeczna*, Wydawnictwo PWE, Warsaw, p. 432, as well as the Constitutional Tribunal ruling in the case TK K 17/92.

guardian of a child. It can also be paid to the 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>180</sup>

The death allowance is payable to any person who covers the costs of a funeral.<sup>181</sup> However, a same-sex partner, unlike a spouse, would have to supply documentary evidence of the costs incurred.<sup>182</sup>

There is currently (2014-2015) discussion taking place on new regulations that relate to large families (three and more children) and provide a number of financial benefits (reductions). It covers families where a parent (or parents) or official spouses raise their children. It does not cover, for instance, a family with four children if the couple is not married and some of children come from previous relationships. The regulation has been judged unconstitutional (and the Constitution is seen as a basis for challenging the law, not the ETA) and the Government Plenipotentiary has also protested against it.<sup>183</sup>

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

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

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

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

Similarly, there is no general non-discrimination provision in the statute on higher education. But access to higher education institutions is granted to all Polish citizens and foreigners equally (with some exceptions).<sup>184</sup>

In the field of education, schools must ensure that each pupil has the knowledge and skills necessary for their development and prepare them to fulfil family and civic responsibilities based on the principles of solidarity, democracy, tolerance, justice and freedom. According to Article 13 of the Education Act, the duties of schools and public facilities include enabling pupils to uphold a sense of national, ethnic, linguistic and religious identity, especially learning their own language, history and culture. In their teaching and pastoral work, schools are also obliged to uphold regional cultures and traditions.<sup>185</sup>

- Pupils with disabilities

In Poland the general approach to education for pupils with disabilities does raise some problems.

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<sup>180</sup> Article 9 Act of 28 November 2003 on Family Benefits (*Ustawa z 28 listopada 2003 r. o świadczeniach rodzinnych*).

<sup>181</sup> Article 78.1 Retirement Act.

<sup>182</sup> Article 79.1 Retirement Act.

<sup>183</sup> Plenipotentiary Annual Report 2015, p. 31.

<sup>184</sup> Poland, Act of 27 July 2005 on Education, as amended (*Ustawa z 27 lipca 2005 r. prawo o szkolnictwie wyższym*, Dz.U.05.164.1365), [hereafter 'Higher Education Act'], Article 43.

<sup>185</sup> See the Ordinance of the Minister of National Education of 14 November 2007 on the conditions and means of realisation by nurseries, schools and public institutions of public duties in a way which enables the upholding of the national, ethnic and linguistic identity of pupils belonging to national and ethnic minorities [...] (Dz.U.2007, Nr 214, poz. 1579 and Dz.U. 2010 Nr 109 poz. 712).

As far as the education of people with disabilities is concerned, the public authorities have the obligation to ensure that all citizens have universal and equal access to education. The Education Act guarantees the possibility of education to pupils with disabilities in all kinds of schools (Article 1)<sup>186</sup> as well as special care for them, a personalised learning plan and special forms of learning.

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

According to the Higher Education Act, state universities receive special funds for actions aiming to educate and rehabilitate people with disabilities. The level of funds depends on the number of students and doctoral students enrolled.<sup>187</sup>

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

The special Ordinance of the Minister of National Education on conditions for the organisation of education, developmental support and care for children and young people with disabilities and behavioural issues in mainstream and integrated pre-school facilities, schools and classes<sup>188</sup> places a number of obligations on schools, including providing appropriate learning conditions, specialised equipment and support for parents, etc.

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

According to the Ordinance of the Minister of National Education and Sport on health and safety in state and non-state schools [...],<sup>189</sup> places for practical learning should be adequately accommodated to the needs of disabled pupils. Their needs should also be taken into consideration when planning out-of-school activities.

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

In its National Health Programme for 2007-2015,<sup>190</sup> the Council of Ministers declared that it would create, amend and execute regulations in the fields of:

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

Judging from the legal documents, the situation of students with disabilities may seem quite positive. However, in practice, children and their families face a number of problems in access to mainstream education (although the situation with regard to special education is much better). Mainstream schools are not adequately prepared, their staff are not appropriately trained and teachers and school administrations are afraid and prefer to

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<sup>186</sup> Poland, Act of 7 September 1991 on the Education System, as amended (*Ustawa z 7 września 1991 r. o systemie oświaty*, Dz.U.04.256.2572), [hereafter 'Education Act'], Article 1.

<sup>187</sup> Article 94.1 point 11 Higher Education Act.

<sup>188</sup> The most recent changes were made in 2014 (Dz.U. 2014, poz. 414).

<sup>189</sup> *Rozporządzenie Ministra Edukacji Narodowej i Sportu z dnia 31 grudnia 2002 r. w sprawie bezpieczeństwa i higieny w publicznych i niepublicznych szkołach i placówkach* (Dz.U.03.6.69).

<sup>190</sup> Resolution of the Council of Ministers no. 90/2007, 15 May 2007.



refuse access to schools instead of solving the problems. In a number of cases of this kind, the Ombud has intervened as well as trying to draw attention to this problem in letters to the Government for a number of years.<sup>191</sup>

In 2012, the Ombud published a special report,<sup>192</sup> *The principle of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations*,<sup>193</sup> and formulated a number of recommendations regarding inclusive education (as opposed to special education and integrated education), a system for financing education (the money should follow the student), and relating to specific kinds of disability. The integration of children with disabilities in education is one of the activities described in the National Programme of Activities for Equal Treatment (for 2013-2016) and inclusive education was an official focus of state educational policy for the school year 2014/2015.<sup>194</sup>

The report also analysed the state of affairs in terms of appropriate textbooks for pupils with disabilities as well as the system of support for parents, students and teachers.<sup>195</sup> The Expert Committee on People with Disabilities<sup>196</sup> established by the Ombud<sup>197</sup> worked in collaboration with the Ministry of Education in order to advocate for the implementation of these recommendations. The Committee also prepared a publication entitled *Protection of the rights of persons with disabilities – the main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities. Analysis and recommendations*,<sup>198</sup> which also covers the issue of equal access to education.

Finally, there are also systems of stipends and special grant programmes, operated by PFRON, supporting the education of pupils and students with disabilities, including the programme Aktywny samorząd (programmes provide special financial support).<sup>199</sup>

An interesting case occurred in 2014 when the director of the Centre of Artistic Education informed directors of art schools (run under the auspices of the Ministry of Culture) that special education for children with disabilities is organised in special and integration schools but not art schools. The Ombud intervened in the case and obtained a promise that this policy would be changed.<sup>200</sup>

#### - Trends and patterns regarding Roma pupils

In Poland some specific patterns exist in education regarding Roma pupils, such as segregation.

In the field of education, the Polish government has invested serious efforts in guaranteeing full equality and non-discrimination for members of national minorities.

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<sup>191</sup> See letters: to the Minister of Education summarising problems of children with disabilities in access to education and calling for action, 25 January 2008, RPO – 572275 – I/07/JS/AB; to the Minister of Health on access to schools and equal treatment of children with haemophilia, 31 July 2008, RPO – 588895 – X/08/JS; to the Minister of Education on text books for blind or visually impaired pupils, 8 September 2008, RPO – 571999 – I/07/KJ; (all documents may be found at [www.rpo.gov.pl](http://www.rpo.gov.pl)).

<sup>192</sup> Ombud Annual Report 2013, p. 418.

<sup>193</sup> Rzecznik Praw Obywatelskich (2012) *Zasada równego traktowania – prawo i praktyka. Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>194</sup> Report on the National Programme 2015, p. 145-146.

<sup>195</sup> Ombud Annual Report 2013, p. 420-421.

<sup>196</sup> <http://rpo.gov.pl/en/content/expert-committee-people-disabilities>.

<sup>197</sup> Ombud Annual Report 2013, p. 421.

<sup>198</sup> The report includes a summary in English (pp. 90-93) and is available on the Ombud's website [www.rpo.gov.pl](http://www.rpo.gov.pl) *Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia* (2012).

<sup>199</sup> See at <http://www.pfron.org.pl/pl/programy-i-zadania-pfr/aktywny-samorzad/1644,dok.html> (15 April 2014).

<sup>200</sup> Ombud Annual Report 2015, pp. 66-68.

Children of minority origin have equal access to all schools on the same terms as other pupils.<sup>201</sup> Access to institutions of higher education is also granted equally.<sup>202</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 their education.<sup>203</sup> This often leads to failure at school, significantly below-average marks, low attendance, dropping out of school or transfer to special schools for children with learning disabilities.

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

The problem of the over-representation of Roma children in special schools has been known for many years and the government promised to improve the situation.<sup>204</sup> Despite this, the problem remained for a long time, although it may now have finally been resolved, as a result of serious promises followed by action on the part of the Minister of Education in August 2008 (accompanying the decision to abolish segregated Roma classes in schools – see below) and the activities of the Roma Issues Team within the Joint Committee of the Government and Ethnic and National Minorities.

The decision was taken to double check whether Roma children attending special schools did really qualify for this or whether they should attend mainstream schools (the appropriate agencies were asked to verify all decisions in this regard). In relation to the procedure used for placement in a special school, the Minister of Education formulated additional conditions to be fulfilled in order to make sure that placement in a special school is needed – previously, only a test in the Polish language was used, causing problems for some Roma children. The Minister recommended the use of other methods, not based on the level of comprehension of Polish.<sup>205</sup> However, in 2011 (more current data is not available) around 20% of Roma pupils still received a decision that they should attend special schools (the number of those who actually attend special schools is not known).<sup>206</sup>

The gradual improvement in Roma education has also been made possible to some extent by a clear change in state policy, aiming to eliminate Roma classes and favour the mainstream education system. However, despite promises given by governmental agencies, and clear recommendations formulated for instance in the ECRI 2004 report on Poland, segregated Roma classes existed for a long time (in 2008, there were still seven such classes). Only at the end of 2008 did the Minister of Education make a final decision to stop the creation of new Roma classes and to abolish existing Roma classes within two years (2009-2010).<sup>207</sup> As of 2011, no Roma classes have existed. However, in 2013 there were plans to establish a Roma class in a Poznań primary school and only the intervention of Ombud prevented this happening (the proponents of the idea argued that it was

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<sup>201</sup> Article 1.1 Education Act.

<sup>202</sup> Article 43 Higher Education Act.

<sup>203</sup> See annual reports on the Programme for the Roma Community in Poland, available at [www.mac.gov.pl](http://www.mac.gov.pl).

<sup>204</sup> As a result of many protests by Roma leaders and NGOs, the Ministry of National Education and Sport recommended that educational facilities pay greater attention to this problem and ordered verification of the decisions to send Roma children to these schools by educational psychology clinics. See *Roma in public education*, Raxen, National Focal Point for Poland, Helsinki Foundation for Human Rights, [www.hfhrpol.waw.pl](http://www.hfhrpol.waw.pl), p. 6.

<sup>205</sup> See minutes from the fourth meeting of the Roma Issues Team.

<sup>206</sup> Information received from Ministry of Internal Affairs in May 2013.

<sup>207</sup> See minutes from the fourth meeting of the Roma Issues Team.

supposed to be a temporary solution aimed to integrate a group of Roma students into general education).<sup>208</sup>

There is also some improvement regarding the pre-schooling of Roma children due to new pre-schools opening up in areas with significant Roma populations. In addition, the data on school attendance by Roma show an increase from previous estimates from a level of around 70% 10 years ago, to 86.8% in 2011/2012.<sup>209</sup>

However, the changes are not satisfactory; in its 2014 report the Ombud still underlines the fact that wider access of Roma children to pre-school and non-school classes, pursuing an expanded programme of teaching the Polish language, is needed.<sup>210</sup>

In the case of the Roma community, a teaching system which exists for other minorities under the Education Act (schools with the minority language as the first or second language) has not been established. However, it should be pointed out that the obligation of the authorities to establish such a system depends on the will of the national minority group (they need to lodge an application). Representatives of the Roma community have different views on whether the Romani language should be used in schools. Part of the community is of the opinion that it should not be.<sup>211</sup> However, a number of measures have been taken in order to convince parents to send children to school (see more in Section 5 below).

Facilitating the educational advancement of the children of migrants and from the Roma minority is one of the objectives in the National Programme of Activities for Equal Treatment (for 2013-2016).<sup>212</sup> The Ministry of Education is responsible for legal analyses and research. It prepared a new ordinance that was issued at the beginning of 2015 and came into force on 10 January 2015: Ordinance of the Minister of National Education on the conditions and procedures of admission to state kindergartens, schools and institutions for non-Polish nationals and Polish citizens who attended education in schools operating in the education systems of other countries, as well as on additional Polish language classes, extra remedial classes, and learning the language and culture of the country of origin.<sup>213</sup>

In 2014 the Ministry of Education also funded 53 local initiatives/activities facilitating the integration of Roma children into the education system (organised by 37 entities – Roma NGOs and local government).<sup>214</sup>

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

In Poland national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

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

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<sup>208</sup> Ombud Annual Report 2014, p. 15.

<sup>209</sup> See reports from the implementation of the Programme for the Roma Community in Poland in consecutive years, at [www.mac.gov.pl](http://www.mac.gov.pl).

<sup>210</sup> Ombud Annual Report 2014, p. 15.

<sup>211</sup> See, for instance, minutes from the eighth meeting (09.09.2009) of the Roma Issues Team.

<sup>212</sup> Report on the National Programme 2015, p. 102-105.

<sup>213</sup> Rozporządzenie Ministra Edukacji Narodowej z dnia 2 stycznia 2015 r. w sprawie warunków i trybu przyjmowania do publicznych przedszkoli, szkół i placówek osób niebędących obywatelami polskimi oraz obywateli polskich, którzy pobierali naukę w szkołach funkcjonujących w systemach oświaty innych państw, a także organizacji dodatkowej nauki języka polskiego, dodatkowych zajęć wyrównawczych oraz nauki języka i kultury kraju pochodzenia, Dz.U. 2015 poz. 31.

<sup>214</sup> Report on the National Programme 2015, p. 105.

- Distinction between goods and services available publicly or privately

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

There is no law regulating the operation of private clubs, etc. They do exist (for instance membership clubs) but they operate on the basis of general legal provisions and use their freedom of economic activity to establish their own internal rules.

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

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

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

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

Access to housing is regulated by the following legislation: the Housing Allowances Act<sup>215</sup> and the Act on the Protection of Tenants' Rights.<sup>216</sup> They contain no provisions of a discriminatory nature.<sup>217</sup>

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

- Trends and patterns regarding housing segregation for Roma

In Poland there are to some extent patterns of housing segregation and discrimination against Roma.

The situation for a considerable number of Roma in terms of housing and living conditions is drastic (especially Bergitka/Carpathian Roma)<sup>218</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.

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<sup>215</sup> Poland, Act of 21 June 2001 on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*).

<sup>216</sup> Poland, Act of 21 June 2001 on the Protection of Tenants' Rights, Municipal Housing Resources and Amendments to the Civil Code (*Ustawa z 21 czerwca 2001 o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie kodeksu cywilnego*).

<sup>217</sup> However, please see the information on the Kozak case in Annex 3, below: Kozak v. Poland (application no. 13102/02; judgment of 2 March 2010).

<sup>218</sup> It is hard to estimate the overall number of Bergitka Roma suffering from poor living conditions, since even the total number of Roma in Poland varies between different sources of information: according to the 2002 National Census there were 12 731 Roma, according to the 2011 census there were 16 000 (including both Roma as the only identity and as one of two identities); Roma organisations sometimes claim that there are around 30 000 Roma in Poland and international sources even give the number of 50-60 000.

According to the Ombud's 2014 report,<sup>219</sup> some of the problems faced by the Roma community for many years remain unresolved. Roma, and especially Bergitka Roma, still live in extreme poverty, on the margins of society and with no real opportunities to improve their living conditions. This was confirmed by visits conducted in 2013 by staff from the Office of the Ombud to several Roma settlements. The results of these visits have challenged whether local governments are able to bear alone the problem of improving the social and living conditions of the Roma community. The possibility of the use of funds from the Programme for the Roma Community does not seem to be sufficient. In the opinion of the Ombud it is necessary to create a separate, comprehensive new Programme for the Roma Community, the aim of which would be solely the planning and financing of improvements to the housing and living conditions for Roma settlements throughout the Poland. This could be accomplished by the new Programme for the Integration of the Roma Community in Poland in 2014-2020 (accepted by the Council of Ministers on 7 October 2014), which includes a section on housing.<sup>220</sup>

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

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

One interesting discrimination case in this respect may be mentioned. A number of Roma in Limanowa municipality had no access to running water. Within the Programme for Roma, special funds were allocated to install a water supply in the form of a 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 project beneficiaries. Three grant allocations were made in the years 2004, 2005 and 2007 respectively. The argument was that the legal status of the buildings was not regulated (i.e. they had been built without permission) but this did not interfere in getting the project accepted and funded from government sources.

In 2013 the Ombud protected a group of Romanian Roma from eviction from their encampments in Wrocław (two encampments were situated on public land owned by the municipality of Wrocław and were illegal). According to the Ombud Report, the situation of the encampments was very complex and therefore during the meetings with the local municipal authorities it was decided that special expert teams should be created to continue the activities. The Ombud made a commitment to continue monitoring the developments.<sup>221</sup>

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<sup>219</sup> Ombud Annual Report 2014, p. 14.

<sup>220</sup> *Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warsaw 2014, also in English, available at <http://mniejszosci.narodowe.mac.gov.pl/mne/romowie/program-integracji-spol> (last accessed 15 May 2015).

<sup>221</sup> Ombud Annual Report 2014, p.16.

## **4 EXCEPTIONS**

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

In Poland national legislation provides for an exception for genuine and determining occupational requirements.

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

The 2008 amendment to the Labour Code<sup>222</sup> (18<sup>3b</sup> § 2 point 1) had already put national legislation regarding employment based on labour contracts in line with the Directives. The notions of proportionality, legitimate aim and genuine and determining occupational requirements were added. According to the Labour Code, an employer 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 means that the reason or reasons for different treatment are genuine and determining occupational requirements. There is no list of those genuine and determining occupational requirements given by the law so it is left to the evaluation of the judge. The test of proportionality of measures and legitimate aim was also introduced.<sup>223</sup>

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

- Exception for employers with an ethos based on religion or belief

In Poland national law provides for an exception for employers with an ethos based on religion or belief.

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

The 2010 Equal Treatment Act also amends the Labour Code, introducing the same exception in relation to access to employment.<sup>224</sup>

However, Polish provisions in both the ETA and the Labour Code do not cover the part of Article 4(2) of the Directive, which stipulates that the difference in treatment should not justify discrimination on another ground.

- Religious institutions affecting employment in state-funded entities

In Poland religious institutions are permitted to select people (on the basis of their religion) and to hire or to dismiss them from a job if that job is in a state entity, or in an entity financed by the state.

In Poland 'religion' (of any registered faith or religious organisation)<sup>225</sup> is taught in schools. Alternatively, for pupils not wishing to take part in religious instruction classes, a course

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<sup>222</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

<sup>223</sup> Article 18<sup>3b</sup> § 2 point 1 (amended), Labour Code.

<sup>224</sup> Article 18<sup>3b</sup> § 4, Labour Code amended by Article 25 of the Equal Treatment Act.

<sup>225</sup> Poland, Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (*Ustawa z 17 maja 1989 r. o gwarancjach sumienia i wyznania*) sets out the registration procedure for churches and other

on ethics should be organised. However, this exists more in theory than in practice (since there are very few applications for courses on ethics and most students participate in religious instruction courses, schools tend not to organise courses on ethics) and this causes a number of problems – some cases have already reached the European Court of Human Rights (see for instance the ruling in the *Grzelak* case).<sup>226</sup>

The *Grzelak* case ruling was not implemented for years and the Ombud repeatedly alerted<sup>227</sup> the Government to the fact. It was finally implemented in April 2014.<sup>228</sup> The amendment introduces new rule so that even a request from one pupil puts an obligation to organise a course on religion or ethics; if the number of pupils is smaller than seven, it may be organised as a course for pupils from different classes or schools. The amendment also introduces a new declaration of will – it should be in written form (parents declare whether they wish their child to take part in the course). Previously, mere consent (oral) was enough, therefore it was not documented. The amendment came into force on 1 September 2014 (the beginning of the new school year).

Based on the Ordinance of the Minister of Education on the conditions and manner of organising courses on religion in state nurseries and schools,<sup>229</sup> teachers of religion are appointed to schools by their management only if they have an appropriate permit from the relevant authorities of the particular faith or religious organisation. The authorities of particular faiths are listed in the Act on relations between the state and specific religions. Currently the religion of the following faiths is taught: Catholic, Orthodox, Protestant, Adventist, Baptist, Pentecostal, Polish Catholic, Mariavite, Judaism and Islam.<sup>230</sup> In relation to the Catholic Church, this provision also comes from the agreement with the Holy See (Concordat, 28 July 1993), which states in Article 12.3 that teachers of religion need a permit from the bishop (*mission canonica*) in order to be appointed.

The employment contract for teachers of religion has a dual character – it is a lay contract (the state school pays the salary) but it also reflects the autonomy of particular faiths. In the event that permission is revoked by the particular religious organisation, the teacher automatically loses the right to teach religion. Depending on the status of the teacher, this means either automatic termination of the employment contract or termination according to labour law (within a given paid notice period).<sup>231</sup>

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

In Poland national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC).

