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# Country report

## Non-discrimination

Poland

2018

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# **Country report**

# **Non-discrimination**

# **Poland**

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Reporting period 1 January 2017 – 31 December 2017

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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 in the Polish 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 several 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. In research commissioned by the Ombud, 92 % of people who believe they were discriminated against in 2016 did not inform any public body (85 % in 2015). 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 CSOs, and the Polish Government seemed to lack any strategic approach to counteracting discrimination. However, the situation in this respect began to gradually improve. 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 2015, for the first time, the new Ombud appointed a deputy responsible for equal treatment. More recently, however, since the parliamentary elections in autumn 2015, the activities of the Government Plenipotentiary for Equal Treatment have been very limited. The new National Programme of Activities for Equal Treatment has not been prepared, and political attacks were made on the Ombud for its activities targeting discrimination. In fact, the general political environment regarding counteracting discrimination became hostile, which resulted in the Polish Government withdrawing support for the draft EU horizontal directive.

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, reports and numerous recommendations. 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. Age discrimination is also slowly being targeted at local level; however, the Ombud continually calls for a more systemic approach.

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 although the Government does not wish to ratify the optional protocol – right of individual petition). However, people with disabilities are still largely invisible in public, due to a variety of barriers.

LGBTI minorities are in a very difficult position in Poland, since they are a frequently attacked group (including occasional material attacks on the offices of LGBT organisations). 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. In recent years, draft laws on civil partnerships have been debated but with no results.

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

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

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). 'Traditional' national and ethnic minorities as well as religious minorities are supported by various positive action programmes aiming at cultivating their culture, heritage and language. There are also special support programmes for the Roma population.<sup>3</sup> However, hate speech and hate violence and crime, targeted at people of different ethnic and religious backgrounds (including immigrants and refugees), are increasingly present in public and have escalated dangerously: the Ombud registered 60 such cases in 2016 and 100 in 2017.

## 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 ETA aims to implement six directives: 1986/613/EEC; 2000/43/EC; 2000/78/EC; 2004/113/EC, 2006/54/EC; and 2014/54/EU. The Act, in contrast to the Labour Code, contains an exhaustive list of grounds of discrimination: gender, race, ethnic origin, nationality (citizenship was added in 2016, implementing Directive 2014/54/EU), 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 2016, in a motion to the Constitutional Tribunal (CT), the Ombud challenged the constitutionality of the provisions of the ETA 'in so far as they limit the scope of the Act because of the closed catalogue of discriminatory grounds. The law excludes some social groups that experience discrimination in many areas of their lives'. However, in 2017 the Ombud withdrew the motion (without providing official justification), and the CT decided on discontinuance of the case.<sup>7</sup>

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<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, also in English, available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol> (hyperlinks last accessed 30 March 2018).

<sup>4</sup> Poland, Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*).

<sup>5</sup> Poland, Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) [ETA], last amendment, not relevant for this report, 24 July 2015.

<sup>6</sup> Poland, Labour Code (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*).

<sup>7</sup> See the CT website at: <http://trybunal.gov.pl/s/k-1716/>.

In order to implement the equality directives, the Code of Civil Procedure was amended in 2004.<sup>8</sup> It gives legal standing to CSOs, which may institute actions on behalf of claimants and join the proceedings at any stage thereof.

Generally speaking, the implemented law is enforced, especially in labour relations. However, outside the field of employment the process is rather slow. There are several reasons behind this. On one hand, there is a lack of awareness among people who are victims of discrimination. On the other hand, there are continuing gaps in the law (for instance, the 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. In general, however, 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).

*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 exercise of their rights by persons in order to defend themselves against unequal treatment must not be the basis for adverse treatment and must not cause any negative consequences for those persons. This protection extends to persons who in any way support other persons 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. Very controversial changes were introduced in 2017. The Ministry of National Education limited the possibility for pupils with disabilities to integrate in mainstream schools. According to the amended

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<sup>8</sup> Poland, Code of Civil Procedure (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), 17 November 1964.



law, individual teaching required because of special needs is to be organised at home, not in school.

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 are still 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 (and in a final, second instance verdict, delivered in 2015) associated discrimination was recognised by a court for the first time.<sup>9</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.

#### **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>10</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

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<sup>9</sup> District Court Warszawa Śródmieście, *XY and Polish Society of Antidiscrimination Law on behalf of XY v. Company Z*, sygn. VI C 402/13, decision 9 July 2014; Regional Court, Warsaw (second instance), sygn. V Ca 3611/14, decision 18 November 2015.

<sup>10</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).

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, relatively few such cases have been brought to the courts over the last seven 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 (*odszkodowanie*) which only 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 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, one can use protection of 'personal rights' such as health, freedom and honour etc. (Civil Code, Articles 23-24).<sup>11</sup> 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 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

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<sup>11</sup> Poland, Civil Code (*Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny*), 23 April 1964.

practice, many of the discrimination cases outside the field of employment are brought on behalf of victims (or joined) by CSOs such as 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 CSOs and in judicial circles). It can be presumed that this kind of evidence could be admitted by a court. However, in regard to situation testing, this is not obvious and would be a risky strategy (there are also theoretical arguments against accepting such evidence). So far, therefore, 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 2010 ETA introduced 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, it can happen that courts also expect a particular ground of discrimination to be demonstrated),<sup>12</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 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 senior citizens.

Public bodies responsible for counteracting discrimination undertake consultations on their policies and there are possibilities for CSOs and social partners to take part in the public debate as well as in formal forums, such as Committees and working groups (although in regard to cooperation with the Government Plenipotentiary for Equal Treatment, such possibilities have recently become very limited). However, many of the social partners' expectations are not being fulfilled (such as amendment of the ETA, which has been the subject of discussion for several 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 amended the existing Act appropriately 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 it can therefore deal with any ground, including but not limited to those listed in the ETA).<sup>13</sup> In 2015 a Deputy Ombud

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<sup>12</sup> See, for instance, Supreme Court verdicts: 3 June 2014, III PK 126/13 and 18 April 2012, II PK 196/11.

<sup>13</sup> Poland, Act on the Ombud (*Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 15 July 1987.

responsible for equal treatment was appointed and a new Team for Equal Treatment was created (with a Section for Anti-discrimination Law and a Section for the Rights of Migrants and National Minorities). The Ombud is also engaged in research activities (as well as compilation of existing data on some issues); it has also launched a section of its website dedicated to equality issues, collected information on jurisprudence relating to discrimination, established thematic teams of external experts to support the Ombud and set up a telephone hotline (to deal 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 on 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 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 cases, 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. In 2015 the competence of the Ombud was slightly extended. According to the changed provision, the Ombud may join proceedings before the Constitutional Tribunal started by someone else (since 30 August 2015). Previously, the Ombud could join proceedings started by someone else, but this was limited to cases of individual constitutional complaint only.<sup>14</sup>

The second institution that has a mandate to promote 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>15</sup> The Plenipotentiary's main task is to execute government policy in the field of equal treatment. In January 2016, serious changes took place: the office of the Plenipotentiary was closed, its staff was reduced and currently it is responsible for a variety of other issues; a new Plenipotentiary was appointed to combine two positions – the newly created position of Government Plenipotentiary for Civil Society together with that of the Plenipotentiary for Equal Treatment. Since then, equal treatment issues have become much less important in the activities of the Plenipotentiary.

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>16</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 the Prime Minister created the Council for counteracting racial discrimination, xenophobia and related intolerance. However, in April 2016 the Prime Minister issued a regulation abolishing the Council. Its Consultative Council was also abolished (it was comprised of independent experts and representatives of CSOs). As the spokesman for the Government explained, the work of the Council did not have any important effects (many commentators disagreed with this statement).

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<sup>14</sup> Poland, Act on the Ombud, Art. 16. 2 p. 3, changed by Art. 130 of Act on Constitutional Tribunal, 25 June 2015 (Dz.U.2015.1064).

<sup>15</sup> Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania.

<sup>16</sup> Poland, Act on National and Ethnic Minorities and on Regional Languages (*Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*), 6 January 2005.

The body responsible for disability policy is the Government Plenipotentiary for Disabled People. The Plenipotentiary, formally a part of the Ministry of Family, Labour and Social Policy, is primarily responsible for implementing the Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons.<sup>17</sup>

## **7. Key issues**

The critique of the 2010 Act produced by the Ombud and CSOs led to the development of two draft laws (prepared in 2012 and 2013) aiming to amend and significantly widen the scope of the ETA. However, no further work on the draft has taken place since the parliamentary elections in October 2015.

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 brought over the course of seven years (with the first final decision not issued until November 2015). In addition, the number of cases involving discrimination in employment and based on the Labour Code is relatively low (50-100 cases a year).

Despite the legal limitations, one of the reasons for the small number of cases is generally the problem of under-reporting. Surveys commissioned by the Ombud show that 85 % (in 2015) and 92 % (in 2016) of persons who were discriminated against during the previous year did not report this to any public institution.

The changes that began to take place in 2016 in regard to limiting the practical role of the office of the Government Plenipotentiary for Equal Treatment, and other developments, including restricting the budget of the Ombud and the political attacks provoked by his anti-discrimination activities, all show that equal treatment is not a priority for the current Government.

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<sup>17</sup> Poland, Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*), 27 August 1997.

## 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 polonais 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. Plusieurs 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. Selon une étude commanditée par le Médiateur, 92 % des personnes estimant avoir fait l'objet d'une discrimination en 2016 n'en ont informé aucune instance publique (85 % en 2015). 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 OSC et le gouvernement polonais ne semblait pas s'être doté de la moindre approche stratégique en matière de lutte contre les discriminations. La situation commence néanmoins de s'améliorer 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>18</sup> En 2015, pour la première fois, le nouveau Médiateur a nommé un adjoint responsable de l'égalité de traitement. Plus récemment néanmoins, à savoir depuis les élections parlementaires de l'automne 2015, les activités du Plénipotentiaire officiel pour l'égalité de traitement ont été fortement limitées. Le nouveau programme national d'activités en faveur de l'égalité de traitement n'a pas été élaboré et le Médiateur a fait l'objet d'attaques politiques en raison de ses actions visant la discrimination. Le climat politique général vis-à-vis de la lutte contre la discrimination est, en réalité, devenu hostile avec pour conséquence que le gouvernement polonais a retiré son soutien au projet de directive horizontale européenne.

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>19</sup> ont donné lieu à la publication d'un plus grand nombre d'études, de rapports et de recommandations. 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. Cette dernière est peu à peu ciblée davantage au plan local, mais le Médiateur réclame sans relâche une approche davantage systémique.

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, même si le gouvernement ne souhaite pas en ratifier le protocole facultatif – droit de recours individuel). Des barrières diverses font cependant que ces personnes restent largement invisibles aux yeux du public.

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<sup>18</sup> *Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2016.*

<sup>19</sup> La précédente médiatrice avait fait de l'âge l'une de ses trois priorités, les deux autres étant les personnes handicapées et les migrants.

Les minorités LGBTI se trouvent dans une situation extrêmement difficile en Pologne, étant un groupe fréquemment visé par des attaques (y compris des attaques visant occasionnellement les bureaux d'organisations LGBT). 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 ces dernières années, mais sans résultats.

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 «traditionnelles», de même que les minorités religieuses, sont soutenues par divers 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>20</sup> On observe toutefois un discours et des crimes haineux ainsi que des faits de violence de plus en plus fréquents en public envers de personnes de différentes origines ethniques et religieuses, en ce compris les immigrés et les réfugiés – un phénomène qui connaît une dangereuse escalade puisque le Médiateur a été saisi de 60 dossiers de ce type en 2016 et de 100 en 2017.

## 2. Législation principale

En vertu de la clause générale de lutte contre la discrimination contenue dans la Constitution polonaise (article 32),<sup>21</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>22</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>23</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 loi sur l'égalité de traitement vise à mettre en œuvre six directives, à savoir les directives 1986/613/CEE, 2000/43/CE, 2000/78/CE, 2004/113/CE, 2006/54/CE et 2014/54/UE. Contrairement au code du travail, elle contient une liste exhaustive de motifs de discrimination: le genre, la race, l'origine ethnique, la nationalité (la citoyenneté a été ajoutée en 2016 en application de la directive

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<sup>20</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.mswia.gov.pl/mne/romowie/program-integracji-spol> (hyperliens consultés en dernier lieu le 30 mars 2018)).

<sup>21</sup> Pologne, Constitution de la République de Pologne (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*).

<sup>22</sup> Pologne, loi sur la mise en œuvre de certaines dispositions de l'Union européenne dans le domaine de l'égalité de traitement (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) [loi sur l'égalité de traitement], modifiée en dernier lieu le 24 juillet 2015 (amendement non pertinent dans le cadre du présent rapport).

<sup>23</sup> Pologne, Code du travail (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*).

2014/54/UE), 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.

En 2016, dans une motion adressée au Tribunal constitutionnel, le Médiateur a contesté la constitutionnalité des dispositions de la loi sur l'égalité de traitement «dans la mesure où elles limitent le champ d'application de la loi en raison de la liste fermée de motifs discriminatoires. La loi exclut certains groupes sociaux qui connaissent une discrimination dans de nombreux domaines de vie». Le Médiateur a toutefois retiré la motion (sans fournir de justification officielle) en 2017 et le Tribunal constitutionnel a prononcé un non-lieu.<sup>24</sup>

Le code de procédure civile a été modifié en 2004 dans le but de transposer les directives sur l'égalité.<sup>25</sup> Il habilite désormais les OSC à ester en justice: celles-ci peuvent engager des poursuites au nom des plaignants et intervenir à n'importe quel stade de la procédure.

La législation de transposition est globalement appliquée, en matière de relations du travail plus particulièrement. 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 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. 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

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<sup>24</sup> Voir le site web du Tribunal constitutionnel sur: <http://trybunal.gov.pl/s/k-1716/>.

<sup>25</sup> Pologne, Code de procédure civile (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), 17 novembre 1954.



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'exercice 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, d'autres personnes exerçant leurs 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. Des modifications très controversées ont été introduites en 2017. Le ministère de l'Éducation nationale a restreint la possibilité pour des élèves handicapés de s'inscrire dans une école ordinaire: la loi modifiée prévoit en effet que l'enseignement individualisé requis en raison de besoins spéciaux doit être organisé à domicile, et non à l'école.

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 sont 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 (et dans un verdict définitif rendu en deuxième instance en 2015).<sup>26</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

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<sup>26</sup> Tribunal d'arrondissement de Warszawa Śródmieście, XY et Société polonaise du droit antidiscrimination au nom de XY c. Entreprise Z, sygn. VI C 402/13, arrêt du 9 juillet 2014; Tribunal régional de Varsovie (deuxième instance), sygn. V Ca 3611/14, arrêt du 18 novembre 2015.

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>27</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 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, quelques affaires seulement de ce type ont été portées en justice au cours des sept dernières années – 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 référence à une réparation (*odszkodowanie*) qui couvre uniquement le préjudice matériel (et non le préjudice moral), et limite donc la

<sup>27</sup> «Professions libérales» est un terme spécifiquement utilisé en Pologne pour désigner les professions auto-réglementées. Le terme «professions fondées sur la confiance du public» est également utilisé (article 17 de la Constitution).

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 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, d'invoquer la protection de «droits personnels» tels que la santé, la liberté et l'honneur, etc. (articles 23-24 du code civil).<sup>28</sup> 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.

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 pratique, bon nombre de cas de discrimination en dehors du domaine de l'emploi sont introduits au nom des victimes (ou rejoins) par des OSC 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 par des OSC et par les milieux judiciaires). On peut présumer qu'une juridiction considérerait ce type de preuve comme recevable. Il s'agirait toutefois d'une stratégie potentiellement risquée et

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<sup>28</sup> Pologne, Code civil (*Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny*), 23 avril 1964.

loin d'être évidente pour ce qui concerne le test de situation (il existe également des arguments théoriques qui s'opposent à la recevabilité de cette forme de preuve); aussi ceux qui portent en justice des affaires se fondant sur des tests de situation se refusent-ils jusqu'ici 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 loi de 2010 sur l'égalité de traitement a 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; elle ne l'étend donc 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 (il peut arriver néanmoins aussi que les tribunaux attendent la démonstration de l'existence d'un motif particulier de discrimination)<sup>29</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 («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 citoyens plus âgés (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 OSC 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 (cette possibilité ayant toutefois été considérablement restreinte récemment en ce qui concerne la coopération avec le Plénipotentiaire officiel pour l'égalité de traitement). 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 la loi existante de manière appropriée 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

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<sup>29</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.

limiter, les motifs énumérés dans la loi sur l'égalité de traitement).<sup>30</sup> Un Médiateur adjoint en charge de l'égalité de traitement a été désigné en 2015, et une nouvelle équipe pour l'égalité de traitement a été créée – laquelle comprend une section «Droit antidiscrimination» et une section «Droit des migrants et des minorités nationales». Le Médiateur procède également à des études (ainsi qu'à la compilation des données existantes sur certaines questions); il a par ailleurs inauguré sur son site web une nouvelle rubrique consacrée aux questions d'égalité, rassemblé des informations concernant la jurisprudence en matière de discrimination, mis en place des équipes thématiques formées d'experts externes pour soutenir le Médiateur, et ouvert une permanence téléphonique (qui traite 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 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. Le mandat du Médiateur a été quelque peu élargi en 2015. La disposition modifiée lui permet en effet (depuis le 30 août 2015) de se joindre devant le Tribunal constitutionnel à des poursuites engagées par quelqu'un d'autre. Le Médiateur disposait antérieurement de cette possibilité, mais uniquement dans le cadre d'une plainte constitutionnelle individuelle.<sup>31</sup>

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>32</sup> Le Plénipotentiaire a pour mission principale de mettre en œuvre la politique gouvernementale en matière d'égalité de traitement. De profonds changements sont intervenus en janvier 2016: le bureau du Plénipotentiaire a été fermé, son personnel réduit et désormais chargé de diverses autres questions; un nouveau Plénipotentiaire a été nommé pour remplir une double fonction – le poste nouvellement créé de Plénipotentiaire officiel pour la société civile venant s'ajouter à celui de Plénipotentiaire pour l'égalité de traitement. Les questions d'égalité de traitement ont perdu depuis lors beaucoup de leur importance dans les activités du Plénipotentiaire.

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>33</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

<sup>30</sup> Pologne, loi sur le Médiateur (*Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 15 juillet 1987.

<sup>31</sup> Pologne, loi sur le Médiateur, article 16.2 sous 3), modifié par l'article 130 de la loi sur le Tribunal constitutionnel, 25 juin 2015 (Dz.U.2015.1064).

<sup>32</sup> *Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania*.

<sup>33</sup> Pologne, loi sur les minorités nationales et ethniques et sur les langues régionales (*Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*), 6 janvier 2005.

a été créé en son sein en 2008. Le Premier ministre a institué en 2013 le Conseil pour la lutte contre la discrimination raciale, la xénophobie et l'intolérance qui y est associée. En avril 2016, toutefois, le Premier ministre a publié un règlement abolissant ledit Conseil, de même que son Conseil consultatif (composé d'experts indépendants et de représentants d'OSC). Comme l'a expliqué le porte-parole du gouvernement, le travail du Conseil n'avait pas d'effets importants (une déclaration sur laquelle de nombreux commentateurs marquent leur désaccord).

L'organisme responsable de la politique en matière de handicap est le Plénipotentiaire officiel pour les personnes handicapées. Faisant officiellement partie du ministère de la Famille, 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>34</sup>

## **7. Points essentiels**

Les critiques formulées à l'égard de la loi de 2010 par le Médiateur et des OSC 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. Mais les travaux relatifs à ces projets ont cessé depuis les élections parlementaires d'octobre 2015.

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 sept ans (le premier arrêt définitif ayant été prononcé en novembre 2015 seulement). Le nombre de recours impliquant une discrimination en matière d'emploi et s'appuyant sur le code du travail est lui aussi relativement peu élevé (entre 50 et 100 cas par an).

En dépit des limites juridiques, ce contentieux peu abondant s'explique généralement par un taux important de sous-signalement: des enquêtes commanditées par le Médiateur montrent que 85 % des personnes ayant fait l'objet d'une discrimination au cours de l'année écoulée ne l'avaient signalé à aucune institution publique en 2015, et que tel était le cas de 92 % d'entre elles en 2016.

Les changements amorcés en 2016 en ce qui concerne la limitation du rôle concret du bureau du Plénipotentiaire officiel pour l'égalité de traitement, de même que d'autres développements, y compris la restriction du budget du Médiateur et les attaques suscitées par ses activités antidiscrimination, sont autant d'éléments qui montrent que l'égalité de traitement n'est pas une priorité pour le gouvernement actuel.

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<sup>34</sup> Pologne, loi sur la réadaptation sociale et professionnelle et l'emploi des personnes handicapées (*Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*), 27 août 1997.

## 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 Orientierung im polnischen Rechtssystem war 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. Verschiedene Faktoren wie das geringe Rechtsbewusstsein in der polnischen Gesellschaft, die Passivität (und manchmal 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. Im Auftrag der Ombudsperson erstellte Studien ergaben, dass 92 % der Personen, die 2016 der Meinung waren, diskriminiert worden zu sein, keinerlei staatliche Stelle informierten (im Vergleich zu 85 % im Jahr 2015). 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 größtenteils auf zivilgesellschaftlichen Organisationen (ZGOs), weil der polnischen Regierung ein strategischer Ansatz für den Kampf gegen Diskriminierung fehlte. Diese Situation begann sich jedoch allmählich zu verbessern. Im Dezember 2013 verabschiedete der Ministerrat erstmals ein Nationales Aktionsprogramm für Gleichbehandlung 2013-2016.<sup>35</sup> 2015 ernannte die neue Ombudsperson erstmalig einen für Gleichbehandlung zuständigen Stellvertreter. In jüngster Zeit, seit den Parlamentswahlen im Herbst 2015, sind die Aktivitäten der Regierungsbevollmächtigten für Gleichbehandlung jedoch sehr eingeschränkt. Das neue Nationale Aktionsprogramm für Gleichbehandlung wurde nicht aufgelegt, und die Ombudsperson wurde aufgrund ihrer gegen Diskriminierung gerichteten Aktivitäten Ziel politischer Angriffe. Tatsächlich wurde das allgemeine politische Umfeld betreffend die Bekämpfung von Diskriminierung zunehmend feindselig, was dazu führte, dass die polnische Regierung ihre Unterstützung für den Entwurf einer horizontalen EU-Richtlinie zurückzog.

Diskriminierung aufgrund des Alters ist erst vor Kurzem in den Fokus der polnischen Öffentlichkeit gerückt. Dank der Arbeit der Ombudsperson<sup>36</sup> hat in den letzten Jahren die Zahl der Studien und Berichte zugenommen und wurden zahlreiche Empfehlungen formuliert. 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. Allmählich wird Altersdiskriminierung auch auf lokaler Ebene ins Visier genommen; die Ombudsperson fordert jedoch unaufhörlich einen systematischeren Ansatz.

Gegen die Diskriminierung von Menschen mit Behinderungen (12,2 % der Bevölkerung) wird seit jeher auf unterschiedliche Weise vorgegangen (und die Ratifizierung des Übereinkommens über die Rechte von Menschen mit Behinderungen im September 2012 schafft neue Möglichkeiten, auch wenn die Regierung das Fakultativprotokoll – Recht auf Individualbeschwerde – nicht ratifizieren will). Aufgrund zahlreicher Barrieren sind Menschen mit Behinderungen in der Öffentlichkeit jedoch nach wie vor kaum sichtbar.

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<sup>35</sup> *Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2016.*

<sup>36</sup> Die frühere Ombudsperson hatte „Alter“ zu einer ihrer drei Prioritäten erklärt; die beiden anderen waren „Menschen mit Behinderungen“ und „Migranten“.

LGBTI-Personen sind in Polen in einer sehr schwierigen Position und gehören zu den Minderheiten, die am häufigsten angegriffen werden (einschließlich einzelner materieller Übergriffe auf die Büros von LGBT-Organisationen). Viele Initiativen auf nationaler und internationaler Ebene (z. B. der Entwurf der horizontalen EU-Richtlinie) wurden von einigen Politikern und Journalisten als Förderung von Homosexualität und als Angriffe von Homosexuellen dargestellt. In den letzten Jahren wurden Gesetzentwürfe zum Thema eingetragene Partnerschaften diskutiert, jedoch ohne Ergebnisse.

Generell sind nationale und religiöse Minderheiten in Polen klein (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 ehemaligen Sowjetunion und aus Vietnam). „Traditionelle“ nationale und ethnische Minderheiten sowie religiöse Minderheiten werden mit unterschiedlichen Förderprogrammen unterstützt, die helfen sollen, ihre Kultur, Sprache und ihr kulturelles Erbe zu bewahren. Es gibt auch spezielle Unterstützungsprogramme für die Roma-Bevölkerung.<sup>37</sup> Hassreden sowie Hassgewalt und Hassverbrechen gegen Menschen mit anderen ethnischen und religiösen Backgrounds (einschließlich Einwanderer und Flüchtlinge) sind in der Öffentlichkeit jedoch zunehmend präsent und haben in gefährlichem Maße zugenommen: 2016 registrierte die Ombudsperson 60 solcher Fälle, 2017 bereits 100.

## 2. Wichtigste Rechtsvorschriften

Das allgemeine Diskriminierungsverbot der polnischen Verfassung (Artikel 32) lautet:<sup>38</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>39</sup>

Bis 2010 war das Arbeitsgesetz das wichtigste Element des polnischen Antidiskriminierungsrechts (das Gesetz wurde 2004 und 2008 an die Richtlinien angepasst).<sup>40</sup> Das Arbeitsrecht regelt arbeitsvertragliche Beschäftigungsverhältnisse und zählt beispielhaft einige verbotene Diskriminierungsgründe auf. Die Liste ist nicht abgeschlossen. Das GBG dient zur Umsetzung der folgenden sechs Richtlinien: 1986/613/EWG, 2000/43/EG, 2000/78/EG, 2004/113/EG, 2006/54/EG und 2014/54/EU. Anders als das Arbeitsgesetz enthält es eine abgeschlossene Liste von Diskriminierungsgründen: Geschlecht, „Rasse“, ethnische Zugehörigkeit, Nationalität (Staatsbürgerschaft wurde 2016 im Zuge der Umsetzung der Richtlinie 2014/54/EU hinzugefügt), Religion, Weltanschauung, politische Überzeugung, Behinderung, Alter und sexuelle Orientierung. Neben einem umfassenden Schutz vor Diskriminierung im Bereich Beschäftigung (der abhängige Beschäftigte, Selbständige und freie Berufe umfasst) bietet das neue Gesetz auch Schutz vor Diskriminierung in allen anderen Lebensbereichen, jedoch nur in Bezug auf „Rasse“, ethnische Zugehörigkeit und Nationalität (und Geschlecht, jedoch

<sup>37</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, abrufbar unter <http://mnieszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol> (letzter Zugriff auf alle Hyperlinks am 30. März 2018).

<sup>38</sup> Polen, Verfassung der Republik Polen (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*)

<sup>39</sup> Polen, Gesetz zur Umsetzung bestimmter Rechtsvorschriften der Europäischen Union im Bereich der Gleichbehandlung (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), zuletzt geändert am 24. Juli 2015 (ohne Relevanz für diesen Bericht).

<sup>40</sup> Polen, Arbeitsgesetzbuch (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*).



nur beim Zugang zu Sozialschutz sowie Gütern und Dienstleistungen einschließlich Wohnraum, jedoch nicht beim Zugang zu medizinischer Versorgung und Bildung). Mit dem Gesetz wurde außerdem die Ombudsstelle (*Rzecznik Praw Obywatelskich*) als Gleichbehandlungsstelle eingerichtet.

2016 beantragte die Ombudsperson beim Verfassungsgericht (VG), die Bestimmungen des GBG für verfassungswidrig zu erklären, „soweit sie den Geltungsbereich des Gesetzes aufgrund der abgeschlossenen Liste von Diskriminierungsgründen einschränken. Das Gesetz schließt verschiedene soziale Gruppen aus, die in vielen Bereichen ihres Lebens von Diskriminierung betroffen sind“. 2017 zog die Ombudsperson den Antrag jedoch (ohne offizielle Begründung) zurück, und das VG entschied auf Einstellung des Verfahrens.<sup>41</sup>

Zur Umsetzung der Gleichbehandlungsrichtlinien wurde 2004 auch die Zivilprozessordnung überarbeitet.<sup>42</sup> Sie erlaubt es ZGOs, vor Gericht aufzutreten: Sie können im Namen von Betroffenen klagen und den Verfahren in jeder Phase derselben beitreten.

Im Allgemeinen wird das implementierte Recht durchgesetzt, insbesondere in den Arbeitsbeziehungen. Außerhalb des Beschäftigungsbereichs ist der Prozess jedoch ziemlich langsam. Dafür gibt es mehrere Gründe. Einerseits mangelt es den Menschen, die Opfer von Diskriminierung werden, an Bewusstsein. Andererseits gibt es nach wie vor Gesetzeslücken (z.B. wird die Klage auf Schadensersatz, die nur materielle, aber keine immateriellen Schäden abdeckt, in der Praxis nicht angewendet). Tatsächlich haben Klagen auf der Grundlage des GBG keine große Bedeutung. Generell wächst jedoch – wenn auch langsam – die Zahl der Diskriminierungsfälle, die vor Gericht gebracht werden, und bewirken zahlreiche Sensibilisierungsmaßnahmen Veränderungen.

### 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 Orientierung 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 Orientierung 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 beinhaltet ein allgemeines *Verbot von*

<sup>41</sup> Siehe die Webseite des VG unter: <http://trybunal.gov.pl/s/k-1716/>.

<sup>42</sup> Polen, Zivilprozessordnung (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), 17. November 1964.

*Viktimisierung*, dem zufolge Personen, die ihre Rechte wahrnehmen, um sich gegen Ungleichbehandlung zur Wehr zu setzen, nicht benachteiligt oder anderen negativen Konsequenzen ausgesetzt werden dürfen. Dieser Schutz gilt auch für Personen, die andere Personen bei der Wahrnehmung ihrer Rechte in irgendeiner Weise unterstützen.

Das GBG 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. 2017 wurden sehr umstrittene Änderungen eingeführt. Das Ministerium für Nationale Bildung schränkte die Möglichkeit ein, Schüler und Schülerinnen mit Behinderungen in Regelschulen zu integrieren. Dem geänderten Gesetz zufolge ist der aufgrund spezieller Bedürfnisse erforderliche individuelle Unterricht zu Hause und nicht in der Schule durchzuführen.

Das GBG 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 einer Vermutung* und *Diskriminierung durch Assoziierung* sind nicht reguliert und sind nach wie vor neue Konzepte. Sie waren jedoch in den Entwürfen zur Neufassung des GBG aus den Jahren 2012 und 2013 enthalten (siehe Punkt 7 weiter unten). 2014 (und in einem endgültigen, zweitinstanzlichen Urteil, das 2015 erging) wurde Diskriminierung durch Assoziierung erstmals von einem Gericht anerkannt.<sup>43</sup>

Das GBG 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. Im GBG ist außerdem ausdrücklich verankert, 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.

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<sup>43</sup> Kreisgericht Warszawa Śródmieście, XY und Polnische Gesellschaft für Antidiskriminierungsrecht im Namen von XY gegen die Firma Z, sygn. VI C 402/13, Urteil vom 9. Juli 2014; Bezirksgericht Warschau (zweite Instanz), sygn. V Ca 3611/14, Urteil vom 18. November 2015.

#### 4. Sachlicher Geltungsbereich

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>44</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 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 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 den letzten sieben Jahren relativ wenige solche Fälle vor Gericht gebracht. Wie die Ombudsstelle in ihrem Jahresbericht erläutert, liegt dies zum Teil sicher daran, dass das neue GBG ein Anrecht auf Schadensersatz (*odszkodowanie*) vorsieht, das nur die Erstattung materieller Schäden, jedoch nicht ideeller Schäden, ermöglicht und damit den rechtlichen Schutz einschränkt. Der vom GBG gewährte Entschädigungsanspruch sollte auch auf Nichtvermögensschäden ausgedehnt werden.

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<sup>44</sup> Freie Berufe werden in Polen Berufe genannt, die sich durch eigene Körperschaften selbst regulieren. Ein anderer gängiger Begriff ist „Berufe des öffentlichen Vertrauens“ (Art. 17 der Verfassung).

Klagen sind andererseits auch nach dem allgemeinen Zivilrecht möglich. Das Zivilgesetzbuch regelt die Zahlung von Schadensersatz und Schmerzensgeld, allerdings sieht die Zivilprozessordnung keine Verlagerung der Beweislast vor. In Rechtssachen, die nicht unter das GBG fallen, kann der Schutz „persönlicher Rechte“ wie Gesundheit, Freiheit, Ehre usw. in Anspruch genommen werden (Zivilgesetzbuch Art. 23-24).<sup>45</sup> 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 Rechtsverletzung 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, das GBG.

Klagen, die aus einem Beschäftigungsverhältnis entstehen, 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 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 außerhalb des Beschäftigungsbereichs von ZGOs wie der Polnischen Gesellschaft für Antidiskriminierungsrecht oder der Helsinki-Stiftung für Menschenrechte im Namen der Betroffenen (oder gemeinsam mit diesen) vor Gericht gebracht.

Im polnischen Antidiskriminierungsrecht ist die Verwendung von *statistischen Beweisen* oder von *Situationstests* nicht ausdrücklich geregelt. Das heißt nicht, dass ihr Einsatz theoretisch ausgeschlossen ist (beide Konzepte werden von ZGOs und in juristischen Kreisen diskutiert). Es ist anzunehmen, dass diese Art von Beweisen von einem Gericht zugelassen werden könnten. Was Situationstests betrifft, ist dies jedoch nicht klar, weshalb dies eine riskante Strategie wäre (es gibt auch theoretische Argumente gegen deren Zulassung als Beweismittel). Aus diesem Grund geben Diskriminierungsoffer, deren Klagen faktisch auf Testing-Verfahren beruhen, dies bislang vor Gericht nicht an, sondern argumentieren, sie seien schlicht diskriminiert worden.

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<sup>45</sup> Polen, Zivilgesetzbuch (*Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny*), 23. April 1964.

Seit der Überarbeitung des Arbeitsgesetzes (2004) lag die *Beweislast* nicht mehr beim Kläger, sondern beim Beklagten; dies galt jedoch nur für arbeitsrechtliche Fälle. Das GBG von 2010 führte eine Verlagerung der Beweislast für alle Entschädigungsklagen ein, die sich auf eine von dem Gesetz erfasste Verletzung des Gleichbehandlungsgebots beziehen; sie gilt also nicht für zivilrechtliche Klagen (mit Ausnahme von Verletzungen von „Persönlichkeitsrechten“, für die ein eigenständiger Mechanismus zur Verlagerung der Beweislast gilt). Nach dem Arbeitsgesetz und dem GBG muss die klägerische Partei Tatsachen glaubhaft machen, die eine Verletzung wahrscheinlich erscheinen lassen (es kann jedoch vorkommen, dass Gerichte auch erwarten, dass ein konkreter Diskriminierungsgrund nachgewiesen wird),<sup>46</sup> und die beklagte Partei muss beweisen, dass sie 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 Ordnungstrafen 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 wurden jedoch auch einige Maßnahmen für Senioren durchgeführt.

Öffentliche Stellen, die für die Bekämpfung von Diskriminierung zuständig sind, führen Konsultationen zu ihren Strategien und Vorgehensweisen durch, und sowohl zivilgesellschaftliche als auch sozialpartnerschaftliche Organisationen haben die Möglichkeiten, sich an der öffentlichen Diskussion sowie an offiziellen Foren wie Ausschüssen und Arbeitsgruppen zu beteiligen (was die Zusammenarbeit mit der Regierungsbevollmächtigten für Gleichbehandlung betrifft, sind diese Möglichkeiten in letzter Zeit jedoch sehr beschränkt). Viele Erwartungen der Sozialpartner werden indes nicht erfüllt (z. B. Änderung des GBG, die nun schon seit mehreren Jahren diskutiert wird).

## **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. Im Zuge des GBG von 2010 wurde die Ombudsstelle zur Gleichbehandlungsstelle bestimmt. Das bestehende Gesetz wurde angemessen geändert, indem der Ombudsperson neue Kompetenzen übertragen wurden (zusätzlich zu ihrem sehr umfangreichen Mandat, die Menschenrechte und Grundfreiheiten zu schützen; im Mandat der Ombudsperson werden keine Diskriminierungsgründe aufgezählt, weshalb sie alle Diskriminierungsgründe – auch, aber nicht nur, die im GBG aufgezählten – bearbeiten kann).<sup>47</sup> 2015 wurde eine stellvertretende Ombudsperson für Gleichbehandlung ernannt und ein neues Gleichbehandlungsteam (mit einer Abteilung für Antidiskriminierungsrecht und einer Abteilung für die Rechte von Migranten und nationalen Minderheiten) eingerichtet. Die Ombudsperson betreibt auch Forschungsaktivitäten (und sammelt Daten zu bestimmten Themen); außerdem hat sie auf ihrer Webseite einen speziellen Bereich zu Gleichstellungsfragen eingerichtet, Informationen über einschlägige Rechtsprechung zusammengetragen, zu bestimmten Themen externe Expertenteams zusammenstellt, die

<sup>46</sup> Siehe zum Beispiel die Urteile des Obersten Gerichtshofs: 3. Juni 2014, III PK 126/13 und 18. April 2012, II PK 196/11.

<sup>47</sup> Polen, Ombudsgesetz (*Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 15. Juli 1987.

die Ombudsstelle unterstützen, eine Telefonhotline eingerichtet (für alle Arten von Beschwerden, einschließlich Diskriminierung) u.a.m.

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 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. 2015 wurden die Zuständigkeiten der Ombudsperson etwas erweitert. Nach der neuen Vorschrift kann sich die Ombudsperson (seit dem 30. August 2015) an Verfahren vor dem Verfassungsgericht beteiligen, die von Dritten initiiert wurden. Davor konnte sich die Ombudsperson auch an Verfahren beteiligen, die von Dritten initiiert wurden, jedoch nur, wenn es sich um individuelle Verfassungsbeschwerden handelte.<sup>48</sup>

Die zweite Institution, deren Aufgabe es ist, die Gleichbehandlung aller Menschen, ungeachtet ihrer „Rasse“ oder ethnischen Zugehörigkeit (neben anderen Merkmalen) zu fördern, ist der/die Regierungsbevollmächtigte für Gleichbehandlung. Diese Stelle wurde im April 2008 innerhalb der Kanzlei des Ministerpräsidenten eingerichtet (das GBG von 2010 stellte ihre Arbeit auf eine neue Rechtsgrundlage).<sup>49</sup> Hauptaufgabe des/der Regierungsbevollmächtigten ist es, die Regierungspolitik im Bereich der Gleichbehandlung umzusetzen. Im Januar 2016 fanden tiefgreifende Veränderungen statt: Das Büro der Regierungsbevollmächtigten wurde geschlossen, der Mitarbeiterstab wurde verringert und ist derzeit für eine Vielzahl anderer Themen zuständig; eine neue Bevollmächtigte wurde für zwei Ämter gleichzeitig bestellt: das neu geschaffene Amt der/des Regierungsbevollmächtigten für die Zivilgesellschaft und das Amt der/des Bevollmächtigten für Gleichbehandlung. Seitdem haben Gleichbehandlungsfragen in der Arbeit der Bevollmächtigten an Bedeutung verloren.

Zum Schutz der Rechte von nationalen und ethnischen Minderheiten wurde mit dem Gesetz über nationale und ethnische Minderheiten und regionale Sprachen von 2005<sup>50</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 Stellungnahmen zu folgenden Themen abgeben: Rechte und Bedürfnisse von Minderheiten, Programme und Gesetzentwürfe in diesem Bereich sowie Grundsätze der Verteilung und Höhe der staatlichen Mittel, die dem Erhalt der kulturellen Identität von Minderheiten dienen sollen. Außerdem ist der Ausschuss für Maßnahmen zur Bekämpfung von Diskriminierung zuständig. 2008 wurde innerhalb des Ausschusses ein Team für Roma-Politik eingerichtet. 2013 richtete der Ministerpräsident den Rat zur Bekämpfung von Rassendiskriminierung, Fremdenfeindlichkeit und damit zusammenhängender Intoleranz ein. Im April 2016 erließ der Ministerpräsident jedoch eine Verordnung, mit der der Rat abgeschafft wurde. Der entsprechende Beirat (bestehend aus unabhängigen Fachleuten sowie Vertretern und Vertreterinnen von ZGOs) wurde ebenfalls abgeschafft. Der Regierungssprecher erklärte, die Arbeit des Rates habe keinerlei

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<sup>48</sup> Polen, Ombudsgesetz, Art. 16. 2 p. 3, abgeändert durch Art. 130 des Gesetzes über das Verfassungsgericht, 25. Juni 2015 (Dz.U.2015.1064).

<sup>49</sup> *Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania.*

<sup>50</sup> Polen, Gesetz über nationale und ethnische Minderheiten und über regionale Sprachen (*Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*), 6. Januar 2005.

bedeutende Wirkung gehabt (zahlreiche Kommentatoren widersprachen dieser Aussage jedoch).

Für Behindertenpolitik ist der/die Regierungsbevollmächtigte für Menschen mit Behinderungen zuständig. Zur Zuständigkeit der/des Bevollmächtigten, der/die formal beim Ministerium für Familie, Arbeit und Soziales angesiedelt ist, gehört vorwiegend die Umsetzung des Gesetzes für die berufliche und soziale Rehabilitation und Beschäftigung von Menschen mit Behinderungen.<sup>51</sup>

## **7. Zentrale Punkte**

Aufgrund der Kritik, die seitens der Ombudsstelle und von ZGOs am GBG von 2010 geübt wurde, wurden (2012 bzw. 2013) zwei Vorlagen erarbeitet, mit denen das Gesetz verbessert und sein Geltungsbereich deutlich erweitert werden sollte. Seit den Parlamentswahlen im Oktober 2015 wurde an der Vorlage jedoch nicht weitergearbeitet.

