

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

COUNTRY REPORT
Poland
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State of affairs up to 8 January 2007

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INTRODUCTION

0.1 The national legal system

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

The law-making power in Poland is centralised. The basic law is the 1997 Constitution; other sources of universally binding law include: acts/statutes (*ustawy*), ratified international agreements and ordinances/regulations (*rozporządzenia*). The legislative power is exercised jointly by the Sejm and the Senate – two Chambers of the Parliament. The legislative initiative, in most cases, is exercised by the government which addresses the Parliament with draft acts (the Deputies, the Senate, the President, and citizens group of at least 100'000 have also a right to propose legislation). In order to adopt a piece of legislation both Parliament's Chambers must consent and the President – who is empowered to employ the veto right – has to sign it. The act, then, needs to be promulgated in an official journal. Council of Ministers, President of the Council of Ministers, and ministers themselves are authorized to enact executive ordinances when there is a specific legal basis in an act issued by the Parliament. Legislative acts (acts and ordinances) can be subjected to constitutional control exercised by the Constitutional Court. Citizens are empowered to lodge a constitutional complaint with it. They may also refer to Commissioner for Civil Rights Protection (Ombudsperson) that it vested with significant control and investigation powers.

0.2 State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report. Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

The overall situation in respect of implementation of EU Racial Equality and Employment Equality Directives can be assessed ambiguously as far as enactment of appropriate legislation is concerned. Undoubtedly, Poland made a great effort to comply with EU law on the day of accession. The two substantive amendments of Labour Code of 24 August 2001 and 14 November 2003 brought Polish labour law in line with the respective equality directives. There are however at least three kinds of problems with the Polish anti-discrimination legislation. Firstly, there is no single act comprising a general ban against discrimination in all the grounds regarding all areas. The provisions are scattered in many different legal acts. Secondly, the level of protection against discrimination is uneven in various areas. In the field of occupation and employment the directives are generally implemented, however the adopted solutions are not free from weak points mentioned later in the report (e.g. regarding reasonable accommodation). When it comes to legislation in the field of counteracting discrimination outside employment, there are, depending on interpretation, either significant gaps or provisions difficult to use in any court proceedings to report. Thirdly, whereas the comparison of Polish anti-discrimination legislation to EU legislation on the whole turns out to be favourable, it is much more difficult to assess the practice of implementing those rules. In its major substance, this legislation entered into force on 1 January 2004 and so far there have been very few cases based on it (survey carried out in Cracow's Regional Court of Labour and Social Security (*Sąd Okręgowy – Sąd Pracy i Ubezpieczeń Społecznych*) in 2005 and in Warsaw's Regional Courts of Labour and Social

Security (*Sąd Okręgowy – Sąd Pracy i Ubezpieczeń Społecznych*) in 2006 indicated no anti-discrimination cases).

There are certain areas in which Polish legislation goes beyond the requirement of the Equality Directives. The following could be mentioned:

- Polish legislation prohibits wider grounds of discrimination in comparison to EU Directives. Apart from those covered by EU law¹ Polish legislation also prohibits all other possible grounds stating that “any discrimination is prohibited”² and then setting as examples: gender, age, disability, race, religion, nationality, political opinion, membership in a trade union, ethnic origin, beliefs, sexual orientation, employment for definite or indefinite period of time, part time or full time employment;
- Definition of direct discrimination appears to be broader under Polish legislation. Under Equality Directives 2000/43 and 2000/78 discrimination occurs where a specific person is treated less favourably than other person “*is, has been or would be*”. Here, the time characteristics (the indicative factor that referred to the moment when discrimination may occur) “*is, has been or would be*” refers to the standard-person, that is, a person the situation of which we compare with the one allegedly discriminated. Under Polish Labour Code discrimination occurs where a specific person “*has been, is or would be*” treated less favourably than other person. Here, the time characteristics “*has been, is or would be*” refers directly to the person discriminated. This shift in time characteristics can mean that the prohibition of discrimination works *pro futuro*, that is, Polish legislation provides *in abstracto* control.
- In Polish legislation, the prohibition of instructions to discriminate is more broadly described. In the respective provision, the Labour Code, considers as discrimination any “incitement” to infringe upon the principle of equal treatment in employment. Undoubtedly, the notion “incitement” is broader than “instruction” as it covers a wider range of acts or conduct.

There are also certain areas in which Polish anti-discrimination legislation witnesses some deficiencies when compared to EU Directives. The following could be named:

- The “escaping clauses” are, under Polish legislation, more broadly defined in comparison to the ones contained in EU anti-discrimination law. While defining indirect discrimination both Directives³ determine the escaping clause as provision, criterion or practice that is “objectively justified by a legitimate aim and the means of achieving them are appropriate and necessary”. The Polish Labour Code, however, establishes this exception by formulation: disproportions that “cannot be justified by objective reasons”.⁴ Indeed, ‘Polish formulation’ is less elaborate and thus much broader and allowing for a wider range of exceptions. It does not refer to the criteria of “appropriateness” and “necessity” of the means employed.
- There is no single officially designated “specialised body” in the sense of the Racial Equality Directive. From the ones described below under Section 7 no one appears to meet the competency criteria set in Art. 13.2 in this directive. Some of them could meet the second and third requirement (independent surveys and independent reports and recommendations), but not together with the first one (providing independent assistance in pursuing discrimination complaints). On the whole the Commissioner for Civil Rights Protection seems to be the closest body to meet the criteria set in the

¹ Directive 2000/43 – national and ethnic origin; Directive 2000/78 – religion, belief, disability, age, sexual orientation; Directive 76/207 – gender.

² Art. 11³ Labour Code.

³ Art. 2.2 both Directives.

⁴ See Art. 18^{3a} para. 4 *in fine* and Art. 18^{3b} para 1 *in fine* Labour Code.

directive. The Commissioner however does not have an obligation to take a complaint or case referred to it and deals with it; the Commissioner is left free to take or to reject any complaint immediately.

- Although the Constitution entails a general principle of equal treatment, the corresponding provisions regarding anti-discrimination outside employment are on the one side scattered in several legal acts, on the other they do not include important elements of directives (e.g. definitions of direct or indirect discrimination, harassment, burden of proof, victimisation). In the field of civil law relations (sale, leasing, tenancy, lending for use or exchange, contract of services) or administrative law relations, discrimination is not explicitly banned (education, health care, social welfare).
- Provisions on shifting a burden of proof apply only to the area of employment and occupation, which is a too narrow interpretation of the Racial Equality Directive.
- Under Polish legislation there is no sufficient and specific protection against victimization. Definition of victimization has not so far been introduced in the legal system. The existing mechanisms may protect only direct complainants against employer's retaliation in the forms of renunciation or dissolution of labour contract. Such protection does not extend to other people, e.g. witnesses (see more under Section 6.4)
- The Polish anti-discrimination law does not entail any specific system of sanctions and it refers only to penalties and punishments set out by the Penal Code and the Code of Minor Offences. Compensation claims for material and immaterial damages are possible under the Civil and Labour Codes. There is however no legal basis for compensation claims against discrimination outside employment between private parties.
- Polish law permits justification of both direct and indirect discrimination in respect of all grounds covered by the Labour Code. In accordance with the Code, in order to justify differentiation in treatment that leads to the breach of the principle of equal treatment in employment, the employer has to prove the existence of 'objective reasons' of his/her actions.
- The general wording of the Labour Code (art. 94.2b) imposing an obligation on employer to counteract discrimination among others because of disability is not equal with the duty to provide reasonable accommodation for the disabled.
- The anti-discrimination clause in the Act on the System of Social Security⁵, which is a "mother-statutory" for social security area, limits the principle of equal treatment of all socially insured to grounds of sex, marital status, and family status.⁶

0.3 Case-law

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

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

1. a. The Supreme Administrative Court
- b. 2006.11.15 (I OSK 1217/06)

⁵ Act of 13th October 1998 on System of Social Security (Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych).

⁶ Art. 2a.1 Act on System of Social Security.

c. *Marek F. v. Wójt Gminy w S.*

d. Every community (represented by the vogt⁷) has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in case when parents or guardians transport a child, the costs of public transport (of a child and a guardian) should be reimbursed.

2. a. The Local Court in Poznań

b. 2006.09.04. (sygn. akt XXIII K 20/05/11)

c. *Inga K., Agnieszka K., Sandra R., Joanna R. v. Przemysław Alexandrowicz and Jacek Tomczak*

d. Parties concluded the case by plea bargaining. The respondents had to make a statement on a public conference that they "...did not compare and did not have in mind to compare homosexuality with either pedophilia, zoophilia or necrophilia. They regret that the wording from the press conference in November 2004 could suggest such comparison was made."

3. a. The District Court in Legnica

b. 2006.06.20 (sygn. akt: V Pa 101/06)

c. *Zbigniew M. v. Komenda Powiatowa Policji w G.*

d. There was discrimination in the recruitment process of the Police Headquarters due to recalling the Act on Disabled and an additional requirement in form of a certificate on the possibility to work overtime and at nights.

4. a. The District Court in Plock

b. 2006.03.16 (sygn. akt IV P 353/05)

c. *Bolesław K. v. „x” limited liability Co. in P.T.*

d. The plaintiff claimed that he was discriminated in his workplace because of his sexual orientation. The court did not find prerequisites of discrimination and dismissed the action.

5. a. The Supreme Court

b. 2001.09.11 (OSNP 2003/15/356)

c. *Henryka Ł. v. primary school “x”*

d. It does not amount to discrimination to dismiss a teacher if the only basis for that is the unsatisfactory evaluation of his work and achievements in teaching.

6. a. The Supreme Court

b. 2001.07.04 (OSNP 2003/10/248)

c. *Krystyna Maria M. v. Powiatowa Stacja Sanitarno-Epidemiologicznej in M.*

d. If, not offering the employee new terms and conditions of work leads to discrimination on the grounds of his/her membership in the trade union, this is a ground for a claim to be re-employed.

7. a. The Supreme Court

b. 1999.04.21 (OSNP 2000/13/505)

c. *Alicja P. v. Zespół Opieki Zdrowotnej w K.*

d. The dismissal based on the fact of acquiring the retirement age and the right to old age pension by a woman cannot be considered as discrimination on the grounds of age or gender.

8.a. The Supreme Court

b. 1998.02.05 (OSNP 1999/4/115)

c. *Genowefa C. v. Zespół Opieki Zdrowotnej w R.*

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

⁷

The highest representatives of the self-government.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

The 1997 Polish Constitution contains a general anti-discrimination clause that reads: “(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. (2) No one shall be discriminated against in political, social or economic life for any reason whatsoever.⁸ This principle does not specify the criteria for the prohibited forms of discrimination.⁹ Thus, the constitutional provision is more general than the Directives, since it does not mention expressly any grounds but prohibits any discrimination. The prohibition on discrimination goes beyond the material scope indicated in art. 3.1 of the Racial and Employment Equality Directives, encompassing political, social, and economic life in their entirety, both in the public and the private sectors. It remains unclear if the constitutional clause refers also to ‘new’ grounds such as age discrimination. There has been no serious public debate in this context so far.

In addition, the Constitution forbids political parties and other organizations, which assume or allow racial hatred in their program or activities.¹⁰ It also guarantees the freedom to preserve and develop own language, preserve customs and traditions, and develop own culture.¹¹ Furthermore, national and ethnic minorities have the right to create their own educational, cultural and religious institutions.¹² The 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.¹³ Furthermore, the Constitution declares that both a woman and a man have equal rights in family, political, social and economic life¹⁴, and in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.¹⁵ In the end, the Constitution contains specific provisions which provide additional protection of the interests of selected social groups, including introducing the principles of: the equal rights of religious associations,¹⁶ and also protection of veterans of the struggle for independence, especially war invalids,¹⁷ children,¹⁸ and consumers.¹⁹ The Constitution does not mention sexual minorities among the protected groups.²⁰ Persons unable to work due to

⁸ Art. 32 Constitution of the Republic of Poland [further: Constitution].

⁹ “This means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of differentiation which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which differentiation may occur” – from the judgment of the Constitutional Tribunal of 16 December 1997 K. 8/97.

¹⁰ Art. 13 Constitution.

¹¹ Art. 35.1 Constitution.

¹² Art. 35.2 Constitution.

¹³ Art. 53, 54.1, 58.1 and 60 Constitution.

¹⁴ Art. 33.1 Constitution.

¹⁵ Art. 33.2 Constitution.

¹⁶ Art. 25 Constitution.

¹⁷ Art. 19 Constitution.

¹⁸ Art. 72 Constitution.

¹⁹ Art. 76 Constitution.

²⁰ According to sexual minority rights organizations, the rejection of a version of a founding draft bill that clearly contained a prohibition on discrimination based on sexual orientation indicates that there is a strong tendency in Poland to deny the principle of equality for homosexuals before the law (*Report on Discrimination Based on Sexual Orientation in Poland*, Stowarzyszenie Lambda, Warsaw 2001, p. 32).

illness or disability, and people who have reached the age of retirement are guaranteed the right to social security by the Constitution.²¹

b) Are constitutional anti-discrimination provisions directly applicable?

The Constitution provides that its provisions are directly applicable unless the Constitution itself does not state otherwise.²² Thus the presumption is in favour of direct applicability of constitutional provisions. This however, to large extent, remains as a theory only. 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 not much tradition to invoke constitutional provisions directly, in particular, the courts are not used to do so. From this reason some lawyers working with clients who experienced discrimination and tried to bring these kinds of cases to courts are of the opinion that it is impossible to bring the case to the court only on the basis of constitutional provisions.²³

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

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

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

As was stated above, Polish Constitution lays down the general provision on non-discrimination and equal treatment. It does not specify any grounds saying in Art. 32 “No one shall be discriminated against in political, social or economic life for any reason whatsoever”. In the provisions of the Labour Code there are several grounds listed such as gender, age, disability, race, religion, nationality, political opinion, membership in a trade union, ethnic origin, belief, sexual orientation, and employment for specified or unspecified period of time, employment part-time of full-time. The grounds are listed as examples only, the list remains open because of the wording of this Article: “any discrimination (...) *in particular* on the grounds of ...” This means that other grounds of discrimination could be equally taken into consideration by courts when applying this provision. The latter remains only a postulate so far only, since no such case law was noticed. The courts in Poland have not yet developed practice to invoke EU legislation and analyze in what manner it influences domestic legislation.

The Act on National and Ethnic Minorities and on Regional Language forbids the discrimination on the ground of affiliation to such minority, thus reinforcing the principle pronounced by the Constitution and Labour Code.²⁴

Issued by Polish Sejm, the Charter of the Rights of the Disabled Persons²⁵ is only a non-binding parliamentary resolution. It should, nonetheless, be taken into consideration when

²¹ Art. 67.1 Constitution.

²² Art. 8.2 Constitution.

²³ From the interviews don to update this report.

²⁴ Passed on 6 January 2005 and entered into force on 1 May 2005 with the exception of several final provisions that entered into force on the day of publication in the Polish official journal (31 January 2005).

reflecting on rights of those persons – it expressly says that disabled persons cannot be subjected to discrimination on account of disability.²⁶

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?

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

There are several definitions of disability on national level, which relate to certain legal acts. The Act on Vocational and Social Rehabilitation and Employment of Disabled Persons contains a legal definition of a disabled person.²⁷ The definition stipulates that a disabled person is someone whose disability has been confirmed by a decision of a competent medical authority.²⁸ Further, disability is defined as a permanent or temporary inability to carry out social functions due to a permanent or long-term disturbance of performance of a human organism, in particular, resulting in incapacity to work.²⁹ There are three levels of disability: low-level, medium level and high-level disability.³⁰

The above definition maybe of some help in clarifying what the disability means for the purposes of the Labour Code. It is important to stress that the Act on Disabled Persons refers only to these disabilities that are declared by medical authorities. There might be a case before the Polish courts when a person, who has some kind of disability, which is not certified by the relevant authority for various reasons. The court should by itself decide whether the person concerned is disabled or not. The court may take into account the definition contained in the Act on Disabled, but it may go beyond this definition. There might be disabilities that do not qualify as disability under the Act, but still such persons may be subject of discrimination or they may feel as disabled persons.

Under the Polish Constitution the term “disabled person” has an autonomous meaning. According to the Article 60 of the Polish Constitution “Public authorities provide disabled persons an aid in securing the living, adaptation to work and the social communication, within the scope of act of the Parliament”. The commentary to the Constitution points out for the open character of the term “disability”³¹. In particular, it says that the drafters of the Constitution took into account as regards the meaning of “disability” recommendations of the Committee of Ministers of the Council of Europe of 1992 as well as the Act on Disabled. The former document provides a much broader definition of “disability” as the latter. It says that the “disability” is “any impairment or lack, resulting from damage, of possibility to exercise certain activities, in a way or in a method regarded as normal for human beings”. It means that under the Constitution, a “disability” has an independent meaning, not curtailed by any decision of the medical authority. Adequately, the term under the Labour Code has also such an independent meaning, not restricted to the meaning under the above-mentioned Act.

²⁵ The Charter of the Rights of the Disabled Persons (Karta Praw Osób Niepełnosprawnych), a resolution of Polish Sejm of 1 August 1997.

²⁶ See Para. 1 of the Charter.

²⁷ Art. 26 of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled Persons (Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych) [further: Act on Disabled Persons].

²⁸ Art. 1 Act on Disabled Persons.

²⁹ Compare Art. 2 point 10 Act on Disabled Persons.

³⁰ Art. 3.1 Act on Disabled Persons.

³¹ Garlicki L., (eds.), Commentary to the Polish Constitution (Komentarz do Konstytucji RP), Wydawnictwo Sejmowe, Volume III, Warsaw 2003.