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

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religious organisations (*związek wyznaniowy*), and sets out the criteria for registering churches or other religious organisations (*wyznanie*). Criteria include application for registration by a minimum of 100 persons and information describing the most important elements of the new church – its name, goals, etc. There are currently 175 registered churches and other religious organisations (*związek wyznaniowy*). See the list at [http://bip.msw.gov.pl/portal/bip/247/15644/Rejestr\\_kosciolow\\_i\\_innych\\_zwiazkow\\_wyznaniowych.html](http://bip.msw.gov.pl/portal/bip/247/15644/Rejestr_kosciolow_i_innych_zwiazkow_wyznaniowych.html) (last accessed 1 May 2015).

<sup>226</sup> Application no. 7710/02, *Grzelak v. Poland* (Lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools); ECtHR ruling 15 June 2010. See also: application no. 32932/02 by Danuta Nowak and Michał Krynicki against Poland lodged on 23 August 2002 (freedom of religion); date of decision to communicate, 1 February 2008; ECtHR decided to cancel the application due to a lack of response from the applicant, decision taken 23 June 2009.

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

<sup>228</sup> The 25 March 2014 amendment of the Ordinance of the Minister of Education on the organisation of religious instruction in State nurseries and schools (14.04.1992) (*Rozporządzenie w sprawie warunków i sposobu organizowania nauki religii w publicznych przedszkolach i szkołach*).

<sup>229</sup> Issued on 14 April 1992, the relevant part amended in 1999 (Dz.U.1992.36.155).

<sup>230</sup> <http://orka2.sejm.gov.pl/IZ6.nsf/main/6B1AA405> (1 May 2013), information from 2008.

<sup>231</sup> Act of 26 January 1982 the Teachers' Charter (*Ustawa z 26 stycznia 1982r. Karta Nauczyciela*), Article 23.2 point 6; Article 52 (1) Labour Code.



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

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

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

In Poland national law includes exceptions relating to difference in treatment based on nationality.

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

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

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

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

In Poland nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

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

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

Nationality is an explicitly protected ground in the ETA (Article 1 and 3) however 'nationality' (*narodowość*) is understood as belonging to a nation (citizenship is not covered verbatim).

A positive example of directly stated protection of foreigners and stateless persons is the Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion,<sup>232</sup> which

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<sup>232</sup> Poland, Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (*Ustawa o gwarancjach wolności sumienia i wyznania*) (Dz.U.2005.231.1965.t.j.).



provides in Article 7.1 that 'foreigners when in Poland exercise freedom of conscience and religion equally with Polish citizens', and in Article 7.2 that Article 7.1 also covers stateless persons.

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

Polish law does not provide a definition of racial discrimination, race or ethnic origin (see also comments on the Act on National and Ethnic Minorities and on Regional Languages in Section 2.1.1 above). When interpreting what racial discrimination means, Polish courts may look at the definitions contained in the international treaties, such as the CERD.

There are also 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.

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

a) Benefits for married employees

In Poland it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

There are no rules that would address this issue directly, but the general constitutional prohibition of discrimination could apply. For instance, the Act on the Employers' Social Funds<sup>233</sup> does not cover this issue but employers' internal regulations on the distribution of welfare funds should take into consideration the general prohibition of discrimination and include not only marriages but also informal partnerships (there is no law on partnerships in Poland).

b) Benefits for employees with opposite-sex partners

In Poland it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

In principle, the majority of social benefits granted by reason of belonging to an employee's family are governed by the definition of the family contained in the Family Code. This means that under Polish legislation the family is understood as the union of a man and a woman together with their children (the Constitution also provides in Article 18 that marriage is a union of a man and a woman and as such is protected by the state).

However, the Labour Code prohibits discrimination based on sexual orientation and this also covers employers' benefits.

There was one interesting case in 2009 regarding Polish State Television (TVP), which offered a family health insurance scheme to employees. All employees received an insurance offer (from the insurance company) which clearly stated that the right to insurance relates to those whose partner (it covered marriages but also informal partnerships) 'is of the opposite sex'. In reaction to complaints by the NGO Campaign Against Homophobia (KPH), the Plenipotentiary for Equal Treatment and the Ombud,<sup>234</sup> TVP declared that it did not influence the wording of the offer and that the definition of

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<sup>233</sup> Poland, Act on Employers' Social Funds (*Ustawa z 4 marca 1994 r. o zakładowym funduszu świadczeń socjalnych*) (Dz.U.2012.592 j.t.).

<sup>234</sup> Letter of the Ombud of 3 July 2009, RPO-622579-1/09/MK available at [www.rpo.gov.pl/pliki/12466292490.pdf](http://www.rpo.gov.pl/pliki/12466292490.pdf) (last accessed 1 May 2015).

'partner' would be changed. KPH and its lawyer looked for examples of this kind of discrimination and announced it on their website offering legal assistance (no cases were reported to them).<sup>235</sup>

It should also be noted that there have so far been very few cases before Polish employment courts where the ground of sexual orientation was raised in the claim. One of the reasons is fear on the part of LGBTI people of disclosing their sexual orientation. The vast majority of LGBTI people claim that they do not reveal their sexual orientation in the workplace.<sup>236</sup>

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

##### **a) Exceptions in relation to disability and health/safety**

In Poland there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC).

The 2010 Equal Treatment Act does not refer to health and safety.

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

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

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

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

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

In Poland national law provides an exception for direct discrimination on the ground of age.

The 2010 Equal Treatment Act transposed Article 6 using the same wording as the Directive.

- Justification of direct discrimination on the ground of age

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<sup>235</sup> See the relevant announcement at [www.kph.org.pl/en/allnews/15-kph/186-dyskryminacja-w-pracy-prawnicy-kph-prosz-o-kontakt](http://www.kph.org.pl/en/allnews/15-kph/186-dyskryminacja-w-pracy-prawnicy-kph-prosz-o-kontakt) (last accessed 1.05.2015).

<sup>236</sup> See: Danish Institute for Human Rights (2009), *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Poland*; Rzeplinski, A. (2008), *Legal study on homophobia and discrimination on grounds of sexual orientation in Poland*, FRALEX; Abramowicz, M. (ed.) (2007), *The situation of bisexual and homosexual persons in Poland 2005 and 2006 report*, Campaign Against Homophobia and Lambda Warsaw Association, Warsaw.

In Poland it is possible, in specified circumstances, to justify direct discrimination on the ground of age.

The 2010 Equal Treatment Act (Article 5.8.a), following Article 6 of the Directive, 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, and if the means of achieving that aim are appropriate and necessary.

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

The case of *Mangold*<sup>237</sup> has not so far been directly invoked. It could be used, but the particular issue it refers to was decided in Poland in a different way – in fixed-term labour contracts the same protection exists no matter what the age of employee. There is also no age discrimination in Polish law regarding a service-related statutory minimum notice period, as there was in the *Küçükdeveci* case.<sup>238</sup>

In Poland national law permits differences in treatment based on age for activities within the material scope of Directive 2000/78.

The ETA (Article 5.8.b) permits different treatment of natural persons due to age: 'that consists of establishing, for the purposes of social security, different rules for assigning or acquiring the right to benefits, including different age criteria for the calculation of the amount of benefits [...]'.

Differences in treatment based on age are also permitted in other legislation, besides the ETA, in some situations (see more in Sections 4.7.2, 4.7.3 and 4.7.4. below).

In Poland national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).

The 2010 Equal Treatment Act transposed Article 6(2) of the Directive. The ETA justifies different treatment if the conditions transposed from Article 6(2) are met. In the case of employee occupational pension schemes, different treatment is permitted provided this does not result in discrimination on the grounds of sex (Article 5.8.b, second sentence, ETA).

According to Polish law, individuals (women and men equally) are obliged to contribute to pensions once they commence employment.<sup>239</sup> There are fixed ages for entitlement to benefits.<sup>240</sup> Nevertheless, some labour groups have special preferences, e.g. miners, teachers, professional soldiers, police officers, etc.

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

In Poland there are some special conditions set by law for older or younger workers in order to promote their vocational integration, and for people with caring responsibilities to ensure their protection.

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<sup>237</sup> C-144/04.

<sup>238</sup> C-555/07.

<sup>239</sup> Article 6 Social Security Act.

<sup>240</sup> Article 24 and 27 Retirement Act.

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

- 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 them leave from work for this purpose;
- working hours cannot exceed six hours per day for people under 16 and eight hours per day for those under 18;
- time spent at school taking part in compulsory classes is counted as working time;
- a young person may not be employed on night shifts or to work during the night from 22.00 to 06.00;
- a list of jobs which may not be undertaken by young people is also provided.<sup>241</sup>

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

#### **4.7.3 Minimum and maximum age requirements**

In Poland there are some exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

According to the provisions of labour law, the minimum age of 18 is, in general, required for engagement as an employee. There are some exceptions regarding minors over 16 (employment of a minor under 16 years old is generally forbidden).

Those who have completed their secondary education, at least (gymnasium),<sup>242</sup> may become employed if they obtain medical approval for the specific kind of work and any occupational qualifications that may be required for the offered position.

Those who do not have any vocational training may be employed only for the purposes of undertaking this training.

There are age requirements in relation to the status of unemployed people. This status and the rights derived from it (unemployment benefit, training, public career advice, etc.) may be obtained only by people between the age of 18 and retirement age.

There are specific age limits concerning some parts of the public sector. Minimum age limits exist e.g. within the judiciary. According to the Judiciary Act, in order to become a judge in a first instance court, a person must be more than 29 years old.<sup>243</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 to complete the whole course of education and training to become a judge. Nomination to the courts of second instance and to the Supreme Court requires a certain length of practice and therefore this is an indirect age limit.<sup>244</sup> As regards administrative courts, there is an age limit for judges in regional administrative courts, who must be 35 or over.<sup>245</sup>

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<sup>241</sup> See Article 190-204 Labour Code.

<sup>242</sup> General education includes the following stages: (a) primary/basic education: 7-13 years old; (b) lower secondary education (gymnasium): 13-16 years old; (c) upper secondary education (lyceum): 16-19 years old; and (d) higher education (higher schools, universities, etc.): from 19 years old.

<sup>243</sup> Poland, Act of 27 July 2001 Law on Common Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), Article 61.1 point 5.

<sup>244</sup> Article 63.1, Article 64.1 Law on Common Courts Organisation, and Article 22.1 point 6 Act of 23 November 2002 on the Supreme Court (*Ustawa z 23 listopada 2002 o Sądzie Najwyższym*).

<sup>245</sup> Poland, Act of 25 July 2002 on the Organisation of the Administrative Judiciary (*Ustawa z dnia 25 lipca 2002 Prawo o ustroju sądów administracyjnych*), Article 6.1 point 5.

To become a judge of the Supreme Administrative Court, the minimum age is 40 years, unless the candidate has been a judge in a regional administrative court for at least three years.<sup>246</sup>

Furthermore, there is a minimum age limit of 30 to become an assistant judge (*asesor*) at a regional administrative court.<sup>247</sup>

The minimum age for becoming a prosecutor is 26.<sup>248</sup> Under the Notaries Act, one of the conditions of becoming a notary is to be at least 26.<sup>249</sup>

#### **4.7.4 Retirement**

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

In Poland there is no state pension age at which individuals must begin to collect their state pensions.

There is no requirement for employees to retire when they reach retirement age. The general retirement age was, until the end of 2012, 60 for women and 65 for men. In May 2012, however, the retirement age was changed by Parliament. The normal retirement age for both men and women will be 67 (to be introduced incrementally – for men by 2020 and for women by 2040).<sup>250</sup>

The retirement age is treated as a right not as an obligation and it is left to the discretion of the employee whether to retire.<sup>251</sup> On the one hand, it is only the employee themselves who can apply to the social security agency to be issued with a decision granting a pension. On the other hand, entitlement to a retirement pension is not subject to resignation from employment.

As a general rule, collection of the state pension is a right, not an obligation. However, for many years this was not obvious, since the jurisprudence of the courts, including the Supreme Court, varied regarding cases in which reaching the retirement age and entitlement to a pension were the reasons for the termination of a labour contract. In a number of cases the Supreme Court adopted different decisions. Finally, in 2009 the Supreme Court,<sup>252</sup> in a special procedure, answered a 'legal question' lodged by the Commissioner for Civil Rights Protection (this special procedure may be initiated by the Ombud in situations where differences exist in the interpretation of the law in court judgments; the legal question is not based on any particular case). The resolution (ruling) was passed by a special panel of seven judges.

The court answered the question: 'Whether reaching retirement age and entitlement to a pension may be the sole reason for the termination of a labour contract with an employee – a woman or a man – and whether this implies discrimination against an employee based on sex and age (Article 11<sup>3</sup> of the Labour Code)'. The Supreme Court adopted the following resolution: 'Reaching retirement age and entitlement to a pension may not be the sole cause of termination of a contract of employment by an employer (Article 45 (1) Labour Code)'. In the justification, the Supreme Court stressed that the termination of the employment of an employee – a woman or a man – just because they reached a certain

<sup>246</sup> Article 7.1 Act on the Organisation of the Administrative Judiciary.

<sup>247</sup> Article 26.1 point 2 Act on the Organisation of the Administrative Judiciary.

<sup>248</sup> Poland, Act of 20 June 1985 on the Public Prosecutor's Office (*Ustawa z dnia 20 czerwca 1985r. o prokuraturze*), Article 14.1 point 5.

<sup>249</sup> Poland, Act of 14 February 1991 on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*), Article 11 point 7.

<sup>250</sup> Retirement Act (Article 24, 27, amended 11 May 2012, in force since 01 January 2013).

<sup>251</sup> Articles 24 and 27 Retirement Act.

<sup>252</sup> Supreme Court Resolution, 21 January 2009, sygn. II PZP13/08.

retirement age and are entitled to a pension constitutes discrimination: indirect discrimination on the ground of gender (in the case of a female employee since the retirement age for women is lower) and direct discrimination on the ground of age (in the case of female and male employees).

Another interesting case was decided by the Constitutional Tribunal which answered a legal question formulated by the Łódź Regional Court:<sup>253</sup> whether Article 29.1 of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund violates the constitutional rules of equality in law and the prohibition of discrimination (Articles 32 and 33). The law challenged made a distinction between the situation of men and women in terms of the right to 'early retirement'. The normal retirement age was 60 for women and 65 for men. However, women were entitled to 'early retirement' at the age of 55 if they had at least 30 years of paid pension insurance, while men in a similar situation (35 years of insurance and 60 years of age) were not entitled to early retirement.

The Constitutional Tribunal found the law on pensions discriminatory. Following the verdict 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.

It is possible, as a rule, for people who have reached normal retirement age to combine employment with receipt of a pension without any restriction. However, if people of retirement age do not terminate their employment contract and continue to work for the same employer (this applies equally to women and men), their pension is suspended. This provision was introduced on 1 July 2000 in response to the dramatic situation in the Polish labour market and the high unemployment rate.<sup>254</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.

#### b) Occupational pension schemes

In Poland there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

The rules that apply to payments from Employees' Pension Programmes, a system of voluntary collection of pension contributions, are rather specific. Individuals begin receiving payments in the following cases: 1) upon a decision by the individuals once they reach the age of 60; 2) upon presentation of a decision granting the right to a state pension when the individual reaches the age of 55; 3) when the individual reaches the age of 70 under two conditions: if the individual has not applied to receive payments previously and if their employment has been terminated by the employer running the Employees' Pension Programme.<sup>255</sup>

#### c) State imposed mandatory retirement ages

In Poland there is no state-imposed mandatory retirement age(s).

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, with the exception of judges (maximum age 70),<sup>256</sup> court enforcement

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<sup>253</sup> 23 October 2007, Marek R. v. Zakład Ubezpieczeń Społecznych, Sygn. akt P 10/07.

<sup>254</sup> Article 103.2a Retirement Act (since 01 January 2011 Article 103a).

<sup>255</sup> Poland, Act of 20 April 2004 on Employees' Pension Programmes (*Ustawa z 20 kwietnia 2004 r. o pracowniczych programach emerytalnych*), Article 42 (1) and (2).

<sup>256</sup> Poland, Act of 27 July 2001 Law on Common Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), Articles 69.1, 69.3.

officers (maximum age 70),<sup>257</sup> public prosecutors (maximum age 70)<sup>258</sup> and notaries public (maximum age 70).<sup>259</sup> The recent developments in this respect are mentioned below.

There are relevant cases that should be mentioned in this context. Firstly, an interesting problem arose in 2012 (initiated by a complaint from an affected party) that engaged both the Ombud and the Plenipotentiary for Equal Treatment. The Pharmaceutical Act limited the possibility of being a manager of a pharmacy to those who are below 65 or 70 (if prolonged using the special procedure). This provision was criticised by the Ombud and the Plenipotentiary in their representations to the Minister of Health as discriminatory. The process of amendment of the law relating to retirement was taking place at the same time, and the questionable provision was changed (with effect from 1 January 2013).<sup>260</sup>

Secondly, in 2013 the Supreme Administrative Court delivered a judgment<sup>261</sup> regarding the retirement age of court bailiffs (judicial enforcement officer – *komornik sądowy*).<sup>262</sup> According to the Law on bailiffs (Article 15a para. 1, item 3a), the Minister of Justice dismisses bailiffs when they turn 65 (until 2013, currently 70). The dismissal by the Minister was challenged by a dismissed bailiff before a Regional Administrative Court which upheld decision of the Minister. The Minister of Justice and the Court concluded that the quoted provision is mandatory and there are no grounds to assume that the bailiff who has reached the age of 65 can continue to pursue this profession. The Supreme Administrative Court considered the cassation appeal against this verdict. In the opinion of the court, interpretation of Article 15a of the Law on Bailiffs required from the Minister of Justice, in the absence of appropriate legislative action, the direct application of the provisions of Directive 2000/78/EC and, in particular, Article 2 para. 2. But the change of law is also questionable.

As a result, in its 2014 report the Ombud stated that it continues to note the limitations of employment for certain functions, or in certain occupations, for those who have passed the age limit. In the opinion of the Ombud it is especially important that any such restriction must be rationally justified and cannot be based on arbitrary criteria. For this reason it is necessary, in the opinion of the Ombud, to analyse legislative measures and identify any other provisions preventing further employment or the further carrying out of certain functions in connection with reaching a certain age.<sup>263</sup>

In 2014 the Ombud continued its efforts. It objected to the change of the age limit for bailiffs (as a result of the case mentioned above, the law was amended and the age limit was changed from 65 to 70 years). In the opinion of the Ombud, it still fails to comply with Directive 2000/78/EC, as well as the Constitution, since the change was introduced without proper substantiation.<sup>264</sup> But the Minister of Justice took a different view, stating that in his opinion there was no need to work on revising the regulation, according to which after reaching the age of 70, the bailiff is dismissed from office by the Minister of Justice. The current regulation does not infringe EU law or the Constitution. It is essential in order to ensure that the rights of all parties to enforcement proceedings are respected, as well as safeguarding the interests of the Treasury. Justifying his view the Minister stated *inter alia* that the situation of bailiffs is comparable to the function and powers granted to judges or

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<sup>257</sup> Poland, Act of 29 August 1997 on Judicial Officers and Enforcement (*Ustawa z dnia 29 sierpnia 1997 r. o komornikach sądowych i egzekucji*), Article 15a.1.3a.

<sup>258</sup> Poland, Act of 20 June 1985 on Public Prosecutor's Office (*Ustawa z dnia 20 czerwca 1985r. o prokuraturze*), Article 62.a.

<sup>259</sup> Poland, Act of 14 February 1991 Law on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*), Article 16.1.2a.

<sup>260</sup> Ombud Annual Report 2013, pp. 394-395; Plenipotentiary Annual Report 2013, pp. 65-66. Act of 6 September 2001, Pharmaceutical Act, as amended (relevant amendment: Dz.U. 2012.1544, Article 10.1).

<sup>261</sup> 9 July 2013, R.C. v. Minister of Justice, sygn. II GSK 391/12.

<sup>262</sup> Ombud Annual Report 2014, pp. 72-73.

<sup>263</sup> Ombud Annual Report 2014, p. 96.

<sup>264</sup> Ombud Annual Report 2015, pp. 22-23.

prosecutors for whom age limits were maintained. It is not possible to perform the duties of a judge on reaching 70 years of age. Similar age restrictions are maintained in relation to notaries.<sup>265</sup>

d) Retirement ages imposed by employers

In Poland national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

It is not possible to set retirement ages by contract, collective bargaining or unilaterally with regard to pensions paid from the Social Security Fund. The Retirement Act stipulates that a person is entitled to a pension if they meet conditions set out in the Act. Only the legislator has the right to set the conditions for receiving pensions from the Social Security Fund. Apart from this, there is also the possibility to take out private, voluntary insurance within the 'third pillar'. In this case, employers (or insurance companies) have more freedom to set and agree upon the rules, including the minimum age at which an insured person will be entitled to receive the part of their pension coming from the third pillar.

e) Employment rights applicable to all workers irrespective of age

The employer can terminate employment on the basis of general rules governing the termination of labour relations.

The law protects all employees irrespective of age (with the exception described below aiming at the protection of people close to retirement age). According to the 2009 resolution of the Supreme Court already mentioned, reaching retirement age cannot be the sole reason for dismissal – this would be discrimination. However, if there is another reason behind the need for dismissal (for instance, reductions in staff), it is acceptable to dismiss people who have the right to a pension.

In addition, employees are protected against dismissal in the four years before they reach retirement age, if the period for which they have been employed gives them the right to a retirement pension on reaching retirement age.<sup>266</sup> No distinction is made between women and men in this respect.