Das größte Problem besteht 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). Das Wenige, was bekannt ist, zeigt jedoch deutlich, dass Opfer von Diskriminierung das GBG sehr selten nutzen; im Laufe von sieben Jahren wurden nur wenige Fälle vor Gericht gebracht (und erst im November 2015 erging das erste abschließende Urteil). Außerdem ist die Zahl der Klagen, die Diskriminierung am Arbeitsplatz betreffen und auf dem Arbeitsgesetzbuch basieren, relativ gering (50–100 Fälle pro Jahr).

Ungeachtet der rechtlichen Einschränkungen ist einer der Gründe für die geringe Zahl der Verfahren generell das Problem, dass Diskriminierung nur selten gemeldet wird. Von der Ombudsperson in Auftrag gegebene Umfragen zeigen, dass 85 % (2015) bzw. 92 % (2016) der Personen, die im Vorjahr diskriminiert wurden, dies bei keiner öffentlichen Stelle gemeldet haben.

Die Veränderungen, die – konkret was die Beschränkung der praktischen Rolle des Amtes der Regierungsbevollmächtigten für Gleichbehandlung betraf – 2016 einsetzten, und andere Entwicklungen (Beschneidung des Budgets der Ombudsperson, politische Angriffe als Reaktion auf deren Antidiskriminierungsaktivitäten usw.) zeigen, dass Gleichbehandlung für die derzeitige Regierung keine Priorität darstellt.

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<sup>51</sup> Polen, Gesetz zur beruflichen Eingliederung und Beschäftigung von Menschen mit Behinderung (*Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*), 27. August 1997.

## 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>52</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 houses of Parliament. In order for a piece of legislation to be adopted, both houses 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>53</sup> (ETA)

Date of adoption: 3 December 2010

Latest amendments: 29 April 2016

Entry into force: 1 January 2011

Protected grounds: gender, race, ethnic origin, nationality, citizenship,<sup>54</sup> 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>55</sup> (implementation amendment)

Date of adoption: 14 November 2003

Latest amendments: 07 April 2017

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 Human Rights<sup>56</sup> (implementation amendment)

Date of adoption: 3 December 2010

Latest amendments: 18 March 2016

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

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<sup>52</sup> For instance, the 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>53</sup> Poland, Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010 (hereafter as 'Equal Treatment Act' or 'ETA').

<sup>54</sup> Protection is limited to certain categories of persons only. Discrimination on grounds of citizenship as such is not prohibited in ETA. See more in Section 2.1.

<sup>55</sup> Poland, Act on the Labour Code (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974 (hereafter 'Labour Code').

<sup>56</sup> Poland, Act on the Commissioner for Human Rights (*Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 15 July 1987.



Treatment<sup>57</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

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 by the ETA)

In 2016 the position of the Plenipotentiary for Equal Treatment was in practice merged with the newly created position of the Government Plenipotentiary for Civil Society.<sup>58</sup> At the same time the office of the Plenipotentiary for Equal Treatment was closed, and a new office was created to serve both Plenipotentiaries. Since 2018 the support previously provided by the two separate offices has been provided by the combined Office of Support for Councils, Teams and Plenipotentiaries.<sup>59</sup> According to law the Plenipotentiaries are two different organs (one based on an Act of Parliament and the other based on an Ordinance of the Council of Ministers – each law mentions only one organ), but in practice there is a personal union – the same person holds both positions and even the names of the Plenipotentiaries are merged on their website as Plenipotentiary for Civil Society and Equal Treatment<sup>60</sup> (see more in Section 7.b, below).

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<sup>57</sup> Poland, Council of Ministers Ordinance on the Government Plenipotentiary for Equal Treatment (*Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania*), 22 April 2008.

<sup>58</sup> Poland, Council of Ministers Ordinance on the Government Plenipotentiary for Civil Society (*Rozporządzenie Rady Ministrów z dnia 8 stycznia 2016 r. w sprawie ustanowienia Pełnomocnika Rządu do spraw społeczeństwa obywatelskiego*), 8 January 2016.

<sup>59</sup> Biuro Obsługi Rad, Zespołów i Pełnomocników. See at: <https://bip.kprm.gov.pl/kpr/bip-kancelarii-prezesa/organizacja-kprm/sekretariaty-departamen/4602,Biuro-Obslugi-Rad-Zespolow-i-Pelnomocnikow.html>.

<sup>60</sup> See at: <http://www.spoleczenstwoobywatelskie.gov.pl>; All hyperlinks in this report were last accessed on 30 March 2018.

## 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>61</sup>

These provisions are directly applicable. The Constitution stipulates that its provisions are directly applicable unless the Constitution itself states otherwise.<sup>62</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, and the courts are not used to doing so. The issue of direct applicability of the Constitution became a subject of interest and debate in 2016 and 2017 due to political developments regarding the role of the Constitutional Tribunal. From late 2015 the Constitutional Tribunal (CT) became the target of political attack. Three justices elected by the previous Parliament were not sworn in by the President, three new judges were elected (called 'understudies' as they took positions that were already occupied), the appointment of the new president of the CT raises doubts as to its legality, and the role of CT was significantly reduced. Many experts are of the opinion that because of the de facto limited role of the Constitutional Tribunal the ordinary courts should directly apply the Constitution more often.<sup>63</sup>

There also exists a special procedure described in Article 193 of the Constitution, which reads: 'Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue currently before such a court.' Polish judges use this possibility when they face the problem of the constitutionality of a law being the legal basis for the verdict in a particular case. However, due to the constitutional crisis in Poland and the current situation with the CT (which is not

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<sup>61</sup> Poland, Constitutional Tribunal (*Trybunał Konstytucyjny*), Judgment K. 8/9716, December 1997.

<sup>62</sup> Poland, 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*), Article 8.2. available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

<sup>63</sup> See articles on the blog: <http://verfassungsblog.de/tag/polish-constitutional-tribunal/> and especially A. Grzelak, *Sententia non existens – the future of jurisprudence of the Polish Constitutional Tribunal?*, at: <http://verfassungsblog.de/sententia-non-existens-the-future-of-jurisprudence-of-the-polish-constitutional-tribunal/>. See also M. Matczak (2018), *Poland: From Paradigm to Pariah? Polish Constitutional crisis – facts and interpretations*, Oxford, available at: [http://www.fljs.org/content/prominent-critic-law-and-justice-party-denounces-\"assault-rule-law-poland\"-\"out-political\"](http://www.fljs.org/content/prominent-critic-law-and-justice-party-denounces-\); and M. Pietrzak (2017), *The Constitutional Court of Poland: The Battle for Judicial Independence* at: <http://www.fljs.org/sites/www.fljs.org/files/publications/The%20Constitutional%20Court%20of%20Poland.pdf>.

accepted by many judges, who consider it to have been taken over politically and to be neither independent nor impartial) the number of questions submitted has dropped.<sup>64</sup>

Constitutional provisions can be enforced against private actors (as well as against 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 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;
- The Constitution uses various terms for those entitled to rights and freedoms: in some articles, it uses 'everyone' or 'anyone', but in others it uses the term 'citizen'. However, it also includes a general clause of protection, Article 37.1, which provides that 'Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution. 2. Exemptions from this principle with respect to foreigners shall be specified by statute.'

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<sup>64</sup> In 2015 the CT received 135 questions of law from the judges, but only 21 in 2016 and a further 21 in 2017. See: Fundacja im. Stefana Batorego (2018), *Analiza działalności orzeczniczej Trybunału Konstytucyjnego w latach 2014-2017* (Stefan Batory Foundation (2018), Analysis of the adjudicating activities of the Constitutional Tribunal in the years 2014-2017), Warsaw at: <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Raport%20ZEP%20o%20funkcjonowaniu%20TK.pdf>.

## 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, citizenship, 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.

Discrimination on grounds of citizenship (as such) is not prohibited in the ETA. Nationality (*narodowość*) is protected but is understood as belonging to a nation and not as citizenship. Since 2016, however, according to Article 1.2 of the ETA the regulation regarding nationality shall apply accordingly to citizenship. The 2016 amendment to the ETA added citizenship as a protected ground only for some categories of people.<sup>65</sup> This act implements EU Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. In the ETA it adds one more discrimination ground by stating in Article 1, paragraph 2 (previously only paragraph 1 of Article 1 listed discrimination grounds) that the ETA provisions regarding nationality should be adequately applied to the citizenship of persons exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.<sup>66</sup> The implementation, however, raises doubts for the Ombud, since the role of an independent body for the promotion of equal treatment and support for EU workers and their family members is entrusted to the National Labour Inspectorate, which has limited powers in certain areas governed by the Directive. Moreover, the task of conducting or commissioning independent surveys and analyses was entrusted to the Minister for Family, Labour and Social Policy, who is part of the Government. Such a procedure does not guarantee fulfilment of the EU standards concerning the independence and objectivity of activities undertaken in this field.<sup>67</sup>

In March 2016, in a motion to the Constitutional Tribunal, the Ombud challenged the constitutionality of the provisions of the ETA<sup>68</sup> 'insofar as they limit the scope of the Act because of the closed catalogue of discriminatory grounds. The law excludes some social groups that experience discrimination in many areas of their lives. This legislative omission unjustifiably differentiates the procedural situation of the persons discriminated against. The challenged statutory solutions are, in the Ombud's view, contrary to the constitutional

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<sup>65</sup> Poland, Act of 29 April 2016 on the amendment of the Act on the promotion of employment and the institutions of the labour market, the Act on the national labour inspectorate and the Act on the implementation of certain provisions of the European Union in the field of equal treatment (*Ustawa z dnia 29 kwietnia 2016 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy, ustawy o Państwowej Inspekcji Pracy oraz ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*).

<sup>66</sup> This amendment also changes two other acts. In the 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*) it adds (Art. 4, para. 1.7a) monitoring, analyses and supporting of equal treatment of country nationals from EU and EEA countries exercising freedom of movement for workers within the scope defined in Art. 1-10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union to the competences of the Minister of Labour. In the Act of 13 April 2007 on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*) it adds new competences to the National Labour Inspectorate, including (Art. 10 para. 1.14a) providing advice to promote equal treatment of citizens of EU Member States, the European Free Trade Association (EFTA) - parties to the Agreement on the European Economic Area that exercise freedom of movement for workers and members of their families.

<sup>67</sup> Ombud Annual Report 2017, p. 157.

<sup>68</sup> Ombud Annual Report 2017, p. 69.

principle of equality and the right to court, as well as the provisions of the Convention on the Rights of Persons with Disabilities.<sup>69</sup>

The Ombud argued that: 'The catalogue of discriminatory grounds of unequal treatment provided for in the Act is closed because of the closed catalogue of the discriminatory grounds in the EU directives that the law was to implement. However, the Constitution (Art. 32) prohibits discrimination on any grounds. In the opinion of the Polish Ombudsman, the legislator, when implementing EU law, should take into consideration the necessity of ensuring the conformity of national law with the Constitution.'

According to the Ombud, 'Persons experiencing discrimination that does not fall within the scope of the Equal Treatment Act may benefit from legal protection measures provided for in the Civil Code. However, their procedural situation is far less favourable than those who experience discrimination within the scope of the Equal Treatment Act. Seeking damages caused by the breach of the principle of equal treatment under the Equal Treatment Act is much simplified<sup>70</sup> in relation to the general provisions of the Civil Code, which constitutes an expression of the right to court protected by the Constitution.'<sup>71</sup>

In March 2017 the Parliament and the Prosecutor General submitted their opinions on the Ombud's complaint. The opinions are long and detailed, but the main argument was that the CT should drop this case because it did not deal with the unconstitutionality of the law, but with the lack of regulation, a conscious legislative omission, and as such might not be held unconstitutional from this point of view. At the same time (March 2017) equality and human rights CSOs insisted on withdrawing the motion from the CT.<sup>72</sup> Some weeks later, in April 2017, the Ombud quite unexpectedly withdrew the complaint and asked for discontinuance of the case. The CT issued a resolution granting discontinuance in October 2017 and the case was formally dropped. The Ombud did not provide information about its decision and the reasons for taking it.<sup>73</sup>

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>74</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,

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<sup>69</sup> See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu> (quotations translated by author).

<sup>70</sup> The Ombud refers here to special procedures in the ETA, such as the special compensation claim and the shift in the burden of proof.

<sup>71</sup> See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

<sup>72</sup> See the CSOs' statement at: [http://ptpa.org.pl/site/assets/files/1745/apel\\_koalicji.pdf](http://ptpa.org.pl/site/assets/files/1745/apel_koalicji.pdf).

<sup>73</sup> For full information on the case see the CT website at: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9882-ustawa-o-wdrozeniu-niektorych-przepisow-unii-europejskiej-w-zakresie-rownego-traktowania/>.

<sup>74</sup> Poland, Act on National and Ethnic Minorities and Regional Languages, passed on 6 January 2005 and entered into force on 1 May 2005 (latest amendment 29 April 2016), (*Ustawa z 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*) [hereafter 'Minorities Act'].

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 the legal basis, but the Ordinance has not been repealed (the two lists of grounds differ slightly, as the Ordinance also includes civil (marital) and family status).

The Social Security Act<sup>75</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>76</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>77</sup> (Article 2) lists gender, race, ethnic origin, nationality, state of health, family and marital status.

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

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.

The 2008 amendment to the Act on granting protection to aliens on the territory of the Republic of Poland,<sup>78</sup> which transposed the Qualification Directive<sup>79</sup> and the Asylum Procedures Directive,<sup>80</sup> is not part of anti-discrimination legislation, but it introduced definitions of race, religion and (partly) sexual orientation (although their usage in anti-discrimination law is only theoretical, since no cases using these definitions have been identified). Article 14 of the amended Act on granting protection to aliens on the territory of the Republic of Poland 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

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<sup>75</sup> Poland, Act of 13 October 1998 on the Social Security System, as amended (*Ustawa z 13 października 1998 r. o systemie ubezpieczeń społecznych*), (latest amendment 08 December 2017), [hereafter 'Social Security Act'].

<sup>76</sup> Poland, Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market, as amended (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*), (latest amendment 8 December 2017), [hereafter 'Employment Act'].

<sup>77</sup> Poland, Act of 21 November 2008 on Capital-based Pensions, (latest amendment 16 November 2016), (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).

<sup>78</sup> Poland, Act of 18 March 2008 on the amendment of the Act of 13 June 2003 on granting protection to aliens on the territory of Poland (*Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*), 18 March 2008.

<sup>79</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>80</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

- 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’.

### *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>81</sup>

The Act then goes on to enumerate the recognised national minorities: Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish.<sup>82</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 ethnic 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>83</sup>

Then, as above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.<sup>84</sup>

The above definitions are criticised for two reasons. First, they exclude some significant national or ethnic groups in Poland (e.g. ‘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). Article 6 of the Act on National and Ethnic Minorities and Regional

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<sup>81</sup> Poland, Minorities Act, Article 2.1.

<sup>82</sup> Poland, Minorities Act, Article 2.2.

<sup>83</sup> Poland, Minorities Act, Article 2.3.

<sup>84</sup> Poland, Minorities Act, Article 2.4.

Languages prohibits discrimination based on membership of a minority. This provision clearly refers only to the national and ethnic minorities provided for in the law.

### *Disability*

There are some 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 (hereafter Disabled Persons Act) contains a legal definition of people with disabilities,<sup>85</sup> stipulating that they are people whose disability has been confirmed by a competent medical authority.<sup>86</sup> The Act also defines the term disability 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>87</sup> There are three levels of disability: slight, moderate and severe.<sup>88</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 registered by the medical authorities. A case could come before the Polish courts involving an individual with a category of disability not certified by the relevant authority for various reasons. In this event, the court itself must decide 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>89</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. According to this commentary, the Constitution should be interpreted as providing a much broader definition of 'disability' than the Disabled Persons Act, which provides that disability is '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'. 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 should also be interpreted 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

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<sup>85</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>86</sup> Poland, Disabled Persons Act, Article 1.

<sup>87</sup> Compare Article 2.10, Disabled Persons Act.

<sup>88</sup> Poland, Disabled Persons Act, Article 3.1.

<sup>89</sup> Garlicki L. (ed.) (2003), *Komentarz do Konstytucji RP* (Commentary on the Polish Constitution), Wydawnictwo Sejmowe, Volume III, Warsaw.



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 guidance 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 UNCPRD on the concept of persons with disabilities 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).

### Age

The Act on elderly people (senior citizens), passed in 2015, defines senior citizens as persons of 60 years of age or older.<sup>90</sup> However, despite the fact that the law provides the exact age for being a senior citizen, it does not have any binding effect on other anti-discrimination laws.

#### 2.1.2 Multiple discrimination

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

However, some Polish laws stipulate that discrimination might occur on the basis of one or more grounds, but do 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 draft laws presented in 2012 (but never passed) the concept of multiple discrimination was introduced.<sup>91</sup>

In Poland, 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 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 (and is again) lower than for men (as a general rule, 60 for women and 65 for men), cases of forced retirement for women were treated by the courts as gender discrimination and the issue of age discrimination never attracted 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

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<sup>90</sup> Poland, Act of 11 September 2015 on elderly people, (*Ustawa z dnia 11 września 2015 r. o osobach starszych*).

<sup>91</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>.

the ground of age.<sup>92</sup> Since the law was changed and the legislator reverted to different retirement ages for women (at 60) and men (at 65) similar cases may also arise in future.<sup>93</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>94</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 draft laws presented in 2012 (but never passed) the concept of assumed discrimination was introduced.<sup>95</sup>

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

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

Two court rulings that introduced the concept of discrimination by association have thus far been identified.

One of these was the first case finally decided under the ETA (2014 – first instance, 2015 – second instance).<sup>96</sup> XY worked as a shop security guard employed by Company Z. XY took part in the equality parade (focused traditionally, but not exclusively, on the rights of the LGBTQ community), 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 in a 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. XY sued the employer, claiming discrimination by association based on sexual orientation. The court of first instance found discrimination by association and awarded the claimant PLN 2 500 (approx. EUR 625) for material damages only and refused to grant non-material damages. The claimant appealed against the ruling, arguing that limiting the compensation to material damages only is in contradiction of the duties of the EU Member States (Article 13 of the ETA read together with Article 17 of Directive 2000/78/EC). The claimant argued that, due to this mistaken interpretation, the national court did not impose a sanction that could be understood as effective, dissuasive and proportionate. The second instance court dismissed the appeals of both parties. The court stressed that the ETA does not differentiate in Article 13 between material and non-material damages and by doing this, the first instance court made a mistake. However, without going into details and discussing the proportionality and dissuasiveness of the

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<sup>92</sup> Supreme Court resolution of 21 January 2009.

<sup>93</sup> In May 2012, the retirement age was changed by Parliament. The normal retirement age for both men and women was set at 67 (to be introduced incrementally). However, in 2016 the previous retirement ages (60 for women, 65 for men) were restored and came into force in October 2017.

<sup>94</sup> See Słubice District Court judgment, sygn. akt IV P 30/11, 18 June 2012, and Gorzów Wielkopolski Regional Court judgment, VI Pa 56/12, 27 November 2012 (not published).

<sup>95</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>96</sup> Poland, District Court Warszawa Śródmieście, XY and Polish Society of Anti-discrimination Law on behalf of XY v. Company Z, sygn. VI C 402/13, decision 9 July 2014; Regional Court in Warsaw (second instance), sygn. V Ca 3611/14, decision 18 November 2015, not published.

sanction, the court declared that, in regard to compensation, 'the amount is adequate and sufficiently compensates for the damage'.

In the second case, YZ (journalist, known media personality) sued the Roman Catholic Diocese of H. for compensation for infringement of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment), referring to ETA, EU directives and CJEU jurisprudence. According to YZ, he supported on social media the petition for legalising civil partnerships (of both different and same-sex partners). Shortly after, he lost the job (YZ argued there was a verbal civil agreement) of running a Radio B. concert in D. The Catholic priest who organised the concert told him that this was because he supported gays. The court of first instance dismissed the lawsuit, stating that there was no binding contract between the parties. In regard to discrimination, the court did not accept the shift of the burden of proof, arguing that the claimant himself should have provided more evidence. The court also argued that the organiser of the concert, being part of the Catholic Church structure, has a right to refuse collaboration with persons who support ideas the Catholic Church does not agree with. So even if one could conclude that the reason for the breach of contract was the claimant's support for civil partnerships between same-sex partners, it would not constitute discrimination. The court relied on Article 5.7 of the ETA, and similar provisions of the Labour Code, (genuine, determining and proportionate occupational requirement). YZ appealed the ruling.

In March 2017 the court of second instance (*sąd okręgowy*) reversed the verdict, finding discrimination and awarding PLN 1 000 (approx. EUR 250) to YZ and PLN 1 000 to the PTPA (CSO representing the claimant).

The court overturned the findings of the court of first instance and decided that there was a binding verbal contract between the parties. Regarding discrimination, the court stated that the claimant provided enough evidence to substantiate discrimination and the burden of proof was shifted to the respondent, who had not proved that there was no breach of the rule of equal treatment. According to the court, the limitations stemming from Article 5.7 of the ETA (the court of first instance referred to these) do not apply in the given case. Finally, the court concluded that the respondent discriminated against the claimant – the court did not discuss the concept of discrimination by association, but found indirect discrimination on grounds of political opinion (*światopogląd*).

As the claimant YZ does not wish to publicise his case, there were no media reports on the rulings, and PTPA did not provide official information about it. The verdict is final.

In draft laws presented in 2012 (but never passed) the concept of discrimination by association was introduced.<sup>97</sup>

## **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'. Even though the provision refers to 'natural person' this wording has never given rise to (nor could in fact be interpreted as)

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<sup>97</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>.

limitation of protection from direct discrimination to one person as opposed to a group of persons.

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 (for instance in court rulings) 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 specific 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), 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 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 (in fact, this provision regulates the shift of the burden of proof).<sup>98</sup> As regards the specified 'exclusion' situations, see Section 2.3.b below.

### 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, 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>99</sup>

Although the testing method has not been officially used to prepare evidence for a court case, it is known and has been used in a number of situations, mainly by civil society

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<sup>98</sup> Poland, Labour Code, Article 18<sup>3b</sup> (1) in fine.

<sup>99</sup> See similar, more detailed, argumentation in: Wencel, K. (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).

organisations (CSOs) and the media,<sup>100</sup> 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>101</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 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 natural 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. Even though the provision refers to 'natural person' this wording has never given rise to (nor could in fact be interpreted as) limitation of protection from direct discrimination to one person as opposed to a group of persons.

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>102</sup> According to the Labour Code indirect discrimination takes place when, 'due to an apparently neutral provision, criterion used or practice/action undertaken, unfavourable differences or particular disadvantage occur or could occur in terms of the establishment and termination of employment, conditions of employment, promotion, and access to training for enhancing professional

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<sup>100</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. Following the training, between January and June 2015 four pilot situation tests were conducted. Finally, in late 2015, the Polish Association of Anti-discrimination Law launched a new publication (in Polish only) that can contribute to the greater popularity of tests: Wysieńska-Di Carlo, K., Śmiszek, K. (eds.) (2015), 'Testy Dyskryminacyjne. Praktyczny podręcznik dla organizacji pozarządowych' ('Discriminatory tests. Practical guide for NGOs'). The publication provides a step-by-step guide but also describes some examples of testing, both in Poland (including the pilot testing mentioned above) and abroad; the publication is available at: [http://ptpa.org.pl/site/assets/files/1029/publikacja\\_testy\\_dyskryminacyjne\\_praktyczny\\_podrecznik.pdf](http://ptpa.org.pl/site/assets/files/1029/publikacja_testy_dyskryminacyjne_praktyczny_podrecznik.pdf).

<sup>101</sup> Poland, Poznań Appellate Court, A.G. v. K. L.-B., sygn. Akt I ACA 1162/11, 29 February 2012.

<sup>102</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code, in force since 18 January 2009 (Dz.U. Nr 223, poz. 1460, 18 December 2008).

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>103</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. However, it is a theoretical issue, since 'large number' has not been interpreted in a way that would limit the protection.

#### b) Justification test for indirect discrimination

The definition of indirect discrimination as quoted above has been in force since 1 January 2011 (definition from the Equal Treatment Act) and since 18 January 2009 (definition from the Labour Code). The concepts of a 'legitimate aim' and 'appropriate and necessary measures' were not known before. It is therefore 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>104</sup>

- 1) failure to employ an individual on the basis of one or more of the 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 action are allowed under Polish legislation.<sup>105</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>103</sup> Poland, Labour Code Article 18<sup>3a</sup>(4) (amended).

<sup>104</sup> Poland, Labour Code, Article 18<sup>3b</sup>(2) (amended).

<sup>105</sup> Poland, Labour Code, Article 18<sup>3b</sup>(3).

### 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>106</sup> Furthermore, no one may be obliged, except on the basis of an Act of Parliament, to disclose personal information.<sup>107</sup>

Article 27.1 of the Personal Data Protection Act<sup>108</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 (Article 27.2):

- '1) the data subject has given his/her written consent, unless the processing consists in erasure of personal data,
- 2) the specific provisions of other statute provide for the processing of such data without the data subject's consent and provide for adequate safeguards,
- 3) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his/her consent until the establishing of a guardian or a curator,
- 4) processing is necessary for the purposes of carrying out the statutory objectives of churches and other religious unions, associations, foundations, and other non-profit seeking organizations or institutions with a political, scientific, religious, philosophical, or trade-union aim and provided that the processing relates solely to the members of those organizations or institutions or to the persons who have a regular contact with them in connection with their activity and subject to providing appropriate safeguards of the processed data,
- 5) processing relates to the data necessary to pursue a legal claim,
- 6) processing is necessary for the purposes of carrying out the obligations of the controller with regard to employment of his/her employees and other persons, and the scope of processing is provided by the law,
- 7) processing is required for the purposes of preventive medicine, the provision of care or treatment, where the data are processed by a health professional subject involved in treatment, other health care services, or the management of health care services and subject to providing appropriate safeguards,
- 8) the processing relates to those data which were made publicly available by the data subject,
- 9) it is necessary to conduct scientific researches including preparations of a thesis required for graduating from university or receiving a degree; any results of scientific researches shall not be published in a way which allows identifying data subjects,
- 10) data processing is conducted by a party to exercise the rights and duties resulting from decisions issued in court or administrative proceedings.'

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<sup>106</sup> Poland, Constitution, Article 47.

<sup>107</sup> Poland, Constitution, Article 51.1.

<sup>108</sup> Poland, Act of 29 August 1997 on Personal Data Protection [amended] (*Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych*), English version available at: [http://www.giodo.gov.pl/data/filemanager\\_en/61.doc](http://www.giodo.gov.pl/data/filemanager_en/61.doc).



It should be noted that, in the light of Article 27.2 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>109</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>110</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 of data being collected solely for litigation purposes, nor have there been any specific examples. 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>111</sup>

Generally speaking, positive actions or 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 (*Główny Urząd Statystyczny*, GUS) published research findings and data regarding people with disabilities on the labour market<sup>112</sup> and organised research on the participation of people with disabilities in sport and physical recreation.<sup>113</sup>

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<sup>109</sup> Poland, Act of 29 June 1995 on Public Statistics [amended] (*Ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej*), available in English at: <http://bip.stat.gov.pl/en/law/law-on-official-statistics/>.

<sup>110</sup> Poland, Public Statistics Act, Article 8.

<sup>111</sup> Poland, Public Statistics Act, Article 9.1; see, for instance, Act of 4 March 2010 concerning the national census on population and housing in 2011, at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20100470277>.

<sup>112</sup> Osoby niepełnosprawne na rynku pracy w 2011r. (Employment of disabled people in 2011) Central Statistical Office, see: <http://stat.gov.pl/obszary-tematyczne/rynek-pracy/opracowania/osoby-niepelnosprawne-na-ryнку-pracy-w-2011-r-5,1.html>.

<sup>113</sup> Information on the activities of the Commissioner for Human Rights in the year 2012 and on the observance of human rights and freedoms. Part two: Information on the activities of the Commissioner for Human Rights 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>, [hereafter 'Ombud Annual Report 2013'], p. 448.



In 2016, the Ombudsman asked the Minister for National Education to initiate a series of measures regarding religion and ethics classes in schools, including a request to collect data. The Minister rejected the request to collect statistical data that include the number of pupils involved in different religions and ethics classes, which, according to the Ombud, would allow for an ongoing assessment of the availability of these lessons in educational settings. The Minister stated that no changes in the organisation of classes are currently planned.<sup>114</sup>

In recent years, the Government has designed a 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 were excluded from the labour market. In 2012 the Central Statistical Office (GUS) published data<sup>115</sup> regarding persons aged over 50 on the labour market.<sup>116</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>117</sup> This was repeated in the National Programme of Activities for Equal Treatment (adopted in 2014): the Central Statistical Office (GUS) and the Government Plenipotentiary for Equal Treatment were tasked with working together to develop more statistical indicators to identify discrimination.<sup>118</sup> However, in the period 2013-2016 little was done (also due to the fact that the activities of the Plenipotentiary were very limited in 2016, see more in Section 7 below). Nevertheless, as a starting point the Office of the Plenipotentiary provided the Central Statistical Office with a long list of data that is needed (this might influence the process of planning surveys, even though the Central Statistical Office replied that it would require additional funding).<sup>119</sup> As a result, there is still no strategy for obtaining equality data, and the picture is rather fragmentary. It also seems that since its last activities at the beginning of 2016 the Plenipotentiary has not treated this issue as a priority and the working meeting with relevant public institutions that was planned did not take place.<sup>120</sup>

Surveys carried out by GUS are the major source of information. GUS conducts surveys according to an annual programme of statistical surveys; in addition, it coordinates the work of other public institutions in this respect. When conducting surveys, GUS uses several different methods. There is no special category of surveys regarding equality data

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<sup>114</sup> Information on the activities of the Commissioner for Human Rights in the field of equal treatment in 2016 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, 2017, (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2016 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*) [referred to in this report as 'Ombud Annual Report 2017'], p. 30. The Polish version quoted in this report was received as a final, but not yet published version, from the Ombud office in June 2017.

<sup>115</sup> *Osoby powyżej 50. Roku życia na rynku pracy w 2011r.* (Persons over 50 on the labour market in 2011), see: <http://stat.gov.pl/obszary-tematyczne/rynek-pracy/opracowania/osoby-powyzej-50-roku-zycia-na-ryнку-pracy-w-2011-r-7,4.html>.

<sup>116</sup> Ombud Annual Report 2013, p. 448.

<sup>117</sup> Plenipotentiary Annual Report 2013, p. 20.

<sup>118</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'], pp. 14-15.

<sup>119</sup> Plenipotentiary Annual Report 2016, pp. 19-20, Report on the execution of the National Programme of Activities for Equal Treatment for 2015 (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2015 r.*), January 2017, [hereafter 'Report on the National Programme 2016'], pp. 16-22, at: [http://www.spoleczenstwoobywatelskie.gov.pl/sites/default/files/rraport\\_za\\_2015\\_przyjety\\_przez\\_rm.pdf](http://www.spoleczenstwoobywatelskie.gov.pl/sites/default/files/rraport_za_2015_przyjety_przez_rm.pdf).

<sup>120</sup> Plenipotentiary Annual Report 2017, pp. 8-10; Report on the execution of the National Programme of Activities for Equal Treatment for 2016 (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2016 r.*), July 2017, [hereafter 'Report on the National Programme 2017'], pp. 14-18.

collection, but in some surveys information that might be relevant for equality issues is collected. All reports prepared by GUS are available on their website.<sup>121</sup>

GUS is responsible for national censuses, takes part in all major European surveys and is responsible for all major national surveys, both periodic and ad hoc.

The Labour Force Survey (LFS)<sup>122</sup> has been carried out every three months since 1992. Selected LFS results are published in Polish and English on the GUS website under the title *Quarterly information on the labour market*.<sup>123</sup> Information on age, disability and marital status is included.

The EU SILC survey<sup>124</sup> has been conducted annually in Poland since 2005. It has a common methodology based on European regulations; it includes information on age.

In 2016, the GUS elaborated the results of the Social Cohesion Survey (*Badanie Spójności Społecznej*) conducted in 2015 (conducted every 4 years),<sup>125</sup> which provided the opportunity to assess the social perception of discrimination based on causes such as disability, age, sex, homosexuality, bisexuality or transgender status, religious beliefs, place of residence, social and material status and nationality or ethnic origin.<sup>126</sup>

The two most recent national censuses, which took place in 2002 and 2011, are the largest source of representative information about the population and its characteristics. The data 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. Participation in the 2011 census was mandatory, although some questions regarding sensitive data were voluntary – these questions refer to nationality, language and membership of national and ethnic minorities, as well as religion (belonging to a church or religious organisation), disability.

Other surveys conducted by GUS, including ad hoc surveys, or thematic reports based on other large surveys include:

- Employment of disabled people in 2011;<sup>127</sup>
- Persons over 50 on the labour market in 2011;<sup>128</sup>
- Time Use Survey,<sup>129</sup> conducted every 10 years, provides information on free time spent by people of 60 years and over on voluntary work and help for others;
- Adult education, conducted in 2011<sup>130</sup> and 2016<sup>131</sup>, provides information on education by age;

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<sup>121</sup> <http://stat.gov.pl/en/basic-data/>.

<sup>122</sup> Badanie Aktywności Ekonomicznej Ludności BAEL, see: <http://stat.gov.pl/informacja-o-badaniach-ankietowych/badanie-aktywnosci-ekonomicznej-ludnosci-bael/>.

<sup>123</sup> See: <http://www.stat.gov.pl>; topic: Labour. Salaries. See for example: <http://stat.gov.pl/en/topics/labour-market/working-unemployed-economically-inactive-by-lfs/>

<sup>124</sup> Europejskie badanie warunków życia ludności, see: <http://stat.gov.pl/obszary-tematyczne/warunki-zycia/dochody-wydatki-i-warunki-zycia-ludnosci/>.

<sup>125</sup> Published in February 2017, see at: <http://stat.gov.pl/obszary-tematyczne/warunki-zycia/dochody-wydatki-i-warunki-zycia-ludnosci/jakosc-zycia-w-polsce-w-2015-roku-wyniki-badania-spojnosci-spoecznej,4,2.html>.

<sup>126</sup> Ombud Annual Report 2017, p. 153.

<sup>127</sup> Osoby niepełnosprawne na rynku pracy, see: [http://stat.gov.pl/cps/rde/xbcr/gus/pw\\_osoby\\_niepelnosprawne\\_na\\_ryнку\\_pracy\\_w\\_2011.pdf](http://stat.gov.pl/cps/rde/xbcr/gus/pw_osoby_niepelnosprawne_na_ryнку_pracy_w_2011.pdf).

<sup>128</sup> Osoby powyżej 50. Roku życia na rynku pracy, see: [http://stat.gov.pl/cps/rde/xbcr/gus/PW\\_osoby\\_pow\\_50\\_roku\\_zycia\\_na\\_ryнку\\_pracy\\_2011.pdf](http://stat.gov.pl/cps/rde/xbcr/gus/PW_osoby_pow_50_roku_zycia_na_ryнку_pracy_2011.pdf).

<sup>129</sup> Budżet czasu ludności, see: <http://stat.gov.pl/en/topics/living-conditions/living-conditions/time-use-survey-2013,6,1.html>.

<sup>130</sup> Kształcenie dorosłych, see: <http://stat.gov.pl/obszary-tematyczne/edukacja/edukacja/ksztalcenie-doroslych-2011,3,2.html>.

<sup>131</sup> See at: <http://stat.gov.pl/obszary-tematyczne/edukacja/edukacja/ksztalcenie-doroslych-w-2016-roku,14,1.html>.

- Education and upbringing reports<sup>132</sup> include, for instance, information on teaching the languages of national minorities.

National and ethnic minority civil society organisations<sup>133</sup> is a periodic survey, but last time it also included data on discrimination. Of the 133 associations that took part in the research, 24 (18 %) declared that they were approached by people who alleged that they had been treated unequally because of their nationality or ethnic origin.<sup>134</sup>

In Poland, national law does not explicitly permit the use of statistical evidence to establish indirect discrimination.

Although there is no explicit mention of the use of statistical evidence to establish indirect discrimination in Polish law, including in 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 of these 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. One of the Supreme Court judges in her academic writings underlines the possibility of using statistical data.<sup>135</sup> Due to lack of court cases it is difficult to predict whether this would be a commonly used approach.

#### b) Practice

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

There have been no cases involving either direct or indirect discrimination where statistics were used in order to prove discrimination.<sup>136</sup>

## 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 material scope of the prohibition of harassment is the same as in the case of direct or indirect discrimination – in all fields protected by the Act. Although the provision refers to 'natural person', this wording has never given rise to (nor could in fact be interpreted as) limitation of protection from harassment to one person as opposed to a group of persons.

<sup>132</sup> Oświata i wychowanie, see: <http://stat.gov.pl/obszary-tematyczne/edukacja/edukacja/>.

<sup>133</sup> Stowarzyszenia narodowościowe i etniczne, see: <http://stat.gov.pl/obszary-tematyczne/inne-opracowania/wyznania-religijne/>.

<sup>134</sup> Rzecznik Praw Obywatelskich (2014), *Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2013 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej* (Report on the activity of the Commissioner for Human Rights in the area of the equal treatment in 2013 and the observance of the principle of equal treatment in the Republic of Poland), Warsaw [hereafter 'Ombud Annual Report 2014'], p. 87.

<sup>135</sup> See for instance: Gonera, K. (2016), 'Stosowanie prawa antydyskryminacyjnego – perspektywa sądu, zagadnienia wybrane' (Implementation of anti-discrimination law – court perspective, selected problems), [in] Bojarski, Ł. (ed.) (2016), *Wspólnie przeciw dyskryminacji. Sędziowie i organizacje obywatelskie na rzecz równego traktowania* (Together against discrimination. Judges and CSOs for equal treatment), pp. 44-47.

<sup>136</sup> From interviews conducted to update this report.

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 or harass – both encouraging and ordering discrimination or 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>137</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>138</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>139</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>140</sup>
- restricting the rights of an individual on account of their religious affiliation or lack of religious belief;<sup>141</sup>
- malicious or persistent violation of an employee's rights stemming from an employment contract or social security;<sup>142</sup>
- refusal to re-employ a person whose reinstatement was decided by the appropriate institution;<sup>143</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>144</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 religious belief, or infringement of the physical integrity of another person on these grounds.<sup>145</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.

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<sup>137</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code, in force since 18 January 2009 (Dz.U. Nr 223, poz. 1460, 18 December 2008).

<sup>138</sup> Poland, Labour Code, Article 183a(5) point 2 (amended).

<sup>139</sup> Poland, Labour Code, Article 183a(7).

<sup>140</sup> Poland, Penal Code, Article 119.1.

<sup>141</sup> Poland, Penal Code, Article 194.

<sup>142</sup> Poland, Penal Code, Article 218.1a.

<sup>143</sup> Poland, Penal Code, Article 218.2.

<sup>144</sup> Poland, Penal Code, Article 256.

<sup>145</sup> Poland, Penal Code, Article 257.

b) Scope of liability for harassment

There is no significant case law on harassment in Poland. However, a case of harassment on the ground of religion or lack of religion might be mentioned.<sup>146</sup>

G. J. (complainant) worked as a mathematics teacher in a Sport School (respondent). During the complainant's one-year leave (a sabbatical), a cross (crucifix) was placed in the teachers' staff room on the initiative of K. W., a priest teaching religion in the school. The priest K. W. obtained the consent of some teachers to hang the cross (they signed a list). G. J. found the crucifix upon return to work after the sabbatical. G. J. removed the cross from the wall twice. During the next Pedagogical Council meeting (announced in advance without a specific agenda), the school head indicated in an initial speech that 'the council was convened in connection with removing the cross from the teachers' staff room and was demanded by the majority of teachers, who were outraged by removal of the cross' and stated that: 'We already know who dared to remove the cross'. During this speech some teachers loudly expressed their indignation, using terms such as 'scandal, who dared to remove the cross' and similar. Other teachers, namely D. F. and A. G., described the atmosphere of the meeting as like 'a lynching, terror'. Some teachers also sent a complaint to the school head, pointing out that they did not agree that 'G. J. did not follow the internal school complaints procedures - and instead arbitrarily decided to remove the cross'. The school head decided to issue an admonition as a penalty. However, after G. J. formally objected to the penalty, stating that it did not present specific charges and dates for committing the alleged acts, the school head quashed the penalty.

In addition, a written statement was issued by 44 teachers, including the following wording: 'the teacher arbitrarily and unlawfully twice took down the cross (hung in accordance with the will of the vast majority of teachers). In addition, G. J. notoriously and deliberately ignores the rules of conduct for teachers at school. Regarding herself as a victim who is the person hurt in this situation, should be considered as manipulation. This teacher's actions destroy the good image of the school.'

In the following period, the complainant pursued correspondence regarding the events described above with the Mayor, the Board of Education, the City Council and the Governor.

The court of first instance stated that the behaviour of the employers and teachers described above had the effect of violating the dignity of G. J., creating an atmosphere of humiliation, exclusion, intimidation and hostility towards her, i.e. discrimination in the form of harassment.

At the outset, the court pointed out that the subject of the proceedings was not resolution of the issue of compliance with the right to place the cross in school rooms; the essence of the proceedings was to determine whether the direct behaviour of the employer or the employer's toleration and acceptance of the teachers' behaviour should be classified as discrimination on the basis of political opinion in the meaning of the Labour Code.