Thus, there are some differences between the concepts of disability adopted by the ECJ in case C-13/05, *Chacón Navas*, and Polish definitions. Polish law define more generally causes of limitations: “damage” on the constitutional level and “disturbance of performance of a human organism” in the Act on Disabled Persons. Effects of disability, in ECJ concept, “hinders the participation of the person concerned in professional life”, which corresponds to the definition from the Act on Disabled Persons: “permanent or temporary inability to carry out social functions (...) in particular, resulting in incapacity to work”. The key difference is that, according to the definition of the Polish Act on Disabled Persons, disability must be confirmed by a decision of a competent medical authority, which is not required in the view of ECJ definition. However the Polish court, as mentioned above, is not bound by the definition from the Act on Disabled Persons.

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

- a **national minority** is a group of Polish citizens, which fulfils all subsequent conditions:
 - (1) is less numerous than the remaining part of Polish population,
 - (2) in a significant manner differs from other citizens by way of language, culture or tradition,
 - (3) aspire to preserve own language, culture or tradition,
 - (4) has awareness of its historic national community and is directed at its expression and protection,
 - (5) inhabits territory of the Republic of Poland for at least 100 years,
 - (6) identifies itself with a nation organized in own country.³²

The Act then continues to enumerate the recognized national minorities: Belarussian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish.³³

- an **ethnic minority** is a group of Polish citizens, which fulfils all subsequent conditions is smaller than the group of the rest of the Polish citizens
 - (1) is less numerous than the remaining part of Polish population,
 - (2) in a significant manner differs from other citizens by way of language, culture or tradition,
 - (3) aspire to preserve own language, culture or tradition,
 - (4) has awareness of its historic national community and is directed at its expression and protection,
 - (5) inhabits territory of the Republic of Poland for at least 100 years,
 - (6) DOES NOT identify itself with a nation organized in own country.³⁴

Then, similarly as above, the Act continues to enumerate the recognized ethnic minorities: Karaimi, Lemk, Roma, and Tatar.³⁵

The above definitions are criticized for two reasons. First of all they exclude some significant national or ethnic groups in Poland (e.g. so called new immigrants like Vietnamese). Furthermore, the definitions are restricted to Polish citizens and therefore do not refer e.g. to migrant workers originating from neighbouring countries (e.g. Ukrainians). The aim of the Act on National and Ethnic Minorities and on Regional Language is, however, to provide certain rights, mostly linguistic and cultural rights, to national and ethnic minorities, as well as to protect them by the state actions.

³² Art. 2.1 Act of 6 January 2005 on National and Ethnic Minorities and on Regional Language (Ustawa z 6 stycznia 2005r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym) [further: Act on Minorities].

³³ Art. 2.2 Act on Minorities.

³⁴ Art. 2.3 Act on Minorities.

³⁵ Art. 2.4 Act on Minorities.

Article 6 of the Act on National and Ethnic Minorities and on Regional Language prohibits discrimination because of the membership in minority. This provision clearly refers to the national and ethnic minorities provided in the law. It must be however underlined that this limited scope of definitions of the national and ethnic minorities does not mean, that the persons not belonging to them are not covered by the Polish anti-discrimination laws. Under Article 37 of the Polish Constitution, every person who is within the jurisdiction of Poland, may exercise freedoms and rights provided in the Constitution. Article 32 Section 2 of the Constitution prohibits discrimination from any reasons whatsoever in a political, social and economic life. It is clear that the grounds of prohibited discrimination include race, color of the skin, ethnic origin or belongingness to national or ethnic minority³⁶.

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

The Polish law does not provide a definition of the racial discrimination, race or ethnic origin. When interpreting what the racial discrimination means, Polish courts may look into the definition contained in the international treaties such as CERD. The scope of applicability of Directive 2000/43/EC is not restricted to the national or ethnic minorities. It includes discrimination because of race or ethnic origin, irrespectively of the nationality of person concerned or his/her belongingness to particular national or ethnic minority.

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

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?

As was indicated above, neither Polish law nor case law defines the majority of the grounds listed in the Directive.

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

There are no such restrictions related to the scope of age provided by law. There are, nevertheless, certain differences in treatment in respect of age, justified by the different needs and social roles. They may occur in relation to the fact of acquiring the retirement age or, on the contrary, nor reaching the minimum age for employment, which is not treated as discrimination but protection of minors.

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

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

³⁶ Garlicki L., (eds.), Commentary to Article 32 of the Constitution, in: Garlicki L., Commentary to the Polish Constitution (Komentarz do Konstytucji RP), op.cit.

2.1.2 Assumed and associated discrimination

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

There is no legal definition of imputed discrimination provided by Polish legislation. However judicial bodies, while ruling on discrimination cases, should take into consideration the objectives of the provisions and the reasons introduced in the national legislation. As it was mentioned above, the scope of discrimination counteracted by labour law is not limited to the listed grounds. Thus, it may be assumed, that if the question of imputed discrimination comes into being, this type should be treated as discrimination, too.

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

The associated discrimination should be treated in the same way as the imputed discrimination, since there are no special law provisions or case law defining this particular type of discrimination.

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

a) How is direct discrimination defined in national law?

As from 1 January 2004, Polish legislation introduced legal definitions of both direct and indirect discrimination.³⁷ They are included in the Labour Code and were incorporated due to the process of implementation of the respective EU Directives.

Direct discrimination is defined to occur when an employee, on account of one or more grounds,³⁸ has been, is or would be treated less favourably than those other employees in a comparable situation.³⁹

This definition goes further than the Directives' one. In accordance with the EU Directives there is no relation to the possible future discrimination, while according to Polish law it may occur and it is forbidden. In line with the above mentioned provision, there is a possibility of the employee to raise the issue of discrimination already in the situation when he/she thinks that he/she is going to be discriminated. Such solution, on the one hand, can be very useful in the situation when the employer plans to issue new rules binding in the workplace and some of them seem to be discriminatory. Here comes the possibility of questioning them at once, before the actual discrimination occurs. On the other hand, this stipulation could prove disadvantageous for the employer who has not taken any discriminatory measure yet but faces possible legal actions brought by employees. Since the burden of proof (of non-existence of discrimination) is shifted in anti-discrimination cases primarily to the employer, it could place him/her in a difficult situation.

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

³⁷ Prior to that date and as from 1 January 2002 there was a definition of indirect discrimination but in relation to gender only.

³⁸ Gender, age, disability, race, religion, nationality, political opinion, membership in a trade union, ethnic origin, beliefs, sexual orientation, employment for definite or indefinite period of time, part time or full time employment.

³⁹ Art. 18^{3a} para 3 Labour Code.

Polish law permits justification of both direct and indirect discrimination in respect of all grounds covered by the Labour Code. In accordance with the Code, in order to justify differentiation in treatment that leads to the breach of the principle of equal treatment in employment, the employer has to prove the existence of ‘objective reasons’ of his/her actions.⁴⁰ As to the specified ‘exclusion’ situations see below, under Section 2.3.

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

Since these regulations are quite new to Polish legislation and hardly any related to them jurisprudence could be found, it is difficult to predict, how the courts will answer this question and what criteria will adopt for making this comparison.

2.2.1 Situation Testing

a) Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.

In the Polish law there is no explicit mention of ‘situational testing’. Nevertheless it should not be a problem to accept the evidence collected as a result of the situational testing.

In civil law proceedings, a party claiming the existence of a certain fact has to present evidence supporting his/her claims⁴¹. Except this, the court may accept the evidence collected *ex officio*. Courts do not use this opportunity very often, as they stand on the position that the civil law proceedings should be contradictory and the role of the courts as regards collection of evidence is only secondary to the role of the parties. A party is not obliged to prove facts that are commonly known, as well as facts that were admitted by the opposing party. The submission of evidence, as well as its assessment, is subject of a decision made by the court. It may happen that the court refuses to accept certain evidence in court proceedings (e.g. if the court considers certain facts as already proven). The most commonly used means of evidence in civil law proceedings are: documents, witness testimonies, expert opinions, or hearing of parties. According to Art. 308 of the Code of Civil Proceedings, the court may admit the evidence in a form of a movie, television program, photocopy, photography, plans, drawings, phone records or tapes as well as other means recording the picture or sound. This rule may have a significant value for evidences collected during situational testing, as implementation of various scenarios requires use of video cameras, tape recorders or even witnesses serving as comparators to the victims of discrimination. The general rule under Polish civil proceedings law is that the party raising certain claim should prove all facts supporting it. In accordance with the anti-discrimination directives, this rule does not apply to discrimination cases, where the burden of proof shifts on the defendant.

In administrative proceedings, the administrative organ should accept as evidence everything which may contribute to explaining the case, and which is not contrary to law. In particular, the evidence may consist of documents, witness testimonies, expert opinions or review of a given thing by the administrative organ. This list is non-exhaustive. The organ may accept other sources of evidence. The administrative organ may accept the evidence presented or requested by a party, if such evidence concerns facts having significance for the case. According to Article 77 of the Code of Administrative Proceedings, an administrative organ is obliged to collect in an exhaustive manner and to review the whole evidence. This means that the main responsibility for collecting the whole evidence is on the administrative organ, and not the party. The organ should in many instances act *ex officio* to collect all the evidence.

⁴⁰ Art. 18^{3b} para. 1 in fine, Labour Code.

⁴¹ Art. 232 of the Code of Civil Proceedings.

In criminal proceedings, the evidence rules are different. It is the prosecutor, who should prove the facts raised in the bill of indictment. The defendant may present evidence that supports his/her innocence. There are following major sources of evidence: explanations by accused, witness testimonies, documents, expert testimonies, opinions of specialists, review of the given thing by a court, court experiment, mental examination of accused, recording of phone conversations etc. This list is non-exhaustive. The court may accept evidence submitted upon motion of the parties or requested *ex officio*. A party requesting the admission of evidence should indicate the source of evidence as well as the facts or other circumstances it wants to prove with it. The court may refuse the evidence if: the given fact is already proved, it is not significant for the case, it may not be proved with a given evidence, it is not possible to perform a requested proof, an evidence motion aims towards prolongation of proceedings, or when submission of certain evidence is contrary to law.

In this context it is worth to mention, that in case of a private bill of indictment (e.g. in defamation cases), the burden of proof is on the person submitting such a bill. It might be e.g. a victim of hate speech, who will be obliged to prove the occurrence of hate speech.

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

The court may admit the evidence in a form of a *inter alia* photocopy, photography, phone records or tapes as it was already mentioned.⁴² The influence from the evolution in other countries is hardly seen.

It should be pointed out, that situational testing can not be used as a cover for provocation which is forbidden by the Polish Criminal Code; art. 24 states that, a person responds as for instigation, when he/she induces somebody to commit penal act in order to direct criminal proceeding against him/her. Situational testing must not interfere with provocation. The line is very thin and the main difference is between inducement to commit penal act and exposure of somebody's prohibited actions.

Having in mind the difference of provocation and situational testing, there is no reluctance to use situational testing as evidence in court.

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

As there is no definition of this method in the Polish law, there are no examples of case-law.

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

Some of the interviewed experts confirmed, that they know the method. However, they did not confirm, that they have already used the method. They were not familiar with any cases concerning the use of situational testing in Polish courts in discrimination cases. In fact, the Helsinki Foundation for Human Rights used the situational testing, but only in order to get a legal ground for further legal action. For example, the Foundation tried to test, relying on the Constitution, whether proceedings before the disciplinary courts of the attorney's bar may be public. The Foundation was not allowed to attend the disciplinary court hearing and following this incident, it submitted a constitutional complaint claiming that the provisions excluding the publicity of the disciplinary courts' hearings are unconstitutional.

In the context of discrimination cases, there are following scenarios possible for situation-testing in Poland:

⁴² Art. 308 Code of Civil Proceedings.

- Access to employment by representatives of minorities. Such scenario could be realized by two persons of similar competences (one belonging to minority), who attend the same qualification interview, but only one person is selected for a job. Following such an interview, the claim for compensation would be lodged by a member of minority not offered an employment.
- Access to services by representatives of minorities (e.g. cafés, restaurants, hotels). The situational testing could be made by a representative of minority, whose request is refused, and thereafter a “normal” person obtains such services without any problems. non-employment of a person on the basis of one or more grounds listed in the discrimination definition, if it is justified on account of the type of work, working conditions, or occupation requirements laid down for employees,
- Access to public offices and to the institutions fulfilling public duties by the disabled persons. In such scenario, a disabled person would try to get to the public institution. Following failure it would start legal action against particular public institution.
- Test litigation against an employer who places age limits in its vacancy announcement. In such a case, the scenario would require a person, who fulfils all the requirement listed in the vacancy, except the age. Such a person would start legal action against the employer.

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

a) How is indirect discrimination defined in national law?

Indirect discrimination occurs when – due to an apparently neutral provision, applied criterion or undertaken action – there are disproportions in respect of terms of employment to the detriment of all or the significant number of employees belonging to a group distinguished on account of one or more grounds listed, if those disproportions cannot be justified by other objective reasons.⁴³

b) What test must be satisfied to justify indirect discrimination?

Under the national legislation the potential indirect discrimination may be justified if specific ‘escaping clause’ (provision enabling discriminatory measures in certain circumstances) may be applied. The wording of Art. 18^{3a} para 4 of Labour Code makes it clear, that the disproportions in treatment which may amount to indirect discrimination could be excused as far as they can be justified by objective reasons.

In relation to both direct and indirect discrimination, an additional provision could be applied, that specifies under what circumstances certain conduct cannot be considered as discrimination.⁴⁴

The following do not amount to the violation of the principle of equal treatment:

- non-employment of a person on the basis of one or more grounds listed in the discrimination definition, if it is justified on account of the type of work, working conditions, or occupation requirements laid down for employees,
- renunciation of the employee's employment conditions in respect of working time, if, if this is justified by reasons not related to employees,
- applying measures that differentiate the legal situation of an employee on account of protection of the parenthood, age or disability of the employee,
- setting the terms of employment and dismissal, remuneration and promotion and access to vocational training – with the consideration of the length of service.

⁴³ Art. 18^{3b} para 4, Labour Code.

⁴⁴ Art. 18^{3b} para 2, Labour Code.

In addition, the measures taken as positive discrimination are allowed under Polish legislation⁴⁵ as well as the differentiating among the employees on account of their religion or belief, if the employee's religion or beliefs constitute significant and justified occupational requirements in relation to the activities carried out within churches or other religious associations.⁴⁶

c) Is this compatible with the Directives?

Indirect discrimination in Polish legislation is defined similarly to the Directive's definition. The most significant difference is the one related to “escaping clause” which is determined more broadly in Polish law. This was done by way of leaving aside the criteria of “appropriateness” and “necessity” of the means employed. In this respect the Polish definition appears not to be in line with the Directive and may cause practical problems when being applied.

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

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

2.3.1 Statistical Evidence

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

Although in the Polish law there is no explicit mention of use of statistical evidence to establish indirect discrimination, it does not mean that it is not possible. Under the Code of Civil Proceedings there are no restrictions regarding the evidence sources or means. The Code lists the most popular ones, provides principles concerning their admission, but does not exclude the possibility of other evidence means, such as statistics. The subjects of proof in civil proceedings are facts that may have a significant meaning for resolving the case. Article 233 of the Code of Civil Proceedings provides that the court assesses the evidence according to its own convictions, on the basis of a comprehensive examination of the collected material. This general principle indicates the role of the statistical evidence. It seems that in discrimination cases, the statistical evidence may serve the purposes of proving *prima facie* discrimination, i.e. convincing the court that the discrimination was probable. In such a case, the burden of proof shifts on the defendant. However, the statistical evidence may not be the only proof. In civil proceedings it should only support the facts or issues that stem from other evidence. For example, we may have a few facts proving that a gay was discriminated in a workplace, but taking alone they are not sufficient to show the probability of discrimination. But if we present statistical evidence, that in similar situations e.g. 95 % people behave in a discriminatory way, our case becomes stronger.

The Criminal Proceedings Code does not contain an exclusive list of evidence sources or means. Theoretically the statistical evidence may be admitted as separate evidence or as a part of the expert opinion. However, the criminal trial aims towards proving without any doubt whether accused is guilty or not. The statistical evidence may help in understanding the context of the case, its social significance, but taking alone, without any other evidence, it may not be a source for the conviction.

⁴⁵ Art. 18^{3b} para 3, Labour Code.

⁴⁶ Art. 18^{3b} para 4, Labour Code.

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

There have not been any cases involving either direct or indirect discrimination, when statistics was used in order to prove discrimination.⁴⁷ Thus, there is no room for judging a possible reluctance. The influence from the evolution in other countries is hardly seen. Each case is judged separately by an independent court.

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

There is no case-law in the field.

d) *Are there national rules which permit data collection? Please answer in respect of all 5 grounds.*

According to the Constitution of the Republic of Poland everyone shall have the right to legal protection of his private life and family life, of his honour and good reputation and to make decisions about his personal life.⁴⁸ Furthermore no one may be obliged, except on the basis of statute, to disclose information concerning his person.⁴⁹

Art 27.1 of the Act on the Protection of Personal Data introduces a prohibition of the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade-union membership, as well as the processing of data concerning health, genetic code, addictions or sex life and data relating to convictions, decisions on penalty, fines and other decisions issued in court or administrative proceedings. Processing of the data referred to in paragraph 1 shall not constitute a breach of the Act where:

- 1) the data subject has given his/her written consent, unless the processing 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 organisations or institutions with a political, scientific, religious, philosophical, or trade-union aim and provided that the processing relates solely to the members of those organisations or institutions or to 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,

⁴⁷ From the interviews done to update this report.