Of course, in practice many problems occur which eventually end up in court. Employees quite often feel that they are being put under pressure to resign from their job when reaching retirement age, or that they are supposedly being dismissed for reasons other than reaching retirement age (but in fact the sole reason is their age). It is probable that many of them do not challenge their employers due to lack of legal awareness, but the rulings of the Supreme Court rulings, and their publication, are most probably raising this awareness.

f) Compliance of national law with CJEU case law

In Poland national legislation is in line with the CJEU case law on age regarding compulsory retirement.

#### **4.7.5 Redundancy**

a) Age and seniority taken into account for redundancy selection

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<sup>265</sup> July 2014, Ombud Annual Report 2015, p. 23.

<sup>266</sup> Article 39 of the Labour Code.



In Poland national law does not permit age or seniority to be taken into account in selecting workers for redundancy.

The general provision states that an employer may not terminate the employment contract of an employee who has less than four years to go before they reach retirement age, unless such a person is being granted a pension on the grounds of incapacity to work.<sup>267</sup>

In this period of special protection against termination of the employment contract, the employer is allowed only to change the existing working and remuneration conditions but, additionally, only in respect of certain groups of employees enumerated in the legislation.<sup>268</sup> Even in the latter case, when such a change would lead to a reduction in remuneration, the employer is obliged to pay a special allowance to compensate for this reduction of pay.<sup>269</sup> There is an exemption in the case of the bankruptcy or liquidation of the employer; in such cases the above-mentioned provision does not apply.

#### b) Age taken into account for redundancy compensation

In Poland national law provides compensation for redundancy. This is not affected by the age of the worker. It is affected by the wages and number of years of employment with this particular employer.

If the above-mentioned employee, who is protected in the period before they reach retirement age, is somehow made redundant, they have 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)**

In Poland national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

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

The Polish Constitution also stipulates generally that any limitation of 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 must not violate the essence of freedoms and rights.<sup>270</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.).

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<sup>267</sup> Article 39 and 40 of the Labour Code.

<sup>268</sup> Poland, 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*), Article 5.5.

<sup>269</sup> Poland, 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*), Article 5.6.

<sup>270</sup> Article 31 of the Constitution.

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

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

In Poland, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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

### a) Scope for positive action measures

In Poland positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

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

The 2003 amendment of the Labour Code that took effect on 1 January 2004 introduced a clear and general stipulation allowing for positive action in employment relations.<sup>271</sup> This provision covers positive action not only for racial or ethnic origin, religion or belief, disability, age and sexual orientation but equally for some additional grounds: gender, political opinion and membership of a trade union.

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

There is no significant case law concerning this issue.

The only serious debates (both within the government and in public debates) have concerned positive action directed at people with disabilities (it was a matter of common agreement for years that positive action is desirable and that a number of positive measures should be established in order to assist full integration by people with disabilities).

In recent years (since 2008), a new debate and campaign have started concerning the 50+ generation, resulting in a governmental programme and changes to the law.

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

There are no debates or examples of positive action in the case of, for instance, sexual orientation.

### b) Main positive action measures in place on national level

In respect of positive action for members of **national minorities**, there is a collection of measures for preferential treatment in Poland. 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% subsidy in comparison to other schools (and even 150% in the case of small schools). The state budget also invests in schools and subsidises the production and publication of textbooks. Furthermore, the Ministry of

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<sup>271</sup> Article 18<sup>3b</sup> § 3 of the Labour Code.

Culture subsidises the minority press and other publications and sponsors cultural events organised by national and ethnic minorities.<sup>272</sup>

In relation to the **Roma community** special programmes have been developed, such as the Government Roma Programme 2004-2013. Since the programme ended, a new strategy was adopted by the Council of Ministers on 7 October 2014, entitled the Programme for the Integration of the Roma Community in Poland 2014-2020.<sup>273</sup>

It is not easy to make a clear division between actions taken as 'broad social policy measures' and 'treatment narrowly tailored' (there are no quotas). All actions taken within the Roma Programme were in a sense tailored narrowly, as they were dedicated specifically to Roma. However, they obviously had a wider social context and in this sense the beneficiaries are all citizens, not just Roma. The new programme has only just started and, since its adoption was postponed, it is too early to evaluate it.

However, examples of positive action included under the Roma Programme are as follows (and similar activities are to be continued):

- larger subsidies for schools with Roma pupils (up to 150% more money per pupil) if the school applies (which is not the rule) for different activities;
- including extra classes;
- employing Roma education assistants to assist the teachers of integrated classes (they assist and help Roma pupils in their integration at school and support and maintain parents' relationships with the school); in 2011/2012, 89 assistants were employed, which means one assistant for 31 pupils (Roma education assistants are themselves from the Roma community);
- employing assistant teachers (145 in 2012);
- additional educational and other activities for Roma children and parents, psychological and pedagogical advice, organising holidays and camps, material help (purchasing school textbooks, etc.);
- special stipends for Roma students (in higher education) and Roma children with artistic talent (in 2012, 61 students and 19 school pupils);
- improving living conditions: renovation of flats (175 in 2012); building of new flats (eight in 2012); providing water, sewage systems and electricity (to 10 flats in 2012);
- preventative health examination and vaccination (1 719 people);
- employing special nurses to assist with medical problems (34 in 2012);
- organising 'white days' with free medical advice provided by doctors from different specialisations (eight activities in 2012);
- supporting employment of Roma by subsidising job creation (nine people in 2012).

In March 2008 the government announced a new programme called 'Solidarity between the Generations' which aimed to activate the over-fifty generation. In Poland only 28% of people over 50 worked, the lowest figure in the EU. The programme consisted of a number of actions, including lowering employment costs for employers, organising special skills training courses, adjusting working conditions and changing the law (to limit early retirement), etc. As a result the number of people over 50 in the labour market has increased significantly.

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<sup>272</sup> Information on particular programmes may be found on the website of the Ministry of Administration and Digitisation; as far as problems related to these programmes are concerned, please see minutes from the meetings of the Joint Committee of the Government and Ethnic and National Minorities at [www.mac.gov.pl](http://www.mac.gov.pl) (last accessed 15 April 2015).

<sup>273</sup> *Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warsaw 2014, also in English, available at <http://mniejszosci.narodowe.mac.gov.pl/mne/romowie/program-integracji-spol> (last accessed 15 May 2015).

Furthermore, in August 2012 the Government Programme for Senior Citizens' Social Activity 2012-2013 (ASOS Programme) was adopted by the Council of Ministers. In 2013 the Minister of Labour appointed the Council for Policy on Older People Seniors. The Council worked on recommendations and as a result, on 24 December 2013, the Council of Ministers adopted *Guidelines on long-term policy on older people 2014-2020*.<sup>274</sup> (The document includes references to **age** discrimination and identifies the following areas of action: health and self-reliance, economic activity for people aged 50+, educational, social and cultural activities, the silver economy and intergenerational relations).<sup>275</sup>

A number of measures can be considered as positive action in the field of **disability** (many of them are mentioned above). The Disabled Persons Act 1997 contains the 'System of Quotas and Penalties', a system of incentives and penalties for employers which aims to support the employment of people with disabilities. Employers who, for at least 36 months, employ disabled people (who were unemployed or seeking work while not holding a job and were directed to work by a district labour office, or whose disability occurred while working for the employer, except if this disability was caused by the fault or infringement of regulations by the employer or by the employee) may receive reimbursements from the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych, PFRON*) for adapting existing and creating new workstations to meet the needs of disabled people, adapting or buying equipment to help disabled people to function at work and having the needs of persons with disabilities identified by occupational health services.<sup>276</sup>

Furthermore, an employer who employs disabled people is entitled to receive a monthly subsidy for the remuneration of disabled employees.<sup>277</sup> The amount of the subsidy is related to the level of impairment of the disabled people employed and is currently PLN 1 800, 1 125 or 450 depending on the level of disability.<sup>278</sup> An employer may also receive a refund of the cost of a co-worker who helps a person with a disability in adapting to work and communicating.<sup>279</sup>

For employers, there is a supplementary – this time negative – incentive to employ disabled people. That is, an employer who employs at least 25 employees is obliged to pay a monthly sum to the PFRON unless they employ at least 6% disabled people.<sup>280</sup> This amount is determined according to the formula in which 40.65% of average remuneration is multiplied by the theoretical number of employees who should be taken on in order to reach the threshold of 6% disabled individuals among all the people employed by the specific employer. According to the Law on the civil service,<sup>281</sup> if the proportion of people employed in a public office is less than 6%, a disabled individual has priority in a recruitment process if they are within the group of the five best candidates.<sup>282</sup>

In addition, there are several programmes which aim to integrate people with disabilities into the labour market (financed by the PFRON).

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<sup>274</sup> Uchwała Nr 238 Rady Ministrów z dnia 24 grudnia 2013 r. w sprawie przyjęcia dokumentu Założenia Długofalowej Polityki Senioralnej w Polsce na lata 2014-2020 (M.P. z dnia 4 lutego 2014 r.).

<sup>275</sup> Ombud Annual Report 2014, pp. 19-20, see also Report on the National Programme 2015, pp. 112-115.

<sup>276</sup> Article 26, Disabled Persons Act.

<sup>277</sup> Article 26a Disabled Persons Act.

<sup>278</sup> April 2014. The exchange rate is about EUR 1.00: PLN 4.00.

<sup>279</sup> Article 26d Disabled Persons Act.

<sup>280</sup> See Article 21.1-2 Disabled Persons Act.

<sup>281</sup> Art. 29a, *Ustawa o służbie cywilnej z 21 listopada 2008* (Dz.U. 2014, poz. 1111).

<sup>282</sup> Ombud Annual Report 2015, pp. 71-72.

## 6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Poland the following procedures exist for enforcing the principle of equal treatment (judicial, administrative and alternative dispute resolution such as mediation).

The 2010 **Equal Treatment Act** introduced a compensation claim (Articles 12-13) stating that anyone (natural and legal persons) who suffers an infringement of the principle of equal treatment is entitled to damages. The relevant general rules of the Civil Code and the Code of Civil Procedure apply. Court verdicts are binding.

According to the **Labour Code** (Article 242), claims stemming from an employment relationship can be adjudicated either by a labour court or by a conciliation committee.<sup>283</sup>

The case can be referred to a **conciliation committee** by an employee only and not by an employer. The conciliation procedure is intended to be speedy; the Labour Code specifies a period of 14 days as the normal term within which the committee should adjudicate.<sup>284</sup> An agreement reached before a conciliation committee should be voluntarily implemented by the employer. If the employer opposes this and does not put the agreement into operation, it can be executed in accordance with civil procedure.<sup>285</sup>

Before 2011, a discrimination compensation complaint had only been introduced into the Labour Code, effective as of 1 January 2004 (Article 18<sup>3d</sup>). Anyone who suffers an infringement of the principle of equality **in employment** is entitled to commence judicial proceedings and seek compensation of at least the minimum monthly salary. The labour court which determines the compensation will take into consideration the type and gravity of the discriminatory measures applied in respect of the complainant. Court verdicts are binding.

Furthermore, the principle of equal treatment and non-discrimination is considered to be one of the fundamental obligations of the employer to the employee. Therefore, the employee is entitled to terminate their labour contract without prior notice on the basis of a grave infringement by the employer of fundamental obligations towards the employee (Labour Code, Article 55 para. 1<sup>1</sup>).

An employee is also entitled to initiate judicial proceedings in order to establish the existence of a labour relationship with a specific content, e.g. in order to determine appropriate remuneration when this has been lowered in a discriminatory manner.<sup>286</sup>

In addition, certain remedies may be applied by **labour inspectors** who supervise and monitor the observance of labour law (including anti-discrimination provisions). According to the National Labour Inspectorate Act, a labour inspector may issue orders or improvement notices, make submissions or bring claims to a labour court if the establishment of the existence of a labour relationship is at stake.<sup>287</sup> Measures taken by

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<sup>283</sup> Article 242 Labour Code.

<sup>284</sup> Article 251 Labour Code.

<sup>285</sup> Article 255.1 Labour Code.

<sup>286</sup> Proceedings on the basis of Article 189 of the Code of Civil Procedure, see Rączka K., Salwa. Z. (ed.) (2004) *Kodeks pracy. Komentarz*, 6th ed., Warsaw, p.72.

<sup>287</sup> Poland, Act of 13 April 2007 on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*), Dz.U.2012.404 j.t., Article 21-33. See also Article 63<sup>1</sup> Code of Civil Procedure.

labour inspectors are binding, but the employer may challenge them in administrative court.

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 a legal adviser,<sup>288</sup> but for an employee, a representative of a trade union, a labour inspector or another employee of the enterprise may also act as a legal representative.<sup>289</sup> In addition, in labour cases claims are automatically exempted from court costs.

In addition, in matters not covered by the Equal Treatment Act, recourse may be made to civil law, which affords protection of '**personal rights**' (Article 23-24 of the Civil Code). According to Article 30 of the Constitution, the inherent and inalienable dignity of the individual is a source of freedoms and rights for individuals and citizens. It is inviolable. The respect and protection thereof is the obligation of the public authorities. Article 23 of the Civil Code (which should be interpreted in line with the above-mentioned constitutional provision) provides general protection of 'personal rights'. According to this provision, personal rights, in particular health, freedom, honour, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of the home, and scientific and artistic work, as well as inventions and improvements, are protected by civil law without prejudice to protection provided by other regulations.

The provision quoted does not include dignity or, for instance, age, disability, ethnic origin, race or sexual orientation, but the list of 'personal rights' is not exhaustive. There is no doubt that personal dignity is protected (as stated in the Constitution and confirmed by a wealth of legal writings and jurisprudence). Therefore, if a person is discriminated against outside the labour context on the grounds of age, sexual orientation, race or any other reason, the dignity of that individual is obviously infringed and they may try to seek redress through this general civil clause. This provision of personal rights was used for example in two cases related to access to services for people with disabilities. In the case *Jolanta K. v. Carrefour Polska Sp.z.o.o.*,<sup>290</sup> the issue was about access for a blind person to a supermarket with a guide dog. The parties reached a settlement in court. Carrefour also announced that the company has changed its negative internal rules on people with disabilities. In addition, the case resulted in an amendment to Polish law in relation to access specifically for blind people with guide dogs to grocery stores, restaurants and similar premises (in force since June 2009).

In the case *Dominik Rymer v. XY, owner of the Sfinks restaurant*<sup>291</sup> the issue was access by a wheelchair user with an assistance dog to a restaurant. The court stated that refusal of access to a restaurant by a disabled person with an assistance dog violates the protection of 'personal rights' and violates the principle of equal treatment in access to services offered to the public. Interestingly, the claimant lost his case at the first instance. The Regional Court decided – with quite an extraordinary justification – that his personal rights were not violated since he was an active person who enjoyed sport which was a kind of therapy for him, and was therefore strong psychologically and self-confident.

On the basis of Article 24 (1) of the Civil Code, an individual whose personal rights are jeopardised by another's actions can demand that the action cease, unless it is not unlawful. Furthermore, if personal rights have been infringed, the individual concerned can demand that the person who infringed them rectify the effects of the violation, in particular that a statement of appropriate content and form be made. The claimant can also demand pecuniary satisfaction or payment of an appropriate sum to a designated social cause based on the rules of compensation laid down in the Civil Code. If the infringement of personal

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<sup>288</sup> Article 87.1 Code of Civil Procedure.

<sup>289</sup> Article 465.1 Code of Civil Procedure.

<sup>290</sup> Warsaw Regional Court, 28 January 2009, sygn. I C 498/08.

<sup>291</sup> Warsaw Court of Appeal, 28 September 2011, I ACa 300/11.

rights results in material loss, the victim may demand compensation on general legal terms (Article 24 (2)). Court verdicts are binding.

The **law on petty crimes** defines refusal to sell goods and provide services as a petty crime. These provisions stem from the communist era and had a different meaning at that time, but it would seem they might play a role to some extent in the prohibition of discrimination in access to goods and services. In such a case, victims should apply to the police, who act as prosecutors in petty crimes (district court). The Code of Petty Crimes (minor offences) provides: (Article 135) 'Anyone who, carrying on the sale of goods in a retail or catering business, hides goods meant for sale or deliberately refuses to sell them without just cause shall be subject to a fine' and (Article 138) 'Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine.' The fine imposed by the court (Article 1.1) may be up to PLN 5 000 PLN (around EUR 1 250 EUR). Court verdicts are binding.

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

The Penal Code does not cover all cases of discrimination, but nevertheless, criminal proceedings may be instituted in more serious cases, such as: the use of force or an illegal threat towards individuals or groups of people because of their national, ethnic, racial, political or religious affiliation;<sup>292</sup> a public insult towards individuals or groups of people or the infringement of the personal integrity of another person on these same grounds;<sup>293</sup> or the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.<sup>294</sup> Court verdicts are binding.

There are no **administrative** remedies laid down specifically to deal with discrimination issues, although such issues can sometimes be present in administrative proceedings. However, the 2010 Equal Treatment Act (Article 24) introduced a new possibility into administrative procedure (amending the Administrative Procedure Code).<sup>295</sup> It provides that if there has been a court ruling that found an infringement of the principle of equal treatment and if this infringement influenced a final administrative decision, an administrative re-trial may be demanded.<sup>296</sup> The procedure is binding.

In terms of non-judicial measures, a **complaint to the Polish Ombud's Office** – the Commissioner for Civil Rights Protection (*Rzecznik Praw Obywatelskich*) – may prove to be an effective tool. Since 1 January 2011 the Ombud has been designated as an equality body. Although the Ombud cannot issue a legally binding decision, the Office can investigate a case and exert pressure on the bodies responsible for inappropriate conduct or it can take certain legal steps (see more under Section 7).<sup>297</sup> The Ombud cannot issue legally binding decisions

The option of bringing an individual complaint before **the European Court of Human Rights** on the basis of an alleged violation of any rights or freedoms guaranteed by the European Convention or its additional Protocols in connection with Article 14 of the Convention cannot be ignored. The independent use of Article 14 (non-discrimination) will

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<sup>292</sup> Article 119.1 Penal Code.

<sup>293</sup> Article 257 Penal Code.

<sup>294</sup> Article 256 Penal Code.

<sup>295</sup> Act of 14 June 1969 - Code of Administrative Procedure [amended] (*Ustawa z dnia 14 czerwca 1960 r. - Kodeks postępowania administracyjnego*).

<sup>296</sup> Article 145b.1 Code of Administrative Procedure.

<sup>297</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*).



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 both criminal and civil procedure the possibility of **mediation** exists and is gradually becoming more popular. If the court directs the case (criminal or civil) to mediation, its result (if agreement is reached) is confirmed by the court and is as binding as a court verdict.

Another conciliation mechanism is provided for in the Code of Civil Procedure and allows a court, acting through a single judge, to **confirm an agreement** reached between the parties before the court proceeding are commenced.<sup>298</sup> Confirmation by a court of an agreement reached between parties is binding in the same way as a court verdict.

The procedures mentioned are the same in relation to employment in the private and public sectors.

#### b) Barriers and other deterrents faced by litigants seeking redress

A common problem faced by victims of discrimination (besides their fear of raising the issue of discrimination) is the lack of **professional legal assistance**. There is no system in place of free pre-litigation out-of-court legal advice for vulnerable groups (work on the Ministry of Justice draft law on access to legal aid has been ongoing since 2005, and there have been several versions of it). In all court proceedings it is possible for an indigent claimant (or victim in a criminal case) to receive a waiver of court costs and a legal aid lawyer (paid for by the state). However, in reality access to an *ex officio* lawyer is limited and the quality of legal aid services is often poor.

In relation to administrative procedures, it should also be noted that the rights of victims of discrimination to access court and/or administrative procedures (as provided for by Article 7.1 of Directive 2000/43) applies only partially in Polish law since the right to state-guaranteed legal aid does not include administrative proceedings (and considerable numbers of administrative proceedings may concern discrimination). The right to legal aid arises only when a person decides to file a complaint with an administrative court (following two non-judicial administrative instances). However, review of an administrative decision in court is limited to an evaluation of its compliance with the law only and not its merits (i.e. it is of a cassational character).

In the **case of the petty crimes** described above (offences against consumers, Code of Petty Crimes, Article 135, 138, see point a) above) it is difficult to state with certainty whether this provision has already been successfully used in the discrimination context. On the one hand it has been given for years as an example of possible legal action in reports and publications and is quoted at conferences, seminars and training events by lawyers and activists as a good legal tool (that is used occasionally). However, no concrete successful example was identified during the research for this report. The only case found was that of a man who sued the owners of the women-only restaurant, Babie Lato, for refusal of service. The court dismissed the claim.<sup>299</sup> However, limited access to information about these cases might be caused by the fact that these are petty crime proceedings: they are not published, and they do not attract public attention. In any case, it is not a special anti-discrimination provision and it has been identified as a possible source of legal action only because of the lack of appropriate procedures.

**The time limits** in the proceedings mentioned vary but generally speaking they do not act as deterrents to seeking redress as they are counted in years rather than months. The

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<sup>298</sup> See Article 184-186 Code of Civil Procedure.

<sup>299</sup> Częstochowa District Court, 2006 (*Sąd Rejonowy, Sąd Grodzki w Częstochowie*), see [www.dyskryminacja.fora.pl/dyskryminacja,2/peruki-dla-panow-w-babim-lecie-sa-legalne,53.html](http://www.dyskryminacja.fora.pl/dyskryminacja,2/peruki-dla-panow-w-babim-lecie-sa-legalne,53.html) (last accessed 1 May 2015).

time limits in relation to discrimination proceedings are the same as general time limits in other labour or civil cases.