The District Court awarded G. J. the amount of PLN 5 000 (ca. EUR 1 200) as compensation and ordered the respondent to publish an apology for unlawful admittance of discriminatory actions against G. J. and violation of her personal dignity. Both sides appealed against the verdict, but the appellate court dismissed both appeals.

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

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<sup>146</sup> Decision of the court of first instance (15.09.2016), V P 40/14, Regional Court in Opole (<https://www.saos.org.pl/judgments/275717>); decision of the court of second instance (31.01.2017), III APa, 33/16, Court of Appeal in Wrocław ([http://orzeczenia.wroclaw.sa.gov.pl/content/\\$N/155000000001521\\_III\\_APa\\_000033\\_2016\\_Uz\\_2017-02-10\\_001](http://orzeczenia.wroclaw.sa.gov.pl/content/$N/155000000001521_III_APa_000033_2016_Uz_2017-02-10_001)).

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 cases the employer has recourse against the employee.

Compensation claims as introduced by the 2010 Equal Treatment Act (Article 13) are 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 are 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 it employs (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 are prohibited in national law. Instructions to discriminate are defined as 'ordering' but also as 'encouraging', and therefore go beyond the scope of the directives.<sup>147</sup>

Instructions to discriminate are prohibited in employment by the Labour Code. The provision of the Labour Code regarding instructions to discriminate was broadened in 2008,<sup>148</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>149</sup>

The 2010 Equal Treatment Act prohibits instructions to discriminate, including both encouraging (*zachęcanie*) and ordering (*nakazywanie*) to discriminate (Article 9). The material scope of the prohibition covers all fields protected by the Act.

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

In Poland, instructions do explicitly constitute a form of discrimination.

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<sup>147</sup> See: Z. Jabłońska, K. Kędziora (red. nauk.), M. Kułak, K. Śmiszek (red. nauk.) (2017), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Komentarz*, (Jabłońska, Z., Kędziora, K. (ed.), Kułak, M., Śmiszek, K. (ed.) (2017), Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment. Commentary), Warsaw; [further as 'ETA commentary 2017'], p. 117, pp. 177-179.

<sup>148</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code, in force since 18 January 2009 (Dz.U. Nr 223, poz. 1460, 18 December 2008).

<sup>149</sup> Poland, Labour Code, Article 18<sup>3a</sup> (5) point 1 (amended) in relation to Article 11<sup>3</sup>.

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 cases the employer has recourse against the employee. The possibility for the employer to be held directly liable for the actions of employees exists in the event of instructions to discriminate.

Compensation claims as introduced by the 2010 Equal Treatment Act (Article 13) are 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>150</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>151</sup>

In addition, the State Treasury is responsible for actions causing damage which are perpetrated by a public servant in the course of their duties.<sup>152</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 it employs (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).

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>153</sup>

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<sup>150</sup> Poland, Equal Treatment Act, Article 13; Poland, Civil Code, Article 415.

<sup>151</sup> Poznań Appellate Court, *A.G. v. K. L.-B.*, sygn. Akt I ACA 1162/11, 29 February 2012.

<sup>152</sup> Poland, Civil Code, Article 417.

<sup>153</sup> Poland, Penal Code, Article 18.1-3.

## **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 for people with disabilities in the area 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.

It is worth-mentioning that failure to provide reasonable accommodation results in discrimination only in the situation when there is a 'traditional' employment contract (covered by the Labour Code). Unfortunately, there is no provision on this in regard to other forms of employment (for instance civil contracts).<sup>154</sup>

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>155</sup> issued on the basis of the Labour Code,<sup>156</sup> provides that 'workstations shall be organised according to the psychological and physical characteristics of employees'<sup>157</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>158</sup>

Improvement of the employment and working conditions of people with disabilities is also promoted through economic incentives under the system of quotas and penalties contained

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<sup>154</sup> ETA commentary 2017, pp. 268-269.

<sup>155</sup> Poland, Ordinance of the Minister of Labour and Social Policy of 26 September 1997 on general provisions on health and safety at work, as amended (*Rozporządzenie ministra pracy i polityki socjalnej z dnia 26 września 1997 r. w sprawie ogólnych przepisów bezpieczeństwa i higieny pracy*).

<sup>156</sup> Poland, Labour Code, Article 237 (15).

<sup>157</sup> Poland, Ordinance on general provisions on health and safety at work, Section 45.1.

<sup>158</sup> Poland, Ordinance on general provisions on health and safety at work, Section 48.



in the 1997 Disabled Persons Act. Employers who, for at least 36 months, employ a person or people officially recognised as disabled (who were unemployed or seeking work while not holding a job 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>159</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>160</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: 8 hours a day, 40 hours a week for slight disability and 7 hours a day, 35 hours a week for moderate and severe disability;<sup>161</sup>
- a disabled person cannot be employed for night shifts and cannot work overtime;<sup>162</sup>
- a disabled person has the right to an additional break of 15 minutes, which should be treated as working time;<sup>163</sup>
- people with moderate and severe disabilities have the right to additional holiday of 10 working days;<sup>164</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>165</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, people with disabilities 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>166</sup>

## b) Practice

Since the ETA entered into force 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>159</sup> Poland, Disabled Persons Act, Article 26.

<sup>160</sup> Poland, Disabled Persons Act, Article 2.8.

<sup>161</sup> Poland, Disabled Persons Act, Article 15.1-2.

<sup>162</sup> Poland, Disabled Persons Act, Article 15.3. 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>163</sup> Poland, Disabled Persons Act, Article 17.

<sup>164</sup> Poland, Disabled Persons Act, Article 19.1. This entitlement does not operate if an individual already has the right to holidays of more than 26 working days or is entitled to other additional holidays.

<sup>165</sup> Poland, Disabled Persons Act, Article 20.1.

<sup>166</sup> Poland, Disabled Persons Act, Article 14.

preamble to Directive 2000/78/EC and extends beyond accommodating the premises or equipment to cover accommodating working time and distribution of duties.<sup>167</sup>

Another rather important case that attracted a lot of attention and discussion was the Supreme Court judgment of 12 April 2012.<sup>168</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 their 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.<sup>169</sup>

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 in areas other than employment for people with disabilities

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>170</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

<sup>167</sup> Poland, Supreme Court, II PK 276/10, judgment of 12 May 2011. This opinion of the Supreme Court was formulated as an aside, in the very last sentence of the judgment. 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>168</sup> Poland, Supreme Court (Sąd Najwyższy), II PK 218/11, judgment of 12 April 2012 (<http://sn.pl/Sites/orzecznictwo/Orzeczenia2/II%20PK%20218-11-1.pdf>).

<sup>169</sup> See also: ETA commentary 2017, p. 173.

<sup>170</sup> Report on the National Programme 2015, p. 95.

with disabilities and behavioural issues<sup>171</sup> creates a number of obligations for schools, including providing appropriate conditions for learning, specialised equipment, support for parents, etc. However, the ordinance 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>172</sup> places for practical learning should be appropriately constructed to accommodate the needs of children with disabilities. 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 for people with disabilities

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>173</sup> (which prohibits and defines direct discrimination, indirect discrimination, harassment and instructions to discriminate).<sup>174</sup> Legislation and case law do not specify whether such a failure amounts to direct or indirect discrimination (or another form).

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 2017, PLN 2 000 gross salary, around EUR 475 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>175</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

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<sup>171</sup> Poland, 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 (*Rozporządzenie Ministra Edukacji Narodowej w sprawie warunków organizowania kształcenia, wychowania i opieki dla dzieci i młodzieży niepełnosprawnych, niedostosowanych społecznie oraz zagrożonych niedostosowaniem społecznym*), DZ.U. 2017, poz. 59 and 949, 9 August 2017, in force since 1 September 2017.

<sup>172</sup> Poland, Ordinance of the Minister of National Education and Sport on health and safety in state and non-state schools (*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), 31 December 2002.

<sup>173</sup> Poland, Disabled Persons Act, Article 23.a.3.

<sup>174</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>175</sup> Ombud Annual Report 2013, pp. 401-403, p. 466.

(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).<sup>176</sup>

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>177</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>178</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 (amended in 2017)<sup>179</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 accessibility 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>180</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>181</sup> specifies in some detail particular requirements regarding the needs of people with disabilities (including the number of adapted rooms, parking spaces, accessible phones, etc.). However, all the requirements but one (elevator buttons) relate to access for persons using wheelchairs. There are also a number of exceptions, for instance historic buildings, mountain shelters, etc.

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<sup>176</sup> European Court of Justice, C-130-75, *Vivien Prais v. Council of the European Communities*, 27 October 1976.

<sup>177</sup> Ombud Annual Report 2013, pp. 401-403, p. 466.

<sup>178</sup> Poland, Act of 7 July 1994 on Construction (*Ustawa z 7 lipca 1994 Prawo budowlane*), Article 5.1 point 4.

<sup>179</sup> Poland, Ordinance of the Minister of Infrastructure on technical conditions with which buildings must comply (as amended 14 November 2017) (*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); *Rozporządzenie Ministra Infrastruktury i Budownictwa z dnia 14 listopada 2017 r. zmieniające rozporządzenie w sprawie warunków technicznych, jakim powinny odpowiadać budynki i ich usytuowanie* (Dz.U.2017.2285)).

<sup>180</sup> Report prepared by the Plenipotentiary on Disabled Persons (*Raport z badania na temat dostępności budynków administracji rządowej i urzędów centralnych dla osób niepełnosprawnych*), 2008.

<sup>181</sup> Poland, Ordinance of the Minister of Industry and Labour on hotels and other establishments providing hotel services (*Rozporządzenie Ministra Gospodarki i Pracy z dnia 19 sierpnia 2004 r. w sprawie obiektów hotelarskich i innych obiektów, w których są świadczone usługi hotelarskie* (Dz.U.2017.2166 t.j.), 19 August 2002.

Many other specialised acts have similar regulations. Public transport timetables should include information about accessibility for disabled people – Ordinance on Timetables;<sup>182</sup> conditions of movement/transport in cemeteries should take into account the needs of disabled people – Ordinance on Cemeteries;<sup>183</sup> pharmacies should be accessible for disabled people – Pharmaceutical Act;<sup>184</sup> when building highways, public roads, railway buildings, bridges and tunnels, construction firms should take into account the needs of people with disabilities (relevant ordinances); and in trams at least one entrance should be accessible for disabled people (relevant ordinance). Similar provisions can be found in, for instance, the telecommunications law and the law on postal services. In 2016 the Polish Association of the Deaf approached the Ombud in connection with the work on a parliamentary bill on audio-visual (radio and TV) fees. The Ombud agreed that, bearing in mind the low percentage of programmes tailored to the needs of the deaf and blind, people with these disabilities are not able to benefit from a programme offer equal to that available to persons without visual or hearing impairment. It is therefore unreasonable to oblige them to pay the full amount of the audio-visual fee. The Ombudsman asked the Chair of the Committee on Culture and Media to consider the arguments in support of a waiver of the fee.<sup>185</sup>

According to the Office of the Ombud, a single nationwide system for reporting emergency situations via short text messages (SMS) or means otherwise accessible to deaf people has not been introduced throughout Poland. This possibility exists in only some voivodships. In reply, the Minister of Internal Affairs and Administration informed the Ombud that it is planned to complete the ongoing work on modernisation of the system in 2017. The Ministry also stated that it has started cooperation with the Polish Deaf Association to find the most suitable solutions to meet the needs of people with hearing impairment.<sup>186</sup>

In 2016 the Ombud focused on access to polling stations during elections. The results of social studies show that the vast majority of voters with disabilities and older people prefer to vote in person at the polling place, and a small proportion by postal vote or by proxy. According to the Ombud, most of the premises inspected do not meet the technical criteria set out in the relevant regulations. Ultimately, half of the polling stations in each municipality should be fully adapted to the needs of voters with disabilities. The Ombudsman asked the Government Plenipotentiary for Civil Society and Equal Treatment and the Government Plenipotentiary for Persons with Disabilities to take effective action to ensure that voters with disabilities can exercise their electoral rights.<sup>187</sup>

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

Despite the existence of numerous provisions in a range of different acts, as mentioned above, the reality is often different, and some obligations remain only 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

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<sup>182</sup> Poland, Ordinance of the Minister of Transport, Construction and Maritime Economy on timetables (*Rozporządzenie Ministra Transportu, Budownictwa i Gospodarki Morskiej z dnia 10 kwietnia 2012 r. w sprawie rozkładów jazdy*). (Dz.U. 2012.451), 10 April 2012.

<sup>183</sup> Poland, Ordinance of the Minister of Infrastructure on cemeteries, graves and other places of burial (*Rozporządzenie Ministra Infrastruktury z dnia 7 marca 2008 r. w sprawie wymagań, jakie muszą spełniać cmentarze, groby i inne miejsca pochówku zwłok i szczątków* (Dz.U.2008.48.284)), 7 March 2008.

<sup>184</sup> Poland, Pharmaceutical Law (*Ustawa z dnia 6 września 2001 r. Prawo farmaceutyczne* (Dz.U.2017.2211 t.j.), 6 September 2001.

<sup>185</sup> Ombud Annual Report 2017, p. 73.

<sup>186</sup> Ombud Annual Report 2017, p. 73.

<sup>187</sup> Ombud Annual Report 2017, p. 103.

against people with disabilities, in terms of the accessibility of public spaces and facilities, and multi-dwelling residential buildings. The allegations formulated relate to the passivity and ineffectiveness of the architectural and construction control authorities in monitoring implementation of the obligations imposed by the Construction Act and secondary legislation. As a consequence, in reality, many buildings, both new and after rebuilding and repairs, are not adapted to the needs of people with disabilities.<sup>188</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>189</sup> The findings were 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>190</sup> According to information provided by the General Building Control Inspectorate, the General Inspector decided to call on all province governors (the Voivodes) 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>191</sup>

In 2016 the Ombud published a report on access to justice for people with disabilities.<sup>192</sup> Its purpose was to assess the availability of the Polish justice system for persons with disabilities in terms of the implementation of the principle of equal treatment and non-discrimination. The conclusions of the study indicate that accessibility, understood as adapting the infrastructure of courts and prosecutors' offices to the needs of people with various disabilities, has an impact on their exercise of the right of access to justice. The second important element limiting access of persons with disabilities to justice are regulations on procedural capacity. In addition, people with disabilities have no real possibility of performing certain occupations, such as that of judge, prosecutor, lay judge or professional attorney.<sup>193</sup>

In 2012 both the Ombud and the Plenipotentiary for Equal Treatment began 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) seemed to be defending the existing situation as satisfactory.<sup>194</sup> The Ombud has directly approached the directors of technical colleges and was planning a meeting with them. The meeting did not take place, but the Government finally started work on the relevant document, *Standardy dostępności budynków dla osób z niepełnosprawnościami mając na uwadze koncepcję uniwersalnego projektowania*

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<sup>188</sup> Ombud Annual Report 2014, pp. 42-43.

<sup>189</sup> Najwyższa Izba Kontroli (2013), *Informacja o wynikach kontroli NIK - Dostępność obiektów użyteczności publicznej dla osób niepełnosprawnych w województwie podlaskim* (Information on Supreme Audit Office audit results – access to public facilities for people with disabilities in the Podlaskie region), 2013, available at [www.nik.gov.pl/plik/id,4642,vp,5982.pdf](http://www.nik.gov.pl/plik/id,4642,vp,5982.pdf).

<sup>190</sup> See Najwyższa Izba Kontroli (2013), *Informacja o wynikach kontroli NIK - Dostępność obiektów użyteczności publicznej dla osób niepełnosprawnych w województwie podlaskim* (Information on Supreme Audit Office audit results – access to public facilities for people with disabilities in the Podlaskie region), 2013, p. 7, pp. 13-16, available at [www.nik.gov.pl/plik/id,4642,vp,5982.pdf](http://www.nik.gov.pl/plik/id,4642,vp,5982.pdf).

<sup>191</sup> Ombud Annual Report 2014, pp. 42-43.

<sup>192</sup> Rzecznik Praw Obywatelskich (2016), *Zasada Równego Traktowania. Prawo i praktyka, nr 20, Dostęp osób z niepełnosprawnościami do wymiaru sprawiedliwości. Analiza i zalecenia* (Commissioner for Human Rights (2016), The principle of equal treatment – law and practice. Access to justice for people with disabilities. Analysis and recommendations); available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>193</sup> Ombud Annual Report 2017, p. 74.

<sup>194</sup> Ombud Annual Report 2013, p. 381, Plenipotentiary Annual Report 2013, pp. 11-12, Ombud Annual Report 2014, pp. 43-44.

(Building accessibility standards for people with disabilities with a view to universal design). In 2017 the Ministry of Infrastructure and Construction conducted public consultation on the draft proposal and in November 2017 the Ministry published a guide entitled *Standardy dostępności budynków dla osób z niepełnosprawnościami uwzględniając koncepcję uniwersalnego projektowania – poradnik* (Building accessibility standards for people with disabilities with a view to universal design). The standards were created as a guide – a code of good practice (not as binding law). It presents the best design solutions, including in graphic form.<sup>195</sup>

The Ombud has also focused on the issue of accessibility of railway stations, platforms and trains, as well as hotel facilities.<sup>196</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>197</sup>

In 2014 a new Law on registration of civil status,<sup>198</sup> replacing the earlier 1986 Act, 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 (Article 17).

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>199</sup> The President of the Office of Electronic Communications (UKE) assessed the level to which providers of publicly available telephone services provide facilities for people with disabilities. The analysis showed that the vast majority of service providers offer facilities or are prepared to provide them when needed. However, it was also found that most of the audited services contained errors that prevented their free use and handling by people with special needs. Only 4 out of 26 services were rated 'satisfactory' and only 1 was rated 'good'. The remainder received an 'insufficient' rating, which is equivalent to a lack of compliance with the WCAG 2.0 standard.<sup>200</sup>

In addition, the President of UKE, guided by the need for equal treatment and non-discrimination, maintains a telecommunications services certification programme, 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 programme includes three categories: Safe Internet, Senior and Offers Comparator.<sup>201</sup> UKE also carries out checks aimed at obtaining information on whether the universal postal

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<sup>195</sup> See at: <https://www.mii.gov.pl/strony/zadania/budownictwo/standardy-dostepnosci-budynkow-dla-osob-z-niepelnosprawnościami-1/>; see also: Report on the National Programme 2017, pp. 146-147.

<sup>196</sup> Ombud Annual Report 2013, pp. 385-388.

<sup>197</sup> Transport – Performance in 2012, (*Transport - wyniki działalności w 2012 r.*), Ombud Annual Report 2014, p. 87.

<sup>198</sup> Poland, Law on registration of civil status (*Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego*) (Dz.U.2016.2064 t.j.), 28 November 2014.

<sup>199</sup> Poland, 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 (*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)) 26 March 2014.

<sup>200</sup> Ombud Annual Report 2017, p. 147.

<sup>201</sup> Information on the activities of the Commissioner for Human Rights 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; Ombud Annual Report 2017, p. 145.

service provider (designated operator) provides access for persons with disabilities to the services they provide (based on Article 62 of the Postal Law of 23 November 2012).<sup>202</sup> Previous data on controlled post offices indicate that adaptation of facilities has not improved significantly in relation to previous years, and is still insufficient.<sup>203</sup>

The National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji*) has carried out a check on implementation by television broadcasters of the obligations resulting from the law.<sup>204</sup> According to the law, at least 10 % of the quarterly programming time, excluding advertising and telesales, must include facilities for people with disabilities, such as audio description, subtitles for deaf people, or sign language interpreting. The analysis of broadcasters' reports shows that in programmes broadcasting over the full calendar year, the average annual share of broadcast time calculated for both types of disability is 16.62 % (including the share of broadcasting time for hearing impairment with subtitles - 11.98 %; sign language - 3.10 %; audio description - 2.73 %). In addition, four television broadcasters were fined because their rates of programmes with facilities for people with visual or hearing impairments were lower than the legal requirements.<sup>205</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 statute, aid to disabled people 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 insured people to grounds of sex, race, ethnic origin, nationality, marital status, and family status.<sup>206</sup>

#### h) Accessibility of public documents

In 2011, an Act on sign language and other means of communication was passed (in force from 1 April 2012).<sup>207</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

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<sup>202</sup> Poland, Law on Postal Law, *Ustawa z 23 listopada 2012 r. Prawo pocztowe* (Dz.U.2017.1481 t.j.), 23 November 2012.

<sup>203</sup> Ombud Annual Report 2017, p. 148.

<sup>204</sup> Art. 18a of the Broadcasting Act and the 'Broadcasters' Agreement' on the implementation of obligations under Art. 18a of the Broadcasting Act concerning facilities for television programs for people with visual impairments and for people with hearing disabilities', (*Ustawa z dnia 29 grudnia 1992 r.o radiofonii i telewizji*), (amended) (Dz.U.2017.1414 t.j.).

<sup>205</sup> Ombud Annual Report 2017, pp. 148-149.

<sup>206</sup> Poland, Social Security Act, Article 2a.1. 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>207</sup> Poland, Act on sign language and other means of communication (*Ustawa z 19 sierpnia 2011 r. o języku migowym i innych środkach komunikowania się*) (Dz.U.2017.1824 t.j.), 19 August 2011.



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>208</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>209</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. In December 2015 the Ombud provided a motion with relevant recommendations to the Government Plenipotentiary for Persons with Disabilities (the Ombud underlined that access to translation services in all public institutions should be provided, especially in health institutions, and interested persons should not be required to provide a certificate of disability).<sup>210</sup> The Government Plenipotentiary for Persons with Disabilities replied,<sup>211</sup> stating that the functioning of the Act on sign language and other means of communication is constantly being analysed. One area that needs discussion is the issue of sign language interpreter certification, since there is no state certification system. Since it is not currently possible to verify the ability of sign language interpreters, it seems unreasonable to impose the obligation of employing such interpreters on subsequent institutions. The Plenipotentiary underlined that in the current legal situation, deaf people can receive support in accessing sign language interpreter services, including during medical consultations, through the subsidies for these services from the State Fund for the Rehabilitation of People with Disabilities. The Plenipotentiary has also asked the Minister of Health to consider including training regarding people with disabilities as an obligatory component of in-service training programmes and to promote the use of online sign language interpreters. The problem is also discussed by the Polish Sign Language Council, which has set up a problem-solving team for accessibility to health services for deaf people. The Ombudsman also asked the Chairman of the Parliamentary Team on the Deaf for an analysis of the recommendations and information on the current work undertaken by the team to ensure that the services of public administration offices are fully available to deaf people.<sup>212</sup>

Various ministries take numerous measures aimed at implementing the Act on sign language and other means of communication by adapting Polish offices and institutions for proper provision of services for elderly people and people with disabilities, introducing solutions that take into account the needs of both groups. These include elimination of architectural barriers, providing sign-language interpreting, adapting websites and training for webmasters, training for staff on work with persons with disabilities.<sup>213</sup> As its office receives relevant complaints, the Ombud is monitoring this process. For instance, in 2017 the Ombud received complaints about the unavailability to blind people of the internet search engine of the National Court Register. Obtaining information from the database is dependent on entering the code from an image – the form was secured with the CAPTCHA mechanism. Unfortunately, on the website concerned the security text cannot be read by screen readers, which in practice makes it impossible for blind people to use the search engine. The problem generated considerable amounts of correspondence between the

<sup>208</sup> Ombud Annual Report 2014, p. 44.

<sup>209</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>210</sup> Information on the activities of the Commissioner for Human Rights in the field of equal treatment in 2015 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, 2016 (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2015 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*) [referred to in this report as 'Ombud Annual Report 2016'], pp. 52-53.

<sup>211</sup> 27 January 2016.

<sup>212</sup> Ombud Annual Report 2017, pp. 89-90.

<sup>213</sup> Report on the National Programme 2017, pp. 148-191.

Ombud, the Plenipotentiary for Equal Treatment, and the Minister of Justice and Minister of Digital Affairs but has not yet been resolved.<sup>214</sup>

One of the problems that 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 of this is provided by the Provincial Road Traffic Centres (*Wojewódzkie Ośrodki Ruchu Drogowego*), which are 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 expense 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 (so far without success).<sup>215</sup>

In regard to 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>216</sup>

In 2005 the Polish Parliament passed the Act on the computerisation of bodies with a public remit,<sup>217</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>218</sup> The Regulation included 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>219</sup> The report was 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) and to indicate the main challenges in this area. A study

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<sup>214</sup> Ombud Annual Report 2018, p. 220.

<sup>215</sup> Ombud Annual Report 2014, pp.47-48.

<sup>216</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*) (Dz.U.2014.464). The regulation sets out a number of requirements with specific deadlines (6, 12 or 24 months), including accessibility of important information in Braille and provision of sign language interpreting.

<sup>217</sup> Poland, Act on the computerisation of bodies with a public remit (*Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne* (Dz.U.2017.570 t.j.)), 17 February 2005.

<sup>218</sup> Poland, Regulation of the Council of Ministers 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 *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* (Dz.U.2017.2247 t.j.), 12 April 2012.

<sup>219</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* (The principle of equal treatment – law and practice. Accessibility of the websites of public institutions for people with disabilities. Analysis and recommendations); available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

showed that none of the surveyed sites was 100 % accessible for people with disabilities.<sup>220</sup> The deadline for adaptations passed in May 2015 but the situation is still not satisfactory. In 2015 the Ombud repeated its recommendations in a communication with the Minister of Digital Affairs.<sup>221</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 of information exchange systems and websites. In addition, regular checks should be carried out with regard to the accessibility of the websites of public authorities.<sup>222</sup>

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<sup>220</sup> Ombud Annual Report 2014, p. 44.

<sup>221</sup> Ombud Annual Report 2016, pp. 49-50.

<sup>222</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.

The 2016 amendment to the ETA added citizenship as a protected ground, but only for some categories of people.<sup>223</sup> This act implements EU Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. The amendment to the ETA adds one more discrimination ground by stating in Article 1 paragraph 2 (previously only paragraph 1 of Article 1 listed discrimination grounds) that the ETA provisions regarding nationality should adequately apply to the citizenship of persons exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.<sup>224</sup>

At the same time, however, the provisions of the Polish Labour Code apply in principle to all employees and employers without any distinction on the basis of their nationality or citizenship.<sup>225</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, in most cases they are required to obtain a work permit. There are, however, several exceptions in relation to citizens of the Member States of the European Union and other countries covered by agreements on free movement of people, as well as people granted different categories of stay permit or refugee status, or similar. Within these 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.

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<sup>223</sup> Poland, Act of 29 April 2016 on the amendment of the Act on the promotion of employment and the institutions of the labour market, Act on the national labour inspectorate and Act on the implementation of certain provisions of the European Union in the field of equal treatment (*Ustawa z dnia 29 kwietnia 2016 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy, ustawy o Państwowej Inspekcji Pracy oraz ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) (Dz.U.2016.691).

<sup>224</sup> This amendment also changed two other Acts. In the 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*) it added (in Art. 4, para. 1.7a) monitoring, analyses and supporting of equal treatment of country nationals from EU and EEA countries exercising freedom of movement for workers within the scope defined in Art. 1-10 of the Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union to the competences of the Minister of Labour. In the Act of 13 April 2007 on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*) it added new competences to the National Labour Inspectorate, including (in Art. 10 para.1.14a) providing advice to promote equal treatment of citizens of EU Member States, the European Free Trade Association (EFTA) - parties to the Agreement on the European Economic Area that exercise freedom of movement for workers and members of their families.

<sup>225</sup> See Poland, Labour Code, Articles 1-3, which do not include any criteria related to nationality or citizenship.

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

#### **a) Protection against discrimination**

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.<sup>226</sup>

#### **b) Liability for discrimination**

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

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

The right to compensation also applies to legal persons (Article 12.2, Article 13) within the protection provided in Article 10 (only on the grounds of the race, ethnic origin and nationality of its members).

### **3.1.3 Private and public sector including public bodies (Article 3(1))**

#### **a) Protection against discrimination**

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

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

#### **b) Liability for 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.

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<sup>226</sup> See also: ETA commentary 2017, p. 94.

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>227</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 prohibits discrimination in the following areas: 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>228</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.

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>229</sup> In October 2015 the Ombud addressed the Prime Minister, pointing out to the need for introduction of protection mechanisms regarding civil contracts and extension of the powers of the Labour Inspectorate.<sup>230</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 (and other listed institutions providing similar services) 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>231</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>232</sup>

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<sup>227</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>228</sup> Poland, Labour Code, Article 18<sup>3a</sup>-18<sup>3b</sup>.

<sup>229</sup> Ombud Annual Report 2015, p. 51.

<sup>230</sup> Ombud Annual Report 2016, p. 39.

<sup>231</sup> Poland, Employment Act, Article 19 c.

<sup>232</sup> Poland, Employment Act, Article 36.4 item 3.

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>233</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>234</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 were passed in 2012 – regarding the professional exam for advocates and legal advisors.<sup>235</sup> The ordinances created the possibility of prolonging the duration of an exam by 50 % for people with disabilities if they have a certificate of disability issued by the relevant medical authorities (based on the Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons that contains a legal definition of a disabled person)<sup>236</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>237</sup>

The Ombud received complaints from people with disabilities regarding the requirement to include the disability symbol and an official indication of the specialism of the certifying doctor in certificates of disability. The applicants pointed out that such regulations interfere in an unreasonable and excessive way with the right of persons with disabilities to privacy. According to the Ombud, mandatory provision of information to the employer about a specific illness that a worker suffers may raise doubts from the point of view of the constitutional right to privacy, the protection of personal data, the right to confidentiality of the patient, and consequently lead to discrimination against persons with disabilities on the labour market. This type of legal regulation is a hindrance to finding a job, especially for people suffering from hidden illnesses such as mental illness, intellectual disability or epilepsy. Such workers often do not need special adaptations of the workplace and working conditions, but common stereotypes associated with their disability still cause reluctance on the part of employers to employ them. The certificates should instead indicate the adaptation and facilities needed for the person with disabilities in the workplace and in the work process. The Government Plenipotentiary for Persons with Disabilities explained that the inclusion of data on the cause of disability and the specialists' diagnosis in disability certificates is necessary to provide adequate support for the specific needs of persons with disabilities in the employment process. However, a project to develop a disability

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<sup>233</sup> Poland, Employment Act, Article 36.5 e.

<sup>234</sup> Poland, Employment Act, Article 38.2 item 3.

<sup>235</sup> Ordinances of the Minister of Justice dated 12 December 2012 (Dz.U. 2012.1453-1454).

<sup>236</sup> Poland, Disabled Persons Act.

<sup>237</sup> Ombud Annual Report 2014, p. 52.

assessment system which will allow for the precise identification of persons to whom support instruments should be directed, is planned.<sup>238</sup>

The legal provisions do not discriminate against migrants in employment, and labour law protects everyone. However, practice differs: on one hand there are thousands of migrants officially employed (mainly of Ukrainian origin) but on the other hand the Polish Government prevents migration to Poland (by not agreeing to a quota of refugees as agreed within the EU). Media and labour inspection bodies have also exposed cases of employment of foreigners under exploitative conditions.

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

In Poland, national legislation prohibits discrimination in the following areas: 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>239</sup>

The 2010 Equal Treatment Act, which widens protection and 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>240</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.

#### **3.2.3.1 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>241</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>242</sup>

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<sup>238</sup> Ombud Annual Report 2017, p. 90.

<sup>239</sup> Poland, Labour Code, Article 18<sup>3a</sup>-18<sup>3b</sup>.

<sup>240</sup> Supreme Court, I PK 100/12, judgment of 22 November 2012.

<sup>241</sup> Poland, Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) [hereafter Retirement Act].

<sup>242</sup> Poland, Social Security Act, Article 2a.1, amended by the 2010 Equal Treatment Act.



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

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.

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>243</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 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>244</sup>

In this context, two interesting issues which were analysed by the Government Plenipotentiary for Equal Treatment in 2014 can be mentioned.<sup>245</sup> One was 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 Plenipotentiary recommended the removal of this restriction. The Director of the National School replied that the limitation is justified by the obligations of students and the intellectual and psycho-physical abilities required. The Plenipotentiary disagreed with this argument. The second issue concerned access to various employability programmes that are targeted, for instance, at people below the age of 25 or over 50. The Plenipotentiary analysed the justification presented by the Labour Offices, which argued that the criteria refer to persons in a special situation on the labour market. This is why the funds allocated are mainly focused on activating people up to 25 or over 50 years of age.

### **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 prohibits discrimination in the following areas: 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.

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<sup>243</sup> Poland, Labour Code, Article 18<sup>3a</sup> § 1.

<sup>244</sup> Poland, Employment Act, Article 40.6.

<sup>245</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.

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).

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

In Poland, national legislation prohibits discrimination in the following areas: 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>246</sup>

The Capital-based Pensions Act<sup>247</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>248</sup> In this way, the Act prohibits discrimination, though the specific grounds of racial or ethnic origin are not mentioned.

In 2014 the Ombud published the findings of research entitled *The principle of equal treatment – law and practice. Equal treatment of patients – non-heterosexual people in the healthcare system. Analysis and recommendations*.<sup>249</sup> The findings were presented together with recommendations in the Ombud's motion to the Minister of Health in March 2016.<sup>250</sup> The Ombud's recommendations included: amendment of the ETA so that compensation and redress can be claimed in the event of a breach of the principle of equal treatment in the field of health care due to sexual orientation; amendment of the Patients' Rights Act so that any discrimination, including due to sexual orientation, is considered at the same time to be a violation of the patient's rights; taking into account the specific problems of LGBTI persons in health programmes and policies, for example in the development of programmes for the prevention of suicide among children and adolescents;

<sup>246</sup> Poland, Social Security Act, Article 2a.1, as amended by the 2010 Equal Treatment Act.

<sup>247</sup> Poland, Act of 21 November 2008 on Capital-based Pensions (*Ustawa z dnia 21 listopada 2008 r. o emeryturach kapitałowych*).

<sup>248</sup> Poland, 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*) (Dz.U.2017.1938 t.j.), Article 20.5.

<sup>249</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).

<sup>250</sup> See at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/3/XI.411.2.2016/692747.pdf>.

the need to disseminate among medical staff knowledge about the specific treatment of LGBTI people; raising the standards of teaching for midwives and nurses.<sup>251</sup>

An interesting case in regard to the LGBT ground was decided in 2016.<sup>252</sup> The claimant challenged the decision of the National Health Fund in regard to refusal by the health insurance body to provide cover to a same-sex spouse (civil partnership concluded abroad – in Scotland) as a member of the claimant's family.

In the justification of the judgment, the court of first instance held that, according to the provisions of the Law on healthcare,<sup>253</sup> the circle of close relatives that may be considered family members is a closed catalogue. In Article 5. pt. 3.b. the law implies that a spouse is considered a family member. The law does not mention the civil partner of the insured person. The court of first instance noted that both marriage and partnership are national civil-family law institutions, and they are interpreted in the light of the national legal system. In the Polish legal system, there is no regulation formalising civil partnerships. The court also referred to Article 18 of the Constitution, which provides that: 'Marriage, being a union of a man and a woman (...) shall be placed under the protection and care of the Republic of Poland'.<sup>254</sup> The Court also referred to the judgment of the CJEU,<sup>255</sup> in which the Court found that persons in a life partnership may claim the same treatment as married spouses only if a registered legal form of life partnership for same-sex couples is provided for by national law, in parallel to marriage reserved only to heterosexual couples, and moreover when national law thus shapes the legal situation of persons in a life partnership so that it is comparable to the situation of married spouses. Only the occurrence of such comparability may speak in favour of the so-called direct discrimination, in this case on grounds of sexual orientation. The claimant party appealed against the judgment. However, the Supreme Administrative Court dismissed the appeal, agreeing with and repeating large sections of the justification of the court of first instance.<sup>256</sup>

#### 3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

In Poland, national legislation prohibits discrimination in the following areas: 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>257</sup>

<sup>251</sup> <https://oko.press/zboczcencow-leczymy-homofobie-transfobie-lekarzy-mozna-leczyc/>.

<sup>252</sup> Poland, Supreme Administrative Court (NSA) (*Naczelny Sąd Administracyjny*), final ruling 25 October 2016, II GSK 866/15 ([http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy\\_ubezpieczen\\_zdrowotnych/33055d0.html](http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy_ubezpieczen_zdrowotnych/33055d0.html)).

<sup>253</sup> Poland, 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*) (Dz.U.2017.1938 t.j.), 27 August 2004.

<sup>254</sup> Poland, Constitution, Article 18, see at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>255</sup> CJEU, C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, 10 May 2011, see at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62008CJ0147>.

<sup>256</sup> Poland, Supreme Administrative Court (NSA) (*Naczelny Sąd Administracyjny*), final ruling 25 October 2016, II GSK 866/15 ([http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy\\_ubezpieczen\\_zdrowotnych/33055d0.html](http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy_ubezpieczen_zdrowotnych/33055d0.html)), see more in Section 12.2, below.

<sup>257</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.

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

There is a rather complex system of different allowances and grants. Most of them are not discriminatory, such as a childbirth grant, which is payable to the mother, father or legal guardian of a child. It can also 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>258</sup>

The death allowance is payable to any person who covers the costs of a funeral.<sup>259</sup> However, a same-sex partner, unlike a spouse, would have to supply documentary evidence of the costs incurred.<sup>260</sup>

During the years 2014-2015 discussions took place regarding new regulations relating to large families (three and more children) and various financial benefits for them (reductions). The regulations would cover families where a parent (or parents) or official spouses raise their children. They would not cover, for instance, a family with four children if the couple were not married and some of the children were to come from previous relationships. The regulations have been judged unconstitutional (and the Constitution, not the ETA, is seen as a basis for challenging the law); the Government Plenipotentiary has also protested against them.<sup>261</sup>

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

In Poland, national legislation prohibits discrimination in the following areas: 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). The authors of the first commentary on ETA pointed out that the terms used in the ETA may, however, narrow down the scope of the protection. The ETA does not use the term 'education' in general but 'system of education' (*oświata*) and 'higher education' (*szkolnictwo wyższe*). The potential problem is that both terms are defined in the law and specifically refer to listed types of educational institutions. So theoretically (there is no case law) one can envisage a situation where discrimination might happen in an institution not specifically covered by the Act on the system of education or higher education.<sup>262</sup>

Generally, discrimination in education is prohibited – the 2016 Education Law<sup>263</sup> refers in its preamble to the Constitution as well as to the 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.

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<sup>258</sup> Poland, Act of 28 November 2003 on Family Benefits (*Ustawa z 28 listopada 2003 r. o świadczeniach rodzinnych*) (Dz.U.2017.1952 t.j.), Article 9.

<sup>259</sup> Poland, Retirement Act, Article 78.1.

<sup>260</sup> Poland, Retirement Act, Article 79.1.

<sup>261</sup> Plenipotentiary Annual Report 2015, p. 31.

<sup>262</sup> ETA commentary 2017, pp. 137-140.

<sup>263</sup> Poland, Act of 14 December 2016 on Education Law (*Ustawa z dnia 14 grudnia 2016 r. Prawo oświatowe*, in force since 01.09.2017) (Dz.U.2017.59); [hereafter '2016 Education Law']. This Act partially replaced the previous Education Act: *Ustawa z dnia 7 września 1991 r. o systemie oświaty* (Dz. U. 2016. poz. 1943, 1954, 1985, 2169). The previous Act is in part still in force (in the version published in 2017: Dz.U.2017.2198 t.j.). To differentiate between these Acts, in this report they are described as the 1991 Education Act and the 2016 Education Law.

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>264</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 1991 Education Act,<sup>265</sup> 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>266</sup>

The Ministry of Education organises several activities within the 'Safe and Friendly School' government programme for 2014-2020.<sup>267</sup> These include training on diversity and counteracting discrimination (mainly based on ethnic origin).<sup>268</sup> However, it is difficult to evaluate the impact of these activities, in view of the fact that politicians and government representatives use stigmatising and discriminatory language in their public appearances, including hate speech. In addition, anti-discrimination education activity is currently under attack. For example, the Ordo Iuris Institute has published a report detailing 25 CSOs that conduct such activities, warning parents and schools against them (there was also a meeting of Ordo Iuris with officials from the Ministry of Education). Anti-discrimination education is presented in the report and in public discourse as harmful and dangerous, and the report recommends not allowing such organisations to enter schools.<sup>269</sup>

#### a) Pupils with disabilities

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

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>270</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.

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<sup>264</sup> Poland, Act of 27 July 2005 on Higher Education, as amended (*Ustawa z 27 lipca 2005 r. prawo o szkolnictwie wyższym*) (Dz.U.2017.2183 t.j.), [hereafter 'Higher Education Act'], Article 43.

<sup>265</sup> Partially still in force (the version published in 2017: Dz.U.2017.2198 t.j.), even though the new 2016 Education Law entered into force in 2017.

<sup>266</sup> Poland, Ordinance of the Minister of National Education of 18 August 2017 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.2017, 1627) (*Rozporządzenie Ministra Edukacji Narodowej z dnia 18 sierpnia 2017 r. w sprawie warunków i sposobu wykonywania przez przedszkola, szkoły i placówki publiczne zadań umożliwiających podtrzymywanie poczucia tożsamości narodowej, etnicznej i językowej uczniów należących do mniejszości narodowych i etnicznych oraz społeczności posługującej się językiem regionalnym*), 18 August 2017.

<sup>267</sup> Rządowy program na lata 2014-2020 „Bezpieczna i przyjazna szkoła”, see at: <https://men.gov.pl/pl/zwiekszenie-szans/bezpieczna-i-przyjazna-szkola/bezpieczna-i-przyjazna-szkola-informacje-o-programie>.

<sup>268</sup> Report on the National Programme 2016, pp. 113-126; Report on the National Programme 2017, pp. 113-128.