⁴⁸ Art. 47 of the Constitution.

⁴⁹ Art. 51.1 of the Constitution.

- 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.

In this case it should be stressed that in the light of the art. 27.1 of the Act on the Protection of Personal Data (points 5 and 6) it is possible to collect sensitive data in order to substantiate a case of discrimination.

In accordance to the general framework set in the Act on Protection of Personal Data, the Act on Public Statistics 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 involved person.⁵⁰ That is why in the current legal framework the sensitive personal data regarding discrimination on the ground of sex, age, disability, racial or ethnic origin, nationality, religion, political beliefs, membership in trade unions and sexual orientation can be collected by the Ministry of Justice (or other state bodies) only on a voluntary basis. When persons do not decide to disclose one of the above mentioned characteristics, the real context of a given crime/offence might not be ever discovered. It explains partly low numbers of discrimination crimes/offences in Polish statistics.

2.4 Harassment (Article 2(3))

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

The Labour Code introduces a general definition of harassment as a form of discrimination. Any behaviour the aim or result of which is injury to dignity or humiliation or abasement of an employee is considered as harassment (Art. 18^{3a} para 5 point 2 Labour Code). Additionally, Labour Code describes sexual harassment; it is understood as any unaccepted behaviour, of sexual character or behaviour related to employee's gender, the aim or result of which is injury to dignity or humiliation or abasement of an employee; this behaviour may consist of physical, verbal or nonverbal elements (Art. 18^{3a} para 6 Labour Code).

b) Is harassment prohibited as a form of discrimination?

Both sexual harassment and harassment are treated as forms of discrimination and thus are prohibited (Art. 11³ Labour Code).

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

- not complying, by a person who runs an employment agency, with the prohibition of discrimination based on gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religious beliefs or membership in a trade union. Such person can be fined not less than 3 000 PLZ (some 750 EUR).⁵¹

⁵⁰ Art. 8 Act on Public Statistics.

⁵¹ Art. 121.3, Act on the Promotion of Employment and the Institutions of Labour Market (Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy) [further: Act on Employment].

- refusal – on the same grounds – to employ a candidate on a vacant work position or vocational training. The same sanction can be imposed, that is, not less than 3 000 PLZ fine.⁵²

The provisions of Polish criminal law do not contain a separate type of an offence that could be described as “harassment” in the meaning of both Directives. The Penal Code covers however some serious acts covered by the concept of harassment. Such offences include, in particular:

- crime of genocide and its preparation⁵³,
- use of violence or unlawful threat towards a group of people or an individual person on account of his/her national, ethnic, racial, political or religious affiliation or because of his/her irreligious attitude⁵⁴, or exhorting in public to commit these offences⁵⁵,
- restricting an individual in his/her rights on account of his/her religious affiliation or irreligious attitude⁵⁶,
- bringing another person to sexual intercourse by using violence, unlawful threat or deceit⁵⁷ or – in the same way – making another person submit to other sexual act or to perform such an act⁵⁸,
- bringing another person to sexual intercourse or submission to or performance of other sexual acts by abusing a dependency relation or using a critical situation of that person⁵⁹,
- malicious or persistent violation of employee’s rights resulting from an employment relationships or social security⁶⁰,
- refusal to re-employ a person whose reinstatement was decided by the appropriate institution⁶¹,
- public propagation of fascism or other totalitarian regime or exhorting to hatred based on national, ethnic, racial or religious differences or on irreligious attitude⁶²,
- public insulting of a group of people or an individual person on account of his/her national, ethnic, racial, or religious affiliation or because of his or her irreligious attitude, or infringement of physical integrity of another person on these grounds.⁶³

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

Existing “codes of conduct” apply mainly to corporations and international organisations, such as eg. the United Nations Organisation. The obligation to behave in a particular manner is included also in the provisions of contracts entered into between the latter and Polish NGOs. For example, the code of professional ethics of the nationwide newspaper “Rzeczpospolita” contains a recommendation that information on a person’s age, race, skin colour, disability, or sexual orientation should be printed only when it has significance for the story.⁶⁴ In Principles of Professional Ethics in the Polish Radio in section concerning

⁵² Art. 123, Act on Employment.

⁵³ Art. 118 Penal Code.

⁵⁴ Art. 119.1 Penal Code.

⁵⁵ Art. 119.2 Penal Code.

⁵⁶ Art. 194 Penal Code.

⁵⁷ Art. 197.1 Penal Code.

⁵⁸ Art. 197.2 Penal Code.

⁵⁹ Art. 199 Penal Code.

⁶⁰ Art. 218.1 Penal Code.

⁶¹ Art. 218.2 Penal Code.

⁶² Art. 256 Penal Code.

⁶³ Art. 257 Penal Code. Existing offences belonging to the category of hate speech and hate crime do not cover the grounds of “sexual orientation”. Sexual minority rights organisations are campaigning for the broadening of the scope of these offences.

⁶⁴ Code of Professional Ethics of *Rzeczpospolita*, p. 1.

behaviour standards toward audience and participants of broadcasts, there is a ban of discrimination on the ground of gender, disability, race, religion, nationality, political opinions, union membership, ethnic origin, faith, sexual orientation, cultural or custom separation.⁶⁵ Age is not included. According to Principles of Journal Ethics in the Polish Television a journalist is not allowed to discriminate anyone on account of his or her gender, age, disability, race, nationality or ethnic origin, religion or belief, political opinions, organisation membership, cultural or custom separation, sexual orientation.⁶⁶

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

When indicating the forms of discrimination, the Labour Code prohibits any action consisting in inciting other persons to violate the principle of equal treatment in employment.⁶⁷ By referral to “incitements” Polish legislation goes beyond what is required by the Equality Directive, since the notion of “incitements” appears to be broader than the notion of “instructions”.

In the context of conducting employment services, the ban on discrimination for the reasons mentioned, among others, in the two Directives encompasses both public employment services and private agencies.⁶⁸ The penalty for not observing the anti-discrimination rule is minimum 3.000 PLN fine.⁶⁹ Vacancy information (on available jobs or pre-employment training positions) announced by the employer cannot contain any requirements that discriminate against candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs, (non)membership in a trade union.⁷⁰

If instructions to discriminate lead a person to commit a criminal offence or crime, the person who issued such instructions is held criminally responsible for directing or instructing to perpetrate, or aiding or instigating the crime.⁷¹ A person publicly inciting to commit a crime is held responsible for its perpetration.⁷² On the basis of civil law a person who has incurred damages due to instructions to discriminate can seek compensation according to general principles.⁷³

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

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

⁶⁵ Point 6 Principles of Professional Ethics in Polish Radio S.A., an attachment to resolution no 64 of Board of Polish Radio S.A. of 9th September 2004.

⁶⁶ Point 11 paragraph 2 of Principles of Journal Ethics in Polish Television S.A.- Information, Commentary, Report, Document, Education, an attachment to resolution of Board of Polish Television of 6th January 2006.

⁶⁷ Art. 18^{3a} para 5 point 1 in relation to Art. 11³ Labour Code.

⁶⁸ Art. 18a.4 Act on Employment.

⁶⁹ Art. 121.3 Act on Employment.

⁷⁰ Art. 36.5 Act on Employment.

⁷¹ Art. 18.1-3 Penal Code.

⁷² Art. 18.1 in relation to Art. 280 Penal Code.

⁷³ Art. 415 Civil Code.

Article 94.2b) of the Labour Code specifies that an employer is obliged to counteract discrimination in employment on the ground, among others, of disability. This provision is too general to infer specific reasonable accommodation duties. Provisions of the Labour Code do not oblige the employer directly to provide reasonable accommodation in order to employ a specific disabled person.

Improvement of employment and working conditions of disabled persons is promoted through economic incentives under the so-called system of Quotas and Penalties contained in the 1997 Act on Disabled Persons.⁷⁴ This system is considered to be a form of reasonable accommodation duties in the Polish law. Employers who employ for at least 36 months disabled persons (who were unemployed or job searching while not holding a job, and were directed to work by a district labour office, or whose disability occurred while working for the employer, except when this disability was caused by fault infringe of regulations by the employer or by the employee) may receive from the National Disabled Rehabilitation Fund (Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych – hereafter PFRON) reimbursement for adapting of existing and creating positions to the needs of disabled persons, adopting space of working place, adopting or buying devices that help disabled persons to function at work, or recognizing needs of disabled persons by medical services on application.⁷⁵

The amendment of 20 December 2002 of the Act on Disabled Persons introduced the definition of an employment position adapted to the work needs of a disabled person. This is a position which is suitably equipped and adapted to the needs arising from the type and degree of disability of the person.⁷⁶

Furthermore, an employer who employs disabled persons is entitled to receive a monthly subsidy for the remuneration of the disabled employee.⁷⁷ The amount of the subsidy is related to the level of impairment of the disabled people employed and the proportion of disabled persons employed in the specific workplace.

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

- limitations as to maximum working time: 8 hours a day, 40 hour a week – in case of low-level disability, and 7 hours a day, 35 hours a week – in case of medium and high-level disability,⁷⁸
- A disabled person cannot be employed for night shifts and cannot work overtime,⁷⁹
- A disabled person has a right to an additional break of 15 minutes which should be treated as his/her working time,⁸⁰
- persons with medium or high-level disability have a right to an additional vacation of 10 working days,⁸¹
- persons with medium or high-level disability have a right to a leave of absence from work of up to 21 days per year whilst retaining their right to remuneration.⁸²

⁷⁴ On the divergence of opinions between those who are in favour of the system of economic incentives and those of the human rights approach, see the World Bank report *Disability and Employment in Poland (Niepełnosprawność a praca w Polsce)*, December 2000, p. 36 and next. The report recommends a harmonious combination of both systems.

⁷⁵ Art. 26, Act on Disabled Persons.

⁷⁶ Art. 2.8 Act on Disabled Persons.

⁷⁷ Art. 26a Act on Disabled Persons.

⁷⁸ Art. 15.1-2 Act on Disabled Persons.

⁷⁹ Art. 15.3 Act on Disabled Persons. This limitation does not include watching services and the situation when the disabled applies for working at night shifts or overtime and the competent doctor of medicine consents, see art. 16 of that Act.

⁸⁰ Art. 17 Act on Disabled Persons.

⁸¹ Art. 19.1 Act on Disabled Persons. This entitlement is not operative when a person has already a right to vacation of more than 26 working days or is entitled to other additional vacation.

⁸² Art. 20.1 Act on Disabled Persons.

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

For employers, there is a supplementary – this time negative – incentive to employ disabled persons. That is, an employer who employs at least 25 employees is obliged to pay some monthly amount to the PFRON unless he/she employs at least 6 % of disabled persons.⁸³ This amount is determined according to the formula in which 40,65 % of an average remuneration is multiplied by the theoretical number of employees who should be taken on to in order to reach the threshold of 6 % of disabled persons among all the people employed by the specific employer.

In addition to the above described instruments to motivate employers to hire more disabled people, when an employee becomes unable to continue work in their current position due to an accident at work or occupational disease, the employer is obliged to arrange a suitable place to work for that person.⁸⁴ It should be however noted that the Act on Disabled Persons has been changed more than 40 times since its adoption in 1997, which brings a certain element of uncertainty regarding the assistance of the state for this group of people. The current government has proposed a new system of supporting the disabled which ‘should bring some order to the provisions’. It initiated a relatively large-scale public debate and consultations with all interested parties on the possible changes.⁸⁵ Nevertheless some organisations representing rights of the disabled persons expressed their reluctance against the next amendment.⁸⁶ For the time being there is an amendment of the Act under preparation in Sejm. Furthermore it remains not clear, whether there will be a fundamental change of the system done on the basis of a new Act on Disabled.

In the Polish law there is no definition of 'disproportionate burden' for employers.

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

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

Polish Labour Code explicitly prohibits discrimination based on disability. There is however no specific provision that would put on the employer an obligation to provide appropriate accommodation for a specific, individual disabled person. Nevertheless, the above described system operating in Poland in respect of encouraging employers to engage disabled employees can be assessed favourably. Probably the most important current hindrances for a fuller integration of the disabled in the labour market are various architectural and transportation barriers that a disabled person can meet on his/her way to work and back home.

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

⁸³ See Art. 21.1-2 Act on Disabled Persons.

⁸⁴ Art. 14 Act on Disabled Persons.

⁸⁵ <http://www.mpips.gov.pl/index.php?gid=723>

⁸⁶ See Opinion of the National Council for Employment of the Disabled Persons (Krajowa Rada Zatrudnienia Osób Niepełnosprawnych, KRAZON), www.niepelnosprawni.info/ledge/x/15159

In respect of discrimination on the ground of religion or belief the provision enabling members of any churches and any religious associations to obtain days off from work or study during religious holidays might be interpreted as a form of providing reasonable accommodation.⁸⁷

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/43?

As regards accessibility, the Polish Constitution of 1997 provides a right to independent living for all citizens.⁸⁸ The Polish Sejm adopted the Charter of Rights of Disabled People⁸⁹ in which it also confirmed the right to live in environment free from functional barriers. This act remains a non-binding resolution only and does not have a direct binding effect. The Construction Law requires that public utility buildings and multi-family houses should be planned and constructed so as to ensure that disabled people have the necessary conditions to use them.⁹⁰ In some instances, however, courts and other bodies of the administration of justice are not easily accessible to the disabled. Information provided in Braille is, as a rule, non-existent. Some additional obstacles are created by civil and administrative procedures and – people who are not able to perceive or communicate their observations cannot witness.⁹¹ There are also problems with taking part in elections by the disabled, because according to the elections statute all citizens have to vote in person. When a person has difficulties in leaving the house and reaching the place, where he/she can vote, it is a practical example of infringement of the right to vote.⁹²

2.7 Sheltered or semi-sheltered accommodation/employment

- a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*
b) Would such activities be considered to constitute employment under national law?

Sheltered employment is in the Polish law regarded as employment. There is a set of conditions which must be fulfilled by an employer to be qualified as an employer leading an enterprise of sheltered employment: 1) he/she should lead the enterprise for at least 12 months, employ not less than 25 employees full time (the calculation should be done on the basis of full time equivalents) and reach alternatively the following rates of employment of disabled persons a) at least 40% of which 10% of all employed have a moderate or significant level of disability, b) at least 30% of blind or mentally disabled who have a moderate or significant level of disability 2) buildings and rooms used by the enterprise are adapted to meet the needs of disabled people and conform with rules and principles of safety hygiene at work, 3) first-aid and specialised medical care, counselling and rehabilitation services are provided, 4) he/she applied to be qualified as such an employer.⁹³

⁸⁷ Art. 42 Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (Ustawa z 17 maja 1989 r. o gwarancjach sumienia i wyznania).

⁸⁸ See Art. 67, 68.3 and 69 Constitution.

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

⁹⁰ Art. 5.1 point 4, Act of 7 July 1994 Construction Law (Ustawa z 7 lipca 1994 Prawo budowlane).

⁹¹ Art. 259 point 1 Code of Civil Procedure; Art. 82 point 1 Code of Administrative Procedure. Similar restrictions are not contained in the Code of Criminal Procedure, though witnessed who are thought not be able to percept or communicate observations can be heard in the presence of an expert physician or psychologist, see Art. 192 Code of Criminal Procedure.

⁹² According to the Polish Constitution (Art. 62 point 1) the participation in elections should be fully guaranteed. The Commissioner for Civil Rights Protection pointed out the lack of full guarantee in practice and proposed some changes to the elections statute, Information of the Commissioner for Civil Rights Protection for the year 2005, p. 51-52.

⁹³ Art. 28 Act on Disabled Persons.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

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

In principle, the provisions of Polish Labour Code are applied to all employees and employers without any distinction as to their nationality or citizenship.⁹⁴ Those regulations shall apply to all persons working legally on the basis of an employment contract, within Polish jurisdiction, which basically is equal to the Polish territory with some territorial exceptions (e.g. diplomatic missions⁹⁵). There is a large range of possible categories which can make the persons belonging to them fall under the provisions of Labour Code. First, there is the group of Polish citizens who have access to labour market despite their nationality (national origin). Currently, representatives of 13 national or ethnic minority groups are considered to be living within the territory of the Republic of Poland.

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

- citizens of the Member States of the European Union,
- citizens of the countries with which EU has signed the agreements on free movement of persons,
- those granted the refugee status on the territory of Poland,
- those granted so called “tolerated status” or having temporary protection on Polish territory,
- those granted a permit to settle on the territory of Poland,
- those granted a permit for temporary residence in Poland,
- other aliens according to some special provisions or international agreements.

Within the above determined groups, no distinction as to the nationality or citizenship was introduced. The only relevant criteria are the legality of the residence on the territory of the Republic of Poland.

With regard to the citizens of the Members State of the European Union, there were some changes introduced to the Polish aliens law with regard to the necessary adoption of the *acquis communautaire*.⁹⁶ On the day of the accession of Poland to the EU a new legal status of the EU resident was introduced. Afterwards the Polish law was amended in 2005 again in order to harmonise it with the changes in the field within the EU. Since then it is possible for

⁹⁴ See Art. 1-3, Labour Code, in that they do not introduce any criteria related to nationality or citizenship.

⁹⁵ See. Art. 6, Labour Code.

⁹⁶ Act of 13 June 2003 on Aliens, Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, Act of 27 July 2002 on the terms and conditions of the entry into and the stay in the territory of the Republic of Poland of the citizens of the EU Member States and the members of their families.

EU citizens to acquire a long-term resident status in Poland after fulfilling certain conditions and to profit from all the rights connected with the status.⁹⁷

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

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

The research conducted of the purpose of drafting the current report has not indicated the existence of such differentiation.