**The statute of limitations** in compensation claims based on infringement of the principle of equal treatment (Article 15, ETA) is three years from the moment when the person learns about the infringement, and no later than five years from the infringement itself. However, generally the statute of limitations in civil matters (including labour matters) is 10 years, and three years in cases of 'periodic services' or cases related to the 'professional activity of the party as an entrepreneur'.<sup>300</sup> This shortened three-year period may cause problems. According to the research conducted in 2009 by the Polish Section of the International Commission of Jurists (ICJ),<sup>301</sup> a major source of obstacles in pursuing justice before the claim becomes time-barred is the situation of dependency between a person eligible to bring the lawsuit and the liable party. It has been observed that employees often do not seek to enforce their rights through fear of losing their jobs. As long as the employment relationship lasts, the employee is afraid of bringing claims against the employer. The short time-bar on claims for payment (three years), when combined with a lack of legal awareness and fear of loss of livelihood, may create a serious obstacle to pursuing justice.<sup>302</sup>

The ICJ draft report describes, for instance, several civil cases against JMD<sup>303</sup> where most of the lawsuits for damages concerned payment for overtime work that was not recorded by the company in the register of working hours. Many of these claims arose earlier than three years before the case was brought to court and, therefore, were already time-barred. Employees had not brought their claims earlier because of fear of losing their jobs and the difficult situation prevailing on the job market at the time of the dispute. As the ICJ draft report points out: 'jurisprudence<sup>304</sup> and legal scholarship allow the possibility of adjudicating a time-barred claim if rejecting such a claim would "violate the principles of social co-existence"'.<sup>305</sup> In addition, the Labour Code provides that a judge can always decide to reject the time-bar argument raised by the employer (to block an employee's claims) if the judge considers it to be an abuse of law.<sup>306</sup> This possibility tends to be applied to employee claims for compensation (e.g. following an accident at work treated as a tort under civil law or particularly blatant cases of discrimination, molestation or harassment).

As a consequence of the above, the law does create a mechanism for preventing injustice caused by a lapse of the prescription period in particular circumstances. However, the criteria for assessing whether a time-bar argument in a given case violates the principles of social co-existence or constitutes an abuse of law are vague, since they need to be interpreted from these general principles. By definition, the application of such 'general clauses' depends on the interpretation adopted by the adjudicating court under the particular circumstances of the case.

An application for an **administrative re-trial** (described under point a. above – if there has been a court ruling finding infringement of the principle of equal treatment, an administrative re-trial may be demanded if this infringement influenced the final

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<sup>300</sup> Article 118, Civil Code.

<sup>301</sup> See Szymielewicz, K. (2009), *Access to justice for human rights abuse involving corporations. A project of the International Commission of Jurists. Report for Poland.*

<sup>302</sup> *Rozpoczęcie biegu przedawnienia roszczenia pracowniczego* (Commentary on the Supreme Court judgment of 3 February 2009 (I PK 156/08)), *Monitor Prawa Pracy* (6), 2009.

<sup>303</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 eight modern distribution centres; see [www.biedronka.pl/](http://www.biedronka.pl/) (last accessed 1 May 2015).

<sup>304</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>305</sup> Compare e.g. Supreme Court Judgment of 17 September 1997 (I PKN 273/97); Supreme Court Judgment of 29 June 2005 (I PK 261/2004); Supreme Court Judgment of 19 March 2009 (IV CSK 492/2008).

<sup>306</sup> Article 8 of the Labour Code.

administrative decision) may be filed within a month of the court ruling on which the claim is based, becoming final.<sup>307</sup> The administrative decision may be quashed within five years of it being served or announced.<sup>308</sup>

In Polish law it is possible to **bring a case after the employment relationship has ended**. Exercise by an employee of the rights arising from a violation of the principle of equal treatment cannot constitute a reason for the employer to terminate the employment relationship.<sup>309</sup> However, if the contract was terminated the employee can either (1) make a request to a court that the notice to quit be recognised as void; or (2) if the employment relationship has already ended, the employee has the right to demand to return to work under the previous conditions or to receive compensation.<sup>310</sup>

Moreover, an employee can terminate an employment contract without notice if the employer has severely violated their obligations towards the employee<sup>311</sup> and then bring a case against the employer.

One other factor which could act as a deterrent to people seeking redress is constituted by **functional barriers**. Some courts and other bodies involved in the administration of justice are not easily accessible for people with disabilities. It is relatively difficult to find information in Braille.

#### c) Number of discrimination cases brought to justice

In Poland there are very limited statistics on the number of cases related to discrimination brought to justice.

There are still no full and reliable official statistics on the number of cases related to discrimination brought to justice. After the Equal Treatment Act came into force on 1 January 2011, the Polish Society of Anti-Discrimination Law sent a letter (24 January 2011) to the Minister of Justice urging the Ministry to collect the relevant statistical data.<sup>312</sup> Both the Ombud and the Government Plenipotentiary for Equal Treatment supported the idea expressed in this letter, and the Ministry of Justice declared it would collect relevant data. As a result, the Ministry of Justice provided information for 2011 – the first year of the operation of the law. According to this information, in 2011, 30 cases were brought to district and regional courts for compensation for discrimination based on the ETA. Of the 30 cases, 17 were decided and 13 were still pending in 2012.<sup>313</sup>

However, in the Ombud's annual report for 2013, numbers for 2012 were not given and the report stated that, despite its declarations, the Ministry of Justice had still not provided the relevant information.<sup>314</sup> What is more, the cases for 2011 mentioned above, listed by the Ministry of Justice, were reviewed by the Polish Society for Anti-Discrimination Law within the framework of a monitoring project and apparently they were not based on the

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<sup>307</sup> Article 145b.2 Administrative Procedure Code.

<sup>308</sup> Article 146.1 Administrative Procedure Code.

<sup>309</sup> Article 18<sup>3e</sup> Labour Code.

<sup>310</sup> Article 44-45 Labour Code.

<sup>311</sup> Article 55 Labour Code.

<sup>312</sup> [www.ptpa.org.pl/archiwum/?2011-01-24-ptpa-pyta-ministra-sprawiedliwosci-o-statystyki-dotyczace-dyskryminacji&nid=170&p=10](http://www.ptpa.org.pl/archiwum/?2011-01-24-ptpa-pyta-ministra-sprawiedliwosci-o-statystyki-dotyczace-dyskryminacji&nid=170&p=10) (last accessed 1 May 2015).

<sup>313</sup> Information on activities of the Civil Rights Commissioner in the field of equal treatment in 2011 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, June 2012, Bulletin 2012, no 2, p.79 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej, Warszawa, czerwiec 2012, Biuletyn Rzecznika Praw Obywatelskich 2012, nr 2, Źródła*, available at: <http://rpo.gov.pl/> (15.05.2015) [hereafter 'Ombud Bulletin 2012/2'], p.79; see also Ombud Annual Report 2013, p. 404.

<sup>314</sup> Ombud Annual Report 2013, p. 451.

2010 Equal Treatment Act, as declared by the Ministry of Justice, but on other laws (such as the Labour Code and Civil Code).<sup>315</sup>

According to information provided by the Ministry of Justice,<sup>316</sup> on the request of the Ombud, in the year 2013, 11 cases were brought to district and regional courts and one case to an Appellate court, for compensation for discrimination based on protection of personal goods and the ETA. Of the 12 cases, in three cases claims were dismissed, two cases were returned, one case was discontinued and six cases were still pending in 2014. In the Ombud's annual report for 2015, numbers for 2014 were not given since the Ministry did not provide them.

Despite the fact that the information is official (at least covering some years), it must be said that it is not wholly reliable. In 2014 a coalition of NGOs contacted all Polish courts requesting, in the official formula of access to public information, data on discrimination cases brought under the ETA.<sup>317</sup> All 287 courts responded. Only five cases brought to the courts under the ETA over the course of four years (2011-2014) were identified (some of them had actually been brought by the same organisations who were doing the research).

This obviously proves that claims based on the 2010 Act are not being brought to the courts.

There are, however, more detailed statistics covering court cases based on the Labour Code: sex discrimination in employment (528 cases heard in 2012, 427 in 2013), sexual harassment as discrimination in employment (14 cases, four cases in 2013), bullying (324 cases, 330 cases in 2013), and discrimination in employment (93 cases heard in 2012, 63 cases in 2013, but no disaggregation by ground).<sup>318</sup>

#### d) Registration of discrimination cases by national courts

In Poland discrimination cases are registered as such by national courts.

There are still no full and reliable official statistics on the number of cases related to discrimination brought to justice based on the ETA and the Civil Code. The Ministry of Justice declared it would collect relevant data but as described in point c) above, the information on discrimination cases is limited and, what is more, not wholly reliable. So theoretically cases are registered, but the system is still not wholly reliable. The situation is better when it comes to cases based on the Labour Code – some categories of discrimination cases are registered (see point c above) but not disaggregated by ground.

One more problem is if there is a change in the legal qualification of a case during a procedure. It can happen that the initial qualification changes, but there is no possibility of changing it in the statistics. So the data on cases registered is not wholly reliable.

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<sup>315</sup> See: PTPA (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu* (Anti-discrimination law in the practice of Polish common courts. Monitoring report'), Polish Society of Anti-Discrimination Law, pp.98-99; (available at [www.ptpa.org.pl](http://www.ptpa.org.pl)).

<sup>316</sup> Ombud Annual Report 2014, p. 107.

<sup>317</sup> Kukowka, G. and Siekiera, A. (eds) (2014), *Monitoring skuteczności funkcjonowania Ustawy z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania* (Monitoring the effectiveness of the functioning of the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (ETA)), Warsaw.

<sup>318</sup> Ombud Annual Report 2013, p. 450-451; Ombud Annual Report 2014, p. 107.

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

A non-governmental organisation may act in support but sometimes also on behalf of the complainant.<sup>319</sup>

a) Standing to act on behalf of victims of discrimination (representing them)

This solution was adopted in the **Code of Civil Procedure**, which allows non-governmental organisations to file a claim on behalf of individuals or join such proceedings,<sup>320</sup> e.g. in alimony (maintenance) and consumer protection cases<sup>321</sup> or in labour law and social security cases.<sup>322</sup> According to the Code of Civil Procedure organisations involved in combating discrimination may engage in judicial procedures on behalf of a complainant. Article 61 stipulates that organisations whose official objectives include protecting equality and non-discrimination and protection from unfounded direct or indirect violation of the rights and duties of citizens may, in the case of claims in this field and with the written consent of citizens, institute actions on behalf of citizens (the court verifies only the fulfilment of the formal criteria, such as the association's official objectives).<sup>323</sup> Since May 2012, NGOs may also initiate proceedings on behalf of an individual who is an entrepreneur (if that individual is a member of the organisation and provides written consent) in a dispute with another entrepreneur.

If an organisation initiates civil proceedings on behalf of a party, it has the rights of a party to the proceedings and may seek and obtain any remedy including calling witnesses or appealing the ruling (the obligations for the party also apply, such as respecting court orders and compliance with deadlines) (Article 62, Code of Civil Procedure).

Until 2012 there were no special provisions on victim consent in civil proceedings and it was a matter of judicial practice. In some cases, the victim's oral consent on the court record was enough. Since May 2012, the written consent of the party is always needed. There are no special additional provisions on victim consent.

Similarly, civil society organisations are entitled to bring **administrative proceedings**. Article 31.1 of the Code of Administrative Procedure reads: 'A civil society organisation may, in a case concerning another person, request: 1) to institute proceedings, 2) to be admitted to proceedings, if it is justified by the official objects of the organisation and when it is in the public interest'. It is up to the administrative organ to decide whether to admit the civil society organisation, but this decision may be appealed. An organisation admitted to administrative proceedings has the rights of a party (with some limitations) (Article 31.3, Code of Administrative Procedure).

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<sup>319</sup> See more detailed analyses in: Spurek, S., 'Udział organizacji społecznej w postępowaniu karnym, cywilnym i administracyjnym' ('Participation of civil society organisations in criminal, civil and administrative proceedings'), in: Śmiszek, K. (ed.) (2006), *Przeciwdziałanie dyskryminacji z powodu orientacji seksualnej w świetle prawa polskiego oraz standardów europejskich* (Counteracting discrimination on the ground of sexual orientation in the light of Polish law and European standards), Warsaw; Gonera, K. (Supreme Court Judge), 'Udział organizacji społecznych w postępowaniu sądowym jako gwarancja prawa do rzetelnego procesu' ('Participation of civil society organisations in court proceedings as a guarantee of the right to fair trial') and Bernatt, M., 'Opinia przyjaciela sądu (amicus curiae) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich' ('The amicus curiae brief as an auxiliary legal institution in the jurisprudence of Polish courts'), both in: Bojarski, Ł. and Beck, C. H. (eds.) (2008), *Sprawny sąd. Zbiór dobrych praktyk* (The efficient court. Collection of best practices), Warsaw (pp. 166-176 and 184-189).

<sup>320</sup> Article 8 Code of Civil Procedure.

<sup>321</sup> Article 61 Code of Civil Procedure.

<sup>322</sup> Article 462 Code of Civil Procedure.

<sup>323</sup> Poland, Act of 2 July 2004 amending the Code of Civil Procedure and some other acts, entered into force on 4 February 2005, latest amendment in force since 03.05.2012, (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*), Article 61.

It should be mentioned that, in fact, standing on behalf of victims of discrimination is seen by NGOs as a very professional activity requiring special competences. The research undertaken by the Polish Association of Anti-Discrimination Law has shown that not many NGOs engage in this kind of work: it is mostly those familiar with legal issues, especially large, strong NGOs based in the capital city.<sup>324</sup>

b) Standing to act in support of victims of discrimination

In Poland associations, organisations and trade unions are entitled to act in support of victims of discrimination.

According to the **Code of Civil Procedure** organisations involved in combating discrimination may engage in judicial procedures in support of a complainant. Article 61 stipulates that organisations whose official objectives include protecting equality and non-discrimination and protection from unfounded direct or indirect violation of the rights and duties of citizens, in the case of claims in this field and with the written consent of the claimant, may join proceedings at any stage thereof (the court verifies only the fulfilment of the formal criteria, such as the association's official objectives).<sup>325</sup>

Since May 2012, NGOs may also join proceedings in support of an individual who is an entrepreneur (if that individual is a member of the organisation and provides written consent) in a dispute with another entrepreneur.

If a non-governmental organisation does not participate in the proceedings, it may still present its opinion on the case to the court (acting de facto as an *amicus curiae* even if the law does not use this expression).<sup>326</sup> There was also an important ruling of the Constitutional Tribunal (CT) which referred to an *amicus curiae* brief provided by an NGO in a case before the CT, thus in a way recognising the use of an *amicus curiae* by the courts even without a clear legal provision allowing for this.<sup>327</sup>

Similarly, civil society organisations are entitled to join **administrative proceedings**. Article 31.1 of the Code of Administrative Procedure reads: 'A civil society organisation may, in a case concerning another person, request: 1) to institute proceedings, 2) to be admitted to proceedings, if it is justified by the official 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 civil society organisation, but this decision may be appealed. But even if it is not taking part in proceedings as a party, an organisation, with the consent of the administrative organ, may still express its opinion (*amicus curiae* brief) (Article 31.2-5). The Act on Procedure before Administrative Courts (a separate instrument from the Code of Administrative Procedure) also allows civil society organisations to take part in proceedings when this is justified by their official objectives and in cases specified by particular provisions (Articles 9; 25.4; 33.2). An organisation admitted to administrative proceedings has the rights of a party (with some limitations) (Article 31.3, Code of Administrative Procedure).

Representatives of civil society organisations may also be admitted to **criminal proceedings**. According to Articles 90 and 91 of the Code of Criminal Procedure, a representative of a civil society organisation may be admitted if 'there is a need to protect the public interest or an important individual interest falling within the official objectives of the organisation, in particular the need to protect human rights and freedoms.' The decision

<sup>324</sup> See: PTPA (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu* (Anti-discrimination law in the practice of Polish common courts. Monitoring report), Polish Society of Anti-Discrimination Law, pp. 179-212; available at [www.ptpa.org.pl](http://www.ptpa.org.pl).

<sup>325</sup> Poland, Act of 2 July 2004 amending the Code of Civil Procedure and some other acts, entered into force on 4 February 2005, latest amendment in force since 03.05.2012 (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*), Article 61.

<sup>326</sup> Article 63 Code of Civil Procedure.

<sup>327</sup> Constitutional Tribunal judgment of 16 January 2006 (SK 30/05), justification p. I.8. p. III 2.2.

whether to admit the representative rests with the court, which evaluates the importance of the public or individual interest. The application to admit representative should be submitted in writing and designate particular person/s as representative/s. In criminal proceedings, a written application would be needed.

In criminal proceedings, the rights of a representative of a civil society organisation are limited to: participation in the hearing, expressing their opinion orally on the court record and submitting their opinion in writing (Article 91, Code of Criminal Procedure).

c) Actio popularis

In Poland national law does not allow associations, organisations or trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis).

d) Class action

In Poland national law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

In 2009 Parliament passed a law on class action which entered into force on 19 July 2010.<sup>328</sup> The European model of class action, as opposed to the American one, was chosen – meaning that all parties interested in the case must join it personally.

Unfortunately, at the very end of work on the draft act, when it had already been passed by the Sejm (the lower house of Parliament), the Senate introduced some changes that significantly narrowed the scope of the law and limited it to consumer protection claims and torts (with the exception of protection of 'personal rights'). Therefore, it does not include, for instance, employment cases (although the issue is disputed and, in fact, requires judicial interpretation since opinions have been voiced that some employment claims, for instance based on torts, could be filed as a collective claim). Nevertheless, organisations have no right to take part in class action, it is undertaken by lawyers representing clients.

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

In Poland national law requires a shift of the burden of proof from the complainant to the respondent.

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* of the Labour Code clearly states that it is the employer who must prove that there were objective reasons to apply discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred.

Until 2010, the shift of the burden of proof only existed in the Labour Code. The 2010 Equal Treatment Act (Article 14) introduced the shift of the burden of proof in all compensation proceedings regarding infringement of the principle 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).

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<sup>328</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).



But, since in reality parties do not base their claims on the 2010 Equal Treatment Act,<sup>329</sup> the use of the shift of the burden of proof is limited in general to Labour Code cases and to some extent only, to discrimination cases based on the general provisions of the Civil Code – in personal goods cases – where the burden of proof is not shifted as under the ETA or Labour Code but there is still a mechanism for reversing the burden of proof (Article 24 para. 1 Civil Code).

In addition, since the 2010 Equal Treatment Act limits possible damages sought to material damage only,<sup>330</sup> a compensation claim for non-material damage would require following general civil rules – again without the shift of the burden of proof.

According to the Equal Treatment Act (Article 14.2), whoever (complainant) alleges infringement of the principle of equal treatment has to substantiate the probability of a violation. If there is *prima facie* evidence (probability) of a violation of the principle of equal treatment, the respondent is obliged to show that they did not commit the violation (Article 14.3). This provision refers to all cases governed by law – this means all forms of discrimination (including harassment) on the grounds protected by the Act.

What is problematic and documented in a number of cases (under labour law) is that in reality courts in most cases (but not all cases, this seems to be a problematic issue) expect not just a substantiation of the probability of a violation but also that the particular ground of discrimination be demonstrated (and parties sometimes do not mention the ground or may not even be aware of the ground of discrimination). Only then does the burden of proof shift to the employer.<sup>331</sup> And if the claimant is not able to show the particular ground of discrimination, the complaint is dismissed.

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

In Poland there are legal measures of protection against victimisation.

The 2010 Equal Treatment Act introduced a general prohibition of victimisation (Article 17) on all grounds protected by the Act: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. The law provides that use of rights to defend against unequal treatment ('rights arising from a breach of the principle of equal treatment') must not form the basis for adverse treatment and must not cause any negative consequences for the individual.<sup>332</sup> The protection extends to an individual who in any way supports someone exercising their rights.<sup>333</sup> In the case of victimisation, the victim may file the same compensation claims as a victim of discrimination.<sup>334</sup>

The Act also treats as unequal treatment and prohibits less favourable treatment on the basis of someone's rejection of harassment or submission to harassment.<sup>335</sup>

In the employment field, the previous provisions continue to exist simultaneously with the ETA. The prohibition of victimisation was substantially broadened in the 2008 amendment to the Labour Code (in force since 18 January 2009).<sup>336</sup> Previously, the Labour Code prohibited only the termination of a labour contract as the result of an employee having used their rights to defend themselves against unequal treatment. This provision was amended and currently any other adverse treatment and any other negative consequences are prohibited (Article 18<sup>3e</sup>(1) Labour Code). This broadened Labour Code protection covers

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<sup>329</sup> See point 6.1 above.

<sup>330</sup> See point 6.5 below.

<sup>331</sup> See for instance Supreme Court verdicts: 03 June 2014, III PK 126/13 and 18 April 2012, II PK 196/11.

<sup>332</sup> Article 17.1 Equal Treatment Act.

<sup>333</sup> Article 17.2 Equal Treatment Act.

<sup>334</sup> Article 17.3 and Article 13 Equal Treatment Act.

<sup>335</sup> Article 3.5, Equal Treatment Act.

<sup>336</sup> Act of 21 November 2008 on the amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.



complainants but also extends to employees who in any way support a victim of discrimination (Article 18<sup>3e</sup>(2)).