<sup>269</sup> The report was published in 2018, beyond the scope of this report, see: <https://oko.press/ordo-iuris-men-ostregaja-nauczycieli-wpuszczajcie-szkol-organizacji-pozarzadowych-ktore-ucza-o-prawach-czlowieka/>.

<sup>270</sup> Poland, Act of 14 December 2016. Education law, (*Ustawa z dnia 14 grudnia 2016 r. Prawo oświatowe*), 14 December 2016, Article 1. In force since 01.09.2017, here 2016 Education Law.

There are a number of laws that specify different conditions for the educational process, including for persons with disabilities. The most important of these 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 places a number of obligations on schools, including providing appropriate learning conditions, specialised equipment and support for parents, etc. The 2017 amendment to the Ordinance specified that this refers to pupils 'holding a decision on the need for special education'.<sup>271</sup>

According to the 2016 Education Law (Article 39.4.1), 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. In practice, this provision raises concerns. The Ombud received complaints from parents of students with disabilities regarding problems connected with their delivery to schools and other educational institutions. These difficulties often lead to a situation in which pupils do not fulfil their schooling obligations. In practice, the rules for reimbursement of transport costs are often determined unilaterally by the local government authorities responsible (mayors, heads of city councils) and often do not cover the actual costs incurred by carers for transporting a child. Parents are reimbursed for transport when accompanying a child, but not for traveling without a child (i.e. for two and not four journeys per day). The Ombud is critical of this solution and undertakes relevant actions to advise parents on the measures they should take to receive adequate reimbursement.<sup>272</sup>

According to the Ordinance of the Minister of National Education and Sport on health and safety in state and non-state schools [...],<sup>273</sup> places for practical learning should make adequate accommodation to meet the needs of pupils with disabilities. Their needs should also be taken into consideration when planning out-of-school activities.

Very controversial changes were introduced in 2017 (in force since 1 September 2017, the start of the new school year). The Ministry of National Education limited the possibility for pupils with disabilities to integrate in schools.<sup>274</sup> According to the amended law, individual teaching required because of special needs is to be organised at home, not in school. Teachers would go to pupils' homes and these pupils would, therefore, not participate in integrated education. This amendment (even when still in draft form) provoked numerous protests from parents, CSOs and the Ombud office. It is seen as a step back in the introduction of integrated education and causes a number of practical problems (for instance parents argue that they have to leave their jobs to stay at home with their children).<sup>275</sup> No information on possible court cases stemming from this change in the law is available.

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<sup>271</sup> Poland, 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 (*Rozporządzenie Ministra Edukacji Narodowej z dnia 24 lipca 2015 r. w sprawie warunków organizowania kształcenia, wychowania i opieki dla dzieci i młodzieży niepełnosprawnych, niedostosowanych społecznie i zagrożonych niedostosowaniem społecznym*) (Dz.U. 2015, poz. 1113), amended in 2017 (Dz.U.2017.1652), in force since 1 September 2017.

<sup>272</sup> Ombud Annual Report 2018, pp. 48, 528-530.

<sup>273</sup> Poland, *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>274</sup> Poland, Ordinance of the Minister of National Education of August 28, 2017 amending the ordinance on the individual obligatory annual pre-school preparation of children and individual teaching of children and young people; (*Rozporządzenie Ministra Edukacji Narodowej z dnia 28 sierpnia 2017 r. zmieniające rozporządzenie w sprawie indywidualnego obowiązkowego rocznego przygotowania przedszkolnego dzieci i indywidualnego nauczania dzieci i młodzieży*), (Dz.U.2017.1656).

<sup>275</sup> Ombud Annual Report 2018, pp. 531-532.

According to the Higher Education Act, state universities receive special funds for measures aiming to educate and rehabilitate people with disabilities. The level of funds depends on the number of students and doctoral students enrolled.<sup>276</sup> The Higher Education Act provides special state stipends for which students with disabilities (undergraduates and PhD students) may apply. However, the stipends do not cover obtaining a second higher education degree (even if persons acquire disabilities during or after their first course of studies). The Ombud recommended relevant extensions but without success.<sup>277</sup> The Minister of Science and Higher Education stated in 2016 that he would consider the Ombud's recommendation during forthcoming work on the Law on Higher Education. However, no amendment is currently proposed.<sup>278</sup>

In 2014 the Ombud commissioned a survey, the results of which were presented in the publication *Zasada Równego Traktowania. Prawo i praktyka, nr 16. Dostępność edukacji akademickiej dla osób z niepełnosprawnościami. Analiza i zalecenia* (The principle of equal treatment – law and practice. Accessibility of higher education for persons with disabilities. Analysis and recommendations).<sup>279</sup> The survey revealed a number of barriers students face, including in architectural design and communication, and stemming from the attitudes of people employed in the universities. Cases where persons with disabilities are excluded from groups of potential students, as sometimes happens, are the most serious. The Ombud passed the research findings and recommendations to the Minister of Science and Higher Education.<sup>280</sup> In one particular case, the Ombud brought a case to the Regional Administrative Court and won the case.<sup>281</sup> The Ombud challenged the decision of the rector of a university who removed a person with disabilities from the list of students (in physiotherapy studies).<sup>282</sup>

In its National Health Programme for 2007-2015,<sup>283</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.

These objectives are no longer included in the subsequent National Health Programme for 2016-2020.<sup>284</sup>

Within the 'Safe and Friendly School' government programme for 2014-2020<sup>285</sup> the Ministry of Education organises training on the needs of children with various disabilities and publishes dedicated guidelines. It also adapts education materials to the needs of pupils with disabilities.<sup>286</sup> The Ministry of Higher Education provides grants to universities; these are used for the salaries of sign-language interpreters, sign-language courses for employees, the purchase of specialised equipment and the adaptation of didactic and

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<sup>276</sup> Poland, Higher Education Act, Article 94.1 point 11.

<sup>277</sup> Ombud Annual Report 2016, pp. 55-56.

<sup>278</sup> Ombud Annual Report 2017, p. 96.

<sup>279</sup> Rzecznik Praw Obywatelskich (2015), *Zasada Równego Traktowania. Prawo i praktyka, nr 16. Dostępność edukacji akademickiej dla osób z niepełnosprawnościami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>280</sup> Ombud Annual Report 2016, pp. 54-57; Ombud Annual Report 2017, p. 94.

<sup>281</sup> Poland, Regional Administrative Court (*Wojewódzki Sąd Administracyjny*), Wrocław, IVSA/Wr389/15, 29 December 2015; see: [http://www.orzeczenia-nsa.pl/wyrok/iv-sa-wr-389-15/sprawy\\_kandydatow\\_na\\_studia\\_i\\_studentow\\_szkolnictwo\\_wyzsze/37804b8.html](http://www.orzeczenia-nsa.pl/wyrok/iv-sa-wr-389-15/sprawy_kandydatow_na_studia_i_studentow_szkolnictwo_wyzsze/37804b8.html)

<sup>282</sup> Ombud Annual Report 2016, pp. 56-57.

<sup>283</sup> Resolution of the Council of Ministers no. 90/2007, 15 May 2007.

<sup>284</sup> Resolution of the Council of Ministers (Dz.U.2016.1492), 4 August 2016.

<sup>285</sup> Rządowy program na lata 2014-2020 „Bezpieczna i przyjazna szkoła”, see at: <https://men.gov.pl/pl/zwiekszenie-szans/bezpieczna-i-przyjazna-szkola/bezpieczna-i-przyjazna-szkola-informacje-o-programie>.

<sup>286</sup> Report on the National Programme 2017, pp. 113-119.



scientific materials to the needs of undergraduate students and PhD students with disabilities.<sup>287</sup>

Judging from the legal documents and reports, with the exception of the 2017 changes to the ordinance mentioned above, the situation of students with disabilities might 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 refuse access to schools instead of solving the problems. In a number of cases of this kind, the Ombud has intervened and for a number of years has tried to draw attention to this problem in letters to the Government.<sup>288</sup> In 2015 a new situation arose when government financial services demanded the return of special subsidies for the education of children with disabilities (even though the money had been spent) from a number of municipalities that finance local schools, both special and mainstream. Various reasons, for instance not providing valid certificates of disability, were given. This caused some financial problems for schools.<sup>289</sup>

In 2012, the Ombud published a special report,<sup>290</sup> *The principle of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations*,<sup>291</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 in relation to specific kinds of disability. The integration of children with disabilities in education was one of the activities described in the Activities for Equal Treatment Programme for 2013-2016 (a new programme has not yet been prepared), and inclusive education was an official focus of state educational policy for the school year 2014/2015.<sup>292</sup>

The Ombud 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>293</sup> The Expert Committee on People with Disabilities<sup>294</sup> established by the Ombud<sup>295</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>296</sup> which also covers the issue of equal access to education.

Based on complaints received, the Ombud identified a problem of possible discrimination against people with profound intellectual disabilities in access to education. There has been no obligation to develop a curriculum for such children and adolescents for particular years of education. There is also a lack of conditions and methods of assessment, promotion and classification. The law also allows the creation of one group for people of different ages

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<sup>287</sup> Report on the National Programme 2017, pp. 119-120.

<sup>288</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 – 1/07/KJ; (all documents may be found at [www.rpo.gov.pl](http://www.rpo.gov.pl)).

<sup>289</sup> Ombud Annual Report 2016, pp. 54-55.

<sup>290</sup> Ombud Annual Report 2013, p. 418.

<sup>291</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>292</sup> Report on the National Programme 2015, pp. 145-146.

<sup>293</sup> Ombud Annual Report 2013, pp. 420-421.

<sup>294</sup> See at: <http://rpo.gov.pl/en/content/expert-committee-people-disabilities>.

<sup>295</sup> Ombud Annual Report 2013, p. 421.

<sup>296</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).



(from 3 to 25 years old). The Ombud asked the Minister of National Education to conduct an analysis of the current legislation. The Ministry has ensured that the provisions of the 1991 Education Act allow for the organisation of education and training for children and young people in a variety of forms to ensure that the obligation to provide annual pre-school preparation, school attendance and educational obligations is fulfilled and there is no discrimination against children and young people as regards access to education. It has been pointed out that the wide variation in the individual functional levels of children and young people with such disabilities significantly hampers standardisation in the curricula for the levels of knowledge and skills that should be acquired in subsequent years of their education. The Minister also gave assurances that the Ministry will conduct an in-depth analysis of the issues of education for children and young people with profound intellectual disabilities.<sup>297</sup>

In 2016 The Children's Rights Ombud made numerous interventions regarding children with special educational needs and children with chronic illnesses. The most frequent problem was the failure to provide adequate psychological and pedagogical assistance in schools. Among others, children with Asperger's syndrome, those experiencing a variety of emotional problems, and those with chronic illnesses (e.g. diabetes) experience unequal treatment. The Children's Rights Ombud also conducted a study on access to textbooks for children with visual impairment. It turned out that students often do not receive textbooks from the first day of a given school year. Therefore, further efforts are needed to create reasonable accommodation tailored to the individual needs of visually impaired pupils and to provide them with the necessary support within the general education system.<sup>298</sup>

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 *Aktywny samorząd* programme (these programmes provide special financial support).<sup>299</sup> The aim of this programme is to eliminate or reduce the barriers limiting participation in social and professional life and access to education for people with disabilities participating in the programme by, inter alia, improving chances of employment on the open labour market through improving qualifications. In 2013, 18 689 people received support, in 2014 – 19 046 people, and in 2015 – 18 969 people.<sup>300</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 integrated schools but not in art schools. The Ombud intervened in the case and obtained a promise that this policy would be changed.<sup>301</sup>

#### b) Trends and patterns regarding Roma pupils

In Poland, there are no specific patterns in education, such as segregation, regarding Roma pupils.

Although there were still some problems regarding segregated school classes in 2016, this problem was finally resolved and currently there are no longer any classes of this kind.

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>297</sup> Ombud Annual Report 2017, p. 96.

<sup>298</sup> Ombud Annual Report 2017, p. 150.

<sup>299</sup> See at <http://www.pfron.org.pl/pl/programy-i-zadania-pfr/aktywny-samorzad/1644,dok.html>.

<sup>300</sup> Report on the National Programme 2017, pp. 120-121.

<sup>301</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>302</sup> Access to institutions of higher education is also granted equally.<sup>303</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>304</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 taken too little action to encourage and facilitate education for Roma children. On the other hand, it has tolerated, and to some extent still tolerates, 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>305</sup> Despite this, the problem persisted 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>306</sup> However, in 2011 around 20 % of Roma pupils still received a decision that they should attend special schools.<sup>307</sup> In November 2015 the Ombud raised this issue in his communication with the Ministry of National Education and asked for current data. According to the Ombud, his office was currently monitoring the matter.<sup>308</sup> In the annual report the Ombud recommended counteracting the segregation of Roma pupils in schools and including them in mainstream education. The Ombud called for monitoring of the practice of placing Roma children in special schools based on their low level of comprehension of the Polish language (no reference to ECtHR case law had been made).<sup>309</sup> These efforts brought results and in the school year 2014/2015 only 208 Roma pupils (6.9 % of all Roma pupils) attended special schools.<sup>310</sup>

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<sup>302</sup> Poland, 2016 Education Law (*Ustawa z dnia 14 grudnia 2016 r. Prawo oświatowe*), Article 1; Poland, 1991 Education Act, Article 13.

<sup>303</sup> Poland, Higher Education Act, Article 43.

<sup>304</sup> See annual reports on the Programme for the Roma Community in Poland, available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>305</sup> As a result of many protests by Roma leaders and CSOs, 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>306</sup> See minutes of the fourth meeting of the Roma Issues Team.

<sup>307</sup> Information received from Ministry of Internal Affairs in May 2013.

<sup>308</sup> Ombud Annual Report 2016, p. 19.

<sup>309</sup> Ombud Annual Report 2016, p. 102.

<sup>310</sup> See Report on the Programme for the Integration of the Roma Community in Poland 2014-2020, for 2015, May 2016 (*Sprawozdanie z realizacji Programu Integracji Społeczności Romskiej w Polsce na lata 2014-2020, w 2015 roku; 5 maja 2016*), at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

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 integration in 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>311</sup> As of 2011, no Roma classes existed. However, in 2013 there were plans to establish a Roma class in a Poznań primary school and only the intervention of the Ombud prevented this happening (the proponents of the idea argued that it was supposed to be a temporary solution aimed to integrate a group of Roma students into general education).<sup>312</sup>

However, segregated Roma classes continued to pose a problem, as local government authorities still tried to organise them. For some time, there were no Roma classes in operation, but in 2016 one of these classes was again established in Wrocław. However, as of 2017 no such classes exist.<sup>313</sup>

There is also some improvement regarding the pre-schooling of Roma children due to new pre-schools opening in areas with significant Roma populations. In addition, the data on school attendance by Roma showed an increase over a 10-year period from an estimated previous level of around 70 % to 86.8 % in 2011/2012.<sup>314</sup>

However, these changes were not satisfactory; in its 2014 report the Ombud still underlined the fact that wider access of Roma children to pre-school and non-school classes pursuing an expanded programme of teaching the Polish language, was needed.<sup>315</sup>

In the case of the Roma community, a form of teaching which exists for other minorities in the education system (schools with the minority language as the first or second language) has not been established. However, it should be pointed out that the obligation for the authorities to establish such schools depends on the will of the national minority group (they need to lodge an application). Representatives of the Roma community have differing 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>316</sup> However, a number of measures have been taken to convince parents to send children to school (see more in Section 5 below).

In 2014 the Ministry of Education also funded 53 local initiatives and activities facilitating the integration of Roma children into the education system (organised by 37 entities – Roma CSOs and local authorities).<sup>317</sup> According to the National Programme of Activities for Equal Treatment, schools, if necessary, take additional measures to sustain and develop the sense of ethnic identity of Roma children and young people and support their education by organising compensatory activities. In the school year 2015/2016, a total of 2 260 Roma pupils were enrolled in such activities, including: 190 children in kindergartens; 1 644 students at primary school level; 476 students at secondary level; and 50 students at upper secondary level. In 2015, The Ministry of National Education also gave grants to 60 applicants for implementation of a total of 72 activities facilitating the integration of Roma children into the education system.<sup>318</sup>

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[integracji-spol/program-integracji-spol/9928.Sprawozdanie-z-realizacji-Programu-integracji-spolecznosci-romskiej-w-Polsce-na-.html](http://integracji-spol/program-integracji-spol/9928.Sprawozdanie-z-realizacji-Programu-integracji-spolecznosci-romskiej-w-Polsce-na-.html); p. 7. (As of March 2018, reports for 2016 and 2017 are not yet available.)

<sup>311</sup> See minutes of the fourth meeting of the Roma Issues Team.

<sup>312</sup> Ombud Annual Report 2014, p. 15.

<sup>313</sup> Information provided to the author of this report by the Ombud Office, December 2016, March 2018.

<sup>314</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>315</sup> Ombud Annual Report 2014, p. 15.

<sup>316</sup> See, for instance, minutes of the eighth meeting (09.09.2009) of the Roma Issues Team.

<sup>317</sup> Report on the National Programme 2015, p. 105.

<sup>318</sup> Report on the National Programme 2016, p. 133.

## Migrants

In general, according to law migrant pupils are protected from discrimination in education (they fall under the category of race, ethnic origin, nationality). As a rule, persons who are not Polish citizens receive education and care in kindergartens and public schools on equal terms with Polish citizens.

Facilitating the educational advancement of the children of migrants and from the Roma minority was one of the objectives in the National Programme of Activities for Equal Treatment (for 2013-2016).<sup>319</sup> The Ministry of Education was responsible for legal analyses and research. In 2015 and 2016 it prepared ordinances 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 had attended education in schools operating in the education systems of other countries (also covering additional Polish language classes, extra remedial classes, and learning the language and culture of the country of origin).<sup>320</sup>

The 2016 ordinance introduced a new solution – the possibility of creating preparatory units in schools, intended exclusively for pupils arriving from abroad. In the opinion of the Ministry of National Education, this is an appropriate form of teaching for children with no knowledge of the Polish language who attend Polish schools. However, some doubts have been raised (as during the discussions of the Ombud Expert Committee on Migrants) that the creation of such divisions means de facto adopting a separate model of teaching. As a result, children, at least for a certain period, will learn in separate classes. It is, therefore, very likely that schools will lose the opportunity for successful integration of foreign students and their Polish counterparts, and children of migrants will begin their studies in Polish schools with a sense of alienation and detachment from the school community. At a meeting of the Expert Committee on Migrants in December 2016, a representative of the Ministry of National Education announced that work on new rules for the teaching of foreign children in schools (to be implemented in 2018) had started. The Expert Committee decided to observe this work and present a proposal for possible actions in this area to the Ombud.<sup>321</sup>

The Ministry of Education also promotes the hiring by schools of assistants who know the language of migrant pupils and may assist them. (The term cultural assistant, *asystent kulturowy*, is used; however, this is not a legally recognised term).<sup>322</sup>

Regarding education in guarded centres for foreigners run by the Polish Border Guard Service (*Straż Graniczna*), implementation of compulsory education takes place within the framework of an individual curriculum. At the request of a teacher who conducts classes for foreign children in a guarded centre as part of individual classes, the director of a school facility may allow changes to parts of the curriculum.<sup>323</sup>

The education of migrants and foreigners has been a priority of the Ombud for some years already (the Expert Committee on Migrants was established in 2011). In 2012 the Ombud

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<sup>319</sup> Report on the National Programme 2015, pp. 102-105.

<sup>320</sup> Four ordinances have already been issued: the first was issued on 2 January 2015, the second (replacing the previous one) on 30 July 2015, the third (again replacing the previous one) on 9 September 2016: *Rozporządzenie Ministra Edukacji Narodowej z dnia 9 września 2016 r. w sprawie kształcenia osób niebędących obywatelami polskimi oraz osób będących obywatelami polskimi, które pobierały naukę w szkołach funkcjonujących w systemach oświaty innych państw*, Dz.U. 2016 poz. 1453; and the fourth (the most recent) ordinance on 23 August 2017: *Rozporządzenie Ministra Edukacji Narodowej z dnia 23 sierpnia 2017 r. w sprawie kształcenia osób niebędących obywatelami polskimi oraz osób będących obywatelami polskimi, które pobierały naukę w szkołach funkcjonujących w systemach oświaty innych państw*, Dz.U.2017.1655.

<sup>321</sup> Ombud Annual Report 2017, p. 122.

<sup>322</sup> Report on the National Programme 2017, pp. 127-128.

<sup>323</sup> Report on the National Programme 2017, pp. 121-125.

commissioned research and in 2013 published a report on these issues, *Zasada równego traktowania. Prawo i praktyka. Realizacja prawa małoletnich cudzoziemców do edukacji* (The principle of equal treatment – law and practice. Implementing the right to education of young foreign nationals).<sup>324</sup> The report outlined a number of issues and although it is now outdated it began the work on analysing the situation of migrants in education that the Ombud office continues to carry out.

In 2017, the Ombudsman for Children's Rights intervened in cases involving children - both Polish and foreign - studying in public schools. The problems concerned forced participation in religious ceremonies or celebrations in schools. The Ombudsman also intervened in the case of a Muslim pupil who was served pork in the school canteen (no further information on these cases is provided; they are often dealt with without bringing them to public attention, through personal contacts or mediation).<sup>325</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 prohibits discrimination in the following areas: 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.<sup>326</sup>

#### **3.2.9.1 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 prohibits discrimination in the following areas: 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.

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<sup>324</sup> Rzecznik Praw Obywatelskich (2013), *Zasada równego traktowania. Prawo i praktyka. Realizacja prawa małoletnich cudzoziemców do edukacji*, available at: <https://www.rpo.gov.pl/sites/default/files/RAPORT-RZECZNIKA-PRAW-OBYWATELSKICH-Realizacja-prawa-maloletnich-cudzoziemcow-do-edukacji%20.png.pdf>.

<sup>325</sup> Information provided by the Ombud Office.

<sup>326</sup> See interesting analyses regarding 'public offer' and definition of 'housing' in: ETA commentary 2017, pp. 141-144.

Access to housing is regulated by the following legislation: the Housing Allowances Act<sup>327</sup> and the Act on the Protection of Tenants' Rights.<sup>328</sup> They contain no provisions of a discriminatory nature.<sup>329</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.

#### 3.2.10.1 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>330</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.

According to the Ombud's 2014 report,<sup>331</sup> some of the problems faced by the Roma community have for many years remained 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 government authorities are able to bear alone the problem of improving the social and living conditions of the Roma community. The possibility of using 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 housing and living conditions for Roma settlements throughout Poland. This could be accomplished by the current 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>332</sup> On the basis of on-site visits the Ombud repeated these recommendations in 2015, 2016 and 2017.<sup>333</sup> It identified various problems, including municipalities buying houses for Roma in other municipalities and asking them to move (without their consent, which causes an impasse, as they do not want to move).<sup>334</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 (over 70% rate of unemployment). The access of Roma to social

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<sup>327</sup> Poland, Act of 21 June 2001 on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*; Dz.U.2017.180 t.j.).

<sup>328</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*; Dz.U.2016.1610 t.j.).

<sup>329</sup> There was, however, an interesting case which ended up in the ECtHR: *Kozak v. Poland* (application no. 13102/02; judgment of 2 March 2010). Generally speaking, same-sex cohabitants may currently inherit the right to housing (which was previously limited) after a partner's death.

<sup>330</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 as 50 000-60 000.

<sup>331</sup> Ombud Annual Report 2014, p. 14.

<sup>332</sup> *Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warsaw 2014, also in English, available at <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>333</sup> Ombud Annual Report 2017, pp. 22-24; Ombud Annual Report 2018, pp. 21-23.

<sup>334</sup> Ombud Annual Report 2016, pp. 17-19, p. 102.



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 government authorities 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 with getting the project accepted and funded from government sources.

Another current problem in Limanowa was tackled by the Ombud. Limanowa municipality decided to buy a property, paid for with Roma Programme money, to provide housing for Roma. However, the municipality deliberately bought a property in a different municipality (Czchów), so that the Roma would have to move. Some families objected to moving. However, all the beneficiaries of the project had earlier declared before a notary public that they would leave their current place of residence after a new building was made available to them. The Ombud undertook several actions to assist the Roma (as described in detail in section 12.2 below).<sup>335</sup>

There are several problems in relation to encampments of Roma migrants who have come to Poland from other countries (mainly Romania). There are large encampments in some big cities (Gdańsk, Poznań, Wrocław).<sup>336</sup> 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>337</sup>

### *Migrants*

In general, according to law migrants are protected from discrimination in housing (they fall under the category of race, ethnic origin, nationality). Migrants are not treated differently under anti-discrimination legislation. The phenomenon is not well researched but in the last couple of years some projects and research were conducted. In a report on the issue, published in 2011, the author wrote: 'we know little about the discrimination of foreigners in access to housing in Poland. Firstly, there is no systematic study on the issue of unequal treatment of persons of different ethnic or national origin in the area of housing (apart from Roma). Secondly, Poland has no problems with ethnic enclaves and ghettos, as opposed to many other countries. In addition, foreigners are still a small percentage of Polish society, and it appears that researchers, the public and the media are more concerned with the housing problems of other social groups. Therefore, if sheltered housing

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<sup>335</sup> Ombud Annual Report 2018, pp. 107-109.

<sup>336</sup> The exact number of Roma immigrants is not known; estimates differ. One source, *Własnym głosem o sobie. Imigranci romscy w Polsce* (With your own voice about yourself. Roma immigrants in Poland, 2015) available at: [https://wsl-poznan.pl/images/Wlasnym\\_glosem\\_o\\_sobie.pdf](https://wsl-poznan.pl/images/Wlasnym_glosem_o_sobie.pdf), pp. 14-15), gives the number as 350, but the Ombud declares in his statements (e.g. in case XI.816.28.2016.) that 'there are about 500 Roma people (mainly from Romania) living in encampments in Wrocław, Poznań and Gdansk. These also include children, some of whom (in Wrocław as many as 20 %) were born in Poland.'

<sup>337</sup> Ombud Annual Report 2014, p. 16.

is created, activities in this area are mainly for pupils of care institutions, people with disabilities or people with mental illnesses.<sup>338</sup>

One could mention, however, that in terms of state policies the Polish Constitution focuses on citizens only, stating in Article 75.1 that: 'Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.'<sup>339</sup>

However, despite the anti-discrimination law, in real life migrants face many problems with discrimination in housing. For instance, according to CSOs assisting migrants, landlords refuse to rent apartments on the basis of race or ethnic origin.<sup>340</sup> This was also proved by situation testing. The authors of the tests concluded that discrimination against refugees exists and is systematic – if a landlord has a choice between renting a flat to a Polish tenant or to a refugee tenant, despite lack of differences between them in regard to the characteristics of the transaction (financial possibilities, length of lease, declared number of people staying in the accommodation) the landlord would more often choose the Polish tenant.<sup>341</sup>

An additional problem 'is a small amount of flats distributed from the commune-owned housing resources. (...), migrants [also] encounter obstacles in access to communal flats, e.g. because of the requirement to register for permanent residence in a particular commune.'<sup>342</sup> Some of those issues were challenged successfully in court with the assistance of CSOs.

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<sup>338</sup> Wencel, K. (2011), *Dyskryminacja cudzoziemców w dostępie do usług mieszkaniowych w Polsce. Między teorią a praktyką* (Discrimination against foreigners in access to housing in Poland. Between theory and practice), p. 3. Available at: <http://interwencjaprawna.pl/docs/ARE-511-dyskryminacja-mieszkaniowa.pdf>.

<sup>339</sup> Poland, Constitution, see at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>340</sup> Wencel, K. (2011), *Dyskryminacja cudzoziemców w dostępie do usług mieszkaniowych w Polsce. Między teorią a praktyką* (Discrimination against foreigners in access to housing in Poland. Between theory and practice), p. 12. Available at: <http://interwencjaprawna.pl/docs/ARE-511-dyskryminacja-mieszkaniowa.pdf>.

<sup>341</sup> See: Wysieńska, K. (2013), *Czyj jest ten kawałek podłogi? Wyniki badań dyskryminacji uchodźców w dostępie do mieszkań* (Whose is this piece of the floor? Results of survey on discrimination of refugees in access to housing), available at: <http://www.isp.org.pl/uploads/filemanager/pdf/Bezpieczny-dom.pdf>; see also: Wysieńska, K. (2013), *Dyskryminacja ze względu na pochodzenie etniczne i kolor skóry na rynku mieszkaniowym – przegląd wyników testów dyskryminacyjnych na świecie, w Europie i w Polsce* (Discrimination based on ethnic origin and skin colour in the housing market – review of the results of discrimination tests in the world, in Europe and in Poland).

<sup>342</sup> Wencel, K. (2011), *Dyskryminacja cudzoziemców w dostępie do usług mieszkaniowych w Polsce. Między teorią a praktyką* (Discrimination against foreigners in access to housing in Poland. Between theory and practice), p. 26. Available at: <http://interwencjaprawna.pl/docs/ARE-511-dyskryminacja-mieszkaniowa.pdf>.



## **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>343</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>344</sup>

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

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>345</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. In addition, as pointed out in the first Commentary to the ETA, Article 5.7 added two notions to the exception: acting in a good faith and loyalty towards the ethics of a particular entity (such as a church or religious organisation). According to the authors this may raise doubts as to conformity with the EU law in that it has too wide an approach.<sup>346</sup>

- 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.

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<sup>343</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code, in force since 18 January 2009 (Dz.U. Nr 223, poz. 1460, 18 December 2008).

<sup>344</sup> Poland, Labour Code, Article 18<sup>3b</sup> § 2 point 1 (amended).

<sup>345</sup> Poland, Labour Code, Article 18<sup>3b</sup> § 4, amended by Article 25 of the Equal Treatment Act.

<sup>346</sup> ETA commentary 2017, pp. 157-159.

In Poland, 'religion' (of any registered faith or religious organisation)<sup>347</sup> is taught in schools. Alternatively, for pupils not wishing to take part in religious instruction classes, a course on ethics should be organised. However, since there are not many applications for courses on ethics and most students participate in religious instruction courses, schools still 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>348</sup>

The *Grzelak* case ruling was not implemented for several years and the Ombud repeatedly alerted<sup>349</sup> the Government to the fact. It was finally implemented in April 2014.<sup>350</sup> The amendment introduces new rules so that even a request from one pupil causes 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 (verbal) consent was enough, and therefore was not documented. The amendment came into force in 2014.

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>351</sup> teachers of religion are appointed to schools by their management only if they have an appropriate permit from the relevant authorities of their particular faith or religious organisation. The authorities of particular faiths are listed in the Act on relations between the state and specific religions. In relation to the Catholic Church, this provision also comes from the agreement with the Holy See (Concordat, 28 July 1993), which states in Article 12.3 that teachers of religion need a permit from the bishop (*mission canonica*) in order to be appointed. According to the Ombud's research (2015), approximately 60 per cent of churches and religious organisations organise religious instruction lessons for their denominations (almost one fifth of these organise these lessons outside the education system).

In 2015, the Ombud published the results of research on religion lessons in *The principle of equal treatment – law and practice. Accessibility of religion lessons for religious minorities and lessons of ethics in the schools. Analysis and recommendations* (2015).<sup>352</sup> The report revealed that even if the situation had improved, a number of problems still remained (refusal to organise lessons of ethics, requiring declaration of non-participation in religious lessons, problems with organisation of lessons for religious minorities). The

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<sup>347</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*, Dz.U.2017.1153 t.j.) sets out the registration procedure for churches and other religious organisations (*związek wyznaniowy*), and sets out the criteria for registering churches or other religious organisations (*wyznanie*). Criteria include application for registration by a minimum of 100 Polish citizens and information describing the most important elements of the new church – its name, goals, etc. There are currently over 160 registered churches and other religious organisations (*związek wyznaniowy*). See the list at: [https://danepubliczne.gov.pl/dataset/koscioly\\_i\\_inne\\_zwiazki\\_wyznaniowe\\_wpisane\\_do\\_rejestru\\_kosciolow\\_i\\_innych\\_zwiazkow\\_wyznaniowych](https://danepubliczne.gov.pl/dataset/koscioly_i_inne_zwiazki_wyznaniowe_wpisane_do_rejestru_kosciolow_i_innych_zwiazkow_wyznaniowych).

<sup>348</sup> ECtHR, No. 7710/02, *Grzelak v. Poland*, 15 June 2010 (Lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools). 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>349</sup> Ombud Annual Report 2013, p. 400, p. 465.

<sup>350</sup> Poland, 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*, most recent amendment 7 June 2017).

<sup>351</sup> Poland, 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*), most recent amendment 7 June 2017.

<sup>352</sup> Rzecznik Praw Obywatelskich (2015), *Zasada Równego Traktowania. Prawo i praktyka*, nr 17, *Dostępność lekcji religii wyznań mniejszościowych i lekcji etyki w ramach systemu edukacji szkolnej. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

Ombud declared that the Ombud's office would monitor implementation of the recommendations.<sup>353</sup>

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>354</sup>

In 2016 one case was settled by the Ombud's Office – a school operated by a Catholic association did not extend its civil law contract with a Spanish language teacher after the school director noticed in the media that the teacher had participated in an equality parade.<sup>355</sup>

In an interesting case decided in 2016 and already mentioned above,<sup>356</sup> YZ (journalist, known media personality) supported a petition for legalising civil partnerships and shortly after he lost a contract opportunity.

YZ sued the Roman Catholic Diocese of H. for compensation for infringement of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment).

The court of first instance<sup>357</sup> (*sąd rejonowy*) dismissed the lawsuit.

The court of second instance<sup>358</sup> (*sąd okręgowy*) changed the verdict awarding compensation. The court stated that the claimant provided enough evidence to substantiate discrimination and the burden of proof was shifted to the respondent, who did not prove that there was no breach of the rule of equal treatment. According to the court the limitations stemming from Article 5.7 of the ETA (the court of first instance referred to these) did not apply. The court concluded that the respondent discriminated against the claimant – indirect discrimination because of political opinion (*światopogląd*) and not on the ground of sexual orientation.

#### **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, but the armed forces are covered in the same way as any other employer by the anti-discrimination law.

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.

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<sup>353</sup> Ombud Annual Report 2016, pp.23-24, pp. 102-103, Ombud Annual Report 2017, pp. 29-30, p. 143.

<sup>354</sup> Poland, Act of 26 January 1982 the Teachers' Charter (*Ustawa z 26 stycznia 1982r. Karta Nauczyciela*), Article 23.2 point 6; Poland, Labour Code, Article 52 (1).

<sup>355</sup> No details of the case were provided, it has not been published; the information was provided via email from the Ombud's Office.

<sup>356</sup> See Section 2.1.3. b), also see more on the case in Section 12.2 below. The court rulings are public (not published). However, the claimant asked that the case not be publicised; it has therefore been anonymised.

<sup>357</sup> District Court in X; YZ, Polish Society for Anti-Discrimination Law on behalf of YZ v. Catholic Diocese of H., decision 16 December 2016, reference number: I C 1326/15, not published.

<sup>358</sup> Regional Court; decision 22 March 2017; reference number: I Ca 75/17, not published.

#### 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 (foreigners need permission from the Minister of Internal Affairs).

Holding Polish citizenship is also, for instance, an obligatory condition for a number of public posts, including:

- in a number of state security agencies, special forces, intelligence services, customs services, the military and the police, and as firefighters, prison guards, municipal police, inspectors of different state inspectorates;
- judge, prosecutor, bailiff, curator;
- detectives, private security guards (but possible for EU and EFTA nationals);
- notary public (but possible for EU and EEA nationals);
- all civil servants (Law on civil service, Article 4, but with some exceptions in accordance with Article 5), public servants (Law on employees of state administration, Article 3), employees in municipal administration (Law on municipal employees, Art. 6, with some exceptions, Article 11.2-3);
- two categories of teachers – appointed and certified (*mianowany, dyplomowany*) – with the exception of nationals of other EU and EFTA Member States (Teachers' Charter, Article 10.5);
- medical doctors (with a number of exceptions regarding other EU and other nationals) (Law on doctors, Article 5).

Recent amendments to the Law on the Supreme Court and the Law on ordinary courts introduced a change stating that a candidate for a position as judge, judge assessor or lay judge must have exclusively Polish citizenship (dual citizenship of another EU Member State also eliminates the candidate).<sup>359</sup> The Ombud drew attention to this issue of restricting access to public service as judges, assessors and lay judges as a result of the requirement to have only Polish citizenship. In the Ombud's opinion, the principles of access to public service must be objective in nature, enabling various candidates to apply for this service in accordance with the principles of equal opportunities, without any discrimination and unjustified restrictions. The Ombud drew attention to the lack of indication in the justification to the draft law of the purpose of the new requirement for candidates. Pursuant to the provisions of the Act on Polish Citizenship, a Polish citizen who simultaneously holds the citizenship of another state has the same rights and obligations as a person who has only Polish citizenship. According to Article 60 of the Constitution, Polish citizens exercising full public rights have the right to equal access to public service. In relation to the above, the Ombud asked the Marshal of the Sejm (lower house of the

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<sup>359</sup> Poland, Law on the Supreme Court, passed on 8 December 2018 (Dz.U.2018.5), Article 30.1.1., in force from 3 April 2018, after the cut-off date for this report; Poland, Law on Ordinary Courts, Article 61.1.1 amended on 8 December 2018 (Dz.U.2018.5), in force from 3 April 2018, after the cut-off date for this report.

Polish Parliament) to take these arguments into consideration during the legislative process (the arguments were not accepted).

In Poland, nationality (as in citizenship) was not explicitly mentioned as a protected ground in national anti-discrimination law until 2016.

Nationality is an explicitly protected ground in the ETA (Articles 1 and 3). However, 'nationality' (*narodowość*) is understood as belonging to a nation and not as citizenship of a state.

Discrimination on grounds of citizenship (as such) is not prohibited in the ETA. Nationality (*narodowość*) is protected but is understood as belonging to a nation and not as citizenship. Since 2016,<sup>360</sup> however, according to Article 1.2 of the ETA the regulation regarding nationality shall apply accordingly to citizenship – but limited to the citizenship of persons exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

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.

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>361</sup> which provides that 'foreigners when in Poland exercise freedom of conscience and religion equally with Polish citizens'; this provision 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.

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<sup>360</sup> See more in Section 2.1 above.

<sup>361</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.2017.1153 t.j.), Article 7.1-2.

#### 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>362</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).<sup>363</sup>

##### 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>364</sup> TVP declared that it did not influence the wording of the offer and that the definition of 'partner' would be changed. KPH and its lawyer looked for examples of this kind of discrimination; however, no cases were reported to them.<sup>365</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>366</sup>

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<sup>362</sup> Poland, Act on Employers' Social Funds (*Ustawa z 4 marca 1994 r. o zakładowym funduszu świadczeń socjalnych*), 4 March 1994 (Dz.U.2017.2191 t.j.).

<sup>363</sup> In 2015 a few draft bills on registered partnerships were submitted to the Parliament but no discussion took place. At the time of the elections in autumn 2015 all these draft bills were removed from the legislative agenda.

<sup>364</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).

<sup>365</sup> KPH announced this on their website, offering legal assistance.

<sup>366</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.

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

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.

According to information provided by the Ombud Office, it received no relevant complaints. However, in one case, after an incident was reported by the media, it acted ex officio, issuing a letter. A client in one of the banks did not want to be served by an employee who was wearing religious symbols. The employee described this situation in detail in a letter to the Forum of Polish Jews (she was not a Jew herself, but sympathised with the symbols and occasionally wore them).<sup>367</sup> In response the Ombud issued a letter. The letter was not only a reaction to this particular case, but also provided information on the legal means of action in similar situations.<sup>368</sup> It also included the opinion of the Ombud that 'discreet manifestation of religious feelings does not violate the rights and freedoms of others'. The letter created some debate (but very little) and some critical reaction. In the opinion of the think tank Ordo Iuris: 'Although it is necessary to agree with the negative evaluation of the behaviour of the bank customer, serious doubts arise in the formulation used by him [the Ombud], suggesting that 'discreet manifestation of religious beliefs in the workplace' alone does not violate the rights and freedoms of others. As these are included in the provisions of the Polish Constitution and of international law, the right to express their convictions is not, in principle, unlimited, and any restrictions in this respect must be of a statutory nature and justified by special circumstances or reasons'.<sup>369</sup>

For the year 2017 (postponed from 2016) the Ombud planned to commission research on unequal treatment in the workplace because of religion.<sup>370</sup> This was proposed by the Catholic News Agency (KAI), which argued that the traditionally high levels of religious faith among Poles are coming into conflict with intensive modernisation processes. In such situations, religion might be treated as a 'negative feature'.<sup>371</sup>

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<sup>367</sup> See at: <http://www.fzp.net.pl/spoleczenstwo/nie-bedzie-mnie-zydowka-obslugiwac>.

<sup>368</sup> See at: <http://www.fzp.net.pl/spoleczenstwo/rzecznik-praw-obywatelskich-pisze-do-forum-zydow-polskich>.

<sup>369</sup> See at: <http://www.ordoiuris.pl/wolnosc-gospodarcza/analiza-listu-rzecznika-praw-obywatelskich-adama-bodnara-do-forum-zydow>.

<sup>370</sup> See at: <https://www.rpo.gov.pl/pl/content/nierowne-traktowanie-w-miejscu-pracy-ze-względu-na-religie>.

<sup>371</sup> As of August 2018 the research report has not yet been published.