3.1.3 Scope of liability

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

According to Polish labour law, the possibility of the employer to be held liable for the actions of the employee exists in the case of the instruction to discriminate. There are no direct provisions in the labour law, especially in the penal provisions as to other types of employer's responsibility in this context.

On the general basis of the civil law there is responsibility of a State's Treasury for the actions causing damage conducted by the public servant while working as such.⁹⁸ In the cases of damage caused by the discriminatory acts – mostly probably the non-material damage, such responsibility of an employer (the State, its representatives) for the acts of its employees shall occur. For example responsibility of the public hospital for the actions of a doctor employed in it (there are of course special conditions to be fulfilled to imply this provision – for example there has to be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the responsibility of an employer for the actions of its employees.

There is however no legal basis for compensation claims against discrimination outside employment between private parties.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

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

⁹⁷ Act of 22 April 2005 the change of the Act on Aliens and of the Act on Granting Protection to Aliens within the Territory of the Republic of Poland as well as some other Acts (Journal of Laws of 2005 No. 94 item 788).

⁹⁸ Art. 417 Civil Code.

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

With respect to employees:

- all employees should be treated equally in respect of: concluding and terminating employment relation, the terms of employment, promotion, and access to vocational training aimed at upgrading their professional qualifications. They should be treated equally irrespective of, among others, gender, age, disability, race, religion, nationality, political opinions, trade union membership, ethnic origin, religion, sexual orientation, as well as irrespective of whether a person is employed for indefinite or specified period of time, full time or part time.⁹⁹
- equal treatment in employment shall mean non-discrimination in any manner whatsoever, direct or indirect, for any reasons described above.¹⁰⁰
- employees have the right to equal pay for equal work or for work of the same value.¹⁰¹ The term ‘pay’ encompasses all elements of remuneration, irrespective of their name or character, as well as other benefits or services related to employment that re granted to employees in pecuniary or non-pecuniary form.¹⁰²

Work of the same value shall be understood as work, the performance of which requires comparable qualifications of employees, confirmed by documents as provided by other regulations or by practice and professional experience, and also comparable responsibility and effort.¹⁰³ The principle of equal treatment in self-employment is also provided; everyone has the right to undertake, conduct and terminate economic activity on equal rights and pursuant to conditions determined by law. A public administration body cannot require or condition its decision related to undertaking, conducting or terminating economic activity by the person concerned on compliance with any additional requirements, in particular those on submitting documents or disclosing data that are not foreseen by law.¹⁰⁴ There is also a stipulation concerning non-discrimination in access to public aid. State shall provide entrepreneurs with public aid on terms and in the form provided for in separate provisions, with due respect of the principles of equality and fair competition.¹⁰⁵

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

Is the public sector dealt with differently to the private sector?

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

- (1) refusal to conclude or terminate an employment contract,
- (2) disadvantageous conditions related to remuneration or other terms of employment or omitting promotion or granting other benefits related to employment,
- (3) omitting selection for vocational training aimed at upgrading professional qualifications,

⁹⁹ Art. 18^{3a} para 1 Labour Code.

¹⁰⁰ Art. 18^{3a} para 2 Labour Code.

¹⁰¹ Art 18^{3c} para 1 Labour Code.

¹⁰² Art. 18^{3c} para 2 Labour Code.

¹⁰³ Art. 18^{3c} para 3 Labour Code.

¹⁰⁴ Art 6, Act of 2 July 2004 on Freedom of Economic Activity (Ustawa z 2 lipca 2004 o swobodzie działalności gospodarczej).

¹⁰⁵ Art. 7, Act on Freedom of Economic Activity.

– unless the employer can demonstrate that he/she was driven by objective reasons.¹⁰⁶

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

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

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

The institutions of the labour market such as employment agencies are also obliged to behave in a non-discriminatory manner. According to the Act on the Promotion of Employment and the Institutions of Labour Market, an employment agency cannot discriminate persons, for whom it seek employment or paid work (including self-employment), on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs, (non)membership in a trade union.¹⁰⁷

Similarly, other institutions of labour market – employment services for the unemployed and those seeking work – also have to operate in a non-discriminatory manner specified by law. The Act on Employment clearly determines that such services should be provided free of charge to everyone in accordance with the principle of equality, that means, they should be provided irrespective of person’s gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs, (non)membership in a trade union.¹⁰⁸

Likewise, the employers are obliged to provide district labour offices with current information concerning the available jobs or pre-employment training positions. While carrying out these duties they cannot formulate contain any requirements that discriminate candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs, (non)membership in a trade union.¹⁰⁹

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

- (1) accessibility of professional counselling for the unemployed and seeking work and for employers,
- (2) voluntary character of using services of professional counselling,
- (3) equality in using services of professional counselling, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion and religion or for reasons of trade union membership.¹¹⁰

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

¹⁰⁶ Art.18^{3b} para 1, Labour Code.

¹⁰⁷ Art. 18a.4 Act on Employment.

¹⁰⁸ Art. 36.4 item 3, Act on Employment.

¹⁰⁹ Art. 36.5 Act on Employment.

¹¹⁰ Art. 38.2 Act on Employment.

Although occupational pensions are regulated by the Act on Retirement and Disability Pensions from the Social Insurance Fund¹¹¹, the anti-discrimination clause regarding occupational pensions is included in the Act on the System of Social Security¹¹², which is a “mother-statutory” for social security area. This clause limits the principle of equal treatment of all socially insured to grounds of sex, marital status, and family status.¹¹³ According to the Ministry of Labour and Social Policy, the anti-discrimination clause ought to be broadly interpreted, but the listing of these three criteria is due to the fact that they may play an important role in the ambit of social security.¹¹⁴ On the other hand experts are of the opinion that Article 2a of the Act on the System of Social Security has proved to be a “blank norm”, which is hardly ever being applied by judges.¹¹⁵ It would be essential to introduce all other grounds of discrimination in the field of social security, and in this way also in respect of occupational pensions.

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

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities ?

The Starosta (a medium level self-governmental body) initiates, organizes and finances the trainings for the unemployed, for persons receiving a training pension and for reserve soldiers, in order to improve their chances for employment of other form of paid work, upgrade their professional qualifications or improve professional activity. While sending such a person to training, the principle of equality in access to training shall be obeyed, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion and religion or trade union membership.¹¹⁶

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

There is no special anti-discrimination provision regarding vocational training outside the employment relationship. Generally, discrimination in education is prohibited – the Act on Education refers to major international human rights instruments (1948 Universal Declaration, 1966 International Covenant on Civil and Political Rights, and 1989 Convention on the Rights of the Child). However, there is no separate and explicit anti-discrimination provision listing protected grounds. Also access to institutions of higher education is granted to all Polish citizens equally and also foreigners according to Act on Higher Education.¹¹⁷

¹¹¹ Act of 17th December 1998 on Retirement and Disability Pensions from the Social Insurance Fund (Ustawa z 17 grudnia 1998r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych) [further: Act on Retirement].

¹¹² Act of 13th October 1998 on System of Social Security (Ustawa z 13 października 1998r. o systemie ubezpieczeń społecznych).

¹¹³ Art. 2a.1 Act on System of Social Security.

¹¹⁴ Mazur-Rafał M. and Zienkiewicz E., *Report on Measures to Combat Discrimination in the 13 Candidate Countries (VT/2002/47). Country Report Poland. May 2003*, MEDE European Consultancy and Migration Policy Group [further: Mazur-Rafał, Zienkiewicz, *Report... 2003*], p. 6.

¹¹⁵ Weyss B., *Analysis of the status quo of Polish Anti-Discrimination Legislations and Policies, Conducted in the framework of the Twinning Project Poland – Austria “Strengthening Anti-discrimination Policies” (PL 02/IB/SO/06, FM No. 2002/000-605.01.02) January 2004* [further: Weyss, *Analysis of... 2004*], p. 37.

¹¹⁶ Art. 40.6 Act on Employment.

¹¹⁷ Art. 43 Act of 27th July 2005 on Higher Education (Ustawa z 27 lipca 2005r. prawo o szkolnictwie wyższym).

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 general, there is an extensive body of legislation concerning trade unions. These legal provisions contain some stipulations of anti-discriminatory character.

- The right to establish and join trade unions is vested in all employees irrespective of the type of their employment relation, members of agricultural co-operative society and persons employed by way of agency contracts unless they are employers.¹¹⁸
- No one shall be subjected to unfavourable treatment on account of membership in a trade union or non-membership or carrying out an executive position in a trade union. In particular, those reasons cannot constitute a condition for concluding employment relation, continuing employment or promotion.¹¹⁹
- The consequence for discriminating an employee on these grounds is also determined in the Act on Trade Unions and may consist in criminal sanctions of imposing a fine or restricting liberty.¹²⁰

As for the unions of employers the Act on the Employers Organizations¹²¹ does not include any anti-discriminatory provisions. It states merely that all employers have the right to create such organizations.

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

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

The national legislation does not necessarily comply with the exception from the Directive. There are no specific provisions that would lead to restrictions of person's rights to social assistance, social security or health care on the grounds of religion or belief, age disability or sexual orientation. There are some provisions concerning the need for special treatment of disabled persons but they provide for positive discrimination in relation to those persons.

The Act on Medical Treatment when determining the access to medical services, and in particular, the so called 'waiting lists' (some medical services are not accessible immediately – in such cases a person must sign into a list and wait for his/he time, it may take a few weeks or months), provides that those lists should be conducted in line with the principle of just, equal, anti-discriminatory and fair access to medical treatment.¹²² In that, the Act prohibits discrimination though the specific grounds of racial or ethnic origin are not mentioned, which however does not exclude them since this anti-discrimination provision is of general application.

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

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

¹¹⁸ Art. 2.1, Act on Trade Unions.

¹¹⁹ Art. 3, Act on Trade Unions.

¹²⁰ Art. 35, Act on Trade Unions.

¹²¹ Act of 23 May 1991 on the Employers Organizations (Ustawa z 23 maja 1991 r. o organizacjach pracodawców).

¹²² Art. 20.5, Act of 27 August 2004 on Medical Treatment Financed from the Public Resources (Ustawa z 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych).

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

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

There is a quite complex system of different allowances and grants. Most of them are not discriminatory, like e.g. a child birth grant, which belongs to a mother, a father or a legal tutor of a child. It can also belong to a factual tutor up to the age of 1 of a child in case it has not been granted to a mother, a father or a legal tutor.¹²³ Death allowance belongs to any person who covered costs of a funeral.¹²⁴ However a same-sex partner, unlike spouse, would have to supply documentary evidence of those costs.¹²⁵

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

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

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

In the field of education, schools must ensure that each pupil has the conditions necessary for his/her development, and prepare him/her to fulfil family and civic responsibilities based on the principles of solidarity, democracy, tolerance, justice and freedom. According to art. 13 of the Act on Education, the duties of schools and public facilities include enabling pupils to uphold a sense of national, ethnic, linguistic and religious identity, especially learning their own language, history and culture. In their didactic and pastoral work, schools are also obliged to uphold regional culture and tradition.¹²⁶ The education system must ensure that disabled or socially maladjusted children and young people have the possibility of receiving an education in all types of schools, in accordance with their individual developmental and educational needs and predispositions, as well as care for pupils with significant or complex disorders through the possibility of creating an individually-tailored learning process, methods and programmes of teaching, and rehabilitation activities.¹²⁷

The right of every citizen of the Republic of Poland to an education is a constitutional right.¹²⁸ Education until the age of 18 is obligatory, and free in public schools (this qualification does not apply to the provision of some educational services by public tertiary schools).¹²⁹ Parents have the freedom to choose schools other than public schools for their children. Citizens and institutions have the right to establish primary, secondary and tertiary schools and educational

¹²³ Art. 9 Act of 28th November 2003 on Family Benefits (Ustawa z 28 listopada 2003r. o świadczeniach rodzinnych).

¹²⁴ Art. 78.1 Act on Retirement.

¹²⁵ Art. 79.1 Act on Retirement.

¹²⁶ The circumstances and manner of realising these goals were described in the Ordinance of the Minister of National Education of 24 March 1992 as relating to the organization of education in a way which enables the upholding the national, ethnic and linguistic identity of pupils belonging to national minorities.

¹²⁷ Art. 1, Act of 7 September 1991 on the System of Education (Ustawa z 7 września 1991 r. o systemie oświaty) [further: Act on Education].

¹²⁸ Art. 70 Constitution.

¹²⁹ The manner of fulfilling the education obligation is defined by the 1991 Act on Education. The regulations for the functioning of higher institutions were defined by the 1990 Act on Higher Education.

establishments.¹³⁰ Public authorities have the obligation to ensure that all citizens have a universal and equal access to education. For this purpose, they are obliged to create and support systems of individual financial and organisational aid for schoolchildren and students.¹³¹ The discrimination in education is prohibited – the Act on Education refers to major international human rights instruments (listed in paragraph 3.2.4), though no specific referral to grounds of racial or ethnic origin is to be noted. This however is guaranteed by constitutional rights and, additionally, by the 2005 Act on National and Ethnic Minorities.¹³²

In the field of education, Polish government put serious efforts into guaranteeing full equality and non-discrimination of members of national minorities. Children of minority origin have equal access to all schools in the same way other pupils have.¹³³ Also access to institutions of higher education is granted to all Polish citizens equally.¹³⁴ However in practice, the implementation of the right to education in case of Roma children raises still some concerns. A serious problem for the education of Roma children remains their inadequate knowledge of Polish language, as well as cultural barriers resulting in problems at school from the very beginning of school education.¹³⁵ This often leads to failure at school, dropping out, or even in a transfer to special schools for mentally handicapped children.¹³⁶ The problems in education of Roma children are connected with the economic situation of Roma families and the indifferent attitude which some Roma families present towards education,¹³⁷ as well as a low level of activity on the part of the state in terms of ensuring suitable conditions for the education of Roma in schools in the previous years.¹³⁸ On the one hand, the state undertook too few actions to encourage and facilitate education for Roma children. On the other hand it tolerated and tolerates even now to some extent the fact that Romani parents often do not fulfil the obligation of sending their children to schools.

It must be however noted that the situation of Roma education is gradually improving. It is to some extent possible due to a clear change of the state policy, which aims at eliminating Roma classes and favours regular education system. Similarly to the previous year, there are no newer precise data on attendance of Roma children to pre-schools and schools. Several sources confirm that the overall number of segregated ‘Romani classes’ or ‘remedial classes’ has significantly dropped to ca. 10-20 with around 200 pupils.¹³⁹ Secondly, there is also some improvement regarding pre-schooling of Roma children due to new pre-schools opened up in

¹³⁰ Ordinance of the Minister of National Education of 1997 relating to specific regulations and conditions of providing and withdrawing permission to establish a public school by a legal or physical person; Ordinance of the Minister of National Education of 2001 relating to outline statutes for public pre-schools and public schools.

¹³¹ Ordinance of the Council of Ministers of 1993 relating to the conditions, form, and mode of granting and dispensing, as well as the amount of, material assistance to schoolchildren; Ordinance of the Minister of National Education and Sport of 2001 relating to regulations for the division of the general education subsidy for units of local government in 2002.

¹³² See Art 6.1

¹³³ Art. 1.1 Act on Education.

¹³⁴ Art. 43 Act of 27th July 2005 on Higher Education.

¹³⁵ “Information of the Commissioner for Civil Rights Protection: 2001”, p. 349 and ff.

¹³⁶ Although there is no state-wide data regarding the number of Roma students attending special schools, the numbers available from the Malopolska Voivodship for the school year 2002/2003 show an overrepresentation of the Roma in these schools (Roma constituted 20% of all the children). Roma children with learning difficulties were sent to psychological-pedagogical clinics to test their intellectual development. Some children could not solve them properly not because of being mentally handicapped but because of poor command of Polish. Due to many protests of Roma leaders and NGOs the Ministry of National Education and Sport recommended educational facilities to pay a greater attention to this problem and ordered to verify the decisions on qualifying Roma children to these schools by psychological-pedagogical clinics. See Roma in Public Education, Raxen, National Focal Point for Poland, Helsinki Foundation for Human Rights, <http://www.hfhrpol.waw.pl>, p. 6.

¹³⁷ Report: The Roma on the Education of their Children (based on the example of the Carpathian Roma) (Raport – Romowie o edukacji swoich dzieci (na przykładzie Cyganów Karpackich), Oświęcim 1997, p. 11, 17 and next. Report published by the Association of Roma in Poland, commissioned by the Minister for National Education.

¹³⁸ “Information of the Commissioner for Civil Rights Protection: 2001”, p. 349 and next., Mirga A. (2001) Addressing the Challenges of Romani Children’s Education in Poland – Past and Current Trends and Possible Solutions, http://www.osce.org/documents/odihr/2003/01/1505_en.pdf

¹³⁹ Poland. Ministry of Interior and Administration (2003), Programme for the Roma Community in Poland (Program na rzecz społeczności romskiej w Polsce), http://www.mswia.gov.pl/index_a.html

areas, where Roma population is significant.¹⁴⁰ Thirdly, the only available data on attendance of Roma to schools for Małopolskie Voivodship show an increase (from previous estimates on a level of ca. 70% to 80% in the school years 2001/2002 and 2002/2003).¹⁴¹ Fourthly, there are some initiatives addressed at certain groups of Roma children (e.g. scholarships for children with outstanding talent for fine arts or at Roma students) which aim at creating equal chances¹⁴²

These positive changes were possible due to a joint effort of the Polish public administration (implementation of the Program for the Roma Community in Poland which was initiated in 2004 and should be realised to 2013, alarming reports of the Commissioner for Civil Rights Protection, Group for National Minorities within the Ministry of Interior and Administration, relevant Commissions of the Sejm) as well as involvement of Roma representatives and organisations. In this context the positive role of ‘assistants of Roma education’¹⁴³ and ‘assisting teachers’¹⁴⁴ should be pointed out. The changes should be however seen as a beginning of a long-term process.