In addition, in relation to harassment, the amended part of the Labour Code states that 'Submission of an employee to harassment or sexual harassment, as well as the taking of actions rejecting (counteracting) harassment or sexual harassment, may not result in any adverse consequences for the employee' (Article 18<sup>3a</sup>(7)).

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

### **a) Applicable sanctions in cases of discrimination – in law and in practice**

The 2010 Equal Treatment Act introduces a general rule that everybody whose right to equal treatment was infringed has the right to compensation, and this extends beyond employment (Article 13). The right refers to both natural persons (on all protected grounds by the Act) and legal persons on the grounds of race, ethnic origin and nationality (Article 12). The Act does not introduce a new procedure but refers to the general rules of the Civil Code and Code of Civil Procedure.<sup>337</sup>

However, the Equal Treatment Act refers to compensation only (*odszkodowanie*) which covers material (and not non-material) damage and therefore limits protection.

The Civil Code provides for general compensation claims for material and non-material damage. Article 415 *et seq.* set out the general terms of compensation for material damage. The compensation should cover all damage that is a consequence of an unlawful act or failure to act of a person who discriminated against the claimant. Articles 445 and 448 of the Civil Code regulate pecuniary damages (punitive) and state that damages should be appropriate, which means that they should ensure effective redress of the damage suffered. Article 448 specifies that an appropriate sum may be paid to a designated social cause.

In addition, if there are cases not covered by the provisions of the Equal Treatment Act, it is also possible to seek to rely on the protection of personal rights described in Section 6.1. Among the actions that a claimant may demand are pecuniary satisfaction and payment to a social cause.

In the field of employment, Article 18<sup>3d</sup> of the Labour Code provides that a person who was a subject of discriminatory treatment by an employer is entitled to compensation not lower than the minimum wage defined in separate laws (in 2014, PLN 1 680, around EUR 400 per month).

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>338</sup>

An employee is entitled to terminate their labour contract without prior notice on the basis of a grave infringement by the employer of fundamental obligations towards the

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<sup>337</sup> Article 13.2 and 14.1 Equal Treatment Act.

<sup>338</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 claimant does not hold, speaks to the inadvisability of returning him to his job (Article 45.2 Labour Code).'

employee.<sup>339</sup> In such a case, the employee is entitled to compensation equal to their salary for the period of notice.

The Labour Code does not envisage any sanctions for violations of the employer's obligation to create an environment free from discrimination in the workplace, especially with respect to gender, age, disability, race, religion, nationality, political beliefs, membership of trade unions, ethnic origin, belief and sexual orientation.<sup>340</sup> In light of this, the provision takes on the character of a mere declaration.

The Employment Act provides two sanctions in the case of conduct contrary to the Act. First, anyone running an employment agency (or similar services listed by the Act) 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 of a trade union is liable to a minimum fine of PLN 3 000 (approx. EUR 750).<sup>341</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>342</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) Ceiling and amount of compensation

Neither the compensation clause provided by the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Article 13) and the Civil Code that the Act refers to, envisage any ceiling on the maximum amount of compensation that can be awarded.

In the Labour Code, there is no maximum threshold for this compensation, and a court can award it according to its assessment of the type and gravity of the discriminatory treatment in a specific case. There is, however, a minimum compensation level which is at least equal to the minimum wage (in 2014, PLN 1 680 PLN, approx. EUR 400 per month).<sup>343</sup>

There is no reliable information on the average amount of compensation available to victims. The number of cases where compensation was given is still small but, generally, courts tend to grant moderate compensation awards (the compensation range is usually between EUR 300 and 2 500). In 2013 compensation based on ETA was awarded only in one case (PLN 1 200, approx. EUR 300).<sup>344</sup>

Generally, in civil cases compensation awarded for 'moral loss' or 'suffering'<sup>345</sup> which resulted from discrimination is rather low, there is no tradition of valuing this type of loss, and different judges use different methods to calculate it. There are Supreme Court rulings which give only general guidelines – the court should take into consideration the living conditions of the party, average standards of living, and the state's level of economic development.<sup>346</sup> The law grants discretion to judges, stating that they should determine 'an appropriate amount'<sup>347</sup> for moral loss and suffering. This judicial independence is supported by the Supreme Court, which leaves the level of compensation awarded solely

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<sup>339</sup> Article 55 § 1<sup>1</sup> Labour Code.

<sup>340</sup> Article 94 point 2b Labour Code.

<sup>341</sup> Article 121.3 Employment Act.

<sup>342</sup> Article 123 Employment Act.

<sup>343</sup> The level of the minimal wage is set each year by the Regulations on the minimum wage.

<sup>344</sup> Ombud Annual Report 2014, p. 92.

<sup>345</sup> Article 445 and 448 Civil Code.

<sup>346</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>347</sup> Article 445 Civil Code.

to the discretion of the judges deciding particular cases.<sup>348</sup> However, research conducted by the ICJ in 2009 revealed that the amount of compensation in civil matters awarded by the courts is 'steadily increasing (compensation exceeding PLN 100 000 (Approx. EUR 25 000) is not uncommon, especially in cases of permanent and extensive bodily injury or long-term impairments to health). Nevertheless, there are continuing allegations that Polish courts, on average, award low compensation, making it incommensurate to the harm actually suffered by the victim'.<sup>349</sup>

c) Assessment of the sanctions

As already mentioned in point a) above the Polish system of compensation for damage is essentially based on the concept of redressing damage, and does not include a typical punitive element. The Equal Treatment Act refers to compensation only (*odszkodowanie*) which covers material (and not non-material) damage and therefore limits protection. This was pointed out by the Ombud in June 2012 in its first report. In the Ombud's view, the compensation claim under the Act should be widened and include non-material damage.<sup>350</sup> The relevant legislative amendments were proposed in both draft laws mentioned in Section 12.1, below.

It is also questionable whether the one and only special Labour Code sanction described above meets the criteria of the Directives (effective, proportionate and dissuasive), because this system also mainly redresses the damage and does not include a punitive element (e.g. for a large company, being required to pay compensation at the level of the minimum wage is hardly dissuasive). However, apart from changes in the law, there is also some room here for judicial interpretation.

A good example of the questionable approach of the courts is the ruling of the Warsaw Regional Court on an appeal in a discrimination case on the grounds of disability (although the facts of the case took place before the ETA entered into force; the case was decided on the basis of the Labour Code).<sup>351</sup> Both courts – district in the first instance and regional in the second instance, found direct discrimination on the ground of disability. The district court awarded the claimant two compensation payments – one for unfair dismissal (approx. EUR 2 000) and a second for the breach of the principle of equal treatment (approx. EUR 3 500). The regional court accepted the first one but overruled the second.

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<sup>348</sup> Supreme Court Judgment of 4 February 2008 (III KK 349/2007).

<sup>349</sup> Szymielewicz, K. (2009), *Access to justice for human rights abuse involving corporations. A project of the International Commission of Jurists*, Draft Report for Poland.

<sup>350</sup> Ombud Bulletin 2012/2, pp. 78-79.

<sup>351</sup> Warsaw Regional Court, A.A. v. Bank, 25 May 2012, XXI Pa 81/12, not published.

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

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

After years of a lack of an equality body in Poland, the 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment finally designated as an equality body the existing Ombud's Office (official name – Commissioner for Civil Rights Protection<sup>352</sup> – *Rzecznik Praw Obywatelskich*). The law appropriately amended the existing Ombud Act, introducing new competences for the Ombud. The Ombud took on its new responsibilities on 1 January 2011.

The second institution which has a mandate to promote the equal treatment of everyone without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu do Spraw Równego Traktowania*) – a body in charge of non-discrimination policies and the coordination of governmental efforts rather than an equality body.

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

### **Ombud**

The Ombud (Commissioner for Civil Rights Protection) is an independent body appointed by the Sejm upon the approval of the Senate for a five-year term of office and accountable to Parliament.<sup>353</sup> The Ombud informs the Sejm and the Senate annually on their activities and this report is public.<sup>354</sup> Since 2012, the Ombud has also prepared an additional report on activities related to equality and discrimination as a part of this report.<sup>355</sup>

<sup>352</sup> In 2011 the Office of Ombud changed its English name to Human Rights Defender, but the Commissioner for Civil Rights Protection is a more accurate translation of the Polish name – *Rzecznik Praw Obywatelskich*.

<sup>353</sup> Articles 3, 5, 7, Act on the Commissioner for Civil Rights Protection.

<sup>354</sup> Comprehensive information about the activities of the Ombud is prepared annually for Parliament and is available in printed form and on its website ([www.brpo.gov.pl](http://www.brpo.gov.pl)); summary reports are also available in English, see: *Summary of the report on the activity of the Human Rights Defender in 2011*; *Summary of the report on the activity of the Human Rights Defender in 2010*; *Summary of the report on the activity of the Human Rights Defender in 2009 with some remarks on observance of human and civil rights and freedoms*; and *Summary of the report on the activity of the Commissioner for Civil Rights Protection in 2008 with some remarks on observance of human and civil rights and freedoms*, at <http://rpo.gov.pl/en> (last accessed 15 May 2015).

<sup>355</sup> Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2014 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, May 2015, (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2014 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*) [referred to in this report as 'Ombud Annual Report 2015']. Previous reports: Information on activities of the Civil Rights Commissioner in the field of equal treatment in 2011 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, June 2012, Bulletin 2012, no 2, p.79 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa, czerwiec 2012, *Biuletyn Rzecznika Praw Obywatelskich* 2012, nr 2, *Źródła*, available at <http://rpo.gov.pl/> (15 May 2015) [referred to in this report as 'Ombud Bulletin 2012/2']. Information on the activities of the Civil Rights Commissioner in the year 2012 and on the observance of human rights and freedoms. Part two: Information on the activities of the Civil Rights Commissioner in the field of equal treatment in 2012 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw 2013 [referred to in this report as Ombud Annual Report 2013] – the version quoted in this report was published by the Polish Senate on 22 April 2013 <http://www.senat.gov.pl/gfx/senat/userfiles/public/k8/dokumenty/druki/300/345.pdf> (last accessed 15 May 2015); in June 2013 the Ombud published the final version on its website, with the same content but different format and page numbering <http://rpo.gov.pl> (last accessed 15 May 2015); *Informacja o działalności Rzecznika Praw Obywatelskich w roku 2012 oraz o stanie przestrzegania wolności i praw człowieka i obywatela. Część 2. Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2012 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa 2013; Report on the activity of the Human Rights Defender in the area of the equal treatment in 2013 and the observance of the principle of equal treatment in the Republic of Poland, Warsaw 2014 [referred to in this report as Ombud Annual Report 2014]; *Informacja o działalności Rzecznika Praw*

The Ombud's Office is independent of other state administration bodies and in reality performs its duties independently. The budget of the Office comes from the central state budget and is approved by Parliament. The Equal Treatment Act (amending the Ombud Act) emphasises the fact that activities related to equal treatment are to be undertaken independently.

In 2011 the total annual budget of the Ombud's Office was PLN 34 645 000 (depending on the exchange rate, approx. EUR 8.25 million). Although the Ombud's Office became the Polish equality body in January 2011, there was no budget devoted to this function (a situation criticised by the Ombud). The situation changed in 2012, when the general budget of the Ombud's Office increased to PLN 38 019 000 (approx. EUR 9.5 million), of which the budget of the Ombud as the equality body was estimated at PLN 1 389 000 (approx. EUR 330 000). In the years 2013 and 2014, however, the Ombud did not receive any additional money for the tasks of the equality body (budget in 2013: PLN 39 164 000 – approx. EUR 9.8 million; budget in 2014: PLN 39 171 000 - approx. EUR 9.8 million). Every year the proposed budget prepared by the Ombud is cut by the Parliament (in 2012 by PLN 4.5 million, in 2013 by PLN 3.6 million and in 2014 by PLN 2.3 million. In the opinion of the Ombud, the resources provided for the Office are not adequate for the realisation of the Ombud's tasks.<sup>356</sup>

The Ombud has been the general human rights institution since 1998 and in June 2014 employed circa 300 employees. The Anti-discrimination Law Section was created in 2011 within the Department of Constitutional and International Law and in 2013 employed nine people. In 2014 the Section was reorganised and a new Department of the Equal Treatment and Protection of Persons with Disabilities was created.<sup>357</sup> In addition, the Ombud's position is that there are in fact more people dealing with equality and discrimination issues, i.e. employees working in other departments and sections who occasionally also deal with equality issues<sup>358</sup> (in response to a query from the author of this report in June 2013, the Ombud's Office declared that 25 people work on equality and discrimination).

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

The relevant law was enacted by the Council of Ministers in the Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment (in force since 30 April 2008). The 2010 Equal Treatment Act became the new legal basis for the operation of the Plenipotentiary (on the level of an Act of Parliament), but the Ordinance is still a valid law as well.

The Office of the Plenipotentiary (within the Chancellery of the Prime Minister) was established in July 2008 and employs around 20 people. The Plenipotentiary, as part of the executive and operating within the Chancellery of the Prime Minister, is not independent. The Plenipotentiary is appointed and recalled by the Prime Minister, is accountable to the Prime Minister as a secretary of state in the Chancellery of the Prime Minister and uses the premises of the Chancellery of the Prime Minister<sup>359</sup> (it does not have a separate budget). It publishes annual reports on its activities and the reports are public.<sup>360</sup>

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*Obywatelskich w obszarze równego traktowania za rok 2013 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa 2014 (the Polish version quoted in this report was published on the website of the Ombud in June 2014; later on an English version of the report was also published, see <http://brpo.gov.pl/en/> last accessed 15 May 2015).

<sup>356</sup> All budgetary information provided is based on information prepared by the Ombud's Office.

<sup>357</sup> Ombud Bulletin 2015, p. 4.

<sup>358</sup> The annual report states that different teams, depending on the subject matter of the particular issue, also deal with the equal treatment aspect, if there is one. Thus it is not only the Anti-discrimination Law Section which is responsible for these matters, see Ombud Annual Report 2014, p. 4.

<sup>359</sup> Article 20 Equal Treatment Act.

<sup>360</sup> Reports are available at [www.rownetraktowanie.gov.pl](http://www.rownetraktowanie.gov.pl).

Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2014 – 31 December 2014, Warsaw, 2015, [referred to in this report as 'Plenipotentiary Annual Report

- c) Protected grounds by the designated body/bodies

### **Ombud**

Protected grounds: the Law on Commissioner for Civil Rights Protection does not provide any grounds (like the Constitution), so the activities of the Ombud are not limited to the given grounds. However, according to the ETA (Articles 1 and 18), which designated the Ombud as an equality body, the protected grounds are gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation.

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

Protected grounds: gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status.

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

### **Ombud**

The Commissioner for Civil Rights Protection (Ombud) is the institution which possesses the strongest instruments to intervene in cases of discrimination.

According to the 1997 Constitution, everyone has the right to apply to the Ombud for assistance in protecting their freedoms or rights infringed by public authorities.<sup>361</sup> The scope of activities of the Commissioner is very broad (protecting human rights and freedoms and citizens' rights and freedoms) and although the issue of the different dimensions of discrimination on all grounds formed part of its activities from beginning, this was not the priority issue.

The 2010 Equal Treatment Act changed the situation (by amending the Act on the Commissioner for Civil Rights Protection) and widened the scope of the competences of the Ombud's Office by adding that the Ombud must also protect the execution of the principle of equal treatment, as well as by listing new competences as required by the Directives. The competences of the Ombud in relation to equal treatment and individual complaints are the following.<sup>362</sup> The Ombud:

- Safeguards the observation of the equal treatment principle;
- Analyses, monitors and supports the equal treatment of everyone;
- Prepares and issues independent reports and recommendations regarding discrimination-related problems;
- Does not have the right of legislative initiative, but can apply to the competent authorities for a legislative initiative to be undertaken, or to have a legal act issued or amended;

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2015'], (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2014 r. do 31 grudnia 2014 r.*, Warszawa 2015).

Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2013 – 31 December 2013, Warsaw, 2014, [referred to in this report as 'Plenipotentiary Annual Report 2014'], (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2013 r. do 31 grudnia 2013 r.*, Warszawa 2014).

Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012, Warsaw, 2013, [referred to in this report as 'Plenipotentiary Annual Report 2013'], (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.*, Warszawa 2013).

Report on activities of the Government Plenipotentiary for Equal Treatment for the period 1 May 2009 – 31 December 2011 [referred to in this report as 'Plenipotentiary Annual Report 2012'] (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres 1 maja 2009 roku – 31 grudnia 2011 roku*).

Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009 (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres 30 kwietnia 2008 r. – 30 kwietnia 2009 r.*). This annual report was not published on the Office's website.

<sup>361</sup> Article 80, Constitution.

<sup>362</sup> See <http://rpo.gov.pl/en/content/what-does-human-rights-defender-do>; in more detail see Article 12ff. of the Ombud Act at <https://www.rpo.gov.pl/en/content/act-human-rights-defender>.

- Cooperates with civil society, associations and foundations acting in the area of equal treatment;
- Provides support to the victims of discrimination;
- Examines facts described by a complainant;
- Can apply to another state audit institution for examination of a case if it is established that the principle of equal treatment has been violated;
- Applies to the competent authorities for the rectification of a violation and subsequently monitors the implementation of any recommendations;
- Can require that preparatory proceedings be initiated and participate in all ongoing civil or administrative proceedings;
- In cases where only private entities are involved, the Ombud can indicate the legal measures to which a given person is entitled.

The 2010 Equal Treatment Act imposed new competences on the Ombud's Office. It provides that the Ombud, in the implementation of the principle of equal treatment, should: analyse, monitor and support the equal treatment of everyone; conduct independent surveys of discrimination; prepare and publish independent reports; and issue recommendations regarding discrimination issues.<sup>363</sup>

The issue of **providing independent assistance** to victims is more complicated. As already mentioned, according to the Polish Constitution and the 2010 Equal Treatment Act, these competences refer to a vertical understanding of human rights (the relationship between a public authority and an individual) and are limited when it concerns conflicts between private parties. In such a case, according to the law, the Ombud can only provide the victim with information on their rights and possible actions.<sup>364</sup> In reality, the Ombud occasionally tries to intervene in cases between private parties (directly, for instance by sending a letter to the enterprise concerned, or indirectly, by contacting other relevant public agencies and urging them to intervene), but it does not have formal power to do this and therefore its actions are limited. The Ombud itself criticises the limitations of its power and gaps in the implementation of the Directives and advocates for changes to the law.<sup>365</sup>

In general, the Ombud's decision as to whether to provide assistance to an individual is discretionary. When accepting a case, the Ombud may carry out its own fact-finding investigation or request the competent institutions (supervisory bodies, prosecutor's offices, state bodies or occupational inspectorates) to examine the case or part of it. The Ombud can also request the Sejm (lower Chamber of the Parliament) to order the Supreme Audit Office (*Najwyższa Izba Kontroli*) to carry out an inspection in order to examine the case or part of it.<sup>366</sup>

When carrying out an investigation, the Ombud has the right to examine every matter on the spot. The Office may "request a hearing or presentation of files of each case conducted by the supreme and central state administration bodies, government bodies, bodies of cooperative organizations, social, professional and socio-professional and the bodies of organizational units with legal personality as well as local government bodies and local government organizational units". As far as court cases are concerned, the Ombud may request information on the stage of a case as well as request access to court and prosecution files.<sup>367</sup>

Apart from examining individual cases, the Ombud may also commission expert assessments and opinions as well as publish information about the types of cases it deals

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<sup>363</sup> Article 17b Act on the Commissioner for Civil Rights Protection.

<sup>364</sup> Article 11 Act on the Commissioner for Civil Rights Protection.

<sup>365</sup> Ombud Bulletin 2012/2, p. 79.

<sup>366</sup> Article 12 Act on the Commissioner for Civil Rights Protection.

<sup>367</sup> Article 13 Act on the Commissioner for Civil Rights Protection.



with, including recommendations. Furthermore, the Ombud may also establish thematic expert teams and ask them for a report on a particular issue. Expert Committees on People with Disabilities, on the Rights of Elderly People and on the Rights of Migrants have already been created.<sup>368</sup> In 2011, the Ombud also started commissioning some research (mainly desk research, rather than empirical) and published some reports (the authors of these reports included recommendations). The Ombud also formulates recommendations, both in the process of its daily work (usually within 'general statements') and in the annual reports.

Thematic reports published recently include:

The principle of equal treatment – law and practice. Services for deaf and deafblind people in public administration offices. Analysis and recommendations (2014).<sup>369</sup>

The principle of equal treatment – law and practice. Equal treatment of patients – non-heterosexual people in the healthcare system. Analysis and recommendations (2014).<sup>370</sup>

The principle of equal treatment – law and practice. Support for people with mental illness in the labour market. Analysis and recommendations (2014).<sup>371</sup>

The principle of equal treatment – law and practice. Elderly people on the financial services market. Analysis and recommendations (2013).<sup>372</sup>

The principle of equal treatment – law and practice. Counteracting violence against women, including elderly women and women with disabilities. Analysis and recommendations (2013).<sup>373</sup>

The principle of equal treatment – law and practice. Intergenerational dialogue. Between ideas and practice. Inspirations (2013).<sup>374</sup>

The principle of equal treatment – law and practice. Accessibility of websites of public institutions for persons with disabilities. Analysis and recommendations (2013).<sup>375</sup>

The principle of equal treatment – law and practice. Implementing the right to education of young foreign nationals (2013).<sup>376</sup>

The principle of equal treatment – law and practice. Guarantees of active participation in elections (active use of electoral law) by the elderly and persons with disabilities. Analysis and recommendations (2012).<sup>377</sup>

The principle of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations (2012).<sup>378</sup>

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<sup>368</sup> Ombud Annual Report 2013, pp. 419-423.