One relevant example of internal enterprise policy was identified. In February 2012 the media<sup>372</sup> were informed that the public enterprise PLL LOT (Polish airlines) had changed its internal policy, *Zasady obsługi pokładowej* (Rules of On-board Operation). From 1 March 2012 new text in the subchapter *Biżuteria* (Jewellery) would read that 'wearing visible jewellery displaying religious symbols is not allowed'. The information caused a lively (but very short) public/media debate and only one or two days later the company informed the media that it had changed its decision. As the spokesman of the company explained, '(...) We wanted our staff to dress so as not to provoke the people we are carrying, who are often orthodox followers of their own religion. However, we acknowledge that this does apply to many people. We apologise to everyone who feels affected.'<sup>373</sup>

#### **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.

In Poland, it is therefore 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, Article 18<sup>3b</sup> § 2 point 4) 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>374</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 *Kücükdeveci* case.<sup>375</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 [...]'.<sup>376</sup>

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<sup>372</sup> See for instance: <http://wiadomosci.onet.pl/kraj/kontrowersyjny-regulamin-pracownikow-pll-lot/5nxlz>.

<sup>373</sup> See for instance: <http://www.rp.pl/artykul/809992-LOT-wycofuje-sie-z-zakazu-eksponowania-symboli-religijnych.html#ap-1>.

<sup>374</sup> CJEU, C-144/04, *Mangold v. Helm*, 22 November 2005.

<sup>375</sup> CJEU, C-555/07, *Kücükdeveci v Swedex GmbH & Co. KG*, 19 January 2010.



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 anti-discrimination 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>376</sup> There are fixed ages for entitlement to benefits.<sup>377</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 and younger workers in order to promote their vocational integration, and for people with caring responsibilities to ensure their protection.

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 6 hours per day for people under 16 and 8 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>378</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 public transport 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, with some exceptions, forbidden).<sup>379</sup>

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<sup>376</sup> Poland, Social Security Act, Article 6 (*Ustawa z 13 października 1998 r. o systemie ubezpieczeń społecznych*), 13 October 1998.

<sup>377</sup> Poland, Retirement Act, Articles 24 and 27 (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*), 17 December 1998.

<sup>378</sup> See Poland, Labour Code, Articles 190-204.

<sup>379</sup> Poland, Labour Code, Articles 190, 191, 202.

Those who have completed the first eight grades of their school education<sup>380</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 careers 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>381</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 requires a certain length of practice and therefore this is an indirect age limit.<sup>382</sup> To become a judge of the Supreme Court, a person must be more than 40 years old.<sup>383</sup> As regards administrative courts, there is an age limit for judges in regional administrative courts, who must be 35 or over.<sup>384</sup>

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 3 years.<sup>385</sup>

The minimum age for becoming a prosecutor is 26.<sup>386</sup> Under the Notaries Act, one of the conditions of becoming a notary is to be at least 26.<sup>387</sup>

The Ombud pays special attention to the problem of age limits. For instance, according to the law on degrees and academic titles, candidates for membership of the Central Commission for Degrees and Titles may not be persons over 70 years of age.<sup>388</sup> According to the Ministry of Science and Higher Education, the adopted age restriction is not discriminatory. However, the Ombud considers that total exclusion of persons over 70 years of age from the Commission may be discriminatory. Similar concerns relate to the age restrictions for members of the Main Board of Science and Higher Education and the Polish Accreditation Commission, as well as restrictions on the right to vote at elections to university bodies.<sup>389</sup>

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<sup>380</sup> Until 2017 general education comprised 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. In 2017 a change was introduced. Gymnasiums will gradually be abolished and general education comprises two levels only: primary school (8 grades) and secondary school (4 grades).

<sup>381</sup> Poland, Act of 27 July 2001 Law on Ordinary Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), 27 July 2001, Article 61.1 point 5.

<sup>382</sup> Poland, Law on Ordinary Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), 27 July 2001, Article 63.1, Article 64.1.

<sup>383</sup> Poland, Act of 8 December 2017 on the Supreme Court (*Ustawa z 8 grudnia 2017 o Sądzie Najwyższym*, Dz.U.2018.5), Article 30.1 point 3, in force from April 2018).

<sup>384</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.

<sup>385</sup> Poland, Act on the Organisation of the Administrative Judiciary (*Ustawa z dnia 25 lipca 2002 Prawo o ustroju sądów administracyjnych*), Article 7.1.

<sup>386</sup> Poland, Act of 28 January 2016 on Public Prosecution (*Ustawa z dnia 28 stycznia 2016 r. o prokuraturze*), (in force since 4 March 2016), Article 75.1 point 5.

<sup>387</sup> Poland, Act of 14 February 1991 on Notaries Public (*Ustawa z dnia 14 lutego 1991r. Prawo o notariacie*), Article 11 point 7.

<sup>388</sup> Poland, Law on degrees and academic titles and degrees and titles in the field of art (*Ustawa z 14 marca 2003 r. o stopniach naukowych i tytule naukowym oraz o stopniach i tytule w zakresie sztuki*), Art. 34a, Dz.U.2017.1789 t.j.

<sup>389</sup> Ombud Annual Report 2017, pp. 63-65.

#### 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.

It is possible, as a rule, for people who have reached normal pension age to combine employment with receipt of a pension.

However, there is an exception to this rule – if people of pension age do not terminate their employment contract and continue to work for the same employer (this applies equally to women and men), payment of 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>390</sup> It was considered to be an incentive for employers to hire younger workers in place of those who had become entitled to a retirement pension and thus possessed the financial resources to cover their living expenses.

There is no requirement for employees to retire when they reach pension age (see some exceptions in 4.7.4 c) below on mandatory retirement ages). The general pension age was, until the end of 2012, 60 for women and 65 for men. In May 2012, however, the pension age was changed by Parliament. The normal pension age for both men and women was set at 67 (to be introduced incrementally – for men by 2020 and for women by 2040).<sup>391</sup> Under legislation passed in 2016 (in force since October 2017) the previous pension age (60 for women and 65 for men) has been restored.<sup>392</sup>

The pension age is treated as a right not as an obligation and it is left to the discretion of the employee whether to retire.<sup>393</sup> On the one hand, only employees themselves 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>394</sup> in a special procedure, answered a 'legal question' lodged by the Commissioner for Human Rights (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

<sup>390</sup> Poland, Retirement Act (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*), Article 103a.

<sup>391</sup> Poland, Retirement Act (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) (Article 24, 27, amended 11 May 2012, in force since 1 January 2013).

<sup>392</sup> Poland, Retirement Act (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) (Article 24, 27, amended 16 November 2016, in force since 1 October 2017).

<sup>393</sup> Poland, Retirement Act (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*), Articles 24 and 27.

<sup>394</sup> Supreme Court Resolution, sygn. II PZP13/08, 21 January 2009.

employment of an employee – a woman or a man – just because they reached a certain retirement age and are entitled to a pension constitutes discrimination: indirect discrimination 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>395</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 payments 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.

#### 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.

If an individual wishes to work longer, payments from such occupational pension schemes cannot be deferred.

An individual can collect a pension and continue to work.

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 and if their employment has been terminated (if the individual continues to work for the same employer, the pension is suspended).<sup>396</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 an employment contract on account of an employee reaching retirement age, nor mandatory retirement ages for any sector, with the exception of judges (maximum age 60 for women and 65 for men; if extended, to maximum age 70),<sup>397</sup> public prosecutors (maximum age 60 for women and 65 for men; if extended – to maximum age 70),<sup>398</sup> court enforcement officers

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<sup>395</sup> Łódź Regional Court, *Marek R. v. Zakład Ubezpieczeń Społecznych*, sygn. akt P 10/07, 23 October 2007.

<sup>396</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>397</sup> Poland, Act of 27 July 2001 Law on Ordinary Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), Articles 69.1, 69.3.

<sup>398</sup> Poland, Act of 28 January 2016 on Public Prosecution (*Ustawa z dnia 28 stycznia 2016 r. o prokuraturze*), (in force since 4 March 2016), Article 127.

(maximum age 70)<sup>399</sup> and notaries public (maximum age 70).<sup>400</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 extended using the special procedure). This provision was criticised as discriminatory by the Ombud and the Plenipotentiary in their representations to the Minister of Health. 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>401</sup>

Secondly, in 2013 the Supreme Administrative Court delivered a judgment<sup>402</sup> regarding the retirement age of court bailiffs (judicial enforcement officer – *komornik sądowy*).<sup>403</sup> According to the Law on bailiffs (Article 15a paragraph 1, item 3a), the Minister of Justice dismissed bailiffs when they turned 65 (until 2013, currently 70). Dismissal by the Minister was challenged by a dismissed bailiff before a Regional Administrative Court, which upheld the 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 a 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, direct application of the provisions of Directive 2000/78/EC and in particular, Article 2 paragraph 2. However, the change to the law is also questionable.

In 2014 the Ombud continued its efforts to challenge certain upper age limits. 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>404</sup> In 2015 the opinion of the Ombud was supported by the bailiffs' self-regulatory body (the National Council of Bailiffs, *Krajowa Rada Komornicza*).<sup>405</sup> However, 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 to safeguard 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 prosecutors, for whom age limits were maintained. It is not possible to continue to perform the duties of a judge on reaching 70 years of age. Similar age restrictions are maintained in relation to notaries.<sup>406</sup>

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.

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<sup>399</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>400</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>401</sup> Ombud Annual Report 2013, pp. 394-395; Plenipotentiary Annual Report 2013, pp. 65-66. Act of 6 September 2001, Pharmaceutical Act (Article 88), as amended (relevant amendment: Dz.U. 2012.1544, Article 10.1).

<sup>402</sup> Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*), *R.C. v. Minister of Justice*, sygn. II GSK 391/12, 9 July 2013.

<sup>403</sup> Ombud Annual Report 2014, pp. 72-73. Poland, Act of 29 August 1997 on Bailiffs and Execution (*Ustawa z dnia 29 sierpnia 1997r. o komornikach sądowych i egzekucji*).

<sup>404</sup> Ombud Annual Report 2015, pp. 22-23.

<sup>405</sup> Ombud Annual Report 2016, p. 38.

<sup>406</sup> July 2014, Ombud Annual Report 2015, p. 23.

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>407</sup>

In 2015 an interesting case was decided by the Supreme Court.<sup>408</sup> A prosecutor who had reached the age of 65 sought the consent of the Prosecutor-General to continue employment. She was refused and challenged the refusal in the court. The Supreme Court stated that generational change is a criterion that the Prosecutor-General may take into account.<sup>409</sup>

As already mentioned above, in 2016 (in force since October 2017) the previous general pension age (60 for women and 65 for men) was restored.<sup>410</sup> This also caused changes in the mandatory retirement age of some specific professions (judges and prosecutors). Leaving aside for the purposes of this report the arguments concerning independence of the judiciary (this change of law is clearly seen as an element of the attack on the judiciary, in breach of the Polish Constitution and international obligations regarding judicial independence), the change of law will affect (starting April 2018, after the cut-off date of this report) not only future judges but also judges currently in service, who will be forced to retire.<sup>411</sup> However, the change also raises questions regarding discrimination. Clearly, re-establishing different mandatory retirement ages for female and male judges has a discriminatory character (as described below in the opinion of the European Commission).

This caused a firm reaction from the European Commission. The Commission concluded on 20 December 2017 (three previous rule of law recommendations had been adopted on 27 July 2016, 21 December 2016 and 27 July 2017) that there is a clear risk of a serious breach of the rule of law in Poland. The Commission therefore decided to take the next step in its infringement procedure against Poland for breaches of EU law by the Law on the Ordinary Courts Organisation.<sup>412</sup>

Regarding the retirement age of judges, the Commission recommends that the Polish authorities:

'Amend or withdraw the law on Ordinary Courts Organisation, in particular to remove the new retirement regime for judges including the discretionary powers of the Minister of Justice to prolong the mandate of judges and to appoint and dismiss presidents of courts;

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<sup>407</sup> Ombud Annual Report 2014, p. 96; Ombud Annual Report 2016, p. 106.

<sup>408</sup> Poland, Supreme Court, sygn. akt III PO 6/15, judgment of 16 July 2015.

<sup>409</sup> Poland, Supreme Court, 16 July 2015, XY v. Prosecutor General, sygn. akt III PO 6/15 available at: <https://www.saos.org.pl/judgments/243008>. The Supreme Court ruled that a properly conducted 'generational replacement' is an acceptable premise, also recognised in the jurisprudence of the CJEU (C-159/10 and C-160/10). The court stated: 'Settled case law of the Supreme Court is the position according to which the generational replacement of prosecutors is the premise that the Attorney General may consider in deciding on a prosecutor's application for consent to continue to hold the post. The Supreme Court cannot interfere with the statutory powers of the Attorney General and assess whether the person concerned should continue to perform its function as prosecutor. The Supreme Court only examines whether the decision of the Attorney General is not arbitrary or taken using prohibited criteria'. See also Ombud Annual Report 2016, pp. 77-78.

<sup>410</sup> Poland, Retirement Act, Article 24, 27, amended 16 November 2016, in force since 1 October 2017.

<sup>411</sup> According to the European Commission: 'Over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch'. See at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>412</sup> See at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

Amend the Supreme Court law, not apply a lowered retirement age to current judges, remove the discretionary power of the President to prolong the mandate of Supreme Court judges (...)'.

Additionally: 'The College of Commissioners also decided to refer the Polish Government to the European Court of Justice for breach of EU law, concerning the Law on the Ordinary Courts and, specifically, the retirement regime it introduces.

The Commission's key legal concern identified in this law relates to the discrimination on the basis of gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years). This is contrary to Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2006/54 on gender equality in employment.

In its referral to the European Court of Justice, the Commission will also raise the linked concern that the independence of Polish courts will be undermined by the fact that the Minister of Justice has been given a discretionary power to prolong the mandate of judges which have reached retirement age (see Article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights).<sup>413</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.

Apart from this, there is also the possibility to take out voluntary additional private pension 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 their additional private pension from within 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>414</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 Supreme Court rulings, and their publication, are most probably raising this awareness.

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<sup>413</sup> See at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>414</sup> Poland, Labour Code Article 39.

f) Compliance of national law with CJEU case law

In Poland, apart from the issues concerning retirement from judicial office which were mentioned above, 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

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>415</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>416</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>417</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).

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<sup>415</sup> Poland, Labour Code, Articles 39 and 40.

<sup>416</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>417</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.



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>418</sup>

On the basis of this provision, a number of limitations were introduced, especially in the area of protecting state security (visa regime, legalisation of residence, military service, etc.).

#### **4.9 Any other exceptions**

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.

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<sup>418</sup> Poland, Constitution, Article 31.

## **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 permitted 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>419</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.

Comparison of the ETA and the Labour Code shows that in the latter, the law mentions 'a limited period of time' within which positive action may be introduced. However, this should have no practical consequences.<sup>420</sup>

There is no significant case law concerning this issue.

The only serious debates (both within the Government and in public debate) 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 outside 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

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<sup>419</sup> Poland, Labour Code, Article 18<sup>3b</sup> § 3.

<sup>420</sup> ETA commentary 2017, p. 190.

schools (and even 150 % in the case of small schools).<sup>421</sup> The state budget also invests in schools and subsidises the production and publication of textbooks. Furthermore, the Ministry of Culture and National Heritage subsidises the minority press and other publications and sponsors cultural events organised by national and ethnic minorities.<sup>422</sup>

In relation to the Roma community special programmes, such as the Government Roma Programme 2004-2013, have been developed. 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>423</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. After some delay, the new programme started in 2015. The only report available on execution of the project is for the year 2015.<sup>424</sup>

However, examples of positive action included under the Roma Programme are as follows (and similar activities are to be continued):<sup>425</sup>

- 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 2015, 106 assistants were employed, the assistants are themselves from the Roma community);
- additional educational and other activities for Roma children and parents, psychological and pedagogical advice, organising holidays and camps, material help (purchasing school textbooks etc. – in 2015, 2 455 pupils, 82 % of Roma children who attend school, received this kind of help;
- special stipends for Roma students (in higher education) and Roma children with artistic talent (in 2015, 111 students and pupils received stipends);
- improving living conditions: in 2015, 514 Roma benefited from renovation and building of flats;
- preventative health examination and vaccination (1 604 people in 2015);
- employing special nurses to assist with medical problems;
- organising vocational training and supporting employment of Roma (270 people were employed in 2015; 105 people took part in vocational courses in 2016; 263 people were employed in 2016).<sup>426</sup>

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<sup>421</sup> This is renewed annually by the Minister of Education, for the most recent regulations see: Poland, Ordinance of the Minister of National Education of 15 December 2017 on the method of division of the educational part of the general subsidy for territorial self-government units in 2018 (*Rozporządzenie Ministra Edukacji Narodowej z dnia 15 grudnia 2017 r. w sprawie sposobu podziału części oświatowej subwencji ogólnej dla jednostek samorządu terytorialnego w roku 2018*), Dz.U.2017.2395.

<sup>422</sup> Information on particular programmes may be found on the website of the Ministry of Internal Affairs and Administration; 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 <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna>.

<sup>423</sup> *Program Integracji Społeczności Romskiej w Polsce na lata 2014-2020*, Warsaw 2014, also in English, available at <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>424</sup> As of March 2018, Information on the programme and programme activities for the years 2015, 2016, 2017, 2018. See at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>425</sup> See programmes and activities for particular years at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>426</sup> See Report on the Programme for the Integration of the Roma Community in Poland 2014-2020, for 2015; May 2016 (*Sprawozdanie z realizacji Programu Integracji Społeczności Romskiej w Polsce na lata 2014-2020, w 2015 roku; 5 maja 2016*), at <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol/program-integracji-spol/9928,Sprawozdanie-z-realizacji-Programu-integracji-spoleczności-romskiej-w-Polsce-na-.html>; see also Report on the National Programme 2017, pp. 82-83.

In March 2008, the Government announced a new programme called 'Solidarity between the Generations', which aimed to activate the over-50 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.

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. 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 (*Założenia Długofalowej Polityki Senioralnej w Polsce na lata 2014-2020*).<sup>427</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>428</sup> The next step was passing the Act of Parliament in 2015 – the first Act on elderly people in Polish history.<sup>429</sup> This Act imposes the obligation on the Government to monitor the situation of senior citizens, including from the perspective of equal treatment and counteracting discrimination, and to report on this annually. In March 2016, a bill on publicly funded health care services was amended so as to increase access to reimbursed products for recipients aged 75 or over.<sup>430</sup>

In 2016 the Ombud addressed the Minister for Family, Labour and Social Policy, specifically highlighting the problems of respecting the rights of elderly people and implementation of the principle of equal treatment regardless of age. The Ombud recommended that it is necessary to shift the emphasis from the focus on the social rights of this group of people to development of a comprehensive state policy on senior citizens, involving all institutions at central and local level. It is also vitally important to increase public awareness of the occurrence of age discrimination and to take systemic measures to counteract it.<sup>431</sup>

A number of measures can be considered as positive action in the field of disability (many of these 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 people officially recognised as disabled (who were unemployed or seeking work while not holding a job 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>432</sup>

Furthermore, an employer who employs people with disabilities is entitled to receive a monthly subsidy for the remuneration of disabled employees.<sup>433</sup> The amount of the subsidy is related to the level of impairment of the people with disabilities employed and is currently approximately EUR 400, 200 or 100 (PLN 1 800, 1 125 or 450), depending on the level of

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<sup>427</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>428</sup> Ombud Annual Report 2014, pp. 19-20, see also Report on the National Programme 2015, pp. 112-115.

<sup>429</sup> Poland, Act of 11 September 2015 on elderly people (*Ustawa z dnia 11 września 2015 r. o osobach starszych*, Dz.U.2015.1705).

<sup>430</sup> Ombud Annual Report 2017, p. 62.

<sup>431</sup> Ombud Annual Report 2017, p. 58.

<sup>432</sup> Poland, Disabled Persons Act, Article 26.

<sup>433</sup> Poland, Disabled Persons Act, Article 26a.

disability.<sup>434</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>435</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>436</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>437</sup> if the proportion of people with disabilities 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>438</sup>

In addition, there are several programmes which aim to integrate people with disabilities into the labour market (financed by the PFRON).

### *Migrants*

There are no major positive action measures related to migrants. Current Polish government policy regarding migrants might be characterised by the objection to reception of immigrants and refugees within the common EU policy. As the Prime Minister stated, 'I cannot see the possibility of immigrants coming to Poland right now'.<sup>439</sup> At the same time, there are thousands of migrants, mainly from Ukraine, in Poland. Polish companies apply for work permits for these people. There are special procedures that facilitate the process of employment of seasonal workers.

The Council of Ministers, acting at the request of the Minister of Interior and Administration, annulled the Polish Migration Policy applicable since 2012, which was the first attempt to create a comprehensive state strategy in the field of migration, as well as proof that the Polish state perceived the benefits of an open approach to migrants. The strategy recommended, among other measures, facilitating access to the labour market and creating systemic integration programmes. It stressed the need to undertake activities aimed at promoting the idea of intercultural dialogue and dissemination of reliable knowledge about the phenomenon of migration, while not omitting the issues of the security of the state, the need for effective border protection and prevention of unregulated migration.

In the Strategy for Responsible Development adopted on February 14, 2017, the Council of Ministers decided to develop a new migration policy. According to the Ministry of Interior (letter to the Ombud, 5 December 2017) work on the migration policy has been included in the priorities of the Ministry of Interior and Administration for 2018.<sup>440</sup>

Several bodies operate special websites for migrants but also for Polish employers, providing information regarding employment of or discrimination against migrants: these include the Ministry of Internal Affairs;<sup>441</sup> the Ombud Office;<sup>442</sup> the Office for Foreigners.<sup>443</sup>

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<sup>434</sup> As of January 2018 — exchange rate approx. EUR 1.00=PLN 4.30.

<sup>435</sup> Poland, Disabled Persons Act, Article 26d.

<sup>436</sup> See Article 21.1-2 Disabled Persons Act.

<sup>437</sup> Poland, Act of 21 November 2008 on the civil service, (*Ustawa o służbie cywilnej z 21 listopada 2008*), Dz.U.2017.1889 t.j., Art. 29a.

<sup>438</sup> Ombud Annual Report 2015, pp. 71-72.

<sup>439</sup> 'Nie widzę możliwości, aby w tej chwili do Polski przyjechali imigranci.'; <http://www.newsweek.pl/polska/polska-nie-przyjme-imigrantow-beata-szydlo-w-wywiadzie-dla-superstacji.artykuly.382568,1.html>, 23 March 2016.

<sup>440</sup> Ombud Annual Report 2018, pp. 348-349.

<sup>441</sup> See at: <http://www.migrant.info.pl/home.html>.

<sup>442</sup> See at: <https://www.rpo.gov.pl/pl/sprawa/migranci>.

<sup>443</sup> See at: <https://udsc.gov.pl/en/>.

The Ministry of Labour also publishes information on assistance for foreigners.<sup>444</sup> In addition, in 2013 an important draft strategic document, *Polska polityka integracji cudzoziemców – założenia i wytyczne* (Polish policy on integration of foreigners – assumptions and guidelines) was prepared by the Ministry of Labour and Social Policy and was available for consultation purposes for a couple of years after 2013. However, the Government never gave final approval to the document.<sup>445</sup> It included many recommendations in regard to employment of foreigners as well as their housing and access to education.

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<sup>444</sup> See at: <http://www.mpips.gov.pl/pomoc-spoleczna/integracja-cudzoziemcow/wybrane-informacje-dotyczace-pomocy-udzielanej-cudzoziemcom/>.

<sup>445</sup> *Polska polityka integracji cudzoziemców – założenia i wytyczne*, 2013.

## 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).

#### *Civil law*

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.

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>446</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>447</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.

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<sup>446</sup> Warsaw Regional Court, sygn. I C 498/08, 28 January 2009.

<sup>447</sup> Warsaw Court of Appeal, I ACa 300/11, 28 September 2011.

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 rights results in material loss, the victim may demand compensation on general legal terms (Article 24 (2)). Court verdicts are binding.

#### *Labour law*

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 paragraph 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 reduced in a discriminatory manner.<sup>448</sup>

#### *Labour inspectors*

In addition, certain remedies may be applied by the 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>449</sup> Measures taken by labour inspectors are binding, but the employer may challenge them in administrative court.

#### *Legal representation and court fees*

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>450</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>451</sup> In addition, in labour cases claims are automatically exempted from court costs.<sup>452</sup>

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<sup>448</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>449</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., Articles 21-33. See also Article 63<sup>1</sup> Code of Civil Procedure.

<sup>450</sup> Poland, Code of Civil Procedure, Article 87.1.

<sup>451</sup> Poland, Code of Civil Procedure, Article 465.1.

<sup>452</sup> Poland, Law on court costs in civil cases (*Ustawa z dnia 28 lipca 2005 r. o kosztach sądowych w sprawach cywilnych*, Dz.U.2018.300 t.j.), 28 July 2005, Article 35.



### *Petty crimes*

The law on petty crimes<sup>453</sup> 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 they might play a role in the prohibition of discrimination in access to goods and services. In such cases, 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 around EUR 1 250 (PLN 5 000). Court verdicts are binding. These provisions had not been used for years until finally the Ombud decided to use them (Article 138) in the case of a person using a wheelchair who was asked to leave a shop.<sup>454</sup>

In 2016 the provisions of the law on petty crimes mentioned above became the subject of lively debate when an interesting case was dealt by the courts under Article 138.<sup>455</sup> A small printing company refused to print a roll-up banner for the CSO LGBT Business Forum. In an email refusing the work, an employee wrote that 'we do not contribute to the promotion of the LGBT movement in our work'. Following a complaint from LGBT organisations, the Ombud submitted a motion to the police suggesting an investigation in relation to discrimination in access to goods based on the Petty Crimes Law. The police agreed and filed a motion with the court to fine the company. The Łódź-Widzew District Court fined the printers PLN 200 (EUR 45) in a simplified procedure (meaning there was no hearing: the court fined the employee based only on the motion of the police). There was an appeal against the court decision. When such a fine is challenged, the case starts again from the beginning in a court of first instance, using a regular procedure with a court hearing.

The case was resolved in the first instance on 31 March 2017. The District Court for Łódź-Widzew decided that the entrepreneur was guilty of committing the misdemeanour in Article 138 of the Code of Petty Crimes and indicated that his personal convictions did not justify refusing to perform the service. However, the court waived the punishment in the form of a fine. The decision was appealed against. The court of second instance – the Regional Court in Łódź (*Sąd Okręgowy*) – decided on 26 May 2017, the very last day the case could be decided, to reject the appeal and upheld the ruling of the court of first instance. However, in September 2017 the Minister of Justice filed a cassation complaint with the Supreme Court and the case is pending.<sup>456</sup>

This case received a great deal of attention. The Minister of Justice/Prosecutor General intervened in a written statement and instructed the prosecution to appeal against the decision. According to the Minister,<sup>457</sup> the judgment of the court (first decision, decided in a simplified procedure, without a hearing) 'stifles freedom of thought, beliefs and views, as well as economic freedom and freedom of transactions. It puts the Foundation representing sexual minorities in a privileged position and infringes the freedom of conscience of an employee, who has the right not to support homosexual content. (...) Courts are obliged to guard the constitutional freedom of conscience, and not to violate it. They are supposed to protect the rights and freedoms of citizens, including the freedom to pursue business, and not impose coercion on them. No ideological reasons justify violating these fundamental principles (...).' This statement was interpreted as a blatant threat to the independence of the judiciary and the independence and impartiality of judges in

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<sup>453</sup> Poland, Law of 20 May 1971 on petty crimes (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń*; Dz.U.1971.12.115).

<sup>454</sup> Information provided to the author of the report by the Ombud's Office.

<sup>455</sup> See more in Section 12.2, below.

<sup>456</sup> As of March 2018.

<sup>457</sup> The statement was available on the site of the Ministry of Justice but was later removed.

particular (statements of Iustitia, the judges' association,<sup>458</sup> the Helsinki Foundation for Human Rights<sup>459</sup> and others).<sup>460</sup> The Ombud also took a position by sending a letter to the Minister which analysed the concept of discrimination, especially in access to goods and services.<sup>461</sup>

The case also provoked a debate in conservative circles. The Ordo Iuris think tank initiated several actions. It prepared a petition to amend the Code of Petty Crimes by deleting Articles 135 and 138 'as a relic of communism, used by promoters of radical ideologies to limit freedom of thought and economic activity'.<sup>462</sup> The petition was signed by more than 16 000 people,<sup>463</sup> and these signatures were officially handed over together with the proposal for amendment to the Deputy Minister of Justice on 19 December 2016.<sup>464</sup>

A similar case involving access to services took place in March 2017. An entrepreneur (Robert K.) who delivers training courses in Krav Maga, a form of self-defence and fighting system, first agreed but later refused to organise a training course of this kind when he found out that the group that requested it was composed of gay people. The group sent a complaint to the Ombud and considered invoking Article 138 of the Code of Petty Crimes.<sup>465</sup> The Ombud informed the police, who decided to bring<sup>466</sup> the case to court.<sup>467</sup>

### *Criminal law*

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>468</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>469</sup> or the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.<sup>470</sup> Court decisions are binding.

### *Administrative law*

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

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<sup>458</sup> See at: <http://www.iustitia.pl/uchwaly/1507-opinia-iustitii-w-sprawie-skargi-krs-do-trybunalu-konstytucyjnego>.

<sup>459</sup> See at: <http://www.hfhr.pl/ministerstwo-sprawiedliwosci-krytykuje-wyrok-sadu-rejonowego- stanowisko-hfpc/>.

<sup>460</sup> See at: <http://www.rp.pl/Dobra-osobiste/307279883-Drukarze-nie-maja-klauzuli-sumienia---rozmowa-z-Irena-Kaminska.html?template=restricted>.

<sup>461</sup> See at: <https://www.rpo.gov.pl/sites/default/files/RPO%20do%20Zbigniewa%20Ziobro%2029.07.2016.pdf>.

<sup>462</sup> See at: <http://www.ordoiuris.pl/wolnosc-gospodarcza/ordo-iuris-zlikwidujmy-komunistyczne-relikty-z- kodeksu-wykroczen>.

<sup>463</sup> See at: <http://www.maszwplyw.pl/zlikwidujmy-komunistyczne-relikty-w-kodeksie-wykroczen- ml2,60,k.html>.

<sup>464</sup> See at: <http://www.ordoiuris.pl/wolnosc-gospodarcza/ordo-iuris-w-obronie-praw-przedsiębiorców>.

<sup>465</sup> See at: <https://www.facebook.com/grupastonewall/posts/1021872407956405>; <http://rainbowstar.pl/pl/samoobrona-dla-osob-lgbt/>; <http://wyborcza.pl/7,87647,21625227,samoobrona- przed-gejami.html>.

<sup>466</sup> See at: <http://poznan.wyborcza.pl/poznan/7,36001,21890090,odmowil-lekcji-osobom-lgbt-policja-stawia- zarzuty-ale-waha.html>.

<sup>467</sup> After the cut off-date for this report, in March 2018 the court of first instance found Robert K. guilty of the misdemeanour, but the punishment was waived. The advocate for Robert K. declared that an appeal against the decision would be filed.

<sup>468</sup> Poland, Penal Code, Article 119.1.

<sup>469</sup> Poland, Penal Code, Article 257.

<sup>470</sup> Poland, Penal Code, Article 256.

administrative procedure (amending the Administrative Procedure Code).<sup>471</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>472</sup> The procedure is binding.

#### *Ombud*

In terms of non-judicial measures, a complaint to the Polish Ombud's Office – the Commissioner for Human Rights (*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>473</sup>

#### *European Court of Human Rights*

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

#### *Alternative dispute resolutions*

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>474</sup>

Cases can be referred to a conciliation committee only by employees and not by employers. 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>475</sup> An agreement reached before a conciliation committee should be implemented voluntarily 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>476</sup>

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 decision.

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 court proceeding commence.<sup>477</sup> Confirmation by a court of an agreement reached between parties is binding in the same way as a court decision.

The procedures mentioned are the same in relation to employment in the private and public sectors.

#### a) Barriers and other deterrents faced by litigants seeking redress

The time limits in the procedures mentioned vary, but generally speaking they do not act as deterrents to seeking redress, as they are counted in years rather than months. The

<sup>471</sup> Poland, Act of 14 June 1969 - Code of Administrative Procedure [amended] (*Ustawa z dnia 14 czerwca 1969 r. - Kodeks postępowania administracyjnego*).

<sup>472</sup> Poland, Code of Administrative Procedure, Article 145b.1.

<sup>473</sup> See Poland, Act of 15 July 1987 on the Commissioner for Human Rights (*Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), Articles 11-14.

<sup>474</sup> Poland, Labour Code, Article 242.

<sup>475</sup> Poland, Labour Code, Article 251.

<sup>476</sup> Poland, Labour Code, Article 255.1.

<sup>477</sup> See Poland, Code of Civil Procedure, Article 184-186.

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 3 years in cases of 'periodic services' or cases related to the 'professional activity of the party as an entrepreneur'.<sup>478</sup> This shortened three-year period may cause problems. According to research conducted in 2009 by the Polish Section of the International Commission of Jurists (ICJ),<sup>479</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>480</sup>

The ICJ draft report describes, for instance, several civil cases against JMD<sup>481</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 more than three years before the case was brought to court and were therefore 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>482</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>483</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>484</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 administrative decision) may be filed within a month of the court ruling on which the claim

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<sup>478</sup> Poland, Civil Code Article 118.

<sup>479</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>480</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>481</sup> JMD - Jeronimo Martins Dystrybucja S.A. is the owner of Poland's largest chain of retail stores that now operates over 2 800 stores and several distribution centres; see [www.biedronka.pl/](http://www.biedronka.pl/).

<sup>482</sup> See: Supreme Court Judgment, II PK 224/06, 29 March 2007; Supreme Court Judgment, I PK 288/04, 22 June 2005; Supreme Court Judgment, I PK 277/07, 8 May 2008; Supreme Court Judgment, III UK 111/04, 20 October 2004.

<sup>483</sup> Compare e.g. Supreme Court Judgment, I PKN 273/97, 17 September 1997; Supreme Court Judgment, I PK 261/2004, 29 June 2005; Supreme Court Judgment, IV CSK 492/2008, 19 March 2009.

<sup>484</sup> Poland, Labour Code, Article 8.

is based, becoming final.<sup>485</sup> The administrative decision may be quashed within five years of it being served or announced.<sup>486</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>487</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>488</sup>

Moreover, an employee can terminate an employment contract without notice if the employer has severely violated their obligations towards the employee<sup>489</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.

#### b) 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. 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>490</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>491</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 2010 Equal Treatment Act, as declared by the Ministry of Justice, but on other laws (such as the Labour Code and Civil Code).<sup>492</sup>

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<sup>485</sup> Poland, Administrative Procedure Code, Article 145b.2.

<sup>486</sup> Poland, Administrative Procedure Code, Article 146.1.

<sup>487</sup> Poland, Labour Code, Article 18<sup>3e</sup>.

<sup>488</sup> Poland, Labour Code, Articles 44-45.

<sup>489</sup> Poland, Labour Code, Article 55.

<sup>490</sup> Information on activities of the Commissioner for Human Rights 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, (*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*), p. 79, 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>491</sup> Ombud Annual Report 2013, p. 451.

<sup>492</sup> See: PTPA (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu* (Anti-discrimination law in the practice of Polish Ordinary Courts. Monitoring report'), Polish Society of Anti-Discrimination Law, pp. 98-99; (available at [www.ptpa.org.pl](http://www.ptpa.org.pl)).

According to information provided by the Ministry of Justice<sup>493</sup> on the request of the Ombud, in the year 2013, 11 cases claiming compensation for discrimination based on protection of personal rights and the ETA were brought to district and regional courts and 1 case to an Appellate court. Of the 12 cases, in 3 cases the claims were dismissed, 2 cases were returned, 1 case was discontinued and 6 cases were still pending in 2014. In the Ombud's annual reports since 2014 numbers are not given, since the Ministry does not provide them. The number of cases based on ETA was provided for 2015 in the report of the Plenipotentiary.<sup>494</sup> In answer to a query from the Plenipotentiary, the Ministry of Justice provided information on 17 cases brought in 2015 under ETA. However, nobody verified this information.

Although the information is official (at least covering some years), it must be said that it is not wholly reliable. In 2014 a coalition of CSOs contacted all Polish courts requesting, in the official formula of access to public information, data on discrimination cases brought under the ETA.<sup>495</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 carrying out 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, 4 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>496</sup>

#### c) 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. As a result, the data on cases registered is not wholly reliable.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

A civil society organisation may act in support but sometimes also on behalf of the complainant.<sup>497</sup>

<sup>493</sup> Ombud Annual Report 2014, p. 107.

<sup>494</sup> Plenipotentiary Annual Report 2017, pp. 10-11.

<sup>495</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>496</sup> Ombud Annual Report 2013, pp. 450-451; Ombud Annual Report 2014, p. 107. No relevant information given in the 2015, 2016 and 2017 reports.

<sup>497</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

a) Engaging on behalf of victims of discrimination (representing them)

This solution was adopted in the Code of Civil Procedure, which allows civil society organisations to file a claim on behalf of individuals or join such proceedings,<sup>498</sup> e.g. in alimony (maintenance) and consumer protection cases<sup>499</sup> or in labour law and social security cases.<sup>500</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>501</sup> Since May 2012, CSOs 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 verbal 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'.<sup>502</sup> 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).<sup>503</sup>

It should be mentioned that, in fact, standing on behalf of victims of discrimination is seen by CSOs as a very professional activity requiring special competences. The research undertaken by the Polish Association of Anti-Discrimination Law has shown that not many CSOs engage in this kind of work: it is mostly those familiar with legal issues, especially large, strong CSOs based in the capital city.<sup>504</sup>

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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 pp. 184-189).

<sup>498</sup> Poland, Code of Civil Procedure, Article 8.

<sup>499</sup> Poland, Code of Civil Procedure, Article 61.

<sup>500</sup> Poland, Code of Civil Procedure, Article 462.

<sup>501</sup> Poland, Act of 2 July 2004 amending the Code of Civil Procedure and some other acts, entered into force on 4 February 2005 (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*), Article 61.

<sup>502</sup> Poland, Administrative Procedure Code, Article 31.1.

<sup>503</sup> Poland, Administrative Procedure Code, Article 31.3.

<sup>504</sup> See: PTPA (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu* (Anti-discrimination law in the practice of Polish Ordinary Courts. Monitoring report), Polish Society of Anti-Discrimination Law, pp. 179-212; available at [www.ptpa.org.pl](http://www.ptpa.org.pl).



b) Engaging 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>505</sup>

Since May 2012, CSOs 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 civil society 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>506</sup> There was also an important ruling of the Constitutional Tribunal (CT) which referred to an *amicus curiae* brief provided by a CSO 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>507</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'.<sup>508</sup> 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).<sup>509</sup> 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.<sup>510</sup> 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 the Code of Criminal Procedure,<sup>511</sup> 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 whether to admit the representative rests with the court, which evaluates the importance of the public or individual interest. The application to admit a representative should be submitted in writing and designate as the representative a specific person or persons. In criminal proceedings, a written application would be needed.

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<sup>505</sup> Poland, Act of 2 July 2004 amending the Code of Civil Procedure and some other acts, entered into force on 4 February 2005 (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*), Article 61.

<sup>506</sup> Poland, Code of Civil Procedure, Article 63.

<sup>507</sup> Constitutional Tribunal, SK 30/05, judgment of 16 January 2006, justification p. I. 8. p. III 2.2.

<sup>508</sup> Poland, Administrative Procedure Code, Article 31.1.

<sup>509</sup> Poland, Administrative Procedure Code, Article 31.2-5.

<sup>510</sup> Poland, Act of 30 August 2002 on Procedure before Administrative Courts, (*Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi*, Dz.U.2017.1369 t.j.), Articles: 9; 25.4; 33.2.

<sup>511</sup> Poland, Act of 6 June 1997 the Code of Criminal Procedure (*Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego*, Dz.U.2017.1904 t.j.), Articles 90-91.



In criminal proceedings, the rights of a representative of a civil society organisation are limited to: participation in the hearing, expressing their opinion verbally 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>512</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 the 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>, paragraph 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).

However, since in reality parties rarely base their claims on the 2010 Equal Treatment Act,<sup>513</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 rights cases – where the burden of proof is not shifted as under

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<sup>512</sup> Poland, Act of 17 December 2009 on pursuing claims in collective actions, in force from 19 July 2010 (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*, Dz.U. Nr 7, poz. 44 z 18 stycznia 2010).

<sup>513</sup> See point 6.1 above.

the ETA or Labour Code but there is still a mechanism for reversing the burden of proof (Article 24 paragraph 1, Civil Code).

In addition, since the 2010 Equal Treatment Act generally limits possible damages sought to material damage only,<sup>514</sup> a compensation claim for non-material damage would require following general civil rules – again without the shift of the burden of proof.<sup>515</sup>

According to the Equal Treatment Act (Article 14.2), whoever (complainant) alleges infringement of the principle of equal treatment must 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 practice, the 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>516</sup> And if the claimant is not able to show the particular ground of discrimination, the complaint might be 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 (even though the provision refers to 'person' this wording has never given rise to, nor could in fact be interpreted, limitation of protection from victimisation to one person as opposed to a group of persons.).<sup>517</sup> The protection goes beyond the scope of the directive and extends to a person who in any way supports someone exercising their rights<sup>518</sup> (such as a witness or a person helping the victim to bring a complaint).<sup>519</sup> In the case of victimisation, the victim may file the same compensation claims as a victim of discrimination.<sup>520</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>521</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>522</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

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<sup>514</sup> See point 6.5 below.

<sup>515</sup> See interesting analyses on the burden of proof in: ETA commentary 2017, pp. 192-203.

<sup>516</sup> See for instance Supreme Court decisions: III PK 126/13, 03 June 2014, and III PK 126/13, 18 April 2012.

<sup>517</sup> Poland, Equal Treatment Act, Article 17.1.

<sup>518</sup> Poland, Equal Treatment Act, Article 17.2.

<sup>519</sup> See: ETA commentary 2017, p. 232.

<sup>520</sup> Poland, Equal Treatment Act, Article 17.3 and Article 13.