Poland does not only limit itself to a guarantee of non-discrimination, it also carries out some positive actions. National and ethnic minorities have a right to create their own educational institutions.¹⁴⁵ Moreover, there are public schools in which instruction is provided in minority languages, bilingual schools with equal instruction in two languages (Polish and a minority language) and schools with additional teaching of a minority language.¹⁴⁶ The schools of national minorities receive an extra 20% subsidy in comparison to other schools. Nevertheless, there are some problems due to the lack of a sufficient number of textbooks for the teaching of minority languages, the up-dating of textbooks, or insufficient financial resources (in spite of an extra 20% subsidy). According to Art. 13 Act on the System of Education, schools and public institutions have the obligation to enable schoolchildren to maintain their sense of national, ethnic, linguistic and religious identity, and in particular the study of their language and their own history and culture. Upon a motion from the parents, language tuition may take place in separate groups, sections, or schools; in groups, sections, or schools with additional lessons in a particular language and on their own history and culture; or in inter-school teaching groups.¹⁴⁷

Polish domestic law relating to the education of persons belonging to national minorities should be recognised as consistent with international and European standards. An assessment of the state of education of national and ethnic minorities is made difficult by the lack of precise data on this issue. The problems most frequently mentioned by national minorities are: lack of curricula, textbooks, teachers, and funds. The situation of individual national minority groups in the field of education varies widely. The best organised is Lithuanian education, largely due to the activities of the members of this minority, covering all the levels of teaching. The Lithuanians have also developed the largest number of textbooks. In the case of the Roma community, a teaching system according to the Act on the System of Education has not been created, but it should be pointed out that the obligation of the authorities to establish such a system depends on the national minority group (they need to lodge the individual application).

¹⁴⁰ Roma in Public Education, op. cit., pp. 19-20.

¹⁴¹ Roma in Public Education, op. cit., p. 6.

¹⁴² Roma in Public Education, op. cit., p. 19.

¹⁴³ They are responsible among others for contacting parents, supervising the attendance to school, assisting in doing homework.

¹⁴⁴ They assist ‘normal’ teachers by making use of their special education in intercultural pedagogy and of experience with bilingual children.

¹⁴⁵ Art. 35.2 Constitution.

¹⁴⁶ The legal ground for these schools is Art. 13 Act on Education and issued on its basis Statutory ordinance of 24 March 1992 of the Minister of National Education on the organization of training enabling up-holding of national, ethnic and language identity of pupils belonging to national minorities.

¹⁴⁷ The conditions and manner of carrying out these tasks were defined in an Ordinance of the Minister of National Education of 1992 relating to the organisation of education enabling the sustenance of national, ethnic, and linguistic identity of schoolchildren belonging to national minorities.

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

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

The access to and supply of goods and services available to the public is not related to any discriminatory criteria. It does not mean that everyone in all circumstance can have access to them – this can be limited by e.g. financial capacity to pay for certain goods or services. In some case, the law expressly prohibits discrimination in granting access. For example, the Energy Law stipulates that every enterprise engaged in transfer or distribution of gaseous fuel, or electric energy is obliged to safeguard providing the services of transferring to all recipients on the basis of equal treatment.¹⁴⁸

The Code of Minor Offences contains two provisions regarding access to and supply of goods and services in Chapter XV – Offences against the interest of consumers. The first one stipulates that whoever, dealing with selling goods in a retail sale or catering business, hides the goods meant for sale or deliberately refuses selling them without a founded reason, is subject to fine.¹⁴⁹ According to the resolution of the Supreme Court this kind of misconduct may be committed by any person taking care of selling goods, and it is of no account whether it is an owner of a company, somebody who is in charge of supervision, an employee or an accommodation salesmen.¹⁵⁰ The second lays down that whoever, being a professional service provider, demands or collects payment higher than one in force, or deliberately refuses to provide the service without a founded reason, is subject to fine.¹⁵¹ Although these provisions stem from the communist regime and were released in order to prevent stockpiling of commercial goods during periods of shortage of commodities, they could also be used to prohibit discrimination with regard to access and supply of goods and services which are available to the public¹⁵². Both articles can be used to counteract discrimination, even though the intention of legislators was different.

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

To which aspects of housing does the law apply? Are there any exceptions?

According to Art. 75.1 of 1997 Constitution, public authorities are obliged to create policies enabling them to meet the housing needs of citizens, and in particular to counteract homelessness, support the development of social building projects, and support the efforts of citizens to secure their own housing. Access to housing is regulated by the following legislation: the Act on Housing Allowances¹⁵³ and the Act on Protections of Tenants' Rights.¹⁵⁴ They contain no provisions of a discriminatory nature. At the same time, Polish domestic legislation seems not to have any particular mechanisms of combating discrimination in housing.

¹⁴⁸ See Art. 4.2, Act of 10 April 1997 Energy Law (Ustawa z 10 kwietnia 1997 Prawo energetyczne).

¹⁴⁹ Art. 135 Code of Minor Offences of 20th May 1971 (Kodeks wyroczeń z 20 maja 1971r.)

¹⁵⁰ Resolution of the Supreme Court of 17th March 2005, signature I KZP 3/05.

¹⁵¹ Art. 138 Code of Minor Offences.

¹⁵² Liegl B., Perchinig B., and Weyss B., *Brochure on Anti-discrimination Legislation and Policies in Poland. Conducted in the framework of the Twinning Project Poland – Austria "Strengthening Anti-discrimination Policies"* (PL 02/IB/SO/06, FM No. 2002/000-605.01.02), July 2004, p. 12.

¹⁵³ Act of 21 June 2001 on Housing Allowances (Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych).

¹⁵⁴ Act of 21 June 2001 on Protections of Tenants' Rights, Municipal Housing Resources and Amendments to the Civil Code (Ustawa z 21 czerwca 2001 o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie kodeksu cywilnego).

The genuine 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 part are not met. The Government and local self-government do not allocate adequate financial resources to solve housing problems. Given the exceptionally difficult housing situation in Poland, the critical situation of the “Bergitka Roma” must also be mentioned in this respect. The deep poverty of this group and their housing conditions¹⁵⁵, which are an outrage to human dignity, require the undertaking of additional measures, including ensuring that they have access to dignified living conditions¹⁵⁶.

The Civil Code, regulating the succession of lease relationships, refers to persons who remained in a factual cohabitation with the lessee.¹⁵⁷ The question is what a factual cohabitation is and whether it applies to homosexual partners. There is no legal definition of this term and no clear answer for this question.

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

As a rule, everyone should be treated equally in the matters of employment and access to labour market, since the constitutional provision and other provision of Polish legislation confirm the general principle of non-discrimination. There are, however, some exceptions laid down, according to which there is a possibility of differentiation among the employees. The Labour Code says that the principle of the equal treatment in employment is not violated by non-employment of a person on the basis of one or more grounds listed in the discrimination definition, if it is justified on account of the type of work, working conditions, or occupational requirements laid down for employees.¹⁵⁸

Provision of Polish law does not transpose the requirements of the directive in the exact manner. This refers especially to the criteria of difference in treatment – ‘the objective is legitimate and the requirement is proportionate’. Polish Labour Code speaks only of ‘justifiability’. This leads to a conclusion that, in this context, the national legislation does not comply with the Directive and to rectify the situation, the “escaping clause” should be more narrowly defined.

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

4.2 Employers with an ethos based on religion or belief

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

¹⁵⁵ “Information of the Commissioner for Civil Rights Protection: 2001”, p. 348.

¹⁵⁶ It is hard to estimate the overall number of Bergitka Roma suffering from poor living conditions since even the total number of Roma in Poland differs depending on sources of information: according to 2002 Nationwide Census there were 12 731 Roma, Roma organisations claim that there are around 30 000 Roma in Poland, international sources give the number of 50-60 000.

¹⁵⁷ Art. 691 Civil Code.

¹⁵⁸ Art. 18^{3b} para 2 point 1, Labour Code.

The Labour Code stipulates that the differentiation of employees on the ground of religion or belief does not amount to violation of the principle of equal treatment in employment, if the employee's religion or belief constitutes a significant and justified occupational requirement in relation to type and character of the activity carried out within the church or other religious associations, as well as organizations whose activities are directly related to religion or belief.¹⁵⁹

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

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

4.3 Armed forces and other specific occupations

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

The legislation related to the employment in some services (the Army, Police, Special Services, Border Guard, etc.) establishes certain physical and mental requirements to become employed in these services. These special criteria are justified on account of the character of the armed services and their tasks.

The members of armed forces who are employed as professional soldiers (*żołnierze zawodowi*) are dismissed when they reach the age of 60 irrespective of their gender, or when they are held by a military medical commission to be unable to continue their service.¹⁶⁰ No public discussion was held so far whether this restriction is compatible with Directive 2000/78.

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

Similarly to the situation of professional soldiers, there are exceptions relating to the employment in other services. Police officers have to indicate physical and mental capability to do the service in armed forces.¹⁶¹ If they are held permanently incapable of continuing the service by a medical commission, they are dismissed from service.¹⁶² Similar provisions were laid down for officers of the Internal Security Agency, Foreign Intelligence Agency,¹⁶³ Border Guard,¹⁶⁴ Government Security Office,¹⁶⁵ Fire Emergency Service,¹⁶⁶ and Prison Service.¹⁶⁷ Police officers and the officers of the other above mentioned services are entitled

¹⁵⁹ Art. 18^{3b} para 4, Labour Code.

¹⁶⁰ Art. 111 point 3 and 5, Act of 11 September 2003 on Military Service of Professional Soldiers (Ustawa z dnia 11 września 2003 r. o służbie wojskowej żołnierzy zawodowych). In general, professional soldiers are at the age of 60 entitled to retirement pension (they need to show the record of 15 years in the army), see Art. 12, Act of 10 December 1993 on Retirement Scheme for Professional Soldiers and Their Families (Ustawa z dnia 10 grudnia 1993 r. o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin).

¹⁶¹ Art. 25.1, Act of 6 April 1990 on the Police (Ustawa z 6 kwietnia 1990 r. o Policji).

¹⁶² Ibidem, Art. 41.1 point 1.

¹⁶³ See Art. 44 point 5 and Art. 60.1 point 1, Act of 24 May 2002 on Internal Security Agency and Foreign Intelligence Agency (Ustawa z 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu).

¹⁶⁴ See Art. 31.1, and Art. 45.1. point 1, Act of 12 October 1990 on the Border Guard (Ustawa z 12 października 1990 r. o Straży Granicznej).

¹⁶⁵ See Art. 20.1 and 35.1 point 1, Act of 16 March 2001 on the Government Security Office (Ustawa z 16 marca 2001 r. o Biurze Ochrony Rządu).

¹⁶⁶ Art. 28 and Art. 43.2 point 1, Act of 24 August 2001 on State Fire Emergency Service (Ustawa z 24 sierpnia 1991 r. o Państwowej Straży Pożarnej).

¹⁶⁷ Art. 24.1 and Art 39.2 point 1, Act of 26 April 1996 on Prison Service (Ustawa z 26 kwietnia 1996 r. o Służbie Więziennej).

to police retirement pension after 15 years of service¹⁶⁸ but can continue their employment after reaching that age.

4.4 Nationality discrimination

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

a) How does national law treat nationality discrimination?

The general clause contained in the Constitution prohibits discrimination in political, social or economic life for any reason whatsoever.¹⁶⁹ That means that all persons despite their nationality should be treated in accordance with the principle of equal treatment, while being under Polish jurisdiction.

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

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

4.5 Work-related family benefits

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

a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

In principle, the majority of the social benefits being granted by reasons of belonging to employee's family stay in relation to the definition of the family on the ground of the Family Code. This means that under Polish legislation the family is understood as a union of a man and a woman together with their children. According to the provisions of the Social Insurance in the case of Accidents in the Workplace and Occupational Diseases¹⁷⁰ there are some social benefits provided for the family of deceased person. Also there is a special pension provided for orphans.

There are also some family benefits guaranteed by the state for parents or other persons bringing up children regardless their marital status under the condition that their income is lower than a certain threshold.¹⁷¹

¹⁶⁸ Art. 12.1, Act of 18 February 1994 on Retirement Scheme for Police Officers, Officers of the Internal Security Agency, Foreign Intelligence Agency, Military Counter-Intelligence Service, Military Intelligence Service, Central Anti-Corruption Office, Border Guard, Government Protection Office, State Fire Departments, Prison Service and their Families (Ustawa z 18 lutego 1994 r. o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin).

¹⁶⁹ Art. 32 Constitution.

¹⁷⁰ Act of 30 October 2002 on Social Insurance in the case of Accidents in the Workplace and Occupational Diseases (Ustawa z 30 października 2002 o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych).

¹⁷¹ Art. 4 and 5, Act of 28 November 2003 on Family Benefits (Ustawa z dnia 28 listopada 2003 r. o świadczeniach rodzinnych).

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

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

4.6 Health and safety

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

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

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

In accordance with the principles of Polish political and legal regime, the freedom of religion and the freedom of expression are safeguarded to all persons; any discriminative limitations impeding a free enjoyment of these rights are prohibited by law. Any potential conflict between the individual's freedom of expression which may also take form of dress or personal appearance (turbans, hair, beards, jewellery, etc.) and the health and safety, under Polish law would be decided on individual basis, taking into consideration the values of mentioned rights and freedoms on the one hand, and the weight of opposing values – public security, public order, public morality, health, rights of others, on the other hand.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

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

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

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

The differences in treatment based on age are permitted under Polish legislation in some situations. For details see sections 4.7.2, 4.7.3 and 4.7.4.

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

According to the Polish law individuals (women and men equally) are obliged to contribute to pensions since they start to be employed¹⁷². There are fix ages for entitlement to benefits, but

¹⁷²

Art. 6 Act on Social Security.

the retirement age is treated as a right not as an obligation and is left to employees' discretion¹⁷³. Basic retirement age for men is 65 and for women 60. Nevertheless, some labor groups have special preferences, e.g. miners¹⁷⁴, railway men/women, teachers, regular soldiers, police officers and officers of other state enforcement agencies, judges, prosecutors.

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

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

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

- there is an education obligation until reaching the age of 18; an employer is obliged to allow such young employee to attend classes and this give him/her a leave from work,
- working hours cannot extend more than 6 hours per day for people younger the 16 years and 8 hours per days in case of those who are under the age of 18,
- the time spent at school taking part in obligatory classes is counted as working time
- young person cannot be employed on night shift and work at night hours: 22 p.m. – 6 a.m.,
- a list of jobs which cannot be undertaken by young people is also provided.¹⁷⁵

Polish legislation provides for some benefits for persons with caring responsibilities: maternity leaves¹⁷⁶, leaves to bring up children¹⁷⁷, caring allowance¹⁷⁸, some facilitations for people taking care of disabled persons (e.g. free transportation as a caretaker of a disabled person).

4.7.3 Minimum and maximum age requirements

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

According to the provisions of labour law the minimum age of 18 is, in general, required to be considered as an employee. There are some exceptions as to the minors over 16 years (employment of a minor under 16 years old is generally forbidden). Those who have graduated from, at least, gymnasium,¹⁷⁹ may become employed if obtain the medical approval for the specific kind of work and occupational qualifications that could be required on the offered position. Those who do not have any vocational training may be employed only for the reasons of such training.

¹⁷³ Art. 24 and 27 Act on Retirement.

¹⁷⁴ Miners extorted favorable legislation changes in particular retirement age at 55: Chapter 3a Act on Retirement will come into force on 1st January 2007.

¹⁷⁵ See Art. 190-204 Labour Code.

¹⁷⁶ Art. 180 Labour Code and chapter 6 Act on Pecuniary Indemnity from Social Insurance in Case of Disease or Maternity of 25th July 1999 [further: Act on Indemnity in Case of Disease] (Dz.U. 1999.60.636).

¹⁷⁷ Art. 186 Labour Code.

¹⁷⁸ Chapter 7 Act on Indemnity in Case of Disease.

¹⁷⁹ In general the education follows stages of: (a) primary/basic education: 7-13 years old; (b) lower secondary education (gymnasium): 13-16 years old; (c) upper secondary education (lyceum): 16-19 years; and (d) higher education (higher schools, universities, etc.): from 21 years.

In principle, there are no restrictions in respect of the access to the training; anyone may benefit from such training. Some limitation may be provided for by educational requirements, depending on the type of training.

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

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

There are specific age limits concerning some parts of the public sector. The minimum age limits exist e.g. within the judiciary. According to the Law on Organization of Judiciary, one can become a judge of the first instance court must be more than 29 years old.¹⁸¹ This age limit is not problematic from the point of view of the age discrimination, as it usually takes up to the age of 29 years to complete the whole education to become a judge. Nomination to the courts of the second instance and to the Supreme Court requires certain length of practice, and therefore it is an indirect age limit.¹⁸² As regards, administrative courts, there is an age limit for judges of regional administrative courts who cannot be younger than 35 years old.¹⁸³ To become a judge of the Head Administrative Court, one must be older than 40 years, unless a given person for at least 3 years was a judge of the regional administrative court.¹⁸⁴ Furthermore, there is a minimum age limit of 30 to become an assistant judge (*asesor*) in the regional administrative court.¹⁸⁵ The minimum age for becoming prosecutor is 26 years.¹⁸⁶ Under the Law on Notaries, one of the conditions to become a notary is the age of 26.¹⁸⁷

Members of certain professions have a possibility to get retired following 15 years of service. However, they cannot be dismissed upon reaching this time of service. They may continue to work. This concerns in particular policemen, fire guards, officers of the Bureau for the Government Protection, officers of the Agency for Internal Security, officers of the Border Guard, officers of the Prisons' Guard. However, a policeman may be dismissed upon reaching 30 years of so-called retirement-counted time (i.e. time which counts for calculating the retirement pension)¹⁸⁸. Similar rules¹⁸⁹ apply to members of other mentioned above "uniform" professions.