<sup>369</sup> Rzecznik Praw Obywatelskich (2014), *Zasada równego traktowania. Prawo i praktyka. Obsługa osób głuchych i głuchoniewidomych w urzędach administracji publicznej. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>370</sup> Rzecznik Praw Obywatelskich (2014), *Zasada równego traktowania. Prawo i praktyka. Równe traktowanie pacjentów – osoby nieheteroseksualne w opiece zdrowotnej. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

Rzecznik Praw Obywatelskich (2014), *Zasada równego traktowania. Prawo i praktyka. Wsparcie osób chorujących psychicznie na rynku pracy. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>372</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Osoby starsze na rynku usług finansowych. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>373</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Przeciwdziałanie przemocy wobec kobiet, w tym kobiet starszych i kobiet z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>374</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Nr 10. Dialog międzypokoleniowy. Między ideą a praktyką. Inspiracje*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>375</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Nr 11. Dostępność witryn internetowych instytucji publicznych dla osób z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>376</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Realizacja prawa małoletnich cudzoziemców do edukacji*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>377</sup> Rzecznik Praw Obywatelskich (2012), *Zasada równego traktowania – prawo i praktyka. Gwarancje korzystania z czynnego prawa wyborczego przez osoby starsze i osoby z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>378</sup> Rzecznik Praw Obywatelskich (2012), *Zasada równego traktowania – prawo i praktyka. Równe szanse w*



The principle of equal treatment – law and practice. Counteracting violence motivated by race, ethnic origin and nationality. Analysis and recommendations (2012).<sup>379</sup>

The principle of equal treatment – law and practice. Enforcement of the rights of foreign nationals in Poland (2012).<sup>380</sup>

Protection of the rights of persons with disabilities – main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities. Analysis and recommendations (2012).<sup>381</sup>

Action policies in an ageing society. Proposals and recommendations (2012).<sup>382</sup>

The principle of equal treatment – law and practice. Accessibility of public infrastructure for persons with disabilities. Analysis and recommendations (2011).<sup>383</sup>

In 2013 the Ombud also initiated public consultations with different institutions and NGOs regarding proposed subjects of research commissioned by the Ombud. Institutions and NGOs propose particular subjects to choose from (see more in Section 8.1. below).

In addition, the Ombud, based on complaints regarding equal treatment, issued 51 (2011), 67 (2012) and 66 (2013) 'general statements' (*wystąpienia generalne*).<sup>384</sup> This means that the Ombud presents to the relevant agencies, organisations and institutions opinions and conclusions which aim to ensure effective protection of the rights and freedoms of humans and citizens and to facilitate the procedures that such cases may involve (the figure for 2014 was not provided in the annual report).<sup>385</sup>

In practice, the competences of the Ombud are exercised in an independent manner. However, the opinion is voiced in public debate that the fact that the Ombud is responsible for all human rights issues limits its activities regarding discrimination and that a body dedicated solely to discrimination issues could do much more. On the other hand, it must be admitted that the situation is much better compared to the time before 2011, when there was no designated equality body.

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

According to the Equal Treatment Act and the Ordinance, the Plenipotentiary should execute government policy in regard to equal treatment and counteracting discrimination.<sup>386</sup> The Plenipotentiary should prepare and present to the Council of Ministers the National Programme of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*)<sup>387</sup> and then report on its execution annually (see more in Section 9 below).<sup>388</sup>

The task of the Plenipotentiary is to execute government policy with regard to equal treatment, 'including counteracting discrimination in particular because of gender, race,

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*dostęp do edukacji osób z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>379</sup> Rzecznik Praw Obywatelskich (2012), *Zasada równego traktowania – prawo i praktyka. Przeciwdziałanie przemocy motywowanej rasą, pochodzeniem etnicznym i narodowością. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>380</sup> Rzecznik Praw Obywatelskich (2012), *Zasada równego traktowania – prawo i praktyka. Przestrzeganie praw cudzoziemców w Polsce*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>381</sup> Rzecznik Praw Obywatelskich (2012), *Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia*, available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>382</sup> Rzecznik Praw Obywatelskich (2012), *Strategie działania w starzejącym się społeczeństwie. Tezy i rekomendacje*, available at [www.rpo.gov.pl](http://www.rpo.gov.pl), English summary pp. 148-154.

<sup>383</sup> Rzecznik Praw Obywatelskich (2011), *Zasada równego traktowania – prawo i praktyka. Dostępność infrastruktury publicznej dla osób z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>384</sup> See Articles 14.2 and 16 Act on the Commissioner for Civil Rights Protection.

<sup>385</sup> Ombud Bulletin 2012/2, p. 9, Ombud Bulletin 2013, p. 609, Ombud Annual Report 2014, p.9.

<sup>386</sup> Article 21 Equal Treatment Act.

<sup>387</sup> Article 22 Equal Treatment Act.

<sup>388</sup> Article 23.3 Article 32 Equal Treatment Act.

ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status'.<sup>389</sup> 'Disability' was not explicitly mentioned originally, but was added in 2010. The competences of the Plenipotentiary include preparing draft laws related to equal treatment and preparing opinions about such drafts; a number of analytical and monitoring competences (see below); the promotion of equal treatment; international cooperation; and implementing projects that support equal treatment and counteracting discrimination.<sup>390</sup>

The competences of this post, as described by law, include analysis and research, monitoring, collaboration with other bodies, local government and NGOs, producing draft laws, issuing opinions about laws drafted by other bodies, and taking action intended to rectify or minimise the consequences of a violation of the principle of equal treatment.

The Plenipotentiary may establish special research teams, call for specific research or expert analysis and provide reports based on this research. It may also issue recommendations.

In the years 2011-2013, the Plenipotentiary ran a project co-financed by the European Social Fund, called 'Equal treatment as a standard of good governance' (*Równe traktowanie standardem dobrego rządzenia*),<sup>391</sup> in collaboration with the Jagiellonian University in Kraków and Warsaw School of Economics. As part of the project, partners conducted research and developed a number of strategic recommendations (in a process including contributions by different stakeholders). Three publications should be mentioned in this context:

- the survey report (2012);<sup>392</sup>
- the diversity policy for the central administration (2012);<sup>393</sup> and
- strategic recommendations for equal treatment (2012).<sup>394</sup>

The project also included a substantial training component. Ultimately, it resulted in the development and introduction in many public offices of anti-bullying and anti-discrimination procedures.<sup>395</sup>

In the years 2013-2014, the Plenipotentiary continued similar activities with a new project also co-financed by the European Union (within PROGRESS): 'Equal treatment as a standard of good governance in the regions' (*Równe traktowanie standardem dobrego rządzenia w regionach*). One of its outcomes is a manual for civil servants *Equal treatment in public administration. The regional and local dimension* (2013).<sup>396</sup>

As already mentioned, the Plenipotentiary is not an independent body, but it exercises its activities quite freely and independently, albeit with some limitations. Thus, for instance, lack of political will regarding changes to the law, the amendment of the ETA and missing ratifications limits the effectiveness of its activities.

#### e) Legal standing of the designated body/bodies

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<sup>389</sup> Article 21 Equal Treatment Act.

<sup>390</sup> Article 21 Equal Treatment Act.

<sup>391</sup> Plenipotentiary Annual Report 2013, pp. 31-38.

<sup>392</sup> Antosz, P. (2012), *Równe traktowanie standardem dobrego rządzenia. Raport z badań sondażowych* (Equal treatment as a standard of good governance. Survey report); available at <http://rownetraktowanie.gov.pl/>.

<sup>393</sup> Lisowska, E. (ed.) (2012) *Polityka różnorodności w administracji centralnej* (Diversity policy in central government), available at <http://rownetraktowanie.gov.pl/>.

<sup>394</sup> *Strategiczne rekomendacje na rzecz równego traktowania*, 2012; available at <http://rownetraktowanie.gov.pl/>.

<sup>395</sup> Plenipotentiary Annual Report 2014, pp. 21-23.

<sup>396</sup> Plenipotentiary Annual Report 2014, pp. 22-23, Plenipotentiary Annual Report 2015, pp. 24-25.

## Ombud

In Poland the designated body has legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination.

The Ombud, after examining a case, may inter alia request that civil and administrative proceedings be instituted, take part in any pending civil case or administrative proceedings, request the institution of preparatory proceedings by a competent prosecutor in the case of offences prosecuted ex officio, and apply to administrative bodies to implement measures laid down by law (Article 14 Act on the Commissioner for Civil Rights Protection). It may also lodge a constitutional complaint (review in abstracto) or join proceedings started by someone else filing an individual constitutional complaint.

## 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) Quasi-judicial competences

In Poland the bodies are not quasi-judicial institutions.

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

In Poland the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public, although 2014 was an exception in this regard.

## Ombud

The Ombud office registers complaints by ground of discrimination. This information is published in the annual report and is available to the public. However, 2014 was different because, due to some technical problems, the Ombud office does not have a detailed breakdown of the complaints it received (not just regarding discrimination but in general). Therefore the data for 2014 is fragmentary. The Ombud only provided the overall number of complaints (this figure is also not wholly reliable).

According to the reports of the Ombud as the equality body, the total number of discrimination complaints received by the Ombud's Office in 2014 was 1 198<sup>397</sup> (in 2011 - 1 033; in 2012 - 1 960; in 2013 - 845). The term 'complaint' can mean a complaint brought by an individual, but many of the complaints are in fact identical letters sent to the Ombud by a number of people in order to protest against something, such as like public discriminatory statements.<sup>398</sup> So, for instance, the 90% increase in discrimination complaints in 2012 was the result of almost 1 000 letters/complaints protesting against the decision of the Minister of Labour and Social Policy not to appoint any deaf people as members of the Polish Council for Sign Language.<sup>399</sup> In 2013, in contrast, there were no "group complaints" so the overall number of complaints was smaller.

The Ombud's Office divides complaints into the following categories (number of cases and their share as a percentage of the total – the first number refers to 2011, the second number, in square brackets, to 2012, **the third number, in bold, to 2013**, the figure for 2014 as already mentioned is not known): principle of equality before the law – 42 (4.1%) [40 – 2%] **(44 – 5.2%)**; prohibition of unequal treatment/discrimination – 85 (8.2%) [21 – 1.1%] **(27 – 3.2%)**; prohibition of unequal treatment/discrimination based on sex – 56 (5.4%) [52 – 2.7%] **(39 – 4.6%)**; prohibition of unequal treatment/discrimination based on religion or belief – 67 (6.5%) [158 – 8%] **(42 – 5.0%)**; prohibition of unequal treatment/discrimination based on sexual orientation – 334 (32.3%) [21 – 1.1%] **(65 –**

<sup>397</sup> Plenipotentiary Annual Report 2015, p. 3.

<sup>398</sup> Ombud Bulletin 2012/2, p. 9.

<sup>399</sup> Ombud Annual Report 2013, p. 390.

**7.7%);** prohibition of unequal treatment/discrimination based on age – 58 (5.6%) [57 – 2.9%] **(49 – 5.8%);** prohibition of unequal treatment/discrimination based on nationality – 42 (4.1%) [54 – 2.8%] **(81 – 9.6%);** prohibition of unequal treatment/discrimination based on disability – 92 (8.9%) [1097 – 56%] **(305 – 36.1%);** prohibition of unequal treatment/discrimination of social and occupational groups – 30 (2.9%) [14 – 0.7%] **(7 – 0.8%);** prohibition of unequal treatment/discrimination related to taxes – 6 (0.6%) [20 – 1%] **(6 – 0.7%);** prohibition of unequal treatment/discrimination of people without a registered place of permanent residence – 3 (0.3%) [13 – 0.6%] **(5 – 0.6%);** prohibition of unequal treatment/discrimination based on race and ethnic origin – 25 (2.4%) [16 – 0.8%] **(18 – 2.1%);** prohibition of unequal treatment/discrimination based on political opinions – 6 (0.6%) [6 – 0.3%] **(3 – 0.3%);** prohibition of unequal treatment/discrimination based on sexual identity – 12 (1.2%) [4 – 0.2%] **(20 – 2.4%);** prohibition of unequal treatment/discrimination related to legal and material/property status – 66 (6.4%) [123 – 6.3%] **(46 – 5.4%);** prohibition of unequal treatment/discrimination based on education or occupation – 11 (1.0%) [107 – 5.5%] **(9 – 1.1%);** prohibition of unequal treatment/discrimination based on social origin – 4 (0.4%) [1 – 0.1%] **(0);** prohibition of unequal treatment/discrimination based on other reasons – 94 (9.1%) [150 – 7.6%] **(79 – 9.4%).**<sup>400</sup>

According to the reports, in 376 [458] **(308)** cases, out of 1 033 [1 960] **(845)**, the Ombud simply informed the parties about other means of action and legal measures to which individuals are entitled.

Of the cases initiated by the Ombud in 2012 and 2013 and finished in 2013, the positive outcome hoped for by the complainant was reached in only 10.2% of cases. In 13% of cases the charges/complaints were not confirmed. In almost 75% of cases the Ombud declared that a positive outcome was not reached, that the activity of the Ombud in the form of a general statement failed. The figures were not presented in the report covering 2014.

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

Complaints (or motions and information as they are called) sent to the office of the Plenipotentiary are also registered by ground of discrimination. This information is published in the annual report and is available to the public.<sup>401</sup>

The Plenipotentiary does not have the right to accept complaints and assist individual victims, but in fact it does receive complaints, applications and letters from victims of discrimination and NGOs. The first annual report prepared mentioned 185 cases of this kind (on the basis of different grounds of discrimination);<sup>402</sup> the next report, covering 2.5 years, listed 907 cases;<sup>403</sup> the annual report covering 2012, mentioned 460 cases,<sup>404</sup> the report covering 2013 mentioned 565 cases<sup>405</sup> and the last annual report covering 2014 mentions 377 cases.<sup>406</sup> The number is therefore going down. The Plenipotentiary mainly takes three kinds of action – it informs victims about the appropriate institution to which they should turn, it approaches different governmental agencies with questions and applications for explanations of their position, and it recommends changes to the law and practice stemming from the complaints received.

#### **h) Roma and Travellers**

<sup>400</sup> Ombud Bulletin 2012/2, pp. 90-91; Ombud Annual Report 2013, pp.607-608, Ombud Annual Report 2014, pp.103-104.

<sup>401</sup> Plenipotentiary Annual Report 2015, pp. 34-36; Plenipotentiary Annual Report 2014, pp. 39-40.

<sup>402</sup> Report on activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009; pp. 44-69.

<sup>403</sup> Plenipotentiary Annual Report 2012, pp. 50-51.

<sup>404</sup> Plenipotentiary Annual Report 2013, p. 54.

<sup>405</sup> Plenipotentiary Annual Report 2014, pp. 39-40.

<sup>406</sup> Plenipotentiary Annual Report 2015, p. 34.

## **Ombud**

Complaints against breaches of national minority rights constitute a small percentage of cases sent to the Ombud. However, the Ombud is definitely committed to Roma issues and over the years has reported the extremely complicated and clearly unfavourable situation faced by the Roma community.

In the last couple of years, the Ombud has, for instance, organised some on-site visits to places where the Roma community live (notably the Bergitka Roma, also called Carpathian Roma – the Roma group in the most difficult situation in Poland) and to schools with Roma pupils, and has formulated recommendations concerning their difficult situation.<sup>407</sup> In 2011, the Ombud dealt with a number of issues related to the situation of the Roma population, urging other bodies – such as the Government Plenipotentiary for Equal Treatment and the Minister of Education – to focus on the protection of Roma rights and awareness-raising that would combat negative stereotypes.<sup>408</sup> This work was continued in 2012 – for instance, the Ombud once again approached the Ministry of Education with proposals for supplementing school textbooks (and teaching materials) with basic information about Roma history and culture.<sup>409</sup>

In 2013<sup>410</sup> the Ombud visited several places where Bergitka Roma live and confirmed in a special report the difficult situation of this group. The Ombud recommends creating a special programme dedicated to the improvement of the social housing conditions of Roma settlements in Poland. The Ombud continued its focus on education and counteracted the creation of a segregated Roma class in a school in Poznań (the instigators of the concept argued that it was intended to be a temporary solution).<sup>411</sup> The Ombud also protected a group of Romanian Roma from eviction from their encampments in Wrocław (two encampments are situated on public land owned by the municipality of Wrocław and are illegal).

## **Government Plenipotentiary for Equal Treatment**

After six and a half years of operation (to the end of 2014), Roma issues did not seem to be one of the Office's priorities. In the course of six years (2008-2014) the Plenipotentiary only dealt with a few Roma-related cases.

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<sup>407</sup> Information from the Commissioner for Civil Rights Protection 2008, pp. 470-474 [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>408</sup> Ombud Bulletin 2012/2, pp. 13-14.

<sup>409</sup> Ombud Annual Report 2013, pp. 379-381.

<sup>410</sup> Ombud Annual Report 2014, pp.14-16.

<sup>411</sup> Ombud Annual Report 2015, p. 12.

## 8 IMPLEMENTATION ISSUES

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

All legislative acts issued in Poland are published in an official journal, which fulfils the requirement of announcing legal norms publicly and enabling the public to be aware of what the law says. Usually, however, publication in an official journal does not mean much to the general public. Nevertheless, it should be noted that the awareness of equal treatment and the need to safeguard non-discrimination is slowly but surely increasing in Poland, although it cannot yet be deemed satisfactory. This is why the Ombud decided to focus its future research on under-reported issues and find out why victims of discrimination do not report it.<sup>412</sup> One of the reasons might be lack of knowledge and awareness about discrimination issues.

From the legal point of view 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'.

The options chosen to put this provision into operation may vary among different employers – it can take form of printed leaflets or brochures distributed in the workplace; it can also be developed as printed information given to the employee, upon which they are required to provide their signature as proof of having taken note of it.<sup>413</sup> Such information can also be attached to labour contracts or workplace codes of conduct. The National Labour Inspectorate is responsible for the implementation of Article 94<sup>1</sup>.<sup>414</sup>

Since the Ombud became the equality body in 2011 it has organised a number of events on discrimination issues, commissioned research and published several reports and manuals. Some of the activities of the Ombud attract public attention and are more publicised, including the work of Expert Committees on People with Disabilities, on the Rights of Elderly People, and the Rights of Migrants.<sup>415</sup> The Committees have presented their findings, opinions and publications during several regional conferences.<sup>416</sup> In addition, since 2011, the Ombud's website has included a section on the Role of the Ombud as the Equality Body (both in Polish and English, although limited).<sup>417</sup> The Ombud has also printed leaflets and guidance on its role as equality body and is gradually becoming more involved in dissemination activities.

The Office of the Government Plenipotentiary for Equal Treatment has the obligation of 'promotion, dissemination and propagation of issues of equal treatment'.<sup>418</sup> The Office created a website at the end of 2008, which was quite limited in substance but is gradually

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<sup>412</sup> Ombud Annual Report 2014, p. 10.

<sup>413</sup> See, for example, Potocka, P. (2004), *Model information on equal treatment in employment*, Gdańsk (published by a private centre for consultancy and vocational training).

<sup>414</sup> See National Labour Inspectorate, Programme of Activities for 2004. [http://pip.bip.ornak.pl/pl/bip/program\\_2004/program\\_2004\\_4](http://pip.bip.ornak.pl/pl/bip/program_2004/program_2004_4) (last accessed 15 May 2015).

<sup>415</sup> Ombud Annual Report 2013, pp. 419-423, Ombud Annual Report 2014, p. 62.

<sup>416</sup> Ombud Annual Report 2014, pp. 62-64, Ombud Annual Report 2015, pp. 78-80.

<sup>417</sup> In Polish at [www.rpo.gov.pl/pl/rowne-traktowanie](http://www.rpo.gov.pl/pl/rowne-traktowanie) and in English at [www.rpo.gov.pl/en/content/equal-treatment](http://www.rpo.gov.pl/en/content/equal-treatment) (last accessed 15 May 2015).

<sup>418</sup> Article 21.2.6, Equal Treatment Act and Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, § 2.1.7.

becoming an interesting source of information.<sup>419</sup> The Office also engages in campaigns and organises some competitions (for school children and journalists) that may play a role in awareness-raising.<sup>420</sup> The Plenipotentiary deals with different grounds of discrimination, but most of its activities are focused on issues of sex discrimination.

According to Polish law, schools should also include anti-discrimination education/activities.<sup>421</sup>

European programmes are a good example of the dissemination of information on discrimination issues, although mainly by the various NGOs taking part in them. As examples, the following EU programmes may be mentioned: the EQUAL Community Initiative,<sup>422</sup> programmes and activities within the European Year of Equal Opportunities for All, and the Council of Europe campaign All Different, All Equal. Thanks to different European programmes, NGOs have become a good source of information for victims of discrimination, and a number of lawyers have been trained by them on legal protection against discrimination. However, there are still significant gaps in this field and appropriate activities by state bodies and the equality body are needed.