<sup>521</sup> Poland, Equal Treatment Act, Article 3.5.

<sup>522</sup> Poland, Act of 21 November 2008 on the amendment of the Act on the Labour Code, in force since 18 January 2009 (Dz.U. Nr 223, poz. 1460, 18 December 2008).

are prohibited (Article 18<sup>3e</sup>(1) Labour Code). This broadened Labour Code protection covers complainants but also extends to employees who in any way support a victim of discrimination (Article 18<sup>3e</sup>(2)).

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>523</sup>

However, the Equal Treatment Act refers to compensation only (*odszkodowanie*) which covers material (but not non-material) damage and therefore limits protection.<sup>524</sup>

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 2017, PLN 2 000 gross salary, around EUR 475 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>525</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

<sup>523</sup> Poland, Equal Treatment Act, Article 13.2 and 14.1.

<sup>524</sup> See interesting analyses on compensation in: ETA commentary 2017, pp. 192-203.

<sup>525</sup> Poland, Labour Code, Article 56.1 and 45.2. See also the Supreme Court ruling, I PKN 565/98, 9 February 1999 (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>526</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>527</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 approx. EUR 700 (PLN 3 000).<sup>528</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>529</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 2017, PLN 2 000 gross salary, around EUR 475 per month).<sup>530</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 EUR 5000). In 2013 compensation based on the ETA was awarded only in one case (approx. EUR 300 – PLN 1 200).<sup>531</sup> In 2017 compensation based on the ETA was awarded in the case of indirect discrimination because of political opinion (*Światopogląd*). The court of second instance (*sąd okręgowy*) changed the decision of the court of first instance and in March 2017 awarded PLN 1 000 (approx. EUR 250) to the claimant YZ and 1 000 PLN to the PTPA, the CSO acting on his behalf.<sup>532</sup>

Generally, in civil cases compensation awarded for 'moral loss' or 'suffering'<sup>533</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

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<sup>526</sup> Poland, Labour Code, Article 55 § 1.

<sup>527</sup> Poland, Labour Code, Article 94 point 2b.

<sup>528</sup> Poland, Employment Act, Article 121.3.

<sup>529</sup> Poland, Employment Act, Article 123.

<sup>530</sup> The level of the minimum wage is set each year by the Regulations on the minimum wage.

<sup>531</sup> Ombud Annual Report 2014, p. 92.

<sup>532</sup> See more details about the case in Section 12.2 below.

<sup>533</sup> Poland, Civil Code, Articles 445 and 448.

development.<sup>534</sup> The law grants discretion to judges, stating that they should determine 'an appropriate amount'<sup>535</sup> for moral loss and suffering. This judicial independence is supported by the Supreme Court, which leaves the level of compensation awarded solely to the discretion of the judges deciding particular cases.<sup>536</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>537</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 (but not non-material) damage and therefore limits protection (in general, civil law differentiates material damage (*odszkodowanie*) and non-material damage (*zadośćuczynienie*) and regulates the two separately). 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 to include non-material damage.<sup>538</sup> The relevant legislative amendments were also proposed in two draft laws (but none of them was passed). There are however also interpretations that 'compensation' from the ETA should cover non-material damage, as it should be read in line with the directives (non-material damage should be covered even though the provision mentions only compensation, or it should be covered by using the general provisions of the civil law to which the ETA refers). This is also the current position of the Ombud, who regrets that courts sometimes do not see it this way.<sup>539</sup> In the first case<sup>540</sup> decided under Article 13 of the ETA the court of first instance found discrimination by association and awarded the claimant the compensation. The court differentiated between material and non-material damages, underlining that Article 13 covers both; however, it awarded only material damages and refused to grant non-material damages. The claimant appealed against the ruling, arguing that Article 13 of the ETA should be read together with Article 17 of Directive 2000/78/EC. The claimant argued that, due to mistaken interpretation, the national court did not impose a sanction that could be understood as effective, dissuasive and proportionate. The second instance court stressed that the ETA does not differentiate in Article 13 between material and non-material damages and by doing this, the first instance court made a mistake. The second instance court suggested rather that referral to the Civil Code (that includes non-material damages) should be used, but at the same time, the court decided that the amount of the damages awarded was adequate. The lack of an adequate number of cases based on the ETA does not allow for a clear line of judicial interpretation.

It is also questionable whether the only special sanction in the Labour Code, as 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).

<sup>534</sup> See e.g. Supreme Court Judgment, II CSK 78/2008, 29 May 2008; Supreme Court Judgment, V CKN 1114/2000, of 12 July 2002.

<sup>535</sup> Poland, Civil Code, Article 445.

<sup>536</sup> Supreme Court Judgment, III KK 349/2007, 4 February 2008.

<sup>537</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>538</sup> Ombud Bulletin 2012/2, pp. 78-79.

<sup>539</sup> Ombud Annual Report 2017, pp. 155-156.

<sup>540</sup> District Court Warszawa Śródmieście, XY and Polish Society of Anti-discrimination Law on behalf of XY v. Company Z, sygn. VI C 402/13, decision 9 July 2014, Regional Court in Warsaw (second instance), sygn. V Ca 3611/14, decision 18 November 2015, not published.

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>541</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>541</sup> Warsaw Regional Court, A.A. v. Bank, XXI Pa 81/12, 25 May 2012, 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 Human Rights<sup>542</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 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. In 2016 the Plenipotentiary for Equal Treatment was in practice merged with the newly created Government Plenipotentiary for Civil Society.<sup>543</sup> At the same time the office of the Plenipotentiary for Equal Treatment was closed, and a new office serving both plenipotentiaries was created. According to law the plenipotentiaries are two different organs (one based on an Act of Parliament and the other based on an Ordinance of the Council of Ministers – each law mentions only one organ), but in practice there is a personal union, as the same person holds both positions and even the titles of the two plenipotentiaries are merged on its website as 'Plenipotentiary for Civil Society and Equal Treatment'.<sup>544</sup> Since the merger, the role of the Plenipotentiary for Equal Treatment has been significantly reduced, and most of its staff members were assigned new tasks related to the other role of the merged office.

- b) Political, economic and social context for the designated body

There is evidence of recent political hostility to the governance of the designated body/bodies. After the parliamentary elections in October 2015 and shifts within the Government in the years 2016-2017, the Ombud faced various political attacks (including calls and even campaigns demanding that the Ombud's appointment should be revoked by the Parliament because he represents liberal, leftist views, supports LGBT people etc.). Both politicians<sup>545</sup> (as confirmed by the spokeswoman for the ruling party)<sup>546</sup> and the legal think tank *Ordo Iuris*<sup>547</sup> gave voice to this. Senior government officials and members of Parliament of the ruling party on many occasions (including in the Parliament during discussions on the Ombud's proposed budget and annual information on activities) attacked Dr Adam Bodnar, the current Ombud, accusing him of not remaining neutral and being politically engaged (the Ombud defends the independence of the judiciary, which is openly attacked and undermined by the ruling Law and Justice party) but also for treason, for reporting to international human rights bodies and for focusing too much on anti-discrimination issues.

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<sup>542</sup> The Office of the Ombud changed its English name to Human Rights Defender, even the Commissioner for Civil Rights Protection is a more accurate translation of the Polish name - *Rzecznik Praw Obywatelskich*.

<sup>543</sup> Poland, Council of Ministers Ordinance on the Government Plenipotentiary for Civil Society (*Rozporządzenie Rady Ministrów z dnia 8 stycznia 2016 r. w sprawie ustanowienia Pełnomocnika Rządu do spraw społeczeństwa obywatelskiego*), 8 January 2016.

<sup>544</sup> <http://www.spoleczenstwoobywatelskie.gov.pl>.

<sup>545</sup> <https://oko.press/pieta-chce-odwolac-bodnara/>; <https://wiadomosci.wp.pl/w-pis-pojawil-sie-pomysl-odwolania-adama-bodnara-to-skutek-materialu-wiadomosci-tvp-6056077225185921a>.

<sup>546</sup> <http://300polityka.pl/news/2016/11/05/po-wypowiedzi-mazurek-do-odwolania-bodnara-potrzeba-35-glosow-pis-musialoby-szukac-wsparcia-u-opozycji/>.

<sup>547</sup> <http://www.maszwpływ.pl/adam-bodnar-musi-odejsc-,57,k.html>.

There is evidence of de facto cutbacks in the budget of the designated body and such cutbacks are disproportionate compared to those for other public bodies.

In 2011 the total annual budget of the Ombud's Office was PLN 35 424 000 (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 since 2013, however, the Ombud has not received 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).

During the last three years, since the change of Government, there have been significant developments regarding the budget. The budget in 2015 was PLN 38 600 000 – approx.<sup>548</sup> EUR 9.2 million; the Commissioner applied for an increase of 18 % in 2016 (for renovation and new tasks). However, the Parliament reduced the budget in 2016 to PLN 35 600 000 – approx. EUR 8.5 million, which is in fact almost equal to the budget for 2011. The budget in 2017 was PLN 37 180 000 – approx. EUR 8 850 000, while the Commissioner had applied for PLN 41 000 000 – approx. EUR 9 750 000. Every year the proposed budget prepared by the Ombud is cut by the Parliament. In the opinion of the Ombud, the resources provided for the Office are not adequate for realisation of the Ombud's designated tasks.<sup>549</sup>

At the beginning of 2016, an interesting debate about the Ombud took place. As already mentioned, the Ombud asked the Parliament for an 18 % increase in its budget (as compared to 2015) for (inter alia) renovation of two buildings and adaptations for persons with disabilities (renovation was recommended by the National Labour Inspectorate) and the creation of eight new posts (in departments not related to equal treatment). The first discussion on the budget took place at a meeting of the Parliamentary Commission of Justice and Human Rights on 5 January 2016. On 14-15 January the second discussion took place at the Parliamentary Commission of Public Finances. During the meetings of both Commissions, MPs from the ruling party expressed their concerns regarding the policy of the Ombud. They underlined their dissatisfaction that the Ombud had appointed a 'gender expert' as a deputy. ('You are appointing yourself a deputy for gender issues and the Parliament is supposed to pay for it?'). As a result, the budget requested was cut (and was even smaller than in previous years).<sup>550</sup> A similar 'critique' was also formulated during consideration of the budget in 2017. The Parliamentary Committee on Justice issued a negative opinion on the draft budget for 2018.<sup>551</sup> MPs from the ruling coalition attacked the Ombud for being focused 'on pathological groups'.

Moreover, if one compares the various public institutions it is clearly noticeable that their budgets are increasing significantly. The Ombud's office is probably the last to face such financial restraints (after the Constitutional Tribunal was – as experts have stated – taken over by the ruling party and its budget increased as a result).

There is evidence of lively debate among both those who support equality and diversity and the designated body and those hostile to equality and diversity and to the designated body.

The numerous attacks on the Ombud created defensive reactions in circles that support this office. Therefore for last two years both supportive and hostile voices have been heard.

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<sup>548</sup> Exchange rate for 2015-2017 – EUR 1 = PLN 4.2.

<sup>549</sup> All budgetary information provided is based on information prepared by the Ombud's Office.

<sup>550</sup> Budget of the Ombud for 2015 and 2016: <http://www.bip.brpo.gov.pl/index.php?md=10814>.

<sup>551</sup> See at: <https://www.rpo.gov.pl/en/content/parliamentary-committee-justice-issued-negative-opinion-chr%E2%80%99s-draft-budget-2018>.



The campaign by Ordo Iuris to revoke the appointment of the Ombud was signed by over 35 000 people. The first sentence of their manifesto reads: 'One cannot be silent when a constitutional human rights body is opposed to fundamental freedoms and rights guaranteed in the Constitution of the Republic in the name of the particular interests of the LGBT subculture. The events of recent months show that radical social activist Adam Bodnar has failed to cope with the difficult mission of impartiality to guard our rights and freedoms.' It then lists various actions of the Ombud and concludes: 'All these actions demonstrate that the Ombud's biased commitment to the ideology of LGBT leads to violations of constitutional freedoms and the rights of ordinary people. Therefore, we ask for a strong response from the Sejm and the Senate of the Republic of Poland, who are entitled to dismiss the Ombudsman, who has misrepresented the complex vow and dignity of the office. Poles need an Ombudsman who will not be a soldier of radical ideology but a defender of the rights of all citizens.'<sup>552</sup> The political decision to revoke the appointment of the Ombud has not yet been taken. However, this would need a three-fifths majority in the Parliament, which the ruling parties do not have.

However, there were reactions to the attacks mentioned above. For example, during the budgetary debate and between the meetings of the Commissions of Finances and Justice, the Equal Opportunities Coalition, formed by 60 CSOs, formulated an appeal addressed to the Chairman of the Parliament regarding the need to accept the proposed budget and criticising 'the negative atmosphere of the debate'.<sup>553</sup>

In reaction to the Ordo Iuris proposition and attacks by politicians, the CSO Akcja Demokracja (Action Democracy) started a campaign of support. For instance, citizens are encouraged to send postcards of support to the Ombud Office, or sign petitions defending him (44 000 signatures as of March 2018).<sup>554</sup>

#### c) Institutional architecture

The Polish Commissioner for Civil Rights holds four different mandates:

1. Ombud: role of the national human rights institution – general mandate, since 1988;
2. National Preventive Mechanism – mandate since 2008;
3. Equality Body – mandate since 2011;
4. Independent monitoring mechanism in reference to the UN CRPD – since 2013, after ratification of the CRPD in 2012. (This task is carried out without a legal basis, based on a form of agreement with the Government, but not formalised in an official document.)

The equality and non-discrimination mandate is structured within the body in the following way. The Ombud has been the general human rights institution since 1998 and in recent years has employed circa 300 employees (around 285 full-time positions, but with some employees working part time). The Anti-discrimination Law Section was created within the Department of Constitutional and International Law in 2011 and in 2013 employed nine people. In 2014 this section was reorganised and a new Department of Equal Treatment and Protection of Persons with Disabilities was created.<sup>555</sup> In addition, the Ombud's position was that there were in fact more people dealing with equality and discrimination issues, i.e. employees working in other departments and sections who occasionally also dealt with equality issues<sup>556</sup> (in response to a query from the author of this report in June 2013, the Ombud's Office declared that 25 people worked on equality and discrimination). In 2015

<sup>552</sup> <http://www.maszwpływ.pl/adam-bodnar-musi-odejsc-57,k.html>.

<sup>553</sup> Letter of the Equal Opportunities Coalition of 60 CSOs to the Chairman of the Parliament, 7 January 2016.

<sup>554</sup> See at: <https://dzialaj.akcjademokracja.pl/campaigns/bodnar>.

<sup>555</sup> Ombud Bulletin 2015, p. 4.

<sup>556</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.

significant changes took place. The new Ombud, Dr A. Bodnar, was elected by Parliament, took his oath and assumed office in September 2015. He appointed a deputy responsible for equal treatment issues, Dr S. Spurek. This was the first time that a special Deputy Ombud for Equal Treatment had been appointed and it clearly shows that this part of the Ombud's mandate (Equality Body) was emphasised. Both the new Ombud and the new Deputy Ombud have a long record of engagement in the field of equality, equal treatment and non-discrimination. Organisational changes followed. A new Equal Treatment Department was established (*Zespół do spraw Równego Traktowania*) with two units: the Discrimination Law Unit (*Wydział Prawa Antydyskryminacyjnego*) and the Migrants' and National Minorities' Rights Unit (*Wydział Praw Migrantów i Mniejszości Narodowych*).<sup>557</sup>

Staff resources and budget dedicated to the equality mandate

There are 12 members of staff in all working on the equality mandate (from a total staff of circa 300 in the Ombud Office), as follows:

2 persons (the Deputy Commissioner for Equal Treatment and her assistant);  
1 person in the secretariat;  
9 persons in the Equal Treatment Department – 2 management positions (director and deputy-director), 5 persons in the Anti-Discrimination Law Unit, 2 persons in the Migrants and National Minorities Rights Unit.

There is no reliable information available on the part of the budget allocated to the equality mandate. There is an (internal) budget category designated as 'Equal Treatment Mechanism', but with more or less the same situation and tasks, it was calculated as covering the cost of 33 persons in 2016, and the cost of 12 persons in 2017. Difficulties stem from the fact that certain discrimination cases are dealt with by other thematic departments and teams in the Ombud's office: therefore one may only attempt to estimate this cost.

In regard to assessment of the nature and level of attention accorded to the equality/anti-discrimination mandate in the work of the designated body, the appointment of the special Deputy Ombud for Equal Treatment and changes to the organisational structure of the office to accommodate the requirements of those cases indicating discrimination demonstrate that the level of attention is high and that the Ombud is really interested in these issues. On the other hand, budget constraints and the kind of chilling effect caused by constant attacks act as a deterrent to increasing the level of attention.

Regarding professional assessment of the level of visibility achieved for the equality mandate by the designated body, it is difficult to objectively judge visibility based on one's personal impressions. The Ombud takes actions to increase visibility – for instance by organising regional meetings and cooperating with numerous stakeholders, through its website and publications, but also through extraordinary initiatives, such as the First Congress on Civil Rights, organised by the Ombud and held in Warsaw on 8-9 December 2017. However, according to Ombud, he is not being invited to contribute by the public media which were taken over by the Government and which, according to experts, play the role of government propaganda organs. The Ombud is thus widely criticised in the public media without a right to present his arguments. This has never happened before in the history of this office.

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<sup>557</sup> Ombud Annual Report 2016, pp. 11-12; Ombud Annual Report 2017, p. 15.

d) Status of the designated body/bodies – general independence

i) Status of the body

*Ombud*

The Ombud Office (Commissioner for Human Rights) is a national human rights institution with additional mandates.

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 that activities related to equal treatment are to be undertaken independently.

The Ombud appoints Deputy Ombuds and recruits staff within the given budget.

*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 also still a valid law.

The Office of the Plenipotentiary (within the Chancellery of the Prime Minister) was established in July 2008. 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>558</sup> (it does not have a separate budget). It publishes annual reports on its activities and the reports are available to the public. However, preparation of the most recent reports was delayed due to the changes in the office; the report covering 2015 was published in December 2016, while the report covering 2016 was published in July 2017.<sup>559</sup>

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<sup>558</sup> Poland, Equal Treatment Act, Article 20.

<sup>559</sup> Reports are available at <http://www.spoleczenstwoobywatelskie.gov.pl/sprawozdania-z-dzialalnosci-pelnomocnika-rzadu-do-spraw-rownego-traktowania>.

Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2016 – 31 December 2016, Warsaw, July 2017, [referred to in this report as 'Plenipotentiary Annual Report 2017'], (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2016 r. do 31 grudnia 2016 r.*, Warszawa lipiec 2017).

Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2015 – 31 December 2015, Warsaw, December 2016, [referred to in this report as 'Plenipotentiary Annual Report 2016'], (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2015 r. do 31 grudnia 2015 r.*, Warszawa grudzień 2016).

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 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.

The situation of the Plenipotentiary and position of the office changed significantly after the parliamentary election in October 2015. The President of the Republic appointed the Council of Ministers on 16 November 2015. Professor M. Fuszara, previously Plenipotentiary for Equal Treatment, resigned on that day, but her successor was not nominated by the new Prime Minister in the following seven weeks (according to Article 20 of the ETA, the Plenipotentiary shall be appointed and dismissed by the Prime Minister).

The new Plenipotentiary, Mr W. Kaczmarczyk, was named on 8 January 2016. It was announced that he was appointed to two positions – the newly created position of Government Plenipotentiary for Civil Society together with Government Plenipotentiary for Equal Treatment.<sup>560</sup> At the same time, the office of the Plenipotentiary for Equal Treatment was closed, and some members of its staff were transferred to the new office dealing with both civil society and equal treatment.<sup>561</sup>

Nevertheless, the functions of the two positions stem from different acts of law, and according to law the two plenipotentiaries are two separate organs. The name of the Plenipotentiary currently present on its website (but not in the law), is 'Government Plenipotentiary for Civil Society and Equal Treatment'.<sup>562</sup>

At the end of 2015 the previous Office of the Plenipotentiary employed 16 people working on equal treatment. As of April 2016, this was reduced to only six people. Although some people from the previous office continue to work in the combined office, their responsibilities cover a much wider spectrum, not limited to equal treatment but focused on the 'development of civil society'.

A new Plenipotentiary, Mr A. Lipiński, was appointed on 5 October 2016.<sup>563</sup> It is noticeable that, since the changes in 2016, the activities of the Plenipotentiary in the field of equal treatment have been very limited.

Since the creation in 2018 (after cut-off date for this report) of the National Freedom Institute (*Narodowy Instytut Wolności*), the body which took over many competences regarding civil society, the number of staff declared as dedicated to equal treatment matters is five.

## ii) Independence of the body

### *Ombud*

The Ombud is an independent body and is accountable to the Parliament.<sup>564</sup> The *Ombud* is appointed by the Sejm (lower house of the Parliament), subject to the approval of the Senate, for a five-year term. The Ombud's Office is independent of other state administration bodies and in practice performs its duties independently.

The Ombud informs the Sejm and the Senate annually on its activities and the reports are available to the public.<sup>565</sup> From 2012 to 2017, as a separate part of the annual report, the Ombud also prepared an additional report on activities related to equality and discrimination. In 2018 the Ombud published a general

<sup>560</sup> The new Plenipotentiary had no record of dealing with equal treatment issues and was not known among CSOs dealing with equality issues. However, he was a scholar researching civil society issues.

<sup>561</sup> Poland, Regulation of 5 January 2016, announced on 7 January 2016.

<sup>562</sup> <http://www.spoleczenstwoobywatelskie.gov.pl>.

<sup>563</sup> Politician of the ruling party with no record of experience in civil society or equal treatment issues.

<sup>564</sup> Poland, Act on the Commissioner for Human Rights, Articles 3, 5, 7.

<sup>565</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.rpo.gov.pl](http://www.rpo.gov.pl)); summaries of the reports are also available in English, see at <http://rpo.gov.pl/en>.

report (900 pages) with a new structure referring to the constitutional provisions: information on equal treatment is therefore scattered throughout the report.<sup>566</sup> In theory the appointment of an Ombud might be revoked by the Parliament. The Sejm and the Senate are entitled to dismiss an Ombud 'who has misrepresented the complex vow and dignity of the office'; such a decision would require a three-fifths majority in the Parliament.

#### *Government Plenipotentiary for Equal Treatment*

*The Plenipotentiary, as part of the executive and operating within the Chancellery of the Prime Minister, is not independent.*

#### e) Grounds covered by the designated body/bodies

##### *Ombud*

Protected grounds: the Law on the Commissioner for Human Rights does not provide any grounds (the same as 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,

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<sup>566</sup> Rzecznika Praw Obywatelskich (2018), *Informacja o stanie przestrzegania wolności i praw człowieka i obywatela w 2017 r. oraz o działalności Rzecznika Praw Obywatelskich* (Information on the observance of human rights and freedoms in the year 2017 and on the activities of the Commissioner for Human Rights), Warsaw, 2018 ([referred to in this report as 'Ombud Annual Report 2018']). Information on the activities of the Commissioner for Human Rights in the field of equal treatment in 2016 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, 2017, (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2016 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*) [referred to in this report as 'Ombud Annual Report 2017']. The Polish version quoted in this report was received as the final, but not yet published, version from the Ombud Office in June 2017. Information on the activities of the Commissioner for Human Rights in the field of equal treatment in 2015 and on the observance of the principle of equal treatment in the Republic of Poland, Warsaw, 2016, (*Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2015 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*) [referred to in this report as 'Ombud Annual Report 2016']. Information on the activities of the Commissioner for Human Rights 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']. Report on the activity of the Commissioner for Human Rights 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 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; an English version of the report was also published later, see <http://rpo.gov.pl/en/>). Information on the activities of the Commissioner for Human Rights in the year 2012 and on the observance of human rights and freedoms. Part two: Information on the activities of the Commissioner for Human Rights 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, see <http://www.senat.gov.pl/gfx/senat/userfiles/public/k8/dokumenty/druki/300/345.pdf>; in June 2013 the Ombud published the final version on its website, with the same content but different format and page numbering <http://rpo.gov.pl>; *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. Information on activities of the Commissioner for Human Rights 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/> [referred to in this report as 'Ombud Bulletin 2012/2'].

nationality, citizenship,<sup>567</sup> religion, belief, political opinion, disability, age and sexual orientation.

Due to shortage of funds, it is difficult for the Ombud to manage its work so as to ensure that adequate and appropriate expertise and attention are given to each ground. Therefore, although the Ombud tries to deal adequately with all the grounds, it also sets certain priorities.

It can be seen that each ground is dealt with by the Ombud's office. However, it is noticeable that there is a very small intake of complaints regarding discrimination based on religion and belief. The Ombud might not be identified as a relevant body in this respect.

### *Migrants*

The Ombud office constantly monitors the situation of migrants, including refugees, living in Poland. It is one of the priorities of the office. In order to effectively carry out its statutory tasks, the Ombud has appointed an Expert Committee on Migrants<sup>568</sup> to play an advisory role, to constantly review the state of the rights and freedoms of foreign nationals and to make recommendations to the Ombud on the actions and interventions required.<sup>569</sup>

In 2016, the Expert Committee on Migrants held four meetings. During the first meeting, the Committee analysed the state of preparation of Polish services and public authorities for the possible reception of foreigners - potential refugees, who were subject to relocation or resettlement processes. The second meeting was devoted to presentation of the report of the Panopticon Foundation, entitled 'Refugees under Special Supervision', which described the forms of supervision applied in the case of applicants for international protection. The results of border monitoring were also discussed. An important conclusion was the conviction that the Ombudsman should conduct independent monitoring at border crossing points (which was subsequently carried out). The third meeting was devoted to legal work by migrants in Poland. The theme of the last meeting was the change in the system of teaching of foreign children.<sup>570</sup> In 2017 the Expert Committee on Migrants held two meetings. During the first meeting the main topic of the discussion was the amendment to the provisions of the Act on granting protection to foreigners. The second meeting was held with the participation of a representative of the Ministry of Family, Labour and Social Policy. The changes in the Act on the promotion of employment and the institutions of the labour market were discussed (this concerns the implementation of Directive 2014/36/EU).<sup>571</sup>

### *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.

- f) Competences of the designated body/bodies – and their independent and effective exercise

### *Ombud*

The Commissioner for Human Rights (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>572</sup> The

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<sup>567</sup> Protection is limited to certain categories of persons only. Discrimination on grounds of citizenship as such is not prohibited in the ETA. See more in Section 2.1.

<sup>568</sup> See at: <https://www.rpo.gov.pl/en/content/expert-committees>.

<sup>569</sup> See at: <https://www.rpo.gov.pl/pl/content/komisja-ekspertow-ds-migrantow>.

<sup>570</sup> Ombud Annual Report 2017, pp. 120-124.

<sup>571</sup> Ombud Annual Report 2018, pp. 751-755.

<sup>572</sup> Poland, Constitution, Article 80.



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 Human Rights) 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>573</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;
- 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 also formulated some additional competences of 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>574</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>575</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>576</sup> and then report on its execution annually.<sup>577</sup>

<sup>573</sup> See <https://www.rpo.gov.pl/en/content/what-does-commissioner-human-rights-do>; for more detail, see the Ombud Act at <https://www.rpo.gov.pl/en/content/act-commissioner-human-rights>.

<sup>574</sup> Poland, Act on the Commissioner for Human Rights, Article 17b.

<sup>575</sup> Poland, Equal Treatment Act, Article 21.

<sup>576</sup> Poland, Equal Treatment Act, Article 22.

<sup>577</sup> Poland, Equal Treatment Act, Article 23.3, Article 32.

The task of the Plenipotentiary is to execute government policy 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'.<sup>578</sup> 'Disability' was not originally explicitly mentioned, 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 counteract discrimination.<sup>579</sup>

The competences of this post, as described by law, include analysis and research; monitoring; collaboration with other bodies, local government and CSOs; producing draft laws; issuing opinions about laws drafted by other bodies; and taking actions 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.

As already mentioned, the Plenipotentiary is not an independent body, but it used to exercise its activities quite freely and independently, albeit with some limitations. Thus, for instance, lack of political will regarding changes to the law, amendment of the ETA and lack of ratifications limits the effectiveness of its activities. In addition, since 2016 its activities regarding equal treatment have been very limited. Certain statements made by the two recent Plenipotentiaries in the context of public debate were also considered controversial. For example, W. Kaczmarczyk argued against prohibition of discrimination in access to goods and services, as in his view this undermines economic freedom, freedom of enterprise and freedom of belief.<sup>580</sup> He also argued against the EU draft horizontal directive.<sup>581</sup>

i) Independent assistance to victims

In Poland, the designated body does have the competence to provide independent assistance to victims.

However, the issue of providing independent assistance to victims is 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 conflicts between private parties are concerned. In such cases, according to the law the Ombud can only provide victims with information on their rights and possible actions.<sup>582</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>583</sup>

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<sup>578</sup> Poland, Equal Treatment Act, Article 21.

<sup>579</sup> Poland, Equal Treatment Act, Article 21.

<sup>580</sup> Examples given were refusal of hotel accommodation to a gay couple and to a black man; see: <http://www.tvn24.pl/wiadomosci-z-kraju,3/kaczmarczyk-odpowiada-czy-hotelarz-moze-odmowic-czarnoskoremu,642533.html>.

<sup>581</sup> Minutes of the Parliamentary Commission on the EU, 5 September 2016, see at: <http://orka.sejm.gov.pl/zapisy8.nsf/0/01EB7ECB99A118CEC1258028004B2A03/%24File/0096508.pdf>.

<sup>582</sup> Poland, Act on the Commissioner for Human Rights, Article 11.

<sup>583</sup> Ombud Bulletin 2012/2, p. 79. See also: ETA commentary 2017, pp. 259-261.



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 house 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>584</sup>

- **Independence**  
In practice, this competence is effectively exercised in an independent manner. The Ombud decides itself to whom it provides assistance and what kind of assistance is provided. That the Ombud does this despite criticism and other pressures is proof of its independence.
- **Effectiveness**  
Since the Ombud's decision as to whether to provide assistance to an individual is discretionary, due to its limited resources, the Office does not offer legal assistance to everyone. For example, it chooses cases of a strategic nature for litigation. Once the result is achieved, other interested complainants who have similar problems are advised to rely on the previous case and the argumentation formulated therein. The Ombud does not provide information on the criteria used to decide on cases for strategic litigation. There are shifts in the focus on various discriminatory grounds but these take place within internal procedures.
- **Resources**  
Due to limited resources a strategic approach is taken. For instance, the Ombud pursued the case of a parent who was not given adequate refunds for delivering a child with disabilities to school. The municipality paid for two journeys per day, while the parent made four journeys per day (two to deliver the child to school and twice to take the child back home). The Ombud won the case and other parents in similar situations approached him for the assistance. Instead of taking their cases, they were simply instructed that they should proceed themselves.

ii) Independent surveys and reports

In Poland, the designated body has competence to conduct independent surveys and publish independent reports.

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 with, including recommendations. Furthermore, the Ombud may also establish thematic expert teams and ask them for reports on specific issues. The Expert Committees on People with Disabilities, on the Rights of Elderly People and on the Rights of Migrants were the first of these to be set up.<sup>585</sup> Others, for instance the Expert Committee on Mental Health Protection, the Expert Committee on Deaf People, the Expert Committee on Health, the Expert Committee on Counteracting Homelessness, then followed.

In 2011, the Ombud also started commissioning research (mainly desk research, rather than empirical) and published several reports (the authors of

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<sup>584</sup> Poland, Act on the Commissioner for Human Rights, Article 12.

<sup>585</sup> Ombud Annual Report 2017, p. 15, pp. 109-123; Ombud Annual Report 2017, pp. 120-124.

these reports included their 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 by the Ombud in 2017 include:

- The principle of equal treatment – law and practice. Crimes motivated by prejudice. Analysis and recommendations (2017).<sup>586</sup>
- The principle of equal treatment – law and practice. Personal assistants for people with disabilities. Research report. Analysis and recommendations (2017).<sup>587</sup>

Previous reports (from the years 2011 – 2016) are available on the Ombud website ([rpo.gov.pl](http://rpo.gov.pl)).<sup>588</sup>

In 2013 the Ombud also initiated public consultations with various institutions and CSOs regarding proposed subjects for research commissioned by the Ombud. Institutions and CSOs proposed particular subjects to choose from.

- Independence  
In practice, this competence is effectively exercised in an independent manner. The Ombud office decides independently which surveys to undertake and prepares its reports independently.

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<sup>586</sup> *Rzecznik Praw Obywatelskich (2017), Zasada Równego Traktowania. Prawo i praktyka, nr 23, Przestępstwa motywowane uprzedzeniami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>587</sup> *Rzecznik Praw Obywatelskich (2017), Zasada Równego Traktowania. Prawo i praktyka, nr 22, Asystent osobisty osoby z niepełnosprawnością. Raport z badań. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>588</sup> Within the series 'The principle of equal treatment – law and practice. Analysis and recommendations', the following reports were published: Access to justice for persons with disabilities (2016) [*Dostęp osób z niepełnosprawnościami do wymiaru sprawiedliwości*]; Availability of environmental support for the elderly from the perspective of the representatives of the communes of the Dolnośląskie Voivodeship (2016) [*Dostępność wsparcia środowiskowego dla osób starszych w perspektywie przedstawicieli gmin województwa dolnośląskiego*]; Equal treatment in employment irrespective of gender identity. (2016) [*Równe traktowanie w zatrudnieniu bez względu na tożsamość płciową*]; Reconciliation of family and professional roles. Equal treatment of parents in the labour market (2015) [*Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy*]; Accessibility of higher education for persons with disabilities. (2015) [*Dostępność edukacji akademickiej dla osób z niepełnosprawnościami*]; Accessibility of religion lessons for religious minorities and lessons of ethics in the schools (2015) [*Dostępność lekcji religii wyznań mniejszościowych i lekcji etyki w ramach systemu edukacji szkolnej*]; Services for deaf and deafblind people in public administration offices (2014) [*Obsługa osób głuchych i głuchoniewidomych w urzędach administracji publicznej*]; Equal treatment of patients – non-heterosexual people in the healthcare system (2014) [*Równe traktowanie pacjentów – osoby nieheteroseksualne w opiece zdrowotnej*]; Support for people with mental illness in the labour market (2014) [*Wsparcie osób chorujących psychicznie na rynku pracy*]; Elderly people on the financial services market (2013) [*Osoby starsze na rynku usług finansowych*]; Counteracting violence against women, including elderly women and women with disabilities (2013) [*Przeciwdziałanie przemocy wobec kobiet, w tym kobiet starszych i kobiet z niepełnosprawnościami*]; Intergenerational dialogue. Between ideas and practice. Inspirations (2013) [*Dialog międzypokoleniowy. Między ideą a praktyką. Inspiracje*]; Accessibility of websites of public institutions for persons with disabilities (2013) [*Dostępność witryn internetowych instytucji publicznych dla osób z niepełnosprawnościami*]; Implementing the right to education of young foreign nationals (2013) [*Realizacja prawa małoletnich cudzoziemców do edukacji*]; Guarantees of active participation in elections (active use of electoral law) by the elderly and persons with disabilities (2012) [*Gwarancje korzystania z czynnego prawa wyborczego przez osoby starsze i osoby z niepełnosprawnościami*]; Equal opportunities in access to education by persons with disabilities (2012) [*Równe szanse w dostępie do edukacji osób z niepełnosprawnościami*]; Counteracting violence motivated by race, ethnic origin and nationality (2012) [*Przeciwdziałanie przemocy motywowanej rasą, pochodzeniem etnicznym i narodowością*]; Enforcement of the rights of foreign nationals in Poland (2012) [*Przestrzeganie praw cudzoziemców w Polsce*]; 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 (2012) [*Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych*]; Action policies in an ageing society (2012) [*Strategie działania w starzejącym się społeczeństwie*]; Accessibility of public infrastructure for persons with disabilities (2011) [*Dostępność infrastruktury publicznej dla osób z niepełnosprawnościami*].

- **Effectiveness**  
Effectiveness of this competence is limited, mainly due to the shortage of funding. There is only one sociologist in a department and only two research themes are chosen annually. Moreover, even if chosen, the subject matter of the research and the survey cannot be treated in a complex way, otherwise this becomes too expensive. For instance, at time of writing this report (March 2018), the department is working on research regarding access of persons with disabilities to the labour market. This is a very complex subject but the team has to choose a specific aspect of this and narrow down its research.

The other limiting factor is that one of the two research subjects selected annually must touch upon issues pertaining to persons with disabilities (since the Ombud has the monitoring mandate under the CRPD).

- **Resources**  
As already mentioned, realisation of this competence is limited, mainly due to the shortage of funding. There is only one sociologist employed in a department and only two research themes are chosen annually.

### iii) Independent recommendations

In Poland, the designated body does have the competence to issue independent recommendations on discrimination issues.

The Ombud issues 'general statements' (*wystąpienia generalne/problemowe*) on the basis of complaints regarding equal treatment and research,; the number of statements in particular years is as follows: 51 (2011), 67 (2012), 66 (2013), 55 (2016)<sup>589</sup> and 30 (2017).<sup>590</sup> This means that the Ombud presents to the relevant agencies, organisations and institutions opinions, conclusions and recommendations which aim to ensure effective protection of the human rights and freedoms of citizens and to facilitate the procedures that such cases may involve.<sup>591</sup> Additionally, preparation of annual reports that are printed, available on the Ombud website and presented in Parliament provides a good opportunity for the Ombud to formulate recommendations.

- **Independence**  
In practice, this competence is effectively exercised in an independent manner. The Ombud formulates its recommendations based solely on the work of the Ombud office. When they lack implementation (which is often the case), the Ombud repeats them in subsequent statements.
- **Effectiveness**  
Considering the number and high quality of analyses in the 'general statements' prepared by the Ombud and addressed to different agencies, as well as recommendations grouped together in its annual reports, it may be said that this competence is effectively exercised. Reaction to those recommendations and their implementation by relevant agencies is, of course, a different issue. The Ombud sometimes repeats the same recommendations for several years, monitoring the situation to see whether they are implemented.

<sup>589</sup> The figure for 2014/2015 was not provided in the annual report.

<sup>590</sup> See Articles 14.2 and 16, Act on the Commissioner for Human Rights.

<sup>591</sup> Ombud Bulletin 2012/2, p. 9, Ombud Bulletin 2013, p. 609, Ombud Annual Report 2014, p. 9, Ombud Annual Report 2017, p. 172, Ombud Annual Report 2018, p.709.

- Resources  
'General statements' and annual reports, which include most of recommendations, are a priority for the Ombud, so adequate resources are directed to these activities.

iv) Other competences

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 organisational units'. As far as court cases are concerned, the Ombud may request information on the status of a case as well as request access to court and prosecution files.<sup>592</sup>

Apart from competences already mentioned and stemming directly from directives, in implementing the principle of equal treatment, the Ombud should not only analyse and monitor equal treatment, conduct independent surveys on discrimination, prepare and publish independent reports and issue recommendations but should also 'support' equal treatment of everyone.<sup>593</sup> The term 'support' should be understood to include media campaigns and awareness-raising activities, communication and promotion. If given adequate resources, the Ombud could also engage in these activities. The Ombud's regional meetings (*spotkania regionalne*)<sup>594</sup> are a good example, as this is a new initiative undertaken by the current Ombud. The Ombud travels to various regions for visits lasting several days and holds many personal meetings with different groups, organisations and institutions. These visits and meetings cover the whole country and fulfil requirements for many of the activities mentioned above, including promotion and raising awareness.

However, due to limited funds, even the scope of these activities is limited. The Ombud does not, for instance, organise social campaigns, but tries to use different opportunities to raise awareness and provide information about its mandate as equality body.

v) Positive obligations

There are very limited positive obligations in the Polish legislation but provisions regarding persons with disabilities and national and ethnic minorities in particular include some preferential treatment. The Ombud does not have any special role in this respect. In practice, however, when the Ombud recommends different solutions (for instance regarding access to education for persons with disabilities or universal design) it may support solutions based on positive obligations. There is no special role for the Ombud in monitoring, evaluating or supervising those bearing obligations when they apply these, or any specific work focused on this issue.

vi) Further competences/activities

The Ombud has, for example, a duty to collaborate with CSOs. It also collaborates with various organisations and institutions at international level.

<sup>592</sup> Poland, Act on the Commissioner for Human Rights, Article 13.

<sup>593</sup> Poland, Act on the Commissioner for Human Rights, Article 17b.

<sup>594</sup> See at: <https://www.rpo.gov.pl/pl/sprawa/spotkania-regionalne-rpo>.

g) Legal standing of the designated body/bodies

In Poland, the designated body, the Commissioner for Civil Rights, has legal standing to: bring discrimination complaints (on behalf of identified victims) to court.

bring ex officio discrimination complaints to court.

Intervene in legal cases concerning discrimination, for example as *amicus curiae*.

*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.<sup>595</sup> It may also lodge a constitutional complaint (review *in abstracto*) or join proceedings before the Constitutional Tribunal started by someone else (before 2015 the Ombud could join only cases of individual constitutional complaint; since 30 August 2015, the Ombud can join any case).<sup>596</sup>

There is no *actio popularis* in Poland. The constitutional complaint (review *in abstracto*) could be understood as a complaint on behalf of non-identified victims, since the Ombud challenges a law as unconstitutional; i.e. a law that is or could be a basis for decisions and rulings affecting many people. However, this is not *actio popularis* exercised in the common courts.

In practice, the Ombud brings a number of cases ex officio, mostly based on media reports. The Ombud's office contacts interested parties in a case and offers its assistance. It might investigate the case, it might bring the case to the court, or join proceedings if these are already instituted.

*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.

h) Quasi-judicial competences

In Poland, the bodies are not quasi-judicial institutions.

i) 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 is an exception in this regard. Information on the number of inquiries received is not publicly available but is reported internally within the office.