There are special age limits for members of different professions:

- judges - a judge gets retired in the age of 65, unless the National Judiciary Council agrees for the further activities as a judge, not longer, however, than until the age of 70.¹⁸⁹ Similar rules apply to prosecutors¹⁹⁰;

¹⁸⁰ Art. 2.1 point 2 items (a) and (b), Act on Employment.

¹⁸¹ Art. 61.1 point 5 Act of 27 July 2001 Law on Organization of Judiciary (Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych).

¹⁸² Art. 63.1, art. 64.1 Law on Organization of Judiciary, and art. 22.1 point 6 Act of 23 November 2002 on Supreme Court (Ustawa z 23 listopada 2002 o Sądzie Najwyższym).

¹⁸³ Art. 6.1 point 5 Act of 25 July 2002 Law on Organization of Administrative Judiciary (Ustawa z dnia 25 lipca 2002 Prawo o ustroju sądów administracyjnych).

¹⁸⁴ Art. 7.1 Law on Organization of Administrative Judiciary.

¹⁸⁵ Art. 26.1 point 2 Law on Organization of Administrative Judiciary.

¹⁸⁶ Art. 14.1 point 5 Act of 20 June 1985 on Public Prosecutor's Office (Ustawa z dnia 20 czerwca 1985r. o prokuraturze).

¹⁸⁷ Art. 11 point 7 Act of 14 February 1991 Law on Notaries Public (Ustawa z dnia 14 lutego 1991r. Prawo o notariacie).

¹⁸⁸ Article 41 Section 2 Point 4 of the Police Act.

¹⁸⁹ Art. 69.1 Law on Organization of Judiciary.

¹⁹⁰ Art. 62a.1 Act on Public Prosecutor's Office.

- professional soldiers - professional soldiers are dismissed when they reach the age of 60 irrespective of their gender¹⁹¹;
- teachers - employment contract of teachers expires when they reach age of 65 years. If, until that time a teacher did not obtain a right to retirement, a director of the school may prolong the length of employment, but not longer than until the age of 67¹⁹²;
- notaries - the Minister of Justice may dismiss a notary upon reaching the age of 70.¹⁹³

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

- miners may get retired upon reaching the age of 55, provided that they were employed at least 20 years (women) or 25 years (men) as miners or performed equivalent works. This concerns miners born before 1949. For other miners the retirement age is 50, provided the above conditions are met.¹⁹⁴
- railway workers may get retired upon the age of 55 (women) or 60 (men), provided they were born before 1949 and have the retirement-counted period longer than 20 (women) or 25 (men) years.¹⁹⁵

It is worth mentioning in this context that in case of reorganization of public administration or self-government, a retirement age for employees of public administration and self-government lowers and is 60 (men) or 55 (women) years.¹⁹⁶

4.7.4 Retirement

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

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

As a rule collecting state pensions is a right not an obligation but jurisprudence is not homogenous.

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

There is no requirement for workers to retire at the moment of reaching the retirement age. The general retirement age is 60 for women and 65 for men and is treated as a right not as an obligation and is left to employees' discretion.¹⁹⁷ On the one hand, it is only the employee himself/herself, who can apply to social security agency for issuing retirement decision. On the other hand, the entitlement to retirement pension is not subjected to resignation from employment.

¹⁹¹ Art. 111 point 5 Act on the Service of the Professional Soldiers.

¹⁹² Art. 23.1 point 4 Act of 26 January 1982 Teachers' Charter (Ustawa z 26 stycznia 1982r. Karta Nauczyciela).

¹⁹³ Art. 16.3 point 1 Law on Notaries Public.

¹⁹⁴ Art. 50a Act on Retirement.

¹⁹⁵ Art. 40 Act on Retirement.

¹⁹⁶ Art. 23.2 Act of 22 March 1990 on Employees of Self-government (Ustawa z dnia 22 marca 1990r. o pracownikach samorządowych).

¹⁹⁷ Art 24 and 27 Act on Retirement.

It is possible to combine employment with pension without any restriction to persons, who reached the retirement age. But in case of persons at the retirement age, who did not terminate employment (women and men equally), pension becomes suspended. This provision was introduced on 1 July 2000 in response to dramatic situation on Polish labour market and the high unemployment rate.¹⁹⁸ It was considered to be an incentive for employers to hire younger workers in the place of the ones that have become entitled to retirement pension and thus possess financial resources to cover their living expenses.

Different rules apply to receiving payments from the so called Employees Pension Programmes, which is a system of voluntary collecting of pensions. Individuals begin receiving payments in the following cases: 1) on a motion of the person after reaching the age of 60, 2) upon presentation of a decision on granting the right to pension, when the person reached the age of 55, 3) after reaching the age of 70 under two conditions: if the person has not made a motion to receive payments previously and if his/her employment has been terminated by the employer who was running the Employees Pension Programme.¹⁹⁹

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

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

However there is in Poland on-going debate on reform of the pensions system since the mid of the 90s. Although in 1999 a new pensions system was introduced, the debates are still going on regarding various issues. In particular the issue of making the retirement age equal to men and women turned out to be very controversial. It has been proved that under the new system payments from pension fund for women are significantly lower, because on average they work shorter and their contribution to pensions fund are smaller.²⁰⁰ That is why experts are in favour of making the retirement of men and women equal.²⁰¹ In order to stop this discrimination the previous social-democratic government proposed the plan of equalising the retirement age and introducing a flexible retirement age for people at the age between 62 and 65 year as well as of setting the general retirement age at a higher level (so called Hausner's Plan). The proposal to make the retirement age for men and women equal met heavy criticism from the public opinion and was eventually not implemented. It is difficult to convince the Polish society that the former 'privilege' for women turned to be in fact discriminatory under the new pensions system. This approach can be explained by the fear for unemployment just before going to retirement. Taking into consideration the public opinion the current government announced that there is no will to make the retirement age of men and women equal.²⁰²

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

¹⁹⁸ Art. 103.2a Act on Retirement.

¹⁹⁹ Art. 42 Para 1 and 2, Act of 20 April 2004 on Employees Pension Programmes (Ustawa z 20 kwietnia 2004 r. o pracowniczych programach emerytalnych).

²⁰⁰ According to the estimates of the Supreme Chamber of Control, after 40 years of work a man can receive pension at the level of 44-69% of his last salary/wage, whereas a woman after working for 35 years can draw a pension only at the level of 34-44% of her last salary/wage, Information on the results of control of the implementation of the act on organisation and functioning of pension funds, Supreme Chamber of Control, 18.02.2002, p. 59.

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

²⁰² <http://gospodarka.gazeta.pl/gospodarka/1,33181,3616873.html>

No, it is impossible to set retirement ages by contract, collective bargaining or unilaterally with regard to pensions paid from Social Security Fund. The Act of 17 December 1998 on Retirement and Disability Pensions from the Social Security Fund stipulates that a person is entitled to pension if she/he meets conditions set in the Act. Only the legislator has the right to set the conditions for receiving pensions from the Social Security Act. Apart from this there is also a possibility to take out additionally a private voluntary insurance within the so called III pillar, where the employers have more freedom to set the rules among others the age limit when an insured person will be entitled to receive pension.

Labour Code differentiates four kinds of contracts of employment: for probation period²⁰³, for determined time period, for the time of certain action, for undetermined time period²⁰⁴. It is impossible to set termination of an employment contract at fix age, but an employer may employ for determined time period and thus possibly connect the set time period with the employee age.

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

The employer can terminate the employment on the basis of general rules governing the termination or labour relations. Employment contracts concluded for indefinite periods of time may, generally, be renounced.²⁰⁵ The Labour Code lays down precise periods of renouncement: (1) 2 weeks in case of employment lasting shorter than 6 months; (2) 1 month in case of employment lasting at least 6 months and (3) 3 months in case of employment lasting at least 3 years.²⁰⁶ The right to renounce the employment contract concluded for a definite period of time is limited by a general clause that requires every renunciation to be justified.²⁰⁷ This obligation is resting primarily on the employer. In case of an unjustified renouncement, the labour court may rule on its legal ineffectiveness or may re-instate the labour contract.

In addition, employees are protected against dismissal in the period of 4 years before reaching the retirement age, if the employment period enables him/her to obtain the right to retirement pension at the moment of reaching the retirement age.²⁰⁸ There is no differentiation between women and men in this respect.

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

4.7.5 Redundancy

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

The general provision states that the employer shall not terminate the employment contract of the employee, who has less than four years to the acquisition of the retirement age, unless such person is being granted a pension on the grounds on incapacity to work.²⁰⁹ In this period of special protection against denunciation or termination of employment contract, an employer is allowed only to denounce the so-far working conditions and remuneration conditions but, additionally, only in respect of certain groups of employees enumerated in the

²⁰³ Art. 25.2 Labour Code.

²⁰⁴ Art. 25.1 Labour Code.

²⁰⁵ Art. 32 Labour Code.

²⁰⁶ Art. 36.1 Labour Code.

²⁰⁷ Art., 45.1 Labour Code.

²⁰⁸ Art. 39 Labour Code.

²⁰⁹ Art. 39 and 40 Labour Code.

legislation.²¹⁰ Even in the latter case, when such denunciation would lead to decrease in remuneration, the employer is obliged to pay a special allowance to compensate for this reduction of pay.²¹¹ There is an exemption in the case of bankruptcy or liquidation of the employer; in such cases the above mentioned provision does not apply.

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

If the above mentioned employee protected before reaching the retirement age was somehow made redundant, he/she has a right to some special compensation. This compensation is provided in the circumstances of a collective redundancy; such person has a right to be re-employed or to be compensated.

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

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

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

In general, Polish Constitution stipulates that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.²¹² On the basis of this provision a number of limitations were introduced especially in the area of protection of the state security (visa regime, legalization of stay, military service, etc.).

4.9 Any other exceptions

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

There appear not to be any other exceptions provided so far under Polish legislation.

5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.

b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

The 2003 Amendment of the Labour Code that took effect on 1 January 2004 introduced a clear and **general** stipulation allowing for positive action. This provision (Art. 18^{3b} para. 3

²¹⁰ Art. 5.5, Act of 13 March 2003 on the Special Conditions of Termination of Employment Relations for the Reasons not Related to Employees (Ustawa z 13 marca 2003 r. o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników).

²¹¹ Ibidem, Art. 5.6.

²¹² Art. 31, The Constitution.

Labour Code) covers positive action not only for racial or ethnic origin, religion or belief, disability, age, and sexual orientation but equally for some additional grounds: gender, political opinion and membership in a trade union. Positive action can take form of specific measures introduced for a limited period of time in order to equalize opportunities of 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 disadvantages of such employees.

In respect of positive action for members of **national minorities**, there is a collection of measures for preferential treatment in Poland. On the political level, a very important privilege (preference) is granted to national minorities in that their electoral committees are exempted from the requirement to obtain at least 5% of votes cast in order to be taken into account for the distribution of seats in the Sejm (lower chamber of Parliament).²¹³

Much affirmative action takes place in the field of education and culture. In order to compensate for their higher operating costs, schools of national minorities receive an extra 20% subsidy in comparison to other schools. The State budget also invests in schools and subsidises the production and publishing of textbooks. Furthermore, the Ministry of Culture subsidises minority press and other publications and sponsors cultural events organised by national and ethnic minorities.

In 2001 the government, taking into account the alarming situation of Roma community, agreed to launch a pilot programme 2001-2003 for the Malopolska Region to promote Roma in the fields of education, employment, healthcare, living conditions, security and culture. Despite its comprehensive nature it was not implemented in this form due to the difficult budgetary situation of the country. Its implementation did not go according to plan also because local governments were given the power to decide on its implementation, and as a result some localities practically suspended its realisation. Nevertheless some important conclusions were drawn which were integrated to the next government programme for Roma in the years 2004-2013. The implementation of the current government programme is secured with the budget of 6 million Polish zloty (some 1,4 million Euro) in year 2004 and about 10 million zloty each next year.²¹⁴ Unlike the first programme the second one aims at providing assistance to Roma living in the whole country (ca. 20 thousand people) and not to a selected group of Roma from one region. Apart from it the programme is implemented by local authorities in close cooperation with NGOs and Roma representatives. The thematic scope covers education, civic education, health care, life conditions, combating unemployment, security, culture as well as raising knowledge about Roma within the Polish society.

Especially in the field of education there are some positive results e.g. the school attendance of Roma children has risen (now at the level of some 80%) and their integration with other pupils is higher thanks to introduction of so called Roma assistants (all together ca. 100 persons) and assisting teachers who can pay special attention to these children and help to overcome their specific problems (e.g. a lack of knowledge of the Polish language or relative low interest of parents at school-related issues, see section 3.2.8). There are some valuable initiatives regarding the easing access for Roma to the labour market like subsidized jobs, vocational training or assistance to some Roma companies. The overall effect of these actions is limited due to a difficult situation at the Polish labour market.²¹⁵

The programme “First Job” is an example of positive action in respect of **age**. It was started in 2002 with the goal of facilitating the employment of young people up to 25 and graduates up to 27 years. To increase their chances of gaining their first work experience, simplifications in employment and independent economic activity, preferential interest rates on loans to

²¹³ Art. 133.2, Act of 12 April 2001 Electoral System to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Ustawa z 12 kwietnia 2001 ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej) [further: Act on Elections].

²¹⁴ *Gazeta Wyborcza*, 18 August 2004. See also http://www.mswia.gov.pl/spr_oby_mn2.html

²¹⁵ <http://www.mswia.gov.pl/index.php?dzial=185&id=2982>.

graduates were introduced, as well as favourable legal solutions and a system of economic incentives for employers were created.²¹⁶ Additional funds were provided to support NGOs activity aiming at facilitating the employment of graduates. The second example in the field is a program “First business” started 2005 which is based on experiences of implementation the “First Job” in the years 2002-2005. The aim of the programme is to assist the same group of young unemployed in opening own business through self-employment by theoretical training, practical guidance as well as subsidies and loans.²¹⁷

Several measures can be considered positive action in the field of **disability**. The Act on Disabled Persons contains a system of incentives for employers, who aim to support the employment of disabled persons. For example, an employer who employs disabled persons who are unemployed or job searching while not holding a job and directed to work by a district labour office, over a period of no less than 54 months, may receive from PFRON a partial reimbursement of the costs associated with employing a disabled person and adapting the position to his/her needs.²¹⁸ Meanwhile, an employer employing the equivalent of up to 24 full-time employees and meeting the specified requirements, may receive from PFRON a partial reimbursement of the cost of salaries paid to disabled persons, and/or social insurance contributions required of employers.²¹⁹ Furthermore, the „Junior” programme is included under the aegis of the „First Job” programme. This is a programme to introduce disabled graduates into professional posts. It aims to do this by directing young disabled persons²²⁰ to carry out 6-18 month internships. Employers receive economic incentives in the form of a bonus for accepting a disabled graduate for an internship or employing him/her. PFRON also implements some other programmes for the disabled.²²¹

6. REMEDIES AND ENFORCEMENT

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

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

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

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

Claims stemming from an employment relation can be determined either by a labour court or by a conciliation committee.²²² The case can be referred to the conciliation committee by an employee only and not by an employer. The conciliation procedure is meant to be speedy; the Labour Code specifies the period of 14 days as regular term to determine the case by the

²¹⁶ www.lpraca.gov.pl and the Annual Report of the Ministry of Labour and Social Policy, p.5, www.mpips.gov.pl

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

²¹⁸ Art. 26.1, Act on Disabled Persons.

²¹⁹ Art. 27.1, Act on Disabled Persons.

²²⁰ This applies to disabled persons with a certified significant, moderate or mild degree of disability who, in the course of 12 months after the date specified in their diploma or school leaving certificate, certificate of completing a course or other document conferring eligibility to carry out a profession, have not taken up further study or have not found employment. www.mps.gov.pl

²²¹ For more see www.pfron.org.pl

²²² Art. 242 Labour Code.

committee.²²³ The agreement reached before the conciliation committee should voluntarily implemented by the employer. If the employer opposes and does not put the agreement into operation, the agreement can be executed in accordance with the civil procedure.²²⁴

Another conciliation mechanism is provided the Code of Civil Procedure that allow the court acting by a single judge to confirm the agreement reached between the parties before the court proceeding was launched.²²⁵

There is a compensation complaint introduced to the Labour Code and effective as of 1 January 2004 (Art. 18^{3d}). Everyone who suffers from infringement of the principle of equality in employment is entitled to start a judicial proceeding and seek compensation not lower than the minimum monthly salary. A labour court that determines the compensation will take into consideration the type and gravity of the discriminatory measures used in respect of the complainant. Since the Polish legal system is furnished with this anti-discrimination compensation complaint, there is no need any longer to use more general legal remedies, like Art. 415 Civil Code (general compensation clause), their use is not excluded though.