Within the project already mentioned which is co-financed by the European Social Fund ('Equal treatment as a standard of good governance'<sup>423</sup> continued as 'Equal treatment as a standard of good governance in the regions'<sup>424</sup>), a number of activities related to dissemination were organised. This included publications, conferences, training for public administration civil servants at both central and local level, as well as the establishment of the Network of Coordinators for Equal Treatment. Fifty-one Coordinators for Equal Treatment were appointed, one in each Ministry and in local government and other institutions.<sup>425</sup> A new equality internet portal was also established to promote the project, but it is limited in content.<sup>426</sup>

The Plenipotentiary has also joined in the European Commission initiative 'Diversity Charter' (*Karta Różnorodności*) and is promoting this idea in Poland. The Charter was officially signed at the Chancellery of the Prime Minister on 14 February 2012 by the CEOs of several companies, initiators of the Charter in Poland.<sup>427</sup> In 2013 during the event on diversity management, co-organised by the Plenipotentiary, four more companies joined the Charter.<sup>428</sup> In 2013 a Diversity Council (*Rada Różnorodności*) was also created by the Polish Confederation of Private Employers, Lewiatan, comprising representatives of business, employers' organisations, the media, public administration and NGOs.<sup>429</sup>

It must be emphasised that, more often than not, most information on equality issues and non-discrimination is not accessible to disabled people. However, it should be noted that some initiatives have been undertaken in this respect. The websites of a number of institutions include a version accessible for people with visual impairments. The Ombud's Office website contains more and more videos in sign language.

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<sup>419</sup> <http://rownetraktowanie.gov.pl/> (last accessed 15 May 2015).

<sup>420</sup> Plenipotentiary Annual Report 2013, pp. 42-46.

<sup>421</sup> Ordinance of the Minister of National Education of 7 October 2009 on pedagogical supervision (*Rozporządzenie Ministra Edukacji Narodowej z 7 października 2009 r. w sprawie nadzoru pedagogicznego*, Dz.U. Nr 168, poz. 1324, ze zm.).

<sup>422</sup> See [www.equal.org.pl](http://www.equal.org.pl) (last accessed 15 May 2015).

<sup>423</sup> *Równe traktowanie standardem dobrego rządzenia*, see: Plenipotentiary Annual Report 2013, p. 31-42.

<sup>424</sup> Plenipotentiary Annual Report 2015, p. 24.

<sup>425</sup> Plenipotentiary Annual Report 2013, p. 39.

<sup>426</sup> [www.sieczrownosci.gov.pl/](http://www.sieczrownosci.gov.pl/) (15 May 2015).

<sup>427</sup> Plenipotentiary Annual Report 2013, pp. 51-52.

<sup>428</sup> Plenipotentiary Annual Report 2014, p. 29.

<sup>429</sup> Plenipotentiary Annual Report 2014, p. 66.



## Measures to encourage dialogue with NGOs

According to the law, the Commissioner for Civil Rights Protection should cooperate with associations, civil society movements and other voluntary organisations and foundations as well as foreign and international bodies and organisations.<sup>430</sup>

Moreover, the Government Plenipotentiary for Equal Treatment, according to the law, should, in the execution of its duties, collaborate with NGOs, including trade unions and organisations of employers.<sup>431</sup>

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

Dialogue with NGOs is also encouraged by the National Programme of Activities for Equal Treatment 2013-2016.<sup>432</sup>

In the Ombud's Office three special teams of experts have been established (representing three priorities of the current Ombud), namely Expert Committees on People with Disabilities, on the Rights of Elderly People (since March 2011) and on the Rights of Migrants (since May 2011), some members of these Committees represent NGOs.<sup>433</sup> There is also the Social Council (since December 2010), which is of a general advisory character.<sup>434</sup> But the Ombud also invites representatives of NGOs to take part in its activities and events.

In 2013 the Ombud decided to start public consultation regarding subjects of research commissioned by the Ombud. There was no list of suggested subjects, the Ombud asked an open question, but also added that it was particularly interested in ideas regarding the needs of social groups not addressed so far for various reasons causing under-reporting. The Ombud has now twice selected research subjects (for the years 2014 and 2015) based on these suggestions (most of them proposed by NGOs).<sup>435</sup> However, it could be said that the Ombud, after being mandated to cover equality issues, did not agree with the broad coalition of non-discrimination NGOs to set up a general Equality Advisory Committee and focused instead on the three priorities mentioned above.

The Plenipotentiary also publishes manuals and guidebooks<sup>436</sup> as well as organising regular conferences with NGOs (in fact, they are often co-organised with NGOs), roundtables and meetings on different subjects. In 2014, for instance, one meeting was devoted to intersectional discrimination (because of sex and nationality, ethnic origin, religion or belief) and one to the problems of the LGBTI community (as a result it was decided that two thematic teams would be established, one to deal with legal and legislative issues and the second to deal with education and awareness-raising).<sup>437</sup>

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<sup>430</sup> Article 17a Act on the Commissioner for Civil Rights Protection.

<sup>431</sup> Article 21.2.7 Act of Equal Treatment, Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, § 3.3.

<sup>432</sup> Report on the National Programme 2015, p. 8.

<sup>433</sup> [www.rpo.gov.pl/](http://www.rpo.gov.pl/) (15 May 2015), see also Ombud Bulletin 2012/2, pp. 51-54 and Ombud Annual Report 2013, pp. 419-423.

<sup>434</sup> [www.rpo.gov.pl/pl/content/rada-spoieczna-rpo](http://www.rpo.gov.pl/pl/content/rada-spoieczna-rpo) (last accessed 15 May 2015).

<sup>435</sup> Ombud Annual Report 2014, p. 10. According to the announcement by the Ombud on 15 May 2014, of 93 suggestions from NGOs and academics (70 original ones, as some were duplicates), the Ombud chose the following four topics: Access to teaching of religion for religious minorities and teaching of ethics; Access to justice for people with disabilities; Discrimination against transgender people in employment; The quality of environmental support for people in need of assistance for activities in daily life, see: (<http://rpo.gov.pl/pl/wyniki-konsultacji>).

<sup>436</sup> Plenipotentiary Annual Report 2015, p. 16.

<sup>437</sup> Plenipotentiary Annual Report 2013, pp. 81-83.; Plenipotentiary Annual Report 2014, pp.72-73; Plenipotentiary Annual Report 2015, pp. 64-67.



### **Measures to promote dialogue between social partners**

The Polish Constitution of 1997 contains a very general provision on dialogue and cooperation between the social partners as one of the foundations of the Polish economic system.<sup>438</sup>

In 2001, Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue.<sup>439</sup> The Committee is composed of representatives of the government, employers' organisations and employees' organisations. Any member of the Committee can put forward for discussion issues that, in their opinion, are important for preserving harmonious relations between the social partners. One of the most important competences of the Tripartite Committee is consultations in respect of the state budget.

Voivodship committees for social dialogue operate at regional (voivodship) level and can be established by a decision of medium-level governmental administration – voivods. They are deliberative bodies with consultative powers over issues dealt with by trade unions and employers' organisations. These committees can also examine social and economic issues that cause conflict between employees and employers.<sup>440</sup> After deliberating, they can issue opinions or nominate a mediator to settle the collective dispute.<sup>441</sup>

In 1995 the Ministry of Economy and Labour established the Centre for Social Partnership, known as the 'Dialogue Centre'. The Centre was intended to initiate and promote social dialogue, assist social partners and offer training.<sup>442</sup>

Hence, there are venues and possibilities for initiating dialogue between social partners in order to give effect to the principle of equal treatment. However, according to the research undertaken for this report, the subject of combating discrimination has never been included on the Tripartite Committee's agenda.

### **Measures to address the situation of Roma and Travellers**

In 2002 a special team on Roma issues was established within the Ministry of the Interior. Later the role of the team was taken over by the new Joint Commission of the Government and Ethnic and National Minorities (an advisory body established on the basis of the 2005 Act on National and Ethnic Minorities and Regional Languages). The Joint Commission meets regularly (in 2013 it met five times and in 2014 six times).<sup>443</sup> There are two Roma members on the Commission (out of 35 members).<sup>444</sup>

In June 2008 a special 'Roma Issues Team' was established by the Commission. The Roma Issues Team consisted of 20 leaders/representatives of the Roma community representing different NGOs and representatives of government bodies responsible for equality issues. Since its establishment in June 2008, it has met around 15 times (its last meeting was in December 2012) and has discussed a number of issues relevant to the Roma community. Minutes from the Team's meetings are available.<sup>445</sup>

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<sup>438</sup> Article 20 Constitution.

<sup>439</sup> Act of 6 July 2001 on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue (*Ustawa z 6 lipca 2001 o Trójstronnej Komisji do Spraw Społeczno-Gospodarczych i wojewódzkich komisjach dialogu społecznego*) [hereafter 'Social Dialogue Act'].

<sup>440</sup> Article 17a.1 Social Dialogue Act.

<sup>441</sup> Article 17b.1 Social Dialogue Act.

<sup>442</sup> For more information visit the Centre's website [www.cpsdialog.pl/](http://www.cpsdialog.pl/) (last accessed 15 May 2015).

<sup>443</sup> Plenipotentiary Annual Report 2014, p. 65, Plenipotentiary Annual Report 2015, p. 53.

<sup>444</sup> See at <http://mniejszosci.narodowe.mac.gov.pl> (last accessed 15 May 2015).

<sup>445</sup> See at <http://mniejszosci.narodowe.mac.gov.pl/mne/komisja-wspolna/zespol-do-spraw-romski/posiedzenia> (last accessed 15 May 2015).

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. But it should be considered that, since the Roma population is very small and most Roma are unemployed, this is not an issue of concern for the Committee's members.

Finally, since the government Programme for the Roma Community in Poland 2004-2013 ended, the process of preparing the new draft programme has started. It was finally accepted by the Council of Ministers on 7 October 2014 – Programme for the Integration of the Roma Community in Poland 2014-2020.<sup>446</sup> The main goal of the Programme is to improve the integration of Roma in four core fields – education (including, as a separate issue, cultural, historical and civic education), housing, health and employment. The Programme follows the EU framework for national Roma integration strategies to 2020, outlined in Council conclusions (2011/C 258/04). Priority within the Programme will be given to complex projects, based on the local analysis of needs and executed in partnerships with NGOs and local government. The Programme includes a diagnosis of the situation of the Roma minority, i.e. its demographic characteristics, main problems and needs. It describes the activities undertaken so far (from 2001 until 2013) and formulates outcomes, indicators and measures for the period 2014-2020.

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

### **a) Mechanisms**

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>447</sup> Thus, should the internal rules of an enterprise, a collective agreement or a private contract include discriminatory clauses, they would clearly be in violation of the 2010 Equal Treatment Act as well as the Constitution.<sup>448</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>449</sup>

Moreover, as far as civil law contracts are concerned, since 2011 they have been covered by the Equal Treatment Act, and the Civil Code stipulates that legal provisions contrary to the law are null and void. Nullity may be limited to a part of the legal provision (e.g. a single clause in a contract), if the conflict with the law concerns only that part of the act.<sup>450</sup>

In addition, the internal rules of occupations, professions, associations, etc. are also reviewed by the courts on the request of a member or another monitoring body, such as the relevant ministry, for instance. Usually, any rules or decisions adopted may be reviewed by an internal second instance body, but may then be challenged before an administrative court. Generally, the right to challenge any rules violating the constitutional prohibition of discrimination arises from the right to a court hearing (Article 45 of the Constitution, Article 6 of the ECHR).

Polish legislation is based on a hierarchical system of law sources and one of the most important general principles is *lex superior derogat legi inferiori* (higher rules – rules with

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<sup>446</sup> *Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warsaw 2014, also in English, available at <http://mnieszosci.narodowe.mac.gov.pl/mne/romowie/program-integracji-spol> (last accessed 15 May 2015)

<sup>447</sup> Article 9.2 Labour Code.

<sup>448</sup> Article 32 Constitution.

<sup>449</sup> Article 18.2 Labour Code.

<sup>450</sup> Article 58.1 and 58.3 Civil Code.

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) Rules contrary to the principle of equality

As already mentioned at the beginning of the report, the 2010 Equal Treatment Act put Polish legislation in line with the Directives. However, limiting protection to the verbatim implementation of the Directives raises serious doubts of a constitutional character. Neither the Polish Constitution nor labour law contain an exhaustive list of grounds of discrimination. However, the ETA, being in fact an almost verbatim implementation of the Directives (in contrast to labour law), provides an exhaustive list of grounds of discrimination, thus limiting the protection of certain groups.

Nevertheless, the general Constitutional anti-discrimination clause is wide and if there are any laws contrary to the principle of equality, it is primarily for the Constitutional Tribunal to declare their non-conformity with the Constitution and, as a consequence, such provisions will become void as soon as the Tribunal's judgment enters into force.

Going beyond the scope of the Directives, it may be argued that there are examples of discriminatory laws and regulations contrary to the principle of equality. A good example discussed lately is the rights of LGBTI people and the lack of possibility of same-sex marriages (or civil unions or partnerships), as well as other limitations regarding, for instance, the healthcare system.<sup>451</sup>

Generally speaking, even if the relevant provisions seem to be non-discriminatory and neutral, their interpretation and implementation may result in discriminatory treatment. It is therefore rather a matter of practice – in fact, there are provisions which have a discriminatory character but it is difficult to identify them on a theoretical basis; in order to challenge them, a specific case of their discriminatory application is needed.

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<sup>451</sup> Ombud Annual Report 2015, p. 39.

## 9 COORDINATION AT NATIONAL LEVEL

There is no single ministry 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 government policy in relation to the principle of equal treatment.<sup>452</sup>

According to the ETA (in force since 1 January 2011), the Government Plenipotentiary for Equal Treatment should prepare and present to the Council of Ministers a National Programme of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*)<sup>453</sup> and then report on its execution annually (the first report was due on 31 March 2013.<sup>454</sup> However, the National Programme was not ready by that date. Eventually, the Polish Council of Ministers adopted the first National Programme of Activities for Equal Treatment (for the years 2013-2016) prepared by the Government Plenipotentiary for Equal Treatment on 20 December 2013.<sup>455</sup> The first annual report on the execution of the National Programme was due by 31 March 2014 but was not prepared on time and was finally published on 27 June 2014.<sup>456</sup> The second report was also delayed and was sent to the Council of Ministers on 7 May 2015<sup>457</sup> (this is the version used in this report).

The Programme is the first governmental document that tackles the problem of discrimination generally (previously, there were programmes focused only on the issues of racism, xenophobia and related intolerance). The Programme focuses on six areas: anti-discrimination policy; equal treatment in the labour market and social security system; counteracting violence (including domestic violence) and increasing protection for victims of violence; equal treatment in education; equal treatment in the healthcare system; and equal treatment in access to goods and services.

Within each area the Programme formulates principal objectives and a number of specific objectives regarding equal treatment and anti-discrimination policies, addressed to particular ministries, public agencies and NGOs within a given period of time. For instance, in the area of Anti-discrimination policy, within the main objective, Raising the standards of anti-discrimination policy, some specific objectives include, the launch of a system of monitoring and evaluation of equal treatment policy; development of a set of key indicators to monitor the situation of vulnerable groups exposed to discrimination (based on data collected within the framework of public statistics); and raising the level of knowledge in the field of equal treatment among employees of public institutions (including judges, civil servants and law enforcement officers).

The Programme was initially planned for 2013-2015 but has been extended to cover 2013-2016 (implementation should be completed during the first half of 2016). In the process

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<sup>452</sup> Article 21.1 Equal Treatment Act.

<sup>453</sup> Article 22 Equal Treatment Act.

<sup>454</sup> Article 23.3, Article 32 Equal Treatment Act.

<sup>455</sup> See Public Information Bulletin – information on the draft National Programme of Activities for Equal Treatment, from February 2013, comments on the draft programme and its consecutive versions, including the last version adopted by the Council of Ministers, from 10 December 2013, published on 13 December 2013. Information about the adoption of the Programme by the Council of Ministers is available on the website of the Prime Minister <https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2013-2016.html> The Programme on the website of the Government Plenipotentiary for Equal Treatment <http://rownetraktowanie.gov.pl/aktualnosci/krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2013-2016>.

<sup>456</sup> It was published on 27 June 2014, see [www.rownetraktowanie.gov.pl/sites/default/files/raport\\_z\\_kpdrt\\_za\\_2013\\_r.\\_przyjety\\_przez\\_rm\\_1.pdf](http://www.rownetraktowanie.gov.pl/sites/default/files/raport_z_kpdrt_za_2013_r._przyjety_przez_rm_1.pdf)

<sup>457</sup> Report on the National Programme 2015.

of consultations many detailed issues were raised by the ministries consulted and some general aspects also raised serious doubts - mostly the problem of lack of funds for programme implementation, but also issues of the lack of regulatory impact assessments or of including gender mainstreaming in the programme. According to the Ombud, many of the recommendations from the Ombud's Office and NGOs were not accepted and the level of involvement in the development of the Programme of some public institutions reveals that they are not paying due attention to the implementation of the principle of equal treatment.<sup>458</sup> The initial idea of establishing a special inter-ministerial team to monitor the implementation of the Programme is still unrealised.<sup>459</sup>

In recent years the most important task taken on by the Office of the Plenipotentiary from the perspective of the Racial Equality Directive was the role of the monitoring body for the *National programme for counteracting racial discrimination, xenophobia and related intolerance 2004-2009*. The relevant decision of the Prime Minister establishing the monitoring team was adopted on 2 February 2009. The team met three times in 2009. The Office of the Plenipotentiary prepared a report on the execution of this programme published in 2010. On 29 October 2009, the Prime Minister decided to continue the programme in the form of the *National programme for counteracting racial discrimination, xenophobia and related intolerance 2010-2013*, with the Office of the Plenipotentiary responsible for coordinating the programme. The Monitoring Team was dissolved in February 2011 and instead a new body was established – the Council for Counteracting Racial Discrimination, Xenophobia and Related Intolerance (established by the Ordinance of the Prime Minister dated 28 February 2011).<sup>460</sup> The members of the Council represent different ministries and other central institutions. For different reasons, including the split of the Ministry of the Interior, the work of the Council has in practice been suspended. The programme mentioned for the years 2010-2013 was never finally elaborated and published.

In February 2013 Prime Minister signed the Ordinance that created the new Council for Counteracting Racial Discrimination, Xenophobia and Related Intolerance.<sup>461</sup>

As the specific objectives of the Council's activities, the Ordinance lists:

- a) monitoring and analysis of areas where the phenomena of racial discrimination, xenophobia and related intolerance occur in public life;
- b) presenting to the Council of Ministers, once every two years, by 31 January, the action plan of the authorities represented on the Council, [...] for preventing and combating racial discrimination, xenophobia and related intolerance;
- c) recommending topics for analysis or expertise necessary to perform the tasks of the Council;
- d) conducting promotional activities for combating racial discrimination, xenophobia and related intolerance;
- e) working on other matters entrusted to the Council by the Council of Ministers.<sup>462</sup>

The Council brings together representatives of all ministries and relevant institutions. The Council met six times in 2013<sup>463</sup> and four times in 2014.<sup>464</sup> In November 2013, it adopted

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<sup>458</sup> Ombud Annual Report 2014, p. 92.

<sup>459</sup> Report on the National Programme 2015, p. 182.

<sup>460</sup> Plenipotentiary Annual Report 2012, p. 7; Plenipotentiary Annual Report 2013, p. 54.

<sup>461</sup> Zarządzenie Nr 6 Prezesa Rady Ministrów z dnia 13 lutego 2013 r. w sprawie Rady do spraw Przeciwdziałania Dyskryminacji Rasowej, Ksenofobii i związanej z nimi Nietolerancji, available at <http://bip.kprm.gov.pl/kpr/bip-rady-ministrow/organy-pomocnicze/organy-pomocnicze-rady/144,dok.html>.

<sup>462</sup> Framework Programme of Actions of the Council on the Prevention of Racial Discrimination, Xenophobia and Related Intolerance 2013, p. 2.

<sup>463</sup> Information about the Council is available at: <https://mac.gov.pl/aktualnosci/rada-ds-przeciwdzialania-ksenofobii-przyjela-ramowy-program-dzialan> (last accessed 15 May 2015).

<sup>464</sup> Plenipotentiary Annual Report 2015, p. 54.

the Framework Programme of Actions by the Council on the Prevention of Racial Discrimination, Xenophobia and Related Intolerance,<sup>465</sup> which defines the scope of action. The four main areas are: 1) monitoring and analysis of areas where the phenomena of racial discrimination, xenophobia and related intolerance occur; 2) response to them or action to be taken by public institutions and civil society; 3) providing examples of good practices, supporting activities of other institutions; 4) educating, training, awareness-raising and promoting positive attitudes through the organisation of conferences, seminars and workshops. In 2014 two working groups were established within the Council – one working on a repository of reports and statistical data regarding threats related to discrimination and xenophobia and the second working on a dictionary of hate speech.<sup>466</sup>

The Council also established a Consultative Council, consisting of representatives of non-governmental organisations and independent experts, and a working group for monitoring the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (particularly in the context of victims of hate crimes).<sup>467</sup> The deadline for implementation of the directive by Poland expires in 2015.

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<sup>465</sup> The English version of the programme is available at <https://mac.gov.pl/> (last accessed 15 May 2015).

<sup>466</sup> Plenipotentiary Annual Report 2015, p. 54.

<sup>467</sup> Plenipotentiary Annual Report 2014, p. 65; see also the Council website <https://mac.gov.pl/aktualnosci/rada-ds-przeciwdzialania-ksenofobii-przyjela-ramowy-program-dzialan> (last accessed 15 May 2015).

## 10 CURRENT BEST PRACTICES

In 2013 the Ombud decided to start a **public consultation, including NGOs, regarding subjects for research commissioned by the Ombud**. The Ombud asks what subjects should be researched, those who are interested submit proposals and the Ombud makes a final decision. Most of the proposed research subjects come from NGOs and this is a good way of identifying interesting projects. However, the Ombud only selected three or four topics each a year out of perhaps 70 proposals. The Ombud has now twice selected research subjects (for the years 2014 and 2015) based on these proposals.<sup>468</sup> (See also Section 8.1 above).