*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 did not have a detailed breakdown of the complaints it received (not only regarding discrimination but in general).

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<sup>595</sup> Poland, Act on the Commissioner for Human Rights, Article 14.

<sup>596</sup> Poland, Act on the Commissioner for Human Rights, Article 16.

As a result, 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 Office in 2017 was 560 (669)<sup>597</sup> and in 2016 was 622<sup>598</sup> (in 2015 it was 787;<sup>599</sup> in 2014 – 1 198;<sup>600</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 might in fact be identical letters sent to the Ombud by a number of people in order to protest against something, such as discriminatory public statements.<sup>601</sup> Thus, 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>602</sup> In 2013, in contrast, there were no 'group complaints', so the overall number of complaints was smaller.

The Ombud Office divides complaints into the following categories (number of cases and their share as a percentage of the total).<sup>603</sup> The figure for 2014, as already mentioned, is not known.

<b>Matter</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Principle of equality before the law	42 4.1 %	40 2 %	44 5.2 %	13 1.7 %	15 2.4 %	6 1.1 %
Prohibition of unequal treatment/discrimination	85 8.2 %	21 1.1 %	27 3.2 %	28 3.6 %	27 4.3 %	18 3.2 %
Prohibition of unequal treatment/discrimination based on sex	56 5.4 %	52 2.7 %	39 4.6 %	55 7.0 %	60 9.7 %	49 8.8 %
Prohibition of unequal treatment/discrimination based on religion or belief	67 6.5 %	158 8 %	42 5.0 %	45 5.7 %	28 4.5 %	23 4.1 %
Prohibition of unequal treatment/discrimination based on sexual orientation	334 32.3 %	21 1.1 %	65 7.7 %	59 7.5 %	59 9.5 %	48 8.6 %
prohibition of unequal treatment/discrimination based on age	58 5.6 %	57 2.9 %	49 5.8 %	46 5.8 %	43 6.9 %	24 4.3 %
Prohibition of unequal treatment/discrimination based on nationality	42 4.1 %	54 2.8 %	81 9.6 %	76 9.7 %	45 7.2 %	84 15 %
Prohibition of unequal treatment/discrimination based on disability	92 8.9 %	1 097 56 %	305 36.1 %	238 30.2 %	211 33.9 %	161 28.7 %
Prohibition of unequal treatment/discrimination of social and occupational groups	30 2.9 %	14 0.7 %	7 0.8 %	6 0.8 %	3 0.5 %	1 0.2 %

<sup>597</sup> Ombud Annual Report 2018. The report gives two different numbers, 560 on p. 60, and 669 on p. 714.

<sup>598</sup> Ombud Annual Report 2017, p. 171.

<sup>599</sup> Ombud Annual Report 2016, p. 10, pp. 110-111.

<sup>600</sup> Plenipotentiary Annual Report 2015, p. 3.

<sup>601</sup> Ombud Bulletin 2012/2, p. 9.

<sup>602</sup> Ombud Annual Report 2013, p. 390.

<sup>603</sup> Based on: Ombud Bulletin 2012/2, pp. 90-91; Ombud Annual Report 2013, pp. 607-608, Ombud Annual Report 2014, pp. 103-104, Ombud Annual Report 2016, p. 111, Ombud Annual Report 2017, pp. 171-172, Information covering the year 2017 is not provided in the Ombud Annual Report 2018. However, it was provided in the draft report, where the total number of 560 complaints was subdivided into categories. The numbers given here are therefore based on the numbers in the draft report, as provided by the Ombud Office.

Prohibition of unequal treatment/discrimination related to taxes	6 0.6 %	20 1 %	6 0.7 %	6 0.8 %	3 0.5 %	2 0.4 %
Prohibition of unequal treatment/discrimination of people without a registered place of permanent residence	3 0.3 %	13 0.6 %	5 0.6 %	5 0.6 %	3 0.5 %	4 0.7 %
Prohibition of unequal treatment/discrimination based on race and ethnic origin	25 2.4 %	16 0.8 %	18 2.1 %	30 3.8 %	18 2.9 %	40 7 %
Prohibition of unequal treatment/discrimination based on worldview/opinions <sup>604</sup> (including non-denominational, irreligious) <sup>605</sup>	n/a	n/a	n/a	9 1.1 %	2 0.3 %	1 0.2 %
Prohibition of unequal treatment/discrimination based on political opinions	6 0.6 %	6 0.3 %	3 0.3 %	9 1.1 %	1 0.2 %	1 0.2 %
Prohibition of unequal treatment/discrimination based on sexual identity	12 1.2 %	4 0.2 %	20 2.4 %	8 1.0 %	9 1.5 %	9 1.6 %
Prohibition of unequal treatment/discrimination related to legal and material/property status	66 6.4 %	123 6.3 %	46 5.4 %	15 1.9 %	4 0.6 %	8 1.4 %
Prohibition of unequal treatment/discrimination based on education or occupation	11 1.0 %	107 5.5 %	9 1.1 %	5 0.6 %	7 1.1 %	1 0.2 %
Prohibition of unequal treatment/discrimination based on social origin	4 0.4 %	1 0.1 %	0	0	n/a	n/a
Prohibition of unequal treatment/discrimination based on other reasons	94 9.1 %	150 7.6 %	79 9.4 %	143 18.2 %	84 13.5 %	80 14.3 %

	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Number of complaints per year	1033	1960	845	810	624	560
Number of complaints where the Ombud simply informed the parties about other means of action and legal measures to which individuals are entitled	376	458	308	292	229	187

<sup>604</sup> Światopogląd.

<sup>605</sup> Bezwyznaniowość.

### *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>606</sup>

The Plenipotentiary does not have the right to accept complaints and assist individual victims, but it does in fact receive complaints, applications and letters from victims of discrimination and CSOs. The first annual report prepared mentioned 185 cases of this kind (on the basis of different grounds of discrimination);<sup>607</sup> the next report, covering 2.5 years, listed 907 cases;<sup>608</sup> the annual report covering 2012 mentioned 460 cases;<sup>609</sup> the report covering 2013 mentioned 565 cases;<sup>610</sup> the report covering 2014 mentioned 377 cases;<sup>611</sup> the report covering 2015 mentioned 365 cases;<sup>612</sup> and the report covering 2016 mentioned 127 cases.<sup>613</sup> The number of cases 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.

#### j) Planning

The Ombud does not prepare a strategic plan in the form of a formal public document. According to the Ombud himself,<sup>614</sup> it would be difficult to have such a strategy since many activities are caused by ad hoc events and developments. In reality, many activities may appear to have the characteristics of having been planned, such as some continuation of particular subjects, preparations for various anniversaries, including ratification of certain instruments (e.g. the 25th anniversary of the ratification of the European Convention on Human Rights in January 2018) and the 100th anniversary of Polish independence in 2018.

The Ombud does not prepare an annual work plan in the form of a formal public document. However, there are some elements of planning as already mentioned above, plus some others. For example, expert committees specialising in various issues plan their work, including analyses, research, publications, activities, conferences etc. Thus, for instance, the Expert Committee on Migrants provides information in the annual information prepared by the Ombud on issues which need further work. In the information covering 2017 it states that legislative work on the final shape of the amendment to the Act on granting protection to foreigners on the territory of the Republic of Poland will be a subject for the Committee's further attention. In 2018, the Committee plans to examine the functioning of the new curriculum for foreign children, which has been in force in Polish schools since 2017. The Committee will present its opinion and proposals regarding possible actions in this area to the Ombudsman.<sup>615</sup>

In addition, some subjects are monitored for an extended period. If the Ombud prepares a 'General statement' on a particular issue, it observes the follow-up. If there is no reaction, the Ombud issues a reminder about the problem to the relevant addressee. Problems also arise which may persist for a long time, such as the current migrant crisis, and which to

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<sup>606</sup> The report covering 2015 was late, and was not published until December 2016, and the report covering 2016 was published in July 2017, probably due to reorganisation of the office and lack of staff.

<sup>607</sup> Report on activities of the Government Plenipotentiary for Equal Treatment for the period 30 April 2008 – 30 April 2009; pp. 44-69.

<sup>608</sup> Plenipotentiary Annual Report 2012, pp. 50-51.

<sup>609</sup> Plenipotentiary Annual Report 2013, p. 54.

<sup>610</sup> Plenipotentiary Annual Report 2014, pp. 39-40.

<sup>611</sup> Plenipotentiary Annual Report 2015, p. 34.

<sup>612</sup> Plenipotentiary Annual Report 2016, p. 37.

<sup>613</sup> Plenipotentiary Annual Report 2017, p. 24-25.

<sup>614</sup> Interview with author of the report, March 2018.

<sup>615</sup> Ombud Annual Report 2018, p. 755.



an extent force adoption of a more planned approach. The Ombud staff analyse various external and internal factors influencing their work in order to address them correctly.

The Ombud publishes annual information, including a separate section on equal treatment and presents it in the Parliament, which considers the information.

The Ombud does not evaluate implementation of the strategic plan.

#### k) Stakeholder engagement

The Ombud collaborates with civil society associations and organisations. They organise joint seminars, and the Ombud grants his patronage to various CSO events. The Ombud is also a leading partner in projects supported by EU funding, for example together with the Campaign Against Homophobia on a healthcare project; with HejtStop; and the PTPA (Polish Association of Anti-discrimination Law) – in this case, the partners have prepared a proposal but a tendering process is not yet finished).

The Ombud tries to establish cooperation with business, employer, and service-provider networks and organisations, but this is not easy; the Labour Law department might have better contacts in this respect. These organisations are not sufficiently responsive in regard to discrimination issues. However, the Ombud Office currently (March 2018) plans to build relationships on the basis of the report on discrimination in employment based on sexual orientation.

On one hand, the Government constantly criticises the current Ombud. Since the Government is attacking the independent judiciary (the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, as well as common courts) and many other institutions, instead of focusing on other issues, the Ombud is struggling with systemic constitutional issues, with attempts to defend the independence of the courts, and as a consequence has less time for other matters. On the other hand, public institutions are natural partners for the Ombud. The Ombud directs 'general statements' to them and formulates recommendations. The Ombud may, for example, ask the National Labour Inspectorate to disseminate information to employers. In principle, public bodies respond to correspondence from the Ombud. However, it has also recently become clear that it is increasingly difficult to obtain the presence of representatives of the relevant ministries at important meetings at the Ombud office. Currently, either lower-level staff members attend these meetings, or nobody attends. The Ombud also organises training for police officers on hate crimes and the jurisprudence of the ECtHR.

Cooperation with some local government entities (presidents of towns, marshals of regional assemblies) is very good. Local government bodies are addressees of many statements from the Ombud, and the Ombud Office has had both good and bad experiences with these contacts.

The Ombud sometimes cooperates with trade unions, but only with part of the movement.

The Ombud also occasionally cooperates with other stakeholders, such as religious minority organisations (for instance holding joint conferences with the Muslim and Jewish communities) and national and ethnic minority organisations (also on joint seminars and conferences).

Other stakeholders include ambassadors, representatives of international organisations, UN monitoring committees. For example, the Ombud commissioned a short report on the negative image of Muslims in the Polish press. Based on this report, the Ombud organised meetings with politicians and journalists to address these issues.

Generally speaking, it can be seen that the Ombud has made great efforts to engage as many stakeholders as possible, and this policy brings positive results.

l) Accessibility: the Ombud does have an accessible and publicly visible office

The Ombud has 3 regional offices and 10 additional places where employees of the Ombud Office are in regular attendance, either every month or every two months.

The Ombud conducts outreach activities in local areas or communities – the most significant of these are the Ombud’s regional meetings.

The Ombud has procedures in place to identify and respond to the access needs of specific complainants (e.g. people with disabilities, people with caring responsibilities, people speaking languages other than Polish, people with literacy issues etc).

The Ombud Office tries to accommodate those needs but this is sometimes difficult, for example with languages issues. However, the Office plans to apply for a special certificate (confirming best governance practices) and to receive this, it will have to conduct a systematic review of all procedures.

m) Roma and Travellers

#### *Ombud*

Complaints against breaches of national minority rights constitute a small percentage of cases sent to the Ombud. However, the Ombud is unequivocally committed to Roma issues and over the years has reported on the clearly unfavourable situation faced by the Roma community.

In the last few years, the Ombud has, for instance, organised several on-site visits to places where the Roma community live (notably the Bergitka Roma, also known as 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>616</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>617</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>618</sup>

In 2013<sup>619</sup> the Ombud visited several places where Bergitka Roma live and confirmed the difficult situation of this group in a special report. The Ombud recommended 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>620</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).

The activities of the Ombud in relation to both housing and education (monitoring the problem of segregated classes, see more in Section 3.2.8.b above) continue.

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<sup>616</sup> Information from the Commissioner for Human Rights 2008, pp. 470-474 [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>617</sup> Ombud Bulletin 2012/2, pp. 13-14.

<sup>618</sup> Ombud Annual Report 2013, pp. 379-381.

<sup>619</sup> Ombud Annual Report 2014, pp. 14-16.

<sup>620</sup> Ombud Annual Report 2015, p. 12.

### *Migrants*

The Ombud conducts on-site visits to Roma migrant encampments (in 2016 in Wrocław and Poznań) and has identified the following problem in the legislation: lack of any registration of migrant Roma in Poland and as a consequence, no access for Roma from these encampments to social assistance and services. Most of the legislative criteria for registration of foreigners (apart from studying and marriage) are related to employment, economic activity, or possession of financial means and health insurance. Roma immigrants do not fulfil these criteria. The Ombud applied to the Government for changes to the relevant legislation. The Minister of Internal Affairs provided the information that analysis of the issue of registration of the stay in Poland of foreigners, Romanian Roma among others, is being conducted and that he considered that the law should regulate the subject matter. As a result, work on a draft law amending the Act on entry into, stay in and departure from the territory of the Republic of Poland by citizens of EU Member States and their family members has been undertaken. In 2016 the Ombud also organised a seminar on the situation of Roma migrants.<sup>621</sup>

### *Government Plenipotentiary for Equal Treatment*

Since the Office of the Plenipotentiary was established, Roma issues have not seemed to be one of the its priorities. In the course of six years (2008-2014), the Plenipotentiary dealt with only a few Roma-related cases. However, mostly thanks to the National Programme of Activities for Equal Treatment, in 2015 the Ombud undertook several activities in relation to Roma. The Ombud Office organised an exhibition of photographs by Chad Evans Wyatt, 'RomaRising – one of many' (*RomaRising – jedni z wielu*), a conference, 'Romni 2015. Debate about the situation of Roma women in Poland', and a meeting focusing on the problems of Roma living in encampments.<sup>622</sup>

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<sup>621</sup> Ombud Annual Report 2017, pp. 22-23.

<sup>622</sup> Plenipotentiary Annual Report 2016, p. 47, p. 54, p. 55.

## 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 publicly announcing legal norms and enabling public awareness 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 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. Because of this, the Ombud decided to focus its research on under-reported issues and find out why victims of discrimination do not report it.<sup>623</sup> According to a study commissioned by the Ombudsman, 92 % of people who have experienced discrimination in the year 2016 have not reported this to any public institution (in 2015 it was 85 %). Moreover, many people are unaware that discrimination is prohibited in areas such as employment and the labour market (67 %) or access to goods and services (75 %). According to the Ombud the reasons for this are manifold and include low levels of legal awareness, lack of understanding of the notion of discrimination, lack of trust in public bodies and institutions, fear of retaliation from reporting discrimination, reluctance to disclose intimate information about one's life, but also lack of faith in the effectiveness of the intervention. For these reasons, the Ombud appealed to the state authorities to exercise special sensitivity, and in particular to take proactive measures to counter and combat discrimination, even without the initiative of specific victims.<sup>624</sup> In addition, due to both global and national developments, worrying social processes have developed, such as increasing hate speech and hate crime against ethnic and religious minorities, anti-Semitism, and rising levels of homophobia and even physical attacks on the offices of LGBT organisations.

From the legal point of view the most important instrument for 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>625</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>626</sup>

Since the Ombud became the equality body in 2011, it has organised numerous events on discrimination issues, commissioned research and published a number of reports and manuals. Some of the activities of the Ombud attract public attention and are more widely publicised, including the work of the Expert Committees on People with Disabilities, on the

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<sup>623</sup> Ombud Annual Report 2014, p. 10.

<sup>624</sup> Ombud Annual Report 2017, p. 114, p. 70, p. 156.

<sup>625</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>626</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).

Rights of Elderly People, and the Rights of Migrants.<sup>627</sup> The Committees have presented their findings, opinions and publications during several conferences.<sup>628</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>629</sup> The Ombud has also printed leaflets and guidance on its role as equality body and is 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>630</sup> The Office created a website at the end of 2008, which was quite limited in substance but gradually became an interesting source of information. However, this ceased due to the changes and the merger of this Office with the Office of the Plenipotentiary for Civil Society, described in detail in Section 7.b, and new information is currently very limited.<sup>631</sup> In the past, the Office also engaged in campaigns and organised some competitions (for school children and journalists) that could play a role in awareness-raising.<sup>632</sup> The Plenipotentiary dealt with various grounds of discrimination, but most of its activities were and still are focused on issues of sex discrimination and, especially recently, on issues affecting families with children.<sup>633</sup> However, the Plenipotentiary documents and cooperates in the preparation of training on equal treatment for various ministries and public institutions.<sup>634</sup>

Until 2017, according to Polish law nurseries, schools and educational institutions should include in their curricula anti-discrimination education and activities embracing the full spectrum of their respective communities.<sup>635</sup> This has now changed. The Ministry of National Education removed anti-discrimination education from the ordinance on school requirements.<sup>636</sup> The draft justification of the new wording of the ordinance stated that at school 'it is important to shape patriotic attitudes, civic attitudes, a sense of identity, national and cultural awareness'.<sup>637</sup> This was welcomed in various conservative circles as a 'retreat from gender ideology', as the previous provision had been described as 'opening the gate to depravity'.<sup>638</sup> It should be underlined that, although the draft ordinance was sent out for public consultation, the list of those to whom it was addressed by the Ministry of National Education did not include organisations conducting anti-discrimination education.<sup>639</sup>

European programmes are a good example of the dissemination of information on discrimination issues, although this is done mainly by the various CSOs taking part in these programmes. As examples, the following EU programmes may be mentioned: the EQUAL Community Initiative,<sup>640</sup> programmes and activities within the European Year of Equal

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<sup>627</sup> Ombud Annual Report 2013, pp. 419-423, Ombud Annual Report 2014, p. 62, Ombud Annual Report 2017, p. 15, pp. 109-123; Ombud Annual Report 2018, pp. 723-763.

<sup>628</sup> Ombud Annual Report 2014, pp. 62-64, Ombud Annual Report 2015, pp. 78-80, Ombud Annual Report 2017, pp. 109-123.

<sup>629</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).

<sup>630</sup> Poland, Equal Treatment Act, Article 21.2.6, and Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, § 2.1.7.

<sup>631</sup> See at: <http://www.spoleczenstwoobywatelskie.gov.pl/dyskryminacja-i-mobbing>.

<sup>632</sup> Plenipotentiary Annual Report 2013, pp. 42-46.

<sup>633</sup> Plenipotentiary Annual Report 2017.

<sup>634</sup> Report on the National Programme 2017.

<sup>635</sup> Poland, Ordinance of the Minister of National Education of 6 August 2015 on the requirements for schools and institutions (*Rozporządzenie Ministra Edukacji Narodowej z dnia 6 sierpnia 2015 r. w sprawie wymagań wobec szkół i placówek*, Dz.U.2015.1214).

<sup>636</sup> Poland, Ordinance of the Minister of National Education of 11 August 2017 on the requirements for schools and institutions (*Rozporządzenie Ministra Edukacji Narodowej z dnia 11 sierpnia 2017 r. w sprawie wymagań wobec szkół i placówek*, Dz.U.2017.1611), replacing the Ordinance of 2015.

<sup>637</sup> See at: <http://wyborcza.pl/osiemdziewiec/7,159012,22043484,fabryka-patriotow-pis-wyrzuca-edukacje-antydiskryminacyjna.html>.

<sup>638</sup> See at: <http://www.oswiata.abc.com.pl/czytaj/-/artykul/dzialania-antydiskryminacyjne-znikna-z-rozporzadzenia>; <https://naszdzienik.pl/polska-kraj/184845.odwrot-od-gender.html>;

<sup>639</sup> See at: <http://wyborcza.pl/osiemdziewiec/7,159012,22043484,fabryka-patriotow-pis-wyrzuca-edukacje-antydiskryminacyjna.html>.

<sup>640</sup> See [www.equal.org.pl](http://www.equal.org.pl).

Opportunities for All, and the Council of Europe campaign All Different, All Equal. Thanks to different European programmes, CSOs have become a good source of information for victims of discrimination, and several 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 was co-financed by the European Social Fund ('Equal treatment as a standard of good governance',<sup>641</sup> continued as 'Equal treatment as a standard of good governance in the regions'),<sup>642</sup> a number of activities related to dissemination were organised. These 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>643</sup> To promote the project, an internet portal on equal treatment was also established, but its content is limited (the most recent records are from 2013).<sup>644</sup> In 2017 the Ombud asked the Plenipotentiary for Equal Treatment to share the list of coordinators so that the Ombud could reach them and involve them in its activities. Surprisingly, the Plenipotentiary refused, arguing that the situation is not stable, and that the list is evolving all the time.<sup>645</sup>

The Plenipotentiary also joined in the European Commission initiative 'Diversity Charter' (*Karta Różnorodności*) and was 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>646</sup> In 2013, during an event on diversity management co-organised by the Plenipotentiary, four more companies joined the Charter.<sup>647</sup> In 2013 the Diversity Council (*Rada Różnorodności*), comprising representatives of business, employers' organisations, the media, public administration and CSOs, was also created by Lewiatan, the Polish Confederation of Private Employers.<sup>648</sup> However, it seems that the last time it met was in 2015.<sup>649</sup>

It must be emphasised that, more often than not, most information on equality issues and non-discrimination is not accessible to people with disabilities. 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 an increasing number of videos in sign language.

### *Measures to encourage dialogue with CSOs*

According to the law, the Ombud should cooperate with associations, civil society movements and other voluntary organisations and foundations as well as foreign and international bodies and organisations.<sup>650</sup>

Moreover, according to the law the Government Plenipotentiary for Equal Treatment should, in the execution of its duties, collaborate with CSOs, including trade unions and organisations of employers.<sup>651</sup>

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<sup>641</sup> *Równe traktowanie standardem dobrego rządzenia*, see: Plenipotentiary Annual Report 2013, pp. 31-42.

<sup>642</sup> Plenipotentiary Annual Report 2015, p. 24.

<sup>643</sup> Plenipotentiary Annual Report 2013, p. 39.

<sup>644</sup> [www.siecrownosci.gov.pl/](http://www.siecrownosci.gov.pl/).

<sup>645</sup> Interview in the Ombud Office, March 2018.

<sup>646</sup> Plenipotentiary Annual Report 2013, pp. 51-52.

<sup>647</sup> Plenipotentiary Annual Report 2014, p. 29.

<sup>648</sup> Plenipotentiary Annual Report 2014, p. 66.

<sup>649</sup> See at: [http://konfederacjalewiatan.pl/kalendarium/2015/4/1/spotkanie\\_rady\\_roznorodnosci](http://konfederacjalewiatan.pl/kalendarium/2015/4/1/spotkanie_rady_roznorodnosci).

<sup>650</sup> Poland, Act on the Commissioner for Human Rights, Article 17a.

<sup>651</sup> Poland, Act on Equal Treatment, Article 21.2.7, Ordinance of 22 April 2008 on the Government Plenipotentiary for Equal Treatment, § 3.3.

Both the above-mentioned institutions maintain dialogue with a number of civil society organisations. CSO representatives are invited to present their opinions and discuss issues of mutual concern. However, since the activities of the Plenipotentiary in the Field of Equal Treatment were limited in 2016 (due to the merger with the office of the Government Plenipotentiary for Civil Society, as described in Section 7.b), collaboration with CSOs has also been very limited. However, in May 2016 the office did organise one conference, entitled '5 years of ETA - evaluation and recommendations for change'.<sup>652</sup>

Dialogue with CSOs was also encouraged by the National Programme of Activities for Equal Treatment 2013-2016.<sup>653</sup>

In the Ombud's Office, three special teams of experts have been established (representing three priorities of the previous Ombud), namely the 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 CSOs.<sup>654</sup> Other Committees were subsequently created, such as the Expert Committee on Mental Health Protection, the Expert Committee on Deaf People, the Expert Committee on Health and the Expert Committee on Counteracting Homelessness.

In addition, the Social Council, which has a general advisory character, was established in December 2010.<sup>655</sup> In addition to organising regular meetings with CSOs, the Ombud also invites representatives of CSOs 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 so far addressed for various reasons, which led to under-reporting. The Ombud selected research subjects for the years 2014-2015 and 2016-2017 based on these suggestions (most of them proposed by CSOs).<sup>656</sup>

The Plenipotentiary also publishes manuals and guidebooks<sup>657</sup> and until the end of 2015 organised regular conferences with CSOs (in fact, these were often co-organised with CSOs), round-table discussions 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 other to deal with education and awareness-raising).<sup>658</sup> However, the teams met only occasionally and there is no information available on the results of their work. In 2015 conferences dealt with the following subjects: 'Equal

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<sup>652</sup> Plenipotentiary Annual Report 2017, pp. 32-33; see also: <http://www.spoleczenstwoobywatelskie.gov.pl/aktualnosci/5-lat-ustawy-rownosciowej-ocena-funkcjonowania-i-rekomendacje-zmian-seminarium-w>.

<sup>653</sup> Report on the National Programme 2015, p. 8.

<sup>654</sup> [www.rpo.gov.pl/en](http://www.rpo.gov.pl/en), see also Ombud Bulletin 2012/2, pp. 51-54 and Ombud Annual Report 2013, pp. 419-423, Ombud Annual Report 2017, pp. 109-123; Ombud Annual Report 2018, pp. 723-763.

<sup>655</sup> [www.rpo.gov.pl/pl/content/rada-spoleczna-rpo](http://www.rpo.gov.pl/pl/content/rada-spoleczna-rpo).

<sup>656</sup> According to the announcement by the Ombud on 22 September 2015, of 54 suggestions from CSOs and academics, the Ombud chose 6 topics for the years 2016 and 2017, as follows. In 2016: Personal assistants for people with disabilities (*Asystent osobisty osoby z niepełnosprawnością*); Unequal treatment in the workplace on grounds of religion (*Nierówne traktowanie w miejscu pracy ze względu na religię*); Prevention of violence motivated by sexual orientation and gender identity (*Przeciwdziałanie przemocy motywowanej orientacją seksualną oraz tożsamością płciową*). In 2017: Discrimination against people with disabilities in health care (*Dyskryminacja osób z niepełnosprawnością w opiece zdrowotnej*); The phenomenon of harassment and sexual harassment (*Zjawisko molestowania i molestowania seksualnego*); Discrimination on grounds of nationality and ethnic origin in employment (*Dyskryminacja ze względu na narodowość i pochodzenie etniczne w zatrudnieniu*). See: ([www.rpo.gov.pl/pl/content/tematy-badan-antydiskryminacyjnych-na-lata-2016-i-2017](http://www.rpo.gov.pl/pl/content/tematy-badan-antydiskryminacyjnych-na-lata-2016-i-2017)).

<sup>657</sup> Plenipotentiary Annual Report 2015, p. 16.

<sup>658</sup> Plenipotentiary Annual Report 2013, pp. 81-83.; Plenipotentiary Annual Report 2014, pp. 72-73; Plenipotentiary Annual Report 2015, pp. 64-67.



opportunities media - the role of the media in shaping attitudes of tolerance and respect for diversity', 'Discrimination at school – unjustified presence. About building anti-discrimination education in formal education system in Poland', 'The concept of the Equality Body – the past, present, future', 'Romni 2015. Debate on the situation of Roma women in Poland', 'A conference on equal treatment and anti-discrimination addressed to the Plenipotentiaries of Equal Treatment of the voivodships and Co-ordinators for Equal Treatment in Ministries and Certain Central Offices'.<sup>659</sup>

In addition, it should be noted that in 2016 the Plenipotentiary for Equal Treatment drafted a negative opinion of the Polish Government in regard to the proposal of the EU horizontal directive. CSOs dealing with discrimination expressed their concern that they were not consulted in the process of preparation of the opinion and could not provide their detailed opinion. When asked about this before the Parliamentary Commission, the Plenipotentiary did not reply directly, but in a response mentioned meeting with some CSOs on discrimination policies, stating that for the first time conservative organisations (he mentioned three of these) had a chance to raise their voice.<sup>660</sup> However, in fact there were no consultations, as was finally admitted later, when the Plenipotentiary was asked for a list of the organisations consulted. Apparently, no invitations to consultations were issued, no written opinions were formulated, even though a number of CSOs expressed their interest in preparing opinions on the draft directive, and (as explained by an employee of the Plenipotentiary Office) the Plenipotentiary instead based its opinion on media materials.<sup>661</sup>

#### *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>662</sup>

In 2001, Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees for Social Dialogue.<sup>663</sup> It was replaced in July 2015 by the Act on the Social Dialogue Council and other institutions of social dialogue.<sup>664</sup>

'The social dialogue entails the involvement of employers, employees and governments into the decision-making process regarding employment and workplace-related issues. This dialogue includes all types of the negotiations, consultations and an information exchange between the representatives of abovementioned groups, on the issues of common interest, related to the economic, labour and social policy. [...] The bipartite dialogue between social partners (i.e. the employees and employers) may have the form of collective bargaining or any other form of negotiation, cooperation, preventing and solving of the disputes. The tripartite dialogue – engages the representatives of employees, employers and government [...]. The Social Dialogue Council is the main institution of the national tripartite dialogue. In the voivodship level there are the Voivodship Social Dialogue Councils. The sectoral dialogue has also the tripartite formula.'<sup>665</sup>

<sup>659</sup> Plenipotentiary Annual Report 2016, p. 48, p. 49, p. 53, p. 54, p. 62.

<sup>660</sup> Minutes of the Commission see at:

<http://orka.sejm.gov.pl/zapisy8.nsf/0/01EB7ECB99A118CEC1258028004B2A03/%24File/0096508.pdf>.

<sup>661</sup> See at: <http://www.tokfm.pl/Tokfm/1,103454,20871375,pelnomocnik-ds-rownego-traktowania-odrzucil-dyrektywe-bez-konsultacji.html>.

<sup>662</sup> Poland, Constitution, Article 20.

<sup>663</sup> Poland, 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*).

<sup>664</sup> Poland, Act of 24 July 2015 on the Social Dialogue Council and other institutions of social dialogue (*Ustawa z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego*, Dz.U.2015.1240) [hereafter 'Social Dialogue Act'].

<sup>665</sup> <http://www.dialog.gov.pl/en/>.



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>666</sup>

Hence, there are venues and opportunities 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. It is interesting that in 2016 the Plenipotentiary for Equal Treatment proposed the following issues for inclusion in the Social Dialogue Council agenda for 2017: 'Review of instruments supporting the professional activity of people aged 50+ and presentation of recommendations and necessary actions'; and 'Instruments supporting the entry of people with disabilities into the labour market – analysis, possible changes in this area'. The Plenipotentiary's proposals were not included in the Social Dialogue Council's work plan for 2017.<sup>667</sup>

### *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; in 2014 six times; in 2015 five times; in 2016 five times;<sup>668</sup> and in 2017 three times).<sup>669</sup> There are 2 Roma members on the Commission (out of 35 members).<sup>670</sup>

In June 2008, the Commission established a special 'Roma Issues Team'. The Roma Issues Team currently comprises 26 leaders and representatives of the Roma community representing different CSOs and representatives of government bodies responsible for equality issues, as well as local government representatives from places with a large Roma population.<sup>671</sup> Since its establishment in June 2008, it had met 15 times by the end of December 2012. After a four-year break the team restarted its meetings and met twice in 2016 for its 16th and 17th meetings (there were no meetings in 2017). The team discusses various issues relevant to the Roma community and in particular various programmes devoted to the Roma community. Minutes of the Team's meetings are available.<sup>672</sup>

Roma organisations also have the opportunity to receive funds from, among others, the Roma Programme (see Section 5 on positive action), and many of them are beneficiaries of such grants.

Roma issues were 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. However, 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.

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<sup>666</sup> For more information, visit the Centre's website [www.cpsdialog.pl/](http://www.cpsdialog.pl/).

<sup>667</sup> Plenipotentiary Annual Report 2017, p. 19.

<sup>668</sup> Plenipotentiary Annual Report 2014, p. 65, Plenipotentiary Annual Report 2015, p. 53; Plenipotentiary Annual Report 2016, p. 63; <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/posiedzenia/2016/9676,Posiedzenia-2016.html>.

<sup>669</sup> See at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/posiedzenia/2017/10212,Posiedzenia-2017.html>.

<sup>670</sup> See at <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/sklad-i-regulamin>.

<sup>671</sup> The list of current members is attached to the minutes of the first meeting in 2016, see at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/zespol-do-spraw-romski/posiedzenia/9852,XVI-posiedzenie-Zespolu-do-spraw-romskich-Komisji-Wspolnej-Rzadu-i-Mniejszosci-N.html>.

<sup>672</sup> See at <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/zespol-do-spraw-romski/posiedzenia>.

Finally, since the government Programme for the Roma Community in Poland 2004-2013 ended, a new programme has started. The Programme for the Integration of the Roma Community in Poland 2014-2020<sup>673</sup> was finally accepted by the Council of Ministers on 7 October 2014. 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, as outlined in Council conclusions (2011/C 258/04). Priority within the Programme is given to complex projects, based on local analysis of needs and executed in partnerships with CSOs 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. In fact, the Programme started in 2015 and information on activities that received funding in subsequent years is available (however, the only report available on the execution of the programme is for the year 2015).<sup>674</sup>

## **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>675</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>676</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>677</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>678</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. 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 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).

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<sup>673</sup> *Program Integracji Społeczności Rromskiej w Polsce na lata 2014-2020*, Warsaw 2014, also in English, available at <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>674</sup> <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

<sup>675</sup> Poland, Labour Code, Article 9.2.

<sup>676</sup> Poland, Constitution, Article 32.

<sup>677</sup> Poland, Labour Code Article 18.2.

<sup>678</sup> Poland, Civil Code, Article 58.1 and Article 58.3.

b) Rules contrary to the principle of equality

As already mentioned at the beginning of the report, the 2010 Equal Treatment Act brought 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 (see also information in Section 12.2 on the constitutional complaint brought by the Ombud).

Nevertheless, the scope of 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 (CT) 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. However, it must be stressed that since the end of 2015 the CT has been undergoing an acute crisis; indeed, some people claim that the CT is 'paralysed' or claim it no longer has validity. The composition of the bench has changed, some judges have been suspended, and some judges are known as 'understudies', since they have agreed to take on positions to which others had already been appointed. The CT may therefore no longer be fully trusted as a guarantor of protection of civil liberties.<sup>679</sup>

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 in recent years 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, for instance in relation to the healthcare system.<sup>680</sup>

In general, 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>679</sup> There are numerous sources describing the constitutional crisis in Poland, including European Commission recommendations and statements, see at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm); for Venice Commission opinions, see at: <http://www.venice.coe.int/webforms/documents/?country=23&year=all>, as well as descriptions by legal scholars on constitutional blogs, e.g.: <http://verfassungsblog.de/?s=Poland>; <http://www.constitutionnet.org/news?region=96>.

<sup>680</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>681</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>682</sup> and then report annually on its execution<sup>683</sup> (the first report was due on 31 March 2013).<sup>684</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>685</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>686</sup> The second report was also delayed and was sent to the Council of Ministers on 7 May 2015<sup>687</sup> (this is the version used in this report). The report covering 2015 was also late and was not published until January 2017.<sup>688</sup> Finally the most recent report, covering 2016, was published in July 2017.<sup>689</sup> The National Programme was planned to continue until the end of the first half of 2016, and should therefore now be evaluated. According to information provided by the Plenipotentiary, evaluation is being undertaken and after final analyses the next programme will be developed (based also on input from various governmental agencies). However, no public consultation on the draft programme has taken place,<sup>690</sup> although the previous programme has come to an end and the Plenipotentiary planned to prepare the new programme in 2017.<sup>691</sup>

<sup>681</sup> Poland, Equal Treatment Act, Article 21.1.

<sup>682</sup> Poland, Equal Treatment Act, Article 22.

<sup>683</sup> Reports published:

Report on the execution of the National Programme of Activities for Equal Treatment for 2016 (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2016 r.*), July 2017, [hereafter 'Report on the National Programme 2017'];

Report on the execution of the National Programme of Activities for Equal Treatment for 2015 (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2015 r.*), January 2017, [hereafter 'Report on the National Programme 2016'];

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'];

Report on the execution of the National Programme of Activities for Equal Treatment for 2013 (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2013 r.*), 27 June 2014, [hereafter 'Report on the National Programme 2014'].

<sup>684</sup> Poland, Equal Treatment Act, Article 23.3, Article 32.

<sup>685</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>686</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>687</sup> Report on the National Programme 2015.

<sup>688</sup> Report on the National Programme 2016, see at: <http://www.spoleczenstwoobywatelskie.gov.pl/raporty-z-realizacji-krajowego-programu-dzialan-na-rzecz-rownego-traktowania>.

<sup>689</sup> See at: <http://www.spoleczenstwoobywatelskie.gov.pl/raporty-z-realizacji-krajowego-programu-dzialan-na-rzecz-rownego-traktowania>.

<sup>690</sup> As of March 2018.

<sup>691</sup> Plenipotentiary Annual Report 2017; Ombud Annual Report 2017, p. 71.

The Programme for the years 2013-2016 was the first governmental document to tackle the problem of discrimination in general (previously, there were programmes focused only on the issues of racism, xenophobia and related intolerance). The Programme focused 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 formulated principal objectives and various specific objectives regarding equal treatment and anti-discrimination policies, addressed to specific ministries, public agencies and CSOs within a given period of time. For instance, in the area of anti-discrimination policy, within the main objective of raising the standards of anti-discrimination policy, some of the specific objectives included were: 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 was extended to cover 2013-2016 (implementation to be completed during the first half of 2016). In the process 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 CSOs were not accepted and the level of involvement of some public institutions in the development of the Programme revealed that they were not paying due attention to implementation of the principle of equal treatment.<sup>692</sup> The initial idea of establishing a special inter-ministerial team to monitor implementation of the Programme<sup>693</sup> was finally realised in September 2015,<sup>694</sup> and the Monitoring Committee of the National Programme of Activities for Equal Treatment has so far met twice (once in 2015 and once in 2016; there were no meetings in 2017).<sup>695</sup> In 2016 the Plenipotentiary began evaluation of the National Programme within the Committee; several ministries expressed positive opinions, stating that the Programme 'is an important instrument in the implementation of the policy of equal treatment in Poland. It provides an opportunity for a comprehensive assessment of the current state of compliance with the principle of equal treatment and the possible indication of areas for improvement and should be continued'.<sup>696</sup> The report covering the last year of operation of the programme was released in July 2017.<sup>697</sup> So far,<sup>698</sup> despite the previous programme having ended in 2016, the new programme has not yet been drafted or announced, although it was scheduled for 2017.

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.

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<sup>692</sup> Ombud Annual Report 2014, p. 92.

<sup>693</sup> Report on the National Programme 2015, p. 182.

<sup>694</sup> <http://www.spoleczenstwoobywatelskie.gov.pl/aktualnosci/i-posiedzenie-zespolu-monitorujacego-krajowy-program-dzialan-na-rzecz-rownego>.

<sup>695</sup> <http://www.spoleczenstwoobywatelskie.gov.pl/aktualnosci/ii-posiedzenie-komitetu-monitorujacego-krajowy-program-dzialan-na-rzecz-rownego>.

<sup>696</sup> Plenipotentiary Annual Report 2017, pp. 47-50.

<sup>697</sup> See at: <http://www.spoleczenstwoobywatelskie.gov.pl/raporty-z-realizacji-krajowego-programu-dzialan-na-rzecz-rownego-traktowania>.

<sup>698</sup> As of March 2018.

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>699</sup> The members of the Council represented 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, the Prime Minister signed the Ordinance that created the new Council for Counteracting Racial Discrimination, Xenophobia and Related Intolerance.<sup>700</sup>

As the specific objectives of the Council's activities, the Ordinance listed:

- 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>701</sup>

The Council brought together representatives of all ministries and relevant institutions. The Council met six times in 2013, four times in 2014<sup>702</sup> and once in 2015 (the consultative body met three times).<sup>703</sup>

On 27 April 2016 the Prime Minister issued a regulation (effective on 1 June 2016) abolishing the Council for Counteracting Racial Discrimination, Xenophobia and Related Intolerance<sup>704</sup> established by the Ordinance of the Prime Minister of 28 February 2011. The Consultative Council (*Rada Konsultacyjna*) to this body was also abolished. (It was comprised of independent experts and representatives of CSOs.) As the spokesman for the Government explained, the work of the Council did not have any important effects, there is no need to have duplicate bodies responsible for the same issues, and that the Government Plenipotentiary for Equal Treatment is responsible for these matters.<sup>705</sup> This happened shortly after the Ombud 'outlined that in recent months there has been an upsurge in hate speech and violence against foreigners. (...) Deputy Minister of Sport Ryszard Szuster had argued that the council "is currently the only body providing coordination of governmental institutions, local government bodies and other entities in preventing and combating discrimination and intolerance."<sup>706</sup>

<sup>699</sup> Plenipotentiary Annual Report 2012, p. 7; Plenipotentiary Annual Report 2013, p. 54.

<sup>700</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* (M.P.2013.79).