The principle of equal treatment and non-discrimination is considered as one of the fundamental obligations due by an employer to the employee. Therefore, the employee is entitled to terminate his labour contract without prior denunciation on the basis of grave infringement by the employer of the fundamental obligations towards the employee (Art. 55 para 1¹). An employee can be also entitled to initiate a judicial proceeding in order to establish the existence of labour relation with a specific content, e.g., determination of appropriate remuneration when it was discriminatorily lowered.²²⁶

Discriminatory treatment may, in some circumstance, take form of a criminal offence prosecuted under Penal Code. In such situations a criminal proceeding can be instituted by a public prosecutor *ex officio*, or sometimes, by a victim himself or herself in accordance with the Code of Criminal Procedure. The Penal Code does not cover all cases of discrimination, nevertheless, criminal proceedings may be instituted in more serious cases such as, the use of force or illegal threat towards the individuals or groups of people because of their national, ethic, racial, political or religious affiliation²²⁷, public insult of such individuals or groups of people or the infringement of the personal integrity of such a person²²⁸ or propagation of fascism and exhortation to hatred based on to national or ethnic origins, race or religion.²²⁹

There are no administrative remedies laid down specifically to deal with discrimination issues, though such issues can sometimes be present at administrative proceedings. In addition, certain remedies could be applied by labour inspectors who are to supervise and control the observance of labour law (including anti-discrimination provisions). According to the Act on National Labour Inspectorate, a labour inspector may issue orders, lay protests, make submissions or bring claims to the labour court when the existence of labour relation is at stake.²³⁰

The opportunity 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 the Article 14 of the

²²³ Art. 252.1 Labour Code.

²²⁴ Art. 255.1 Labour Code.

²²⁵ See Art. 184-186 Code of Civil Procedure.

²²⁶ A Proceeding on the basis of Art. 189 Code of Civil Procedure, See K. Rączka, *Kodeks pracy. Komentarz* (ed.) Z. Salwa, 6th ed., Warsaw 2004, p.72.

²²⁷ Art. 119.1-2 Penal Code.

²²⁸ Art. 257 Penal Code.

²²⁹ Art. 256 Penal Code.

²³⁰ Art. 21, Act of 6 March 1981 on National Labour Inspectorate (Ustawa z 6 marca 1981 r. o Państwowej Inspekcji Pracy). See also Art. 63¹ Civil Code.

Convention cannot be ignored. The independent use of Article 14 (non-discrimination) will not be possible unless Poland ratifies Protocol No 12. To-date, there are no signs however that the government intends to accept the Protocol.

On the part of non-judicial measures, a complaint to the Commissioner for Civil Rights Protection (*Rzecznik Praw Obywatelskich*), may prove to be effective a tool. Though the Ombudsperson cannot issue a legally binding decision, the office can investigate the case and exert pressure on the bodies responsible for inappropriate conduct or it can take some legal measures (see more under Section 7).²³¹ The Ombudsperson is however free to take any case or reject it. Apart from dealing with individual complaints, the Office of the Ombudsperson may conduct more general studies on specific themes, including non-discrimination.

As far as legal representation is concerned, some preferential treatment is allowed in labour cases. In Poland, in principle, legal representation may be provided only by an advocate (attorney-at-law) or legal counsellor,²³² whereas for an employee, a representative of a trade union, a labour inspector or other employee of the enterprise may equally stand for a legal representative.²³³

One of the factors which might act as deterrents to seeking redress are functional barriers. Some courts and other bodies of the administration of justice are not easily accessible to the disabled. It is relatively difficult to find the information in Braille. Some additional obstacles are created by civil and administrative procedures: people who are not able to perceive or communicate their observations – is it because of sensory impairments such as blindness, deafness, mental/intellectual impairments – cannot act as witnesses.²³⁴

In the Polish law it is possible to bring a case after the employment relationship has ended in two cases. First, if the principle of equal treatment was violated, it may not be the ground for termination of employment relationship by the employer.²³⁵ In such a case the employee can either make a demand by a court to recognise the notice as ineffective or if the employment relationship has already ended, he/she has the right to demand to come back to work at previous conditions or to receive compensation.²³⁶ Moreover the employee can cancel the employment contract without notice if the employer has severely violated his/her obligations towards the employee.²³⁷

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

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

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

²³¹ See Art. 11-14, Act of 15 July 1987 on Commissioner for Civil Rights Protection (Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich).

²³² Art. 87.1 Code of Civil Procedure.

²³³ Art. 465.1 Code of Civil Procedure.

²³⁴ Art. 259 point 1 Code of Civil Procedure; Art. 82 point 1 Code of Administrative Procedure. Similar restrictions are not contained in the Code of Criminal Procedure, though witnessed who are thought not be able to percept or communicate observations can be heard in the presence of an expert physician or psychologist, see Art. 192 Code of Criminal Procedure.

²³⁵ Art. 18^{3e} of Labour Code.

²³⁶ Art. 44-55 of Labour Code.

²³⁷ Art. 55 of Labour Code.

proceedings was more of a secondary character in comparison to the primary role of the claimant himself or herself. The organisation could act in support but sometimes also on behalf of the complainant. Such a solution was adopted in the Code of Civil Procedure, which allowed non-profit making social organisations to bring a claim on behalf of individuals or join such proceedings²³⁸, e.g. in alimentary (nourishment) and consumer protection cases²³⁹ or in labour law cases and social security²⁴⁰. If a social organisation did not participate in the proceeding, it could still act as *amicus curiae* and present its opinion on the case to the court²⁴¹.

Due to the changes of the Law on Code of Civil Procedure in August 2004, some organisations involved in combating discrimination may engage in judicial procedures in support of complainant and on behalf of him/her. The new art. 61 § 4 stipulates that organisations whose statutory objectives include equality protection and non-discrimination protection by unfounded, direct or indirect differentiation of rights and duties of citizens may, in the cases of claims in this field with the consent of the citizens, institute actions on behalf of the citizens and with the consent of the plaintiff may join the proceedings in each stage thereof.²⁴² In a short period of time after introducing this solution the Helsinki Foundation for Human Rights made use of this provision and in 2005 as well as in 2006 engaged in some discrimination cases both as *amicus curiae* and on behalf of complainant.²⁴³

Similarly, social organisations are allowed to start or join an administrative proceeding²⁴⁴ and representatives of social organisations may also be admitted to criminal proceedings.²⁴⁵ More specifically, as regards labour relations, a labour inspector (*inspektor pracy*) may launch court proceedings on behalf of citizens or join pending proceedings but only in cases where existence of employment relationship is to be settled.²⁴⁶

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The 2003 Amendment of Labour Code (in force since 1 January 2004) brought a revolutionary change into the legal system. So far, in accordance with the fundamental principle of civil law – the burden of proof rested on the plaintiff.²⁴⁷ Currently, in the anti-discrimination cases the burden of proof is partially shifted from the complainant to the respondent. Article 18^{3b} para. 1 *in fine* clearly states that this is the employer who should

²³⁸ Art. 8 Code of Civil Procedure.

²³⁹ Art. 61 Code of Civil Procedure. The list of the social organizations that may participate in court proceedings on the basis of this article is fixed by the Minister of Justice. See Order of 1 July 1991 of the Minister of Justice on the list of social organizations entitled to act before courts on behalf of or to the benefit of citizens (Zarządzenie Ministra Sprawiedliwości z 1 lipca 1991 r. w sprawie ustalenia wykazu organizacji społecznych uprawnionych do działania przed sądami w imieniu lub na rzecz obywateli).

²⁴⁰ Art. 462 Code of Civil Procedure.

²⁴¹ Art. 63 Code of Civil Procedure.

²⁴² Art. 61 § 4, Act of 2 July 2004 amending of the Code of Civil Procedure and some other acts, entered into force on 4 February 2005 (Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw).

²⁴³ From the interviews done to the project. <http://www.hfhrpol.waw.pl>

²⁴⁴ Art. 31.1 Code of Administrative Procedure reads: “A social organization may, in a case concerning another person, request: 1) to institute a proceeding, 2) to admit it to the proceeding, if it is justified by statutory objectives of the organization and when it lies in public interest”. Since there are no administrative procedures specifically devoted to combating discrimination, this provision can have only potential significance and might first be used in future when such procedures are introduced to Polish legislation.

²⁴⁵ Art. 90 and 91 Code of Criminal Procedure. A representative of a social organization may be admitted if “there is a need to protect public interest or important individual interest falling within statutory objectives of the organization, in particular the need to protect human rights and freedoms.”

²⁴⁶ Art. 63¹ Code of Civil Procedure.

²⁴⁷ Art. 6 Civil Code. In the field of labour relations the same principle is valid, see Art. 300 Labour Code.

prove that there were objective reasons to employ discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred. This solution is used in respect of any discrimination, in both direct and indirect discrimination cases; it also covers cases of instructing to discriminate and harassment.

Regarding the burden of proof the Polish Civil Code entails however a general rule for civil proceeding that an obligation to prove a fact belongs to the person, who derives legal effects from the fact (art. 6 Civil Code). It implies that outside employment there is no possibility of shifting burden of proof in the Polish law.

Obviously, as far as criminal proceedings are concerned, the burden of proof remains not shifted, and – in accordance with the presumption of innocence – it is for the public prosecutor to prove the charge. The accused may provide evidence and has the rights to defence but cannot be obliged to do so.

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

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

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

Nevertheless, the Labour Code prohibits renunciation and dissolution of a labour contract as a result of an employee having used his rights to defend against unequal treatment (Art. 18^{3e} Labour Code). This provision refers to complainants only, and does not cover witnesses or other people. Furthermore, this provision does not prohibit other possible measures that can be implemented by the employer, like down-grading, imposing a fine, etc. That is why according to some experts it would be advisable to introduce a more effective protection against discrimination for complainant, witnesses and other persons who help the victim of discrimination²⁴⁸ in form of provisions fully compatible with the directives. It cannot be forgotten, however, that such adverse measures can be subjected to judicial control in respect of their justifiability, on the basis of general principles of judicial scrutiny in labour relations.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

c) Is there any information available concerning:

- the average amount of compensation available to victims
- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

The existing remedies and procedures were reported under Section 6.1 above. Out of a possible range of “effective, proportionate and dissuasive” sanctions which were to give a

²⁴⁸ B. Liegl, B. Perchinig, B. Weiss, Legal and Institutional Aspects of Counteracting Discrimination in Poland (Prawne i instytucjonalne aspekty przeciwdziałania dyskryminacji w Polsce), Warsaw 2004, p. 24-25
<http://www.rownystatus.gov.pl/pl/data/AspektyPrzeciwdzialaniaDyskryminacji.pdf>

proper effect to the Racial Equality and Employment Equality Directives, the Polish legislator decided to use the mainly the one mentioned directly in the directives, that is, the payment of compensation. In the Labour Code there is no maximum threshold for this compensation, and the court can award it according to its assessment of the type and gravity of the discriminatory treatment in a specific case. There is however a minimum of compensation which is at least equal to the minimum wage, which is now in Poland at the level of ca. 241 EUR (936 PLN)²⁴⁹. It is questionable whether this sanction meets the directives' criteria (effective, proportionate and dissuasive), because this system redresses only the damage and does not include a sanctioning element (e.g. for a big company the necessity to pay a compensation at the level of a minimum wage must not be dissuasive). Apart from this there is no reliable information on the average amount of compensation available to victims.

Under the provisions of the Labour Code, an employee whose contract was terminated without notice in violation of the regulations for dissolving 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 rules²⁵⁰ on the advisability or possibility of returning to work.

An employee is entitled to terminate his labour contract without prior denunciation on the basis of grave infringement by the employer of the fundamental obligations towards the employee (Art. 55 para 1¹). In such a case, the employee is entitled to compensation equal to his/her salary for the period of notice.

If there are cases not covered by the above described provisions, it is possible to seek compensation on the basis of the general compensation clause (Art. 415 Civil Code). For example, according to a Supreme Court ruling, a job candidate who answers to an employer's specification which is discriminatory (art. 11³ Labour Code), and who is not hired, may seek compensation within the bounds of so-called unfavourable interest (*culpa in contrahendo*).²⁵¹

According to civil law, a person whose personal interest, which includes *inter alia* health, freedom and dignity, has been threatened may demand that such actions be desisted from. He can also demand that the person who committed such a violation undertake the actions necessary to remove its effects, in particular to make a declaration of appropriate form and content. If, as a result of a violation of personal welfare, property damage has occurred, the victim may demand its repair.²⁵²

The Labour Code do not envisage any sanctions for violations of the employer's obligation to create an environment free from discrimination in the workplace, especially with respect to gender, age, disability, racial or ethnic origin, religion, belief, and sexual orientation.²⁵³ In light of this, the provision takes on the character of a mere declaration.

Recently introduced, the Act on the Promotion of Employment and the Institutions of Labour Market provides 2 sanctions for conduct contrary to the Act. Firstly, everyone who while running an employment agency does not obey the prohibition of discrimination based on gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religious beliefs or membership in a trade union is liable to fine not lower than 3 000 PLZ

²⁴⁹ Every year the level of minimal wage is set by the Act on minimal wage, the actual amount of 241 EUR or 936 PLN applies for the year 2007.

²⁵⁰ Art. 56.1 and 45.2 Labour Code. See also the Supreme Court ruling of 9 February 1999, I PKN 565/98, OSNAPiUS 2000/6/225, which stated that: "The necessity of hiring new employees with appropriate qualifications, which the plaintiff does not hold, speaks to the inadvisability of returning him to his job (Art. 45.2 Labour Code)."

²⁵¹ Supreme Court ruling of 24 March 2000, IPKN 3114/99.

²⁵² Art. 23, 24 and 415 Civil Code.

²⁵³ Art. 94 point 2b Labour Code.

(some 700 Euro).²⁵⁴ Secondly, everyone who – on the same grounds – refuses to employ a candidate on a vacant work position or vocational training is liable to the same fine.²⁵⁵ Such cases are decided by municipal courts (*sądy grodzkie*).

A specific sanction was introduced in the Act on trade unions²⁵⁶ for cases of discrimination of an employee on grounds of membership in a trade union, non-membership in a trade union or carrying out a trade union function. Such acts of discrimination are treated as criminal offences, that is, are determined by criminal courts that can impose a fine or a restriction of liberty.²⁵⁷

Should a civil servant speak or behave in a discriminatory manner, he or she would violate the Constitution and the Act on Civil Service²⁵⁸. There is every prospect that his or her conduct would not be tolerated by superiors and disciplinary measures could be used in this situation²⁵⁹. In addition, even criminal sanctions could apply, if the conduct in question constituted a criminal offence, such as the public insult of individuals or groups due to their national, ethnic or racial origin or an exhortation to hatred based on those grounds. More generally, criminal sanctions may have a role to play in all situations where discrimination takes form of a criminal offence.

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?*
- b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*
- c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*
- d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*
- e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*
- f) Is the work undertaken independently?*

There is no single “specialised body” in the sense of the art. 13.2 of the Racial Equality Directive which would be able to fulfil all the three functions. Nevertheless there are a few institutions that are of relevance in this context and which have the mandate to promote equal treatment of all persons without discrimination based on racial or ethnic origins.

Though it has no power to issue any binding decision, the Commissioner for Civil Rights Protection (Ombudsperson), is the institution that possesses the strongest instruments to intervene in cases of discrimination and can prove to be an effective tool. It is an office which

²⁵⁴ Art. 121.3, Act on Employment.

²⁵⁵ Art. 123, Act on Employment.

²⁵⁶ Act of 23 May 1991 on Trade Unions (Ustawa z 23 maja 1991 r. o związkach zawodowych).

²⁵⁷ Art. 35.1 Act on Trade Unions.

²⁵⁸ Art 67.1 point 1, Act of 18 December 1998 on Civil Service (Ustawa z 18 grudnia 1998 r. o służbie cywilnej).

²⁵⁹ Art. 106.1 Act on Civil Service.

is independent from other organs of state administration and which performs its duties in an independent way, according to the subsidiary principle. According to the 1997 Constitution, everyone has a right to apply to the Ombudsperson for assistance in protection of his freedoms or rights infringed by organs of public authority.²⁶⁰ When taking a case the Commissioner may carry on own fact-finding investigation or request competent institutions (supervisory organs, prosecutor offices, organs of state, occupational or social control) to examine the case or a part of it. It can also request the Sejm (lower Chamber of the Parliament) to order the Supreme Chamber of Control (*Najwyższa Izba Kontroli*) to carry on an inspection in order to examine the case or a part of it.²⁶¹ Carrying on an investigation, the Ombudsperson has the right to: examine every case on the spot even without prior notification. It may request information and documentation of every case run by administrative bodies, social and occupational organisations, and organs of units that possess legal personality. As far as court cases are concerned, the Commissioner may request information on the stage of a case as well as request access to court and prosecutor files.²⁶² After having examined the case, the Ombudsperson may *inter alia* request to institute civil and administrative proceedings, may take part in every pending civil case or administrative proceedings, may request to institute a preparatory proceeding by a competent prosecutor in the case of offences prosecuted *ex officio*, and apply to administrative organs to employ measures laid down by law.²⁶³ Apart from examining individual cases, the Commissioner can carry out independent, general surveys, publish reports and make recommendations. Thus, in general, it meets the criteria set in Art. 13.2 Racial Equality Directive. It must be however noted that the scope of activities of the Commissioner is very broad (protecting rights and liberties of the human being and of the citizen) and although the issue of various dimension of discrimination on all the grounds is present its activities, it has never been the priority issue. Within the office there is no unit dealing with discrimination cases exclusively. However these cases are within the scope of various divisions responsible for labour law, social security or protection disabled people's rights etc. Because discrimination cases are rather rarely brought to courts in Poland, it has never been a topic to a separate report or survey.²⁶⁴

Also complaints against breach of national minority rights constitute a small percentage of cases sent to the Ombudsperson.²⁶⁵ These cases do not indicate discrimination towards national minorities, but they do sometimes indicate the intolerance of some sectors of the society towards some minorities. In its opinions, the Office has been favourable in its assessment of both the law and state's policy, though it reported the extremely complicated and clearly unfavourable situation of Roma community.