**Regular meetings of the Government Plenipotentiary with NGOs** may be seen as a good practice, although this should be an obvious activity (however, since there were problems with dialogue with NGOs in the past, it now seems to be an example of good practice).

Something which is also potentially a good practice (since it is still a new phenomenon) is the fact that the Government Plenipotentiary for Equal Treatment has engaged in popularising the “**social contractual clauses**” (*klauzule społeczne*) and they have already been included in some policy documents, including the National Programme of Activities for Equal Treatment (2013-2016). As a result, more contracts of public institutions based on public procurement law include social clauses<sup>469</sup> and the idea is becoming better known within the administration due to a number of activities.<sup>470</sup>

Within the Programme of the Government Plenipotentiary for Equal Treatment, ‘Equal treatment as a standard of good governance’, continued as the programme ‘Equal treatment as a standard of good governance in the regions’ (see more in Section 7 above), an example of good practice might be the creation of the network of **local equal treatment plenipotentiaries, coordinators**, based in local government and public institutions.<sup>471</sup>

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<sup>468</sup> Ombud Annual Report 2014, p. 10. See also <http://rpo.gov.pl/pl/wyniki-konsultacji> (last accessed 15 May 2015).

<sup>469</sup> Plenipotentiary Annual Report 2014, p. 28.

<sup>470</sup> Report on the National Programme 2015, pp. 47-58.

<sup>471</sup> Plenipotentiary Annual Report 2015, pp. 9, 24-25.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

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

Although the 2010 ETA seems finally to fully implement Directives 2000/43/EC and 2000/78/EC (as described in the report above), it raises some doubts and debate.

The most important doubts relate to the new equality body. The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment finally designated as an equality body the existing Ombud's Office (the Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*). The law appropriately amended the existing Ombud Act, imposing on the Ombud new competences. However, according to the Polish Constitution and the 2010 ETA, those competences are limited where conflicts between private parties are concerned.

Another problematic issue highlighted by the Ombud in its first report published in June 2012, and repeated since then, is related to the compensation claim introduced by the ETA. The Equal Treatment Act (Article 13) refers to compensation only (*odszkodowanie*), which covers material (and not non-material) damage and therefore limits the protection. The compensation claim under the Act should be widened to include non-material damages as well. It is questionable whether both sanctions based on the ETA, as well as the one and only special Labour Code sanction meet the criteria of the Directives (effective, proportionate and dissuasive), because this system only redresses the damage and does not include a punitive element. However, it is currently the subject of debate and writing and also court verdicts vary (see more in Section 6.5 above).

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

As already mentioned there are very limited statistics on the number of cases related to discrimination brought to justice (and those which do exist are erroneous and not wholly reliable). However, what little is known clearly shows that victims of discrimination very rarely use the ETA, with only a few cases over the course of four years (see more in Section 6.1). In addition, the number of cases based on the Labour Code, covering discrimination in employment, is relatively low (50-100 cases a year).

Another issue of concern is the level of knowledge and data collection relating to discrimination. Although both offices (the Ombud and the Government Plenipotentiary) are engaged in some projects, there is still considerable need for much more research and data collection.

Despite the fact that a number of previous draft versions of the ETA were wider in their scope, the government's final decision to limit the law to a simple implementation of the Directives was interpreted as being caused by lack of government commitment to counteracting discrimination and the result of fear generated by some infringement procedures initiated by the European Commission in the Court of Justice of the EU (one of these ended with the following verdict of the CJEU – C 326/09, 17 March 2011).

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

For instance, the Concluding Observations of the UN Human Rights Council adopted on 26 October 2010 were announced on 29 October 2010, the same day as the Act on the



Implementation of Certain Provisions of the European Union in the Field of Equal Treatment was adopted by the Sejm for the first time. The Council expressed its concern that the draft Equal Treatment Act was not exhaustive and did not cover discrimination based on sexual orientation, disability, religion or age in the fields of education, healthcare, social protection and housing. Therefore the Committee recommended that Poland should further amend the Equal Treatment Act so that discrimination based on all grounds and in all areas would be adequately covered.<sup>472</sup>

Finally, there is internal discussions related to the work on the horizontal directive that demonstrate that it is seen as controversial. The European Union Affairs Committee of the Polish Parliament adopted (4 December 2014) a desideratum urging the Polish Government to rethink its positive opinion on the draft of the directive.<sup>473</sup>

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<sup>472</sup> The UN HRC site including Concluding Observations and third party submissions [www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx](http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx).

<sup>473</sup> Plenipotentiary Annual Report 2015, pp. 21-22.

## 12 LATEST DEVELOPMENTS

### 12.1 Legislative amendments

**The 25 March 2014 amendment of the Ordinance of the Minister of Education on the organisation of religious instruction in State nurseries and schools** (14.04.1992).<sup>474</sup> The Ordinance finally implements the *Grzelak* ruling of the ECtHR where the Court found a lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools.<sup>475</sup> See more in Section 4.2 above.

**The 26 March 2014 Ordinance of the Minister of Administration and Digitisation on the detailed requirements for the provision of facilities for people with disabilities** by providers of publicly available telephone services.<sup>476</sup>

**The 30 May 2014 amendment of the Act on National and Ethnic Minorities and on Regional Languages** (entered into force on 9 July 2014).<sup>477</sup> The amendment introduced the social integration [ '*integracja społeczna*' ] of minorities as a duty for public authorities (previously, 'civic integration' existed, but was not defined). Social integration is defined as efforts to improve important aspects of the lives of people belonging to minorities, in particular living conditions and access to the education system, the labour market, social security and healthcare.

**The 28 November 2014 new Law on civil status registration**<sup>478</sup> providing facilities for people with disabilities enabling them to participate in the field of civil status registration.<sup>479</sup>

**Draft changes of the ETA:** the critique of the 2010 Act produced by NGOs and the Ombud led to the development of two draft laws amending and significantly widening the scope of the Act (mentioned above in a number of places). Both were inspired by the critique from the Ombud's Office, but also by numerous statements and proposals from the coalition of 47 NGOs led by the Polish Society for Anti-discrimination Law (the coalition is mentioned in the justification for the draft law submitted to Parliament).<sup>480</sup>

Both draft laws include numerous positive amendments widening the scope of protection. The first draft law was prepared within the Office of the Government Plenipotentiary for Equal Treatment, and was mentioned in its annual report,<sup>481</sup> although it has not been made public or official and, apparently, work on it has stopped.<sup>482</sup> The second complex draft law amending the Act was prepared in 2012 by independent experts and was lodged in October 2012 in Parliament by a group of Members of Parliament representing two opposition parties,<sup>483</sup> the Palikots Movement and Democratic Left Alliance, as well as some individual

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<sup>474</sup> *Rozporządzenie w sprawie warunków i sposobu organizowania nauki religii w publicznych przedszkolach i szkołach.*

<sup>475</sup> Application no. 7710/02, *Grzelak v. Poland*, ECtHR ruling 15 June 2010.

<sup>476</sup> *Rozporządzenie Ministra Administracji i Cyfryzacji z 26 marca 2014 r. w sprawie szczegółowych wymagań dotyczących świadczenia udogodnień dla osób niepełnosprawnych przez dostawców publicznie dostępnych usług telefonicznych* (Dz. U. z 2014 r., poz. 464).

<sup>477</sup> Minorities Act.

<sup>478</sup> *Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego* (Dz. U. poz. 1741, z późn. zm.).

<sup>479</sup> See more in Section 2.6 above.

<sup>480</sup> See Plenipotentiary Annual Report 2013, pp. 14-17 and the draft law at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf> (Justification, p. 6).

<sup>481</sup> Plenipotentiary Annual Report 2013, pp. 14-17. Neither the Ombud Annual Report 2014 nor the Plenipotentiary Annual Report 2014 refers to the draft law.

<sup>482</sup> Report on the National Programme 2015, p. 7.

<sup>483</sup> The draft law (Druk Sejmowy nr 1051 z 10.10.2012) is available at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

MPs.<sup>484</sup> There was an attempt to reject the draft at the first reading (June 2013). However, a majority decided to send the draft to the Justice and Human Rights Parliamentary Commission for further work. The Commission decided (on 8 October 2013) to create a Sub-commission to continue work on the draft.<sup>485</sup> However, these are not rapid processes and, considering the fact that there are parliamentary elections in autumn 2015, there is almost no chance of the amendments being adopted. The Plenipotentiary also used the following argument – that it is better to wait and pass a completely new law (taking into consideration the new horizontal directive) than to partially amend the existing ETA.

## 12.2 Case law

**Name of the court:** The Constitutional Tribunal

**Date of decision:** Judgment of 23 January 2014

**Name of the parties:** n/a

**Reference number:** Case: K 51/12

**Web address:** <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/6622-pozbawienie-osob-niepelnosprawnych-mozliwosci-sprawowania-funkcji-wojta-burmistrza-prezydenta/> (15.05.2015)

### **Brief summary:**

The Polish Ombud challenged the constitutionality of a provision of the Polish Electoral Code before the CT. Article 492(1)(6) of the Code stipulated that a person's term of office as the mayor of a village (similarly applicable to mayors of towns and cities) must expire after a medical statement on complete incapacity for work or incapacity for self-care had been issued with regard to that individual. The Ombud argued that the provision was inconsistent with Article 60 of the Constitution ('Polish citizens enjoying full public rights shall have a right of access to public service based on the principle of equality') in conjunction with Article 32 of the Constitution (1. All persons shall be equal before the law. All persons shall have the right to equal treatment by the public authorities. 2. No-one shall be discriminated against in political, social or economic life for any reason whatsoever) as well as with Article 29(a) of the Convention on the Rights of Persons with Disabilities.

In the judgment the Constitutional Tribunal ruled that Article 492 (1) (6) of the Polish Electoral Code, 'construed in the way that it concerned a medical statement on complete incapacity for work or incapacity for self-care issued after a given person had been elected to hold the office of the mayor of a village, was consistent with Article 60 in conjunction with Article 31(3) of the Constitution'<sup>486</sup> (which reads: 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).

Since the interpretation of the challenged provision of the Electoral Code was the source of the dispute and misunderstandings, the Constitutional Tribunal clarified that the provision applies to mayors already in office, and therefore it does not apply to candidates standing for election to the said offices. The provision applies to the group of people who were considered by the competent authority as being incapable for work or incapable of self-care in the period when they were mayors in office, as it is tantamount to recognition of the person to be unfit to occupy this particular position.

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<sup>484</sup> Its first reading took place in Parliament on 20 June 2013 and the draft was sent to the Parliamentary Commission for further work, see <http://sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?id=4C12B53EB4CAC3A8C1257AFC003AA7EB>.

<sup>485</sup> The legislative process can be followed at [www.sejm.gov.pl](http://www.sejm.gov.pl).

<sup>486</sup> Press release (in English) after the verdict on the website of the Tribunal <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/6622-pozbawienie-osob-niepelnosprawnych-mozliwosci-sprawowania-funkcji-wojta-burmistrza-prezydenta/> (last accessed 15 May 2015).

The Tribunal discontinued the proceedings with regard to the examination of conformity to Article 32 of the Constitution as well as Article 29(a) of the Convention, on the grounds that issuing a ruling within that scope was useless. Indeed, the Ombud had not proven that normative content arising from those provisions exceeded the scope of Article 60 of the Constitution. Thus, a higher-level norm for the review in the said case was Article 60 in conjunction with Article 31(3) of the Constitution.<sup>487</sup>

**Name of the court:** Court of Appeal (Warsaw)

**Date of decision:** 26 June 2014

**Name of the parties:** R.G. v. Bank

**Reference number:** I ACa 40/14

**Web address:**

[http://orzeczenia.ms.gov.pl/content/\\$N/154500000000503\\_I\\_ACa\\_000040\\_2014\\_Uz\\_2014-06-26\\_001](http://orzeczenia.ms.gov.pl/content/$N/154500000000503_I_ACa_000040_2014_Uz_2014-06-26_001) (15.05.2015)

**Brief summary:**

R.G. claimed that the Bank had refused to accept his application for the family version of accident insurance (*umowa ubezpieczenia od następstw nieszczęśliwych wypadków*), after learning that his partner (cohabitant) was of the same sex. R.G. – based on the protection of personal goods – sued the bank for PLN 10 000 (approx. EUR 2 500) in damages and publication of a written apology. The Regional Court (ruling of 30 August 2013, case no. I C 996/12) did not find that the dignity (personal good) of the claimant had been violated.

The Court of Appeal expressed a different opinion. In the view of the court the denial of entitlement to family accident insurance because of the sexual orientation of the applicant's partner was discriminatory and unlawful and the bank violated the dignity of the applicant.

However, the Court of Appeal overruled the appeal. According to Article 448 of the Civil Code (torts), the precondition for liability is culpable action, undertaken both intentionally and unintentionally. The Court did not find culpable action in the case. It also noted that, at the time of case, the Supreme Court had been changing the interpretation of the concept of cohabitation (extending it to same-sex couples). In addition, the Bank, after some intervention from the Insurers Ombud, agreed to cover the insurance of the claimant and his partner (in October 2010).<sup>488</sup>

It should also be noted that the situation took place in May 2010, before the Anti-discrimination Act (ETA) came into force (1 January 2011).

**Name of the court:** District Court Warszawa Śródmieście

**Date of decision:** 9 July 2014.

**Name of the parties:** PTPA on behalf of XY v. Company Z

**Reference number:** sygn. VI C 402/13

**Web address:** not published

**Brief summary:**

XY worked as a shop security guard employed by Company Z. XY took part in the equality parade, fragments of which were shown on television. After the broadcast XY received a text message from his employer (from the security chief of the store where he worked), in which he was informed that he was fired. The information was confirmed by telephone conversation with the argument that an individual who participates in such events and is associated with groups organising them cannot be a security guard because it tarnishes the company's image. The claimant demanded PLN 5 000 (EUR 1 250) in damages (50% as compensation, 50% as non-material damages, compensation for harm suffered). The

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<sup>487</sup> Press release (in English) after the verdict on the website of the Tribunal  
<http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/6622-pozbawienie-osob-niepelnosprawnych-mozliwosci-sprawowania-funkcji-wojta-burmistrza-prezydenta/> (last accessed 15 May 2015).

<sup>488</sup> The case is currently pending before the ECtHR.

court found discrimination by association and awarded the claimant PLN 2 500 (approx. EUR 625) only in material damages and refused to grant non-material damages.

The ruling described is not final and the appeal is pending. However, this is probably the first ruling in Poland that takes into account discrimination by association, therefore it is being reported here even if it is not final and binding.

### **Trends and patterns in 2014 in cases brought by Roma**

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

According to the Ombud's first report as equality body, there have been some individual complaints regarding Roma, in the majority of cases relating to social care and housing.<sup>489</sup>

In 2012 the Ombud, in its report *Counteracting violence motivated by race, ethnic origin and nationality* (*Przeciwdziałanie przemocy motywowanej rasą, pochodzeniem etnicznym i narodowością*), recommended that the police create a single database that would register violent 'discrimination crimes' and that it conduct relevant research.<sup>490</sup>

The information provided by the Police Headquarters for 2013 gives the number of cases for the three types of crimes committed related to hate speech, defamation, violence and propagation of fascism and totalitarianism, but does not include information on numbers of cases regarding Roma.<sup>491</sup>

In addition, according to the 2013 Framework Programme of Actions of the Council on the Prevention of Racial Discrimination, Xenophobia and Related Intolerance: 'The permanent activity of the Council will be collecting information about events which are associated with a high level of risk in the context of intolerance directed against representatives of national and ethnic minorities. [...] The ambition of the Council in the discussed field is to create a system for integrated monitoring of incidents of a racist and xenophobic nature. The system is to be an electronic platform, which will be a source of current information on events, facilitate communication between the entities connected to the system, allow for the creation of statistical summaries and reports, and contribute to effective responses.'<sup>492</sup>

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<sup>489</sup> Ombud Bulletin 2012/2, pp. 13-14.

<sup>490</sup> Ombud Annual Report 2013, p. 374.

<sup>491</sup> Ombud Annual Report 2014, p. 112.

<sup>492</sup> Framework Programme of Actions of the Council on the Prevention of Racial Discrimination, Xenophobia and Related Intolerance 2013; English version at [https://mac.gov.pl/files/wp-content/uploads/2013/11/ramowy-program-dzialan-rady-ds-ksenofobii\\_en.pdf](https://mac.gov.pl/files/wp-content/uploads/2013/11/ramowy-program-dzialan-rady-ds-ksenofobii_en.pdf) (last accessed 15 April 2015).

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

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

**Country: Poland**

**Date: 01.01.2015**

<b>Title of legislation (including amending legislation)</b>	Title of the Law: Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment Abbreviation: ETA Date of adoption: 03.12.2010 Latest amendments: 17.06.2013 Entry into force: 01.01.2011 Web link: <a href="https://www.rpo.gov.pl/en/content/act-3rd-december-2010-implementation-some-regulations-european-union-regarding-equal">https://www.rpo.gov.pl/en/content/act-3rd-december-2010-implementation-some-regulations-european-union-regarding-equal</a> Protected grounds: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation
	Civil/administrative/criminal law:
	Material scope: Full scope as covered by Directives 2000/43 and 2000/78: employment, access to goods and services (including housing), social protection, social advantages, education
	Principal content: Almost verbatim implementation of 5 Directives, 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.
<b>Title of legislation (including amending legislation)</b>	Title of the Law: Act on the Labour Code (implementation amendment) Abbreviation: Date of adoption: 14.11.2003 Latest amendments: major amendment 21.11.2008; last amendment 04.03.2014 Entry into force: 01.01.2004 (18.01.2009) (01.01.2011) Web link: <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> Protected grounds: gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a definite or indefinite period of time, employment part-time or full-time; the list remains open
	Civil law: labour law
	Material scope: Employment
	Principal content: prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation; right to compensation for infringement of equal treatment; obligation to provide information on equal treatment rules.
<b>Title of legislation (including amending legislation)</b>	Title of the Law: Act on the Commissioner for Civil Rights Protection Abbreviation: Date of adoption: amendment adopted on 03.12.2010 Latest amendments: 18.11.2011 Entry into force: 01.01.2011 Web link: <a href="http://rpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich">http://rpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich</a> Protected grounds: not listed
	Civil/administrative/criminal law:
	Material scope: full scope

	Principal content: Designation of Commissioner for Civil Rights Protection (Ombud) as an equality body
<b>Title of legislation (including amending legislation)</b>	Title of the Law: The Council of Ministers Ordinance on the Government Plenipotentiary for Equal Treatment (replaced by ETA, but still in force) Abbreviation: Date of adoption: 22.04.2008 Latest amendments: 30.06.2010 Entry into force: 30.04.2008 Web link <sup>493</sup> Protected grounds: gender, race, ethnic origin, nationality, religion or beliefs, political convictions, age, disability, sexual orientation, civil (marital) and family status
	Civil/administrative/criminal law:
	Material scope:
	Principal content: Designation of existing Plenipotentiary as Government Plenipotentiary for Equal Treatment as described by the ETA. Competences:
	<ul style="list-style-type: none"> <li>- Execution of government policy with regard to equal treatment</li> <li>- analysis and research, monitoring</li> <li>- collaboration with other bodies, local government and NGOs</li> <li>- creation of draft laws</li> <li>- taking actions which aim to eliminate or restrict the consequences of a violation of the rule of equal treatment</li> </ul>

<sup>493</sup> [http://rownetraktowanie.gov.pl/sites/default/files/pelnomocnikrzadudo...dz\\_u\\_2008\\_75\\_450wersja2010\\_.pdf](http://rownetraktowanie.gov.pl/sites/default/files/pelnomocnikrzadudo...dz_u_2008_75_450wersja2010_.pdf).

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country: Poland**

**Date: 01.01.2015**

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	26/11/1991	19/01/1993	No	Yes	Yes
Protocol 12, ECHR	Not signed	No	No	No	No
Revised European Social Charter	25/10/2005	No	No	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	02/03/1967	18/03/1977	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01/02/1995	20/12/2000	No	N/A	Yes
International Convention on Economic, Social and Cultural Rights	02/03/1967	18/03/1977	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	07/03/1966	05/12/1968	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	29/05/1980	30/07/1980	No	N/A	Yes
ILO Convention No. 111 on Discrimination		08/05/1961	No	N/A	Yes



<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention on the Rights of the Child	29/01/1990	07/06/1991	No	N/A	Yes
Convention on the Rights of Persons with Disabilities	30/03/2007	06/09/2012	Reservations and interpretative declaration – please see below.	No Poland has not signed the Convention's Optional Protocol.	Yes

### **Convention on the Rights of Persons with Disabilities – reservations**

- 'The Republic of Poland understands that Article 23.1 (b) and Article 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto, unless that right is guaranteed by the national law.'
- Reservations to Article 23.1(a) of the Convention until relevant domestic legislation is amended. Until the withdrawal of the reservation a disabled person whose disability results from a mental illness or mental disability and who is of marriageable age, cannot get married without the court's approval based on the statement that the health or mental condition of that person does not jeopardise the marriage, nor the health of prospective children and on condition that such a person has not been fully incapacitated. These conditions result from Article 12 § 1 of the Polish Code on Family and Guardianship.
- One interpretative declaration: 'The Republic of Poland declares that it will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.'

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