<sup>701</sup> Framework Programme of Actions of the Council on the Prevention of Racial Discrimination, Xenophobia and Related Intolerance 2013, p. 2.

<sup>702</sup> Plenipotentiary Annual Report 2015, p. 54.

<sup>703</sup> Plenipotentiary Annual Report 2015, p. 64.

<sup>704</sup> Poland, *Zarządzenie nr 53 Prezesa Rady Ministrów z dnia 27 kwietnia 2016 r. w sprawie zniesienia Rady do spraw Przeciwdziałania Dyskryminacji Rasowej, Ksenofobii i związanej z nimi Nietolerancji*.

<sup>705</sup> See at: <http://www.tvn24.pl/wiadomosci-z-kraju,3/bochenek-o-rozwiazaniu-rady-ds-przeciwdzialania-dyskryminacji,640986.html>.

<sup>706</sup> See more at: <http://www.thenews.pl/1/9/Artykul/251284,Polish-PM-abolishes-antidiscrimination-council#sthash.vGzbnpVb.dpuf>.



Despite the statement of the spokesman for the Government, some details of the work of the Council can be given.

In November 2013, the Council adopted the Framework Programme of Actions by the Council on the Prevention of Racial Discrimination, Xenophobia and Related Intolerance, which defined the scope of action. The four main areas were: 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 other working on a dictionary of hate speech.<sup>707</sup>

In February 2015, the Council of Ministers adopted an action plan for 2015 for the bodies represented in the Council, including monitoring of the media, incidents and events exhibiting signs of discrimination and intolerance; organising conferences and symposia; preparation of prevention programmes; educational and social campaigns; organisation of training courses, workshops and seminars.<sup>708</sup>

The Council also established a Consultative Council, consisting of representatives of civil society 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>709</sup>

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<sup>707</sup> Plenipotentiary Annual Report 2015, p. 54.

<sup>708</sup> <https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/plan-dzialan-na-rok-2015-organow-reprezentowanych-w-radzie-do-spraw.html>.

<sup>709</sup> Plenipotentiary Annual Report 2014, p. 65.

## 10 CURRENT BEST PRACTICES

In 2013 the Ombud decided to initiate public consultation, including CSOs, 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 CSOs and this is a good way of identifying interesting projects. However, the Ombud only selects 3 or 4 topics each a year out of perhaps 50-70 proposals. The Ombud has now selected research subjects for the years 2014-2015,<sup>710</sup> and 2016-2017<sup>711</sup> based on these proposals. (See also Section 8.1 above).

A second good practice by the Ombud are his regional meetings – the Ombud visits different regions one by one (each visit lasts a couple of days) and meets with different institutions, CSOs and citizens. As the Ombud states in the annual report, 'An important element of my work as the Ombudsman [...] were regional meetings organised throughout the country. In nearly all of these meetings, the participants raised issues related to discrimination or exclusion. Both I and the representatives of my Office have made every effort to ensure that each case is properly explained.'<sup>712</sup>

Something which is also potentially a good practice (since it is still a relatively 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>713</sup> and the idea is becoming better known within the administration due to a range of activities, including seminars and conferences.<sup>714</sup> In some public institutions over 50%, in some cases even as many as 80% of all contracts already include these clauses; however, the goal of 100% of overall contracts has not yet been achieved.<sup>715</sup>

The Golden Book of Good Practices for the Social Participation of Older People is an initiative established by the Ombud. On 10 April 2017 the Ombud Office held a ceremony to award prizes to the winners of the second edition of the Golden Book of Good Practices for Social Participation of Older People. Eleven projects received awards. In September 2017, the third edition of the Golden Book of Good Practices for the Social Participation of Older People was announced.<sup>716</sup>

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<sup>710</sup> Ombud Annual Report 2014, p. 10. See also <https://www.rpo.gov.pl/pl/content/wyniki-konsultacji-tematów-badań-antydyskryminacyjnych-na-2015-r>.

<sup>711</sup> See at: [www.rpo.gov.pl/pl/content/tematy-badan-antydyskryminacyjnych-na-lata-2016-i-2017](http://www.rpo.gov.pl/pl/content/tematy-badan-antydyskryminacyjnych-na-lata-2016-i-2017).

<sup>712</sup> Ombud Annual Report 2017, p. 3.

<sup>713</sup> Plenipotentiary Annual Report 2014, p. 28.

<sup>714</sup> Report on the National Programme 2015, pp. 47-58; Report on the National Programme 2016, pp. 68-86.

<sup>715</sup> Report on the National Programme 2017, pp. 61-82.

<sup>716</sup> Full list of winners: <https://www.rpo.gov.pl/pl/content/zlota-ksiega-dobrych-praktyk-na-rzecz-spoiecznego-uczestnictwa-osob-starszych-ii-edycja>; see also Ombud Annual Report 2018, p. 743.



## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

Although the 2010 ETA seems 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 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 Human Rights – *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 (*odszkodowanie*), which only covers material (but not non-material) damage and therefore limits the protection. The compensation claim under the Act should be widened to include non-material damages. It is questionable whether both sanctions based on the ETA, as well as the only special sanction in the Labour Code 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 written opinions and court decisions also vary (see more in Section 6.5 above).<sup>717</sup>

### 11.2 Other issues of concern

The Law and Justice Party, which formed the Government in October 2015, never had equality issues on its agenda. In fact, when Law and Justice was previously in power (in a coalition of three parties – Law and Justice, Self-defence and the League of Polish Families) the post of Plenipotentiary was abolished (on 3 November 2005). It was not re-established until March 2008, after elections and a change of Government. However, the situation of the Plenipotentiary has changed: before 2011 the Plenipotentiary was appointed on the basis of an Ordinance of the Council of Ministers, but since January 2011 the post has its legal basis in an Act of Parliament (the ETA). Any decision regarding the existence of the Plenipotentiary would therefore require amendment of this Act.

In order to understand something of the current shift in focus of the present Government it is worth noting that Minister Beata Kempa, until 18 December 2017 the head of the Chancellery of the Prime Minister, where the office of the Government Plenipotentiary for Equal Treatment was situated until 5 January 2016 and where the office of the Plenipotentiary for Equal Treatment and Government Plenipotentiary for Civil Society is also currently situated, is the founder and leader of the Parliamentary Group 'Stop Gender Ideology'. This group protests against so-called 'gender ideology' from the standpoint of traditional, conservative values.<sup>718</sup>

A new trend has been noticed by the Ombud and other actors engaged in LGBTI issues: all court cases in relation to the rights of LGBTI persons that are dealt with by the office of the Ombud attract attention from the prosecution services. Prosecutors (exercising their right) then decide to join all such proceedings, not in order to support the victim of discrimination or the Ombud's efforts but as a way to control what is happening or to represent the opposing party rather than the alleged victim of discrimination (for example in the case against a publishing company described in Section 12.2 below).

<sup>717</sup> See also: ETA commentary 2017, pp. 192-201.

<sup>718</sup> Webpage of the Parliamentary Group of MPs 'Stop Gender Ideology': <http://www.sejm.gov.pl/sejm7.nsf/agent.xsp?symbol=SKLADZESP&Zesp=270>.

These attitudes and actions on the part of public bodies and officials (e.g. that of a minister who lodged an application for extraordinary remedy against a judgment establishing discrimination based on sexual orientation) is worth noting, particularly when compared to denying budgetary resources to the Ombud, which has the knock-on effect of the Ombud not being able to adequately assist victims of discrimination.

There are two bodies in Poland that have a mandate to deal with discrimination, the Ombud (equality body) and the Government Plenipotentiary for Equal Treatment. There are important developments in regard to both. The Ombud faces problems related to the budget of the office and political attacks (including calls that the Ombud's appointment should be revoked by the Parliament because he represents liberal, leftist views, supports LGBT people etc.). The role of the Plenipotentiary for Equal Treatment has been marginalised. The office was combined with the newly created (in January 2016) office of the Plenipotentiary for Civil Society (*Pełnomocnik Rządu do spraw Społeczeństwa Obywatelskiego*). Since the merger of the two, the role of the Plenipotentiary in discrimination issues has been minimalised, the office has been reduced, and the remaining staff directed to focus on issues of civil society.

There were some internal discussions related to work on the horizontal directive that demonstrate that it is seen as a controversial issue. The European Union Affairs Committee of the Polish Parliament adopted (4 December 2014) a desideratum urging the Polish Government to rethink its positive opinion of the draft of the directive.<sup>719</sup> In 2016, however, the Plenipotentiary for Equal Treatment drafted a negative opinion of the Polish Government regarding the proposal of the EU horizontal directive. CSOs expressed their concern that they were not consulted in the process of preparation of the opinion and could not provide their opinions (see more in Section 8.1 above). However, the new official position of the Government, accepted by Parliamentary and Senate Commissions, is negative: the Government does not support the draft directive.<sup>720</sup>

According to the opinion Wojciech Kaczmarczyk (the Government Plenipotentiary for Equal Treatment at the time) expressed in the Sejm (lower house of the Parliament) Commission meeting,<sup>721</sup> when informing members of the change in the Government's position, the Government believes that there is no need to introduce another regulation to guarantee the rights of religious or sexual minorities. He argued thus: 'Within Polish law there are sufficient mechanisms of protection against discrimination on the grounds mentioned'. According to the position of the Government: 'The current draft of the Directive cannot be accepted. The Government of the Republic of Poland expresses, inter alia, doubts as to the compliance of the proposal with the principle of subsidiarity and the Constitution of the Republic of Poland. The project may lead to the restriction of freedom of economic activity and freedom of contracts. It also points out broad and blurred definitions that allow for an interpretation that extends beyond the provisions of the Directive. It also stresses the difficulty of amending or repealing the Directive and the opposition of some Member States and protests of entrepreneurs.'

In March 2016, the Ombud expressed its concern over escalating racial tension in Poland: 'We can observe an extraordinary wave of hatred on the internet. (...) This is the moment when words turn into deeds. About once a week, or every two weeks we [receive a report] of a racial beating.'<sup>722</sup> In 2017 Ombud continued to express its concerns on the increase in racial discrimination and hate speech, including at conferences, including 'Fight against

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<sup>719</sup> Plenipotentiary Annual Report 2015, pp. 21-22.

<sup>720</sup> Plenipotentiary Annual Report 2017, pp.20-21.

<sup>721</sup> Minutes of the Commission see at:

<http://orka.sejm.gov.pl/zapisy8.nsf/0/01EB7ECB99A118CEC1258028004B2A03/%24File/0096508.pdf>.

<sup>722</sup> See more at: <http://www.thenews.pl/1/9/Artykul/243728,Racial-tension-escalating-in-Poland-human-rights-ombudsman#sthash.D4vZbvqJ.dpuf>; on hate speech and hate crime see also: Ombud Annual Report 2017, pp. 66-67.

anti-Semitism and anti-Gypsyism in Poland - monitoring, intervention, education'<sup>723</sup> and 'Antisemitism in Poland: Diagnosis, Consequences, and Methods of Prevention',<sup>724</sup> and on the occasion of publication of the report entitled 'The principle of equal treatment – law and practice. Crimes motivated by prejudices. Analysis and recommendations'.<sup>725</sup> In 2016 the Ombud registered about 60 cases of hate speech and violence; in 2017 about 100 cases were registered.<sup>726</sup>

The Ombud's Office also receives complaints regarding various incidents of homophobic speech in public. Two examples are the public exhibitions entitled 'Stop deviants' shown in several towns<sup>727</sup> and extremely homophobic leaflets distributed among children.<sup>728</sup>

In 2016 the physical attacks made on the offices of LGBTI organisations, such as the CSOs Campaign Against Homophobia and Lambda, did not meet with adequate reaction from the Government in the form of public criticism of this kind of attack; the perpetrators were not found.<sup>729</sup>

The problem of homophobia and transphobia was raised in a special statement by the Ombud, who appealed to the Government on the occasion of the International Day Against Homophobia and Transphobia (IDAHOT) on 17 May 2016. The Ombud underlined that 'it is particularly disturbing to hear the statements of public authorities legitimising homophobia and discrimination based on sexual orientation or gender identity. Public authorities should not only refrain from such statements, but should express opposition to such attitudes and behaviours while encouraging equal treatment for all.'<sup>730</sup> As the problem of homophobia continues to exist, the Ombud regularly takes a position on these issues, including on the occasion of Transgender International Rights and Education Day<sup>731</sup> and at conferences, seminars and events, such as the debate on the rights of LGBT persons at the University of Warsaw held under the honorary patronage of the Ombudsman.<sup>732</sup> The Ombud also commissioned relevant research: The principle of equal treatment – law and practice. Equal treatment in employment irrespective of gender identity. Analysis and recommendations (2016).<sup>733</sup>

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 six 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

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<sup>723</sup> See at: <https://www.rpo.gov.pl/pl/content/konferencja-walka-z-antysemityzmem-i-antycyganizmem-w-polsce-monitoring-interwencja-edukacja>.

<sup>724</sup> See at: <https://www.rpo.gov.pl/pl/content/z-przejawami-nienawisci-nalezy-stanowczo-walczyć-adam-bodnar-na-konferencji>.

<sup>725</sup> Rzecznik Praw Obywatelskich (2017), *Zasada Równego Traktowania. Prawo i praktyka*, nr 23, *Przestępstwa motywowane uprzedzeniami. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>726</sup> Ombud Annual Report 2018, p. 77.

<sup>727</sup> See at: <http://www.dzienniklodzki.pl/wiadomosci/opoczno/a/homofobiczna-wystawa-stop-dewiacji-w-opocznie-mieszkancy-oburzeni-zdjecia,10574554/>.

<sup>728</sup> See at: <http://queer.pl/news/197396/kielce-marenin-festyn-ulotka-cameron-homofobia>.

<sup>729</sup> See at: <http://www.newsweek.pl/polska/atak-na-lambda-w-warszawie-i-kph-nasila-sie-homofobia,artykuly,381161,1.html>.

<sup>730</sup> See at: <https://www.rpo.gov.pl/pl/content/oswiadczenie-rpo-z-okazji-miedzynarodowego-dnia-walki-z-homofobia-i-transfobia>.

<sup>731</sup> See at: <https://www.rpo.gov.pl/pl/content/miedzynarodowy-dzien-edukacji-i-praw-osob-transpłciowych>.

<sup>732</sup> See at: <https://www.rpo.gov.pl/pl/content/debata-na-temat-praw-osob-lgbt-na-uniwersytecie-warszawskim-pod-honorowym-patronatem-rpo>.

<sup>733</sup> Rzecznik Praw Obywatelskich (2016), *Zasada Równego Traktowania. Prawo i praktyka*, nr 19, *Równe traktowanie w zatrudnieniu bez względu na tożsamość płciową. Analiza i zalecenia*; available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

engaged in some projects, there is still considerable need for much more research and data collection.

Neither the Polish Constitution nor labour law contain an exhaustive list of grounds of discrimination. However, in contrast to labour law, the ETA, actually an almost verbatim implementation of the Directives, 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, both at local level (expressed by CSOs) and at international level, urging the Polish Government to widen the scope of protection.

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 (lower house of the Parliament) 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>734</sup>

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<sup>734</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).

## 12 LATEST DEVELOPMENTS IN 2017

### 12.1 Legislative amendments

1. Poland, Retirement Act, Article 24, 27, amended on 16 November 2016 (in force since 1 October 2017).<sup>735</sup>

The amendment restored the previous retirement age (60 for women and 65 for men). This retirement age was in force until 2012. In May 2012, Parliament changed the retirement age. The normal retirement age for both men and women was set at 67 (to be introduced incrementally). The current amendment thus restores the previous situation.

2. The restoration of the previous general pension age (60 for women and 65 for men) also caused changes in the mandatory retirement age of judges and prosecutors – judges (maximum age 60 for women and 65 for men, if extended – maximum age 70),<sup>736</sup> public prosecutors (maximum age 60 for women and 65 for men, if extended – maximum age 70).<sup>737</sup>

These particular changes caused a firm response from the European Commission, which recommended (on 20 December 2017) that the Polish authorities:<sup>738</sup>

'Amend or withdraw the law on Ordinary Courts Organisation, in particular to remove the new retirement regime for judges including the discretionary powers of the Minister of Justice to prolong the mandate of judges and to appoint and dismiss presidents of courts; Amend the Supreme Court law, not apply a lowered retirement age to current judges, remove the discretionary power of the President to prolong the mandate of Supreme Court judges [...]'.

Additionally, 'the College of Commissioners also decided to refer the Polish Government to the European Court of Justice for breach of EU law, concerning the Law on the Ordinary Courts and, specifically, the retirement regime it introduces. The Commission's key legal concern identified in this law relates to the discrimination on the basis of gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years). This is contrary to Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2006/54 on gender equality in employment.

In its referral to the European Court of Justice, the Commission will also raise the linked concern that the independence of Polish courts will be undermined by the fact that the Minister of Justice has been given a discretionary power to prolong the mandate of judges which have reached retirement age (see Article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights).<sup>739</sup>

3. Until 2017, according to Polish law, nurseries, schools and educational institutions should include in their curricula anti-discrimination education and activities embracing the full spectrum of their communities.<sup>740</sup> This has now changed. The Ministry of National Education removed anti-discrimination education from the ordinance on school

<sup>735</sup> Poland, Retirement Act, Article 24, 27, amended 16 November 2016, in force since 1 October 2017.

<sup>736</sup> Poland, Act of 27 July 2001 Law on Ordinary Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), Articles 69.1, 69.3.

<sup>737</sup> Poland, Act of 28 January 2016 on Public Prosecution (*Ustawa z dnia 28 stycznia 2016 r. o prokuraturze*), (in force since 4 March 2016), Article 127.

<sup>738</sup> See at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>739</sup> See at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>740</sup> Poland, Ordinance of the Minister of National Education of 6 August 2015 on the requirements for schools and institutions (*Rozporządzenie Ministra Edukacji Narodowej z dnia 6 sierpnia 2015 r. w sprawie wymagań wobec szkół i placówek*, Dz.U.2015.1214).

requirements.<sup>741</sup> The draft justification of the new wording of the ordinance stated that at school 'it is important to shape patriotic attitudes, civic attitudes, a sense of identity, national and cultural awareness'.<sup>742</sup> This was welcomed in various conservative circles as a 'retreat from gender ideology', as the previous provision had been described as 'opening the gate to depravity'.<sup>743</sup> It should be underlined that, although the draft ordinance was sent out for public consultation, the list of those to whom it was addressed by the Ministry of National Education did not include organisations conducting anti-discrimination education.<sup>744</sup>

4. The most recent changes to the Law on the Supreme Court and the Law on common courts introduced a change stating that a candidate for a position as a judge, judge assessor or lay judge must have exclusively Polish citizenship.<sup>745</sup> The Ombud drew attention to this issue of restricting access to public service as judges, assessors and lay judges as a result of the requirement to have only Polish citizenship. In the Commissioner's opinion, the principles of access to public service must be objective in nature, enabling various candidates to apply for this service in accordance with the principles of equal opportunities, without any discrimination and unjustified restrictions. The Ombud drew attention to the lack of indication in the justification to the draft law of the purpose of the new requirement for candidates. Pursuant to the provisions of the Act on Polish Citizenship, a Polish citizen who simultaneously holds the citizenship of another state has the same rights and obligations as a person who has only Polish citizenship. According to Article 60 of the Constitution, Polish citizens exercising full public rights have the right to access public service on equal terms. In relation to the above, the Ombud asked the Marshal of the Sejm (lower house of the Parliament) to take these arguments into consideration during the legislative process (the arguments were not accepted).

5. Very controversial changes were introduced in 2017 (in force since 1 September 2017, the start of the new school year). The Ministry of National Education limited the possibility for pupils with disabilities to integrate in schools.<sup>746</sup> According to the amended law, individual teaching required because of special needs is to be organised at home, not school. Teachers would therefore go to pupils' homes and pupils would not participate in integrated education. This amendment (even while still in draft form) provoked numerous protests from parents, CSOs and the Ombud. It is seen as a step back in the introduction of integrated education and causes a number of practical problems (for instance parents argue that they have to leave their jobs and stay at home with their children).<sup>747</sup>

## 12.2 Case law

**Name of the court:** Constitutional Court

**Date of decision:** 11 October 2017 (discontinuance of the case)

**Name of the parties:** motion of the Ombud to the Constitutional Tribunal

<sup>741</sup> Poland, Ordinance of the Minister of National Education of 11 August 2017 on the requirements for schools and institutions (*Rozporządzenie Ministra Edukacji Narodowej z dnia 11 sierpnia 2017 r. w sprawie wymagań wobec szkół i placówek*, Dz.U.2017.1611), replacing the Ordinance of 2015.

<sup>742</sup> See at: <http://wyborcza.pl/osiemdziewiec/7,159012,22043484,fabryka-patriotow-pis-wyrzuca-edukacje-antydiskryminacyjna.html>.

<sup>743</sup> See at: <http://www.oswiata.abc.com.pl/czytaj/-/artykul/dzialania-antydiskryminacyjne-znikna-z-rozporzadzenia>; <https://naszdzienik.pl/polska-kraj/184845,odwrot-od-gender.html>;

<sup>744</sup> See at: <http://wyborcza.pl/osiemdziewiec/7,159012,22043484,fabryka-patriotow-pis-wyrzuca-edukacje-antydiskryminacyjna.html>.

<sup>745</sup> Poland, Law on the Supreme Court, passed on 8 December 2018 (Dz.U.2018.5), Article 30.1.1., in force from 3 April 2018, after the cut-off date for this report; Poland, Law on Ordinary Courts, Article 61.1.1 amended on 8 December 2018 (Dz.U.2018.5), in force from 3 April 2018, after the cut-off date for this report.

<sup>746</sup> Poland, Ordinance of the Minister of National Education of August 28, 2017 amending the ordinance on the obligatory annual individual pre-school preparation of children and individual teaching of children and young people; (*Rozporządzenie Ministra Edukacji Narodowej z dnia 28 sierpnia 2017 r. zmieniające rozporządzenie w sprawie indywidualnego obowiązkowego rocznego przygotowania przedszkolnego dzieci i indywidualnego nauczania dzieci i młodzieży*, Dz.U.2017.1656).

<sup>747</sup> Ombud Annual Report 2018, pp. 531-532.



**Reference number:** K 17/16

**Web address:** <http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9882-ustawa-o-wdrozeniu-niektorych-przepisow-unii-europejskiej-w-zakresie-rownego-traktowania/>

**Brief summary:** In March 2016, in a complaint to the Constitutional Tribunal, the Ombud challenged the constitutionality of the provisions of the ETA 'in so far as they limit the scope of the Act because of the closed catalogue of discriminatory grounds. The law excludes some social groups that experience discrimination in many areas of their lives. This legislative omission unjustifiably differentiates the procedural situation of the persons discriminated against. The challenged statutory solutions are, in the Ombudsman's view, contrary to the constitutional principle of equality and the right to court, as well as the provisions of the Convention on the Rights of Persons with Disabilities.'<sup>748</sup>

The Ombud argued that: 'The catalogue of discriminatory grounds of unequal treatment provided for in the Act is closed because of the closed catalogue of the discriminatory grounds in the EU directives that the law was to implement. However, the Constitution (Art. 32) prohibits discrimination on any grounds. In the opinion of the Polish Ombudsman, the legislator, when implementing EU law, should take into consideration the necessity of ensuring the conformity of national law with the Constitution.'<sup>749</sup>

According to the Ombud: 'Persons experiencing discrimination that does not fall within the scope of the Equal Treatment Act may benefit from legal protection measures provided for in the Civil Code. However, their procedural situation is far less favourable than those who experience discrimination within the scope of the Equal Treatment Act. Seeking damages caused by the breach of the principle of equal treatment under the Equal Treatment Act is much simplified in relation to the general provisions of the Civil Code on what constitutes the expression of the constitutionally protected right to court.'<sup>750</sup>

In March 2017 the Parliament and the Prosecutor General submitted their opinions on the Ombud's complaint. The opinions are long and detailed, but the main argument was that this case should be dropped by the CT because it did not deal with the unconstitutionality of the law, but with the lack of regulation, conscious legislative omission and as such might not be held unconstitutional from this point of view. Some weeks later, in April 2017, the Ombud quite unexpectedly withdrew the complaint and asked for discontinuance of the case. The CT issued a resolution on discontinuance in October 2017 and the case was therefore formally dropped. The Ombud did not provide information about its decision and the reasons for taking it.<sup>751</sup>

**Name of the court:** Sąd Rejonowy in X (2nd instance – Sąd Okręgowy in P)<sup>752</sup>

**Date of decision:** 16 December 2016 (2nd instance – 22 March 2017)

**Name of the parties:** YZ, PTPA<sup>753</sup> on behalf of YZ v. Catholic Diocese of H.

**Reference number:** I C 1326/15 (2nd instance – I Ca 75/17)

**Web address:** not published

**Brief summary:** YZ (journalist, known media personality) supported a petition for legalising civil partnerships (of both opposite-sex and same-sex partners) on social media (Facebook). Shortly after signing the petition, he lost the job (YZ argued there was a verbal

<sup>748</sup> See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu> (this and subsequent quotes translated by author).

<sup>749</sup> See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

<sup>750</sup> See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

<sup>751</sup> For full information on the case see the CT website at: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9882-ustawa-o-wdrozeniu-niektorych-przepisow-unii-europejskiej-w-zakresie-rownego-traktowania/>.

<sup>752</sup> The court rulings are public (not published). However, the claimant asked that the case not be publicised; it has therefore been anonymised.

<sup>753</sup> Polish Society for Anti-Discrimination Law, representing the claimant.

agreement) of running a Radio B. concert in D. The Catholic priest who organised the concert told him (using insulting words) that this was because he supported gays.

YZ sued the Roman Catholic Diocese of H. for compensation for infringement of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment) referring to the ETA, EU directives and CJEU jurisprudence (he asked for PLN 3 750 for himself and PLN 1 250 for the PTPA, which represented him).

The court of first instance (*sąd rejonowy*) dismissed the lawsuit, stating that there was no binding contract between the parties. Regarding discrimination, the court did not accept the shift of the burden of proof, arguing that the claimant should have provided more evidence himself. The court also argued that the organiser of the concert, as part of the Catholic Church structure, has a right to refuse collaboration with persons who support ideas the Catholic Church does not agree with. So even if one could conclude that the reason for the breach of the contract was the claimant's support for civil partnerships between same-sex partners, this would not constitute discrimination. The court also relied on Article 5.7 of the ETA (and similar provisions of the Labour Code), stating that the ETA shall not apply to:<sup>754</sup> '7) limitation by churches and other religious associations, and also organisations, whose ethical rules are based on religion, denomination or belief, of the access to professional activity or performance thereof due to religion, denomination or belief, provided that the type or conditions of performance of such professional activity make religion, denomination or belief a real and dominant professional requirement set for a given natural person, in proportion to the accomplishment of legitimate objective of the differentiation of situation of this person; this applies also to the requirement for employed natural persons, that specifies the obligation to act in good faith and be loyal to the ethics of church, other religious association or organisation, whose ethical rules are based on religion, denomination or belief.' YZ appealed against the ruling.

The court of second instance (*sąd okręgowy*) overturned the decision in March 2017, awarding PLN 1 000 (approx. EUR 250) to YZ and PLN 1 000 to the PTPA. The court overturned the findings of the court of first instance and decided that there was a binding verbal contract between the parties. Regarding discrimination, the court stated that the claimant provided enough evidence to substantiate discrimination and the burden of proof was shifted to the respondent, who had not proved that there was no breach of the rule of equal treatment. According to the court, the limitations stemming from Article 5.7 of the ETA (the court of first instance referred to these) do not apply in the given case. Finally, the court concluded that the respondent discriminated against the claimant – indirect discrimination because of political opinion (*światopogląd*).

As the claimant YZ does not wish to publicise his case, there were no media reports on the rulings, and the PTPA did not provide official information about it. The decision is final.

**Name of the court:** Sąd Rejonowy dla Łodzi-Widzewa (Łódź-Widzew District Court)

**Date of decision:** (simplified procedure) July 2016

**Name of the parties:** Police v. Printing house

**Reference number:** not available

**Web address:** not available

**Name of the court:** Sąd Rejonowy dla Łodzi-Widzewa (Łódź-Widzew District Court), (2nd instance – Sąd Okręgowy in Łódź)

**Date of decision:** (regular procedure) 31 March 2017 (2nd instance – 26 May 2017)

**Reference number:** VII W 1640/16; (2nd instance – V Ka 557/17); (cassation Supreme Court – II KK 333/17)<sup>755</sup>

**Web address:** -

<sup>754</sup> See at: <https://www.rpo.gov.pl/en/content/act-3rd-december-2010-implementation-some-regulations-european-union-regarding-equal>.

<sup>755</sup> See at: <http://www.sn.pl/sprawy/SitePages/e-Sprawa.aspx?ItemSID=7729-ce0d61b0-fe80-4050-bec5-582cc7606e5a&ListName=esprawa2017&Search=II%20KK%20333/17>.



**Brief summary:** A small printing company refused to print a roll-up banner for the CSO LGBT Business Forum. An employee wrote in an email refusing the work that 'we do not contribute to the promotion of the LGBT movement in our work'. Following a complaint from LGBT organisations, the Ombud sent a motion to the police suggesting an investigation in relation to discrimination in access to goods based on the Code of Petty Crimes. The police agreed and filed a motion with the court to fine the company.

The case was dealt with under Article 138 of the Code of Petty Crimes which stipulates: 'Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide a 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 (approx. EUR 1 250).

The Łódź-Widzew District Court fined the printers PLN 200 (EUR 45) in a simplified procedure (meaning there was no hearing; the court fined the employee of the printing house based only on the police motion). At this time, the case attracted a great deal of attention and both the Minister of Justice/Prosecutor General and the think tank Ordo Iuris<sup>756</sup> engaged in the debate on the issue and in the case itself. There was an appeal against the court decision. Once such a fine is challenged, the case starts again from the beginning in a court of first instance in a regular procedure – specifically hearing representations from both parties during the court hearing.

On 31 March 2017, the District Court for Łódź-Widzew decided in a regular procedure (after a hearing) that the owner of the company was guilty of committing the misdemeanour described in Article 138 of the Code of Petty Crimes and indicated that his personal convictions did not justify refusing to perform the service. However, the court waived the punishment. The decision was appealed against.

On 26 May 2017, the very last day the case could be decided, the court of second instance – the Regional Court in Łódź (*Sąd Okręgowy*) – decided to reject the appeal and upheld the ruling of the court of first instance.

This case is very important due to specific circumstances. The first of these was the extraordinary intervention of the Minister of Justice/Prosecutor General (also published on the website of the Ministry), which was widely criticised as a blatant threat to the independence of the judiciary and the independence and impartiality of judges in particular (statements of the judges' association Iustitia,<sup>757</sup> the Helsinki Foundation for Human Rights<sup>758</sup> and others).<sup>759</sup> The Minister of Justice simply stated that the decision was unconstitutional, suggested that the judge was uneducated and gave instruction as to how the decision should look.

According to the Minister, the judgment of the court 'stifles freedom of thought, beliefs and views, as well as economic freedom and freedom of transactions. It puts the Foundation representing sexual minorities in a privileged position and infringes the freedom of conscience of an employee, who has the right not to support homosexual content. (...) Courts are obliged to guard the constitutional freedom of conscience, and not to violate it. They are supposed to protect the rights and freedoms of citizens, including the freedom to pursue business, and not impose coercion on them. No ideological reasons justify violating these fundamental principles (...).'

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<sup>756</sup> Ordo Iuris ([ordoiuris.pl](http://ordoiuris.pl)) is a conservative think tank focused on protection of life (pro-life), defence of traditional marriage, defence against immorality and depravity etc. In the years 2016 and 2017 the organisation attacked the Ombud for advocating the rights of the LGBTQ community and among other things called for the dismissal of the Ombud.

<sup>757</sup> <http://www.iustitia.pl/uchwaly/1507-opinia-iustitii-w-sprawie-skargi-krs-do-trybunalu-konstytucyjnego>.

<sup>758</sup> <http://www.hfhr.pl/ministerstwo-sprawiedliwosci-krytykuje-wyrok-sadu-rejonowego-stanowisko-hfpc/>.

<sup>759</sup> <http://www.rp.pl/Dobra-osobiste/307279883-Drukarze-nie-maja-klauzuli-sumienia---rozmowa-z-Irena-Kaminska.html?template=restricted>.

The Ombud also took a position by sending a letter to the Minister analysing the concept of discrimination, especially in access to goods and services.<sup>760</sup>

The case also provoked debate and some actions in conservative circles: Ordo Iuris initiated several actions. It prepared a petition to amend the Code of Petty Crimes by deleting Articles 135 and 138 'as a relic of communism'<sup>761</sup> used by promoters of radical ideologies to limit freedom of thought and economic activity. The petition was signed by more than 16 000 people<sup>762</sup> and these signatures were officially handed over together with the proposal for amendment to the Deputy Minister of Justice on 19 December 2016.<sup>763</sup>

Finally, the case provided one more reason to attack the Ombud as someone who defends LGBTI persons and not 'normal citizens'. These attacks came from conservative CSOs, the media and politicians, including MPs and members of the Government.

The circumstances mentioned above resulted in one more appeal; the Minister of Justice filed a cassation complaint to the Supreme Court (in September 2017).<sup>764</sup> The Ordo Iuris think tank joined the Minister with additional arguments and represents the respondent.<sup>765</sup> On the other hand the anti-discrimination CSO, Campaign Against Homophobia, also responded to the cassation complaint and provided its counter-arguments.<sup>766</sup> The case is pending.<sup>767</sup>

#### *Trends and patterns in 2017 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 well be said that the only perceivable pattern is the lack of such cases. They are extremely rare, despite the existence of 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.

As reported in the section on housing above, Limanowa municipality, for instance, decided to buy a property, paid for with Roma Programme money, to provide housing for Roma. However, the municipality deliberately bought a property in a different municipality (Czchów), so that the Roma would have to move. Some families objected to moving. The reason was the reaction of the authorities of Czchów municipality to information about the possible transfer of Roma from Limanowa. The Mayor of Czchów issued a decree prohibiting occupation of the property bought by Limanowa.<sup>768</sup> However, all the beneficiaries of the project had earlier declared before a notary public that they would leave their current place of residence after a new building was made available to them. In the statements they made, the Roma agreed that these notarial declarations might become enforcement orders, enforceable by the District Court in Limanowa.

<sup>760</sup> <https://www.rpo.gov.pl/sites/default/files/RPO%20do%20Zbigniewa%20Ziobro%2029.07.2016.pdf>.

<sup>761</sup> <http://www.ordoiuris.pl/wolnosc-gospodarcza/ordo-iuris-zlikwidujmy-komunistyczne-relikty-z-kodeksu-wyroczen>.

<sup>762</sup> <http://www.maszwpływ.pl/zlikwidujmy-komunistyczne-relikty-w-kodeksie-wyroczen-ml2,60,k.html>.

<sup>763</sup> <http://www.ordoiuris.pl/wolnosc-gospodarcza/ordo-iuris-w-obronie-praw-przedsiębiorców>.

<sup>764</sup> See at: <http://www.sn.pl/sprawy/SitePages/e-Sprawa.aspx?ItemSID=7729-ce0d61b0-fe80-4050-bec5-582cc7606e5a&ListName=esprawa2017&Search=II%20KK%20333/17>.

<sup>765</sup> See at: <http://www.ordoiuris.pl/wolnosc-gospodarcza/stanowisko-ordo-iuris-dla-sadu-najwyzszego-w-sprawie-drukarza-z-lodzi>.

<sup>766</sup> See at: <https://kph.org.pl/wyrok-ws-drukarza-z-lodzi-do-kasacji-sad-najwyzszy-zadecyduje-7-czerwca/>.

<sup>767</sup> As of March 2018.

<sup>768</sup> Decree No. 12/2016 of 17 February 2016, approved by the resolution of Czchów City Council No. XIII / 139/2016 of 16 March 2016.

On 17 February 2016 the Ombudsman's representatives held a meeting with the Roma families, which was also attended by the Deputy Governor (*wice-wojewoda*) of Małopolska and the Mayors of Limanowa and Czchów. Subsequently, in his address to the Governor of Małopolska, the Ombudsman suggested that the body undertake mediation between the local authorities and Roma families. Despite the ongoing mediation, the Limanowa authorities decided to enforce the notarial declarations made by the Roma. Faced by imminent enforcement by the bailiffs, the Ombudsman decided to file a lawsuit against the Limanowa municipality in the District Court, in which he requested annulment of the enforceable executive orders and for securing actions by suspending ongoing enforcement proceedings. At the Ombudsman's request, in January 2017 the District Court suspended execution of the orders pending consideration of the complainant's actions.<sup>769</sup>

The Ombudsman also intervened in connection with the decree issued by the Mayor of Czchów, who prohibited occupation of the property purchased by the Limanowa local authority. After the Governor, acting as the supervisory authority, appealed against the decree in the Regional Administrative Court in Kraków, the Ombudsman joined proceedings. The Ombudsman argued that none of the conditions set out in the law on municipal self-government which could authorise the local authorities of Czchów municipality to issue the decree actually existed. The Ombudsman also stated that by depriving the Roma of even the potential opportunity to inhabit the property intended for their occupation, the local authorities had discriminated against Roma on the ground of their ethnic origin and had violated the right to protection of private life in an unauthorised manner. In this regard, according to the Ombudsman, Czchów municipality had violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. In February 2017 the Regional Administrative Court in Kraków<sup>770</sup> recognised the contested Czchów decree as invalid.<sup>771</sup> The Mayor of Czchów filed an appeal against the decision with the Supreme Administrative Court. The Ombud filed a motion to dismiss the appeal.<sup>772</sup>

In addition, in 2016 one case regarding Roma was heard that was beyond the scope of the directives but interesting due to the court's justification. In the judgment of the Wrocław Court of Appeal of 27 April 2016<sup>773</sup> the court stated: 'Based on life experience, the court holds that people of Roma origin are often discriminated against in the community of fellow-prisoners.' The District and Appellate Courts in Wrocław, recognising the claim for compensation and redress for unfair detention and racial discrimination against persons of Roma origin, agreed with the complainant's claims, despite the lack of clear evidence of discrimination. In the justification, the Court of Appeal cited, in addition to life experience, the case law of the European Court of Human Rights, which stated that as a consequence of turbulent history and continuous displacement, the Roma community was particularly vulnerable to discrimination. For this reason, the court increased the amount of redress for discrimination.<sup>774</sup>

In 2011 a compensation claim for discrimination was introduced in the ETA. However, not one single case in regard to Roma has been dealt under this provision of the law (indeed, there are only a few cases stemming from other grounds). In general, there are very few, absolutely incidental, court cases regarding discrimination against Roma.

Every year in its annual report, the Ombud, on the basis of research and on-site visits, refers to discrimination against Roma, including discrimination in education and in housing, and formulates relevant recommendations (mentioned in earlier sections on housing and education). However, this does not result in cases brought by Roma to the courts.

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<sup>769</sup> Decisions of Limanowa District Court, 5 January 2017.

<sup>770</sup> Judgment of the the Regional Administrative Court in Kraków, 1 February 2017, sygn. III SA/Kr 679/16.

<sup>771</sup> Ombud Annual Report 2017, pp. 22-24.

<sup>772</sup> Ombud Annual Report 2018, pp. 107-109. The case was not decided in 2017.

<sup>773</sup> Poland, Court of Appeal, Wrocław, II Aka 91/16, 27 April 2016.

<sup>774</sup> Ombud Annual Report 2017, p. 130.

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

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Poland  
**Date:** 1 January 2018

<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment</p> <p>Abbreviation: ETA</p> <p>Date of adoption: 03.12.2010</p> <p>Latest amendments: 29.04.2016</p> <p>Entry into force: 01.01.2011</p> <p>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></p> <p>Protected grounds: gender, race, ethnic origin, nationality, citizenship,<sup>775</sup> religion, belief, political opinion, disability, age and sexual orientation</p> <p>Civil/administrative/criminal law:</p> <p>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</p> <p>Principal content: Almost verbatim implementation of 5 Directives, including 2000/43 and 2000/78:</p> <ul style="list-style-type: none"> <li>- prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation;</li> <li>- right to compensation for infringement of equal treatment;</li> <li>- designation of Ombud as an equality body.</li> </ul>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Act on the Labour Code (implementation amendment)</p> <p>Abbreviation:</p> <p>Date of adoption: 14.11.2003</p> <p>Latest amendments: major amendment 21.11.2008; last amendment 07.04.2017</p> <p>Entry into force: 01.01.2004 (18.01.2009) (01.01.2011)</p> <p>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></p> <p>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</p> <p>Civil law: labour law</p> <p>Material scope: Employment</p> <p>Principal content:</p> <ul style="list-style-type: none"> <li>- prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation;</li> <li>- right to compensation for infringement of equal treatment;</li> <li>- obligation to provide information on equal treatment rules.</li> </ul>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Act on the Commissioner for Human Rights</p> <p>Abbreviation:</p> <p>Date of adoption: amendment adopted on 03.12.2010</p> <p>Latest amendments: 18.03.2016</p> <p>Entry into force: 01.01.2011</p> <p>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></p>

<sup>775</sup> Protection is limited to certain categories of persons only. Discrimination on grounds of citizenship as such is not prohibited in the ETA. See more in Section 2.1.

	Protected grounds: not listed
	Civil/administrative/criminal law:
	Material scope: full scope
	Principal content: Designation of Commissioner for Human Rights (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
	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 CSOs</li> <li>- Creation of draft laws</li> <li>- Taking actions which aim to eliminate or restrict the consequences of a violation of the rule of equal treatment</li> </ul>

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Poland  
**Date:** 1 January 2018

<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 Covenant 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

<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>
ILO Convention No. 111 on Discrimination		08.05.1961	No	N/A	Yes
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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