The Commissioner is appointed by the Sejm upon approval of the Senate for the 5 years term in office. The Commissioner informs the Sejm and the Senate annually on his activities and this report is public. Its budget comes from the central budget and is approved by the parliament.²⁶⁶ At the moment the office is neither equipped with sufficient resources to play the role described in the directive nor has specific competences in the field.

²⁶⁰ Art. 80, The Constitution.

²⁶¹ Art. 12, Act on Commissioner for Civil Rights Protection.

²⁶² Art. 13 Act on Commissioner for Civil Rights Protection.

²⁶³ Art. 14 Act on Commissioner for Civil Rights Protection.

²⁶⁴ The Commissioner receives annually between 50-60 000 of complaints (January-September 2006: 37 705, 2005: 51 643 complaints, 2004: 59 248, 2003: 55 286, 2002: 52 091, 2001: 55 404). Within the period of time between 2001 and 2004 there were only 25 cases concerning discrimination. <http://www.brpo.gov.pl/index.php?poz=440&id=66>.

²⁶⁵ From the total number of complaints indicated in the previous footnote, up to 2004 there were app. 30 new cases concerning national and ethnic minorities annually, whereas in 2005, after coming in force the new law there were only 7 new cases, Information of the Commissioner for Civil Rights Protection under preparation.

²⁶⁶ 2006 the Office of Commissioner for Civil Rights Protection had at its disposal ca. 7 416 918,04 EUR (28 768 000 PLN, exchange rate 1 EUR = 3,8787 PLN).

In 2002 a Team for National Minorities (Zespół do Spraw Mniejszości Narodowych) was created as an advisory body of the President of the Council of Ministers.²⁶⁷ The Team comprised representatives of a number of ministries (e.g. public administration, internal affairs, finances, education, culture, labour and social policy, justice, foreign affairs, European integration). It established some sub-structures dealing with specific problems: in 2001 a Sub-Team on Education of National Minorities and in 2002 a Sub-team on Roma issues. The main tasks of the Team were: (1) drafting projects for government actions in the field of national minorities, (2) coordinating activities of various governmental agencies, (3) making assessments and formulating proposals as to the enjoyment of rights of national minorities' and their needs, (4) preventing violations of national minorities' rights, (5) initiating surveys on the situation of national minorities in Poland and (6) raising awareness and disseminating knowledge on national minorities. Out of competencies listed in Article 13.2 of Racial Equality Directive, the Team was involved in conducting surveys concerning discrimination, publishing reports and making recommendations. However, it did not have the crucial competency of providing independent assistance to victims of discrimination.

The Act on National and Ethnic Minorities and on Regional Language reinforces the role of the Minister of Interior and Administration²⁶⁸ in implementing governmental policy towards ethnic and national minorities. In addition, the Act created the Joint Committee of the Government and Ethnic and National Minorities as a consultative body of the President of the Council of Ministers.²⁶⁹ It is a consultative and advisory body of the Prime Minister, composed of representatives of selected Ministers and minorities, which had the task to express its opinions regarding rights and needs of minorities, programmes and draft laws in the field, principles of allocation and amount of money from the state budget directed to preserving of cultural identity of minorities as well as taking actions in the field of counteracting discrimination.²⁷⁰

The Government Plenipotentiary for the Disabled is usually a secretary of state in the Ministry of Social Policy. She/he has an office at his or her disposal which is a semi-separated unit within the Ministry of Labour and Social Policy working as one of its departments and having a share in the Ministry's budget. It is a part of the state administration neither having the competence to provide assistance to victims, conduct surveys, publish reports nor issue recommendations on discrimination issues nor to bring discrimination complaints or to intervene in legal cases concerning discrimination.

The institution created to supervise and control the implementation of labour law in Poland is the National Labour Inspectorate (*Państwowa Inspekcja Pracy*) established still in the early 80-ies. It is formally subordinate to the Sejm.²⁷¹ This body while having a wide mandate and dealing with a whole variety of labour law and employment issues could have a significant role to play in promotion and controlling of equal treatment. In 2003 the Inspectorate run a pilot programme of monitoring the compliance with the principle of equal treatment of men and women in the workplace.²⁷² Although activities in the field of disseminating and monitoring the equal treatment regulations were included in Inspectorate's Programme of Activities for 2004, they do not seem to be a priority of that body. Judging by the web page of the office the same is true for the year 2005 and 2006.²⁷³

²⁶⁷ It succeeded the Inter-ministerial Team for National Minorities that worked 1997-2001.

²⁶⁸ As, currently, the minister responsible for religious beliefs and national and ethnic minorities, see Art. 21 of the Act on Minorities.

²⁶⁹ See Art. 23 and 24 of the Act on Minorities.

²⁷⁰ Art 23.2 of the Act on Minorities.

²⁷¹ Art. 2 Act on National Labour Inspectorate of 6 March 1981 with changes.

²⁷² See 2003 Report of National Labour Inspectorate, p. 41-42.

²⁷³ In the programs of activity for the years 2006 and 2007 there is no mention to counteracting discrimination, in the 2006 program this word appears once, but only in context of training of employees of the National Labour Inspectorate. <http://www.pip.gov.pl/html/en/doc/00000010.pdf>

After coming to power the new Polish government has not revealed any plans to establish an independent institution with the mandate described in the art. 13 of the Council Directive 2000/43/EC. At the beginning of the year 2006 there has been established a Department for Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy responsible for coordinating actions pertaining to the status of women and family in the society and fulfils tasks pertaining to counteracting discrimination for any reasons in all domains of social, economic and political life, except for issues related to counteracting ethnic discrimination.²⁷⁴ In 2006 the department organised a round table with all interested stakeholders to discuss preparations to the European Year of Equal Opportunities for All. Apart from this the first open grant competition for NGOs active in counteracting discrimination was organised (the first stage has been completed).²⁷⁵

8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

All legislative acts issued in Poland are published in an official journal, which fulfils the requirement of pronouncing legal norm publicly and allowing the community to be aware what the law says. Usually however, such publication in an official journal does not mean much to the general public. Nevertheless, it can be noted that the awareness of equal treatment and the need to safeguard non-discrimination is slowly but constantly raising in Poland, although it is not satisfactory yet. From that viewpoint it would be advisable to introduce issues of equal treatment and non-discrimination to school education.

The most important for the effective dissemination of information related to the issues of discrimination in employment is Art. 94¹ 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 that it directly implements the option brought in Art. 12 Employment Equality Directive. The Labour Code recommends that the employer is to meet this requirement by disseminating information in the written form. The employer, however, is left free to choose other options and grant access to the information “by another means accepted by certain employer”. This provision is in force only since 1 January 2004 (prior to that date – as from 1 January 2002 – it covered only equal treatment between men and women). The options chosen to put this provision into operation may differ at various employers – they can take form of printed leaflets or brochures distributed in the workplace; they can also be developed as printed information handed to the employee upon which he or she is required to give his/her signature as a proof of taking note of them.²⁷⁶ Such information can also be attached to the labour contract or the codes of conduct in the workplace. The National Labour Inspectorate is responsible for the implementation of Art. 94¹.²⁷⁷

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

²⁷⁴ <http://www.mpips.gov.pl/index.php?gid=893>, www.rodzina.gov.pl, www.kobieta.gov.pl

²⁷⁵ <http://www.kobieta.gov.pl/?1,12,134>

²⁷⁶ See for example P. Potocka, *Model Information on Equal Treatment in Employment*, Gdansk 2004, (published by a private centre of consultation and vocational training).

²⁷⁷ See National Labour Inspectorate, Programme of Activities in 2004.
http://pip.bip.ornak.pl/pl/bip/program_2004/program_2004_4

It can be expected that a significant impact on Polish society may have the implementation of the Community Initiative “Equal” within the European Social Fund. Its second edition (and the first one in Poland) began in November 2004. Almost a hundred projects (out of 751) were accepted for implementation.²⁷⁸ Putting many of them into operation will mean not only disseminating knowledge on equality issues but also, and more important, should bring about favourable changes for a number of people. However it must be noted that throughout the year 2005 carrying out of several projects was impeded due to complicated implementation rules. The preliminary evaluation of the Equal’s performance is generally favourable, but also critical to not transparent regulations on how to carry out and manage projects to receive the funding.²⁷⁹

It must be emphasised that, more often than not, most of the information on equality issues and non-discrimination are not accessible to disabled people. However it must be noted that some initiatives have been undertaken in this respect. For example, the website of the Ministry of Interior and Administration was designed in a way that made it accessible to people with visual impairments using screen reading software. The Ministry uses the Intelligent Web Reader as the software.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

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

There are not too many legal provisions on the dialogue between public administration bodies and NGOs. The Government’s Plenipotentiary for the Disabled is obliged to cooperate with NGOs and foundations that perform activities for the benefit of the disabled people.²⁸⁰

A more general provision applies to the Commissioner for Civil Rights Protection – to the benefit of human and civil rights and freedoms, it should cooperate with associations, civil society movements, other voluntary unions and foundations.²⁸¹

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

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Polish 1997 Constitution contains a very general provision on the dialogue and cooperation between social partners as one of the basis of the economic system of Poland.²⁸² Obviously,

²⁷⁸ See www.equal.org.pl

²⁷⁹ http://www.bkkk-cofund.org.pl/download/1_raport_czastkowy_equal.doc

²⁸⁰ Art. 34.6 point 5, Act on Disabled Persons.

²⁸¹ Art. 17a, Act on Commissioner for Civil Rights Protection.

²⁸² Art. 20 Constitution.

employers organisations and trade unions exist in Poland, collective agreements are being concluded, codes of conduct are being introduced in various enterprises, but usually they are meant specifically to deal with equal treatment issues.

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

In 2001 the Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees of Social Dialogue.²⁸³ The Tripartite Committee established by this Act replaced the previous Tripartite Committee created in 1994²⁸⁴ that for some years did not function properly due to political tensions among the parties involved. The Committee is composed of representatives of the government, employers and employees organisations. Every party of the Committee can bring under discussion issues that, it pretends, are important for preserving pacific relations between social partners. One of the most important competences of the Tripartite Committee is consultations in respect of state budget.

Voivodship committees of social dialogue are operating on regional (voivodship) level and can be established by a decision of medium-level governmental administration – voivods. They are deliberative bodies with consultative powers over issues dealt with by trade unions and employers organizations. These committees can also examine social and economic issue that raise conflicts among employees and employers.²⁸⁵ After deliberations they can issue opinions or nominate a mediator to settle the collective dispute.²⁸⁶

The Ministry of Economy and Labour in 1995 created the Centre of Social Partnership “Dialog”. The Centre has been meant to initiate and promote social dialogue, assist social partners and offer training.²⁸⁷

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

The Labour Code stipulates that provisions of collective agreements and staff regulations cannot be less beneficial for employees than the provisions of the Code and other legislative and governmental acts.²⁸⁸ Hence, should the internal rules of an enterprise, a collective agreement or a private contract include discriminatory clauses; they would clearly be in violation of the Constitution.²⁸⁹ In addition, they – according to the Labour Code – would be null and void, and instead of them, appropriate provisions of the Labour Code would be

²⁸³ Act of 6 July 2001 on the Tripartite Committee for Social and Economic Affairs and Voivodship Committees of Social Dialogue (Ustawa z 6 lipca 2001 o Trójstronnej Komisji do Spraw Społeczno-Gospodarczych i wojewódzkich komisjach dialogu społecznego) [further: Act on Social Dialogue].

²⁸⁴ Council of Ministers Resolution 7/94 of 15th February 1994 on the creation of the Tripartite Committee for Social and Economic Affairs (Uchwała Rady Ministrów 7/94 z 15 lutego 1994 r. w sprawie powołania Trójstronnej Komisji do Spraw Społeczno-Gospodarczych).

²⁸⁵ Art. 17a.1 Act on Social Dialogue.

²⁸⁶ Art. 17b.1 Act on Social Dialogue.

²⁸⁷ For more information visit Center's website: <http://www.cpsdialog.pl/>

²⁸⁸ Art. 9.2 Labour Code.

²⁸⁹ Art. 32 Constitution.

applied.²⁹⁰ Moreover, as far as civil law contracts are concerned, the Civil Code stipulates that legal action contrary to law is null and void. Nullity may be limited to a part of the legal action (e.g. a single clause in a contract), if the conflict with law concerns only that part of the action.²⁹¹

Polish legislation is based on hierarchical system of law sources and one of the most important general principle is “lex superior derogate legi inferiori” (higher rules – rules with a greater law power – prevail over lower rules). There are also principles: “lex specialis derogat legi generali” (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

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

9. OVERVIEW

See the section 0.3.

For the implementation of the anti-discrimination law in Poland in 2006 it is important to consider the political and social context. Although there was no broader debate on anti-discrimination law as such, the attitude of the governing parties towards this legal body was not favourable. It was particularly visible on the example of some public statements on homosexuals given by politicians of the ruling conservative coalition, which were understood as hate speech²⁹². This stance was however rejected by opposition parties and representatives of civil society.

Apart from this it should be noticed that there were two discrimination cases being decided at Polish courts in spring 2006, both concerning discrimination at workplace, the first one because of sexual orientation²⁹³, the second because of disability²⁹⁴. In both cases courts of the first instance dismissed the actions with the explanation that evidences were not found. Yet the second case regarding disability ended successfully for the plaintiff – the sentence was changed by the court of the second instance after the appeal.²⁹⁵

10. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

²⁹⁰ Art. 18.2 Labour Code.

²⁹¹ Art. 58.1 and 58.3 Civil Code.

²⁹² Roman Giertych (Leader of the League of Polish Families) announced on 16.05.2006 that ‘in the Polish school there is place for tolerance but there is and will be no place for homosexual propaganda’ (TVP 16.05.2006). Vice-president of the League of the Polish Families Wojciech Wierzejski addressed a written parliamentary question to the Minister of Interior and Administration and the Minister of Justice, in which he wrote: ‘...it is commonly known that homosexual circles are interested in disseminating deviant attitudes among young people and are connected with circles being linked with criminals with among others things a paedophile character...’. He did not give any evidence for these words but said that these are facts commonly known like e.g. the fact, that ‘...the majority of homosexuals in Poland were confidants of the secret service...’. Rzeczpospolita, 17.05.2006, p. 3

²⁹³ District Court (Sąd Rejonowy) in Plock, Departament IV for Employment and Social Security, sentence of 16.03.2006, IV P 353/05, parties: B.K v. “X”, limited liability Company in Piotrków Trybunalski (case no 4 in sec. 0.3)

²⁹⁴ District Court (Sąd Rejonowy) in Głogów, Departament IV for Employment, sentence of 08.02.2006, IV P 467/05, parties: Zbigniew Maciejewski v. The County Police Headquarters (Komenda Powiatowa Policji) in Głogów (case no 3 in sec. 0.3)

²⁹⁵ The District Court (sąd okręgowy) in Legnica, sentence of 29.06.2006, V Pa 101/06, parties: Zbigniew M. v. Komenda Powiatowa Policji w Głogowie.

There is no a single body responsible for coordination at national level of all issues of equal treatment and non-discrimination based on all racial or ethnic origin, religion or belief, disability, age and sexual orientation. For a more comprehensive view on a number of intuitions see above section 7.

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country **Poland**

Date: February 2007

Polish legislation in internet: <http://isip.sejm.gov.pl/prawo/index.html>
<http://prawo.lex.pl/>

Parliament's website (Polish only)

Polish Law Server, a private company (Polish only)

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Admini- strative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
Constitution	17 October 1997	general anti-discrimination clause		general application	general application

Labour Code (amended many times)	originally: 1 January 1975	gender, age, disability, race, ethnic origin, nationality, religion, political convictions, membership in a trade union, beliefs, sexual orientation, employment for fixed/unfixed time, part time/full time	labour relations	- prohibition of direct and indirect discrimination, instructions to discriminate and harassment; - right to compensation for infringement of equal treatment - protection (partial) against victimization - obligation to inform about regulations on equal treatment
Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market	1 June 2004	gender, age, disability, race, ethnic origin, nationality, religious beliefs, political convictions, sexual orientation, membership in a trade union	employment, pre-employment vocational training	- prohibition of discrimination by private employment agencies; - prohibition of discrimination of by public employment agencies -prohibition of discrimination by employers in informing about vacancies - equal treatment in vocational training - sanctions for discrimination (fine or restriction of liberty) - tasks of Government's Plenipotentiary for the Disabled
Act of 27 August 1997 on Vocational and Social Rehabilitation of the Disabled	1 January 1998	disability		

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country	Poland				Date	February 2007
Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?	
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes	
Protocol 12, ECHR	No	No	-	-	-	
Revised European Social Charter	Yes	Yes	Yes ²⁹⁶	Ratified collective complaints protocol? No	Yes	
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes	
Framework Convention for the Protection of National Minorities	Yes	Yes	No	-	Yes	
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	-	Yes/No Most provisions of the Covenant have a program character	
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes	
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	-	Yes	
ILO Convention No. 111 on Discrimination	Yes	Yes	No	-	Yes	
Convention on the Rights of the Child	Yes	Yes	No	-	Yes	

²⁹⁶ http://www.coe.int/T/E/Human_Rights/Esc/5_Survey_by_country/Poland_Factsheet_2006.asp